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ATTORNEY GENERAL OPINION NO. 81- 37

Mr. J. Ronald Vignery  
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P.O. Box 629  
Goodland, Kansas 67735

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

Synopsis: (1) County hospital boards do not have power to purchase medical clinics.

(2) Assuming the use of statutorily authorized funding hospital boards do have the power to add to existing medical clinics once they have been lawfully acquired.

(3) The hospital board does not have the power to use private financing to acquire a medical clinic.

(4) That the method of purchase to be used in acquiring a medical clinic is purchase of the corporation holding the building does not by itself make such purchase unlawful.

(5) The hospital board may lease a facility to be used as a medical clinic to medical doctors, dentists, optometrists and pharmacists.

(6) The hospital board may not use a lease-purchase agreement to acquire that which it could not acquire by normal purchase.

(7) The county commission may purchase a medical clinic for the hospital board using methods provided in K.S.A. 19-1801 et seq. or through use of county home rule power, but private financing may not be used.

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(8) The county commission may use county home rule power to enable the hospital board to purchase a medical clinic, but such power may not be used to allow private financing.

Cited herein: K.S.A. 10-1101, K.S.A. 1980 Supp. 12-1675, K.S.A. 19-101, second, fourth, K.S.A. 1980 Supp. 19-101a, K.S.A. 1980 Supp. 19-1801, 19-1804, 19-1815e, 19-1869, 19-1878 and K.S.A. 19-18,117, 19-18,118.

\* \* \*

Dear Mr. Vignery:

You inquire regarding the authority of the Sherman County Commission or the Board of Trustees of the Northwest Kansas Medical Center, a county hospital created under the authority of K.S.A. 19-1801 et seq., to purchase an existing structure to be used as a medical clinic. You state that the structure in question is currently the sole asset of a corporation whose only owner is a physician.

Specifically, you posed eight separate questions; hence, consideration of your questions will be in the order that they were presented. We will endeavor to include some discussion of options available to the hospital board and county commission.

- "1. May the hospital board purchase an existing facility owned privately for use as a medical clinic? (Page 14 of your Opinion No. 79-47 at paragraph 1 at the bottom thereof, seems to indicate that this is possible although other language of the opinion is conflicting.)"

As you noted in your question, this office has discussed the subject of medical clinics and county hospitals in Attorney General Opinion No. 79-47. In that opinion we determined, inter alia, that the board of trustees of a county hospital could not purchase or construct a medical clinic using funds derived from a bond issue or tax levy. We also determined that funds derived from other unrestricted sources could be used to construct a medical clinic. The power of a hospital board to purchase a medical clinic with funds derived from unrestricted sources was not analyzed in that opinion, but references to the question were

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made in two conclusory statements. The first of these statements was made as a summation of part one of the opinion, where we stated:

"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." Attorney General Opinion No. 79-47, p. 9. (Emphasis in original.)

The second statement appears in the conclusion of the opinion as follows:

"(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." Id. at page 14. (Emphasis added.)

The portions of these statements which deal with the question at issue here are not in accord; but since that question really was not dealt with in the above opinion the conflicting language need not be given undue weight.

The problem with determining whether a hospital board may purchase a medical clinic using otherwise unrestricted funds arises because hospital boards are given authority in K.S.A. 19-18,117 to "construct or reconstruct, maintain, operate, improve, equip, lease, rent or enlarge medical, dental and optometric clinics." This statute is the only authority enabling hospital boards, established pursuant to K.S.A. 1980 Supp. 19-1801 et seq., to acquire medical clinics, and it does not contain language in reference to any power to purchase a medical clinic. Although it may seem logically consistent that a hospital board with the power to construct, maintain, operate, improve, equip, lease, rent or enlarge a medical clinic would also be able to purchase a medical clinic, the language of the statute does not grant that power. K.S.A. 19-18,117 with regard to this issue, is not, on its face, ambiguous and thus does not invite interpretation other than the plain meaning. Had the legislature intended to grant the power to purchase a medical clinic the word "purchase" could have very easily been included. In 73 Am.Jur.2d Statutes §203, it is stated:

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"In this respect, it has been declared that it is not the office of the court to insert in a statute that which has been omitted, and that what the legislature omits, the courts cannot supply. These rules have been regarded as applicable to an unintentional omission." (Footnotes omitted.)

In Eidson v. Palmquist, 188 Kan. 373, 376 (1961), the Kansas Supreme Court stated that: "The mandate of the legislature cannot be enlarged by supplied language or by strained interpretation." A study of the legislative history of this act does not provide any clear indication that it was part of the legislative intent to enable hospital boards to purchase a medical clinic. A further indication of the propriety of this determination is the fact that the legislature has provided alternative methods of acquiring (by purchase) a medical clinic through the enumerated powers of the county commission. Alternative methods for the purchase of a medical clinic are contained in K.S.A. 1980 Supp. 19-1869 and 19-1878.

- "2. May the hospital board purchase an existing structure for use as a medical clinic and add to that existing structure an addition also to be used as a medical clinic to house physicians, dentists, optometrists, and a pharmacy."

Although we have determined that the hospital board may not purchase a medical clinic we will discuss the second part of this question because of the likelihood that it may also arise when an alternative method of purchase is used. The use to which a medical clinic is to be put is no where delineated in the statutes. However, in K.S.A. 19-18,117 the hospital board is expressly granted the authority to enlarge medical, dental and optometric clinics. The use of a medical clinic to house a pharmacy is not mentioned. In addition, what is meant by medical clinic is nowhere defined in the county hospital laws. Generally speaking, medical clinics are common in Kansas as facilities for the providing of out-patient medical services. Offices, examining rooms and laboratories are essential to the delivery of such services. Pharmacies are frequently included in office complexes housing physicians for the conveniences of doctors and patients alike. Common to all such uses of medical clinic space is the character of its use, namely, delivery of out-patient medical services. K.S.A. 1980 Supp. 19-1804 grants the hospital board various powers and duties, among

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them a general custodial power: "The board shall be charged with the business-like supervision, care and custody of all hospital property." In the absence of further clarification we must assume that decisions regarding the space utilization of medical clinics are matters to be determined within the sound discretion of the hospital board of trustees.

"3. Again mindful of your Opinion No. 79-47, and language therein indicating that the hospital board is not subject to the Cash Basis Law, may the hospital board finance the purchase of the existing structure and a new addition thereto through means of private financing as well as the use of unrestricted funds and business receipts of this hospital?"

Here, again, we note our previous conclusion that the hospital board does not have the authority to purchase a medical clinic. However, we will proceed to discuss the rest of this question under the assumption that a permissible alternative method of purchase is found which might necessitate an answer to the question. As you have noted, we reiterated in Attorney General Opinion No. 79-47 that county hospital boards are not subject to the Cash Basis Law (K.S.A. 10-1101 et seq.). Hospital boards neither have the power to create an indebtedness against the municipality nor are they a mere administrative arm of the county. See Attorney General Opinion No. 77-352. However, it is a commonly accepted rule of statutory interpretation that the powers of administrative bodies are limited to those powers expressly given or necessarily implied from the laws creating the body and enabling its activities. 1 Am.Jur.2d Administrative Law §70 (1962), citing Bennett v. Corp. Comm'n., 157 Kan. 539 (1943). Cf. Wichita Pub. Schools Employees Union v. Smith, 194 Kan. 2 (1964) (school boards) and Murray v. State Board of Regents, 194 Kan. 686 (1965). In light of this rule we must conclude that county hospital boards may not borrow money from private sources, as such financing is not expressly authorized anywhere in K.S.A. 19-1801 et seq., nor is it necessarily implied since the legislature has specifically provided for alternate methods for financing, i.e., a tax levy or bond issue by the county. We call your attention to Attorney General Opinion No. 79-90, wherein this office concluded that a community mental health center lacked authority to borrow from a private financial institution to purchase or construct a building because the enabling legislation provided other funding sources.

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"4. May the hospital board purchase only stock of the existing corporation now owning the medical clinic through means of private financing and unrestricted funds and business receipts of the hospital, and then dissolve the corporation so that the purchase of the stock would not be for investment purposes as such."

Once again, our response to this question is predicated on our conclusion that it must be the county and not the hospital board which funds and purchases the medical clinic. Likewise, since the hospital board has no authority to borrow money from a private lending institution, we can respond to your question only if we assume that the county is to acquire the property through a purchase financed by some statutorily authorized means. If we make this assumption, the question becomes whether the county may purchase the corporate stock of the corporation holding title to the real estate in question.

One of the most basic of the powers of a county is "[t]o purchase and hold real and personal estate for the use of the county." K.S.A. 19-101, second. The county is also empowered "[t]o make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate or administrative powers." K.S.A. 19-101, fourth. However, counties are restricted in the use of "moneys which are not immediately required for the purposes for which the moneys were collected or received;" to those investment vehicles contained in K.S.A. 1980 Supp. 12-1675. In the present situation we believe the county may use these broad powers to purchase real property for a legitimate county concern (acquiring a medical clinic) by purchasing the stock of a corporation. (We note, however, that if the corporation was created pursuant to the Professional Corporation Law, K.S.A. 17-2706 et seq., the transfer of stock may be subject to the restrictions contained in K.S.A. 17-2712.) This type of purchase is to be contrasted with the investment of idle funds in certain securities under the provisions of K.S.A. 1980 Supp. 12-1675 and 19-1804, which are for the purpose of causing a return on unneeded funds, while the purchase of a medical clinic is a specifically authorized concern of the county and county hospital board. This contrast is possible only if the corporation is dissolved upon purchase by the county. In 56 Am.Jur.2d Municipal Corporations, it is stated that municipal corporations normally may not subscribe to or purchase stock in private corporations, but:

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"[A] purchase of all of the stock of a corporation by a municipality or other governmental unit, for the purpose of enabling it to acquire the property of the corporation for public purposes, has been held not to violate a constitutional prohibition against the purchase of stock, particularly where the intention was to dissolve the corporation upon acquiring all its stock." (Footnotes omitted.)

Thus, the contemplated purchase is within the power of the county when such purchase is for a public purpose and is followed by dissolution of the private corporation.

"5. If the facility is able to be purchased by the hospital board, may the same be leased to medical doctors, dentists, optometrists, and pharmacists?"

Again, your question is predicated upon the purchase of a medical clinic by the hospital board, a premise which has been rejected. Assuming, however, that a suitable medical clinic can be obtained by the county, your question might be whether the hospital board may lease the clinic to doctors, dentists, optometrists and pharmacists. We call your attention to our answer to question 3 above and conclude that such leases would be permissible.

"6. May the hospital board lease the medical clinic from the regular corporation and then sublease the same to medical doctors, dentists, optometrists and pharmacists under a twenty year lease purchase agreement? Said agreement to establish monthly lease terms and at the end of the twenty year period, the building would be deeded to the hospital."

Pursuant to K.S.A. 19-18,117, the hospital board is given authority to lease or rent (as tenant) a medical clinic. In addition, as previously noted in answers to questions 2 and 4, the board may enter into leases (as lessor) to permit dentists, doctors, optometrists, etc. to practice in a medical clinic managed by the hospital board. However, your question proposes that the lease agreement will provide for the purchase of the medical facility by the hospital board after the twenty-year lease. Presumably the installment payments to be made by the board are designed to cover the lease costs and purchase price. As

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stated in our response to question number 1, the hospital board has no authority to purchase a medical clinic. This is true, whether the manner of payment is by lump sum at the time of contracting or by installment payments over a period of years.

In addition, we call your attention once again to the language of Attorney General Opinion No. 79-47, which concluded that tax funds raised for operation and maintenance of a county hospital may not be used to lease a medical clinic. Id. at 10.

"7. It appears from your Opinion No. 79-47, that Home Rule by the County Commission would be applicable in this instance. Assuming that the County Commission would adopt a Home Rule provision relating to hospitals and medical clinics in Sherman County, may the County Commission purchase the existing medical clinic through unrestricted funds of the hospital and private financing. If not, must an election be held before a bond issue may be issued for the purchase of the existing structure and the new addition."

The applicability of county home rule power in this area was recognized by the Kansas Supreme Court in Thomas County Taxpayers Ass'n. v. Finney, 223 Kan. 434 (1978). Home rule power is available to the county under K.S.A. 1980 Supp. 19-101a; however, this power may not be exercised when it conflicts with uniformly applicable legislation. The Cash Basis Law, K.S.A. 10-1101 et seq., is uniform in application and controlling on the creation of indebtedness by county government. Because the use of private financing by the county must be in compliance with the Cash Basis Law, any such creation of indebtedness will be so limited. Home rule power may be used to enable the county to use a method of purchase not provided in K.S.A. 19-1801 et seq., where there is no conflict with uniformly applicable legislation.

K.S.A. 1980 Supp. 19-1869 enables the county to issue bonds for the purchase or construction of a medical clinic. This statute calls for approval by the electorate before issuance of the bonds. Thus, an election must be held before bonds issued pursuant to this statute may be issued for the purchase of the structure in question under these statutes. The above question was answered by Attorney General Curt Schneider in Attorney General Opinion No. 77-342. Attorney General Schneider determined that county home rule power could be used to exempt the county hospital from the provisions of 19-1801 et seq. by charter resolution. Thus, an election must be held before bonds may be issued under K.S.A. 19-1801 et seq., unless pursuant to the exercise of county home rule, the county exempts itself from these provisions.



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"8. If the County Commission were to pass a Resolution providing for Home Rule for the hospital, may the hospital board by itself be given the authority to purchase the existing medical clinic and build an addition thereon using unrestricted funds of the hospital and its business receipts as well as private financing for its source of funding and thereafter lease said facility to physicians, dentists, optometrists, and pharmacists."

The question posed here presents an interesting problem. County home rule power is made available by K.S.A. 1980 Supp. 19-101a, which states in pertinent part thus:

"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: First, counties shall be subject to all acts of the legislature which apply uniformly to all counties." (Emphasis added.)

This broad grant of power may only be used for county business and local legislation or administration. Because authority analyzing the connections between the county and the hospital board is lacking it is difficult to determine whether hospital board business is to be included. Examination of K.S.A. 19-1801 et seq. shows that the county hospital is created by the county to provide health care for its inhabitants, it is initially funded by county funds, title to hospital property is held by the county, hospital board trustees are initially appointed by the county, and the county commission determines the number of trustees to sit on the hospital board. K.S.A. 19-101c requires that county home rule powers be liberally construed for the purpose of giving counties the largest measure of self-government. The substantial ties mentioned above, coupled with the requirement that home rule be liberally construed leads to the conclusion that county hospital districts are within county home rule power. In accord: Opinions of the Attorney General, Nos. 76-255, 77-79, 77-208 and 79-66.

However, the use of county home rule power in this situation is not without limitation. K.S.A. 1980 Supp. 19-101a first requires that "[c]ounties shall be subject to all acts of the legislature which apply

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uniformly to all counties." As concluded in answer to question 7 above, K.S.A. 19-1801 et seq. is not uniformly applicable and thus county home rule power may be used. However, the Cash Basis Law, K.S.A. 10-1101 et seq., is a uniform act applicable to all counties. Because the hospital board must gain the ability to use private financing through county home rule it is exercising the power of the county, and such power is subject to the Cash Basis Law. Stated another way, the county does not have the power to use private financing contrary to the Cash Basis Law; because the county does not have the power to enter into private financing agreements, it may not grant such power to an agency which it may affect with its home rule power. In Murray v. State Board of Regents, 194 Kan. 686 (1965), similar reasoning was used to determine that a lease entered into by the Kansas State University Endowment Association was not enforceable:

"The legislature has not seen fit to authorize the State Board of Regents to acquire land by negotiation and purchase, neither has the legislature seen fit to authorize the Board to negotiate options to purchase, and it had no authority to do so. No doubt the Endowment Association entered into the lease and option agreement for the purpose of assisting the Kansas State University in obtaining government grants for the purpose of conducting nuclear research programs, but its assistance could not go beyond the power of the University and the State Board of Regents to act. The Endowment Association could not by agreement, or under the claim of agency, extend the power of the State Board of Regents beyond that granted by the legislature." Id. at 690, 691.

Thus, county home rule power may be used to give the hospital board power to purchase a medical clinic, but this power will not work to allow the use of private financing in contravention of the Cash Basis Law.

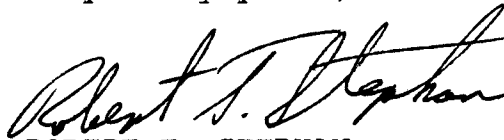
Although we have endeavored to respond to your specific questions, the questions themselves suggest the need to analyze generally the power of the county hospital board vis-a-vis county government and the methods of financing contemplated by the legislature for the acquisition of medical clinics.

Generally speaking, although the county hospital law grants authority to the hospital board of trustees to manage the financial affairs of the county hospital (see K.S.A. 1980 Supp. 19-1804), it leaves

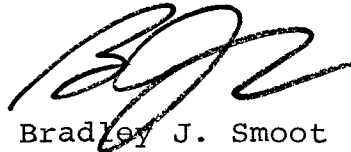
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the generation of funds for capital expenditures to the county (see K.S.A. 1980 Supp. 19-1801, 19-1809, 19-1815e, 19-1869, 19-1878). Throughout the Act, no mention is made of private funding. The Legislature seems to have contemplated funding of county hospital improvements through those traditional sources of public financing, namely, municipal bonds and taxes. There is no grant of authority to borrow funds and obligate either county real estate or hospital funds (public funds) for the repayment of such loans. Probably most significant in the statutory scheme, consistent throughout the Act, is the requirement for public elections where capital expenditures are anticipated. Action by a county hospital board which circumvents the public funding mechanisms provided by statute also destroys opportunity for direct voter participation in the process of acquiring real property. The acquisition by the county of real property is significantly different from the purchase of bedding and supplies for operation of the hospital. Real property is both a benefit and a liability. In addition, it involves the removal of private property from the county tax roles when such property is transferred to a public entity. In short, the Legislature was not to be presumed to lack justification for distinct methods of acquisition and funding for the purchase or construction of real property and personal property. Under the county hospital law, the county commission has a significant role in the funding and acquisition of real property and little or no authority over the decision-making process for actual management of the hospital facilities. Management is entrusted to the board of trustees. Funding is entrusted to the county.

Very truly yours,



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