

Opinion No. 80-02

January 28, 1980

OPINION OF: Jeff Bingaman, Attorney General

BY: Robert G. Sloan, Assistant Attorney General

TO: Honorable Alvaro E. Castillo, State Auditor, Post Office Box 2383, Santa Fe, New Mexico 87501

Proceeds from general obligation bonds for capital construction of a facility cannot be spent for the ordinary operation of the facility.

FACTS

On June 17, 1975, the voters of Bernalillo County approved a general obligation bond issue proposal in the amount of \$7,850,000.00 for the purpose of securing funds for "constructing and equipping" a county jail. Certain expenditures from the proceeds of this bond issue have been questioned by the State Auditor pursuant to the authority vested in him by Sections 12-6-1 **et seq.**, NMSA 1978. These audit exceptions, amounting to a total of \$89,252.45 include expenditures for sheets, pillow cases, towels, food, tableware, various sanitary supplies, toothbrushes, toothpaste, fuel, file folders, copier paper, dental tools, uniforms, etc. Please refer to the attached Exhibit "A" for a complete list of the questioned items.

QUESTIONS

Was Bernalillo County authorized to make the questioned expenditures from the proceeds of the general obligation bond issue?

CONCLUSIONS

No.

ANALYSIS

It is well-established that counties are created by law and may exercise only such authority as may be defined by law or necessarily implied therefrom. **See, e.g., El Dorado at Santa Fe, Inc., v. Board of County Comm'rs. of Santa Fe County**, 89 N.M. 313, 551 P.2d 1360 (1976). Thus, a county may borrow money through the issuance of general obligation bonds only to the extent authorized by law or necessarily implied therefrom. **See, e.g., Board of County Commr's. of Guadalupe County v. State**, 43 N.M. 409, 94 P.2d 515 (1939).

OPINION

The relevant statutory authorization for bond issues of a county may be found at Sections 4-49-1 **et seq.**, NMSA 1978, as amended. Section 4-49-6, **supra**, contains a legislative declaration that county jails are "necessary public buildings." And Section 4-49-7, **supra**, describes the conditions under which a county may issue its general obligation bonds "for the purpose of **building**. . . . jails" **See also** Section 4-49-1, **supra**. Sections 4-49-8 through 4-49-12, **supra**, outline the general procedures to be followed in connection with submitting such a bond issue proposal to the qualified electors of a county. There is no question that these procedures were properly followed by Bernalillo County.

The power granted counties to issue general obligation bonds for the purpose of building county jails is limited by Article IX, Sections 9 {**104*} and 10 of the New Mexico Constitution which state in pertinent part that "[a]ny money borrowed by . . . any county . . . shall be applied to the purpose for which it was obtained, or to repay such loans, and to no other purpose whatsoever," and that "[n]o county shall borrow money except for the purpose of erecting, remodeling and making additions to necessary public buildings . . . [p]rovided, however, that no moneys derived from general obligation bonds . . . shall be used for maintaining existing buildings. . . ." The provisions of Article IX, Section 10 are not self-executing, and counties must, therefore, issue bonds according to the statutes provided for such purpose. **See, e.g., State ex rel. Haas v. Board of County Comm'rs. of De Baca County**, 32 N.M. 309, 259 P. 37 (1927). Moreover, Article IX, Section 10 does not constitute a grant of authority to issue bonds, but rather is a limitation upon such power. **See, e.g., Board of County Comm'rs. of Guadalupe County v. State, supra**.

Finally, our Supreme Court has repeatedly stated that these statutory and constitutional provisions relating to county bond issues must be strictly followed. **See, e.g., Shoup Voting Machine Corp. v. Board of County Comm'rs. of Bernalillo County**, 57 N.M. 196, 256 P.2d 1068 (1953); **Board of County Comm'rs. of Guadalupe County v. State, supra**; **Tom v. Board of County Comm'rs. of Lincoln County**, 43 N.M. 292, 92 P.2d 167 (1939); **State ex rel. Haas v. Board of County Comm'rs. of De Baca County, supra**. **See also** Opinion of the Attorney General No. 60-45, dated March 11, 1960.

Since the statutes relating to bond issues of counties make no reference to **equipping** jails, and since Article IX, Section 10 of our Constitution apparently limits the issuance of such bonds to **erecting, remodeling and making additions** to jails, it would seem that Bernalillo County was acting beyond its authority when it floated the bond issue under review for the "constructing **and equipping**" of a county jail. A divided Supreme Court, however, in **Board of County Comm'rs. of Bernalillo County v. McCulloh**, 52 N.M. 210, 195 P.2d 1005 (1948), held:

"We are of the opinion that the Relator [Board of County Commissioners] has the implied authority to expend out of the proceeds of the bond issue in question the necessary funds . . . to purchase and install equipment reasonably necessary to the use of the building as a modern hospital." **Id.**, 52 N.M. at 218 (bracketed language supplied).

It is this language of three members of the Court in **McCulloh** on which Bernalillo County and bond counsel relied as apparent support for the questioned expenditures. We do not believe the majority's holding in **McCulloh** can or should be construed in such a broad fashion.

The **McCulloh** case arose when the Attorney General of New Mexico refused to approve as to form the bond issue in question because it purported to authorize expenditures, in addition to the costs of **constructing** a county hospital with isolation ward, for **equipping** such hospital and **acquiring the land** on which to construct it. The Attorney General's approval was a condition precedent to the purchase of these bonds by the State Treasurer. The Attorney General had relied primarily on the language of the pertinent statutes, constitutional provisions and applicable New Mexico case law in reaching his decision. Opinion of the Attorney General No. 5118, dated December 22, 1947. Three members of the Supreme Court in the ensuing ^{*105} original mandamus proceeding, however, reached a conclusion contrary to the Attorney General's interpretation. **Board of County Comm'rs. of Bernalillo County v. McCulloh, supra**, 52 N.M. at 212-219. The majority's conclusion was challenged by the dissent of two member of the court. **Board of County Comm'rs. of Bernalillo County v. McCulloh, supra**, 52 N.M. at 219-224 (dissent of Justices Sadler and McGhee). Nevertheless, we believe that the majority's holding in **McCulloh** does not authorize the challenged expenditures in this instance.

We have reviewed the briefs filed with the Supreme Court in the **McCulloh** case, and both the County and **amicus curiae** Bernalillo County Medical Association argued, **in the abstract**, merely that the authority to erect a hospital carried with it the implied power to equip it with the fixtures required to make it a modern hospital. Capital improvements which become an integral part of the building being erected, they argued, necessarily came within the authority to erect such a building. We do not disagree with such a contention, but the items questioned here do not involve such improvements.

The great bulk of the authority relied on by the majority in the **McCulloh** opinion likewise limited expenditures for equipment from bond proceeds to fixtures which become an integral part of the building being erected. Examples of impliedly permissible items mentioned in these cases were vaults, safes, heating systems, desks attached to floors, ventilating fans and devices, tubular fire escapes, blackboards, etc. While Bernalillo County in its Reply Brief filed in **McCulloh** suggested that the fixture rule might be too stringent, they admitted that at best they were impliedly authorized to purchase for the proposed hospital only permanent personalty like "beds, mattresses, room furniture and all sorts of medical apparatus such as x-ray machines, fluroscopes, diathermy, operating tables, iron lungs, etc., except drugs which would be supplies." Again, we do not quarrel with this contention in view of the majority's holding in the **McCulloh** case, but note that such items are not at issue here.

Although the holding in **McCulloh**, on its face, might arguably be construed as authorizing the questioned expenditures of Bernalillo County, when analyzed in the context in which it was presented to the Court, along with the authorities relied on by the

majority and the dissent of two Justices, a different construction should be reached. That is, in addition to actual construction-related costs, the proceeds of general obligation bond issues of a county may be expended only for the purpose of the construction site and for equipment which becomes an integral part of the building being constructed (i.e., fixtures) or which is of a permanent or non-depletable nature and reasonably necessary to the use of the building for its intended purpose (e.g., beds, mattresses and other permanent furnishings). Expenditures for other personal property, however, must be charged to the County's general operating fund and not to the general obligation bond fund. We believe this conforms with the holding in the **McCulloh** case and the language and basic purposes underlying the constitutional and statutory provisions previously discussed.

In closing, we should note that insofar as Opinion of the Attorney General No. 6334, dated December 7, 1955, could be broadly construed as authority for the questioned expenditures, it is hereby expressly overruled.

{*106} Exhibit "A"

COUNTY OF BERNALILLO QUESTIONABLE EXPENDITURES

Jail Bond Construction - 1976

Voucher

Date	Vendor #	Purpose	Amount
6/12/77	Frank's Supply 58	Small equipment	126.27
6/20/77	Equipment Sales & 62	Skill Drill	21.51
9/20/78	Henry Hillson 071	Sheets, pillow cases, etc.	23,855.80
9/28/78	Avanti, Inc. 077	Supplies for badges	249.30
10/6/78	Business Systems Copier & Equip 073	Paper, \$309.25	5,494.25
10/6/78	Hales Sanitary Supply bid #770	078 Supplies, (sanitary)	3,886.47
10/6/78	Henry Hillson & Co. 079	Sandals (bid #556)	560.00
10/11/78	BLK Commodities 082	Uniforms	7,035.41
10/11/78	Henry Hillson & Co. 083	Sheets, etc. (bedding)	2,021.32
11/15/78	Supermarkets of NM 099	Toothbrushes	320.40
12/8/78	Simon Neustadt 104	Food	2,574.06
12/8/78	Allied School & Office Products 116	3,000 file folders	4,950.00
1/15/79	Caine Coffee 120	Food	76.44
1/15/79	Southwest Dist. 128	Food	965.88
1/15/79	Southwest Dist. 130	Food	4,174.91
1/15/79	Nobel 136	Towels	139.10
1/15/79	Nobel 137	Food	6,006.51
1/30/79	Southwest Dist. 126	Food	2,390.80

1/30/79 Southwest Dist 125 Punch 375.00
1/30/79 North American Surg 117 Sponge 3.09
1/30/79 Hughes Meat Co. 118 Meat 513.09
2/9/79 Blk Commodities 138 Coveralls 159.29
2/9/79 Graham Dental Supply 139 Supplies (small) 179.60
2/9/79 Graham Dental Supply 140 Dental (small tools?) 1,850.28
2/9/79 Nobel, Inc. 141 Kitchen utilities &
food 70.60
2/9/79 Swift & Co. 143 Food 537.96
2/9/79 Classic Foods 145 Meat 1,204.00
2/9/79 Southwest Dist. 147 Food 890.40
2/9/79 Graham Dental Supply 148 Ice 45.00
2/9/79 Graham Dental Supply 149 Dental Supplies &
Small Tools 538.65
2/9/79 Zanius Food 150 Spices & food 284.20
3/20/79 Market Produce 154 Food 1,029.59
3/20/79 Picker Corp. 155 Mangers, etc. (supplies) 1,114.32
3/20/79 Volume Shoe Corp 156 Shoes 286.20
5/3/79 Graham Dental Supply 160 Dental supplies & tools 964.11

{*107} COUNTY OF BERNALILLO QUESTIONABLE EXPENDITURES

Jail Bond Construction - 1975

Voucher

Date	Vendor #	Purpose	Amount
10/19	Henry Hillson 87	Towels (bath)	892.50
10/19	Southwest Dist. 92	Dishes	1,074.54
11/1	T G & Y Stores 95	Film	3,318.75
10/1	Southwest Dist 96	Glasses (dishes)	746.72
11/21	Supreme Sales Co. 102	Toothpaste	1,580.00
11/26	Henry Hillson 103	Shower curtains	117.60
11/26	Supreme Sales 108	Shoes	1,062.50
12/5	Southwest Dist 109	Cups & bowls	450.24
12/5	Chevron Oil 112	8,959 gal of fuel	3,330.24
12/5	Supreme Sales, Inc. 113	Utensils (knives, forks, spoons)	468.00
1/30	North American	Surgical 117 Sponges	17.03
1/30	Nobel Inc. 131	Cleaning Supplies	1,151.24
5/5	Amco Supply 54	Tools (hand)	149.28

ATTORNEY GENERAL

Jeff Bingaman, Attorney General