



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 18, 1992

To All Bond Counsel:

Re: Hospital Districts, Public Property Finance Act,  
Indemnity of Conduit Issuers, Other Matters

Several positions have been adopted by the Public Finance Section since the last general letter to All Bond Counsel.

1. Hospital District Contractual Obligations I. A number of hospital district special acts, as well as Section 286.129 of the Health & Safety Code, limit the ability of the district to incur debt. The limitation generally provides that, except for revenue bonds, general obligation bonds and construction contracts, the district may not incur debt other than from revenues on hand or to be on hand in the current and immediately following fiscal year. Under San Saba County v. McCraw, 108 SW2d 200 (Tex. 1937), the "vital conditions and safeguards" of the statute pursuant to which a district was created become part of the contract with the voters. Thus, it appears to us that such districts cannot incur debt under the Public Property Finance Act. (Such districts would appear to be able to use the Public Property Finance Act for subject-to-appropriation financings, however.)

2. Hospital District Contractual Obligations II. Hospital districts created under Chapter 281 of the Health & Safety Code cannot directly levy a tax for contractual obligations. (These districts do not have the problem discussed in No. 1 above.) Taxes for the payment of bonds and for operations and maintenance for these districts are levied by the county commissioners court. It is our position that the taxes for contractual obligations must also be levied by the commissioners court. Thus, in addition to the district's resolution authorizing the issuance of the contractual obligations, there must also be a commissioners court order levying the tax for their payment.

3. Indemnity of Non-Profit Issuers. For bond issues under the Development Corporation Act, the Health Facilities Development Act, the Housing Finance Corporations Act (multi-family) and similar financings involving a non-profit corporation and a private user, we now require that the issuer and its sponsoring unit be indemnified against all losses except those resulting from their

own wilful misconduct, bad faith or fraud. While some counsel have expressed a belief that these parties should not be indemnified for their gross negligence, our position is that the issuer and its sponsoring unit should not be exposed to liability based on a standard or degree of care. We think that non-profit issuers and their sponsoring units should have liability only for knowing or intentional wrongdoing, given the nature of the role they perform. We now agree, however, that the situation is different for pollution control financings where the issuer is a governmental entity with, presumably, the resources to make its own decision as to whether to take the risk with respect to gross negligence. Therefore, for such financings by those issuers, the indemnity provision may also exclude claims or losses resulting from the gross negligence of the issuer.

4. Indemnity of Trustees, Banks, etc. As you know, in traditional financings we do not permit trustees, paying agents and similar service providers to be indemnified (i) except to the extent provided by law, or (ii) for their negligence. In conduit financings we have allowed indemnity for the negligence of such parties if such indemnity is solely to the extent it comes from the user or from the trust estate pledged to the payment of the bonds. However, this does not apply to student loan bonds or to single family mortgage bonds. In those instances, the money available for indemnity is public money (see Texas Att'y Gen. Open Records Decisions Nos. 268 (1981) and 601 (1992)) and cannot be used to indemnify a private party for its negligence.

5. Single Family Housing Bonds. Please note that we have a requirement for a commitment fee from lenders to cover the full amount of the bond issue. This fee must be in the minimum amount of 0.5% of the allocation to each lender, and cannot be subject to reimbursement by the issuer or any other party. This requirement also applies to refundings which provide money for new loans.

6. Paying Agent/Registrar Agreements. As most of you are aware, we have been requiring that termination clauses in these agreements, if they have a termination clause, must not permit the termination of the agreement until a successor has been appointed and has accepted the appointment.

7. Reimbursement of Expenditures Prior to Issuance. We require that the issuer provide evidence that it intended to reimburse itself from a future borrowing prior to making the expenditures for which the issuer is planning to reimburse itself from bond proceeds, as now permitted for most purposes by section 7(b) of Article 717k-6, Tex. Rev. Civ. Stat. Ann. For tax-exempt issues, action by the governing body which satisfies federal tax law requirements will generally satisfy our requirements.

8. Use of Contractual Obligations to Purchase Equipment Being Lease-Purchased. It has been our position that contractual obligations could be used to acquire title to personal property which the governmental entity had obtained pursuant to a lease-purchase agreement only where title had not purported to have already passed to the governmental entity. Thus, in situations where the agreement purported to pass title immediately, with the vendor retaining only a security interest or other lien, we felt the use of contractual obligations was problematical. It is now our view, however, that the Public Property Finance Act permits the use of contractual obligations to purchase whatever residual property interest the vendor (or assignee) retains in the personal property. Thus, we will not require a showing that "title" has not passed to the governmental entity. There will be a requirement that there be a sum certain provided for in the agreement for pre-paying the agreement or buying out the vendor's remaining interest in the personal property. We will require appropriate certifications as to such, including the amount required, and will also require the standard certifications as to the property, but will not review the agreement itself.

9. Interest Rate Swaps. Since the authority to enter into an interest rate swap or similar agreement is found in article 717q, Tex. Rev. Civ. Stat. Ann., a swap or similar agreement must be entered into, or at least provided for, at the time of issuance of bonds. (See Section 6 of Article 717q.) However, several questions remain open as to the scope of the ability of an issuer to enter into a swap or similar agreement subsequent to the issuance of the bonds and the authority of this office to approve such subsequent agreements. Your comments on this matter are invited.

10. Combined Interest and Sinking Funds - Tax Bonds as Parity Bonds. It has been our unofficial view that taxes are levied for each tax bond issue and that each issue is secured by the proportionate amount of taxes in the combined I&S Fund, and, further, that tax bonds issued after the levy of taxes are not secured by tax money raised by that levy. That is, tax bonds are not parity bonds. However, we understand there are differing views on this issue in the bond community. Thus, your comments on this matter are also requested, and we will refrain from taking an official position for the time being.

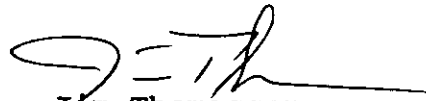
11. Utility Districts. As you know, certain districts are subject to the City of Houston consent ordinance requirement of uniform annual debt service savings for refundings. It is our position that this requirement is met by having a spread from the greatest annual debt service saving to the least annual debt service saving of not more than \$5000 plus the interest thereon.

(Debt service savings for the first year do not come within this requirement if the debt service payment timing is not compatible with so doing.) Also, please note that (for those issuers subject to the jurisdiction of the Texas Water Commission) the bond resolution must provide for Water Commission approval prior to the expenditure of surplus bond proceeds, if such approval is required at that time.

As most of you know, Sheela Rai was appointed Assistant Chief of the Public Finance Section last March. Also, many of you have had contact with Tom Griess, who joined us this past December, and on September 1 we were joined by Marsha Ozer. For the record, though already well known I'm sure, the other attorneys in the section are Teryl Whitfield, Lynn Stuck and Barron Wallace. Our secretarial staff has been augmented by the arrival of Nancy Leasure, who joins Jean Inman (formerly Jean Hamil) and Susan Colvin.

Finally, our secretaries tell us that the occasional new transcript is still being mailed to our street address, 411 W. 13th Street. This address is to be used only for Federal Express or other express delivery, since the Postal Service does not deliver mail to this building. Transcripts and other mail addressed to 411 W. 13th Street are generally substantially delayed in reaching us.

Sincerely,



Jim Thomassen  
Assistant Attorney General  
Chief, Public Finance Section

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