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Val Verde County

RD-122

July 17, 1991

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Opinion Committee

Mr. Dan Morales, Attorney General
Supreme Court Building
P. O. Box 12548
Austin, Texas 78711

Re: Request for Attorney General's Opinion by Val Verde County
Hospital District

Dear Mr. Morales:

The Val Verde County Hospital District has requested that I seek an Attorney General's Opinion on the propriety of the following two issues:

- (1) Whether or not a Hospital District may construct a building on the Hospital grounds owned by the Hospital District for the purpose of leasing the same to a doctor in the private practice of medicine i.e. dialysis services.
- (2) Whether or not the Val Verde County Hospital District may use the excess funds in their Interest and Sinking Fund Account to finance the construction of the building.

The facts are as follows:

The Val Verde County Hospital District is a county wide Hospital District created by Chapter 658, Acts 1975 of the 64th Legislature, under authority of Article IX Section 9 of the Texas Constitution. The Hospital District presently leases a portion of its physical plant to private physicians (Angelo Dialysis Center, Inc.) for a term of years. The Angelo Dialysis Center, Inc. provides renal care within the Hospital for patients of the Val Verde Memorial Hospital. The lease is on a month to month basis. The Dialysis Center needs to expand its facilities. The Val Verde Memorial Hospital does not have room within its present physical structure to accommodate the expansion. The Val Verde County Hospital has agreed to build a free standing building on the Hospital grounds. The building will be leased to Angelo Dialysis Center, Inc. for a period of ten (10) years. The Angelo Dialysis Center, Inc. shall pay to the Val Verde County Hospital District a monthly lease payment for the use of the facilities. The Val Verde County Hospital District proposes to use the excess funds from its Interest and Sinking Fund Account to construct the facility.

Issue No. (1): Whether or not the Hospital District may build a physical facility for the purpose of leasing the physical facility to private physicians for a term of ten (10) years.

The Val Verde County Hospital District has the express authority to lease any portion of its physical plant. The Hospital District derives its power from the constitution and the act creating the District. A special purpose District may exercise the powers that are expressly delegated to it by the Legislature or which exist by clear and unquestioned implication. Tri-City Freshwater Supply District Two of Harris County vs. Mann, 142 S.W. 2nd 945, 946 (Tex. 1940).

Article IX Section 9 of the Constitutes provides, in part:

"Sec. 9. The Legislature may by law provide for the creation, establishment, maintenance and operation of Hospital Districts composed of one or more counties or all of any part of one or more counties with power to issue bonds for the purchase, construction, acquisition, repair or renovation of buildings and improvements and equipping same, for hospital purposes; providing for the transfer to the Hospital District of the title to any land, buildings, improvements and equipment located wholly within the District which may be jointly or separately owned by any city, town or county, providing that any District so created shall assume full responsibility for providing medical and hospital care for its needy inhabitants and ..." (emphasis added)

As originally enacted and subsequently amended, Chapter 658, Acts 1975 provides:

Sec. 1. In accordance with the provisions of Article IX, Section 9, of the Texas Constitution, this Act shall be operative so as to authorize the creation, establishment, maintenance and operation of a Hospital District within this State co-extensive with the boundaries Val Verde County, Texas, to be known as "Val Verde County Hospital District" with such rights, powers and duties as provided in this Act, and in Article IX, Section 9 of the Texas Constitution.

Sec. 10. The District, through its Board of Directors, is authorized to enter into an operating or management contract with regard to its facilities or a part thereof, or may lease all or part of its buildings and facilities under terms and conditions considered to be the best interests of its inhabitants, provided that in no event shall any lease be for a period in excess of twenty-five (25) years from the date entered.

Sec. 19. After creation of the Hospital District, no municipality or political subdivision within the boundaries of the District shall have the power to levy taxes or issue bonds or other obligations for Hospital purposes or for providing medical care. The

said Hospital District shall assume full responsibility for providing Hospital care for the indigents residing within the District.

The Val Verde County Hospital District is expressly authorized as directed by Article IX Section 9 of the Constitution and the Enabling Statute to acquire and manage physical plant facilities for Hospital purposes and to provide medical and hospital care for the needy residing in the District. Further, the Val Verde County Hospital District has express authority to lease any portion of its Hospital property for a term not exceeding twenty-five (25) years.

The next question is whether or not the Val Verde County Hospital District has the express or implied power to lease a portion of its Hospital property for use to a private corporation for use as a dialysis clinic.

The State Constitution, Article III, Section 51 and Section 52, prohibits the lending or loaning of public monies to a private corporation or individual. The constitutional prohibition, may be avoided if the political subdivision satisfies the "Public Purpose Doctrine". The "Public Purpose Doctrine" has been defined as an activity that:

(1) Will serve to benefit the community as a whole; and

(2) It is directly related to the functions of the political subdivision. (M. Willatt, Constitutional Restrictions on the Use of Public Money, 38 Tex. Bar Journal 413, May 1975).

Texas Courts have specifically held that counties taking care of the sick is a public purpose. Seydlar vs. Border, 115 S.W. 2nd 702 Tex. Civ. App. - Galveston 1938 (writ ref'd). For the Hospital District to meet the public purpose test, the arrangement must meet the following criteria: (1) Serve the Hospital purpose; (2) The District must retain control over the agreement; (3) There must be sufficient protection within the arrangements for the handling of public money or properties; (4) There must be a need for the lending of credit; (5) There must be adequate consideration passing to the Hospital District. (M. Willatt, Constitutional Restrictions on the Use of Public Money, 38 Tex. Bar Journal 413, 421 May 1975).

The above criteria recognizes that not all transactions between public and private parties are prohibited. A political subdivision can hire services, buy goods and construct buildings. In these situations the consideration is easily measurable, the degree of control satisfied by the specification for the goods, services, or the building, and the goods, services, or buildings must be necessary for the political subdivision to perform its functions.

Difficulty arises where the political subdivision contracts to receive the accomplishment of a public purpose which is more nebulous than the receipt of goods or services. There could be no lending of credit to a private party in exchange for the operation of facility which would ordinarily be a public purpose, but which is acceptable to

private uses, in the absence of assurance that the facility will not be put to these private uses. Consequently, it is not enough to merely find the project would be a "public purpose" of the Hospital District if it were operated by the Hospital District. The entire transaction must be examined to determine from the contract and surrounding circumstances as to whether or not the "public purpose" will be effectuated. The political subdivision must retain enough control over the performance of the contract to insure the "public purpose" will be effectuated.

The Val Verde County Hospital District's lease with Angelo Dialysis Center, Inc. meets the "Public Purpose Doctrine" in that Angelo Dialysis Center, Inc. provides a needed medical service to the community. Prior to the Hospital District entering into its present Lease Agreement, the District provided renal services to the patients of the Hospital. The Angelo Dialysis Center is able to provide the needed dialysis service to the citizens of Val Verde County at a lesser cost than the Hospital District. Further, the Hospital District retains control over the present Lease Agreement, and will retain complete control over the ten (10) year lease. The cost of building the facility, plus interest, will be repaid to the Hospital District via the lease payments by Angelo Dialysis Center, Inc.. There is a necessity for the Hospital to build the facility because both parties want the facility adjacent to the Val Verde Memorial Hospital. There is no suitable site within a reasonable distance of the Hospital grounds for Angelo Dialysis Center, Inc. to build its own building. Both the Dialysis Center and the Val Verde County Hospital District want the dialysis services rendered within walking distance of the Val Verde Memorial Hospital. There will be adequate consideration passing to the Hospital District in that the entire cost of the construction, plus interest, will be repaid to the Val Verde County Hospital District over a period of ten (10) years.

Further, the leasing of the facilities to the Angelo Dialysis Center, Inc. is not for the private practice of medicine. Dr. Montoya provides the only renal care within Val Verde County. The renal care is for patients who are on Medicare and Medicaid. The renal care services are unique, and if the service were not provided by the dialysis center, the Hospital District would either have to provide the service, or the residents of Val Verde County would have to travel outside the county to acquire this service. Thus, the service provided would not be in the category of private practice of medicine and is more in attune with the providing of emergency room physicians, or physical therapists, activities that are a necessity of every public hospital.

The Attorney General has issued an opinion, JM-258 (1984), in which the Titus County Hospital District was told they had no authority to lease part of the Hospital's physical plant to private physicians for use as private medical offices. In that opinion, Mr. Mattox stated that "offices for the private practice of medicine are not 'hospital purposes' or the provision of medical or hospital care for the needy."

The Val Verde County Hospital District's situation can be distinguished from the Titus County Hospital District's case because the Val Verde County Hospital District's Enabling Legislation specifically authorizes the Val Verde County Hospital District to lease its physical facilities for a period not to exceed twenty-five (25) years. Enabling Legislation, Section 10, page 13. The Titus County Hospital District had no specific authority to lease its property, and had to rely only upon implied authority from the Constitution and its Enabling Legislation. The Val Verde County Hospital District's fact situation can further be distinguished from Titus County Hospital District, in that Val Verde County Hospital District proposes to lease its facilities for the purpose of rendering renal care to its patients. The dialysis service is unique, and cannot be compared to general practice of medicine. The Hospital District, for over twenty (20) years, has provided renal care service for its patients. The Hospital District has recognized the necessity of this service, and has made provisions for this service to be available to its patients for over 20 years. The dialysis service is a necessary medical service for the citizens of Val Verde County, Texas.

The Val Verde County Hospital District has specific authority to lease its facilities to a private physician for a period not to exceed 25 years. Further the Hospital's lease of the facility to Angelo Dialysis Center, Inc. does not violate the Constitutional prohibition against the lending or loaning of public monies to a private corporation. The provision of renal care services through the Angelo Dialysis Center, Inc. is a Hospital purpose, and fits within the "Public Purpose Doctrine".

Issue No. (2). Whether or not the Val Verde County Hospital District may finance the construction of the facility with excess funds in its Interest and Sinking Fund Account.

The Val Verde County Hospital District has an account with the Del Rio Bank and Trust Company established for the purpose of retiring its bonded indebtedness. The bonded indebtedness will be retired on January 1, 2002. The present calculation to pay the 1991-1992 principal and interest due on the indebtedness is \$638,000.00. The account has a balance of \$938,799.00. The excess has been built up over a period of years from the interest the Del Rio Bank and Trust Company pays to the Val Verde County Hospital District on the funds deposited in the account. The Val Verde County Hospital District would like to withdraw a portion of these excess funds to construct the facility.

The Val Verde County Hospital District has the express authority to build a facility, without the necessity of a bond issue, provided the facility can be built with funds on hand.

Sec. 11 of the Enabling Legislation provides, in part:

(Sec. 11). ***Except as permitted in the preceding Section and as permitted by Sec. 7 and 8 of this

Act, the District may incur no obligation payable from any revenues of the District, taxes or otherwise, except those on hand or to be on hand within the then current and following fiscal year of the District.

The Legislature has given political subdivisions the authority to invest surplus left in the Interest and Sinking Fund after the full payment of principal and interest on the bonded indebtedness has been made. Tex.Rev.Civ.Stat.Art. 752a (1955). Op.Atty.Gen. 1947, No. V-157.

Although Article 752a is not directly applicable to the Val Verde County Hospital District, it does stand for the principle that the surplus in an Interest and Sinking Fund may be used for other purposes. In the Hospital District's case, the bonded indebtedness has not been retired and paid in full. This will not happen until 2002. Nevertheless, there is a surplus in the Interest and Sinking Fund that is well in excess of the amount needed for the 1991-1992 payment of principal and interest. The Val Verde County Hospital District proposes to withdraw this surplus for the purpose of building a permanent facility upon Hospital property.

Tex.Rev.Civ.Stat.Art. 836 "Investments", would not apply as the Hospital District would not be investing funds used for redemption and payment of the outstanding bonds, but would be using the surplus in the Interest and Sinking Fund Account that has accumulated over the years.

The Order Authorizing the Issuance of the Bonds, copy attached as Exhibit "A", states the general purpose of the bonded indebtedness as follows:

Section 1. Authorization, Principal Amount. That the District's bonds are hereby authorized in the aggregate principal amount of \$3,600,000 for the purpose of construction, acquisition repair or renovation of buildings and improvements, and equipping the same for hospital purposes.

The Hospital District would not be divesting earmarked funds to another purpose. The District would be using the surplus for the purposes originally set out and authorized in the Bond Order.

There is no legal authority directly in point on this question. This is not a situation where funds allotted for the payment of principal and interest on a bonded indebtedness are diverted to another purpose. This is a situation where the Hospital District has accumulated a surplus in the Interest and Sinking Fund over the years, that it desires to use for the purpose originally stated in the Bond

Issue. This purpose being for the construction of a building and improvements, and equipping the same for Hospital purposes.

Respectfully submitted,

Carmen Rivera-Worley
Carmen Rivera-Worley,
County Attorney

CRW:bmj

cc: Mr. Quinton Etzel, Attorney for Val Verde County Hospital Dist.

ORDER AUTHORIZING THE ISSUANCE OF BONDS

THE STATE OF TEXAS
COUNTY OF VAL VERDE
VAL VERDE COUNTY HOSPITAL DISTRICT

WHEREAS, \$4,000,000 of bonds were lawfully and favorably voted at an election duly held in Val Verde County Hospital District (the "District") on September 12, 1981; and

WHEREAS, none of the bonds voted at said election has been authorized, issued, or delivered; and

WHEREAS, the Board of Directors of the District deems it necessary and advisable to authorize, issue, and deliver \$3,600,000 of said bonds; and

WHEREAS, the bonds hereinafter authorized and designated were voted and are to be issued and delivered pursuant to Chapter 658, Acts of the 64th Legislature, Regular Session, 1975.

THEREFORE, BE IT ORDAINED BY THE BOARD OF DIRECTORS OF VAL VERDE COUNTY HOSPITAL DISTRICT:

Section 1. Authorization, Principal Amount. That the District's bonds are hereby authorized in the aggregate principal amount of \$3,600,000 for the purpose of construction, acquisition, repair or renovation of buildings and improvements, and equipping the same for hospital purposes.

Section 2. Designation. That said bonds shall be designated as the: VAL VERDE COUNTY HOSPITAL DISTRICT AD VALOREM TAX BONDS, SERIES 1982 (the "Bonds").

Section 3. Date, Numbers, Maturities. That the Bonds shall be dated January 1, 1982, shall be in the denomination of \$5,000 each, shall be numbered consecutively from one upward, and shall mature on September 1, in each of the years, and in the amounts, respectively, as set forth in the following schedule:

<u>YEARS</u>		<u>AMOUNTS</u>	<u>YEARS</u>		<u>AMOUNTS</u>
1984	\$	50,000	1990	\$	75,000
1985		50,000	1991		100,000
1986		50,000	1992		100,000
1987		50,000	1993		125,000
1988		75,000	2002		2,850,000
1989		75,000			

Section 4. Interest Rates, Interest Coupons. That the Bonds scheduled to mature during the years, respectively, set forth below shall bear interest at the following rates per annum:

Bonds maturing in the year 1984	9-1/2%;
Bonds maturing in the year 1985	9-3/4%;

Exhibit "A"