

Opinion No. 80-11

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OPINION OF: Jeff Bingaman, Attorney General

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TO: Governor Bruce King, Governor's Office, Santa Fe, New Mexico 87501

FINANCIAL INSTITUTIONS

The State Board of Finance may exercise its authority to require additional collateral for deposits of public funds, unless otherwise required by law.

QUESTIONS

1. Does Section 6-10-20 NMSA 1978 permit the State Board of Finance to require additional security of all banks receiving deposits of public moneys subject to the control of the Board?
2. Does Section 6-10-20 NMSA 1978 permit the State Board of Finance to specify the kind of additional collateral which a bank must furnish?
3. Does Section 6-10-20 NMSA 1978 apply to the deposit of money from the severance tax permanent fund pursuant to Section 7-27-5(A) NMSA 1978?
4. Does Section 6-10-20 NMSA 1978 apply to the deposit of money from the severance tax permanent fund pursuant to Section 7-27-5(B) NMSA 1978?
5. Does Section 7-27-5(C) NMSA 1978 permit the State Board of Finance to require additional security for deposits of money from the severance tax permanent fund made pursuant to Section 7-27-5(B) NMSA 1978?
6. Does Section 7-27-5(C) NMSA 1978 authorize the State Treasurer to require that mortgages be pledged at market value?

CONCLUSIONS

1. Yes.
2. Yes.
3. Yes.
4. No.

5. Yes.

6. No.

ANALYSIS

In order to properly respond to any question requiring an interpretation of Section 6-10-20 NMSA 1978, it is necessary first to determine the effectiveness of that statute in light of the matters raised in the compiler's note. Section 6-10-20 NMSA 1978, as presently compiled was enacted by Laws 1925, Chapter 123, Section 8 and reads as follows:

"Any board of finance may at any time within its discretion require any bank which has qualified as a depository of public moneys subject to the control of said board and including banks which have furnished {**126*} bonds with personal sureties, and which may be continued for the period of one year as specified in Section 19 hereof, to furnish additional security for said deposit of the kind in this act specified."

OPINION

The compiler's note states that the clause "and including banks . . . in Section 19 hereof" is "obsolete" as it is inconsistent with Section 6-10-19 NMSA 1978 which provides that "[n]o depository bond with personal sureties shall be accepted by any treasurer and/or board of finance." Section 6-10-19 NMSA 1978, was enacted by Laws 1933, Chapter 175 which included a section stating that "all Acts and parts of Acts in conflict herewith are hereby repealed." This language does not operate as an express repealer, but rather is subject to the rules of law which apply generally to repeals by implication. **Alvarez v. Board of Trustees of La Union Townsite**, 62 N.M. 319, 309 P.2d 989 (1957). As a rule, repeals by implication are not favored unless necessary to give effect to obvious legislative intent, **Buresh v. City of Las Cruces**, 81 N.M. 89, 463 P.2d 513 (1969).

Section 6-10-19 NMSA 1978 evidences clear legislative intent to preclude the acceptance of bonds with personal sureties. This preclusion is in direct conflict with that clause in Section 6-10-20 NMSA 1978, which presumes that banks may furnish bonds with personal sureties. Since the later statute, Section 6-10-19 NMSA 1978, covers and displaces the personal surety clause in Section 6-10-20 NMSA 1978, repeal by implication cannot be avoided. **Matter of Childers Estate**, 89 N.M. 334, 552 P.2d 465 (1976). The personal surety clause in Section 6-10-20 NMSA 1978 is thus repealed by implication.

The compiler also notes that the remaining part of Section 6-10-20 NMSA 1978, may have been "superseded" by a provision of a statute enacted by Laws 1934, Chapter 24, Section 2 and repealed by Laws 1969, Chapter 243, Section 3. That statute, which had been compiled as Section 11-2-18 NMSA 1953, and is now essentially replaced by Sections 6-10-16 and 6-10-17, NMSA 1978, dealt extensively with the matter of security for deposits of public funds. It generally required that certain kinds of securities be

deposited in an amount equal to the amount of those public funds not insured by the federal deposit insurance corporation, and stated that "[n]o other or further security or bonds shall be required for the security of such deposit." The compiler's note thus suggests a possible conflict between Section 6-10-20 NMSA 1978, which permits a board of finance to require additional security, and the later 1934 law which prohibited the requiring of further security. This conflict does not, however, result in a repeal by implication of Section 6-10-20 NMSA 1978.

The repeal of a legislative act may be accomplished either in express terms or by implication. **Geck v. Sheperd**, 1 N.M. 346 (1859). Section 6-10-20 NMSA 1978 was not expressly repealed by the 1934 law and can be repealed by implication only if necessary to give effect to a later and inconsistent law. **Buresh v. City of Las Cruces, Supra; Dairyland Ins. Co. v. Rose**, 92 N.M. 527, 591 P.2d 281 (1979). Section 11-2-18 NMSA 1953, having itself been expressly repealed without reenactment in substantially the same terms and without savings clause or other limitation, may be considered, insofar as its operative effect, to never have existed. 73 Am.Jur.2d, Statutes 384. Thus, whether or not {^{*127}} Section 11-2-18 NMSA 1953 was ever in conflict with what is now Section 6-10-20 NMSA 1978, there is no present law to which effect must be given by resort to implication. Section 6-10-20 NMSA 1978 should therefore be read as follows:

"Any board of finance may at any time within its discretion require any bank which has qualified as a depository of public moneys subject to the control of said board to furnish additional security for said deposit of the kind in this act specified."

Question 1:

Section 6-10-20 NMSA 1978 permits the State Board of Finance to require additional security from "any bank" which is a depository of public funds under the control of the Board. Statutory words are presumed to have been used in their ordinary and usual sense. **Bettini v. City of Las Cruces**, 82 N.M. 633, 485 P.2d 967 (1971). Ordinarily, "any" means "some; one out of many; an indefinite number." **Black's Law Dictionary**, Revised Fourth Edition 1968, p. 120.

The reference to "any bank" would thus permit the State Board of Finance to selectively require additional security of one or more of the banks in which public funds under its control are deposited. Section 6-10-20 NMSA 1978 leaves such selection within the discretion of the Board, and sets no limit on the number of banks which may be asked to furnish additional security. "Any" does not preclude "all," and, unless otherwise provided by law, the Board may impose additional security requirements on all banks in which public funds are under the control of the Board are deposited.

Question 2:

Section 6-10-20 NMSA 1978 refers generally to deposits of public money in banks and as such, is applicable in conjunction with other provisions governing these deposits. For

example, Article VIII, Section 4 of the New Mexico Constitution requires that all funds not invested in interest-bearing securities be deposited in certain insured banks and savings and loan associations under conditions provided by law. Section 6-10-15 NMSA 1978 prohibits the deposit of any public moneys in banks which have not qualified by depositing collateral security or by giving bond. The terms of this statute set out the general state policy of requiring security for all public moneys. **State ex rel. Hannett et al. v. Graham**, 30 N.M. 537, 239 P. 740 (1925). Section 6-10-16 NMSA 1978 defines the class of securities acceptable for the deposit of public money, establishes the method by which they are to be valued, and provides that no security shall be required of deposits of public money insured by the Federal Deposit Insurance Corporation. Section 6-10-17 NMSA 1978 provides that deposits of public money be secured by delivery of securities valued at one-half the amount of the deposit, or by delivery of a depository bond executed in accordance with Section 6-10-15, **supra**.

Thus, the authority vested in the State Board of Finance by Section 6-10-20 NMSA 1978 to require additional security depends on the other provisions of this statutory scheme. That is, such "additional security" is in addition to the fifty percent required by Section 6-10-17 NMSA 1978. It is limited either to the kind of securities listed by Section 6-10-16 NMSA 1978, having either par or market value as determined by that section, or to {*128} depository bonds executed in accordance with Sections 6-10-15 and 6-10-17 NMSA 1978. Within these general limitations which may apply to particular public funds, the State Board of Finance may exercise its statutory authority under Section 6-10-20 NMSA 1978. It is left to the Board's discretion to determine how much more security must be furnished and whether or not it must be of a particular type.

Question 3:

The disposition of money from the severance tax permanent fund is governed by Section 7-27-5 NMSA 1978 (as amended, Laws 1980, Chapter 66, Section 1) which provides for both the investment and the deposit of the severance tax permanent fund.

Subsection (A) of Section 7-27-5 NMSA 1978 directs the State Treasurer to

". . . invest the severance tax permanent fund in accordance with Section 6-10-10 NMSA 1978 and with the advice and consent of the state board of finance make investments in treasury bills, bonds or securities which are direct obligations of the United States of America."

Although Subsection (A) refers to some investments for which a collateral requirement is not applicable, investments made "in accordance with Section 6-10-10" may be considered deposits for purposes of determining the applicability of Section 6-10-20 NMSA 1978.

Section 6-10-10 NMSA 1978 deposits are made in designated federally insured banks and savings and loan associations. A bank qualifies as a designated depository of public funds by depositing collateral security or by giving bond in accordance with

Section 6-10-15 NMSA 1978. Such security or bond is in turn governed by Sections 6-10-16 and 6-10-17 NMSA 1978. Section 6-10-20 NMSA 1978 authorizes the State Board of Finance to increase the collateral required of banks in which deposits of state funds under its control have been made.

The severance tax permanent fund is under the supervision and control of the State Board of Finance. Section 6-1-1(E) NMSA 1978; Sections 7-27-1, **et seq.**, NMSA 1978. Thus, the State Board of Finance may exercise its Section 6-10-20 NMSA 1978 authority to require additional security for Subsection (A) deposits made by the State Treasurer. Such exercise of Section 6-10-20 NMSA 1978 authority must, however, be consistent with guidelines approved under Subsection (G) of Section 7-27-5 NMSA 1978.

Question 4:

Under Subsection (B) of Section 7-27-5 NMSA 1978, the State Treasurer is authorized to deposit money from the severance tax permanent fund in New Mexico banks and savings and loan associations "qualified as insured public depositories under Section 6-10-10 NMSA 1978." This reference to Section 6-10-10 NMSA 1978 only required that the bank and savings and loan associations be insured by an agency of the United States. Deposits of money from the severance tax permanent fund authorized by Subsection (B) are initially secured by certain mortgages with an aggregate outstanding principal balance equal to at least one hundred and twenty percent of the deposit.

The authority granted the State Board of Finance under Section 6-10-20 NMSA 1978 to require additional security is part of the basic statutory plan generally governing {^{*129}} the deposit of public funds. Subsection (B) defines a separate and distinct plan for deposits of money from the severance tax permanent fund. As a rule, where a general statute covers the same matter as a specific statute, and where the two may be in conflict, the special statute is considered an exception to or qualification of the general. **Lopez v. Barreras**, 77 N.M. 52, 419 P.2d 251 (1966); **State v. Lujan**, 76 N.M. 111, 412 P.2d 405 (1966). Accordingly, the specific provision of Subsection (B) may be considered an exception to such statutes as Sections 6-10-15, 6-10-16, 6-10-17 and 6-10-20 NMSA 1978, which generally govern the deposit of public money. Banks in which Subsection (B) deposits are made cannot be required to furnish additional security under the authority of Section 6-10-20 NMSA 1978.

Question 5:

In conjunction with deposits made pursuant to Subsection (B) of Section 7-27-5 NMSA 1978, Subsection (C) provides that the

". . . state treasurer shall devise and submit to the state board of finance guidelines covering the allocation of funds among institutions qualifying under this section, the specifics of an acceptable first mortgage to be pledged for such deposits and any additional requirements or reports necessary to protect the integrity of the fund . . . The

state board of finance may approve, disapprove or amend and approve guidelines submitted by the state treasurer pursuant to this subsection."

A requirement that depositories furnish additional collateral would protect the integrity of the fund. Additional collateral is not precluded by the various specific collateral requirements established in Subsection (B). Indeed, those are minimum requirements stated in terms of notes having an outstanding principal balance ". . . equal to or exceeding . . ." some amount. The authority in Subsection (C) to impose additional requirements is similar to that defined in Section 6-10-20 NMSA 1978 in that the legislature has set a minimum collateral requirement and has provided a means by which it may be increased. Thus, guidelines may be adopted under Subsection (C) to increase the minimum collateralizations defined in Subsection (B).

Question 6:

No guideline may be devised to require that mortgages be pledged at market value because such a guideline would conflict with the basis for valuing a mortgage established in Section 7-27-5 NMSA 1978. Subsection (B) values a mortgage pledged as collateral according to its "outstanding principal balance." For example, for an initial deposit, a bank or savings and loan association must pledge mortgages having "an outstanding principal balance equal to or exceeding one hundred and twenty percent of the amount of the deposit." Section 7-27-5(B)(1) NMSA 1978. See also, Section 7-27-5(B)(2), (4) and (6) NMSA 1978. Regardless of the market value of a mortgage, for purposes of Subsection (B), its value as collateral is equal to its outstanding principal balance.

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