



STATE OF WEST VIRGINIA  
OFFICE OF THE ATTORNEY GENERAL  
CHARLESTON 25305

CHARLIE BROWN  
ATTORNEY GENERAL

October 2, 1986

The Honorable T. R. Mullins  
Prosecuting Attorney of  
Boone County  
Boone County Courthouse  
Madison, West Virginia 25130

Dear Mr. Mullins:

We are in receipt of your letter concerning the financing of an emergency room facility currently under construction at Boone Memorial Hospital. More precisely, your letter asked the opinion of this office regarding the following issues:

"(a) May a hospital owned and operated by a County Commission, pursuant to West Virginia Code §7-3-14, enter into long term, binding debt obligations sufficient to obtain an irrevocable letter of credit without violating the constitution and other laws of the State of West Virginia?

"(b) Would any long term obligation entered into by Boone Memorial Hospital to obtain such a letter of credit represent a valid and binding obligation of the Boone County Commission and the State of West Virginia?

"(c) Does West Virginia Code §7-3-14 provide the only mechanism for financing construction and improvements upon a county owned hospital?"

Your letter stated that the Boone County Commission had authorized the hospital's participation in a multi-county revenue bond pool established by the West Virginia Hospital Association. It is our understanding that the bond pool would operate as follows: (1) the Boone County Commission, along with eleven (11) other commissions and one city council, would issue Hospital Improvement and Equipment Acquisition Revenue Bonds; (2) the proceeds from said bond issue would be used to furnish loans to hospitals, secured by letters of credit, for the acquisition of equipment or improvement of hospital facilities. The hospital is ultimately responsible for repayment of the loan with revenues generated from the operation of the hospital. The revenues used

for repayment of the loan will, in turn, be used to redeem the bonds issued by the multi-county bond pool.

In order for the Boone Memorial Hospital to apply for a loan from the fund, the hospital must first obtain an irrevocable letter of credit as security for the borrowed money. The banking institution to which the hospital has applied for a letter of credit has questioned the legality of the hospital's entering into a long-term, multi-year obligation.

Clearly the Boone County Commission is authorized to make improvements on Boone Memorial Hospital. However, the question has arisen as to whether or not, by entering into the loan agreement with the bond pool, the hospital has entered into a long-term debt obligation which would have the effect of pledging the credit of the State of West Virginia, in violation of Article X, Section 6, of the West Virginia Constitution.

In the interest of clarity, this office will answer your second question first:

"Would any long term obligation entered into by Boone Memorial Hospital to obtain a letter of credit represent a valid and binding obligation of the Boone County Commission and the State of West Virginia?"

The initial question to be answered with regard to your inquiry concerns the nature of Boone Memorial Hospital. The hospital is owned and operated by the Boone County Commission pursuant to Sections 7-3-14 et seq. of the West Virginia Code. As such, it is a public corporation and its authority is limited in the same way as other public entities, such as counties and municipalities. See Shaffer v. Monongalia General Hospital, 135 W. Va. 163, 62 S.E.2d 795 (1950).

As a public corporation, the county hospital must not contract a debt in violation of Article X, Section 6, of the West Virginia Constitution. Although the section provides that "the credit of the State shall not be granted \* \* \*," it has also been held to prohibit counties and municipalities from granting their credit to others. State ex rel. County Court v. Demus, 148 W. Va. 398, 135 S.E.2d 352 (1964). See also W. Va. Code § 11-8-26 (Replacement Volume 1983).

It is clear from Article X, Section 6, of the West Virginia Constitution that the loan agreement, if it is to be valid, may not constitute an obligation of the state or of the Boone County Commission. In fact, the loan agreement has been structured to

avoid binding the county commission. The loan payments are to be made strictly from hospital revenues. Moreover, if, for some reason, the hospital could not make payments from the revenues, a cause of action could not be brought against the county commission. Section 8.17 of the Loan Agreement provides:

"No provisions, covenants or agreements contained in this Loan Agreement or any obligations herein imposed upon the Issuers [including the Boone County Commission] or breach thereof, shall give rise to or impose upon the Issuers a pecuniary liability or charge upon their general credit or taxing powers. In making the agreements, provisions and covenants set forth in this Loan Agreement, Issuers have not obligated themselves or any officer, member or employee thereof, except with respect to their rights and interests in the Program. The Hospitals agree to at all times indemnify the Issuers from all liabilities, claims, causes of action, costs and expenses imposed upon or asserted against the Issuers on account of the undertaking of this Loan Agreement, the Program or the authorization, issuance, offering and sale of Bonds."

In an attempt to clarify the issue of whether the loan agreement would become an obligation of the Boone County Commission, this office contacted Mr. James W. Withrow of the law firm Lovett, Vaughan and Cooper of Charleston. Lovett, Vaughan and Cooper serves as bond counsel to the bond pool. Mr. Withrow stated that the bond insurer, Financial Guaranty Insurance Company (FGIC) of New York has had dealings in situations similar to the one faced by Boone Memorial Hospital. Mr. Withrow stated that FGIC could structure the loan agreement in such a way as to require the loan payments to be made strictly from hospital revenues, and if, for some reason, the hospital could not make payments from the revenues, a cause of action would not be brought against the Boone County Commission. This seems to be the effect of the language of Section 8.17.

Thus, the Loan Agreement has been structured to avoid imposing any liability on public funds, and, so long as any letter of credit is similarly structured, it would not bind the county commission or the state.

Since the hospital, as a public hospital, may not bind itself in violation of Article X, Section 6, of the Constitution, your first question becomes important:

"May a hospital owned and operated by a County Commission, pursuant to West Virginia Code § 7-3-14, enter into long term, binding debt obligations sufficient to obtain an irrevocable letter of credit without violating the Constitution and other laws of the State of West Virginia?"

The above question is twofold: First, may the board of trustees for a hospital owned by a county commission take action with regard to capital improvements to the hospital? Second, may the board enter into a long-term debt for such purpose? The answer to both parts of the question is "yes."

As to the first part of the question, whether the board of trustees is empowered to take the action contemplated, one must look to Code 7-3-15. That section states, in part:

"The administration and management of any county public hospital \* \* \* shall be vested in a board of trustees \* \* \*.

"Such board of trustees shall provide for the employment of and shall fix the compensation for and remove at pleasure all professional, technical and other employees, skilled or unskilled, as it may deem necessary for the operation and maintenance of the hospital \* \* \* and disbursement of funds in such operation and maintenance shall be made only upon order and approval of such board.\* \* \*"

Under the statute, the authority of the board is subordinate to the county commission's control of fiscal affairs. 49 Ops. Att'y Gen. 24 [1960]. Section 7-13-14 clearly indicates that any extension of the hospital is to be accomplished by the county commission if the expense is to be paid with the proceeds of a revenue bond sale. Id.

Code 7-3-14 authorizes and empowers the county commission of any county to:

"acquire by purchase or construction and to thereafter own, equip, furnish, operate, lease, improve and extend a public hospital \* \* \*."

Code 7-3-14 further states:

"[T]he county commission is hereby authorized and empowered \* \* \* to issue and sell the negotiable revenue bonds of such county, which shall be payable solely and only from all or such part of the net revenues from the operation of such county public hospital \* \* \*."

Code 7-3-7 empowers county commissions to "acquire real estate for, construct, equip, furnish and maintain" a hospital or other public building and to borrow funds "for the purpose of building, constructing, furnishing and equipping" a hospital. This Code section also authorizes and empowers a county commission "to do and perform any and all acts and make all contracts necessary to effectuate the general purpose of this act. \* \* \*"

It has been determined, however, that the board of trustees may also acquire real estate for a purpose consistent with and in furtherance of the efficient operation of a county hospital. 50 Ops. Att'y Gen. 512 [1963]. In this case, the construction of an emergency room would clearly further the efficient operation of the hospital.

As to the second part of the question, it is the opinion of this office that since a long-term debt of the county hospital would not obligate the Boone County Commission or the state, the hospital may, with certain limitations, enter into such an agreement sufficient to obtain a letter of credit. Although the hospital does not presently have funds to pay for the construction of an emergency room, there is authority for the proposition that the board may enter into a long-term contract, binding funds beyond the current fiscal year. The discussion in 50 Ops. Att'y Gen. 512 at 520, supports this:

"The primary purpose of [statutes limiting the fiscal spending powers of public entities] is to protect the taxpayers from indebtedness beyond what each year's means will pay. \* \* \* [The statutory prohibition] has only been applied to funds derived by local fiscal bodies from taxation, which funds are historically characterized as 'public funds.' But the funds in the hands of the Board of Hospital Trustees are neither tax-derived nor are they subject to the traditional statutory budget controls incident to the expenditure of 'public funds' administered by local governmental fiscal bodies. Rather, the disposition of the hospital funds are [sic] subject only to the provisions of the bond order and the provisions of Chapter 7, Article 3, Sections 14, 15 and 16 \* \* \*

which authorize the building of a county hospital through the issuance of revenue bonds. No local fiscal body, as the term is generally used, has any control over the disbursement or collection of the hospital funds. No tax-derived funds are used for the upkeep, operation or maintenance of the hospital. Although the hospital was established for the general welfare of the citizens of the county, it is doubted whether it could be said that the funds are 'public funds' insofar as the statutory regulations as to their disbursement is [sic] concerned."

Thus, although the county commission may not enter into a long-term loan, the board of trustees may do so, if the loan instrument provides that payments will only be made from monies determined by the board to be surplus funds or funds derived solely from the operation of the hospital. No public or tax-derived monies of the county or state may be obligated.

Finally, you ask:

"Does West Virginia Code § 7-3-14 provide the only mechanism for financing construction and improvements upon a county owned hospital?"

Code 7-3-14 authorizes county commissions to issue and sell negotiable revenue bonds in order to raise money to finance the acquisition and maintenance of a public hospital. Said bonds are to be paid out of the revenues generated from the operation of the hospital. The issuance of the above-mentioned revenue bonds is one means available to a county commission to finance hospital construction or improvement.

Code 8-32-4(a) states that the Legislature has determined:

"[T]hat the support of public or nonprofit health institutions \* \* \* is for the general welfare of the public and is a public purpose for which funds of a \* \* \* county commission may be lawfully expended."

Along these lines, Code 8-32-4(b) adds:

"[C]ounty commissions are hereby empowered and authorized to appropriate funds, subject to the conditions and limitations set forth in this section, for the establishment, cost, operation, maintenance and projects of any health institution



\* \* \*. Any such appropriation shall be made from general funds of such \* \* \* county commission not otherwise appropriated or from federal revenue sharing funds received by such \* \* \* county commission."

This section envisions the use of unappropriated county funds or federal revenue-sharing funds to finance projects of health institutions. The construction of an emergency room facility would be one such project contemplated by Code 8-32-4.

Of course, Code 13-2C-1 et seq. will be used, indirectly, in your case. The Act, known as the Industrial Development and Commercial Development Bond Act, grants county commissions and municipalities powers to acquire and lease industrial or commercial projects. Health-care facilities, such as hospitals, are included in the definition of commercial projects. See Code 13-2C-3. Code 13-2C-4(3) allows county commissions to finance one or more industrial or commercial projects. Projects can be financed by making secured or unsecured loans to others. Along with these powers, Code 13-2C-6 allows two or more governmental bodies to finance one or more industrial or commercial projects. It is under this authority that the several county commissions and one city council joined together to form the multi-county bond pool.

It is the opinion of this office, therefore, that Code 7-3-14 is not the only means available to the Boone County Commission for the financing of construction and improvements on Boone Memorial Hospital.

In conclusion, it is the opinion of this office that:

1. The long-term obligation contemplated by the Boone Memorial Hospital may not and will not become an obligation of the State of West Virginia or of the Boone County Commission;
2. The Board of Trustees for the Boone Memorial Hospital is empowered to make improvements such as the construction of an emergency room;
3. Although the County Commission may not enter into a long-term debt obligation, the Boone County Hospital may enter into such an obligation, so long as the terms of the agreement are in conformity with the restrictions discussed in this opinion; and,

4. Code 7-3-14 does not provide the sole means of financing the construction of an emergency room facility at Bocne Memorial Hospital.

Very truly yours,

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Attorney General

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