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ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

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FILE NO. 81-042

FINANCE:

Payment of Surplus Revenues
Generated by University
Facilities Revenue Bonds,
Series of 1970 and 1970A

Honorable Robert G. Cronson
Auditor General
State of Illinois
509 South Sixth Street, 1st Floor
Springfield, Illinois 62701

Dear Mr. Cronson:

I have your letter in which you inquire whether section 6a-4 of "AN ACT in relation to internal auditing in State government" (Ill. Rev. Stat. 1979, ch. 127, par. 142a4) requires that surplus revenues from University Facilities Revenue Bonds, Series 1970 and 1970A, which were issued by the Board of Regents pursuant to the provisions of the Board of Regents' Revenue Bond Act of 1967 (Ill. Rev. Stat. 1979, ch. 144, par. 351 et seq.), must be deposited in the University Income Fund in the State treasury. You advise that you have concluded

Honorable Robert G. Cronson - 2.

that the only lawful disposition of the funds in question is to deposit them in the University Income Fund. I agree with your conclusion.

Section 6.02 of the resolutions authorizing the issuance of University Facilities Revenue Bonds, Series 1970 and 1970A, requires the Board of Regents to establish a Revenue Fund upon the delivery and payment of any of the authorized bonds. It further requires the transfer of the surplus net revenues of the existing university facilities and the gross revenue of the university facilities after outstanding bonds have been paid in accordance with their terms, into that Revenue Fund.

Section 6.07 of the same resolutions provides that surplus revenues in the Revenue Fund "may be used for any lawful purpose as said Board, by resolution, shall direct". You have pointed out that the Board of Regents has been transferring the surplus generated by the 1970 and 1970A series bonds to prior bond series which have current deficits. You have also advised that no additional bonds have been issued under the provisions of article 8 of the two resolutions.

University Facilities Revenue Bonds, Series of 1970 and 1970A, were issued pursuant to the authority of the Board of Regents' Revenue Bond Act of 1967 (Ill. Rev. Stat. 1979, ch. 144, par. 351 et seq.). Section 4(A) of that Act (Ill. Rev.

Honorable Robert G. Cronson - 3.

Stat. 1979, ch. 144, par. 354A) provides that "the Board shall have power, and is hereby authorized from time to time, to issue negotiable bonds (i) to acquire any one project, or more than one or any combination thereof, for each such University, * * * ."

According to section 1.01(c) of the resolution of the Board of Regents which authorized the issuance of \$11,800,000 in University Facilities Revenue Bonds, Series of 1970, those bonds were issued for the construction of a new University Union-Auditorium Building at Illinois State University. According to section 1.01(c) of the resolution which authorized the issuance of \$1,600,000 in University Facilities Revenue Bonds, Series of 1970A, those bonds were issued for the construction of new student housing facilities, consisting of 50 one-bedroom units and 50 two-bedroom units, at the same University.

Section 6.01 of each of the aforementioned resolutions provides for the transfer into the Revenue Fund of the surplus net revenues of the existing university facilities and the gross revenues of the university facilities, after outstanding bonds have been paid in accordance with their terms. It further provides that "All moneys and investments in said Revenue Fund shall be used and held for use only in the manner and in the order as specified in Sections 6.03, 6.04, 6.05, 6.06, and 6.07 hereof". Sections 6.03 through 6.07 create certain accounts into which certain amounts of money in the Revenue Fund are to

Honorable Robert G. Cronson - 4.

be transferred. The priority of payment and the purposes for which the money can be used are thereby established. The language about which you inquire, which appears in section 6.07 of each of the resolutions, provides as follows:

"One-half of all moneys remaining in the Revenue Fund on June 30, 1971, and at the end of each succeeding Fiscal Year thereafter, after all transfers as hereinabove required have been made, shall be transferred by the Treasurer to the Bond Reserve Account until there is on deposit therein the maximum amount specified in Section 6.05 hereof and the balance shall be deemed Surplus Revenues, and may be used for any lawful purpose as said Board by resolution shall direct." (Emphasis added.)

In determining the lawful purpose for which the surplus revenues may be used, not only the terms of the bonds and the resolutions authorizing them must be considered, but also the law at the time of the issuance of the bonds. In Giese et al. v. Engelhardt et al. (N.D. Sup.Ct. 1970) 175 N.W. 2d 578, 585, the court, in construing the terms of a surety bond, stated:

"The authorities hereafter referred to establish that a contract, executed by a public agency pursuant to statute, embody and contain the terms of the statute and, if the contract and statute conflict, the latter must govern. The obligations on a bond required by statute are measured by the particular statute requiring the bond, together with other applicable statutes. In other words, the provisions of the statute are read into the bond.

The law of land in existence at time contract is entered into forms part of [the] contract as if its provisions were expressly incorporated therein. Ireland's Lumber Yard v. Progressive Contractors, Inc. 122 N.W.2d 554 (N.D.1963).

Generally, contracting parties enter into their contract in reference to existing law, and all relevant existing law at the time of the contract becomes a part of the contract and must be read into it. Lillethun v. Tri-County Elec. Co-op,

Honorable Robert G. Cronson - 5.

Inc., 152 N.W.2d 147 (N.D.1967).

* * *

(See, also, 1971 Ill. Att'y Gen. Op. 1.)

The legal principle set forth above is also expressed in Hindu Incense Manufacturing Co. v. MacKenzie (1949), 403 Ill. 309, 392. Also, in The Illinois Bankers Life Association v. James T. Collins (1930), 341 Ill. 548, 552, the court stated:

* * *

A basic rule of the construction of contracts and a material part of every contract is that all laws in existence when the contract is made necessarily enter into and form a part of it as fully as if they were expressly referred to or incorporated into its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement. * * *

* * *

At the time of the adoption of the resolutions authorizing issuance of the revenue bonds, Series of 1970 and 1970A, section 6a-4 of "AN ACT in relation to State finance" (Ill. Rev. Stat. 1969, ch. 127, par. 142a-4) provided in pertinent part:

"(1). The following items of income received by the Universities under the jurisdiction of the Board of Regents of the Regency Universities System for general operational and educational purposes shall be paid into the state treasury without delay not later than 10 days after the receipt of the same, without any deduction whatever and shall be covered into a special fund to be known as the Board of Regents Income Fund: tuition, laboratory and library fees, excess income from auxiliary enterprises and activities as provided in paragraph (2) of this Section, and all other income arising out of any activity or purpose not specified in paragraphs (2) and (3). The General Assembly shall from time to time make appropriations payable from the Board of Regents Income Fund for the support and improvement of such State Colleges

and Universities.

* * * Any income derived from such auxiliary enterprises or activities which is not necessary to their support, maintenance, or development shall not, however, be applied to any general operational or educational purpose but shall be paid into the State Treasury as provided in paragraph (1) of this Section.

* * *

The above provision, which is in force and effect at the present time (Ill. Rev. Stat. 1979, ch. 127, par. 142a-4), clearly requires excess or surplus income from auxiliary enterprises and activities to be paid into the Board of Regents Income Fund in the State treasury. The General Assembly then makes appropriations from this fund for the support of universities under the jurisdiction of the Board of Regents. An interpretation of section 6.07 of the resolutions permitting the Board of Regents to use the surplus revenue for any purpose it desires, including the transfer of such surplus to prior bond series which have current deficits, would be improper, in my opinion, since such transfers would be contrary to the express requirement of section 6a-4 of "AN ACT in relation to State finance" (Ill. Rev. Stat. 1979, ch. 127, par. 142a-4) that unpledged excess or surplus revenue from auxiliary enterprises and activities be paid into the Board of Regents Income Fund of the State treasury. Section 6a-4 was a part of the law at the time of the adoption of the bond resolutions in question, and, therefore, its provisions must be read into the resolutions

Honorable Robert G. Cronson - 7.

as if they were expressly incorporated therein.

In conclusion, I am of the opinion that the un-pledged surplus revenue from the 1970 and 1970A Board of Regents' Revenue Bond Series must be deposited in the Board of Regents Income Fund in the State treasury.

Very truly yours,

A T T O R N E Y G E N E R A L