

CITIES: May not erect buildings with the primary object of renting same when completed.

September 2, 1938

Mr. Joe Martin Carter, Sec.
Chamber of Commerce
Doniphan, Missouri

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Dear Mr. Carter:

We wish to acknowledge your request for an opinion under date of August 17, 1938, as follows:

"The City Council, backed by the Chamber of Commerce, is considering submitting a bond issue (within the legal limit) for a hospital within the Doniphan City limits.

"It is possible to get a P.W.A. Loan and Grant for this purpose, if bonds can be voted. On completion, the hospital will be rented for enough to make it almost self-liquidating, but not entirely so.

"Please advise us if a fourth class city, such as Doniphan, can legally vote bonds for this purpose. If not, we will go no further because, of course, the bonds would not be saleable."

From your request, the only question presented is whether Doniphan, Missouri, a city of the fourth class, has the power to vote bonds for a hospital and supplement it with a Federal grant for the purpose of building a hospital and renting to private interests.

McQuillin on Municipal Corporations, Vol. 3, Section 1218, page 721, points out that a municipal corporation cannot erect a building as an investment as follows:

"If it has more room in such a building than is needed for municipal purposes, it may rent out a portion of it; though a municipal corporation cannot erect buildings as an investment. And where a town erects a new municipal building, thus leaving useless an old one, it may repair the old one for the purpose of renting it. While it would be legal if the primary purpose were to invest money in a building to rent, the town having no longer any use for the building need not sacrifice it, but may do what one might prudently do with such a building."

And in the case of *Bates vs. Bassett*, 60 Vt. 530, 15 Atl. 200, l.c. 202, the court, in pointing out that a town has no right as a primary purpose to erect buildings to rent, said:

"The town has no right as a primary purpose to erect buildings to rent; but if, in the erection of its hall for its proper municipal uses, it conceives that it will lighten its burdens to rent part of its building, whereby an income is gained, no sound reason is suggested why it may not do so. The true distinction drawn in the authorities is this: If the primary object of a public expenditure is to subserve a public municipal purpose, the expenditure is legal, notwithstanding it also involves as an incident an expense, which, standing alone, would not be lawful. But if the primary object is not to subserve a public municipal purpose, but to promote some private end, the expenditure is illegal, even though it may incidentally serve some public purpose. This is the test where good faith is exercised in making the expenditure. If a public purpose is set up as a mere pretext to conceal a private purpose, of course the expenditure is illegal and fraudulent."

Mr. Joe Martin Carter

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From the foregoing, we are of the opinion that Doniphan, Missouri, a city of the fourth class, may not vote bonds for a hospital and supplement it with a Federal grant for the purpose of building a hospital which, when constructed, would be rented to private interests.

Respectfully submitted

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
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