



STATE OF KANSAS

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October 17, 1978

ATTORNEY GENERAL OPINION NO. 78- 326

Arthur Winters
Mayor of Little River
City Hall
Little River, Kansas 67457

RE: Real Estate - Title - Fee Conveyed to Municipality For Hospital Purposes - Lack of Reversionary Clause - Abandonment. K.S.A. 58-2202.

SYNOPSIS: In 1916 a hospital and nursing school was being operated and maintained by a private closely held corporation owned by the donor, who, by a general warranty deed, conveyed fee title to a municipality with the provision, as a "condition of title", that the City would continue the operation of the hospital and nursing school by said corporation. The deed contained no reversionary clause or other alternative in the event that the corporation ceased to exist or that the hospital ceased to operate. There was no time limit. In 1972 the Bureau of Hospitals, Department of Health, closed the hospital for lack of licensure standards. In 1973 the Secretary of State forfeited the corporation charter. In 1978 the building is vacant and a nuisance. The city has merchantable title to the property, unencumbered by the restrictive covenant that the property shall be used for hospital purposes operated by said corporation, because of change of conditions and abandonment of purpose, and the city is free to sell the property.

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Dear Mayor Winters:

You and your Little River City council members have decided to

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dispose of six lots and the building thereon, which stands vacant and becoming a nuisance. You submit the deed whereby the city got title. You ask if a clear title can now be given by the city?

The deed is a gift from George M. Hoffman, and the consideration is a restrictive covenant in the deed which explains that the structure on this land is presently being operated and maintained by a corporation, The Hoffman Memorial Hospital Association, a Kansas corporation, and that, as a "condition of title" the city must agree to the continued management and operation of the hospital and nursing school by said corporation and hold the land for that purpose. Under the terms of the deed, the city was further bound to pay all taxes and assessments levied against the property and furnish gratis all water and electricity used in the hospital.

Notwithstanding that the city faithfully performed its agreed obligations under the covenant from 1916 to 1972, the hospital building became so deteriorated and obsolete for hospital purposes, that the Bureau of Hospitals, Kansas Department of Health and Environment, ruled in 1972 that the building failed to meet the licensing standards, and further was unable to be repaired or remodeled to meet them, and ordered that the hospital cease operation, which it did. The hospital in recent years, with improved roads and highways, had been loosing patients from Little River and its vicinity, who were driving 10 miles to Lyons or 25 miles to Hutchinson to use more recently built and better equipped hospital facilities. For the last few years of its existence, the Little River hospital served mainly for the terminal care of elderly persons. But even this limited service was removed, when in 1972 the Kansas Bureau of Hospitals declined to license the Hoffman hospital as an approved nursing home for the elderly. Instead, the Bureau approved and licensed the newly constructed Sandstone Heights Nursing Home at Little River, which it found to meet the needs of the Little River community.

The Hoffman Memorial Hospital Association, Inc. ceased to exist on August 13, 1973 when the Kansas Secretary of State forfeited its charter in accordance with K.S.A. 17-7513. We are advised that in 1978 all of its officers and members of its board of directors are either deceased or have moved from the community. It has ceased to exist and it is incapable of performing its obligations under the covenant contract.

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In our opinion the deed in this case conveys a fee simple title to the City of Little River. The Hoffmans use such words as "do, by these presents, grant, bargain, sell and convey", "This deed of conveyance vests in the grantee the above real estate and with the buildings and permanent fixtures," "TO HAVE AND TO HOLD THE SAME, Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, forever." "and that they will WARRANT AND FOREVER DEFEND the same unto said (city) its successors, heirs and assigns against said (Hoffmans) their heirs and all and every person whomsoever, ..."

There appears no intent by the Hoffmans in this instrument to pass less than a fee simple estate. There is no reservation of any interest in the real estate itself. There is no right of a reversion or any other alternate procedure in the event that the hospital ceased to operate, or that the Hoffman Memorial Hospital Association, Inc. ceased to be in charge of the operation of that hospital. K.S.A. 58-2202 specifically provides that "(E)very conveyance shall pass all the estate of the grantor therein, unless the intent to pass a less estate shall expressly appear or be necessarily implied in the terms of the grant." K.S.A. 58-2203 sets out the form to be followed in making a warranty deed. We think it has been followed in this case. If a written instrument intending to convey real estate contains words "in substance to those of the statute," it is sufficient. Hinchliffe v. Fischer, 198 Kan. 365, 368, 424 P.2d 581 (1967).

Where a deed, conveying ground to a county for court-house purposes, contains no provision for forfeiture or reversion, the County has absolute fee simple title upon abandonment of the site. Garfield Township v. Herman, 66 Kan. 256, Syl. #2, 71 Pac. 517, 11 ALR 2d 557 V.1 (1903); Finney County Comm'rs. v. Welch, 133 Kan. 258, 261, 299 Pac. 600 (1931). Revestment of estates upon condition subsequent are never favored in law, and no deed will be construed to create such a right unless the language in it is so clear that no room is left for any other construction. Fast v. Fast, 209 Kan. 24, 27, 496 P.2d 171 (1972).

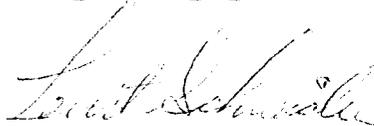
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In our opinion the restrictive covenant in this deed, that the Hoffman Memorial Hospital continue and the donor's "Memorial Hospital Association" operate and maintain the hospital, is not one which "runs with the land", but is merely a contract, personal to the donor. A covenant to do an affirmative act for the grantor's personal benefit is not binding on subsequent grantees. 7 Thompson on Real Estate Secs. 3152, 3154, 3168, 3195 COVENANTS IN DEEDS. Covenants restricting free use of property are strictly construed. Doubt will be resolved in favor of the unrestricted use of property. Sporn v. Overholt, 175 Kan. 197, 199, 262 P.2d 828 (1953), citing 26 C.J.S. DEEDS 515, Sec. 163(a).

Equitable relief is not warranted where there is a change in conditions so great or radical as to neutralize the benefits of the restriction and destroy its purpose. Hecht v. Stephens, 204 Kan. 559, 563, 464 P.2d 258 (1970). A court of equity may cancel a restrictive covenant, as a cloud on title, where there has been a radical change, disregard of the restriction by interested parties, or where the covenant is found to no longer serve the purpose for which it was imposed and is no longer beneficial to those claiming under it. 28 Am.Jur. 2d Sec. 316, COVENANTS, CONDITIONS AND RESTRICTIONS. The courts will not enforce a restriction on the use of property where it has been waived, abandoned or enforcement estopped. 26 C.J.S. 169 DEEDS, RELEASE, WAIVER, ESTOPPEL OR ABANDONMENT.

We believe that the inability of the structure of the Hoffman Memorial Hospital to meet state licensing standards for hospitals, the closing of the hospital in compliance with such standards, the forfeiture of the corporation charter of the designated operator of the hospital, all amount to a waiver and abandonment of the covenant in this deed. The condition in the deed can no longer actually or lawfully be performed.

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS:CJM:gw