

## Opinion No. 73-60

August 17, 1973

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Honorable Fred T. Hensley District Attorney Ninth Judicial District P.O. Box 119  
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### QUESTIONS

#### QUESTIONS

Under the provisions of the statutes authorizing the 3/4 mill hospital levy (Section 15-48-12, N.M.S.A., 1953 Comp. (1971 P.S.)) can such tax funds be paid to a non-profit organization leasing the hospital facilities of a jointly owned city-county hospital?

#### CONCLUSION

See analysis.

### OPINION

#### {\*119} ANALYSIS

A similar question was answered in Opinion of the Attorney General No. 58-225, dated November 14, 1958. The conclusion reached in the opinion was that since Section 15-48-12, N.M.S.A., 1953 Comp., did not mention county-owned hospitals leased to private concerns, taxes could not be levied in support of such hospitals. The opinion was based on **Akopianz v. Board of County Commissioners of Otero County**, 65 N.M. 125, 333 P.2d 611 (1958), which specifically held that the hospital referred to in Opinion No. 58-225 was a private hospital:

"The Association was thereby invested with exclusive right of control and management. Its operation under the lease by such private corporation determines its status. Thusly, its status became that of a private hospital, notwithstanding ownership by the County of Otero."

Certainly, as stated in Opinion No. 58-225, we cannot construe a statute to prescribe taxation in aid of a private concern. Thus we must first determine if the hospital in question is a private hospital. As in **Akopianz**, the hospital is by terms of the lease under the exclusive control of the leasing organization. I am advised that the hospital is actually governed by a board of nine directors, one appointed by the county, one appointed by the city, and seven designated by the leasing organization. Certainly this arrangement does not vest sufficient control with the city-county to make the hospital public in character.

Two former opinions have dealt with leasing a county hospital and maintaining its character as a county hospital. Opinion of the Attorney General No. 5280, dated February 8, 1950, stated that the agreement between the county and the lessee 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." Opinion of the Attorney General No. 65-115, dated June 25, 1965, indicated that two more requirements were necessary to the agreement: that the county may oversee the maintenance of the building and that the hospital will be operated as a nonsectarian institution. Note that these opinions indicate that in order to comply with constitutional mandates, the above provisions should be included in a lease of a hospital built with public funds since such hospitals must remain necessary public buildings.

The lease in which your question is based contains none of the provisions necessary to maintain the character of the hospital as a county hospital. It is, at this point, a private hospital. See **Levin v. Sinai Hospital of Baltimore City**, 186 Md. 174, 46 A.2d 298 (Ct. App. 1946).

More significantly when dealing with the mill levy, control of the hospital must be vested in a public body rather than in a board of directors of a private corporation as involved here. Obviously, the legislature intended that the county commissioners maintain control over county hospitals for it provided in Section 15-48-8, N.M.S.A., 1953 Comp.:

"Board of county commissioners designated as governing body of hospitals -- Powers. -  
- The board of county commissioners of such county or counties {*\*120*} **constructing, maintaining or operating** such hospital or isolation ward **shall be the governing body** of such hospital and isolation ward, and shall have the power and authority to establish regulations for the operation of such hospitals and isolation wards, including the right to establish reasonable charges for hospital service for those who are able to pay therefor." (Emphasis added).

Section 15-48-5, N.M.S.A., 1953 Comp. provides:

"Power to lease hospitals. -- All counties shall have the power to authorize the leasing or operating of such hospitals and isolation wards to persons, firms, organizations, or corporations upon such terms and conditions as the board of county commissioners may determine."

Therefore a county hospital may be leased to or operated by a private organization but control must be retained by the board of county commissioners. This power of control may be delegated. One manner of doing so is provided in Section 15-48-10, N.M.S.A., 1953 Comp., which states that the county commissioners may appoint a five-member Board of Trustees which "shall have full power and authority to manage and operate the hospital."

More specifically we must turn to statutes which speak directly to city-county hospitals. Section 14-45-2, N.M.S.A., 1953 Comp., provides in part:

"Hospitals -- Joint operation with county -- Indebtedness authorized. -- A. Any municipality may enter into an agreement with the county for the construction, maintenance and operation of a county-municipal hospital."

Section 14-45-3, N.M.S.A., 1953 Comp., provides:

"Joint county-municipal hospitals. -- If a county-municipal hospital is authorized, the board of county commissioners and the governing body of the municipality may jointly:

**A. Lease the hospital upon such terms and conditions as they may determine to a person, firm, corporation, association or the county or municipality for the operation and maintenance of the hospital;**

B. Enter into an agreement with the state welfare department for the care of sick or indigent persons;

C. Accept gifts, endowments or grants-in-aid for the purpose of constructing, equipping and maintaining the hospital or endowing rooms or wards for sick, needy or indigent persons; or

D. Perform any act or adopt any regulation necessary or expedient to carry out the purposes of sections 14-45-2 through 14-45-4 New Mexico Statutes Annotated, 1953 Compilation." (Emphasis added)

Finally, Section 14-45-4, N.M.S.A., 1953 Comp., establishes the governing body of such hospitals:

"County-municipal hospital -- Board of trustees -- Powers. -- A. A county-municipal hospital **shall be** governed by a board of trustees consisting of five [5] members who shall be appointed for two-year terms. **Three [3] of the trustees shall be appointed by the board of county commissioners and two [2] of the trustees shall be appointed by the governing body of the municipality.**

B. The board of trustees has complete control of the management of the hospital. Once each year the board of trustees shall submit to the board of county commissioners and the governing body of the municipality:

(1) a report of its management of the hospital; and

(2) a financial statement showing all money received and expended and the purposes for which the money was expended." (Emphasis added).

Reading all these statutory provisions together and with the applicable Attorney General Opinions, we envision a county-municipal hospital leased for operation to a private organization and governed by a five-member board appointed partially by the county and partially by the city. The lease does not vest <sup>{\*121}</sup> absolute control of the hospital in the private organization but rather it merely leases the facilities to the organization for operation. In this manner the county, through its representation on the board, maintains control of the four elements above listed as necessary to characterization as a county hospital. Certainly the board will establish charges and oversee building maintenance. The board must operate the hospital as non-sectarian and provide for the caring of indigent and sick persons.

Since the hospital retains its character as a county hospital, a levy pursuant to Section 15-48-12, **supra**, would be proper, especially since subparagraph A(2) provides for a 3/4 mill levy on each hospital "operated by or **on behalf of** the county."

We are loathe to say that the legislature intended by Section 15-48-12, **supra**, to penalize county-municipal hospitals by disallowing the 3/4 mill levy if the hospital is jointly owned, particularly when the levy is authorized for county hospitals, for municipal hospitals serving in lieu of a county hospital, and for counties wherein no county or municipal hospital is located. We also do not believe that the legislature intended to penalize a county which leased the hospital for operation. Surely the desired result was a hospital run most efficiently by whatever manner. The important consideration is control of the tax monies by a public body, and establishment of a governing board pursuant to Section 14-45-4, **supra**, eliminates the possibility of taxation in aid of a private concern.

However, we cannot sanction the assessment of a 3/4 mill levy, the proceeds of which support a private hospital. Opinion of the Attorney General No. 6426, dated April 23, 1956 is in point. It refers to Article IV, Section 31 of the New Mexico Constitution, which prohibits the use of public funds for the support of a private organization. Article IX, Section 14 of the New Mexico Constitution specifically prohibits counties and municipalities from directly or indirectly making a donation to or in aid of any person, association, or public or private corporation.

In summary, we are of the opinion that under present circumstances the levy would be illegal, but modification of the lease and hospital structure of government pursuant to the guidelines in this opinion would render the levy legally acceptable.

By: Jane E. Pendleton

Assistant Attorney General