



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751

July 12, 1984

ATTORNEY GENERAL OPINION NO. 84- 69

Steven L. Ruddick  
Associate General Counsel  
College of Health Sciences and Hospital  
University of Kansas  
39th and Rainbow  
Kansas City, Kansas 66103

Re: Public Health -- Health Facilities -- Projects Re-  
quiring Certificate of Need; Exemptions by Legislature  
Through Appropriations for State Institutions

Synopsis: Kansas statutes requiring certificates of need for certain projects undertaken by health facilities (K.S.A. 65-4801 et seq.) contain no exemption for facilities owned or operated by the state, although federal facilities are specifically exempted. K.S.A. 65-4819. In that the act was in response to federal legislation which mandated the adoption of a plan for health care cost control through a certificate of need program in return for federal funds, any exemption should be through an express amendment, and should not be inferred. Accordingly, the appropriation by the 1984 Kansas Legislature of money for two projects at the University of Kansas Medical Center does not in itself act to amend by implication the requirements of K.S.A. 65-4801 et seq.; leaving the two projects subject to a grant of a certificate of need before they are undertaken. Cited herein: K.S.A. 1983 Supp. 65-4801, K.S.A. 65-4802, K.S.A. 1983 Supp. 65-4805, K.S.A. 65-4819, L. 1984, ch. 13, 21, 23, Kan. Const., Art. 2, §16, 42 U.S.C.A. §300m, 42 U.S.C.A. §300m-1, 42 U.S.C.A. §300m-2.

\*

\*

\*

Steven L. Ruddick  
Page Two

Dear Mr. Ruddick:

As Associate General Counsel for the College of Health Sciences and Hospital at the University of Kansas Medical Center (KUMC), you request our opinion on a question involving two appropriations made by the 1984 Kansas Legislature. Specifically, you inquire concerning the effect of these appropriations upon the provisions of K.S.A. 65-4801 et seq., which statutes set forth the procedures for obtaining certificates of need by health facilities. Your preliminary research (which you have enclosed) indicates that KUMC does not have to obtain such certificates where, as here, the legislature has expressly authorized expenditures for the projects.

The two projects in question were authorized as follows:

L. 1984, ch. 21, §9(h).

"There is appropriated for the above agency [KUMC] from the University of Kansas hospital fund for the fiscal year ending June 30, 1985, the following:

Plan and prepare site for installation of nuclear resonance imaging system for diagnostic radiology . . . . . \$200,000"

L. 1984, ch. 23, §48(h).

"There is appropriated for the above agency [KUMC] from the University of Kansas hospital fund for the fiscal year ending June 30, 1985, the following:

Nuclear magnetic resonance imaging system for diagnostic radiology -- acquisition by lease or lease-purchase and site planning and preparation for installation . . . . . \$450,000"

L. 1984, ch. 13, §2(d).

"There is appropriated for the above agency [KUMC] from the University of Kansas hospital fund for the equipment acquisition and for the fiscal years specified as follows:

. . . .

Purchase Dornier kidney stone lithotripter  
equipment

For the fiscal year ending June 30,  
1985 . . . . . \$800,000

For the fiscal year ending June 30,  
1986 . . . . . \$800,000"

All of the above expenditures were contained in bills which were approved by the legislature and signed into law by the governor and which became effective on July 1, 1984.

In 1976, K.S.A. 65-4801 et seq. was enacted. One of the sections of the act, now codified at K.S.A. 65-4802, provides that:

"No person shall undertake a project described in K.S.A. 65-4805, or make any arrangements or commitment for financing the offering or development of a project described in K.S.A. 65-4805, unless a certificate of need has been obtained under the provisions of this act."

"Persons" is defined at K.S.A. 1983 Supp. 65-4801(h) to include the state of Kansas or any political subdivision or instrumentality thereof, as well as any individual, company or corporation., K.S.A. 1983 Supp. 65-4805(a) lists numerous types of projects which trigger the provisions requiring a certificate of need, some of which include:

"(3) The offering of a health facility service having an estimated annual operating budget of more than \$250,000 and which was not offered on a regular basis within the twelve-month period prior to the time such service is proposed to be offered.

"(4) Any capital expenditure in excess of \$600,000 made by or on behalf of a health facility, community mental health center required to be licensed pursuant to K.S.A. 75-3307b and amendments thereto, treatment facility for drug abusers required to be licensed pursuant to K.S.A. 65-4601 and amendments thereto, or a treatment facility for alcoholics required to be licensed pursuant to K.S.A. 65-4012 and amendments thereto, except that this subsection (a)(4) shall not apply to expenditures solely for site acquisitions.

. . . .  
"(6) Any expenditure made by or on behalf of a health facility in excess of \$600,000 in preparation for the offering or development of a project which would require a certificate of need under this subsection (a).

. . . .  
"(8) The acquisition of major medical equipment by any person, if such equipment will be used to provide health facility services to persons admitted to a health facility."

Finally, the term "health facility" which is used throughout the above definitions is itself defined at K.S.A. 1983 Supp. 65-4801(b) to include medical care facilities.

Given the above definitions, we have no hesitation in concluding that KUMC is an institution which falls under the scope of the certificate of need statutes, both as a health facility and as a "person," which term includes instrumentalities of the state. The two projects which are set forth above are also included within the scope of the act, as both are projects which require a certificate of need under the various provisions of K.S.A. 1983 Supp. 65-4308. The lithotripter equipment, by the mere size of the appropriation (\$1,600,000), constitutes "major medical equipment." K.S.A. 1983 Supp. 65-4801(j), 65-4805(a)(8). While considerably smaller in terms of dollars, the two appropriations for the nuclear resonance imaging system constitute only the first steps of what will be a multi-year project. Additionally, the definition of major medical equipment includes the cost of preliminary plans and activities "essential to the acquisition of such equipment." K.S.A. 1983 Supp. 65-4801(j).

In that these two projects clearly come within the provisions of the certificate of need statutes, the only question to be determined concerns the effect of the legislature's action in making the appropriations for the projects, i.e. does this have the effect of amending by implication the certificate of need process to exempt these two pieces of equipment? In our opinion, such a result is not warranted, given the general disfavor with which amendments by implication are viewed by the courts and the legislative history behind K.S.A. 65-4801 et seq.

Kansas courts have made it clear through their reported decisions that actions of the legislature to supersede earlier acts should be by express language, either by amendment or outright repeal.

Only when the later enactment is so repugnant to the provisions of the first act that both cannot be given force and effect will the court find that an amendment or repeal by implication has occurred. City of Salina v. Jaggars, 228 Kan. 155 (1980) and cases cited therein at 169. Put another way, the conflict between the prior and present acts must be "irreconcilable." Kimminau v. Common School District No. 1, 170 Kan. 124 (1950). Although it is correct to say that such amendments by implication do not violate the provisions of the Kansas Constitution which state that no act should be revised or amended unless the subsequent act sets forth the affected statute (Article 2, Section 16), this does not alter the narrow range of situations in which the doctrine is applied.

In our opinion, the present situation is not such a case. The mere act of appropriating money for a certain project does not guarantee that the project will actually ever be accomplished. Indeed, the legislature recognizes this fact, for appropriation bills contain language to the effect that should moneys so appropriated not be spent, they will revert back (i.e. "lapse") to the general fund. In the projects involved here, the securing of an appropriation is only one step of many which must be taken before KUMC can actually put the equipment on line. One of these steps is the obtaining of a certificate of need, and it is no more correct to say that an appropriation eliminates the need for such a certificate than to argue that such a grant of funds eliminates other statutes which may have a bearing on the ability of the institution to complete the project. For example, if the state could not meet applicable local zoning laws for a building it wished to construct, the present of an appropriation for the project would not have the effect of overriding such an ordinance.

The legislative history behind the certificate of need statutes also argues strongly against any form of amendment by implication, whether by an appropriation bill or otherwise. An illuminating discussion of the reasons why the act was necessary is found in the case of State ex rel. Metzler v. St. Francis Hospital and Medical Center, 227 Kan. 53, 53-54 (1980):

"The United States Congress, in 1984, enacted the National Health Planning and Resources Development Act (42 U.S.C. Sec. 300k et seq.). The act creates a structure for carrying out health planning and dictates health resources allocation and regulation. Regulations are imposed upon the various states and are enforced by the mechanism of withholding federal funding from states that do not comply. The Kan-

sas Legislature, in order to take advantage of federal funding and to comply with the federal regulations, passed in 1976 comprehensive certificate of need legislation now codified as K.S.A. 65-4801 et seq. One of the goals of this legislation is to prevent unnecessary duplication of health resources and facilities which will theoretically prevent higher medical costs resulting from duplication. The statutes require any health care facility that wishes to undertake expansion, a new construction project, adoption of new major services, etc., to obtain a certificate of need by application to the Secretary of Health and Environment."

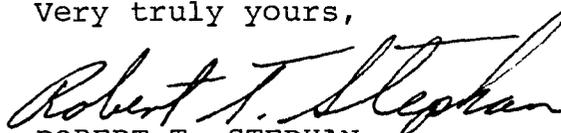
Among the federal requirements with which the state complied through passage of K.S.A. 65-4801 et seq., are those found at 42 U.S.C.A. §300m et seq. Therein, it is provided that: (1) each state must enter into an agreement with the Secretary of Health and Human Services for the designation of a state health planning and development agency [300m(a)], which in Kansas is the Department of Health and Environment; (2) this agency is to administer the state administrative program prescribed by section 300m-1 and carry out the state's health planning and development functions prescribed by section 300m-2 [300m(b)(1)]; (3) one of these functions is the administration of a state certificate of need program [300m-2(a)(4)(B)]; (4) a failure on the part of a state to comply results in the loss of federal moneys [300m(d)(2)]. See also, State of North Carolina ex rel. v. Califano, 445 F.Supp. 532 (E.D.N.C. 1977), affirmed 435 U.S. 962, 56 L.Ed.2d 54 (1978), Greater St. Louis Health Systems Agency v. Teasdale, 500 F.Supp. 23 (E.D. Mo. 1980).

Given the above detailed and lengthy requirements, as well as the direct connection between the passage of the federal act in 1974 and K.S.A. 65-4801 et seq. two years later, it is our opinion that any exemption to the latter act's provisions should be made through an express amendment, and not inferred. This is especially true in light of the possible effect which exemptions, whether for state projects or otherwise, could have on the ability of Kansas to continue to receive federal health care and planning funds. While the federal program is voluntary, with non-compliance resulting only in loss of funds (Teasdale, supra, 506 F.Supp. at 27), we find no legislative intent to jeopardize potentially millions of federal dollars by making these two appropriations except from K.S.A. 65-4801 et seq. Nor is it necessary to so conclude, for the appropriations are not inconsistent with the certificate of need statutes, as was noted above.

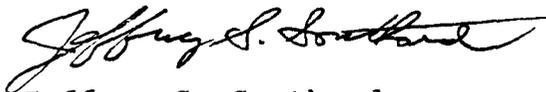
Steven L. Ruddick  
Page Seven

In conclusion, Kansas statutes requiring certificates of need for certain projects undertaken by health facilities (K.S.A. 65-4801 et seq.) contain no exemption for facilities owned or operated by the state, although federal facilities are specifically exempted. K.S.A. 65-4819. In that the act was in response to federal legislation which mandated the adoption of a plan for health care cost control through a certificate of need program in return for federal funds, any exemption should be through an express amendment, and should not be inferred. Accordingly, the appropriation by the 1984 Kansas Legislature of money for two projects at the University of Kansas Medical Center does not in itself act to amend by implication the requirements of K.S.A. 65-4801 et seq., leaving the two projects subject to a grant of a certificate of need before they are undertaken.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard  
Deputy Attorney General

RTS:JSS:crw