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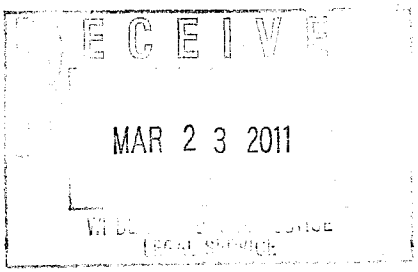

Honorable J. B. Van Hollen
Wisconsin Attorney General
Wisconsin Department of Justice
114 East State Capitol
Madison, WI 53707-7857

RE: Request for Formal Opinion

Dear Attorney General Van Hollen:

Pursuant to Wisconsin Statute Section 59.42(1)(c), our office writes on behalf of the County of Polk to request an opinion concerning Article XI, Section 3a of the Wisconsin Constitution and Section 66.1025 of the Wisconsin Statutes. Specifically, I wish to know the following:

1. May a county operate a licensed skilled care nursing facility on property which the county received on a donation which was made on the condition that the land be devoted to the special purpose of a county infirmary without either enacting a resolution to accept a grant from the honor or heirs of the donor that relieves the county of the condition or seeking a court order that relieves the county of the condition?

2. Does Section 46.18(13) require a county to establish, maintain and annually appropriate moneys for the purpose of modernizing and replacing the buildings and equipment of a county nursing home which is operated on land received on a donation which was made on the condition that the land be devoted to the special purpose of a county infirmary?

Background:

The questions relate to the operation of the County's nursing home, Golden Age Manor Nursing Home. Since 1959, Polk County has operated the Golden Age Manor Nursing Home. Golden Age Manor is regulated and licensed pursuant to Sections 49.498 and 50.03 as a skilled care nursing facility.

In January 1957, the County acquired the land on which the Golden Age Manor Nursing Home is located. The deed contains a clause that reads:

> "If the above named grantee fails to commence construction of a County infirmary on the above described premises within two (2) years from the date of this conveyance, said property described above shall become the property of the Amery Industrial Development Corporation, a Wisconsin Corporation, and grantee herein agrees in such case to take all necessary proceedings to convey said premises to said Amery Industrial Development Corporation."

No record of the County evidences that the County took formal action to accept the donation of property. Nonetheless, the County has held title to the land and has operated the nursing home since inception.

The history of the Golden Age Manor Nursing Home demonstrates that the "county infirmary" was an outmoded form of residential care institution prior to the operation of the nursing home. In 1956, the County Board of Supervisors passed a bonding issue for the financing of a "county home or infirmary". In August 1957, the County Board of Supervisors approved additional financing through transfers to the "New County Home Building and Equipment Fund". In April 1958, moneys were transferred from the Lime Quarry Fund to the "New County Home Building and Equipment Fund". In 1959 the County Board of Supervisors adopted a resolution declaring the facilities to be a general hospital. Since that resolution, the Polk County Board proceedings demonstrate that Golden Age Manor is referred to as a nursing home, a general hospital or a county home. When the Golden Age Manor was opened in 1959, it was opened as a county home. In 1977 the Polk County Board of Supervisors adopted a resolution to study the name of the Golden Age Manor, noting the change for residential facility needs from that of a social model of services to that of rehabilitation. In 1997, the Polk County Board of Supervisors approved the construction of an Alzheimer's unit, then referring to Golden Age Manor as a long term health care facility. The license of the Golden Age Manor Nursing Home states that the facility is licensed as a skilled care nursing home and that the license was initially issued on April 30, 1959.

The Golden Age Manor Nursing Home and the deed had been the subject of recent litigation. See Sollman v. County of Polk, 2008AP 831-AC. In 2008 the Polk County Board of Supervisors enacted a resolution to sell the nursing home. The Court of Appeals considered whether the resolution was consistent with Sections 59.52(6)(c) and 66.1025. The Court of Appeals reversed the circuit court and determined void the resolution. In making that determination the Court of Appeals concluded that the deed demonstrated that the property was donated and conveyed to the County for the special purpose of a County infirmary. See ¶15. The Wisconsin Court of Appeals stopped short of considering what was meant by "county infirmary".

The Court of Appeals had concluded that that the reversionary interest of the Amery Development Corporation had been extinguished because "within two years of the conveyance the county commenced construction of " a nursing home".

Suffice it to say, the County has never operated Golden Age Manor as a "county infirmary." As such, our office is of the opinion that the statutory provisions applicable to counties that operate infirmaries lack relevance to the County or the Golden Age Manor Nursing Home. Those statutory provisions are specifically Sections 46.18(13), 49.72 - 49.729.

Certainly, Section 46.18(1) applies to counties that operate residential care institutions which are licensed and regulated under Chapter 50 and elsewhere. A county operated skilled care nursing facility, like the Golden Age Manor Nursing Home, is such a residential care facility. By resolution that incorporated home rule, Section 59.03, the Golden Age Manor Governing Committee has been created and designated to function as the board of trustees called for in Section 46.18(1).

Question 1:

The first question involves an interpretation of "special purpose". Article XI, Section 3a of the Wisconsin Constitution, Wisconsin Statute Section 66.1025 and cases interpreting those provisions concern the issue of disposition of lands. Such legal authorities afford little guidance on the meaning of "special purpose". Similarly, our office knows of no Attorney General opinion that interprets Section 66.1025 or its predecessors in regard to the breadth or limitation meaning of "special purpose."

Our office has located several legal authorities, although remotely relevant on the issue, that seemingly conflict with each other. First, in the opinion of the Attorney General found at OAG 40-87 (June 13, 1987), it is concluded that once a county acquires property for a valid public purpose, the county may continue to own, manage and maintain the property when that specific purpose for which such property was originally acquired ceases. The Attorney General stated that a municipal government could lawfully own, manage and maintain property for an altogether different public purpose than the specific public purpose for which such property was acquired. The Attorney General stated that the manner in which public property is operated during one specific public use and another is largely within the discretion of the governing body involved. Specifically, our office asks whether the conclusions reached in this particular opinion hold true when under the application to lands subject to Section 66.1025.

Second, in the opinion of the Attorney General found at OAG 1-08 (February, 14, 2008), relative to gifts to the county human service department, it is stated that a restriction by a donor to the effect of gift, grant or donation can only be used by one of the specified boards must be honored if the county board decides to accept a donation containing such restriction. The Attorney General relied on the Wisconsin Supreme court case of Nelson v. Madison Lutheran Hospital, 237 Wis. 518, 297 N.W. 424 (1941). In Nelson, the court considered subscriptions

made and paid for a specific purpose of building a sanatorium. The project had failed and was abandoned. In a discussion of the cy pres doctrine and charitable trusts, the Court held that the subscriptions had to be returned even in absence of express conditions or provisions of a reverter. The Court used similar language found in Article XI, Section 3a of the Wisconsin Constitution and Section 66.1025, stating that where it must be taken as a fact that it is impossible or impracticable to carry out the trust and the settlors manifested no intention to devote the property to general charitable purposes, a resulting trust arises regardless of the absence of conditions or of a reverter clause.

While the Nelson decision is applicable to charitable trust cases, its applicability to Section 66.1025 is remote. Additionally, in Sollman, the Court of Appeals resolved the issue of reverter. The dispositional commands of Section 66.1025 supersede in any event.

OAG 1-08 and OAG 40-87 are in opposition. A reading of OAG 40-87 leads to a reasonable conclusion that it is permissible to use lands for a public purpose different from the special purpose for which such lands may have been donated. A reading of OAG 1-08 seems to indicate otherwise. Yet, neither opinion goes so far as to indicate that the acts sets forth in Section 66.1025 are conditions precedent to use donated lands consistent with the conclusions reached in OAG 40-87.

Question 2:

Our office knows of no case law or Attorney General opinion that considers Section 46.18(13). Our office is of the opinion that Section 46.18(13) does not apply to counties that operate a licensed skilled care nursing facility on property which the county received on a donation which was made on the condition that the land be devoted to the special purpose of a county infirmary. Rather, our office is of the opinion that Section 46.18(13), in its express language is clear and unambiguous. Section 46.18(13) is limited to counties that do operate a county infirmary. Section 46.18(13) would not apply to counties that operate other types of residential care facilities to which other subsections of Section 46.18 may apply.

Our office is of the opinion that the operative language of Section 46.18(13) is constitutionally suspect. In an absolute sense the statutory provision would cause counties to place moneys into a reserve fund contrary to Article VIII, Section 5 of the Wisconsin Constitution, as recognized by the Attorney General in the opinion found at OAG 18-87 (April 7, 1987) and the court decisions cited therein. Equally, the provisions of Article XI, Section 3a of the Wisconsin Constitution and Section 66.1025 may not be construed in such a manner so as to provide a waiver of the other constitutional provisions.

Additionally, our office is unaware of any statutory provision that requires counties to adopt capital improvement plans. Certainly, the adoption of such plans makes good business sense. Nonetheless, absent an identifiable capital expenditure, placing moneys into a building reserve is inappropriate.

Please contact me at 715-485-9282 should you require additional information in analyzing our request and providing a response. Our office looks forward to your opinion. Thank you for your consideration.

Sincerely,

Jeffrey B. Fuge
Corporation Counsel/Child Support Director

C: Mr. Dana Frey, County Administrator
Mr. William Johnson, County Board Chairperson
Ms. Kathryn Keinholz, Chairperson of the Golden Age Manor Governing Committee