

Opinion No. 63-98

August 12, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. William I. Buhler City Attorney 418 Main Street Truth or Consequences, New Mexico

QUESTION

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1. May a municipality lawfully use bond moneys secured from a bond issue for the acquisition or erection of Public Utilities, for the construction of flood control projects?
2. May a municipality use revenues derived from the operation of a municipal utility for the construction of municipal flood control programs?

CONCLUSIONS

1. No.
2. Yes, see analysis.

OPINION

{*213} ANALYSIS

Under the facts as stated in your letter requesting an opinion of this office, the City of Truth or Consequences, New Mexico, has issued its Joint Utility Refunding and Extension Revenue Bonds, Series February 1, 1963, in the aggregate amount of \$ 1,459,000.00.

In the first question above, inquiry {*214} is made as to whether the municipality may lawfully use bond moneys secured for such utility purposes, for the construction of flood control projects.

Article IX, Section 9 of the New Mexico State Constitution imposes a restriction upon the use and expenditure of moneys obtained from specific bond issues. This provision sets out as follows:

"Any money borrowed by the State, or any County, district, **or municipality thereof, shall be applied to the purpose for which it was obtained**, or to repay such loan, **and to no other purpose whatever.**" (Emphasis supplied)

This constitutional provision prohibits a municipality from applying proceeds from the sale of municipal bonds for any other purpose other than that specified in the bond resolution. Thus, a municipality may not use moneys obtained from the sale of utility bonds for other purposes, such as flood control projects.

In answering the second question above, consideration must be given to Article IX, Sec. 12, of the State Constitution, and several applicable statutory provisions. Article IX, Sec. 12, provides in part:

"No city, town or village shall contract any debt except by ordinance, which shall be irrevocable until the indebtedness therein provided for shall have been fully paid or discharged, **and which shall specify the purpose to which the funds to be raised shall be applied**, and which shall provide for the levy of a tax . . . **The proceeds of such tax shall be applied only to the payment of such interest and principal.** . . ." (Emphasis supplied).

Section 14-39-7, N.M.S.A., 1953 Compilation expressly declares it to be unlawful for any municipality "to divert, use or expend any . . . money or credits in the purchase, construction or extension or repair of any other public utility or for any purpose other than that for which the same was or shall be obtained."

In addition, Section 14-39-26, N.M.S.A., 1953 Compilation specifies that the revenues derived from the operation of any public utility owned and operated by the municipality, where there are outstanding revenue bonds pertaining to such utility, may be expended only in accordance with specific statutory priorities. Excess funds derived from the operation of municipally owned public utilities may be expended by the municipality **only** in accordance with this section where there are outstanding bonds against such utility. This section states that after surplus revenues have been applied in accordance with such listed priorities, then "any revenue in excess thereof may be transferred to the general fund of the municipality to be expended as the governing body of the municipality shall direct. . ."

From the above cited constitutional and statutory authorities it is clearly indicated that a municipality may use tax moneys raised to repay or refund bond issues only for purposes of retirement or refunding of such bonds. Where, however, there are excess funds available from the operation of a municipal utility and these funds are applied in the priority prescribed in Section 14-39-26, supra, then any remaining excess funds of the utility's operation may be transferred to the municipal general fund and employed for any lawful purpose, including flood control projects and which are deemed feasible by the governing body of the municipality.

By: Thomas A. Donnelly

Assistant Attorney General