**Opinion No. 68-102**

October 11, 1968

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Harry Wugalter Chief Public School Finance Division Dept. of Finance & Administration 433 State Capitol Santa Fe, N. M. 87501

## QUESTION

QUESTION

Is it lawful for a school district to levy taxes outside the constitutional twenty-mill limit in order to pay assessments against land owned by the school district by reason of the inclusion of the land in a municipal street improvement district?

CONCLUSION

See analysis.

## OPINION

*{*158}* **ANALYSIS**

Municipalities are authorized to create improvement districts for a number of purposes, including street improvement. See Sections 14-32-1 through 14-32-38, N.M.S.A., 1953 Compilation. After a contract has been awarded for the proposed street improvement, the governing body of a municipality assesses the total cost of the improvement against the benefited tracts of land in the district. Section 14-32-14, N.M.S.A., 1953 Compilation. Section 14-32-26, N.M.S.A., 1953 Compilation provides for the assessment and payment of assessments by public institutions as follows:

**"Improvement district -- Public institution boards directed to pay installments for assessments.** -- Board of regents, board of trustees and other governing bodies of educational, or other quasi-municipal or public corporations or institutions, and boards of county commissioners and the governing bodies of other political subdivisions of New Mexico are specifically authorized and directed to make *{*159}* levies to pay any assessment and installment on the assessment on any tract or parcel of land owned by the said educational or other public institution and political subdivision, and which is assessed by the municipality."

There is no problem in carrying out the above quoted statutory provision when the school district has not reached its statutory mill limitation and the county has not exceeded its constitutional limitation on assessment of property taxes. The issue presented is the method of payment of these assessments when the constitutional

twenty-mill limitation has been reached. This limitation is set forth in Article VIII, Section 2 of the New Mexico Constitution as follows:

"Taxes levied upon real or personal property for state revenue shall not exceed four mills annually on each dollar of the assessed valuation thereof except for the support of the educational, penal and charitable institutions of the state, payment of the state debt and interest thereon; and the total annual tax levy upon such property for all state purposes exclusive of necessary levies for the state debt shall not exceed ten mills; Provided, however, that **taxes levied upon real or personal tangible property for all purposes, except special levies on specific classes of property and except necessary levies for public debt, shall not exceed twenty mills annually on each dollar of the assessed** valuation thereof, but laws may be passed authorizing additional taxes to be levied outside of such limitation when approved by at least a majority of the qualified electors of the taxing district who paid a property tax therein during the preceding year voting on such proposition. (As amended November 3, 1914; September 19, 1933; November 7, 1967.)" (Emphasis added.)

The real question is whether a levy for payment of an assessment under Section 14-32-26, supra, is a levy for "public debt" under Article VIII, Section 2 of the New Mexico Constitution.

The New Mexico Supreme Court has never found it necessary to define "public debt" as that phrase is used in Article VIII, Section 2 of the New Mexico Constitution. See **Board of Directors v. County Indigent Hosp. Cl. Bd.,** 77 N.M. 475, 423 P.2d 994 (1967) and **Martin v. Harris,** 45 N.M. 335, 115 P.2d 80 (1941). However, the New Mexico Supreme Court has on a number of occasions considered statutory millage limitations being exceeded to satisfy judgments. In **Martin v. Harris,** supra, the New Mexico Supreme Court held that neither the statutory five-mill limit on county expenditures, nor the Bateman Act, presented a defense to an action to require a levy to satisfy a judgment obtained in a tort action against a county. See also **Barber v. State,** 39 N.M. 434, 49 P.2d 246 (1935). Similarly it has been held that the statutory fivemill limit on county expenditures does not apply to judgments rendered against the county in condemnation proceedings which were instituted by the county for the purpose of acquiring rights of way for a state highway. **In re Atchison, Topeka and Santa Fe Ry. Co.'s Taxes,** 41 N.M. 9, 63 P.2d 345 (1936).

In **In re Atchison, Topeka and Santa Fe Ry. Co.'s Taxes,** supra, the New Mexico Supreme Court held that the statutory five-mill limitation did not apply to condemnation awards and judgments sounding in tort because these obligations were involuntary and represent no part of the ordinary current expenses incurred in carrying on the county business. In this case the Supreme Court also recognized that the statutory fivemill limitation was designed to curb waste and extravagance and then concluded that this purpose is not served when we are considering obligations of the county for its torts or for condemnation awards.

*{*160}* In **Crist v. Town of Gallup,** 51 N.M. 286, 183 P.2d 156 (1947) there is dicta that the above decisions of the New Mexico Supreme Court apply to both statutory and constitutional limitations touching the creation and amount of municipal indebtedness. However, in **Board of Directors v. County Indigent Hosp. Cl. Bd.,** supra, the New Mexico Supreme Court said that:

"We have never found it necessary to decide if a levy in excess of twenty mills could be made constitutionally in order to obtain funds to satisfy a judgment arising out of a tort action or a condemnation proceeding." Id at 479.

In **Board of Directors v. County Indigent Hosp. Cl. Bd.,** supra, the New Mexico Supreme Court considered the constitutionality of a section of the Indigent Hospital Claims Act under Article VIII, Section 2 of the New Mexico Constitution. Section 13-2-20, N.M.S.A., 1953 Compilation provides that if there is no money in the county indigent hospital claims fund to pay claims of hospital for treating indigent persons then the board of county commissioners may levy a tax against the taxable value of the property in the county sufficient to raise the amount needed to pay the claims. This section further provides for an election if the levy exceeds the constitutional limitation of twenty mills. Dona Ana County had budgeted and spent up to its twenty mill limit and therefore submitted the question of paying the claims of a hospital to the electors of the county. The voters of the county voted against exceeding the constitutional twenty mill limitation to pay these claims. The hospital then decided to follow the provisions of Section 13-2-21, N.M.S.A., 1953 Compilation and brought suit against the County Indigent Hospital Claims Board.

Section 13-2-21, supra, provides that in the event that there is no money in the county indigent hospitals claims fund to pay claims and if the electors have failed to vote in favor of a levy as provided in Section 13-2-20, supra, the hospital making the claim is authorized to bring suit against the county and obtain judgment to pay the claims. The judgment obtained was to be considered as a "public debt" under Article VIII, Section 2 of the New Mexico Constitution and a levy beyond the twenty mill limitation imposed on property in the county. The New Mexico Supreme Court held this provision unconstitutional as follows:

"Without attempting a definition of 'public debt' we are satisfied it does not include debts represented by judgments obtained under the statute here being considered."

Thus we see what "public debt" does not include, but this does not answer the question of what it does include. However, in **Board of Directors v. County Indigent Hosp. Cl. Bd.,** we are told to compare a Wyoming decision with the dicta found in **Crist v. Town of Gallup,** supra, that was mentioned above. That decision is the decision of the Supreme Court of Wyoming in **Grand Island & Northern Wyoming Railroad Company v. Baker,** 6 Wyo. 369, 45 Pac. 494 (1896).

The **Grand Island & Northern Wyoming Railroad Company** decision is the leading case on the question of exceeding a constitutional limitation to pay "public debts." The

New Mexico Supreme Court has distinguished this decision in order to arrive at the conclusion that statutory limitations on mill levies may be exceeded to pay tort claims and condemnation awards. See **In re Atchison, Topeka and Santa Fe Ry. Co.'s Taxes,** supra. However, it is clear that the New Mexico Supreme Court now considers that the **Grand Island & Northern Wyoming Railroad Company** decision was not controlling in those decisions in which it has been distinguished because those decisions involved *{*161}* statutory limitations and not constitutional limitations. Since the Wyoming Supreme Court's decision is the leading decision on this subject, we believe that it should be discussed before giving our opinion on whether a levy pursuant to Section 14-32-26, supra, constitutes a "public debt."

Wyoming had a twelve mill constitutional limit when the **Grand Island & Northern Wyoming Railroad Company decision** was at issue. In 1895 the board of county commissioners of the County of Crook, Wyoming levied a tax levy amounting to nineteen and threequarters mills on the dollar. The only part of this levy complained of was a "judgment tax" of three and one-quarter mills, which was levied to pay certain judgments against the county.

In its opinion in the **Grand Island & Northern Wyoming Railroad Company** case, the Supreme Court of Wyoming held that a number of debts were not to be considered as "public debts" for purposes of exceeding the twelve mill constitutional limitation. First of all it held that the twelve mill limitation could not be exceeded to pay ordinary expenses of the county, including salaries of public officers, as these are not "public debts." The Supreme Court of Wyoming recognized that any different construction would be destructive of the plain import and object of the Wyoming Constitution and would invite the most reckless and improvident administration of public affairs.

Next it was argued that even through the Wyoming constitutional twelve mill limitation could not be exceeded to pay ordinary expenses of the county, that once these ordinary expenses were reduced to judgments they were then "public debts" for which levies could be made beyond the twelve mill constitutional limitation. The Supreme Court of Wyoming disagreed holding that this would accomplish by indirection that which could not be done directly.

It is interesting to note that the Supreme Court of Wyoming found that many eminent authorities have held that similar limitations on indebtedness by counties did not cover a debt established against a county for tort. However, condemnation awards were held to fall in the category of ordinary expenses of the county. The distinction between the two types of judgments appears to be the involuntariness of the cause for these debts.

We note that the New Mexico Supreme Court has indicated that condemnation awards may be involuntary debts of the county. See **In Atchison, Topeka and Santa Fe Ry. Co.'s Taxes,** supra. However, perhaps the real test of whether a debt is a "public debt" under a constitutional limitation on indebtedness is whether the purpose of curbing waste and extravagance in government is carried out. Thus if the county does not have revenue available in its operating budget to pay a condemnation award it should not

have brought the action to condemn the property. The board of county commissioners must stay within the limits set by the constitution or go to the people of the county and ask that this limit be raised. Tort judgments may well fall in another class of judgments. This type of debt cannot be anticipated by the county commissioners nor is this debt voluntarily incurred. The tort claim should not go unpaid simply because the maximum constitutional tax levy has been reached. However, we are not asked, and we do not consider, whether judgments sounding in tort constitute "public debts" for purposes of exceeding the constitutional twenty mill limitation.

The question that we must answer is whether Section 14-32-26, supra, creates a debt that cannot be foreseen by the school district or whether this type of debt should be anticipated and budgeted as ordinary expenses by the school district. It is our opinion that ordinarily this indebtedness may be anticipated and therefore should *{*162}* be budgeted and paid for by the school district out of its operating budget. See Section 77-6-7 (3), N.M.S.A., 1953 Compilation.

Before concluding however, it should be pointed out that this office has two earlier opinions on this subject. The first opinion is Attorney General Opinion No. 765, was issued May 24, 1934. In this opinion it was concluded that taxes levied for the purpose of paying paving assessments against property owned by a school district are levies for public debt and do not come within the twenty-mill constitutional limitation. No analysis or reasoning is found in this opinion to support is conclusion. Opinion No. 765 is therefore overruled.

The second opinion is Attorney General Opinion No. 6117, issued February 28, 1955. It is not clear if this opinion was directed to the problem of exceeding the constitutional twenty-mill limitation. In this opinion it was said that if a school district is unable to pay an assessment for street improvements from its operating budget, the municipality making the assessment may obtain a judgment against the school district and tax levies would thereupon be necessary in order to pay such judgment. We cannot agree with the conclusion reached in this opinion. It makes absolutely no difference whether or not a municipal assessment against a school district has been reduced to a judgment. The mere reduction of a debt to a judgment does not make that debt a "public debt" within a constitutional limitation on tax levies. Opinion No. 6117 is therefore also overruled insofar as it conflicts with this opinion.

In conclusion, we have pointed out that school districts must budget in their operating budgets the amount necessary to pay assessments by municipalities made pursuant to Section 14-32-26, supra.

By: Gary O'Dowd

Assistant Attorney General