



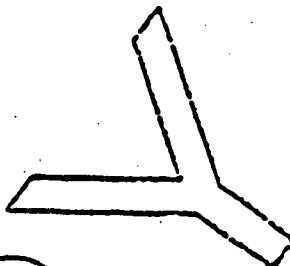
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ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

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FILE NO. 82-002

HIGHWAYS:
Disposition of Toll Highway
Authority Construction Fund
When It Is Closed



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Gentlemen:

I have your letters requesting an opinion on the use and disposition of moneys held by the State Treasurer in the Construction Fund of The Illinois State Toll Highway Authority. The Construction Fund was established under the provisions of article VI of a Bond Resolution adopted by the Illinois State Toll Highway Commission, the Authority's predecessor, on October 25, 1955. The Bond Resolution author-

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ized the issuance, from time to time, of bonds in the aggregate principal amount of \$415,000,000. Section 14 of "AN ACT in relation to the construction, operation, regulation and maintenance of toll highways, etc." (Ill. Rev. Stat. 1979, ch. 121, par. 314a39) created the Illinois State Toll Highway Commission and authorized it, by resolution, to issue and sell bonds from time to time to finance the acquisition, construction and improvement of any toll highway. Similar power was conferred on the Authority by section 17 of "AN ACT in relation to the construction, operation, regulation and maintenance of a system of toll highways, etc.", approved August 7, 1967. (Ill. Rev. Stat. 1979, ch. 121, par. 100-17.) Section 33 of the same Act (Ill. Rev. Stat. 1979, ch. 121, par. 100-33) transferred all the duties, obligations, functions, powers, property, rights, privileges, interests, and assets of the original Commission to the Authority.

The Acting Executive Director of the Authority has stated that there is currently approximately \$34,000,000 in the Construction Fund. He advises that all the Toll Highways authorized by the Bond Resolution pursuant to the statute, have been completed. All such highways are defined as "The Facility" in the Bond Resolution. Two actions have been brought against the Authority by certain construction contractors and landowners on accounts allegedly owed to them on projects financed through the proceeds of the Authority's

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bond issues. The Authority has suits pending against the same construction contractors on counterclaims arising out of the construction contracts and the work performed thereunder. The total of the claims and of the counterclaims is very large.

The Auditor General requested an opinion on whether the balance currently in the Construction Fund, when that fund is closed in accordance with the Bond Resolution, is payable entirely to the Sinking Fund to be used for retiring bonds pursuant to section 5.04, or whether any portion of the balance of the Construction Fund can be paid to the General Reserve Fund and used for purposes other than the retirement of bonds. The Acting Executive Director of the Authority subsequently joined in the Auditor General's request and raised a related question concerning the proper distribution of certain earmarked moneys in the Construction Fund.

The Construction Fund currently includes approximately \$8,000,000 which has been earmarked, pursuant to section 6.04 of the Bond Resolution, for the payment of interest on bonds during the period of construction. The earmarked interest moneys, are derived from the 1970 East-West Extension bond issue. The Acting Executive Director of the Authority has advised that construction of the entire Facility, as designated in section 2.02 of the Bond Resolution, has been completed and the Facility is now operating and producing revenues from which bond interest is currently being paid. The Acting

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Executive Director inquired whether the earmarked interest moneys now in the Construction Fund can also be transferred to the General Reserve Fund and used for purposes other than the retirement of bonds or the payment of interest thereon.

In answer to the first question, it is my opinion that the balance in the Construction Fund, other than the \$8,000,000 earmarked for interest, is payable, when the fund is closed, entirely to the Sinking Fund to be used for the retirement of bonds.

In answer to the second question, it is my opinion that the approximately \$8,000,000 in the Construction Fund earmarked for the payment of interest on bonds during the period of construction can be used only for paying interest on the bonds and may not be paid either to the Sinking Fund to retire the bonds or to the General Reserve Fund for any other purpose.

Section 1.02 of the Bond Resolution provides in pertinent part:

"Resolution To Constitute Contract. In consideration of the purchase and acceptance of the Bonds authorized to be issued hereunder by those who shall hold the same from time to time, this Resolution shall be deemed to be and shall constitute a contract between the Commission and the Holders of Bonds and coupons; * * * ."

Accordingly, both the first and the second questions raised must be decided in accordance with the provisions of the Bond Resolution construed in the light of the applicable statutes. Section 6.11 of the Bond Resolution specifies how

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the moneys in the Construction Fund shall be distributed upon completion of the Facility. The section provides in pertinent part:

"Application of Money in Construction Fund on Completion of The Facility. Not later than six months after the completion of The Facility which fact shall be evidenced to the Treasurer by a certificate stating the date of such completion, signed by the Chairman and Secretary of the Commission, and approved by the Consulting Engineers, and accompanied by an opinion of the Attorney General stating that the Commission has acquired title to, or perpetual easements for the purposes of, The Facility, and all of the property necessary and incident thereto, free from all liens or encumbrances except liens, encumbrances or other defects of title which do not have a materially adverse effect upon the Commission's right to use such lands or properties for the purposes intended or which have been adequately guarded against by a bond or other form of indemnity, that there are no unreleased mechanics', laborers', contractors' or materialmen's liens on any property pertaining to The Facility on file in any public office where the same should be filed in order to be valid liens against any party of such property, and that, in the opinion of the Attorney General, the time within which such liens can be filed has expired, the balance in the Construction Fund, not reserved by the Commission with the approval of the Consulting Engineers for the payment of any remaining part of the cost of The Facility, shall be transferred by the Treasurer to the credit of the Sinking Fund Account and applied as Revenues in accordance with the provisions of Section 5.04 * * * ."

Section 5.04 provides:

"Sinking Fund Account. It shall be the duty of the Treasurer to apply the funds to the credit of the Sinking Fund Account to the payment and redemption of the Bonds as provided by this Resolution, and subject to the provisions of subparagraph (Third) of subdivision 2 of Section 4.03, without further order and direction by the Commission, as follows:

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The Treasurer shall endeavor to purchase Bonds or portions of Bonds whether or not such Bonds shall then be subject to redemption, on the most advantageous terms obtainable with reasonable diligence, having regard to interest rate and price, such price not to exceed the principal amount of such Bonds and the interest accrued thereon to the date of payment therefor plus the amount of the premium, if any, which might on the next ensuing redemption date be paid to the holders thereof under the provisions of Section 2.03 if such Bonds or portions should be called for redemption on such date from moneys in the Sinking Fund Account; * * *."

The original Act, which created the Authority's predecessor (Ill. Rev. Stat. 1979, ch. 121, par. 314a26 et seq.), provided in section 15 thereof (Ill. Rev. Stat. 1979, ch. 121, par. 314a40) for the establishment of a sinking fund. Section 15 provides in pertinent part:

* * * * Such tolls shall be fixed and adjusted at the lowest possible rate that will provide funds sufficient * * * to pay * * * (b) the bonds and interest thereof and all sinking fund requirements and other requirements provided by resolution authorizing the issuance of the bonds as they shall become due. The tolls, and all other revenues derived from the operation of the said toll highways, except such part thereof as may be required to pay the cost of maintaining, repairing and operating the toll highway, and to provide such reserve therefor as may be provided by resolution authorizing the issuance of the bonds, shall be set aside at such regular intervals as may be provided in such resolution in a sinking fund or reserve fund, as is hereinafter provided, which fund is hereby pledged to and charged with the payment of, (1) the interest upon such bonds as such interest shall fall due, (2) the principal of the bonds, as the same shall fall due, and (3) the necessary fiscal agency charges for paying principal and interest. The use and disposition of such sinking or reserve fund shall be subject to such regulation as may be provided in the resolution authorizing the

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issuance of the bonds. Subject to the provisions of the resolution authorizing the issuance of bonds any moneys in such sinking fund in excess of an amount equal to one year's interest on the bonds then outstanding may be applied to the purchase or redemption of bonds * * * ."

When the pertinent sections of the Bond Resolution and of the statutes are applied to the first question, the answer in the plain words of the Resolution is clear. Section 6.11 specifies that after completion of the several toll roads constituting The Facility:

"[T]he balance in the Construction Fund * * * shall be transferred by the Treasurer to the credit of the Sinking Fund account and applied as Revenues in accordance with the provisions of section 5.04 * * * ."

Section 5.04 of the Resolution imposes the duty on the Treasurer to apply the funds in the Sinking Fund account:

" * * * [T]o the payment and redemption of the Bonds as provided by this Resolution * * * as follows:

The Treasurer shall endeavor to purchase Bonds * * * on the most advantageous terms obtainable * * * such price not to exceed the principal of such Bonds and the interest accrued thereon * * * ."

Nothing in section 5.04 authorizes the application of funds in the Sinking Fund Account to anything except the payment, redemption, or purchase of the principal and interest of the Bonds. The section does make such payments subject to subparagraph (Third) of subdivision 2 of section 4.03. Subparagraph (Third)(1) requires the Treasurer to credit the Sinking Fund Account with amounts sufficient in each year

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to retire the principal amount of bonds specified in the tables set forth in subparagraph (Third); and subparagraph (Third)(11) provides that purchases and redemption of bonds pursuant to section 5.04 of the Bond Resolution, "by the application of funds to the credit of the Sinking Fund Account, shall be prorated between" the principal amount of bonds originally issued and those issued subsequently. Nothing in subparagraph (Third) authorizes or permits the use of Sinking Fund moneys, or their transfer to any other accounts, for any purpose other than the payment of bonds, or their purchase or redemption pursuant to section 5.04.

Nothing in the original statute creating the Toll Highway Commission (Ill. Rev. Stat. 1979, ch. 121, par. 314a26 et seq.), and nothing in the 1967 Act (Ill. Rev. Stat. 1979, ch. 121, par. 100-1 et seq.) establishing the Toll Highway Authority and transferring all the duties and rights of the Commission to the Authority authorizes or permits the application of moneys in the Sinking Fund Account to anything except the payment, redemption or purchase of the principal and interest of the bonds. Section 19 of the 1967 Act, quoted above, expressly provides that revenues be set aside as may be provided in the applicable bond resolution in a sinking fund which is pledged to and charged with the payment of the interest as it falls due, the principal as the same shall fall due, and any fiscal agency charges for paying principal

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and interest. Subject to the provisions of the Bond Resolution "any moneys in the Sinking Fund in excess of an amount equal to one year's interest on the bonds then outstanding may be applied to the purchase and redemption of bonds".

Since litigation is now pending between the Authority and two contractors, there is a possibility that judgments might be entered against the Authority. Any such judgments would be a part of the cost of construction. Section 6.11 of the Bond Resolution requires the Authority to retain in the Construction Fund an amount to pay costs. Therefore, an amount should be retained in the Construction Fund to provide for this potential liability. After the litigation is concluded, any of this reserve not needed to pay judgments is required to be paid entirely to the Sinking Fund to be used for the purpose of retiring bonds pursuant to section 5.04 of the Bond Resolution, for the reasons that I have stated above.

The approximately \$8,000,000 in the Construction Fund earmarked for the payment of interest on bonds during the period of construction was required to be set aside for the purpose of paying interest during this period of time by the provisions of section 6.04 of the Bond Resolution, which provide in pertinent part:

"Interest Payments from Construction Fund.
The Treasurer shall promptly after receiving the proceeds of the Bonds to be issued under the provisions of Section 2.16 set aside from such

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proceeds and hold in trust solely for the payment of interest, the amount required for paying the interest which will be payable on said Bonds initially issued to and including one year after the estimated date of completion of that portion of The Facility described in subparagraphs (1), (2) and (3)(a) of Section 2.02. * * *

The Treasurer shall promptly, after receiving the proceeds of the Bonds to be issued under the provisions of Section 2.18, for the construction of that portion of the East-West Route described in subparagraph (3)(b) of Section 2.02, set aside from such proceeds and hold in trust solely for the payment of interest, the amount required for paying the interest which will become payable on said Bonds to and including one year after the estimated date of the completion of said part of the Route described in said subparagraph (3)(b) of Section 2.02.
* * *

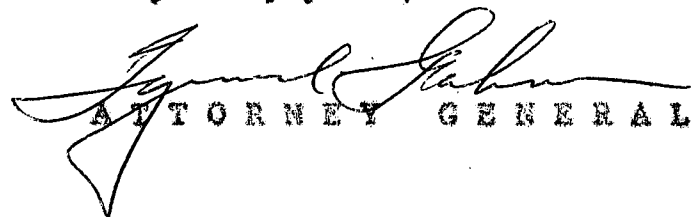
The aforesaid provisions state specifically that the money which is required to be set aside in the Construction Fund is to be used solely for the payment of interest. Subparagraph (First) of subdivision 2 of section 4.03 of the Bond Resolution provides for the crediting, from revenues of the Facility, of interest to the interest account other than interest which is to be paid from the construction account pursuant to section 6.04. Furthermore, subparagraph (c) of section 6.03 of the Bond Resolution declares that one of the items of cost of the Facility is interest on the bonds prior to the commencement of and during the construction of the Facility, and for one year after its completion. It is apparent, therefore, that the money in the Construction Fund,

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which was set aside for the purpose of paying interest, should be used for paying interest rather than paid to the Sinking Fund to retire bonds.

In conclusion, I am of the opinion that the balance in the Construction Fund, when that fund is closed, excluding the \$3,000,000 earmarked for interest, is payable entirely to the Sinking Fund to be used for the retirement of bonds. I am also of the opinion that the approximately \$3,000,000 in the Construction Fund earmarked for the payment of interest on bonds during the period of construction can be used only for paying interest on the bonds and may not be paid either to the Sinking Fund to retire the bonds or to the General Reserve Fund for any other purpose.

Very truly yours,


ATTORNEY GENERAL