

**LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS**

Bill Number: HB 490

52nd Legislature, 1st Session, 2015

Tracking Number: .198993.3

Short Title: Public School Capital Outlay Uses

Sponsor(s): Representatives Eliseo Lee Alcon, D. Wonda Johnson, and W. Ken Martinez

Analyst: David Craig

Date: February 26, 2015

Bill Summary:

Among its provisions, HB 490:

- amends the *Severance Tax Bonding Act* to allow supplemental severance tax bonds (SSTBs) to be issued and used for other purposes pursuant to the *Public School Capital Outlay Act* or the *Public School Capital Improvements Act*;
- defines “school building” and “public school building” within:
 - sections of the *Public School Code* governing General Obligation Bonds (GOBs);
 - the *Public School Capital Outlay Act*;
 - the *Public School Capital Improvements Act*; and
 - the *Public School Buildings Act*;¹ and
- allows expenditures from the Public School Capital Outlay Fund (PSCOF) from FY 16 through FY 20 for both:
 - debt service payments on revenue bonds issued by Gallup-McKinley County Schools equal to the lesser of:
 - \$3.0 million per year; or
 - the amount of debt service payments due, when multiplied by the state percentage share calculated pursuant to the *Public School Capital Outlay Act*; and
 - loan payments for Zuni Public Schools equal to the lesser of:
 - \$1.0 million per year; or
 - the amount in loan payments due when multiplied by the state percentage share calculated pursuant to the *Public School Capital Outlay Act*.

¹ HB 490 defines “school building” or “public school building” as a public school building, public school administration building, or any related public school structure or facility, including teacher housing in school districts with schools located in sparsely populated, isolated, rural areas, that is owned, acquired or constructed by a school district as necessary to carry out the functions of the school district.

Fiscal Impact:

HB 490 does not carry an appropriation. Instead, it allows expenditures from FY 16 to FY 20 from the PSCOF of:

- up to \$3.0 million per year to Gallup-McKinley County Schools; and
- up to \$1.0 million per year to Zuni Public Schools.

According to a Public School Facilities Authority (PSFA) analysis of an identical bill,² the provisions of HB 490 would reduce funding for discretionary programs of the PSCOF of up to \$4.0 million dollars in each fiscal year FY 16 through FY 20 for a combined total of up to \$20.0 million. With regard to the expanded educational support spaces and use of the PSCOF, the PSFA analysis indicates that:

- the Facilities Assessment Database³ has incomplete information regarding teacher housing (commonly referred to as “teacherages”);
- with regard to teacherages assuming 33 school districts have 50 teacherages each, the estimated annual program cost would be \$17,556,000;
- with regard to administrative spaces, assuming all 89 school districts have administrative space, the estimated annual program cost would be \$21,787,200; and
- the total impact of including educational support spaces in the standards-based public school capital outlay process is \$39,343,200.

Fiscal Issues:

The definition of the terms “school building” and “public school buildings” expands the use of the bonds issued under the provisions of these laws to public school administration buildings, or any related public school structure or facility, including teacher housing in school districts with schools located in sparsely populated, isolated, rural areas.

As shown in the Attachment, the courts have generally excluded the use of GOBs or *Public School Capital Improvements Act* (commonly referred to as “HB-9”) funds for construction of teacherages. Current law provides that a school district may issue GOBs for the purpose of:

- erecting, remodeling, making additions to and furnishing school buildings;
- purchasing or improving school grounds;
- purchasing computer software and hardware for student use in public schools;
- providing matching funds for capital outlay projects funded pursuant to the *Public School Capital Outlay Act*; or
- any combination of these purposes.

This language mirrors language in Article IX, Section 11 of the state constitution. Because the courts have limited the definition of “school buildings” to a structure which is used for instruction, teacherages have been excluded from public school capital outlay.

² SB 592, *Public School Capital Outlay Uses*

³ The Facilities Assessment Database (FAD) is a tool used to create standards-based prioritization for funding public school facilities through the Public School Capital Outlay Council (PSCOC). The FAD combines building repair cost and system life cycle analysis with state adequacy standards to create the New Mexico Condition Index (NMCI).

Language in HB 490 (pages 4, line 20 to page 5, line 1) proposes to amend the *Public School Code* to include a definition of school building in provisions relating to GOBs that allow an expanded use of those funds. However, the language on page 15, line 22 to page 16 line 5, allowing expenditures from the PSCOF payable to Gallup-McKinley County Schools is applicable only to revenue bonds issued for the school district. GOBs are generally less restrictive in their use than revenue bonds (see “Background,” below). The sponsor may wish to consider whether to include GOBs, or any other bond financing mechanism provided for in the *Public School Code*,⁴ as an allowable source for debt service payments, as GOBs are the most commonly used bond financing mechanism by school districts; and current language would not allow the PSCOF expenditures to be used to service GOB debt at Gallup-McKinley County Schools.

Technical Issues:

Although the definition is the same in each case, in two instances (page 4, line 20; and page 6, line 18) the term being defined is “school building”; and in two other instances (page 17, line 19; and page 19, line 8) the term being defined is “public school building.” The sponsor may wish to consider amending the bill so that it defines the same term in each instance.

Substantive Issues:

According to a PSFA analysis of an identical bill:

- the 2002 report of the Special Master appointed as a result of the Zuni lawsuit specifically highlighted “the disqualifying effect of direct legislative appropriations to individual schools for capital outlay purposes”;
- including the use of the PSCOF to service debt for two specific school districts is a direct appropriation that may be viewed by the other 87 school districts as having a disqualifying effect on the standards-based process;
- PSCOC does not have standards for teacherages or administrative spaces; and
- standards would have to be developed and site visits conducted to evaluate and rank teacherages with teacherages and administrative spaces with administrative spaces to determine the highest priority needs of these two building types.

Background:

General Obligation Bonds⁵

GOBs are debt instruments backed by the full faith and credit of the issuing jurisdiction; that is, its full taxing authority. A jurisdiction issuing a GOB may use any source of revenue to make payments to a bondholder, like taxes, fees, or the issuance of new debt. Because a jurisdiction that encounters difficulty making payments on GOBs can raise taxes to offset the shortfall, GOBs are generally considered safe investments. GOBs also enjoy popularity with bond purchasers as they provide some federal tax advantages to bondholders. GOBs must be approved by voters prior to being issued and they do not limit the taxpayers required to repay the debt to those who use the service – two characteristics of GOBs that revenue bonds do not share.

⁴ These may include: general obligation bonds, qualified school bonds, and qualified school construction bonds.

⁵ The descriptions of general obligation bonds and revenue bonds are drawn primarily from Lee, Jr., Robert, Ronald W. Johnson and Philip G. Joyce. *Public Budgeting Systems*, 7th Ed. Boston: Jones and Bartlett Publishers, 2004.

Revenue Bonds

Revenue bonds are types of bonds that are most often issued on the basis of pledging the revenue from a specific tax or fee for use of the proceeds, producing the practical effect of placing the burden of financing the government service or facility on those that use the service or facility. Revenue bonds are most commonly used for facilities with a dedicated revenue source. For example, using the revenue from parking fees for use of a parking garage to finance the parking garage construction is one example of revenue bond financing. In addition to municipalities,⁶ because of the specialized nature of the dedicated revenue source, often these types of bonds are issued by special purpose authorities. For example, in New Mexico, water and natural gas associations have the ability to issue revenue bonds to finance a water or natural gas supply system.⁷ School districts are provided the authority to issue revenue bonds under the provisions of the *School Revenue Bond Act*⁸ and the *Teacher Housing Revenue Bonding Act*.⁹

School Revenue Bonding Act

The *School Revenue Bonding Act* allows school districts to issue school revenue bonds for income projects, which are projects that involve purchasing, erecting, improving, repairing or furnishing a building; that involve improving a facility, including any land on which it is situated; and that produces income to the school district. After the local school board determines that the income project is necessary, and the Public Education Department (PED) approves, a local school board may issue revenue bonds to finance repayment of any money borrowed for the income project. To secure payment of any revenue bonds issued, the local school board may execute a mortgage, deed of trust or other security agreement to secure payment of any revenue bonds. A local school board must meet certain requirements for records and restricted use of the income from the income project to issue school revenue bonds, including the establishment of a retirement fund, where all net income from the income project is deposited. School revenue bonds may be refunded under provisions of the *School Revenue Bonding Act*.

Teacher Housing Revenue Bonding Act

The *Teacher Housing Revenue Bonding Act* allows school districts to issue teacher housing revenue bonds specifically for the purpose of financing teacher housing projects, which are residential housing facilities for teachers, including land and land improvements. Similar to provisions of the *School Revenue Bonding Act*, local school boards must determine that the housing project is necessary and obtain PED approval of the project prior to issuing the bonds. However, for the purposes of a revenue bond for a teacher housing project, a school district may pledge to repay the bonds:

- not only with the income to the school district from the housing project;
- but also with portions of federal funds that the state does not take credit for in the calculation of the State Equalization Guarantee, which are most commonly 25 percent of the school district's Impact Aid or any applicable federal Forest Reserve funds.

⁶ 3-31-1 NMSA 1978 et seq.

⁷ 3-28-1 NMSA 1978 et seq.

⁸ 22-19-1 NMSA 1978 et seq.

⁹ 22-19A-1 NMSA 1978 et seq.

Teacher housing revenue bonds are subject to the same requirements for record retention and restricted use of the income from the teacher housing projects to issue revenue bonds, including the establishment of a retirement fund as school revenue bonds, and they may also be refunded.

Committee Referrals:

HEC/HWMC/HAFC

Related Bills:

CS/HB 92 *Severance Bonds for Transportation Projects*
HB 236a *Increase Severance Tax Permanent Fund Inflows*
HB 253a *Charter School Facility 4 Year Plans*
HB 352 *Charter School Capital Outlay Assistance*
SB 128 *Public School Capital Outlay Building Needs*
SB 130a *Public School Lease Purchase Act Definitions*
SB 150 *Increase Severance Tax Distributions*
SB 326 *Reduce Severance Tax Bonding Capacity*
SB 592 *Public School Capital Outlay Uses (Identical)*

Opinion No. 81-01

January 12, 1981

OPINION OF: Jeff Bingaman, Attorney General

BY: Jill Z. Cooper, Deputy Attorney General

TO: Kathleen R. Marr, Secretary, Department of Finance and Administration, 421 State Capitol, Santa Fe, New Mexico 87503

PUBLIC SCHOOLS

Revenues generated by school district general obligation bonds pursuant to the Public School Capital Improvements Act may not be spent to construct teacher housing.

QUESTIONS

May a school district use general obligation bond proceeds or Public School Capital Improvements Act revenue for the construction of teacher housing?

CONCLUSIONS

No.

ANALYSIS

The permissible uses of school district general obligation bond proceeds are defined at Section 22-18-1 NMSA 1978 which provides that

". . . a school district may issue general obligation bonds for the purpose of erecting, remodeling, making additions to and furnishing school buildings, or purchasing or improving school grounds or any combination of these purposes . . ."

OPINION

The language of Section 22-18-1 is apparently derived from Article IX, Section 11 of the New Mexico Constitution which provides that

"No school district shall borrow money except for the purpose of erecting, remodeling, making additions to and furnishing school buildings or purchasing or improving school grounds or any combination of these purposes. . . ."

The authorizing language of Section 22-18-1 must therefore be read as a limitation on the use of proceeds from general obligation bonds because any other use is prohibited by the constitution.

Board of Education of City of Aztec v. Hartley, 74 N.M. 469, 394 P.2d 985 (1964). In the **Aztec** case, the Supreme Court held that a school district election called to issue bonds for "school purposes" was invalid on the grounds that the phrase "school purposes" was "too all-inclusive and includes purposes prohibited by the constitution." 74 N.M. at 473.

Thus, bond proceeds may be used to construct teacher housing only if such use is included among the purposes defined by Section 22-18-1. In particular, it would be necessary to find that teacher housing is included within the meaning of the term "school building." If the construction of teacher housing is not permitted in that context, it certainly would not be permitted in the context of an improvement to school grounds.

Where the term "school building" has been defined by the courts {**203*} in the context of the

expenditure of revenues from a bond issue, it has been generally determined that a school building is a structure which is used for teaching. For example, in **Petition of School Board of School Dist. No. U2-20 Jt., Multnomah County**, 232 Or. 593, 377 P.2d 4, 5 (1962), the Court stated that "[a] building is a 'school building' if it is designed to carry out a part of the instructional program authorized by the district." The Court held that a swimming pool would be a school building because a course of instruction was given in swimming. Similarly, in **Jones v. Sharyland Independent School District**, 239 S.W.2d 216 (Tex. Civ.App. 1951), the Court held that a gymnasium was a school building within the meaning of school bonding provisions because state law required that physical education be taught in the schools and it was apparent that a gymnasium was necessary to properly teach it. See also, **Alexander v. Phillips**, 31 Ariz. 503, 254 P. 1056 (1927). However, in **Board of Education of Louisville v. Williams**, 256 S.W. 29 (Ky. Ct.App. 1953), the Court determined that bonding statutes must be strictly construed and a stadium could not be considered a "school building".

Accordingly, insofar as buildings used for teacher housing are not used for instructional purposes, such buildings do not fall within the meaning of the term "school building" as it is commonly used in bonding provisions.

Funds made available to school districts under the Public School Capital Improvements Act may be used for "capital improvements" which are defined at Section 22-25-2(B) NMSA 1978 as ". . . expenditures, exclusive of any debt service expenses, for:

- (1) erecting, remodeling, making additions to, providing equipment for or furnishing public school buildings;
- (2) purchasing or improving public school grounds; and
- (3) maintenance of public school buildings or public school grounds, exclusive of salary expenses of school district employees."

These revenues are derived from direct taxes levied in the school district and distributions from the public school capital improvement fund. They do not involve the borrowing power of the school district and would not, therefore, be subject to the prohibitions of Article IX, Section 11. Nevertheless, as a rule, school districts have no inherent power of taxation and may only exercise such power as is authorized by law. See, e.g., 68 Am. Jur. 2d Schools §§ 79, 80.

Where school districts expend funds for the construction of teacherages, the relevant case law indicates that they do so pursuant to specific statutory authority. See, e.g., **Landrum v. Centennial Rural High School Dist.**, 146 S.W.2d 799 (Tex. Civ.App. 1940); **McNair v. School Dist. No. 1 of Cascade County**, 87 Mont. 423, 288 P. 188 (1930). If not specifically mentioned, teacherages are not included within an authorization to construct school buildings or school houses. **Denny v. Mecklenburg County**, 211 N.C. 558, 191 S.E. 26 (1937). In the **Denny** case, the Court explained that school districts have only such authority as is defined by law, and the authority to construct teacherages is neither expressly nor implicitly granted by a statute authorizing the district to erect and *{*204}* equip school houses. See also, **Hansen v. Lee**, 119 Wash. 691, 206 P. 927 (1922). Section 22-25-2(B) does not specifically authorize the construction of teacher housing.

In summary, revenues generated by school district general obligation bonds or pursuant to the Public School Capital Improvements Act may not be spent to construct teacher housing.

ATTORNEY GENERAL

Jeff Bingaman, Attorney General