

Opinion No. 41-3942

November 4, 1941

BY: EDWARD P. CHASE, Attorney General

TO: Mr. C. R. Sebastian State Comptroller Santa Fe, New Mexico

{*122} In your letter dated November 3, 1941, you inquire whether in cases where municipalities have outstanding general obligation bonds and also revenue bonds, the interest requirements of the general obligation bonds take priority over the principal and interest requirements of the revenue bonds.

Section 90-2505 of the 1929 Compilation provides for a levy of general taxes upon all property in a municipality to pay the interest and principal of outstanding general obligation bonds. This laws was passed in 1912.

In 1919, Chapter 47 was passed providing that the revenue from the operation of public utilities owned and operated by a municipality for the construction of which general obligation bonds were issued shall be applied first to the maintenance and repair as well as the payment of expenses of operation of such utility; second, to the payment of interest on bonds issued for the purchase or construction of such public utility; and third, to the creation of a sinking fund.

This law was amended by Section 1, Chapter 117, Laws of 1941, but the amendment enlarged the purposes for which bonds could be issued and did not in any way change the provisions regarding application of the revenues derived from the operation of the public utility.

In 1925, in Chapter 51, appearing as Section 90-2603 of the 1929 Code, the legislature provided that raising of sufficient funds from the operation of a public utility to create a sinking fund shall be optional with the municipality. This question was discussed by the court in *Seward v. Bowers*, 37 N.M. 385, and at page 393, Judge Zinn uses this language:

"It will continue to be the duties of municipalities to conform to the provisions of 1929 compiled statutes, Chapter 90, Article 26, in the conduct of municipal water work systems, except where they issue bonds under Chapter 57, in which event Article 26, supra, must give way to the 1933 act. * * *

"The legislature has the unquestioned power to change the policy, and did, by the enactment of Chapter 57, supra, so that the revenues from the water works which prior thereto were required by the statute to be placed in a fund to meet interest payments on existing bonds may be pledged to secure revenue bonds.

"The appellant, as a taxpayer, had no vested right in Laws of 1919, Chapter 47, which the legislature could not repeal * * *.

"If the legislature first made it mandatory to provide and establish a rate sufficient to meet (a), (b), and (c), and subsequently amended the law leaving (c) optional, cannot it now make (b) likewise optional? We can see no distinction. Clearly, Chapter 47, Laws of 1919, must give way to Chapter 57, Laws of 1933."

Chapter 57, Laws of 1933, Section 6, requires the municipality to establish such rates for services as will be sufficient to pay { *123 } all reasonable expenses of operation and create a net revenue which shall be sufficient to pay interest on said revenue bonds and provide a sinking fund to discharge the same upon their maturity.

I am aware of the fact that Judge Bickley, in a specially concurring opinion in the Seward v. Bowers case, was of the opinion that interest requirements to meet the outstanding general obligation bonds should be considered a part of the operating expenses and should be deducted before requirements for interest and principal on the revenue bonds is set aside. However, the majority of the court concurred with Judge Zinn to the effect that Chapter 57, Laws of 1933, superseded Section 90-2601 of the 1929 Compilation, and where revenue bonds are issued, a general levy for interest and sinking funds to pay the general obligation bonds outstanding should be made.

In view of this authority, it is my opinion that the requirements for interest and sinking fund to pay the revenue bonds takes priority over interest requirements to pay outstanding general obligation bonds.

By C. C. McCULLOH,

Asst. Atty. General