Opinion No. 75-75

December 30, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Mr. Vincent J. Montoya Executive Officer Board of Finance 421 State Capitol Building Santa Fe, New Mexico 87503

QUESTIONS

FACTS

Several statutes relating to the deposit of public money have been amended by Chapters 157, 161 and 304, New Mexico Laws 1975, and the amendments appear to be either contradictory or amenable to differing interpretations.

QUESTIONS

How should Chapters 157, 161 and 304, New Mexico Laws 1975, be construed as they affect the amount of public money which may be deposited in financial institutions?

CONCLUSION

See Analysis.

OPINION

*{*199}* **ANALYSIS**

A. History

The legislative history of these acts is as follows. Chapter 157, approved on April 7, 1975, and Chapter 304, approved on April 10, 1975, both became effective on June 20, 1975 as neither contained an emergency clause. Chapter 161, however, became effective on April 7, 1975, the date of its approval, since it contained an emergency clause.

B. **General**

1. **Chapter 157**

The deposit of public money by the state, county, municipal or other political subdivision treasurer, and by the several boards of finance, in federally insured banks or savings and loan associations is treated in this chapter. Such deposits in individual **savings and loans** may not exceed an aggregate amount equal to "the amount of federal savings

and loan insurance corporation insurance for a single public account." See Sections 1, 2, 4, 6, 8-10. (Emphasis supplied.) The quoted language represents perhaps the most consistent *{*200}* and dominant change in the former language of the several statutory sections amended. Prior to amendment, the statutes limited **savings and loan deposits** to an aggregate amount equal to "the amount of federal savings and loan insurance corporation insurance for a **single depositor in an individual capacity."** See former Sections 11-2-7, 11-2-25, 11-2-26, 11-2-33, and 77-6-30, 77-6-44, NMSA, 1953 Comp. (Emphasis supplied.) The effect of this change will be discussed below.

Particular attention should be given to Section 11-2-33, **supra,** as amended by this chapter. Besides amending Section 11-2-33, **supra,** in the manner previously mentioned, Chapter 157 affects it by requiring that public money **deposited in banks** and savings and loan associations by county, municipal and board of control treasurers, but not by local boards of education designated as boards of finance, receive a minimum rate of return. That minimum is "a rate of interest not less than one hundred percent of the asked price on United States treasury bills of the same maturity, on the day of deposit. . ." If a qualified and designated bank or a savings and loan association does not agree to pay the minimum rate for a deposit, it forfeits its eligibility for that deposit. Chapter 157, Section 6C.

2. **Chapter 161** (Declaring an emergency.)

This chapter amends only Section 11-2-33, **supra.** The changes include the same minimum interest rate and forfeiture language but only for **bank deposits.** For our discussion, it is important to note that as regards deposits in savings and loans, the "single depositor in an individual capacity" phrase was **not** amended to read "single public account."

3. **Chapter 304**

Section 11-2-27, NMSA, 1953 Comp. is repealed by Chapter 304 and a new Section 11-2-27 is enacted. The new section requires that the State Board of Finance "shall fix the rate of interest to be paid upon **all time deposits** of public money made by **all public officials** authorized to make deposits of public money." (Emphasis supplied.)

Once again, Section 11-2-33, **supra,** was amended, but the "single depositor in an individual capacity" language was **not** altered. In fact, the only change in the statute is the addition of the sentence: "Any bank that fails to pay the minimum rate of interest at the time of deposit **provided for herein** for any respective deposit, forfeits its right to an equitable share of that deposit under this section." (Emphasis supplied.) No specific mention is made of a minimum rate of return.

Finally, Section 3 of this chapter amends Section 77-6-44, **supra,** by adding the same forfeiture sentence as quoted in the previous paragraph. But again, no mention is made of a minimum rate of return.

Incidentally, we noted previously that Chapter 157 also amended Section 77-6-44, **supra.** The forfeiture language, however, was not included in Chapter 157, nor was the minimum rate language. The only change was to "single public accounts," and this change is not found in Chapter 304.

C. **Compilation:**

In the 1975 Interim Supplement to the New Mexico Statutes Annotated, *{*201}* the following sections have been compiled exactly as they were written in their respective chapters. They are not affected by other enactments.

1. Section 11-2-7 (Chapter 157, § 1).

2. Section 11-2-25 (Chapter 157, § 2).

3. Section 11-2-26 (Chapter 157, § 3).

4. Section 11-2-27 (Chapter 304, § 1).

5. Section 11-2-28 (Chapter 157, § 4).

6. Section 11-2-30 (Chapter 157, § 5).

7. Section 11-2-38 (Chapter 157, § 7).

8. Section 77-6-30 (Chapter 157, § 8).

9. Section 77-6-41 (Chapter 157, § 9).

Section 11-2-33, **supra,** was amended by Chapter 157, § 6, Chapter 161, § 1, and by Chapter 304, § 2. It has been compiled and printed as written in Chapter 157, § 6 and the changes found in the other two chapters have not been included.

Section 77-6-44, **supra,** was amended by Chapter 157, § 10 and by Chapter 304, § 3. Both amendments are included in the Interim Supplement and designated "77-6-44(1)" and "77-6-44(2)" respectively.

D. **Rules of Construction**

In construing statutes, and in determining which laws are to be given effect among others, several rules need to be considered.

When two or more acts that concern the same subject matter or have a common purpose, are passed in the same legislative session, they are deemed to be in **pari materia** and should be construed with reference to each other. If they can be harmonized, all are to be given effect. **State v. Fidelity & Deposit Co. of Maryland,** 36

N.M. 166, 9 P.2d 700 (1932); **Blackwell v. Bank of Albuquerque,** 10 N.M. 555, 556, 63 P. 43 (1900). This rule is based on the premise that statutes passed or approved at the same time are imbued with the same spirit and actuated by the same policy and thus should be construed together as though they were supplemental to each other. **State Property & Buildings Commission v. Hays,** 346 S.W.2d 3 (Ky. 1961); **San Jacinto River Conserv. & Recl. Dist. v. Sellers,** 143 Tex. 328 184 S.W.2d 920 (1945); **O'Brien Packing Co. v. Martin,** 172 Okl. 157, 44 P.2d 72 (1935); **Manilla Community School Dist. v. Halverson,** 251 Iowa 496, 101 N.W. 2d 705 (1960). If the several acts are read and construed together as one and the conflicting provisions are not eliminated, the question remains as to which of the conflicting provisions shall be allowed to prevail. **Spokane County v. Certain Lots in City of Spokane,** 153 Wash. 462, 279 P. 724 (1929).

Where the conflict remains, the rule is that the later of the acts passed at the same session will prevail. **State v. Marcus,** 34 N.M. 378, 281 P. 454 (1929); **Board of County Commissioners of Socorro County v. Leavitt,** 4 N.M. (Gild.) 37, 12 P. 759 (1887). Where one of the acts contains an emergency clause, however, it will prevail over another without an emergency when both are passed at the same session. **Spokane County v. Certain Lots, supra; State Property & Building Commission v. Hays, supra.**

Several courts have qualified the "last passed" rule by stating that they are merely canons of construction. As such, they are *{*202}* only aids to the ascertainment of the legislative intent and must yield to such intent if the same be otherwise. They should never be followed to the extent of defeating or overriding the definite intent of the legislature. **Buchsbaum & Co. v. Gordon,** 389 Ill. 493, 59 N.E. 2d 832 (1945); **Potosi Brewing Co. v. Metropolitan Distributing Co.,** 342 Ill. App. 131, 95 N.E.2d 529 (1950); **Horn v. White,** 225 Ark. 540, 284 S.W.2d 122 (1955); **People v. Fleetwood,** 413 Ill. 530, 109 N.E.2d 741 (1952).

E. **Amount of Deposit**

1. **In Banks**

Public officials who are authorized to make deposits of public money may make such deposits in banks whose deposits are insured by an agency of the United States and which have been certified or designated to receive such deposits. There are no statutory limits as to the amount which may be so deposited. See Sections 11-2-7, 11-2-28 and 11-2-33, 77-6-30, 77-6-41 and 77-6-44, NMSA, 1953 Comp. (1975 Interim Supp.).

Such public officials may make deposits in banks whose deposits are insured by the federal deposit insurance corporation but which have not been required to qualify as public depositories. The amount deposited in each of these banks, however, may not exceed the amount of such insurance. See Section 11-2-25, NMSA, 1953 Comp. (1975 Interim Supp.).

2. **In Savings and Loan Associations**

a. **Limitation on amount of deposit**

Public officials who are authorized to make deposits of public money may make such deposits in savings and loan associations whose deposits are insured by an agency of the United States, regardless of whether the associations have been certified or designated to receive such deposits. There are, however, statutory limitations with respect to the amount which may be deposited.

In the statutes under consideration, the "aggregate" amount which may be deposited in a savings and loan by public officials and boards, "in **any** official capacity," may not exceed the amount of federal savings and loan insurance corporation insurance. The word "any" is a word of flexible meaning and must be interpreted in the light of the context and the subject matter. **Wachendorf v. Shaver,** 149 Ohio St. 231, 78 N.E.2d 370, 375 (1948). As the context and subject matter of these statutes with respect to the word "any" is federal savings and loan insurance, we quote from the Federal Home Loan Bank Board Rules and Regulations for Insurance of Accounts, Section 1183 E. for the proposition that the "aggregate" amount which officials may deposit in any of their official capacities is dependent upon the status of the depositor and the source of the money to be deposited.

"For insurance purposes, the official custodian of funds belonging to a public unit, rather than the public unit itself, is insured as the account holder. All funds belonging to a public unit and **invested by the same custodian** in an insured institution . . . **are added together** and insured to the $ 100,000 maximum, **regardless of the number of accounts** involved. If there is more than one official custodian for the same public unit, the funds invested by **each custodian** are separately insured up *{*203}* to $ 100,000. If the same person is custodian of funds **for more than one public unit,** he is separately insured to $ 100,000 with respect to the funds of each unit held by him in properly designated accounts . . . ."

(Emphasis supplied.)

On several occasions this office has been asked to determine the amount of federal deposit insurance coverage which may be available upon the deposit of public money. Our experience has been that while we or the financial institution may have one view of the matter, the federal insuring agency may have a quite different view. Since the determination of coverage is dependent upon the specific fact situation as well as the law, we urge and caution all public officials who are responsible for making such deposits to seek advice from the insuring agency whenever the slightest doubt exists as to coverage.

b. **"Single public account" and "single depositor in an individual capacity."**

In this portion of our analysis, we will consider the phrases "the amount of insurance for a single depositor in an individual capacity" ("individual") and "single public account" ("public") which were referred to in Section B above.

Until shortly before the recent legislative session, deposits of both private and public money in savings and loans received the same amount of coverage. Thus the use of "individual" in the previous public money deposit laws was of no particular consequence. As of November 27, 1974, however, a distinction was created. Such deposits of public funds became insurable up to $ 100,000 when made in the public depositor's state, while accounts of individuals are now insured up to only $ 40,000. 12 CFR 526, as amended, 39 F. Reg. 41243, Nov. 27, 1974.

It appears that the legislature was aware of this change and intended to give public officials the latitude to increase the amount of their insured deposits in associations. This is evidenced in HB 187 which was enacted as Chapter 157. In amending the many sections relating to public deposits, that bill originally deleted the former "individual" language and inserted a provision limiting the aggregate deposit amount to an "amount of money which can be fully insured by an agency or instrumentality of the United States." This language was later changed to the "single public account" phrase, possibly in recognition that the latter phrase has a more precise meaning in the federal insurance laws and regulations.

In construing these three chapters together as one law and as a part of a coherent system of legislation, the following results.

Expect for the possible conflict in the treatment of Sections 11-2-33, and 77-6-44, **supra,** by these three chapters, Chapter 157 permits, as of June 20, 1975, public fund deposits at the higher insured amount by many public officers and entities, including county and municipal treasurers. (See amended Sections 11-2-7, 11-2-25, 11-2-28, 77-6-30, and 77-6-41, being Chapter 157, Sections 1, 2, 4, 8 and 9, respectively.) If either of Chapters 161 and 304 are given the prevailing effect, the public officers and entities mentioned in Sections 11-2-33 and 77-6-44, **supra,** would have the lower insurance limit determine the aggregate of their deposits.

From the rules of construction *{*204}* previously noted, we believe that deposits could properly be made in an aggregate not to exceed the amount of "public" insurance, and that this was the legislature's intent.

By: Harvey B. Fruman

Assistant Attorney General