

facility as the average person. Any physical defect with which a school bus driver is suffering must bear a reasonable relation to the driver's ability to drive a bus without difficulty and function properly otherwise as a bus driver. It must be pointed out that in those instances where the governing body has to make a determination, the criterion is to be "full normal use."

As pointed out in this Opinion, the question of the fitness of a person to serve as a school bus driver is an administrative decision to be made by the governing body of the school corporation. Each case should be decided in light of its peculiar facts and circumstances. The standards which should be used to determine the fitness of a person to serve as a school bus driver who suffers from defects set out in your question #3 have been stated in this Opinion.

This Opinion would invade the administrative prerogative of the various governing bodies of the school corporations if it attempted to decide categorically with certainty and finality whether or not persons who suffer the physical defects listed in your question #3 could qualify to serve as school bus drivers.

In conclusion, it is my Official Opinion that the Legislature intended that school buses should be driven only by those persons who do not suffer from physical handicaps that might adversely affect their behavior either during the normal operation of the bus or in an emergency situation.

OFFICIAL OPINION NO. 73

December 31, 1965

Mr. Richard L. Worley
State Examiner
912 State Office Building
Indianapolis, Indiana

Dear Mr. Worley:

This is in answer to your following request for an Official Opinion:

1. Under the provisions of the Acts of 1903, Ch. 86, Burns' 22-3101, et seq. and the Acts of 1917, Ch.

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144, Burns' 22-3115, et seq., as amended, do the trustees of a county hospital have the authority to enter into a lease rental, with option to purchase agreement, for the construction of a nursing home to be operated in conjunction with the county hospital?

"2. If the trustees have such authority, is it necessary for them to secure approval of the county commissioners and county council?

"3. If your answer to question 1 is in the affirmative, is competitive bidding required pursuant to the Public Works Law? Burns' 53-108, et seq."

Examination of a number of statutes is necessary in order to answer your questions. The terms of these statutes contain many dissimilarities. Therefore, each statute will be considered separately, and each one of your three questions will be answered in order by its number under the discussion of each particular statute.

(A) *1917 Hospitals, Ind. Acts of 1917, ch. 144, as amended, Burns IND. STAT. ANN., §§ 22-3115, 22-3117—22-3122, 22-3127—22-3140.*

(1) That part of your first question which refers to the power of the board of trustees of a county hospital constructed and operating under the terms of the 1917 Hospital Act to enter into a lease of or to own a nursing home to be operated in conjunction with such a county hospital and specifically, whether such operation is an authorized hospital purpose, has been answered in my Official Opinion No. 7 issued earlier this year.

My first conclusion was that the 1917 act itself authorizes a county operating a hospital under that act to lease or own a hospital facility which is separate from its other buildings, upon issuance of an order by the board of county commissioners.

My second conclusion reads as follows:

"In my opinion, a county hospital [operating under the 1917 Act] may not have the authority to acquire,

operate and maintain with public funds a 'nursing home' completely separate in operation from the hospital, for the care of aged persons who do not require medical and physicians' services. A county hospital may, however, acquire, operate and maintain a separate facility, as a part of its hospital operation, for the care of those patients who require medical services and services of a physician, and may place in said separate facility those patients who require less intensive physicians' and medical services than other patients in the county hospitals."

As pointed out in that Opinion, the question of whether a 1917 hospital may operate a nursing home cannot be answered categorically, "because the answer will depend upon the nature of the care offered by, and the structure of, the facility."

(2) The board of trustees of the hospital must secure the approval of the board of county commissioners. An order of the board of commissioners is required for additions to a 1917 hospital. The Act requires no further approval.

(3) Under § 3, as amended, and § 3(a), as added and amended, of the 1917 Acts, Burns IND. STAT. ANN., (1965 Supp.), §§ 22-3118 and 22-3119, the boards of trustees of 1917 hospitals are required to receive bids for the purchase of all "materials" costing over one thousand dollars or two thousand dollars, respectively. It does not appear that the purchase of a leasehold is a purchase of "materials" in ordinary terminology.

Indiana Acts 1947, ch. 306, § 1, as amended, Burns IND. STAT. ANN., § 53-108, requires that when

"... any public building or any other public work or improvement of any character whatsoever is to be constructed, erected, altered or repaired at the expense of the state or at the expense of any county, . . . and when the costs of such work or improvement will be two thousand dollars [\$2,000] or more, it shall be the duty of the board, commission, . . . acting on behalf of the state, county, . . . or commission created by law, . . . to adopt plans and specifications and award a con-

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tract for such public work or improvement to the lowest and best bidder who submits a bid for the performance thereof. . . .”

Although this statute applies to buildings or works or improvements constructed at the expense of the governmental unit, and technically the funds of a governmental unit may not be used to construct the hospital addition in question, as a practical matter the construction cost will be repaid by funds received as rental from the county, and it is, in my opinion, at least the better practice for the board of commissioners to follow this statute in obtaining a hospital facility to lease. If the year to year rental is continued until the option period arrives, and the option to purchase is exercised, the hospital addition will in fact become the property of the county, and any attempt to lease it without competitive bidding seems to me to be an unwarranted avoidance of at least the spirit of this statute and Ind. Acts 1945, ch. 99, as amended, Burns IND. STAT. ANN., § 53-501, which appear to be intended, when construed together, to cover all purchases by counties except services. And these statutes enunciate a very worthwhile public policy. They prevent fraud, collusion and favoritism in the execution of public contracts and therefore should be stringently enforced.

An additional problem may arise from the county's debt limitation. There is no procedure provided in the 1917 Act for a determination of the amount of money which would be a "reasonable rental." If the rental is not "reasonable," the lease might well be held to create a debt of the county which, with other county debts, would be subject to the county's debt limitations under the Indiana Constitution, art. 13, § 1. See *Protsman v. Jefferson-Craig Consolidated School Corp.*, 231 Ind. 527, 537-538, 109 N.E.2d 889 (1953). The results of competitive bidding might aid in establishing the amount of a "reasonable rental" for the facility leased by the county.

(B) *1903 Hospitals, Ind. Acts 1903, ch. 86, as amended, Burns IND. STAT. ANN., §§ 22-3101—22-3110.*

(1) (a). My second conclusion concerning 1917 hospitals was based in part upon the fact that the word "hospital" is not defined in the 1917 Act. Neither is it defined in the 1903

Act. Section 6 of the 1903 Act, as amended, Burns IND. STAT. ANN., § 22-3106, does require such a hospital to take patients certified by the township trustee to be indigent and in need of medical care which can better and more cheaply be given in the hospital than at home. Paying patients may be received and accepted for "treatment and care," and their charges are "to be graded in amount according to the room, nursing and other supplies and service rendered and furnished such pay patients." Acts 1903, ch. 86, § 7, as amended, Burns IND. STAT. ANN., § 22-3107. Thus the Legislature contemplated that the hospital would give varying degrees of care to patients as the condition of the patients require, and it is my opinion that the second conclusion quoted above from my 1965 Official Opinion No. 7 applies to 1903 hospitals as well as to 1917 hospitals.

Therefore, the succeeding conclusions in this Opinion are based upon the premise that any hospital facility which might be leased by the county will qualify as a part of the county hospital within the meaning of my 1965 Official Opinion No. 7, page 31.

(b) The 1903 Act authorizes the board of county commissioners to construct a hospital:

"Whenever it shall appear to the board of county commissioners of any county in the state of Indiana, by petition or otherwise, that there is a demand for a hospital within such county, and that the interests of the county and its citizens will be best subserved by the establishment and maintenance of such hospital, such board shall be empowered to provide such hospital by purchasing suitable grounds therefor, and constructing suitable buildings thereon, and otherwise improving the same for hospital purposes, and to fully equip and furnish such hospital, . . . and to do all and singular the things necessary to acquire, establish, construct, equip and maintain such hospital. . . ." Acts 1903, ch. 86, § 1, as amended, Burns IND. STAT. ANN., § 22-3101.

Such a hospital is specifically authorized to become a lessor under certain conditions, Acts 1903, ch. 86, § 2, as amended,

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Burns IND. STAT. ANN., § 22-3102, but no specific authorization to become a lessee is given.

The only reference to additional construction and equipment is contained in Ind. Acts of 1945, ch. 61, § 4, amending the 1903 Act, ch. 86, § 7, Burns IND. STAT. ANN., § 22-3107:

“. . . And all sums collected from such pay patients shall go into the funds and the treasury of said hospital, to be used and expended for *additional construction and the equipment, betterment, maintenance and operation* of such hospital, to the end that such hospital shall be and become as nearly as possible self-sustaining.” (Emphasis added.)

The underlined portion was substituted for the original words “for the betterment and maintenance.”

Section 1 of Ind. Acts 1947, ch. 362, as amended, Burns IND. STAT. ANN., § 22-3112, reads in part as follows:

“The board of trustees of any county hospital organized and operating under the laws of the state of Indiana as provided for in chapter 86, Acts of 1903, and amendments thereto, are hereby authorized to provide a cumulative building fund to provide for the erection of hospital buildings and/or the erection of additions to and the remodeling of the present buildings used for hospital purposes and owned by the county in which such hospital is located. . . .”

Although this section refers to the “board of trustees” of the hospital, and the 1903 hospitals are managed by a “governing board,” it is clear by the citation to which act the Legislature is referring. Unless the 1903 hospital’s governing board has the authority to add to and remodel present buildings, some of the language in this section is meaningless. It is also significant that this section was enacted by the General Assembly next succeeding the 1945 General Assembly, which added the additional construction provisions to Acts 1903, ch. 86, § 7, as amended, Burns IND. STAT. ANN., § 22-3107.

Although it does not appear that the board of county commissioners’ authority to construct a hospital under this 1903

Act is necessarily exhausted by the construction of one or more hospitals, and it does appear that at least one General Assembly interpreted the 1903 Act as authorizing further construction, nevertheless, the act as a whole apparently contemplates construction and equipment by the county rather than leasing by the county of hospital facilities, and in my opinion, it would be prudent to seek further authority for the leasing of additional hospital facilities to be operated by a governing board created under the 1903 Act.

Therefore, it is unnecessary to answer your questions numbered (2) and (3) for the 1903 Act.

(C) *Building Authorities and County Aid to Hospitals.*

Several statutes authorize the creation of county or city-county building authorities to construct hospitals. According to the information you have submitted to us, at least one of the counties presently seeking to lease hospital facilities operates two hospital facilities as separate operations, and at least one such county contains a fourth class city. Therefore, laws concerning hospital construction in such counties have been considered in this Opinion. Under the discussion of each statute, it will be indicated whether the statute is applicable to hospitals constructed and operating under either or both the 1903 and the 1917 Acts. Those statutes authorizing taxation to create a cumulative building fund have been excluded from this Opinion, since you have informed us that the counties involved do not desire to finance a hospital facility in that manner.

(a) *Ind. Acts of 1961, ch. 96, as amended, Burns IND. STAT. ANN., §§ 22-3201—22-3225.*

(1) In counties which own and operate two or more county hospitals as separate institutions a "County Hospital Building Authority" is created by statute for the purpose of

“. . . financing, acquiring, constructing, equipping and leasing to the county in which such authority is created, land and a building, or buildings, for hospital purposes.” *Ind. Acts of 1961, ch. 96, § 1, as amended, Burns IND. STAT. ANN., (1965 Supp.), § 22-3201.*

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The word "acquiring" was added by Ind. Acts 1965, ch. 362, § 1. Although the act refers to "boards of trustees" (created by the 1917 hospital act) and "boards of managers," while the 1903 hospitals are operated by a "governing board," the act appears to have been intended to apply to all county hospitals created under Indiana law. The county is authorized to lease land and a building from the authority, for a period of not more than forty (40) years, Acts 1961, ch. 96, § 10, Burns IND. STAT. ANN., § 22-3209. Renewals and options to purchase may be included in the contract, Acts 1961, ch. 96, § 12, Burns IND. STAT. ANN., § 22-3212. Under this statute, the only financing specifically authorized for hospital construction is the issuance of bonds.

(2) The authority is created by statute, and directors are to be appointed by the circuit judge. The board of trustees or the board of managers of the hospital, the board of commissioners of the county, and a majority of the county council of the county must agree on the terms and conditions of any lease proposed to be entered into pursuant to the act, Acts 1961, ch. 96, § 11, as amended by Ind. Acts 1965, ch. 362, § 5, Burns IND. STAT. ANN., (1965 Supp.), § 22-3211. The 1965 amendment added the requirement of the county council's approval. See also Acts 1961, ch. 96, § 24, as amended by Acts 1965, ch. 362, § 7, Burns IND. STAT. ANN., (1965 Supp.), § 22-3224 (f).

The plans and specifications and estimates of cost for the building or buildings must also be submitted to and receive the approval of the board of county commissioners and the hospital authorities before the lease is executed, and the plans and specifications must be approved by the state board of health, state fire marshal and such other state agencies as may be designated by law to pass on plans and specifications for public buildings. Acts 1961, ch. 96, § 13, Burns IND. STAT. ANN., § 22-3213.

(3) The requirements for approval of a lease by the authority created under the act and the hospital board of trustees, the board of commissioners and a majority of the county council, plus provisions for public hearings, petitions and hearings by the state board of tax commissioners are completely detailed in § 11 of the Acts of 1961, ch. 96, as amended,

Burns IND. STAT. ANN. (1965 Supp.), § 22-3211, and in my opinion, preclude the necessity for awarding a contract to the authority under the public works law, Ind. Acts 1947, ch. 306, as amended, Burns IND. STAT. ANN., § 53-108. Section 25 of the 1961 Act, ch. 96, Burns IND. STAT. ANN., § 22-3225, states that it is unnecessary that those proceeding under that act comply with the provisions of any other law except as provided in the 1961 Act itself.

The authority is required, however, to comply with the public works statute in letting its contracts:

“. . . all contracts for construction and equipment of any building shall be let in accordance with the general laws of the state relating to public contracts. . . .”
Acts 1961, ch. 96, § 20, Burns IND. STAT. ANN., § 22-3220.

(b) *Ind. Acts of 1919, ch. 131, as amended, Burns IND. STAT. ANN., §§ 22-3308—22-3311.*

(1) This statute authorizes county aid to a hospital benevolent not-for-profit association incorporated under Indiana law with its principal office located in or within a mile of the city limits of any city of the fourth or fifth class, which association desires to construct a hospital within the area defined, and which county is without sufficient hospital facilities to properly care for its citizens. The aid may be given in a sum not to exceed the sum already provided by such association. The county is authorized to contract with the association concerning holding of title to the buildings or receiving donations for construction, and the board of commissioners is authorized to accept from the association or its members stock or interest in the hospital, without cost to the county, and thereafter the hospital shall be the sole property of the county.

This act appears to apply to counties with both 1903 and 1917 hospitals.

(2) Under this statute, the board of commissioners is authorized to enter into contracts which bind the county. If aid is provided by said board, the proper officers of the county may issue bonds as for construction of any county building,

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and the county council "shall make appropriations from the county treasury of such county to levy and collect an additional tax. . . ." Acts 1919, ch. 131, § 4, as amended, Burns IND. STAT. ANN., § 22-3311.

(3) The board of commissioners, for the county, is authorized to aid in the construction of a hospital under this act, Acts 1919, ch. 131, § 1, as amended, Burns IND. STAT. ANN., § 22-3308. The board of commissioners is also authorized to select at least one-half of the members of the board of managers or trustees, Acts 1919, ch. 131, § 2, Burns IND. STAT. ANN., § 22-3309, and such hospital must be open to all citizens and physicians of the county on reasonable terms, Acts 1919, ch. 131, § 3, Burns IND. STAT. ANN., § 22-3310. Therefore, it is my opinion that the hospital receiving aid under this statute will be a "public building" to be constructed "at the expense of any county" within the meaning of the public works law, Ind. Acts 1947, ch. 306, as amended, Burns IND. STAT. ANN., § 53-108, and any contracts let after county aid has been contracted for must be let pursuant to that statute.

(c) *Ind. Acts 1953, ch. 54, as amended, Burns IND. STAT. ANN., §§ 26-2501—26-2523.*

(1) This statute authorizes the creation in each county of the state of a building authority for the purpose of

". . . financing, acquiring, constructing, equipping, operating and leasing to the governmental units within the territorial boundaries of the county, lands or buildings for public or governmental purposes." Acts 1953, ch. 54, § 1, Burns IND. STAT. ANN., § 26-2501.

"A hospital, or an addition to a hospital" is included in the definition of "building," Acts 1953, ch. 54, § 22, as amended, Burns IND. STAT. ANN., § 26-2522. "Unless otherwise indicated by the context," the words "governmental unit" shall mean and include the county. "Governing body" shall mean "the governing body of a governmental unit and shall be construed to mean the board of commissioners in the case of counties." *Id.*

Boards of trustees of 1917 hospitals are specifically authorized by an amendment to § 3 of the 1917 Act, Burns IND.

STAT. ANN., § 22-3118, and by § 3a as added by Acts 1963, ch. 361, § 2, as amended, Burns IND. STAT. ANN. (1965 Supp.), § 22-3119, to contract for the leasing of hospitals constructed under the 1953 Act, and the duties of the board of hospital trustees are changed accordingly by statute. Although counties having 1903 hospitals are not specifically authorized by their enabling statute to lease hospitals constructed under such 1953 Act, it appears that the latter act itself authorizes them to do so:

“Any governmental unit within the territorial limits of the county shall be authorized to lease all or any part of buildings from the authority, and the authority shall have the power to lease buildings or any part thereof to said governmental units. . . .” Acts 1953, ch. 54, § 10, as amended, Burns IND. STAT. ANN., § 26-2510.

This 1953 Act has a unique feature in that it authorizes the authority to negotiate a loan or loans instead of issuing bonds to finance construction. Acts 1953, ch. 54, § 16, Burns IND. STAT. ANN., § 26-2516. Any lease may provide an option to renew and/or to buy for the governmental unit. Acts 1953, ch. 54, § 13, Burns IND. STAT. ANN., § 26-2513.

(2) The board of commissioners is authorized in both the 1903 and 1953 Acts to contract on behalf of the county, and would appear to be the only approving authority required for counties operating under the 1903 statute. Under the 1917 Act, the board of trustees of the hospital must also approve. However, in order that an authority be created, the board of commissioners, the county council and the common council of the city constituting the county seat must approve a hearing required as a condition precedent to the creation of an authority. As previously stated, once the authority is created, the board of directors of the authority and the governmental unit leasing from it are authorized to contract with each other, subject to a public hearing before the contract is entered into, Acts 1953, ch. 54, § 12, Burns IND. STAT. ANN., § 26-2512, and possible petition and state tax board review. There is no further approval required from any other governmental unit except that plans, specifications and estimates are to be submitted to the lessee and the state board

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of health, state fire marshal and such other state agencies as may be designated by law to pass on plans and specifications for public buildings. Acts 1953, ch. 54, § 14, Burns IND. STAT. ANN., § 26-2514. The bodies vested by law with authority to review tax levies shall review the governmental unit's tax levy only to ascertain that the levies are sufficient to raise the amount required to meet the rental under the lease contract. Acts 1953, ch. 54, § 19, as amended, Burns IND. STAT. ANN., § 26-2519.

(3) As previously indicated, Section 12 of the Acts of 1953, ch. 54, Burns IND. STAT. ANN., § 26-2512, appears to provide an exclusive method for approval of a lease between an authority created under the act and a county. See also Acts 1953, ch. 54, § 23, Burns IND. STAT. ANN., § 26-2523, obviating compliance with any other law except as specified in the act.

Indiana Acts 1953, ch. 54, § 21, Burns IND. STAT. ANN., § 26-2521, provides:

“ . . . all contracts for construction and equipment of any building shall be let in accordance with the general laws of the state relating to public contracts. . . .”

Therefore, the authority must let such construction contracts under the public works law, Ind. Acts 1947, ch. 306, as amended, Burns IND. STAT. ANN., § 53-108.

This Opinion is limited to the answers to your questions under existing statutes, assuming all other legal requirements are met, and any other questions such as whether a particular contract of rental creates a debt of the county are not covered herein.