



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTON
ATTORNEY GENERAL**

December 14, 1989

To All Bond Counsel:

The following are positions taken by the Public Finance Section which have not been formally disseminated since the All Bond Counsel Letter of December 13, 1988. As indicated below, some of these positions are not fully developed, and your opinions are solicited regarding possible future modifications.

1. We do not believe that taxes may be pledged to certificates of obligation for facilities authorized by Article III, Section 52-a of the Texas Constitution and enabling statutes without an election. Additionally, it appears to us that if revenue certificates of obligation are to be issued, only revenues from the project may be pledged, as provided by Articles 725d and 835s. This results from the Article III, Section 52-a requirement that such obligations be issued in connection with a program authorized by the legislature. The certificate of obligation statute is not such a program, and thus the revenue pledging provisions in that statute are not applicable. Your comments are invited if you disagree.

Additionally, it has been suggested that certificates of obligation are not available at all for any of the purposes under the above articles, because of the "in connection with a program" requirement. I am not sure this is significant, since, under the above requirements, there would seem to be no particular advantage to issuing certificates instead of bonds. We have not taken a position as to this as yet, however.

2. We additionally have doubts that H.B.3192, enacted by the 71st Legislature-Regular Session, codified as Section 380.001 of the Local Government Code, is constitutional, in that it provides for the establishment of programs by a municipality, rather than establishing a program as authorized by Article III, Section 52-a. Our doubts are strong enough that we would not, at this time, approve bonds for which this statute is a necessary component. Your comments are also invited on this matter.

3. For contractual obligations issued by school districts pursuant to the Public Property Finance Act, we have established separate guidelines for property for new buildings. The reasoning for this is based on the premise that the maintenance tax cannot be used for the construction of a new building (except as provided in Madeley v. Trustees of Conroe Independent School District) and that some items which might be maintenance for an existing building would be considered part of the construction of a new building. Thus, property for a new school building, to be eligible for financing, must (i) be personal property, (ii) not become a "fixture" (be permanently attached by bolting, welding, etc, even if it is possible to detach it), (iii) have a useful life shorter than that of the building, and (iv) be of a type not generally considered to be a part of a building, or included in the term "building", in the context of constructing or acquiring same, under generally accepted common terminology. For example, modular air conditioning units may meet the requirements of (i), (ii) and (iii), but they would not pass muster under (iv). Likewise "modular lighting" "modular plumbing" and the like. Also, for another example, basketball goals in a gymnasium which are bolted to the ceiling or walls would not meet (ii), even though they might meet the other requirements. (There may be some question as to whether the basketball goals are personal property, or whether they rather have become part of the realty, but, for purposes of replacement of existing, worn out equipment, we have agreed to their financing with contractual obligations.) Another example is replacement of outdoor units of an air conditioning system for an existing building. We have approved the replacement of such units under the Public Property Financing Act, and will continue to do so. Obviously, such replacements would not meet the requirements for a new building. Finally, desks, tables and other furniture, lab equipment and kitchen appliances (but not built-ins) would meet all of the requirements. I am sure these guidelines can be refined, and your comments are again requested.

I have considered no longer reviewing specific lists of items to determine if they are eligible for financing, but rather accepting an opinion of bond counsel that the items being financed comply with the guidelines. However, this does not appear workable at this time.

4. We will continue to collect a separate fee for each series of bonds submitted in a transcript. Even though, in some instances, there may be very little difference between each series, a bright line test is much more efficient for us than making a determination each time whether there is enough difference to justify a separate fee. This includes those combination new money and refunding bonds divided into separate series for tax reasons.

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5. Notes issued by school districts pursuant to Section 20.49 of the Education Code may be used to fund or reimburse costs incurred for an asbestos abatement program from the effective date of the amendments to that section, June 14, 1989. As you know, the general rule is that prior expenses may not be reimbursed.
6. Capital appreciation bonds ("Cabs") are frequently sold at a premium in school district refundings in order to limit the initial principal amount of the issue, and still provide sufficient funds for the escrow. Cabs have also been done for new money financings. However, Cabs cannot be sold for a premium in new money school district financings, or other voted authorization financings, if the result is the receipt of bond proceeds in excess of the voted authorization. In other words, the premium amount must be counted against the authorization.
7. We now agree that in a combination new money - refunding issue the entire amount of the issuance costs may be allocated to the refunding portion, so that the entire face amount of the new money bonds may be placed in the construction fund. We previously had some question regarding this procedure, but have been persuaded otherwise.
8. Our position has been for some time that equipment financed by contractual obligations under the Public Property Finance Act must have a delivery date of prior to the first interest payment date of the obligation. This apparently is a problem for certain types of "build to order" equipment, which ordinarily has a long lead time from the time a firm order is placed. For this type of equipment we will accept a certificate covenanting or representing that a firm order for the equipment will be placed prior to the first interest payment date, and that the issuer will then be contractually obligated for the purchase of the equipment. Additionally, there must be a provision regarding no substitution of a different equipment item. (If a vendor fails to honor a contract, it is acceptable for the equipment to be ordered from another vendor, but it must be substantially the same piece of equipment.)
9. It may be possible to issue contractual obligations in the form of Cabs, but in that instance delivery, or firm commitment, for special equipment, must take place prior to the first compounding date.

Regarding personnel changes in the Public Finance Section, Leroy Grawunder, as most of you know, left the Public Finance Section last March. Carol Polumbo was soon thereafter appointed Assistant Chief of the Section, and Terri Whitfield was designated as the person with lead responsibility in the water district area. Within the last month or so we have had additional personnel changes. Sheela Rai left the office in early November, and was

replaced by Juan Aguilera a week later. At the end of November Lynn Stuck also joined Public Finance. Jose Villarreal is still with us, so that we are now back to full attorney strength. Jean Hamil and Susan Colvin continue to comprise the secretarial staff.

Please do not hesitate to contact me or any of the attorneys of the Section should you have questions or comments regarding any of the above, or any other matters within our purview.

Sincerely,



Jim Thomassen
Assistant Attorney General
Chief, Public Finance Section

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