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NO.
STATE OF NEBRASKA
OFFICIAL
APR 1 1992
DEPT. OF JUSTICE

DATE: March 31, 1992

SUBJECT: Procedure for Collection of Loan Obligations of Municipalities Under the Wastewater Treatment Facilities Construction Assistance Act

REQUESTED BY: Lawrence S. Primeau, Director
Department of Administrative Services

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

This is in response to your request for an Opinion of this office regarding loans made to municipalities under the Wastewater Treatment Facilities Construction Assistance Act, Neb.Rev.Stat. §§ 81-15,147 et seq. You have asked a series of questions relating to interpretation and implementation of statutory provisions pertaining to collection of delinquent loan amounts from state aid to municipalities.

I. ENFORCEABILITY OF REMEDIAL PROVISIONS

Initially, you inquire concerning the enforceability of Neb.Rev.Stat. § 81-15,158 (1990 Cum.Supp.) which states:

> If a municipality fails to make any payment pursuant to a loan within sixty days of the due date, such payment shall be deducted from the amount of aid to municipalities to which the municipality is entitled under sections 77-27,136 to 77-27,137.01. Such amount shall be paid directly to the Wastewater Treatment Facilities Construction Loan Fund.

This provision establishes a specific remedy by deduction of delinquent loan amounts from funds appropriated for distribution to

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municipalities under the provisions of Neb.Rev.Stat. § 77-27,136 (Reissue 1990). The Department of Environmental Control is expressly authorized by the Act to make loans to municipalities.[1] The provisions of § 81-15,158 are clear, and we are not aware of any impediment to application of the remedy (offset) if appropriate procedures are followed. Procedures are enumerated in Neb.Rev.Stat. § 72-1503 (Reissue 1990) and include notice by the agency to the Director of the Department of Administrative Services, notification of the political subdivision, and verification of delinquent amounts to be withheld from state-aid payments.

The collection remedy is required to be utilized. The statute includes mandatory language that such payment shall be deducted and such amount shall be paid to the Wastewater Treatment Facilities Construction Loan Fund. Under Nebraska rules of statutory construction, the word "shall" presumes mandatory or ministerial action. See Neb.Rev.Stat. § 49-802 (Reissue 1988). Further, our supreme court has held that, in the construction of statutes, the word "shall" is considered mandatory and it is particularly so considered when the statute is addressed to public officials. State ex rel. Smith v. Nebraska Liquor Control Commission, 152 Neb. 676, 42 N.W.2d 676 (1950). Since the remedy is legislatively authorized and mandated, we believe the procedure is legally enforceable.

II. APPLICABILITY OF OTHER STATUTORY PROVISIONS

You have also asked whether application of § 81-15,158 would "affect the applicability of other offset/intercept statutes such as [s]ections 72-1502 and 72-1601."

Neb.Rev.Stat. § 72-1502 (Reissue 1990) provides that delinquent accounts owed the state shall be collected in accordance with the procedures set out in Neb.Rev.Stat. § 72-1503 (Reissue 1990).[2] Amounts the state owes to any person may be intercepted if that person is indebted to the state on account of any tax or other obligation due and owing the state pursuant to Neb.Rev.Stat. § 72-1601 (Reissue 1990). If we understand your question, we do

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[1] Neb.Rev.Stat. § 81-15,153 (1990 Cum.Supp.) empowers the Department of Environmental Control to make loans for construction or modification of publicly owned wastewater treatment works and various categories of loan eligibility and terms are described in Neb.Rev.Stat. § 81-15,154 (1990 Cum.Supp.).

[2] Neb.Rev.Stat. § 72-1503 establishes a process for collection of delinquent accounts, amounts due the state, by political subdivisions through withholding of state-aid payments.

not believe that application of the provisions of Neb.Rev.Stat. § 81-15,158 would in some fashion impact the application of the intercept provisions provided in other statutes. The statutes are similar in their provision in that a remedy is provided for collection of debts and other delinquent obligations of persons and political subdivisions.

III. PROCEDURAL REQUIREMENTS

You inquire whether the intercept provisions of Neb.Rev.Stat. § 81-15,158 are subject to "the procedural requirements of sections 72-1501 through 72-1503?" We believe the statutory procedures are applicable and necessarily should be complied with. Section 72-1503 provides the manner in which delinquent accounts shall be collected unless otherwise provided by law. Section 81-15,158 does not provide a different "manner" or process for collection of delinquent accounts; rather, it requires that the remedy be applied and does not establish a different procedure. Accordingly, it is our opinion that the procedures included in Neb.Rev.Stat. § 72-1503 should be complied with to accomplish collection of delinquent loan obligations of municipalities.

IV. DUE PROCESS REQUIREMENTS

The next question you have asked is whether "additional due process requirements must be satisfied." We generally believe that due process requirements are complied with if the statutory procedures generally outlined in Neb.Rev.Stat. § 72-1503 are followed. You have referred to an informal Opinion of Attorney General, January 9, 1980, which expressed concerns related to constitutional issues regarding Neb.Rev.Stat. § 77-2418 (now codified at Neb.Rev.Stat. § 72-1601) which authorizes interception of amounts owed to individuals by the state for satisfaction of any debts owed by an individual to the state. The concerns of a constitutional nature expressed in that Opinion pertained to property rights and vested interests of private persons and corporations. These issues for the most part are not applicable since the subject properly consists of public funds and the parties involved are public entities.

The Nebraska Department of Environmental Control is the lead agency for administration of the lending program for municipalities under the Act. The implementing rules and regulations provide for preparation of loan documents and terms for security as well as the process for delinquent loan payments. Chapter 7 of the implementing regulations provide for a request for hearing or appeal in accordance with the Administrative Procedure Act, Neb.Rev.Stat. §§ 84-901 et seq. Procedural due process is accomplished since the provisions of the Administrative Procedure

Act regarding notice and hearing are applicable under the rules and regulations of the Department of Environmental Control.

V. MEMORANDUM OF UNDERSTANDING

A copy of a proposed Memorandum of Understanding was enclosed with your Opinion request, and you inquire whether this agreement would satisfy statutory and due process requirements. The parties to the proposed Memorandum are the Department of Environmental Control, Department of Administrative Services, and the State Treasurer. In brief, the agreement outlines the procedures which would be followed for collection of delinquent loan payments from municipalities. After review, we conclude the procedures outlined are consistent with statutory procedures and generally would comply with due process.

However, we find paragraph 7 of the Memorandum of Understanding draft to be directly contrary to the express provisions of the Wastewater Treatment Facilities Construction Assistance Act. As drafted, paragraph 7 appears to require that amounts withheld from state-aid to municipalities shall be deposited in a fund or account pursuant to a pledge agreement or master trust indenture in place for "security for outstanding bonds." Neb.Rev.Stat. § 81-15,151 (1990 Cum.Supp.) in part states "that amounts deposited into the fund from state appropriations may not be used to pay or to secure the payment of bonds or the interest thereon." We believe that state-aid payments to municipalities under the provisions of Neb.Rev.Stat. § 77-27,136 (Reissue 1990)[3] constitute amounts from state appropriations.

The Nebraska Supreme Court consistently has precluded the use of state funds for repayment of bond obligations, particularly if the funds would be comprised of state appropriation, revenue, or tax amounts. See State ex rel. Douglas v. Nebraska Mortgage Finance Fund, 204 Neb. 445, 283 N.W.2d 12 (1979); State ex rel. Meyer v. Duxbury, 183 Neb. 302, 160 N.W.2d 88 (1968); State ex rel. Meyer v. Steen, 183 Neb. 297, 160 N.W.2d 164 (1968). Accordingly, it is our opinion that funds derived from state-aid to municipalities may not be pledged to secure the payment of bonds issued by the Nebraska Investment Finance Authority. In light of this opinion, we conclude that the provisions of paragraph 7 of the Memorandum should be stricken or revised in their entirety.

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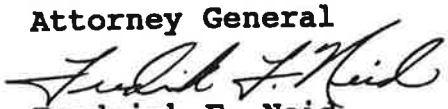
[3] Section 77-27,136 provides that the Legislature shall appropriate funds collected from general sales tax and income tax for aid to municipalities, counties, and natural resources districts, and Neb.Rev.Stat. § 77-27,137.01 (Reissue 1990) describes the procedure for distribution of the aid funds to incorporated municipalities.

In summary, it is our opinion that the collection mechanism provided in Neb.Rev.Stat. § 81-15,158 is enforceable if statutory procedures are followed. We further conclude that paragraph 7 of the proposed Memorandum of Understanding contradicts express statutory provisions and necessarily should be deleted or modified. In most other respects, the draft of the Memorandum outlines procedures in compliance with statutory and due process requirements.

Sincerely,

DON STENBERG
Attorney General



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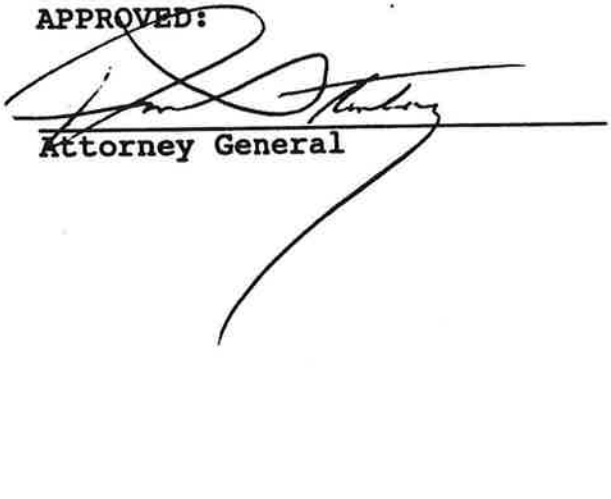

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