September 12, 1974

JOANNE E. FINLEY, M.D., *Commissioner*
*New Jersey State Department of Health*
Health & Agriculture Building
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION NO. 8—1974

Dear Dr. Finley:

The Executive Director of the New Jersey Health Care Facilities Financing Authority has asked for an opinion on the constitutionality of a proposed amendment to the Health Care Facilities Financing Law, N.J.S.A. 26:2I-1 *et seq.*, which would empower the Authority to finance or refinance through the public sale of bonds construction projects undertaken by proprietary health care facilities. The present statute empowers the Authority to finance or refinance public and private non-profit health care facility construction projects. The Authority has requested advice as to whether an amendment to include proprietary health care facilities within the purview of the act would be violative of Article VIII, §II, par. 1 and Article VIII, § III, par. 3 of the 1947 New Jersey Constitution.

In 1972 the Legislature declared "that a serious public emergency exists affecting the health, safety and welfare of the people of the State" because of the obsolescence and inadequacy of the State's hospital and other health care facilities. N.J.S.A. 26:2I-1. In order "to encourage the timely construction and modernization, including equipment, of hospital and other health care facilities," N.J.S.A. 26:2I-1, the Legislature created the Authority in the State Department of Health and declared it to be "a public body corporate and politic, with corporate succession" and "an instrumentality exercising public and essential governmental functions." N.J.S.A. 26:2I-4.

The Authority has been empowered "to borrow money and to issue bonds," N.J.S.A. 26:2I-5(e), for "participating hospitals." N.J.S.A. 26:2I-6. The term "participating hospitals" is clearly and unequivocally limited to either governmental institutions or "non-profit [institutions] providing hospital or health care service to the public." N.J.S.A. 26:2I-3. The projects to be financed by the Authority must be in conformity with the Health Care Facilities Planning Act (N.J.S.A. 26:2H-1, *et seq.*), N.J.S.A. 26:2I-6; as such, they must have been the subjects of certificates of need pursuant to N.J.S.A. 26:2H-7 and be licensed prior to operation pursuant to N.J.S.A. 26:2H-12(a). N.J.S.A. 26:2I-28. The Authority may construct, acquire, operate and manage financed projects for the use and benefit of the participating hospital and its patients, employees and staff. N.J.S.A. 26:2I-28.

The bonds issued by the Authority may not "be deemed to constitute a debt or liability of the State or of any political subdivision thereof other than the authority, nor a pledge of the faith and credit of the State or of any such political subdivision, other than the authority," and the face of the bonds must bear a statement to that effect. N.J.S.A. 26:2I-9. In addition, the "issuance of bonds...shall not directly or indirectly or contingently obligate the state or any political subdivision thereof to levy or to pledge any form of taxation whatever therefor." N.J.S.A. 26:2I-9. The Authority is specifically limited to extinguishing its obligations which have arisen through the sale of bonds by securing for the bondholders the "rates, rents, fees and charges for the use of and for the services furnished or to be furnished by each project...." N.J.S.A. 26:2I-10.

The issue raised by the Authority is whether the inclusion of proprietary health care facilities within the definition of "participating hospitals" found in N.J.S.A. 26:2I-3 and the issuance of bonds on behalf of same would be repugnant to the following provisions of the New Jersey Constitution:

Article VIII, § II, par. 1 provides:

> "The credit of the State shall not be directly or indirectly loaned in any case."

Article VIII, § III, par. 3 provides:

> "No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever."

When considering whether a specific governmental program conflicts with these constitutional provisions, the purpose of the program must be considered. Our courts have consistently held that the purpose of the program must be a public purpose. *N.J. Sports & Exposition Authority v. McCrane*, 61 N.J. 1, 15 (1972); *New Jersey Mortgage Finance Agency v. McCrane*, 56 N.J. 414, 420 (1970); *Clayton v. Kervick*, 52 N.J. 138, 156 (1968); *Roe v. Kervick*, 42 N.J. 191, 207 (1964); *Whelan v. N.J. Power & Light Co.*, 45 N.J. 237 (1965); *Lynch v. Borough of Edgewater*, 8 N.J. 279, 291, (1951). Declarations of a public purpose by the Legislature, as found in N.J.S.A. 26:2I-1, raise a strong presumption that the act in fact does effectuate a public purpose. *N.J. Sports & Exposition Authority v. McCrane, supra* at 8; *Roe v. Kervick, supra* at 229.

In *Roe v. Kervick, supra,* our Supreme Court discussed the general parameters of the concept of public purpose:

> ". . .The concept of public purpose is a broad one. Generally speaking, it connotes an activity which serves as a benefit to the community as a whole, and which, at the same time is directly related to the functions of government. Moreover, it cannot be static in its implications. To be serviceable it must expand when necessary to encompass changing public needs of a modern dynamic society. Thus it is incapable of exact or perduring definition. In each instance where the test is to be applied the decision must be reached with reference to the object sought to be accomplished and to the degree and manner in which the object affects the public welfare. *Hoglund v. City of Summit, supra* (28 N.J. at p. 549); *DeArmond v. Alaska State Development Corporation*, 376 P.2d 717 (Alaska Sup. Ct. 1962); *City of Frostberg v. Jenkins*, 215 Md. 9, 136 A.2d 852, 855 (Ct. App. 1957); *Opinion to the Governor*, 76 R.I. 249, 69 A.2d 531 (Sup. Ct. 1949); *Rhyne Municipal Law*, § 15-4, p. 341 (1957)." 42 N.J. at 207.

The court enumerated several criteria which must be met before a purpose can validly be considered a public one. The transaction must be contractual and the public must receive a substantial consideration in addition to the repayment of the obligation with interest. The primary purpose of the contract must be the accomplishment

of the public purpose, and any private benefit must be incidental and subordinate. If these criteria are met, then "[such] a transaction does not consitute a forbidden loan within the contemplation of *Article VIII* of the Constitution." *Roe v. Kervick, supra* at 218.

Numerous and varied governmental programs have been held to be imbued with a public purpose. *N.J. Sports & Exposition Authority v. McCrane, supra* (construction, operation and maintenance of a sports complex in the Hackensack meadowlands); *Levin v. Town Committee, Bridgewater Tp.*, 57 N.J. 506 (1971) (elimination of a blighted area); *New Jersey Mortgage Finance Agency v. McCrane, supra* (provision of mortgage funds by an independent state agency which sold bonds to raise capital and then reloaned the capital to private lending institutions at less than the prevailing rate.; *Brody v. City of Millville*, 120 N.J. Super. 1 (App. Div. 1972); *aff'd* 62 N.J. 244 (1973) (municipal operation of an airport and municipal financing, construction and leasing of a building to a private firm engaged in aircraft engine repair).

In *Clayton v. Kervick, supra*, the court considered whether the Education Facilities Authority, created by N.J.S.A. 18A:72A-1, *et seq.*, violated Article VIII, § II, par. 1 and Article VIII, § III, par. 3 of the New Jersey Constitution. The Educational Facilities Authority was empowered, *inter alia*, to construct projects for participating public and *private* educational institutions through the public sale of bonds and to enter into leasing arrangements with self-liquidating goals, in much the same manner as the Authority herein has been empowered.* The court held that, in light of the criteria as set forth in *Roe v. Kervick, supra*, the legislative plan embodied in the Educational Facilities Authority Law did not violate either of the aforementioned constitutional provisions, even though aid would be given to private nonsectarian educational institutions. The court was convinced that the law in question was designed to further a public purpose "without creating any state debt or liability and without granting private benefits except to the incidental extent necessay to achieve the public purpose." *Clayton v. Kervick, supra* at 156. In addition, the court noted the "safeguards and controls contemplated by the act (N.J.S. 18A:72A-5; N.J.S. 18A:72A-30)," along with other licensing and operating requirements for educational institutions, all of which reduced the danger "that public funds may be diverted to private profit-making." *Clayton v. Kervick, supra* at 156. See also *New Jersey Mortgage Finance Agency v. McCrane, supra* at 424.

In light of the holding of the court in *Clayton v. Kervick, supra*, dealing with a statute very similar to the proposed amendment to N.J.S.A. 26:2I-1, *et seq.*, it is clear that the New Jersey Health Care Facilities Financing Authority Law will continue to meet the criteria set forth by the New Jersey Supreme Court in *Roe v. Kervick, supra*. There can be no question that there is a valid public purpose in the provision of adequate financing to ensure the people of New Jersey the benefits of health care of the highest quality to be provided efficiently and promptly at a reasonable cost. N.J.S.A. 26:2H-1. Thus, the public will receive a substantial consideration from the issuance of bonds for the projects of proprietary health care facilities over and above the mere repayment of the obligation with interest. Any private benefit to be derived by a proprietary health care facility from the issuance of bonds would be incidental and subordinate to the achievement of the public purpose to be derived from the Authority's financing and as such would be permissable. Lastly, the control exercised by the Authority over the project itself under N.J.S.A. 26:2I-5 and N.J.S.A. 26:2I-28, in addition to the licensing and other requirements of N.J.S.A. 26:2H-1, *et seq.*, and N.J.S.A. 26:2J-1, *et seq.*, will serve to reduce the danger that public funds will be diverted for private gain.

You are therefore advised that an amendment to the Health Care Facilities Financing Authority Law to provide for the financing or refinancing of proprietary health care facility construction projects through the public sale of bonds by the Authority would not be in derogation of the provisions of Article VIII, § II, par. 1 or Article VIII, § III, par. 3 of the 1947 New Jersey Constitution.

Very truly yours,
WILLIAM F. HYLAND
*Attorney General*

By: JONATHAN WEINER
*Deputy Attorney General*

* The statues creating the Authority herein and the Educational Facilites Authority, and the resultant responsibilities and authorities of each, are strikingly similar. For example, both are public bodies corporate and politic and instrumentalities exercising public and governmental functions (N.J.S.A. 26:2I-4 and N.J.S.A. 18A:72A-4); both may borrow money and issue bonds which are not to be deemed debts or liabilities of the State or a pledge of the faith and credit of the State (N.J.S.A. 26:2I-5, 7 and 9 and N.J.S.A. 18A:72A-10); both may fix rates, rents, fees and charges to pay the cost of maintaining the project and to pay the principal and interest on the bonds issued on the project (N.J.S.A. 26:2I-10 and N.J.S.A. 18A:72A-11); and both may construct, operate and manage projects for the use and benefit of the participating entity and its students, faculty and staff (N.J.S.A. 26:2I-28 and N.J.S.A. 18A:72A-30).

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September 13, 1974

JOHN P. CALLAHAN, *Director*
Division of State Auditing
Office of Fiscal Affairs
State House
Trenton, New Jersey

FORMAL OPINION NO. 9—1976

Dear Director Callahan:

You have requested an opinion concerning the appropriate disposition of property belonging to inmates of the New Jersey Home for Disabled Soldiers who die intestate without having been survived by any heirs at law or next of kin. The financial post-audit report of the New Jersey Memorial Home for Disabled Soldiers at Menlo Park has recommended that unclaimed monies be transferred to the State Treasurer as authorized by N.J.S.A. 30:4-132. This statute provides as follows:

> "Unclaimed personal property of deceased patients, and of other former patients of an institution supported in whole or in part by state funds, shall be held at such institution, awaiting claim therefor, for a period