

Opinion No. 33-623

July 11, 1933

BY: E. K. NEUMANN, Attorney General

TO: Mr. R. R. Posey, Attorney at Law, Las Cruces, New Mexico.

{*64} Regarding your letter of June 22, 1933, in connection with the problems of the Town of Hatch, New Mexico, in reference with Chapter 57, Laws of 1933.

The opinion of the Supreme Court of New Mexico, in the case of Seward vs. Bowers et al, was filed June 30, 1933, and, unless reversed upon rehearing, if one is granted, is conclusive upon most of the questions raised by you. No doubt you are already familiar with the holding, and it is interesting to note that the same conclusions were reached through four separate opinions.

Your first question, relating to a proposal of a \$ 16,500 bond issue, under said laws, by the Town of Hatch to repay a loan from the Reconstruction Finance Corporation, asks if the revenue bonds issued constitute a debt within the meaning of Article IX, Section 12 of the Constitution of this State.

In answering this direct question, the Court, in the above case, concludes:

"It is abundantly clear that no indebtedness can possibly result against the Town of Springer from the issuance of the revenue bonds, and these bonds are not within the inhibition of the Constitution."

Question No. 2: Whether or not it would be necessary for the authorizing ordinance to provide for a levy of a tax for payment of such bonds?

I would say that this is not required, and, on the other hand, if it were required, the act permitting or requiring same would probably create an indebtedness of the town and the bonds would probably be within the inhibition of the Constitution. In said case, the court refers to the act in question and states that the bonds cannot be paid except from the revenues of the water department and {*65} for that reason the Town of Springer cannot pay off the bonds in any other manner.

Question No. 3 is answered by the above.

Question No. 4 relates to the power of the municipality to mortgage its water system as additional security for the payment of the bonds, and, if so, what remedy would the R. F. C. have in case of default.

In the above cited case the court says that the only remedy to a bondholder in this situation is as follows:

"The undertaking of the Town of Springer is not a guarantee or pledge that the interest or the bonds will be paid, but only a pledge that the Town of Springer shall establish a rate that will do so. * * * The fixing of a proper rate and the application of the revenue in the manner directed by law constitutes the legal, equitable and moral duty of the Town Board of the municipality, and failing in that, the bondholder may apply to the court to have such rates established and applied. * * * The credit of the city is not extended, nor is any of its money which is derived from taxation or other existing sources of revenue pledged in the payment of the interest or principal upon the bonds, and the city cannot be coerced into applying any of its general revenue."

Speaking of the only remedy available to the bondholder, the Court says:

"The debtor pledged the net revenues. The creditor knows exactly where to look for his money and knows he cannot look elsewhere."

In another place, it is stated that the act gives the bondholder the right of mandamus against the town to establish the rates. This, probably is the only remedy available, coupled, of course, with the right to have those revenues segregated for the purpose at hand.

As to the mortgage, our Supreme Court, in Palmer vs. Albuquerque, 19 N.M. 285, held that a city could not mortgage its property.

As to question No. 5, the Court says:

"The existing 1916 bonds have no present or future lien either upon the waterworks or the revenues therefrom, and the Town of Springer has unquestioned power to pledge the net revenues of the waterworks to retire the proposed bonds when and as issued." (Then follows a discussion of the remedies available to general obligation bonds.)

As to question No. 6, I can give no help, except to state that the Court apparently decided that the 1933 act would control in case of bonds issued thereunder, as a relaxation of the general laws.

As to your last question, as to the rate fixing power, the Court in the case cited makes the following statement:

"We find no authority cited by appellant and no provision of the Constitution or Statutes where such power is granted to the Corporation Commission, whereas, Laws 1933, Chapter 57, the law in question, specifically grants such power to the Municipal Corporation in this instance, * * * and is a proper grant of authority by the Legislature to a Municipal Corporation, and not in contravention of any constitutional powers of the State Corporation Commission."

Trusting the foregoing will be of some benefit to you, I am