



STATE OF KANSAS

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April 21, 1981

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ATTORNEY GENERAL OPINION NO. 81- 99

Mr. Gordon R. Olson
City Attorney
809 Main
Sabetha, Kansas 66534

Re: Cities and Municipalities -- Miscellaneous Provisions -- Leasing of City Hospital

Synopsis: Boards of trustees of city hospitals established and operated pursuant to K.S.A. 1980 Supp. 12-1615 are "special" trustees and may lease hospital property. Cited herein: K.S.A. 1980 Supp. 12-1615, K.S.A. 14-679, 14-687.

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Dear Mr. Olson:

You request the opinion of this office regarding whether the hospital board of trustees of Sabetha, Kansas, has authority to lease, for an agreed sum, a portion of the city's hospital, to a medical doctor. You state that the hospital is currently leased to the Great Plains Luthern Hospital, Inc., Phillipsburg, Kansas, pursuant to a lease agreement in force until 1982.

According to your letter, Sabetha originally acquired the hospital, and the hospital's board of trustees was established, pursuant to K.S.A. 1980 Supp. 12-1615. That statute provides in pertinent part:

"(a) Any person desiring to make donations of . . . real estate . . . for the purpose of maintaining a hospital . . . shall have the right to vest the title to the . . . property so donated . . . in any . . . city of this state, and when such gift . . . shall be to any . . . city, if there be no public hospital belonging to or under control of such . . . city, then the . . . mayor of such city with

the consent of the council, or the commissioners of any city under commission government, shall immediately name a five (5) member board of trustees for such hospital, and upon qualification of such trustees, the title shall vest in such trustees, and in any case above provided for, the title shall thereafter be held and controlled by such board according to the terms of the deed, gift, devise or bequest of such property; and as to such property, such board shall be held and considered to be special trustee."

The hospital in Sabetha was donated to the city in 1969 by the Nazareth Convent and Academy, a Kansas Corporation, Inc., of Concordia, Kansas, in a Corporation Deed (General Warrantee) by which the Corporation donated the property in fee simple with no negative covenants or other specified conditions. The city, pursuant to K.S.A. 1980 Supp. 12-1615, then transferred the property to the Sabetha Hospital Board of Trustees, pursuant to that statute, and title to the property vested in the Board.

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, 195 Kan. 2 (1964) (school boards) and Murray v. State Board of Regents, 194 Kan. 686 (1965). Whether the Sabetha Hospital Board of Trustees has the power to lease hospital property to a medical doctor, or to anyone else, therefore, depends upon whether that power is expressly given or necessarily implied from the language of K.S.A. 1980 Supp. 12-1615.

K.S.A. 1980 Supp. 12-1615(a) does not specifically grant the power to lease hospital property. However, the statute does specify that boards of trustees of city hospitals created pursuant to K.S.A. 1980 Supp. 12-1615 "shall be held and considered to be special trustee[s]." (Emphasis added.) Id. "Special trusts" and "special trustees" are important terms in the common law of trusts:

"The special trust is where the machinery of a trustee is introduced for the execution of some purpose particularly pointed out, and the trustee is not, as before, a mere passive depository of the estate, but is called upon to

exert himself actively in the execution of the settlor's intention, as in the ordinary case of a trustee holding property on the express trusts of a settlement or of a will, or where a conveyance is made to trustees upon trust to sell for payment of debts." Mowbray, Lewin on Trusts 6 (16th ed. 1964).

See also Rathbun v. Hill, 187 Kan. 130, (1960); Gossenbacher v. Spring, 108 Kan. 397, (1921); Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936); Perkins v. Brinkley, 133 N.C. 154, 45 S.E. 541 (1903). The legislature, therefore, by using the common law term "special trustee," obviously intended boards of trustees created pursuant to K.S.A. 1980 Supp. 12-1615 to take an active role in managing the property vested in, and controlled by, such boards.

As a general rule, special and simple trustees have the power to lease land when such is part of the trust estate:

"Where the trust estate includes land, it is ordinarily the duty of the trustee to make the land productive by leasing it; and the trustee normally has a power to lease the land, even though there is no provision in the trust instrument directing or authorizing him to make leases." Scott, The Law of Trusts §189 (1967) (footnote omitted) (citing, e.g., Davis v. Harrison 240 F. 97 (C.C.A. 9th, 1917)).

Based upon the above statutes, case law and legal treatises, it is apparent that the Sabetha Hospital Board of Trustees is empowered to lease hospital property. This implied power, however, is unique to hospital boards created pursuant to K.S.A. 1980 Supp. 12-1615 and boards similarly created, unless specifically so empowered. Although the Sabetha Hospital Board is a board of a city of the second class, it is not subject to K.S.A. 14-601 et seq., covering hospitals of cities of the second class. Hospital boards created pursuant to K.S.A. 14-601 et seq. have more limited powers and responsibilities: 1) They are not given the status of "special trustees"; 2) hospital property is vested in the city, not the hospital board; 3) the city, not the hospital board, has the authority to lease or otherwise convey hospital property; 4) hospitals created pursuant to K.S.A. 14-601 et seq. are financed by public funds rather than private donations. See, e.g., K.S.A. 14-679 and 14-687.

Basic difference between hospital boards created pursuant to K.S.A. 1980 Supp. 12-1615 and those created pursuant to

K.S.A. 14-679 and 14-687 is the former are special (active) trustees whereas the latter are general (passive) trustees. The difference between these two types of trustees is succinctly stated in 76 Am.Jur.2d, Trusts §13 (1975):

"If it is essential that the legal title remain in the trustee to enable him to perform the duties of the trust, then the trust is active; if not, then the trust is deemed to be passive."
Id. 97 A.L.R. 729 (1935).

Given this distinction, it is understandable why the legislature gave cities the power to lease hospital property in K.S.A. 14-679 and 14-687, yet refrained from doing so in K.S.A. 1980 Supp. 12-1615. In K.S.A. 14-679 and 14-687, the trustees are passive trustees and title remains with the cities. In K.S.A. 1980 Supp. 12-1615, title is vested in active trustees who have all the powers, duties and responsibilities which are divided between the various cities and their boards of trustees covered by K.S.A. 14-601 et seq. Therefore, there was no need to specify the body empowered to lease hospital property.

Having decided the Sabetha Hospital Board of Trustees has the power to lease hospital property vested in it by K.S.A. 1980 Supp. 12-1615, the question remains whether the board can lease a part of the hospital to a specific medical doctor for use in his medical practice. On at least two previous occasions this office has opined that boards of trustees of county hospitals may lease space in a medical clinic to doctors for use in connection with the hospital. See Kansas Attorney General Opinion Nos. 80-78 and 81-37. We do not believe the lease you propose would be inconsistent with the purpose of the trust, namely the operation of a community hospital, nor a breach of the fiduciary duty owed the city of Sabetha by the Sabetha Hospital Board of Trustees. However, we are constrained to note that this authority to lease office space in the hospital to a physician is not without limitation. Numerous times this office has invoked the public purpose doctrine [see State ex rel., Griffith v. Osawkee Township, 14 Kan. 419, 420, now at pp. 322, 323 (1875)] in reference to public aid to medical doctors. See Kansas Attorney General Opinion Nos. 80-200 (proscribing the loan or use of public funds to acquire a private residence for a local doctor); 77-315 and 77-269 (prohibiting the use of public funds to guarantee a net income to physicians). In addition, this office has opined that a municipality may not lawfully purchase real estate in order to make a gift to a private ~~person~~ ^{entity}. See Kansas Attorney General Opinion No. 80-19. In short, the lease of space in the public hospital must be for a public purpose, benefiting the hospital and its users and

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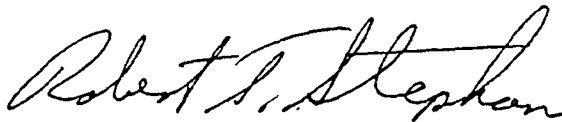
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such lease may not be used merely to enhance the financial interests of any private citizen.

Finally, as previously noted, the hospital is currently leased to the Great Plains Lutheran Hospital, Inc., Phillipsburg, Kansas, until January 1, 1982. Prior to such date the terms of the lease may require the consent of the lessee, hospital corporation, before the Sabetha hospital board may execute a lease with another party for all or part of the hospital premises.

In conclusion, it is our opinion that the Sabetha Hospital Board of Trustees is empowered by K.S.A. 1980 Supp. 12-1615 to lease the hospital premises over which it has control. It is also our opinion that it is neither inconsistent with the terms of the trust nor a violation of the board's duty that the board of trustees lease a part of the hospital property to a medical doctor for his/her medical practice. Finally, due to the terms of a current lease agreement conveying the use of all hospital property to Great Plains Lutheran Hospital, Inc., until January 1, 1982, any lease between the Sabetha Hospital Board and a third party may require consent of Great Plains Lutheran Hospital, Inc.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Bradley J. Smoot
Deputy Attorney General

RTS:BJS:hle