

Opinion No. 60-187

October 13, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mrs. Irene M. Richard Superintendent Girls' Welfare Home Albuquerque, New Mexico

QUESTION

QUESTIONS

1. Can the Girls' Welfare Home sell two tracts of land that it owns, one for cash, the other on conditional sales or mortgage arrangement, then pay the cash proceeds and assign the payments under the security arrangement to a contractor who will, in return, build a new dormitory for the Girls' Welfare Home?
2. Can the Girls' Welfare Home exchange real property that it owns in return for the construction of a new dormitory?
3. Can the Girls' Welfare Home borrow money to pay a contractor to build a new dormitory for the Home, and pledge as security for the loan the proceeds of the sale of real property owned by the Home, including the payments due under a security arrangement?

CONCLUSIONS

1. Yes.
2. Yes.
3. No.

OPINION

{*586} ANALYSIS

Your questions require us to review Opinion of the Attorney General No. 57-133, June 13, 1957. That opinion was also directed to the Girls' Welfare Home, and raised substantially the same questions that you now raise. It was there held that the Girls' Welfare Home could dispose of property owned by the Home, if the consent of the State Board of Finance were first obtained. We adhere to that opinion. As to the details of the sale, we feel that they can be of any nature that the State Board of Finance will approve. Thus, you can sell for cash, on conditional sale, or by mortgage. You could also exchange the property as consideration for the construction of a new dormitory.

The terms of sale, as we say, can be anything the State Board of Finance will approve. Your opinion request states that you will sell one tract for cash, and the other on a 20 year basis with ten percent down and the five percent per annum interest. We see no legal impediment to either arrangement. You state that the sale will be at public auction. We are of the opinion that the sale may be either public or private. You further state that you propose to take bids for purchase, and remain open for bids until a fixed date. We are of opinion that the sale may be made with or without bids as you see fit, and as the State Board of Finance will approve.

To summarize, we see no legal impediment to any of the arrangements that you propose for the sale or exchange of this property.

We must now consider whether the Girls' Welfare Home has the power to expend or pledge the proceeds of the sale of property owned by the Home. Opinion of the Attorney General No. 57-133, supra, dealt with this question and held that the Home had no such power. It was there pointed out that Article IV, Section 30 of the Constitution of New Mexico prohibits the expenditures of funds {*587} from the State Treasury except on appropriation of the Legislature. That opinion did not consider the effect of Section 13-3-3, N.M.S.A., 1953 Compilation, and whether the cited section amounts to such an appropriation. It reads as follows:

"Sale or lease of lands -- Disposition of Proceeds -- The New Mexico College of Agriculture and Mechanic Arts **and all other state, educational and charitable institutions**, in New Mexico, **are authorized to expend the funds derived from the sale or lease of their lands**, or so much thereof as may be necessary which are placed to the credit of the respective institutions, for buildings, equipment and other permanent improvements. (Emphasis Ours).

Proceeds of the sale of lands by a State Institution are placed to the credit of the selling institution. See Section 6-1-8 N.M.S.A., 1953 Compilation, (P.S.). The Girls' Welfare Home is a state institution. See Section 42-5-4, N.M.S.A., 1953 Compilation. We feel that a sale of property by the Girls' Welfare Home falls squarely within the provisions of Section 13-3-3, supra. We are further of the opinion that Section 13-3-3, supra, amounts to a continuing appropriation by the Legislature of the proceeds of the sale or lease of property by State Institutions. Such an appropriation avoids the constitutional objection raised by Opinion of the Attorney General No. 57-133, supra.

We are of opinion, then, that the Girls' Welfare Home may expend the proceeds of the sale of property to acquire a new dormitory. This may be done by paying cash to the contractor, or by **assigning** the payments due under a conditional sales contract or mortgage. Furthermore, the Girls' Welfare Home may convey the property of the Home to a contractor, in return for which the contractor will build the Home a new dormitory.

Your third question, whether the Girls' Welfare Home can borrow money to build a new dormitory, and pledge the payments due under a conditional sales contract or mortgage, is an entirely different matter.

The powers of the Girls' Welfare Board are stated in Section 42-5-2, N.M.S.A., 1953 Compilation, but the power to borrow money is not included. This is enough to determine the question, but we wish to distinguish two statutes that might be thought to grant that power to governing boards of State Institutions by implication.

We have already held that Section 13-3-3, *supra*, grants the governing boards of State Institutions the power to expend the proceeds of the sale or lease of institutional lands. That section does not grant those boards the power to expend borrowed money.

Section 6-1-8, *supra*, empowers any institutional board to "sell or otherwise dispose of" real or personal property of the institution, subject to the approval of the State Board of Finance. Furthermore, the president of the governing board is empowered to execute such "deeds, leases, right-of-way easements, bills of sale or other documents necessary to convey all or any interest in said real or personal property." This might be thought to empower the State Institutions to give mortgages on institutional property, or to pledge that property as security for a loan, since a mortgage or pledge is certainly a document creating an interest in real or personal property. But, in our opinion, this section contemplates some change in ownership of the property, not the mere creation of a lien against it. The section uses the words "sell or otherwise dispose of", and empowers the president of the governing board to execute instruments necessary to "convey." The section goes on to mention "deeds" (which create an estate in land), "leases" (which create an estate for years, or some other period), "right-of-way easements" (which create a {588} limited estate and an absolute right to the use of the easement granted), and "bills of sale" (which transfer the ownership of personal property).

Nothing in the section grants to Institutions the power to create security interests in real or personal property. A mortgage or pledge of real or personal property of an institution creates a security interest in that property, as distinguished from an ownership interest. In our opinion, State Institutions may not create security interests in their property by way of mortgage or pledge to secure a loan of money. Our holding that the payments due under a conditional sales contract or mortgage may be **assigned** as consideration for the construction of a dormitory does not conflict with this view, for an assignment is a transfer of ownership, not the creation of a security interest.

To summarize, the Girls' Welfare Board may sell property owned by the Girls' Welfare Home at either public or private sale, with or without bids, and for cash or by way of conditional sales contract or mortgage, subject to the approval of the State Board of Finance. The Board may also exchange such property in return for the construction of a new dormitory. The Board may expend the proceeds of the sale for the acquisition of a new dormitory. This may be done by paying cash to a contractor, or by **assigning** the payments to become due under a conditional sales contract or mortgage. The assignment may be directly to the contractor, or to a bank in return for money to be used to pay the contractor. But the Board may not borrow money for the construction of a dormitory, and may not mortgage or pledge property of the Girls' Welfare Home.

So much of Opinion of the Attorney General No. 57-133, June 13, 1957, as holds that a State Institution may not expend the proceeds of the sale of property owned by the Institution is hereby overruled.

By: Norman S. Thayer

Assistant Attorney General