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May 6, 1988

Honorable Edmund J. Matko
Prosecuting Attorney of Harrison County
Harrison County Courthouse
Clarksburg, West Virginia 26302

Dear Mr. Matko:

This will acknowledge receipt of your letter concerning the proposed joint issuance of refunding bonds by various counties and municipalities in West Virginia, the proceeds of which will be loaned by the counties and municipalities to public service districts (PSD's) and municipalities (Municipalities) for the purpose of paying off revenue bonds, previously purchased by the Farmers Home Administration (FmHA), which were issued by the PSD's and Municipalities, the proceeds of which were utilized to finance water and waste disposal projects and a small number of hospital projects. More precisely, your letter asked the opinion of the Attorney General regarding the following issues:

(1) Is borrowing by PSD'S of money from counties and/or municipalities, as evidenced by a note, permissible borrowing under Chapter 16, Article 13A, Section 24 of the Code of West Virginia, 1931, as amended (the Code)?

(2) Do water and waste disposal projects and hospital projects owned by PSD's and Municipalities constitute qualified "industrial projects" or "commercial projects" as defined in Chapter 13, Article 2C, _et seq_., of the Code?

(3) Does Chapter 13, Article 2C of the Code permit the issuance of refunding bonds ((Refunding Bonds), the proceeds of which will finance the refunding of revenue bonds which have been issued by a Municipality or PSD pursuant to a different statute?

(4) Assuming the previous questions are answered in the affirmative, can the Refunding Bonds be issued jointly by several counties and municipalities?

Your letter indicates that as a result of enactment into law of the Omnibus Budget Reconciliation Act of 1986 (OBRA) and the Continuing Appropriations Act of 1987, specific federal agencies are required to sell certain assets. One of the agencies affected is the FmHA. OBRA was subsequently amended by the Agricultural Credit Act of 1987 (ACA) to provide borrowers from FmHA the right to purchase their loans on potentially favorable terms before such loans may be sold to other parties. Consequently, FmHA is conducting a Discount Purchase Program (the Discount Purchase Program) which offers these borrowers the opportunity to purchase the FmHA loans at a discounted price (subject to certain conditions and restrictions).

Eligibility requirements for the Discount Purchase Program require that only certain public service project loans of the FmHA borrower may be purchased at a discount. The borrower may purchase any one or more of its eligible loans. If a loan is delinquent, the delinquent amount must be paid at par at the time the loan is purchased. Only loans which have been closed and fully disbursed according to the FmHA records by March 4, 1988, may be purchased at a discount.

Potential advantages of participating in the Discount Purchase Program include:

1. FmHA borrowers buying their loans at a discounted price may result in saving their community money. Normally, FmHA only permits redemption of loans at the full outstanding amount (par).

2. FmHA borrowers will avoid the future possibility of FmHA requiring them to refinance (graduate their loans at par.

3. Purchase of the loans will free the borrowers of certain financial and audit reporting requirements contained in the loan documents.

4. Monies that relate strictly to the loans being purchased that borrowers may already have in escrow or reserve funds may be used to purchase the loans. For example, if a

borrower has any funds in low-yielding accounts and investments, these funds could be used to retire the loans at a potentially favorable price.

5. Purchase of loans does not preclude borrowers from obtaining future loans from FmHA, providing they meet FmHA eligibility requirements.

It is our understanding that the financing plan would operate as follows: (1) Multiple counties and municipalities in West Virginia would jointly issue refunding bonds under Chapter 13, Article 2C of the Code; (2) proceeds of the joint refunding bond issue would be loaned to PSD's and Municipalities for the purpose of paying off revenue bonds, previously purchased by FmHA, which were issued by the PSD's and Municipalities, the proceeds of which were utilized to finance water and waste disposal projects and a small number of hospital projects. Such revenue bonds represent the FmHA loans which would be paid off under the Discount Purchase Program; (3) the joint refunding bonds of the counties and municipalities (Refunding Bonds) would be issued in separate series, with each series secured by the revenues generated from the Municipality or the PSD under and pursuant to the terms of individual loan agreements; (4) the refunding bonds would be issued jointly by the counties and municipalities so that the credits of the various PSD's and Municipalities could be pooled and bond insurance could be obtained for the Refunding Bonds; (5) various other efficiencies and reduced issuance costs would also be obtained by the joint issuance.

The initial question to be answered with regard to your inquiry concerns the ability of a PSD to borrow funds, evidenced by a promissory note, from counties and/or municipalities pursuant to the financing mechanism set forth above.

Chapter 16, Article 13A, Section 24 of the Code provides:

"Any public service district created pursuant to the provisions of this article is authorized and empowered to accept loans or grants and procure loans or temporary advances evidenced by notes or other negotiable instruments issued in the manner, and subject to the privileges and limitations, set forth with respect to bonds authorized to be issued under the provisions of this article, for the purpose of paying part or all of the cost of construction or acquisition of water systems,

> sewage systems or gas facilities, or all of these, and the other purposes herein authorized, from <u>any authorized agency</u> * * *." (Emphasis provided.)

Although the term "authorized agency" is not expressly defined in the above provision, it is logical to assume that an authorized agency would be any entity from which a PSD could accept loans or grants or procure loans or temporary advances.

As indicated below, Chapter 13, Article 2C, <u>et seq</u>., of the Code, also known as The Industrial Development Commercial Development Bond Act (the IDB Act), specifically authorizes the financing of water and sewer facilities for the general public. The water and sewer projects which are the subject of this inquiry constitute "industrial projects" which could have been initially financed under the IDB Act. See, <u>infra</u>. This office also has previously interpreted the IDB Act as an alternative source of financing public works facilities. Op. Att'y Gen., October 2, 1986. Consequently, as the IDB Act specifically provides for the lending by counties, by and through their county commissions, and municipalities, by and through their councils or other governing bodies in lieu thereof, of bond proceeds to finance water and sewer projects, it follows that a county or a municipality is an "authorized agency" from which PSD's may procure loans as set forth above.

In the alternative, it should be noted that Chapter 16, Article 13A, Section 13 of the Code provides as follows:

> "'For constructing or acquiring any public service properties for the authorized purposes of the district, or necessary or incidental thereto, and for constructing improvements and extensions thereto, and also for reimbursing or paying the costs and expenses of creating the district, the board of any district is hereby authorized to borrow money from time to time and in evidence thereof issue the bonds of such district, payable solely from the revenues derived from the operation of the public service properties under control of the district . . ."

As indicated above, it is the intent of the PSD's to evidence their borrowings by a promissory note. It is anticipated that payment of the note shall be secured solely by the revenues derived from the operation of the public service properties under control of the PSD's. A note from a PSD, the payment of which is secured solely from the revenues derived from the operation of the public service properties under the control of such PSD, qualifies as a revenue bond under Chapter 16, Article 13A, Section 13 of the Code, and would, therefore, not be subject to the restrictions concerning sources of borrowing as set forth in such Chapter 16, Article 13A, Section 24 of the Code, as there exist no such restrictions in Chapter 16, Article 13A, Section 13 of the Code.

The second question to be answered with regard to your inquiry is whether water and waste disposal projects and hospital projects owned by PSD's and/or Municipalities qualify as "industrial projects" or "commercial projects" as defined in the IDB Act. Section 3 of the IDB Act provides:

> "Unless the context clearly indicates otherwise, as used in this article:
>
> "(a) 'Commercial project' means * * * nursing homes and other <u>health care facilities</u> * * *
>
> * * *
>
> "(d) 'Industrial project' means * * * sewage or solid waste disposal facilities * * * or <u>facilities for the furnishing of water, if available on reasonable demand to members of the general public</u> * * *." (Emphasis supplied.)

Although not defined in the IDB Act, the term "health care facility" has been defined in other statutory provisions to include hospitals. <u>See</u>, Chapter 16, Article 2D, Section 2 of the Code. Consequently, water and waste disposal projects and hospital projects owned by PSD's and/or Municipalities do qualify as "industrial projects" or "commercial projects" as defined in the IDB Act. See also, O'. Att'y Gen., October 2, 1986.

The third question to be answered with regard to your inquiry is whether the IDB Act permits the issuance of refunding bonds, the proceeds of which will be utilized for the purpose of refunding revenue bonds which have been issued by a Municipality or PSD pursuant to different statutes.

Section 11 of the IDB Act entitled "Refunding bonds" provides:

> "Any bonds issued hereunder and at any time outstanding may at any time and from time to time

> be refunded by a county or municipality by the issuance of its refunding bonds in such amount as the governing body may deem necessary to refund at the principle of the bonds so to be refunded * * *."

The above language expressly provides a mechanism by which bonds initially issued pursuant to the IDB Act may be refunded, however, such language does not expressly preclude the issuance of refunding bonds pursuant to the IDB Act, the proceeds of which shall be utilized to refund bonds issued under different statutes. The IDB Act is silent as to whether refunding bonds can be issued for such purpose. However, as the water and sewer projects and hospital projects owned by PSD's and/or Municipalities described above constitutes "industrial projects" or "commercial projects" which could have been originally financed under the IDB Act, it is implicit that refunding bonds can be issued under the IDB Act, the proceeds of which finance the refunding of revenue bonds originally issued under different statutes. When the whole context of the law demonstrates a particular intent in the Legislature to effect a certain purpose, i.e., the financing of commercial and industrial projects, some degree of implication may be called to aid the intent. Gas Co. v. Wheeling, 8 W. Va. 320 (1875); Daniel v. Simms, 49 W. Va. 554, 39 S.E. 690 (1901). Moreover, by utilizing the IDB Act to issue refunding bonds, there would be no circumventing any approval, process or other procedural mechanism on either the local or state level, as the different statutes pursuant to which the water and sewer projects and hospital projects were financed, e.g., Chapter 16, Article 13A, Section 1, et seq., of the Code, Chapter 7, Article 3, Section 14, et seq., of the Code and Chapter 8, Article 1C, Section 1, et seq., of the Code do not contain any provisions governing refundings which would be viewed as more stringent to meet than those contained under the IDB Act.

The final question to be answered with regard to your inquiry as to whether the refunding bonds described above may be issued jointly by several counties and municipalities.

Section 6 of the IDB Act clearly provides for the joint issuance by counties and/or municipalities of bonds to finance water and sewer projects and hospital projects to be located within the respective counties or municipalities. As discussed above, the joint issuance mechanism under the IDB Act provides for the most efficient manner in which the FmHA loans can be prepaid at the least cost to the respective Municipalities and PSD's. The pooling of the various credits to secure bond insurance is clearly beneficial to some of the smaller

Municipalities and PSD's who would not otherwise have the ability to borrow on their own in the financial market place.

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

1. The borrowing by PSD's of money from counties and/or municipalities, as evidenced by a note, is permissible borrowing under Chapter 16, Article 13A, Section 24 of the Code.

2. Water and waste disposal projects and hospital projects owned by PSD's and/or Municipalities constitute qualified "industrial projects" and "commercial projects" as defined in the IDB Act.

3. The IDB Act permits the issuance of refunding bonds, the proceeds of which will be utilized to finance the refunding of revenue bonds which have been issued by a Municipality or PSD pursuant to different statutes.

4. The IDB Act provides for the joint issuance by several counties and/or municipalities of bonds for the purposes stated herein.

Very truly yours,

CHARLES G. BROWN
ATTORNEY GENERAL

By Solicitor General
STEPHEN D. HERNDON

SDH/mlk