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September 21, 1988

OPINION
OF
HAL STRATTON
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Opinion No. 88-56

By: Carol A. Baca
Assistant Attorney General

To: The Honorable Harroll H. Adams
State Auditor
PERA Building, Room 302
Santa Fe, New Mexico 87503

QUESTIONS:

1. Are "excess funds" in county general funds to be taken into account in the budget approval and property tax setting process?
2. May counties accumulate general funds money for contingencies or for other long term purposes such as investment?
3. May counties accumulate unspent property taxes in the general fund to pay for capital expenditures?

CONCLUSIONS:

1. Yes.
2. Counties may accumulate general funds money for reasonably foreseeable contingencies. Counties may not accumulate funds for the sole purpose of investment.
3. Yes.

ANALYSIS:

A county that accumulates excess funds can reflect accumulation on its books as an unreserved general fund balance, a

contingency fund, or a designated fund balance. For purposes of this opinion, an unreserved general fund balance means excess funds that the county has not reserved or designated for some defined purpose. A contingency fund is a fund that the county has reserved for a contingent liability, such as threatened or pending litigation and estimated noncollectible receivables. Contingent liabilities fall into three categories: probable, reasonably possible and remote. See Financial Accounting Standards Board, Statement of Financial Accounting Standards No.5, Accounting for Contingencies 1-2 (1975). A designated fund balance means excess funds that the county has identified or designated for some tentative plan or project. Funds in this category are not committed or obligated and may be used for other purposes; they include, for example, excess funds that the county has designated for equipment replacement or capital improvements.

1. As a general principle, taxes should not be levied for the purpose of accumulating unnecessary surplus funds or to prepare for remote and speculative contingencies. People ex rel. Stevenson v. Atchison, T. & S.F. Ry. Co., 261 Ill. 33, 36, 103 N.E. 614, 616 (1913); Cities Service Oil Co. v. Carter, 247 La. 974, 983, 175 So. 2d 288, 291 (1965); Rogge v. Petroleum County, 80 P.2d 380, 381 (Mont. 1938); Pacific First Sav. & Loan Ass'n. v. Pierce County, 27 Wash. 2d 347, 351, 178 P.2d 351, 353 (1947); 4 C. Antieau, Local Government Law §41.01 (1987). Section 4-51-1 NMSA 1978, which applies to county budgets, provides: "At the close of any calendar year should the actual revenues exceed the estimated budget estimates [sic] of expenses as so finally approved and certified, such excess moneys shall be applied on the budget estimate for the next succeeding year." The legislature thus has determined that counties must not accumulate unnecessary surplus funds.

Pursuant to Section 6-6-2(A) NMSA 1978, each county files a proposed budget with the local government division of the department of finance and administration on or before July 1 of each year. Section 6-6-2(D) NMSA 1978 requires the local government division to review the proposed budgets and "make corrections, revisions and amendments to the proposed budgets as may be necessary to meet the requirements of law." The secretary of finance and administration sets the counties' property tax rates after the local government division approves the budgets. Section 7-38-33(A) NMSA 1978. Because Section 4-51-1 is a requirement of law for county budgets, the department of finance and administration must take excess funds into account in the budget approval and property tax rate setting process, and apply excess funds to the following year's budget estimate. Counties may not accumulate surplus funds as unreserved general fund balances. The department of finance and administration cannot approve proposed budgets that retain unreserved general fund balances.

2. Counties may apply excess funds to a contingency fund. See Government Accounting Standard Board, Codification of Governmental Accounting and Financial Reporting Standards §1500.110 (2d ed. 1987.) Contingency funds, however, should not be established for the purpose of accumulating funds for the remote future or for contingencies that may never occur. See, e.g., People ex rel. Stevenson v. Atchison, T. & S.F. Ry. Co., 261 Ill. 33, 36, 103 N.E. 614, 616 (1913). Therefore, if a county intends to reserve excess funds in a contingency fund, Sections 6-6-2 and 4-51-1 require the county to make a good faith estimate of reasonably foreseeable contingent liability and include it in the proposed budget submitted to the local government division.

Sections 6-10-10(F) and 6-10-44 NMSA 1978 authorize counties to invest funds. Section 6-10-10(F) provides, in pertinent part:
[C]ounty ... treasurers, by and with the advice and consent of their respective boards of finance ... have the power to invest all sinking funds or money remaining unexpended from the proceeds of any issue of bonds or other negotiable securities ... and all money not immediately necessary for the public uses of the counties ... not invested or deposited in banks, savings and loan associations or credit unions [in certain securities].

(Emphasis added.) Section 6-10-44 allows a county treasurer to "temporarily invest" excess funds in certain securities if he cannot divide equitably and ratably among qualified depositories all the money he has on hand. Both sections contemplate that a county may invest funds as an interim measure until it spends them for public use. In light of Section 4-51-1 and the public policy against using taxes to accumulate unnecessary surplus funds, we do not believe that Sections 6-10-10(F) and 6-10-44 authorize counties to create funds solely for the purpose of investment. However, these sections authorize counties to invest funds that they have identified or reserved for some future public use.

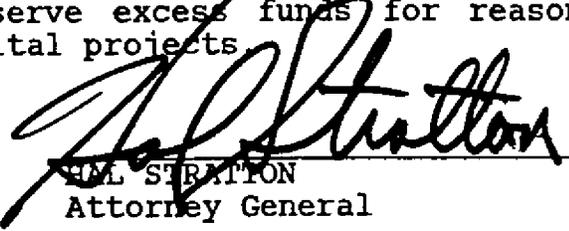
3. Section 7-37-7(B)(1) NMSA 1978 authorizes a property tax rate "for the use of each county for general purposes." We have found no authority that prohibits counties from using general funds for capital projects. Section 6-6-2(H) NMSA 1978 allows the local government division to increase a county's total budget in the event the county:

[U]ndertakes an activity, service, project or construction program which was not contemplated at the time the final budget was adopted and approved and which activity, service, project or construction program will produce

sufficient revenue to cover the increase in the budget or the local public body has surplus funds on hand not necessary to meet the expenditures provided for in the budget with which to cover the increase in the budget.

(Emphasis added.) This section clearly assumes that a county can use surplus funds for capital projects. Counties may place excess funds in a reserve account or designate a fund balance for use in future capital projects.

In summary, counties may not accumulate funds as an unreserved general fund balance, for a remote contingency, or for the sole purpose of investment. They must apply excess funds in such categories to the following year's budget estimate. Counties, however, may designate or reserve excess funds for reasonably foreseeable contingencies or capital projects.


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