

Opinion No. 70-102

December 24, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: The Honorable David L. Norvell Speaker, New Mexico House of Representatives
State Capitol Building Santa Fe, New Mexico 87501

QUESTIONS

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1. Can the City of Clovis use the provisions of the Industrial Revenue Bond Act, Section 14-31-1, N.M.S.A., 1953 Comp., to purchase one or both of the cemeteries from Consolidated Industries, Inc., a Colorado corporation, which either owns or controls said cemeteries?
2. Can the City of Clovis use any of the provisions of the General Revenue Bond Act, Section 14-30-1, N.M.S.A., 1953 Comp., to purchase one or both of the cemeteries from Consolidated Industries, Inc., which owns or controls each?
3. If the City can use either one or both of the above Revenue Bond Acts to purchase the cemetery, is it necessary that a petition of taxpayers representing two-thirds (2/3rds) of the taxes paid upon property within the municipality during the previous year be first obtained in order to comply with Section 14-41-1(B), N.M.S.A., 1953 Comp.?

CONCLUSIONS

1. No.
2. See Analysis.
3. See Analysis.

OPINION

{*184} ANALYSIS

1. Can a cemetery be purchased by the municipality under the Industrial Revenue Bond Act? We believe the answer to this question is no. A cemetery would not appear to fall within the definition of "project" as that term is used in the Industrial Revenue Bond Act. Section 14-31-1(B), N.M.S.A., 1953 Comp. Furthermore, a municipality may not itself operate a "project" financed under the industrial Revenue Bond Act. Section 14-31-2, N.M.S.A., 1953 Comp.

2. May the municipality acquire the cemetery under the provisions of the General Municipal Revenue Bond Act? Under this act, the municipality may issue revenue bonds for municipal utilities, public buildings, municipal buildings and streets, roads, alleys and bridges. Section 14-30-1, N.M.S.A., 1953 Comp. If a cemetery is a utility, we can see the possibility of the use of this Act for the acquisition of a cemetery.

The Municipal Code defines a municipal utility in Section 14-1-2(H), N.M.S.A., 1953 Comp. That definition does not specifically include cemeteries, but the section does state that a municipal utility is not necessarily limited to the types listed but includes "other self-liquidating municipally owned projects."

Whether or not a cemetery falls within the statutory definition of municipal utility is a mixed question of law and fact. We have found one case specifically holding that a cemetery was a public utility. **Denton v. City of Sapulpa**, 78 Okla. 178, 189 P. 532 (1920). See generally Annot., 9 A.L.R. 1033 (1920); Annot., 35 A.L.R. 592 (1925). Whether or not the specific cemetery in question would be "self-liquidating" is primarily a question of fact.

There is the counterargument that the legislature did not intend that a municipality acquire and maintain a cemetery under the Revenue Bond Act in view of the enactment of those sections of the Municipal Code specifically providing for the acquisition and maintenance of a municipal cemetery. In the absence of Section 14-41-1 to -9, N.M.S.A., 1953 Comp., the courts might very well find that a municipality should be allowed to acquire and maintain a municipal cemetery as a public utility. But, as the New Mexico Supreme Court has said "[a] statute enacted for the primary purpose of dealing with a particular subject prescribing terms and conditions covering the subject matter supersedes a general statute which does not refer to that subject although broad enough to cover it . . ." **Varney v. City of Albuquerque**, 40 N.M. 90, 55 P.2d 40 (1936).

Although the more conservative approach is to follow the specific versus general statutory interpretation, this opinion can in no way bind the city attorney or bonding company attorneys so as to prevent the City of Clovis from proceeding under the Revenue Bond Act. Absent a decision from the courts squarely in point, a municipality must rely on the advice of its own attorney in view of the fact that the city attorney must defend the actions of the municipality in court. Of course, it goes without saying that in matters of revenue bonding, the opinion of bond counsel is probably the best authority.

3. As to the third question, we believe that the Revenue Bond Act and the municipal cemetery provisions of {*185} the Municipal Code are mutually exclusive. If the city proceeds under the Municipal Revenue Bond Act, then the acquisition and maintenance should be done in accordance with Sections 14-22-1 to -10, N.M.S.A., 1953 Comp. On the other hand, if the city proceeds under the municipal cemetery law then the acquisition and maintenance should be carried out under Sections 14-41-1 to -9, N.M.S.A., 1953 Comp. There does not appear to be any reason to believe that the legislature intended for the municipality to pick and choose those parts of either act

which best suited its purposes. Either one or the other law should be followed exclusively.

By: Mark B. Thompson III

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