



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

August 9, 1978

ATTORNEY GENERAL OPINION NO. 78-256

Mr. James B. McKay, Jr.
McKay and McKay
214 West Central Avenue
Post Office Box 49
El Dorado, Kansas 67042

Re: Cities--Industrial Revenue Bonds--Facility

Synopsis: A city which proposes to issue industrial revenue bonds under K.S.A. 12-1740 *et seq.* for hospital purposes, may define and pledge as a "facility" therefor under K.S.A. 12-1744 all land and improvements of the hospital, both existing and proposed, which lie outside the area of an original tract of land used for hospital purposes notwithstanding that the existing buildings and proposed addition may be sited astride the boundaries of the restricted and unrestricted land, so long as the governing body determines upon the advice of bond counsel and underwriters, that the portion of the structure to be pledged provides adequate security for the protection of the bondholders. Proceeds of the issue may be expended for improvements to the hospital facility which are located on the restricted site.

* * *

Dear Mr. McKay:

You inquire concerning several questions which have arisen regarding a proposed issue of industrial revenue bonds for hospital purposes under K.S.A. 12-1740 *et seq.*

You advise that Susan B. Allen Memorial Hospital is a private non-sectarian hospital formed as a not-for-profit corporation

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under the laws of the State of Kansas, and is operated as a charitable organization exempt from Federal income taxes under section 501(c)(9) of the Internal Revenue Code of 1954, as amended. The hospital complex consists of a tract of land which was originally donated to the hospital for the purpose of furnishing a site for its facilities, together with certain additional land which has been subsequently acquired. The original site was donated to the hospital pursuant to a deed which contains restrictive covenants which operate to prohibit the mortgage, pledge or other encumbrance of that tract of land. The original site cannot, therefore, be conveyed to the city in connection with the proposed bond issue or in any manner pledged to secure the bonds. The hospital now wishes to undertake a substantial program of modernization and expansion and has obtained a certificate of need pursuant to K.S.A. 1977 Supp. 65-4801 *et seq.*, for the construction of the contemplated additions. You enclose a site plan which shows both the existing hospital complex and the proposed additions in relation to the tract of land which constituted the original site and which is subject to the restrictive provisions described above. You point out that the existing improvements are located both on the restricted tract and on the adjacent non-restricted land. In some instances, certain buildings comprising part of the existing hospital complex are located on both sides of the boundary between the restricted tract and the unrestricted land.

Accordingly, you advise that both the city and the hospital corporation request our opinion concerning two questions. First, you inquire whether the city may by ordinance define the "facility" to be pledged to secure the bonds pursuant to K.S.A. 12-1744 to include all of the land and improvements, both existing and contemplated, lying outside the restricted original site, although the boundary line between the "facility" thus described and the portion of the hospital complex on land which may not be pledged in some instances falls in the middle of the existing buildings.

According to the site plan which you enclose the existing main hospital building includes a main building, a center section, and a north wing building. A substantial portion of this entire structure, including what appears to be all of the laundry, a portion of the area devoted to records and library, and nearly half of the north wing building lie west of and outside the unrestricted land. However, it appears from the site plan that this entire structure, although doubtless comprising various additions to the original building which have been added over the years, is now a single unitary hospital facility lying athwart the unrestricted and restricted land. That portion of the facility which is constructed on the unrestricted tract is not, so far

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as appears, physically or functionally divisible from the remainder of the building. Likewise, the proposed addition to the existing hospital will not be functionally or physically separate from the existing structure, which itself is located, as indicated above, astride the restricted and unrestricted land.

K.S.A. 12-1744 authorizes the city to pledge the "facility purchased or constructed and the net earnings therefrom" We have been concerned that to define the facility as proposed above, to include all the land and improvements existing and contemplated, lying outside the restricted site, even though the boundaries of the restricted site lay in the middle of certain of the existing buildings, would result in the pledge of merely a portion of the completed hospital structure which was not functionally or physically separate or separable from the restricted portion of the site, and which for that reason was not properly denominated a pledgeable "facility." After some extended consideration, however, we are persuaded that this restrictive construction of the term "facility" is unwarranted by the industrial revenue bond act. The term "facility" is not defined in the act. Thus, governing bodies are given broad discretion concerning the kinds of improvements which may be financed under the act. In considering the "facility" for pledging purposes under K.S.A. 12-1744, the physical and functional relation of pledged assets to nonpledged assets, as here, might well be taken into consideration by the underwriters of the bonds, in determining the adequacy of the security. However, considerations which bear upon the adequacy of the security should not be applied to identify or define the kinds of facilities which may be constructed with proceeds under the act in the first instance.

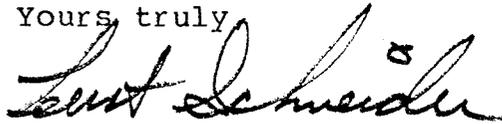
Consequently, in my judgment, the governing body must be given wide discretion in defining the "facility" for security purposes under K.S.A. 12-1744. Clearly, the kind of improvement proposed to be undertaken here is within the authority of the industrial revenue bond act. Whether the "facility" as defined above provides adequate security for the issue is an administrative determination. If the governing body determines, upon the advice of its bond counsel and bond underwriters, that the "facility" so defined constitutes adequate security for the protection of the bond holders, the governing body is authorized to define the "facility" accordingly, in my judgment.

Secondly, you ask whether, because K.S.A. 12-1744 provides governing body "may pledge" the facility the city may apply the proceeds of the hospital revenue bonds to finance expenditures for improvements made in the restricted portion of the hospital complex,

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even though that property is not subject to be pledged to secure the loan. Once again, if the city governing body determines that the "facility," as defined above, constitutes adequate security for the issue, satisfactory to the bond counsel and underwriters, the use of proceeds from the issue for improvements on the restricted site constitutes a permissible use of the bond proceeds. Such improvements would constitute the use of funds for equipping or improving a hospital facility, a lawful object of expenditures under K.S.A. 12-1741.

Yours, truly,

A handwritten signature in cursive script, reading "Curt T. Schneider". The signature is written in dark ink and is positioned above the printed name.

CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj