

Opinion No. 17-2002

June 12, 1917

BY: HARRY L. PATTON, Attorney General

TO: Hon. H. L. Bickley, City Attorney, Raton, New Mexico.

Sewer Assessments in Cities May Be Paid in Less Than Ten Installments

OPINION

This is to acknowledge receipt of your letter of the 5th instant asking for construction of Section 3709, Code 1915, which provides for the assessment of taxes and the payment of certificates of indebtedness created on account of the establishment of sewer districts in municipalities.

You call attention to the following language of the section:

"Said assessments may be made payable in ten annual payments."

Your inquiry is directed to the point as to whether this provision is mandatory with reference to the number of payments, or as to whether or not the City Council may make provision for the issue and the payment of certificates of indebtedness for a shorter period.

I know of no two words that have received more attention at the hands of the courts as to the construction of meaning than "may" and "shall." In numerous instances in construing statutes "may" has been held to mean "shall" -- always dependent upon the view of the court as to legislative intent. One of the many instances in which "may" is read to mean "shall" or "must," is in cases in which third persons or the public show an interest in having the act done. It has occurred to me that it was intended by this act to give the public the right to make these payments in ten annual installments, instead of being forced to meet the payment in one payment, or in any number less than ten. On the other hand, we have a rule of construction that words are to be given their ordinary or commonly accepted meaning, unless a contrary intent of the legislature is manifest. Applying these two rules, I am inclined to believe that there is nothing in the act which indicates that the legislature intended that the word "may" should be construed as mandatory, and that if the courts so held, it would be another instance of judicial legislation.

As I have before said, the books are full of cases construing these words. There are no end of cases appearing in "Words and Phrases." However, after a reasonably diligent search, I have been able to find but one case which I consider to be in point. This case is People's National Bank, v. Ayer, et al., 24 Ind. App. 212, 56 N. E. 267. In that case the question arose upon the construction of a statute relating to the assessment for

street improvements and in making assessments for the cost of sewers. The statute under consideration reads as follows:

"Provided, that in the case of sewers the assessment may be made to run twenty years, and the bond issued to anticipate said assessments, may also be issued payable during the period of twenty years."

The court held that the word "may" should not be given a mandatory construction. In its opinion it said:

"Had the legislature intended to make the extension of 20 years mandatory, it seems reasonable to conclude that, in view of the existing laws, the word 'shall,' instead of 'may,' would have been used, as in the statute before us. It seems altogether reasonable that the legislature intended to grant to the common council -- the legislative branch of our city government, presumably familiar with the conditions attending the improvement -- a discretion to be exercised in the interest of the property owners."

I have not overlooked the further provision of Section 3709, providing that:

"The said City Council, or Board of Trustees, are hereby authorized to issue certificates to be designated as 'sewer certificates,' to the amount of such assessment, running for a period of eleven years, and payable in equal annual installments, from and after the date of the issuance thereof."

Notwithstanding such provision, I am of the opinion that the doctrine announced in the Indiana case is the correct rule, and agree with you that in the discretion of the Council the assessments may be paid in four annual payments.