Opinion No. 63-147

October 30, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. W. Peter McAtee Special City Attorney for Villages of Estancia, Moriarty and Willard Tower Plaza Building 117 Marquette, N. W. Albuquerque, New Mexico

QUESTION

FACTS

The Villages of Estancia, Moriarty and Willard, New Mexico, have jointly made application for the issuance of a grant from the Federal Housing and Home Finance Agency for the acquisition and maintenance of natural gas lines and distribution systems. Such joint endeavor on the part of the three communities has been made under the provisions of Laws of 1963, Chapter 309, which authorizes the creation of an inter-community water or natural gas supply association to supply such communities with water or gas.

QUESTIONS

1. Would an inter-community water or natural gas supply association organized pursuant to Laws of 1963, Chapter 309, be subject to the payment of taxes levied by the State of New Mexico, and specifically ad valorem, sales, and income taxes?

2. What provisions, if any are possible, should be incorporated in the official charter of the association which would insure its status as a publicly owned municipal utility?

3. In view of the provisions of Article IX, Section 14 of the State Constitution, may each of the three villages concerned in the joint inter-community project properly turn over to the association any federal funds obtained by them to finance the project?

CONCLUSIONS

1. See analysis.

2. See analysis.

3. Yes.

OPINION

*{*336}* **ANALYSIS**

The state legislature by the enactment of Laws 1955, Chapter 18, and as amended by Laws 1963, Chapter 309, authorized any two or more incorporated cities, towns, or villages, by joint or concurring resolution of the city council or board of trustees, to appoint three or more commissioners to organize an association for the purposes of acquiring a water or natural gas supply system.

Section 14-40-76, N.M.S.A., 1953 Compilation, provides that "Any such association formed . . . shall be designated an inter-community water or natural gas supply association. The directors thereof shall be composed of the commissioners appointed by and shall serve at the pleasure of the city council or board of trustees of the incorporated municipalities who appoint such commissioners."

The basic purpose of such joint community endeavor is as stated in Section 14-40-75, N.M.S.A., 1953 Compilation, which states in part:

". . . said association subject to issuance of a certificate of convenience and necessity by the New Mexico public service commission may by resolution of its board of directors purchase or otherwise acquire any water or natural gas supply system, including distribution and transmission pipe line or other water or natural gas works, whether already constructed, or which may be constructed, and to further acquire all the rights, privileges, and franchise of any person, persons or corporation owning the same, or having any interest or right therein, and to hold and operate the same in the same manner as the persons or corporation from whom the same may be acquired and distribute said water or natural gas in the same manner or as may otherwise be determined by said board of directors from time to time. . ."

In order to finance such purchase or acquisition of water or natural gas supply systems an inter-community water or natural gas supply association is authorized pursuant to Section 14-40-84, N.M.S.A., 1953 Compilation, et seq. to issue revenue bonds payable solely out of the net income derived from the operation of such system.

An inter-community water or natural gas supply association by law is endowed after formation with powers as a body corporate and may "acquire, hold, enjoy, dispose of and convey property real and personal and do any other act or thing necessary or proper for carrying out the purposes of their organization."

Somewhat similar legislation to that discussed herein, was enacted by the state legislature, Laws 1961, Chapter 135, and known as the Joint Powers Agreements Act. Such *{*337}* act authorizes two or more municipalities, or other governmental agencies to jointly exercise any power common to the contracting parties.

Section 4-22-4, N.M.S.A., 1953 Compilation, of the Joint Powers Agreements Act permits the parties to such agreement to contract for the acquisition of revenue-producing facilities including water or natural gas utilities. This Section states in part:

"A. Every agreement executed by one or more public agencies shall clearly specify the purpose of the agreement or for any power which is to be exercised. The agreement shall provide for the method by which the purpose will be accomplished and the manner in which any power will be exercised under such agreement. . . .

G. If the purpose set forth in the agreement is the acquisition, construction or operation of a revenue producing facility, the agreement may provide (1) for the repayment or return to the parties of all or any part of any contributions, payments or advancements made by the parties pursuant to such agreement; . . ."

Section 4-22-5, N.M.S.A., 1953 Compilation, contemplates that a separate entity may be created to exercise certain joint powers. This Section sets out in applicable part:

"A. The agency provided by the agreement to administer or execute the agreement may be one of the parties to the agreement or a commission or board constituted pursuant to the agreement. . ."

Section 4-22-6, N.M.S.A., grants to joint powers agreements "all of the privileges and immunities from liability, exemptions from laws . . ." enjoyed by the agencies in their individual capacities.

Article VIII, Section 3, of the State Constitution provides in part:

"The property of the United States, the state and all counties, towns, cities and school districts, **and other municipal corporations,** public libraries, community ditches and all laterals thereof, all church property, all property used for educational or charitable purposes, all cemeteries not used or held for private or corporate profit, and all bonds of the State of New Mexico, and of the counties, municipalities and districts thereof shall be exempt from taxation. . ." (Emphasis supplied)

This office has previously held in Attorney General's Opinion No. 61-64, dated July 19, 1961, that property owned by a town is exempt from real and personal property taxation. Such opinion was premised upon the provisions of Article VIII, Section 3, quoted above.

The purpose of Article VIII, Section 3, is in part to provide an exemption to municipalities so as to prevent the levying of taxes upon publicly owned property. Such exemption as pointed out in **State v. Locke** (1923) 29 N.M. 148, 219 P. 790, is designed to prevent any tax on municipal property. This case states in part:

"The exemption granted to the property of the United States is perhaps compulsory; that to the State, all counties, towns, cities and school districts arises from public policy, which repudiates, as being utterly futile, the theory of the *{*338}* state taxing its own property in order to produce the funds with which to operate its own affairs. . ."

Based upon the above quoted constitutional provisions, it is our opinion that if a municipality may incorporate a separately owned city utility system which is tax exempt, then under Laws 1955, Chapter 18, as amended, and under the Joint Powers Agreements Act (Laws 1961, Chapter 135), we believe that two or more incorporated communities may organize under such laws a joint-inter-community non-profit water or natural gas corporation and enjoy the same tax advantages as would a municipality acting separately, if, (1) the corporate ownership is entirely vested in the participating communities, (2) is jointly controlled by each of the several municipalities, and (3) and also is conducted pursuant to the Joint Powers Agreement Act. Such corporation if so created would, in our opinion, be a jointly owned municipal corporation which is tax exempt from the payment of state **property** taxes, including ad valorem, and income taxes. We retain some doubt as to whether such corporation if organized exclusively pursuant to Laws 1963, Chapter 309, would enjoy such tax exempt status. However, if such corporation were organized so as to comply with the requisites of both the Joint Powers Agreements Act and Laws 1963, Chapter 309, then it is our opinion that such jointly owned municipal corporation would be free from the taxes stated above.

It should be expressly noted that such corporation or legal entity would not be exempt from the payment of the State school (sales) tax however. Section 72-16-2, N.M.S.A., defines "person" or "company" as follows:

"Definitions. -- When used in the Emergency School Tax (Act): A. "Person" or "company" includes any individual, estate, trust, receiver, business trust, corporation, firm, copartnership, joint adventure, association, or any other group acting as a unit, unless the intention to give a more limited meaning is clearly disclosed by the context, co-operative and foreign corporations, transacting business in this state pursuant to the provisions of sections 45-4-1 through 45-4-32 New Mexico Statutes Annotated, 1953 Compilation, and any municipality-owned (municipally-owned) utility engaged in the proprietary function of selling or furnishing to consumers, electricity or electrical power, natural or artificial gas, or water for domestic, commercial and industrial purposes; . . ."

Section 72-16-4.6, N.M.S.A. further provides:

"Privilege taxes -- Electric, gas, water, transmission and transportation businesses. -- The tax shall be computed at an amount equal to three per cent (3%) of the gross receipts derived from such businesses of every person engaging or continuing in the following businesses: A. Furnishing to consumers, electricity or electrical power, natural or artificial gas, water for domestic, commercial and industrial purposes; . . ."

Under the above quoted statutes tax liability would exist requiring such entity to pay the State school (sales) tax.

Your second question inquires what provisions, if any, should be included in the official charter of the association to insure its status as a publicly owned municipal corporation.

*{*339}* In our opinion the articles of incorporation and by-laws of such corporation should clearly and definitely state that: (1) the purpose of such corporation is to enable each of the three villages to supply water and natural gas to their inhabitants; (2) That the entire ownership of said jointly owned municipal corporation is to be maintained at all times in the hands of representatives of each of said villages; (3 that the corporation is to be jointly managed and controlled by representatives of each of the said villages; (4) that the corporation will be at all times operated as a non-profit municipal corporation for the benefit of each of said municipalities; and (5) that in the event the corporation is ever dissolved then the property or assets of said corporation will be distributed equitably to each of the said villages owning an interest therein.

The last question raised requests an opinion as to whether in the event the Federal Housing and Home Finance Agency makes a direct grant to each of the three participating villages, may the villages in turn pay over the sums received to said corporation.

A similar question to that here posed was raised in the case of **Village of Deming v. Hosdreg Company,** (1956) 62 N.M. 18, 303 P. 2d. 920. In that case a constitutional attack was made against a legislative provision which authorized municipalities to issue revenue bonds to construct, purchase, own, lease or sell projects to induce manufacturing, industrial and commercial enterprises to locate or expand in this state. The court in that case was confronted with the question of whether a municipality was violating Article IX, Section 14 of the State Constitution by providing facilities for private corporations. The court after review upheld the act stating in part:

"We think it fair to say from a review of the cases cited dealing with the term "donation," as found in this proviso of the constitution, that the word has been applied in its ordinary sense and meaning, as a "gift", an allocation or appropriation of something of value, without consideration to a person, association or public or private corporation."

In the instant situation, under the facts as stated, the Federal Housing and Home Finance Agency may make a direct loan to each of the villages. If the villages maintain absolute control over the joint municipal corporation and transfer such funds to the corporation, such in our opinion, would not be violative of Article IX, Section 14 of the State Constitution. We believe this conclusion is further supported by **Wiggs v City of Albuquerque,** (1952) 56 N.M. 214, 242 P.2d. 865, wherein the University of New Mexico and the City of Albuquerque proposed to jointly construct an auditorium to be paid for in part by a bond issue under which the City and University would disclaim any general obligation for such bonds, but that the payments should be secured only by a lien against the auditorium and realty and pledge of net revenues. The New Mexico Supreme Court in the **Wiggs** case, supra, held that such arrangement did not violate Art. IX, Section 14 of the State Constitution.

We think here, that each individual village could, beyond question, separately form a municipal corporation to furnish such utility service, and that similarly, they may properly

combine together under the provisions of Laws 1955, Chapter 18, as amended, and Section 4-22-1, N.M.S.A., et seq. to jointly and cooperatively engage in such project.

In **City of Clovis v. Southwestern Public Service Co.,** (1945) 49 N.M. 270, *{*340}* 161 P.2d. 878, the court stated:

"(9) Under the title 'Municipal Corporations,' 44 C.J. at Sec. 4095, p. 1152, we find the following statement:

"Constitutional provisions prohibiting a municipality from making donations or lending its credit to, or subscribing to the stock of private corporations do not operate to forbid a municipality to construct, own, sell, or lease a public utility . . ."

"And, we find in I McQuillan on Corporations, Section 206, where a discussion of such constitutional language is involved, this statement:

"Such a provision, it is held, applies only to the union of public funds and private capital or credit in an enterprise, and will not prevent a city from establishing its own gas work to supply light and heat for its citizens, or providing its own water works, sewerage system, lighting system, airport, or maintaining a zoological park."

"The purpose of the constitution is to forbid investment of public funds in private enterprises. Johnson v. District No. I, 128 Or. 9, 270 P. 764 (273 P. 386)."

In our opinion, such municipalities may properly turn such funds obtained from the Federal Housing and Home Finance Agency over to the joint inter-community water or natural gas supply association if such was the original purpose of the federal grant. Since we have concluded that such corporation, if entirely controlled, owned and operated by the respective villages, is in fact a public municipal corporation, a transfer of municipal funds to the corporation would not be a gift or donation prohibited by Article IX, Section 14 of the Constitution of the State of New Mexico.

By: Thomas A. Donnelly

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