OPINION
45-212

April 2, 1945 (OPINION)

MUNICIPAL BONDS

RE: Retirement - General Fund Not Available

We are in receipt of your letter of March 31, 1945, wherein you say that the city of Garrison has several thousand dollars in its general fund, and you desire to have information as to the procedure to follow in order to retire the outstanding bonds.

Your financial situation is undoubtedly similar to the condition now found in many taxing districts throughout the state. Owing to the collection of delinquent taxes the amount of money flowing into your general fund has probably materially exceeded the budget estimates made during the past several years, on which estimates levies for general fund purposes were made. And on the basis of a common-sense procedure, you naturally conclude that surplus moneys in the general fund should be used for the payment of bonds.

Your attention, however, is directed to the provisions of section 57-1531 of the North Dakota Revised Code of 1943, (section 11 of the Session Laws of 1929). This section provides the method by which your city budget for the ensuing year shall be determined. You will note that this section specifically requires that the "the available surplus consisting of free and unencumbered balance" must be taken into consideration in determining your levy. And this means, of course, that under the statutes your city cannot validly use such surplus funds for debt retirement.

We may say, however, that some taxing districts have probably, on their own initiative, followed the rule of common-sense business practice and used such surplus funds to pay outstanding bonds. This office, however, cannot advise nor encourage any municipality to ignore the provisions of the statute in any report.

But no one can consistently contend that the governing body of a city or other municipality is guilty of malfeasance or misfeasance in office by following sound business practice, for we all know that tax collections in recent years have been unusually good because of favorable economic conditions and that these conditions may change. But if you should use surplus moneys in your general fund to retire bonds, any disgruntled taxpayer may challenge the legality of your levy this year.

Ordinarily, bonds can only be paid when they become due and then it is up to the holders of such bonds to present them for payment. The form of your city bonds and the provisions contained in them undoubtedly state how and when they shall be paid, including the notice, if any, required to be given. If the bonds referred to in your letter are not due, the only thing to do is to get in touch with the owners and negotiate for their payment in case you have funds available for this purpose.

NELS G. JOHNSON

Attorney General