

## Opinion No. 70-04

January 22, 1970

**BY:** OPINION OF JAMES A. MALONEY, Attorney General

**TO:** Mr. John H. Lawless, Jr. Village Attorney of Tularosa P.O. Box 1390 Alamogordo, N.M. 88310

### QUESTION

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May a municipality waive all or any part of a penalty charged for delinquent payment of an assessment levied against real estate as part of a municipal street improvement district?

#### CONCLUSION

No.

### OPINION

#### {\*7} ANALYSIS

Municipalities are authorized to create improvement districts for a number of purposes, including street improvements. See Sections 14-32-1 through 14-32-38, N.M.S.A., 1953 Compilation. After a contract has been awarded for a proposed street improvement, the governing body of the municipality assesses the total cost of the improvement against the benefited tracts of land in the district. Section 14-32-14, supra. **Waltom v. City of Portales**, 42 N.M. 433, 81 P.2d 58 (1938).

The governing body of the municipality may, by ordinance, fix penalties to be charged for delinquent payment of an assessment. Section 14-32-16 (A) (3), supra. The assessment together with any interest or penalty accruing to the assessment constitutes a lien upon the tract land assessed under the street improvement district. Section 14-32-16 (B), supra. The lien upon such property is an obligation owed to the municipality, continuing until it is finally extinguished in the proper manner. Section 14-32-16, supra.

Article IV, Section 32 of the New Mexico Constitution provides:

"No obligation or liability of any person, association or corporation held or owned by or owing to the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, postponed, or in any way diminished by the legislature, nor shall any such obligation or liability be extinguished except by the payment thereof into the proper treasury, or by proper proceeding in court. Provided that the obligations

created by Special Session Laws 1955, Chapter 5 running to the state or any of its agencies, remaining unpaid on the effective date of this amendment are void. (As amended November 4, 1958.)"

This constitutional provision is intended to prevent public officials from releasing debts justly owed to a municipality and to discourage collusion between public officials and private citizens. Attorney General Opinion No. 69-69, issued July 1, 1969. Under the {\*8} constitutional provision, it is apparent that obligations owed to a municipality, such as the lien upon a tract of land assessed under the street improvement district, may be properly extinguished in two manners only: either by payment of the penalty and the assessment into the proper treasury or by a proper proceeding in court.

The proper court proceeding for collection of the levy created by the street improvement district assessment is foreclosure. Section 14-32-16 (E), supra. In passing, it should be noted that the municipality is under a positive duty to foreclose once the assessment becomes delinquent. Section 14-32-18 (A), supra; Section 14-32-19 (A), supra.

Unless the lien is either paid into the proper treasury or extinguished by the proper court proceeding, a municipality may not waive all or any part of the lien.

By: James C. Compton, Jr.

Assistant Attorney General