Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 25, 1997

The Honorable Thomas F. Lee
District Attorney, 63d Judicial District
P.O. Box 1405
Del Rio, Texas 78841

Letter Opinion No. 97-068

Re: Whether the Val Verde County Hospital District is authorized to construct a building to lease to private physicians, and related questions (ID# 39523)

Dear Mr. Lee:

On behalf of the Val Verde County Hospital District (the "hospital district"), you ask whether the hospital district is authorized to construct a building to lease to private physicians. You also ask whether the hospital district is authorized to lease real property to a private enterprise that would construct a building and lease office space to private physicians. We conclude that the hospital district is authorized by statute to construct a building on its premises and to lease the building to private physicians, provided that the lease serves a hospital purpose under article IX, section 9 of the Texas Constitution and comports with the requirements of article III, section 52. We conclude that the hospital district lacks statutory authority to lease undeveloped real property.

First, we address the statutory authority of the hospital district. The hospital district is a county-wide hospital district created by a special law[1] of the Sixty-fourth Legislature, under the authority of article IX, section 9. This office addressed the statutory authority of your hospital district to construct a building on its hospital grounds to lease to private physicians, who planned to operate a kidney dialysis center, in Attorney General Opinion DM-66. That discussion, which we excerpt at length below, is dispositive of the hospital district's statutory authority:

> Generally, a special-purpose district, such as a hospital district, may "exercise only such powers as have been expressly delegated to it by the Legislature, or which exist by clear and unquestioned implication." *Tri-City Fresh Water Supply Dist. No. 2 of Harris County v. Mann*, 142 S.W.2d 945, 946 (Tex. 1940). Implied powers are those that are "indispensable to . . . the accomplishment of the purposes of [the district's] creation." *Id.* at 947; *see also* Attorney General Opinion JM-258 (1984). With these principles in

[1] *See* Act of May 17, 1975, 64th Leg., R.S., ch. 658, 1975 Tex. Gen. Laws 1977, 1977. This statute was amended in 1983, *see* Act of May 29, 1983, 68th Leg., R.S., ch. 1087, 1983 Tex. Gen. Laws 5708, 5708; twice in 1991, *see* Act of April 25, 1991, 72d Leg., R.S., ch. 70, 1991 Tex. Gen. Laws 511, 511; Act of May 21, 1991, 72d Leg., R.S., ch. 813, 1991 Tex. Gen. Laws 2830, 2830; and again in 1997, *see* H.B. 2696, Act of May 31, 1997, 75th Leg., R.S. (eff. Sept. 1, 1997).

mind, we first consider whether the hospital district may construct the building to lease to a private physician for the purpose of providing dialysis services.

Article IX, section 9, of the Texas Constitution does not expressly authorize the hospital district to construct a building to lease to a private physician. *See* Attorney General Opinion JM-258. The hospital district's enabling statute, however, confers upon the hospital district the express authority to construct buildings on its premises: "[T]he district shall provide for the establishment of a hospital system by the purchase, construction, acquisition, repair, or renovation of buildings and equipment . . . ." Acts 1975, 64th Leg., ch. 658, § 2, at 1977. In addition, section 10 of the enabling statute provides in part as follows:

> 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 upon terms and conditions considered to be to the best interest of its inhabitants, provided that in no event shall any lease be for a period in excess of 25 years from the date entered.

Id. § 10, at 1982 (emphasis added). We conclude that the foregoing provision expressly authorizes the hospital district to lease a building on its premises to any person or entity, including a private physician, provided that the board of directors determines that the terms and conditions of the lease are in the best interests of the inhabitants of the hospital district.

Attorney General Opinion DM-66 (1991) at 2-3.[2]

On the basis of the analysis in Attorney General Opinion DM-66, we conclude that the hospital district is authorized by statute to construct a building that will be part of its hospital system on the hospital grounds. We also conclude that the hospital district is authorized by statute to lease the building to private physicians, for a period not in excess of twenty-five years, if the hospital district's board of directors determines the lease is in the best interest of the hospital district's inhabitants.

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[2]Section 10 was extensively amended in 1991. *See* Act of May 21, 1991, 72d Leg., R.S., ch. 813, 1991 Tex. Gen. Laws 2830, 2830. The main thrust of these amendments was to authorize the hospital district to enter into consulting contracts and to provide hospital district immunity to private companies in connection with operating, management, or consulting contracts with the hospital district. We do not believe that the amendments affect the hospital district's leasing authority.

You also ask whether the hospital district board is authorized to lease real property to a private enterprise that would construct a building and lease office space to private physicians. Section 10 of the enabling statute speaks in terms of the lease of facilities and buildings rather than undeveloped real property. While additional language in section 10 authorizes the hospital district to sell or dispose of real property if the board affirmatively finds that the real property is not needed for the operation of the hospital system,[3] this language does not authorize the lease of real property. No other provision in the enabling statute authorizes the hospital district to enter a lease. Because the authority to lease undeveloped real property does not appear to be indispensable to operating the hospital district, we do not believe that such authority can be implied.[4] Moreover, given that the legislature appears to have intended to address the hospital district's authority to lease, sell, and dispose of property in section 10 in comprehensive terms, it would be particularly inappropriate for this office to imply leasing authority not specifically provided. Finally, we note that courts and this office have required strict compliance with the terms of legislative authorization for the conveyance of land.[5] For these reasons, we conclude that the hospital district board is not authorized to lease undeveloped real property.

Having addressed the hospital district's statutory authority, we next consider constitutional limitations on the hospital district's authority. As noted in Attorney General Opinion DM-66, the determination that the hospital district has the express authority to construct and lease a building is not the end of our analysis. We must also consider whether the plan to construct and lease a physicians' office building would serve a "hospital purpose" consistent with the requirements of article IX, section 9, which charges the hospital district with the purpose of providing medical care, particularly medical care for the needy, and article III, sections 51 and 52, which generally prohibit the use of public funds for private purposes. *See* Attorney General Opinion DM-66 (1991) at 3 (citing *Sullivan v. Andrews County*, 517 S.W.2d 410 (Tex. Civ. App.--El Paso 1974, writ ref'd n.r.e.)); *see also* Attorney General Opinions JM-258 (1984), H-966 (1977), H-16 (1973), M-912 (1971), M-256 (1968).

This office has considered the permissibility of a proposed hospital district lease under article IX, section 9 on a number of occasions. In Attorney General Opinion JM-258, this office considered whether it was permissible for the Titus County Hospital District to lease office space to private

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[3]Section 10 provides in pertinent part: "The district shall be empowered to sell or otherwise dispose of any property or equipment of any nature upon terms and conditions found by the board to be in the best interest of its inhabitants, provided, however, that in no event shall the board be authorized to sell or dispose of any real property unless the board affirmatively finds that the same is not needed for the operation of the hospital system." Act of May 29, 1975, 64th Leg., R.S., ch. 658, 1975 Tex. Gen. Laws 1977, 1977, *as amended by* Act of May 21, 1991, 72d Leg., R.S., ch. 813, 1991 Tex. Gen. Laws 2830, 2830.

[4]Implied powers are those that are "indispensable to . . . the accomplishment of the purposes of [the district's] creation." *Tri-City Fresh Water Supply Dist. No. 2 of Harris County v. Mann*, 142 S.W.2d 945, 947 (Tex. 1940).

[5]*See, e.g., State v. Easley*, 404 S.W.2d 296, 298-99 (Tex. 1966); *Wilson v. County of Calhoun*, 489 S.W.2d 393, 397 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.); Attorney General Opinions JM-1242 (1990) at 4-5, MW-62 (1979) at 1, V-320 (1947) at 1-2.

physicians, concluding that "offices for the private practice of medicine are not 'hospital purposes' or the provision of 'medical or hospital care for the needy.'" Attorney General Opinion JM-258 (1984) at 3. By contrast, in Attorney General Opinion DM-66, we concluded that the proposed lease was permissible. In that opinion, we had been provided with information suggesting that the dialysis clinic would provide renal services to patients at a lesser cost than the hospital district and would serve primarily Medicare and Medicaid patients. The hospital district also stated that it was important to patients that the dialysis clinic be located within walking distance of the hospital and that there was no suitable site near the hospital that the dialysis clinic might purchase to build a facility. On the basis of that information, we concluded "that the construction and leasing of a building for the purpose of providing cost-effective dialysis services adjacent to the hospital would serve a 'hospital purpose.'" Attorney General Opinion DM-66 (1991) at 3-4. Similarly, in Attorney General Opinion DM-131, we concluded that a hospital district was authorized to lease part of its facility to private physicians to operate a private adolescent drug treatment facility, provided that the facility treat needy adolescents, because such a facility would serve a hospital purpose. *See* Attorney General Opinion DM-131 (1992) at 1-2. Together the foregoing opinions suggest that article IX, section 9 does not authorize a hospital district to lease office space to private physicians unless the lease will procure for the district necessary services, including services for needy patients, that would not otherwise be available.

A letter from the hospital district's attorney asserts that the lease at issue would serve several purposes:

> Val Verde County is a rural and isolated section of the State. The County is underserved by physicians. The District needs to recruit and retain qualified physicians to carry out the District's purposes of operating a Hospital and providing medical care for the needy inhabitants of the County. In order to recruit physicians to Val Verde County, there must be facilities for the physicians to occupy. At present, there is a critical shortage of office facilities for incoming physicians. . . . The availability of strategically located office space would be an incentive for physicians to locate and retain their practice in Val Verde County, Texas. . . . The building will be available for lease by physicians who are presently being recruited to Val Verde County, Texas, as well as being available for physicians who are presently practicing. . . .
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> [There are] no suitable sites within a reasonable distance of the Hospital for new physicians to build their own facilities. The physicians renting from the District will be required to treat [M]edicare and [M]edicaid patients, as well as the general population.

We assume for purposes of this opinion that the facts asserted in the hospital district's letter are true. The letter does not provide any information about the type of physicians the hospital district intends to attract or retain. We assume that the plan is intended to attract or retain physicians who will provide services necessary to the operation of the hospital district.

This office has never considered a hospital district plan to construct and lease a physicians' office building for the purpose of attracting and retaining physicians to practice at a hospital in a rural, underserved area of the state, where no alternative, private sites are available near the hospital. While we doubt that a hospital district plan to construct and lease a physicians' office building under other circumstances would serve a hospital purpose, we believe that a hospital district plan with the purpose here, in these very limited circumstances involving a hospital in an underserved area of the state where no alternative, private sites are available, would serve a hospital purpose within the meaning of article IX, section 9. Again, we assume that the plan is intended to attract or retain physicians who will provide services necessary to the operation of the hospital district. We also stress that this conclusion is predicated on the statement that the hospital district will require physicians leasing the building to serve needy patients.

Finally, we consider whether the proposed lease would violate article III, sections 51 and 52 of the Texas Constitution, which prohibit a political subdivision from using public funds for private purposes. In order to avoid this prohibition, the proposed lease must serve a public purpose and the hospital district must receive adequate quid pro quo. Attorney General Opinion DM-131 (1992) at 3 (citing Attorney General Opinion H-777 (1976) at 5). The lease must also include sufficient controls to ensure that the public purpose is accomplished. *Id.* We believe that the hospital district has identified a valid public purpose for the lease. The adequacy of consideration is a factual question, which we cannot resolve.[6] Furthermore, this office does not review specific contracts.[7] Thus, the determination whether a particular lease comports with article III, sections 51 and 52 is beyond the purview of this office.

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[6]Attorney General Opinions DM-383 (1996) at 2 (questions of fact are inappropriate for opinion process), DM-98 (1992) at 3 (questions of fact cannot be resolved in opinion process), H-56 (1973) at 3 (improper for attorney general to pass judgment on matter that would be question for jury determination), M-187 (1968) at 3 (attorney general cannot make factual findings).

[7]*See* Attorney General Opinion JM-697 (1987) at 2 ("review of contracts is not an appropriate function for the opinion process").

SUMMARY

The Val Verde Hospital District has express statutory authority to construct buildings and to lease all or part of its buildings. A hospital district lease of a building to private physicians to attract and retain physicians to practice at a hospital in a rural, underserved area of the state, where no alternative, private sites are available near the hospital, would serve a "hospital purpose" within the meaning of article IX, section 9 of the Texas Constitution, provided that the lease will procure for the district necessary services, including services for needy patients, that would not otherwise be available. In addition, in order to comport with constitutional limitations on the use of public funds, a hospital district lease must serve a public purpose and the hospital district must receive adequate quid pro quo. Any lease must include sufficient controls to ensure that the public purpose is accomplished. The hospital district is not authorized under its enabling statute to lease undeveloped real property.

Yours very truly,

Mary R. Crouter

Mary R. Crouter
Assistant Attorney General
Opinion Committee