

Opinion No. 65-115

June 25, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

TO: The Honorable Herbert J. Taylor, State Representative, McKinley County, District 2, Box 268, Gallup, New Mexico

QUESTION

STATEMENT OF FACTS

McKinley County proposes to construct a much needed new hospital in Gallup, New Mexico. Half the money for the construction cost is to be supplied by bond issue and the other half would be supplied through Hill-Burton matching funds. McKinley County proposes to lease the hospital as soon as it is built to the Poor Sisters of Saint Francis Seraph, a non-profit charitable organization, the organization that owns the land on which the hospital is to be built. The term of the proposed lease would be for a period of fifty years after the construction of the hospital. At the end of the fifty-year period, the Lessee, the Poor Sisters of Saint Francis Seraph, has the option of purchasing the hospital buildings and improvements for the sum of One Dollar. By the terms of the proposed lease, the County is to provide the equipment necessary to operate the hospital. The Lessee will provide for a reasonable volume of charity care to conform with the requirements of the Hill-Burton Act. The management of the hospital will be under a governing board consisting of the Mother Provincial, the Provincial Council of the Poor Sisters of Saint Francis Seraph, together with the local administrator of St. Mary's Hospital. Under the proposed lease, this board has complete responsibility for the management of the hospital, including the establishment of all necessary rules and regulations and by-laws. The lease expressly provides that the Lessor shall be delegated none of the power to manage the hospital. Paragraph 3 N of the lease provides that the governing board of the hospital will appoint an advisory committee consisting of five residents of McKinley County. This advisory committee is to serve in a consultive capacity only and it will not have any authority to make rules or regulations or by-laws or to bind the hospital in any authority to make rules or regulations or by-laws or to bind the hospital in any manner whatsoever. The lease also provides that the Lessee, the Poor Sisters of Saint Francis Seraph, may terminate the lease during the fifty-year primary term in the event the hospital becomes obsolete so as to lose accreditation and the Lessor is not willing or able to modernize the hospital, or in the event the governing board shall determine that it can no longer operate the hospital. In addition, the lease provides that if the Lessee should terminate the lease during the fifty-year period and the Lessor continues to operate it thereafter, then at the conclusion of the fifty years, the Lessee, the Poor Sisters of Saint Francis Seraph, shall still have the right to purchase the buildings and improvements for One Dollar. The Lessor, McKinley County, will have to pay the Lessee for the Care of indigent persons from McKinley County.

QUESTION

Does McKinley County have the power to lease a hospital built with county funds and matching Hill-Burton funds, to a charitable, religious group under the terms and conditions stated in the Statement of Facts?

CONCLUSION

See analysis.

OPINION

{*198} ANALYSIS

There are several legal questions involved in this proposed transaction. The first question is whether public funds may be used to construct county buildings on land which is not owned by the county. This can be accomplished if the land is leased to the county for a period of time at least equal to the contemplated life of the building. However, there must be no provision allowing the owner of the land to terminate the lease of the land prior to the end of the term. This is because such a termination would result in the landowner acquiring the county's building prior to the end of the estimated life of the building. Such an occurrence might very well violate the anti-donation provision of the constitution. Article IX, Section 14. Attorney General Opinions Nos. 57-156 and 63-3; although we do note that donations by a county for the care of the sick and indigent are not prohibited.

A preferable method of handling the problem is for the landowner to deed the property to the county for fifty years with the county agreeing to deed the land and buildings back to the conveyor at the end of the fifty-year period.

The next legal question involves

Article IX, Section 10, which provides that:

"No county shall borrow money except for the purpose of erecting, remodeling and making additions to **necessary public buildings**. . . and in such cases only after the proposition has been submitted to the qualified electors of the county, who paid a property tax therein during the preceding year, and approved by a majority of those voting thereon." (Emphasis added)

Section 15-49-1, N.M.S.A., 1953 Compilation, declares hospitals to be necessary public buildings, and Section 15-48-1, N.M.S.A., 1953 Compilation, authorizes counties to construct hospitals. Section 15-48-5, N.M.S.A., 1953 Compilation, grants to counties the power "to authorize the leasing or operating of such hospitals . . . upon such terms and conditions as the board of county commissioners may determine."

However, the hospital must retain its character as a necessary public building. In order to accomplish this, the lease of the building must contain three provisions. As was said in Opinion No. 5280 (1950), the agreement must "provide 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." The third requirement is that the county may oversee the maintenance of the building.

We visualize no particular problems in connection with indigent patients -- particularly in view of the recent enactment of the Indigents Hospital Claims Act. This law provides that counties will pay hospital costs for indigents.

The second requirement, namely control of rates charged, can be met by including a provision that the board of county commissioners must approve the rate schedule initially and periodically thereafter. Presumably the board would approve rates which were in line with those charged by other hospitals for like services.

The next question is whether the lease of the building for one dollar per year is legally permissible. The right of a county to lease a hospital for a nominal sum has been at least impliedly recognized by our Supreme Court in **Akopianz v. Board of County Commissioners {*199} of Otero County**, 65 N.M. 125, 333 P.2d 611. The consideration to the county is not the one dollar; it is the fact that it has a hospital in operation in the county.

There must also be a provision in the lease that the hospital will be operated as a non-sectarian institution wherein there will be no sectarian teaching or indoctrination. See **Zellers v. Huff**, 57 N.M. 609, 261 P.2d 643.