

Opinion No. 50-5280

February 8, 1950

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. Gus Mitchell, Chairman Board of County Commissioners Santa Fe, New Mexico

{*128} I am in receipt of your letter requesting an official opinion as to whether Santa Fe County, by virtue of Chapter 148, Laws of 1947, has the power to purchase own, maintain and operate hospitals, through the issuance of bonds, under the following set of facts.

A plan is being considered whereby the County of Santa Fe is to issue bonds in a substantial amount to be used for the enlargement and improvement of St. Vincent Hospital in Santa Fe. This money is to be commingled with other monies to be contributed by the present owners of the hospital and monies to be obtained from the government.

It is your understanding that the portion to be contributed by Santa Fe County will not be used for the construction of any particular portion of the new hospital nor will the County of Santo Fe have any control over the hospital after it is completed except such as may be given by contract entered into by the county and the owner of the completed hospital. This action does not contemplate a lease or control of any kind by the county.

It is my opinion that you cannot legally issue bonds for the above purpose. Article 9, Section 10 of the Constitution of New Mexico, insofar as is material, states as follows:

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

The Supreme Court of the {*129} State of New Mexico in the case of Board of County Commissioners of Bernalillo County vs. McCulloh, 52 N.M. 210 held that the word "erecting" in constitutional provision that no county shall borrow money except for the purpose of "erecting" necessary public buildings or constructing or repairing public roads and bridges, is used in a comprehensive sense, and power to "erect" a public building includes implied power to purchase necessary land on which to erect it, and to equip it so that it can be used for the purpose for which it is built.

In this opinion the court distinguishes two of its previous opinions in which it held that the power of county to erect necessary buildings did not carry with it the power to remodel such building. Town vs. Board of County Commissioners, 43 N.M. 292, Board of County Commissioners vs. State, 43 N.M. 409.

In Board of County Commissioners of Bernalillo County vs. McCulloh, 52 N.M. 210, the minority opinion, in a three to two decision, states as follows:

"The majority concede that the strongest argument raised against lending approval to the bond issue in question arises on a comparison of sections 10 and 11 of Article 9 of the state constitution. For convenience in contrasting them, we set them out side by side as follows:

Sec. 10. "No county shall borrow money except for the purpose of erecting necessary public buildings * * *"

Sec. 11. No school district shall borrow money except for the purpose of erecting and furnishing school buildings or purchasing school grounds. It thus appears that when the framers of the constitution intended legislative authorization in school districts to borrow money for 'furnishing' buildings erected, they made that intent clear by removing it from the field of inference. But as to counties, they made their intent equally clear by omitting the legislative authorization conferred in the case of school districts. We call to mind the cardinal rule of construction that the mention of one thing excludes another (expressio unius est exclusio alterius). Under its application power is withheld from the legislature to authorize payment by counties for equipment and furnishings from the proceeds of bonds issued to erect county buildings."

It has been held that the right to purchase a hospital is not within the purview of the constitutional limitation. See Barker v. Town of Floyd, 66 N.Y.S. 210, 32 Misc. 474.

The next question you ask is whether the County can issue bonds to erect a hospital and then turn and lease said hospital to persons, firms, organizations or corporations. We must bear in mind that in order to do so, that after erecting the public building, it must continue to maintain its character of a public building. It therefore follows, Can so liberal a construction be given to Art. 9, Section 10 as to permit the erection of a public building, knowing that it is going to be immediately leased to persons, firms, organizations or corporations, as provided in the act of 1947, Chapter 148. Such a liberal construction seems impossible under New Mexico decisions.

Therefore, it is my further opinion that in view of the decisions quoted, the county does not have the authority to borrow money for the erection of a hospital and then lease it to persons, firms, organizations, or corporations, for by leasing it would lose its character as a public building.

It is my further opinion that the County has the power to borrow money for the erection of a {130} county hospital and, as provided in Chapter 148, Laws of 1947, authorize the operation of such hospital by persons, firms, organizations or corporations, provided that the agreement for the operation of said hospital provides for the caring of indigent and sick persons and the right to establish charges for hospital services. In this manner, the hospital can maintain its character as a county hospital.

If other factors, which are not before us, enter into the matter, they may materially affect the opinions above rendered.