Opinion No. 68-19

February 8, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Honorable George E. Fettinger State Representative House of Representatives Legislative-Executive Bldg. Santa Fe, N. M. 87501

QUESTIONS

1. In view of the constitutional amendment authorizing only "DEPOSITS" in federally insured Savings and Loan Associations, must the enabling legislation authorize only DEPOSITS?

2. Does the federal statue permit Federal Savings and Loan Associations to accept "DEPOSITS" of state moneys under the provisions of the Constitutional Amendment?

3. Can state Savings and Loan Associations accept DEPOSITS or only savings accounts?

4. Are state chartered institutions eligible to accept state moneys under the Constitutional amendment?

CONCLUSIONS

1. No.

2. Yes.

3. See analysis.

4. Yes, with enabling legislation.

OPINION

*{*35}* **ANALYSIS**

The first three questions that you have asked all indicate a problem with the word "Deposit" used in the amendment to Section 4, Article VIII of the Constitution of New Mexico. Therefore, we will discuss that problem before proceeding to your specific questions. That Section now provides in pertinent part:

"All public moneys not invested in interest-bearing securities shall be deposited in . . . federal savings and loan associations in this state, or in savings and loan associations

incorporated under the laws of this state whose deposits are insured by an agency of the United States . . . ."

There is no question that money placed in a savings and loan association is not called a "deposit." Section 48-15-132, N.M.S.A., 1953 Compilation (P.S.) provides as follows:

"From the effective date of the Savings and Loan Act, any shares, stock, share accounts and investment certificates, except permanent capital stock and except shares or share accounts not entitled to dividends, which an association subject to the Savings and Loan Act has outstanding shall be considered as savings accounts."

The Federal Courts in opinions dealing with federal savings and loan associations have held that money placed therein is not "deposited" as that term applies to money placed in a bank. **Wisconsin Bankers Association v. Robertson,** 294 F.2d 714 (D.C. Cir. 1961); **Aetna Casualty and Surety Co. v. Porter,** 290 F.2d, 309 (D.C. Cir. 1961). Consequently if the word "deposited" used in the constitutional amendment were construed to mean deposit in the sense that it applies to banks, state money could not be placed in savings and loan associations. However, it is clear that such a construction would make the above noted amendment a nullity and completely bypass the will of the people. Therefore we must look to the law of New Mexico as it regards the construction of the constitution. In our opinion the present amendment falls squarely within the rules first laid down in **State ex rel Ward v. Romero,** 17 N.M. 88, 125 P. 617 and repeated in **Board of County Commissioners of Bernalillo County v. McCulloh,** 52 N.M. 210 (1948) which follows:

"It is the duty of this court to interpret the various provisions of the Constitution to carry out the spirit of that instrument. We should not permit legal technicalities and subtle niceties to control and thereby destroy what the framers of our Constitution intended.

"Where the spirit and intent of the instrument can be clearly ascertained, effect should be given to it, and the strict letter should not control if the letter leads to incongruous results clearly not intended."

The following language from *{*36}* **Greene v. Esquibel,** 58 N.M. 429 is also important:

"The fundamental principle of constitutional construction is to give effect to the intent of the framers of the organic law and of the people adopting it. A constitutional clause must be construed reasonably to carry out the intention of the framers, which gives rise to the corollary that it should not be construed so as to defeat the obvious intent if another construction equally in accordance with the words and sense may be adopted which will enforce and carry out the intent. The intent must be gathered from both the letter and spirit of the document. It has been very appropriately stated that the polestar in the construction of Constitutions is the intention of the makers and adopters."

Another decision containing important rules of construction for the Constitution is **Flaska v. State,** 51 N.M. 13.

In our opinion the obvious intent of the people of the state was that state money could be placed in savings and loan associations under the conditions that savings and loan associations can accept money. In our opinion the people of New Mexico were aware of the operations of savings and loan associations and that they did not intend for the word "deposited" to be construed in a strict technical sense which would have precluded the amendment from having any meaning.

Turning now to your specific questions, we are of the opinion that the enabling legislation authorizing money to be placed in savings and loan associations need not necessarily use the word "deposit". We see no reason why that word cannot be used in this particular instance to describe what is actually the act of placing money in savings accounts. Therefore we have answered your first question, "No."

We are aware that Chapter 12, Section 1464, U.S.C.A. which controls federal savings and loan associations provides:

"Such associations shall raise their capital only in the form of payments on such shares as are authorized in their chapter which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board."

We are also aware that savings accounts in federal savings and loan associations have been held to be valid under the quoted language. **Wisconsin Bankers Association v. Robertson** supra. In view of what we said above regarding the word "deposited" it is our opinion that state money may be placed in federal savings and loan associations. Of course the money will have to be placed therein in accordance with the ability of a federal savings and loan association to accept money, that is to say the money can be placed in savings accounts. It should be noted here that in making this determination we are not attempting to construe federal law and, of course, the federal government would not be bound by such an opinion. Our opinion is based on our construction of the constitutional amendment which as stated above does not contemplate that the word "deposited" be restricted to a technical sense. Therefore, it is our opinion that the prohibition against deposits in a federal savings and loan association would have no application.

In answer to your third question it is our opinion that a state savings and loan association cannot accept a deposit of money if by the word deposit you mean deposit as that word relates to banks. Section 48-15-132, supra, provides that all money in savings *{*37}* and loan associations except permanent capital stock and shares or share accounts not entitled to dividends shall be considered savings accounts. As noted above, however, it is our opinion that this situation is not controlling on whether or not money can be placed in state savings and loan associations. In connection with this question it should be noted that Section 48-15-109, N.M.S.A., 1953 Compilation (P.S.) provides for the payment of interest on savings accounts after payment of operating expenses and transfers to loss reserves. This provision applies to all associations governed by state law.

Your fourth question was answered by Attorney General's Opinion No. 68-6, wherein we stated our opinion that enabling legislation was necessary to carry out the provisions of the constitutional amendment.

By: Roy G. Hill

Assistant Attorney General