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April 5, 1979

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ATTORNEY GENERAL OPINION NO. 79-47

Steven E. Worcester
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Hill City, Kansas 67642

Re: Counties and County Officers--Hospitals--Medical Clinics

Synopsis: The hospital board may not purchase or construct a medical clinic using funds derived from a bond issue or tax levy; however, funds derived from other sources, not otherwise restricted, may be used to construct a medical clinic without an election.

The county commission may not purchase or construct a medical clinic using funds derived from a bond issue or tax levy without a prior election.

The hospital board may not lease a medical clinic using funds derived from a bond issue or tax levy; however, funds derived from other sources, not otherwise restricted, may be used to lease a medical clinic without an election.

The hospital board may not purchase a medical clinic using funds obtained by a two-mill tax levy for the hospital.

The county commission may not purchase or construct a medical clinic using funds obtained by a two-mill tax levy for the hospital and now under the control of the hospital board.

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The county commission may continue to levy a two-mill tax, otherwise lawful, for the hospital even though there is a surplus of funds from this levy.

The hospital board is not subject to the requirements of the Cash-Basis Law.

The county commission may exercise its home rule powers to accomplish the purchase, construction or lease of a medical clinic.

* * *

Dear Mr. Worcester:

You inquire regarding the authority of the Graham County Commission or Graham County Hospital Board to acquire a medical clinic.

Specifically, you have posed the following questions:

- "1. May the Hospital Board purchase the clinic without an election by the Graham County voters or may it construct a clinic on land already owned by the County without such election?
- "2. May the County Commission purchase the clinic without an election by the Graham County voters, or may it construct a clinic on land already owned by the County without such election?
- "3. May the Hospital Board enter into a renewal of the lease for the medical clinic without another election of the Graham County voters?
- "4. May the Hospital use the funds obtained by the two-mill levy for purchase of the medical clinic or construction of a medical clinic?
- "5. May the County Commission use funds that the Hospital now has from the two-mill levy and which will be obtained from the two-mill levy for the purchase of the medical clinic or for construction of a medical clinic?

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"6. May the two mills still be levied by the County on behalf of the Hospital even though there is a surplus from this levy on the Hospital records?"

In addition, you inquire whether the Cash-Basis Law would affect the ability of the hospital board to purchase or construct a medical clinic for Graham County should the funds on hand prove to be inadequate.

Prior to considering each of the aforementioned questions in detail there are three matters of general applicability that are worthy of brief discussion. First, K.S.A. 1978 Supp. 19-1801 et seq. is a conglomerate of special legislation that requires extensive review and careful, painstaking scrutiny. In Thomas County Taxpayers Ass'n v. Finney, 233 Kan. 434 (1978), the Kansas Supreme Court declared,

"[t]he legislative history of article 18, chapter 19 of K.S.A. and its forerunners reveals that the article consists of numerous pieces of special legislation, couched in general terms, and adopted from time to time since 1913 to allow or remedy an existing situation in some particular county. As a result we do not have a comprehensive county hospital code that can be uniformly applied and relied upon throughout the state." Id. at 438.

The court's observation both recognizes the intricacies of the county hospital law and the lack of uniformity of the law as it applies to the counties indicating the possibility of the exercise of county home rule powers pursuant to K.S.A. 1978 Supp. 19-101a. We shall consider this possibility at the conclusion of this opinion.

Second, as we read the pertinent statutes, once a county hospital is established and a tax levy authorized by an election pursuant to K.S.A. 1978 Supp. 19-1801, the funds so raised are to be transferred to the hospital fund. K.S.A. 19-1802. Thereafter "[t]he board shall have the exclusive control of the expenditures of all moneys collected to the credit of the hospital funds, and all expenditures,

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including compensation of members, shall be made only after approval of a majority of members appointed to said board." K.S.A. 1978 Supp. 19-1804(f). Generally speaking, absent the exercise of county home rule, the hospital board of trustees, not the county commission, is the proper body to lease, purchase or construct the medical clinic.

While the hospital board of trustees has authority to spend, it has no authority to levy taxes or issue bonds. Such functions are reserved to the governing body of the county. See, for example, K.S.A. 1978 Supp. 19-1801; K.S.A. 1978 Supp. 19-1809; K.S.A. 1978 Supp. 19-1815e; K.S.A. 1978 Supp. 19-1969 and K.S.A. 1978 Supp. 19-1878.

Third, many of your questions concern whether an election is required prior to the purchase, construction or lease of a medical clinic. It should be remembered that elections are of two types, namely, "mandatory" and "protest." The former is always required before action is taken and the latter election is required only after the filing of a "protest" petition in accord with the specific statute under which the action is proposed. Election requirements vary depending on the source of the funding proposed for the acquisition of the clinic.

We now consider your questions in the order that they are presented and will endeavor to analyze the pertinent law with a view toward identifying the variety of options available to your county and hospital in acquiring a medical clinic.

"1. May the hospital board purchase the clinic without an election by the Graham County voters or may it construct a clinic on land already owned by the county without such an election?"

The subject of constructing medical clinics for use in connection with county hospitals was first added to the county hospital laws in 1970 by amending what is now K.S.A. 1978 Supp. 19-1869 [L. 1970, ch. 109, §1]. In 1971, the legislature added K.S.A. 19-18,117 and 19-18,118 pertaining to medical clinics. [L. 1971, ch. 90, §§1,2.] In 1975, the legislature enacted K.S.A. 1978 Supp. 19-1815e providing for the issuance of bonds for the construction of medical clinics. [L. 1975, ch. 149, §1.] Also, that same year, the legislature amended K.S.A. 19-1869 to authorize the purchase of a medical clinic, which authority had not been previously granted under any provision for county hospitals. [L. 1975, ch. 165, §1.] In 1976, the legislature amended K.S.A. 1978 Supp. 19-1878, to allow additional bonds or tax levies for the purchase or construction of medical clinics. [L. 1976, ch. 128, §1.]

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Of the above-cited laws, only K.S.A. 19-18,117 and 19-18,118 grant authority to the hospital board to acquire a medical clinic. The other provisions authorize the county commission to issue bonds for the acquisition of such a clinic.

K.S.A. 19-18,117 provides:

"The governing board of a hospital created or operated under the provisions of article 18 of chapter 19 of the Kansas Statutes Annotated, or acts amendatory thereof or supplemental thereto, is authorized to construct or reconstruct, maintain, operate, improve, equip, lease, rent or enlarge medical, dental and optometric clinics for use in connection with the hospital under such terms and conditions as shall be approved by such governing board."

Thus, the hospital board of trustees is authorized to construct a medical clinic, although the statute does not specifically authorize the purchase of a medical clinic. However, the source of funds for such purpose is not specified. This creates no small amount of confusion in interpreting the county hospital law.

K.S.A. 19-18,118, enacted in 1971, in pari materia with K.S.A. 19-18,117, refers to the filing of a petition for an election in opposition "to the tax levy." What tax levy? Nowhere in the county hospital law is a tax levy specifically authorized for a medical clinic. Although a study of the legislative history of K.S.A. 19-18,117 and 19-18,118 does not resolve all questions regarding the legislature's intent, such a study does shed some light on how the above sections should be construed. These sections were presented to the 1971 legislature in the form of Senate Bill No. 332 [L. 1971, ch. 90, §§1, 2.]. However, the bill, as introduced, did not contain the language of K.S.A. 19-18,118, which language was added by the Senate Committee on Public Health and Welfare. Similarly, the title of the act contained no reference to a tax levy until such a reference was added by the Senate Committee. As it now reads, the title of the act describes its purposes, as follows:

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"AN ACT relating to county hospitals; .
granting authority for the construction,
operation and lease of medical, optometric
and dental clinics in connection therewith;
providing for a tax levy to pay for such
construction and operation and further
providing for an election authorizing
such construction, operation and tax levy
in certain cases where a protest petition
is filed."

The underlined portion of the above-quoted language of the title was inserted by the Senate Committee.

In our judgment, Senate Bill No. 332 is ambiguous and, therefore, in attempting to ascertain the legislative intent, we may look to the title of the act for whatever interpretive value it may hold. See U.S. v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007 (1897), reversing 58 F.58, 7 C.C.A. 15, 24 L.R.A. 73, which affirmed, C.C., 53 F.40.

Clearly, both the title and section 2 of the act, now K.S.A. 19-18,118, indicate that the legislature intended to provide for a tax levy to construct and operate medical clinics; however, the legislature failed to so provide by specific terms in the law itself. Although courts will sometimes insert words into a statutory provision to give the provision its intended meaning, courts are generally not prone to rewrite the statute by strained interpretation. Eidson v. Palmquist, 188 Kan. 373 (1961). This is especially true where the ambiguous statute is a taxing provision. Such provisions are normally construed in favor of the taxpayer. See Grauer v. Director of Revenue, 193 Kan. 605 (1964), and cases cited therein at page 610. In addition, we are in no position to speculate on the amount of the tax levy allowed or what body would be responsible for the levy or by what procedure or under what conditions the tax would be levied. Under these circumstances, we cannot ascertain the legislative intent other than that a tax was contemplated. Therefore, we may not inject the omitted language into the statute to provide for a tax for a medical clinic, as such a vital omission may only be supplied by the legislature. In Russell v. Cogswell, 151 Kan. 793 (1940), the Court, in refusing to enlarge the scope of a taxing statute, said:

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"No matter what the legislature may have really intended to do, if it did not in fact do it, under any reasonable interpretation of the language used, the defect is one which the legislature alone can correct." [Emphasis by the Court.] Id. at 795.

There being no tax levy authorized by K.S.A. 19-18,117, we next consider whether other sources of funding are available to the hospital board for the construction of a medical clinic. Naturally, if the funds to be used by the hospital board for the construction of the clinic are derived from hospital business receipts, grants or other unrestricted donations, no election is required. However, if the board of county commissioners is required to issue bonds or levy a tax for the construction of the medical clinic, then the election requirements contained in the statutory provisions authorizing such bond issue or tax levy would govern. For example, K.S.A. 1978 Supp. 19-1815e and K.S.A. 1978 Supp. 19-1869 both permit the issuance of bonds for the acquisition of a medical clinic, and both sections require a public vote before such an issue.

In addition, we have considered whether funds raised pursuant to K.S.A. 1978 Supp. 19-1801 and its predecessor, applicable when Graham County established its county hospital, would be a financial resource available to the hospital board for use in the construction of a medical clinic to be used in connection with the county hospital. After all, isn't the medical clinic to be used in conjunction with the hospital and may not such a hospital be composed of various buildings designed to fit the patient needs of the community? K.S.A. 1978 Supp. 19-1801 has, since its adoption in 1913, permitted funds, raised for the establishment and support of a county hospital, to be used for "the purchase of a site or sites and the erection thereon of a public hospital or hospital buildings." (Emphasis added.) In addition, the Kansas Supreme Court has interpreted section 19-1801 as contemplating that taxes for more than one year may be authorized for the support of the hospital. Atchison, T. & S.F. Ry. Co. v. McPherson County Comm'rs., 119 Kan. 695 (1925). Arguably, revenues raised pursuant to the tax levy for support of the hospital could be used by the hospital board to which such funds are transferred pursuant to K.S.A. 19-1802 for the construction of a medical clinic. However, in light of several Kansas Supreme Court cases strictly construing other provisions of this statute, we are convinced that such an interpretation, although reasonable, would not be preferred by the courts.

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In Seltmann v. Board of County Commissioners, 212 Kan. 805 (1973), the Kansas Supreme Court observed:

"The statutes pertaining to the construction of county hospitals have consistently required an approval by the electors in the county as a condition precedent to a construction program. In 1945 the board of county commissioners of any county were empowered to submit to the people a resolution to enlarge and make additions to a county hospital previously established. (K.S.A. 19-1869) . . . Apparently the legislature felt the need of the public for medical clinics to be used in connection with county hospitals. In 1970 the legislature amended 19-1869 to permit the constructing and equipping of medical clinics used in connection with county hospitals. It does not appear that medical clinics were previously referred to in connection with county hospitals." Id. at 809.

K.S.A. 19-18,117 was in effect at the time of this decision and was indeed mentioned by the Court in reference to the interest of the hospital board in the action. But, the Court did not discuss whether hospital revenue derived from the K.S.A. 19-1801 tax levy was a source of funds for use by the hospital board pursuant to K.S.A. 19-18,117. However, the above-quoted language suggests that medical clinics were an after thought of the legislature; not to be viewed as just another hospital building. The Court in Seltmann held that K.S.A. 19-1869 was a special exception to the general powers of the county to construct public buildings, and that the construction of a medical clinic by the county required a prior election.

Various statutes of the county hospital law contemplate the possibility of expenditures for a medical clinic. Where tax dollars or bond revenues are to be used, the county, not the hospital board, is responsible for making such improvements. See K.S.A. 1978 Supp. 19-1815e and K.S.A. 1978 Supp. 19-1869. Likewise, both such sections require a prior election to authorize a bond issue.

If revenues from a tax levy or bond issue are to be used for the construction of a medical clinic, only K.S.A. 1978 Supp. 19-1878 would allow the construction of such a clinic without a mandatory election.

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K.S.A. 19-1878 provides for the issuance of additional bonds or the levy of additional taxes for the building of additions to the existing hospital or equipping of such hospital where the hospital board certifies to the county that funds available for such purpose are inadequate. In 1976, the legislature amended the language to allow an additional tax levy or bond issue for the purchase or construction and operation of a medical clinic. This statute, as recently interpreted by the Kansas Supreme Court in Thomas County Taxpayers Ass'n v. Finney, 223 Kan. 434 (1978), is intended "to be a method of supplementing an existing bond issue or tax levy which is found to be insufficient for its original purposes." Id. at 439. Therefore, it would not be possible to rely on this provision to issue bonds or levy a tax for a medical clinic, unless a prior bond issue or tax levy for that purpose proves to be inadequate.

In sum, the hospital board may not purchase or construct a medical clinic unless the funds to be used for such construction (not purchase) are derived from business receipts, grants, donations or other unrestricted source.

"2. May the county commission purchase the clinic without an election by the Graham County voters, or may it construct a clinic on land already owned by the county without such election?"

The board of county commissioners is not specifically granted the authority to purchase or construct a medical clinic under K.S.A. 1978 Supp. 19-1801 et seq. However, under various provisions of the county hospital law, the county has the authority to issue bonds for the purpose of purchasing or constructing and equipping a medical clinic. K.S.A. 1978 Supp. 19-1815e and K.S.A. 1978 Supp. 19-1869. Under these provisions, the county, not the board, is charged with the duty "of the making of such improvements." Both these sections require an election to approve the bond issue. Therefore, absent the exercise of county home rule, the county commission cannot purchase or construct a medical clinic without a prior election.

"3. May the hospital board enter into a renewal of the lease for the medical clinic without another election of the Graham County voters?"

Again, the hospital board appears to have statutory authority to lease a medical clinic pursuant to K.S.A. 19-18,117. However, the source of funds for this purpose is the key as to whether an election must be held.

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If funds to pay the lease are derived from non-tax sources such as business receipts, grants or donations, a prior election is not mandatory to the expenditure of lease payments for the medical clinic. However, if the lease is proposed to be paid from tax revenues or receipts from a bond issue, the matter is far less clear.

First, no statute specifically authorizes the issuance of bonds or the levying of a tax for the purpose of leasing a medical center.

Second, although K.S.A. 1978 Supp. 19-1801, which provides authority to tax for the "support" of the hospital, might be construed to include the use of such tax revenues for the lease of a medical clinic, we find such an interpretation unwarranted. The county hospital law, as we have said, did not contemplate the necessity of medical clinics until the amendment of K.S.A. 1978 Supp. 19-1869 in 1970. Clearly, the legislature in 1913 did not intend that funds raised for support of the hospital would be spent for the lease of a medical clinic.

Third, funds collected by the county either by the issuance of bonds or taxes which were designated for the purpose of purchase, construction or maintenance of a capital improvement, may not, in our judgment, be used for the lease of a medical clinic. Thus, funds raised pursuant to K.S.A. 1978 Supp. 19-1815e or K.S.A. 1978 Supp. 19-1869 or K.S.A. 1978 Supp. 19-1878 may not be used for payment under a lease agreement.

Therefore, absent the exercise of county home rule, we must conclude that the hospital board may lease a medical clinic only if the funds for such purpose are derived from sources other than tax revenues or the issue of county bonds. The use of funds derived from business receipts, grants, donations or other unrestricted source for the lease of a medical clinic would not require prior approval by the electors of Graham County.

"4. May the hospital use the funds obtained by the two-mill levy for purchase of the medical clinic or construction of a medical clinic?"

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You advise that in 1977 the board of county commissioners of Graham County, Kansas, levied a two-mill tax for the hospital without an election. However, the county commission minutes do not indicate the statutory authority for such levy, nor do they indicate the specific purpose of the tax. The Graham County commission minutes of July 18, 1977, state only, "[h]ospital levy of 2.00 mills was approved." The June 26, 1978, minutes state, "[h]ospital budget for 1979 was reviewed and it was determined to give the hospital the 2 mill levy requested."

Without knowing the authority for the tax or its specific purpose, we cannot conclusively advise you as to whether funds collected by such tax may be used to construct a medical clinic. As you know, funds collected pursuant to tax levy may be spent only for the purposes for which the tax was levied and no other purpose. See Kan. Const., Art. 11, §5.

However, since an election was not held as would be required by K.S.A. 1978 Supp. 19-1809 or K.S.A. 1978 Supp. 19-1815e or K.S.A. 1978 Supp. 19-1869, one might presume that the levy was authorized pursuant to K.S.A. 1978 Supp. 19-1801 which does not require a prior election.

As previously discussed, the hospital board is not free to use funds derived pursuant to K.S.A. 1978 Supp. 19-1801 "for support of the hospital" for the purchase or construction of a medical clinic. Likewise, the hospital board may not use funds raised pursuant to county hospital laws for the lease of a medical clinic. However, funds derived from sources other than taxes or bond issues may be used for the lease of a medical clinic.

"5. May the county commission use funds that the hospital now has from the two-mill levy and which will be obtained from the two-mill levy for the purchase of the medical clinic or for construction of a medical clinic?"

As we noted previously, except where bonds have been issued pursuant to K.S.A. 1978 Supp. 19-1815e or K.S.A. 1978 Supp. 19-1869, revenues raised for the hospital are subject to the "exclusive" control of the hospital board of trustees and, absent the exercise of county home rule, the county commission has no authority to spend such funds for the purchase or construction of a medical clinic. Thus, funds transferred to the hospital fund derived from a tax levy as previously described are not to be spent by the board of county commissioners.

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"6. May the two mills still be levied by the county on behalf of the hospital even though there is a surplus from this levy on the hospital records?"

We believe the answer to your inquiry is contained in K.S.A. 1978 Supp. 19-1804(d), which provides in pertinent part as follows:

"The board is also authorized and empowered to create a sinking fund for additional equipment and improvements, the maximum amount that may be credited to said sinking fund annually to be an amount not greater than would be obtained by a two (2) mill levy Any surplus moneys remaining in the hospital fund for a period of five (5) years, and for which there is not an immediate or prospective need may, by action of the board, be transferred to the county general fund."

Thus, within the limitations quoted above, the county may continue to levy the tax for the hospital and credit such funds to the sinking fund for equipment and improvements.

If in your view K.S.A. 19-1801 et seq. does not seem to provide the means for Graham County to accomplish the purchase, construction or lease of a medical clinic from accumulated tax funds or otherwise, the board of county commissioners may wish to consider the exercise of statutory home rule authority pursuant to K.S.A. 1978 Supp. 19-101a, which provides in part:

"(a) Counties are hereby empowered to transact all county business and perform such powers of local legislation and administration as they deem appropriate, subject only to the following limitations, restrictions, or prohibitions:"

Thus for projects and purposes properly viewed as "county business," the board of county commissioners need not seek either express or implied statutory authority so long as the local action to be taken is not prohibited by K.S.A. 1978 Supp. 19-101a.

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Of the limitations on the exercise of county home rule powers contained in K.S.A. 1978 Supp. 19-101a, two restrictions of the statute seem pertinent to the problem of acquiring a county medical clinic: ". . . counties shall be subject to all acts of the legislature which apply uniformly to all counties; . . . counties shall be subject to all acts of the legislature concerning elections, election commissioners and officers and their duties as such officers and the election of county officers"

K.S.A. 19-18,117 does not apply "uniformly to all counties." By its express terms it applies only to those counties which operate county hospitals under K.S.A. 19-1801 et seq., which includes only those counties described in K.S.A. 19-1801, as follows:

"[a]ny county having less than forty thousand (40,000) inhabitants except a county having a population of not less than five thousand (5,000) nor more than twelve thousand (12,000) which has within its boundaries a city of the third class in which is located a hospital the cost of the operation and maintenance of which is paid wholly or in part from funds raised by taxation and except a county having within its boundaries any territory of a hospital district operating . . . under . . . [K.S.A.] 80-21,101 to 80-21,122"

Similarly, special sections of the law relevant to medical clinics do not, by their own terms, apply uniformly to all counties. See K.S.A. 1978 Supp. 19-1815e and 19-1869 and K.S.A. 19-18,117.

Since the act is not uniformly applicable to all counties, any county may exempt itself from the provisions of the county hospital law by the enactment of a charter resolution pursuant to K.S.A. 19-101b, unless the legislative action proposed by the county is prohibited by some other limitation of K.S.A. 1978 Supp. 19-101a.

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As mentioned previously, the issuance of bonds for the purchase or construction of county medical clinics for counties operating a county hospital under K.S.A. 19-1801 et seq. requires an election as provided by K.S.A. 1978 Supp. 19-1815e and 19-1869.

We do not construe these two provisions as legislation "concerning elections"; rather, they concern the issuance of hospital and medical clinic bonds which require a prior election. We believe that the prohibition of the seventh limitation of K.S.A. 19-101a is intended to prevent action concerning the manner of how an election is to be held. (See Attorney General Opinion No. 76-44.)

In addition, if bonds are not used to provide a funding source and no election is otherwise required, then the limitation on the exercise of home rule powers where elections are concerned is obviously not applicable. However, even under home rule, an election may be called, since subsection (c) of K.S.A. 19-101b allows for a "protest" election under certain conditions.

Finally, you inquire as to the effect of the "Cash Basis" law on any purchase or lease by the Graham County Hospital Board of Trustees. In our judgment, the Board of Trustees is not subject to the provisions of K.S.A. 10-1101 et seq., commonly known as the "Cash Basis" law, in the performance of its functions under K.S.A. 19-1801 et seq. (See Attorney General Opinion No. 77-352.) Of course, the county and its governing body, the board of county commissioners, are limited by the terms of K.S.A. 10-1113 which prohibits the governing body of any municipality from creating an indebtedness beyond funds actually on hand. However, because of the independent nature of the hospital board regarding the expenditure of hospital funds, the board should not be viewed as merely a subordinate administrative arm of the county commission. Since the hospital board is neither a "governing body" nor a "municipality" as those terms are defined in K.S.A. 10-1101(a) and (b), the "Cash-Basis" law is inapplicable.

In conclusion, it is our opinion that:

- (1) The hospital board may not purchase or construct a medical clinic using funds derived from a bond issue or tax levy; however, funds derived from other sources, not otherwise restricted, may be used to purchase or construct a medical clinic without an election.

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(2) The county commission may not purchase or construct a medical clinic using funds derived from a bond issue or tax levy without a prior election.

(3) The hospital board may not lease a medical clinic using funds derived from a bond issue or tax levy; however, funds derived from other sources, not otherwise restricted, may be used to lease a medical clinic without an election.

(4) The hospital board may not purchase a medical clinic using funds obtained by a two-mill tax levy for the hospital.

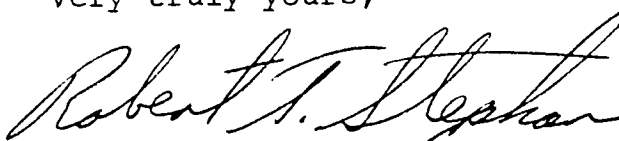
(5) The county commission may not purchase or construct a medical clinic using funds obtained by a two-mill tax levy for the hospital and now under the control of the hospital board.

(6) The county commission may continue to levy a two-mill tax, otherwise lawful, for the hospital even though there is a surplus of funds from this levy.

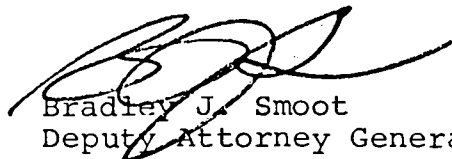
(7) The hospital board is not subject to the requirements of the Cash-Basis Law.

In addition, we suggest that the county commission also may exercise its home rule powers to accomplish the purchase, construction or lease of a medical clinic.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Bradley J. Smoot
Deputy Attorney General

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