

Opinion No. 47-5118

December 22, 1947

BY: C. C. McCULLOH, Attorney General

TO: Mr. Ray Rodgers State Treasurer Santa Fe, New Mexico

{*121} We wish to advise that we have carefully examined the transcript of bond proceedings of Bernalillo County, relative to the issuance of \$ 1,000,000.00 in general obligation bonds by said county for the purpose of constructing and equipping a hospital and isolation wards, and the purchase of necessary land therefor.

We are now prepared to advise you as to the legality of said proposed bond issue in view of the fact the bid submitted by you, subject to our approval of the proceedings, has been accepted by resolution duly passed and adopted by the county commissioners of Bernalillo County.

This office is cognizant of the worthy purpose for which monies raised by this bond issue are to be put, and also the fact that said issue was overwhelmingly approved by the taxpayers of Bernalillo County who voted on the question. Under such a state of facts, we believe every reasonable consideration should be resolved in favor of the validity of such issue.

However, on the other hand, monies belonging to the permanent school fund as well as other state funds, will no doubt be used by you in purchasing this issue, and we believe all citizens of this state would agree that you should not invest state monies in a questionable bond issue.

We do not propose to go on record as stating this issue is invalid beyond question, for such is not the case, as there are legal authorities that could be cited in support of the validity of said issue. (For instance, see: Territory ex rel Overholson v. Baxter, (Ok.) 83 P. 709; State ex rel Davis et al v. Barber, 180 So. 809, 139 Fla. 706; Jewett et al v. School Dist. No. 25, in Fremont County, 49 Wyo. 277, 54 P. 2d 546.)

However, in view of Article 9, Section 10 of the New Mexico Constitution, we do believe said issue to be invalid. That section provides in part as follows:

"No county shall borrow money except for the purpose of **erecting** necessary public buildings . . ."

In the present case, you will recall, the purpose for which said bonds were voted was for **constructing and equipping** a hospital and isolation ward, and for the **purchase of necessary land** therefor.

In this connection, it is interesting to note that Article 9, Section 11 of the New Mexico Constitution, which follows the constitutional provision on county indebtedness, pertains to school district indebtedness. That section provides in part as follows:

"No school district shall borrow money, except for the purpose of **erecting** and **furnishing** {*122} school buildings or **purchasing school grounds**. . ."

To our knowledge, the Supreme Court of New Mexico has never passed specifically on the question herein involved as to whether or not the term "erecting necessary public buildings" is broad enough to include the equipping of said building as well as the purchase of necessary land on which to erect said building. However, our court has on two previous occasions passed on Article 9, Section 10 of the New Mexico Constitution wherein related matters were involved and it is these two decisions and the cases cited therein that we conclude the present bond issue is invalid.

The first of these two cases is Tom v. Board of County Commissioners of Lincoln County, 43 N.M. 292, 92 P. 2d 167. In that case bonds were voted for the purpose of erecting, remodeling and repairing the Lincoln County court house and jail buildings. In holding the proposed bond issue void, the Court on page 295 of their opinion said:

"The constitution prohibits either the remodeling or repairing of public buildings by the use of funds so obtained."

In the case of Board of Commissioners of Guadalupe County v. State, 43 N.M. 409, 94 P. 2d 515, the petition calling for a bond election provided that the proceeds of said bond issue be used for the purpose of remodeling the county court house of Guadalupe County and building an addition thereto.

The Court, in declaring the bond issue void at page 417 of said opinion, stated:

"In construing a constitutional provision expression of one thing is exclusion of another. (See In re Atchison, Topeka & Santa Fe Railway Co., 37 N.M. 194, 20 P. 2d. 918.)

"The expression of the limitation on power to borrow money for the purpose of **erecting** buildings excludes the power to borrow money to remodel, alter or repair a building already existing, unless these processes amount in fact to erection of a building."

Thus, by analogy, we are of the opinion that our Court would hold that the power to "erect necessary public buildings" does not include authority to equip said building and to purchase the necessary ground on which to build said building.

It is our considered opinion that the State Treasurer should not purchase this bond issue unless our Supreme Court, upon proper presentation, determines that said issue is within the provisions of Article 9, Section 10 of the New Mexico Constitution, and will be a valid and binding obligation on Bernalillo County.

We believe this determination can be had without undue delay if the proper authorities will mandamus the Attorney General in an original action filed in the Supreme Court. If the Supreme Court of this State upholds the validity of said issue, you may rest assured you will receive the certificate of approval of the Attorney General on the same day the Court sends down its mandate ordering the Attorney General to approve said issue.

Trusting the aforementioned properly advises you for the present time in regard to the purchase of said issue, I am

By ROBERT V. WOLLARD,

Asst. Atty. General