

Opinion No. 33-589

April 25, 1933

BY: E. K. NEUMANN, Attorney General

TO: Hon. Juan N. Vigil, State Comptroller, Santa Fe, New Mexico.

{*42} Under date of April 11, 1933, you requested an opinion upon certain matters mentioned in a letter from Mr. Charles Fahy, City Attorney for the City of Santa Fe. Mr. Fahy refers to various sewer and paving bond issues secured by liens against property in Santa Fe.

The first question presented is whether or not separate sinking fund accounts should be kept for the principal and interest on the several bond issues and whether or not, if all funds collected which are applicable to the payment of principal and interest are put together in one fund, the interest on bonds must be paid therefrom so long as moneys are available, even though this may result in the fund being insufficient to pay the principal when it becomes due.

Section 90-709 of the 1929 Code provides that the City Treasurer shall keep all moneys received on special assessments in a **special fund** to be applied to the payment of improvement for which the assessment was made. There seems to be no statute which requires interest and principal {*43} sinking fund accounts to be kept separate or which requires interest and principal on improvement bonds to be paid out of separate accounts. The interest on bonds is just as much a part of the indebtedness as the principal. 33 C.J. 255. In the absence of statutory provision, it is my opinion that interest on city improvement bonds must be paid when due out of any funds in the treasury collected from special assessments created for the payment of such bonds.

The second question relates to the order of payment of such bonds. It is stated that the bonds themselves provide that they are to be paid in numerical order. Some of the bonds were issued as early as 1922. Those issued prior to 1923 were in the form of assignable certificates. Prior to 1922 and since that time there have been two methods of procedure for the levying of special assessments by incorporated cities for the purpose of street improvements, one being the provisional order plan and the other the petition plan. *Ellis vs. New Mexican Construction Co.*, 27 N.M. 312, 201 P. 487. Both of these plans at and prior to the year 1922 provided for the issuance of assignable certificates, the **terms and conditions** of which should be fixed by the governing body of the city. See Sections 90-1217 and 90-1224 of the 1929 Code. By Chapter 133, Laws of 1923 (Section 90-1201, 1929 Code), the Legislature authorized the issuance of negotiable coupon bonds to be paid out of the proceeds of special assessments for street improvements and provided that "governing body shall fix the **terms and conditions** of such bonds. This act also validated improvement bonds previously issued by municipalities payable from special assessments.

The question of the order of payment of bonds such as the ones now under discussion was decided in the case of State vs. Mills, 133 Wash. 681, 234 P. 1042, and under the terms of the Washington statute it was held that the bonds should be paid in numerical order. The Court further states:

"Moreover such a bond is in itself a contract between its holder and the city and both parties are bound by its terms, unless such terms are beyond the authority of the city to make."

It appears that under the provisions of our statutes the city in the present case had the power to provide that the terms of the bonds should be such as to require them to be paid in numerical order and that it did so provide.

In the case of Meyers vs. City of Idaho Falls (Idaho) 11 P (2nd) 626 it was held that city improvement bonds which, under the provisions of the statute, were payable numerically, nevertheless should be paid pro rata where the funds were insufficient to pay all of them in full. This decision was based upon a construction of the Idaho statute which contained what the Court referred to as an "equality clause." Our statute contains no such clause nor one of similar import.

Having considered the facts as stated in Mr. Fahy's letter and the authorities on both sides of the question. I am of the opinion that the city improvement bonds referred to should be paid in numerical order as they become due.

By: QUINCY D. ADAMS,

Asst. Attorney General