

**OPINION  
71-165**

June 22, 1971            (OPINION)

Mr. Kenneth E. Raschke

Commissioner of Higher Education

RE: Higher Education - Revenue Buildings - Expenses

This is in reply to your letter of June 14, 1971, relative to House bill 1042 of the 1971 Legislative Assembly as applied to the above-captioned bond issue. You note House Bill 1042 creates and enacts sections 15-55-20 and 15-55-21 of the North Dakota Century Code. These sections require that expenses incurred in the use of each revenue-producing building or other revenue-producing campus improvement are to be payable from the gross revenues of the revenue bond project except in those instances where contracts or revenue bond indentures in existence on the effective date of the Act provide that such payments shall not be charged to the gross revenues. House Bill 1042 did not contain an emergency clause and does not become effective until July 1, 1971.

You further note that a dormitory has been under construction at North Dakota State University for several months under an interim financing program. The University has also entered into an interest subsidy agreement with the federal government for the project. The federal government prefers that the building be approximately ninety percent completed prior to the sale of the bonds.

You ask whether House Bill 1042 would apply to this bond issue if the contract for sale of the bonds has been signed by the bidder and by the State Board of Higher Education prior to July 1, 1971, although the actual delivery of the bond may not be made until after July 1, 1971.

Section 15-55-21 of the North Dakota Century Code, as enacted by House Bill 1042, provides:

"EXPENSES TO BE PAID FROM GROSS REVENUES. Expenses incurred as defined in section 15-55-20 of the North Dakota Century Code shall be payable from the gross revenues of the revenue bond project, except in those instances where contracts or revenue bond indentures in existence on the effective date of this section provides that such payments shall not be charged to the gross revenues."

Section 15-55-20 of the North Dakota Century Code, as enacted by House Bill 1042, defines "expenses incurred" to include, but not limited to, "the estimated value of heat, electricity, water, repairs, insurances, and janitorial and maintenance services provided."

As we understand the situation the trust indenture which the Board of Higher Education has executed with respect to the above project does not permit payment of certain of the above expenses of heat,

electricity, etc., where they are provided by a central plant and not separately metered. The provisions of House Bill 1042 would require that such expenses be paid from the gross revenues if House Bill 1042 is applicable.

The obvious reason the Legislature excluded from House Bill 1042 projects wherein contracts or revenue bond indentures in existence on the effective date of the Act provide that such payments shall not be charged to gross revenues was that the inclusion of such projects would have constituted a violation of contract. In this instance we understand the dormitory is under construction and that the provisions for amortizing such building were completed prior to the time of the enactment of House Bill 1042 and prior to its effective date. Furthermore the dormitory is to be ready for occupancy this fall and contracts have been entered into with students who will be living in the dormitory for the coming year. If the expenses referred to are to be included as part of the expenses which must be paid from gross revenues the amount received would not be sufficient to meet interest and principal under the present contracts. To attempt to increase the room rentals at this time might also constitute a breach of contract.

While we understand the intent of the Legislature in requiring these expenses to be paid from the revenues of the project, in order to make such projects actually self-supporting, we also recognize in the exceptions made by the Legislature the acknowledgement that prior to this time the Board had the authority under Chapter 15-55 to enter into agreements for sale of revenue bonds whereby these expenses would not be charged against the gross revenues of the project. In enacting such legislation with the exceptions thereto we do not believe the Legislature intended to place in peril a project which is nearly complete although the actual delivery of the bonds was not complete on July 1, 1971. We also realize that the present situation is not an attempt to evade the statutory requirements contained in House Bill 1042 since the dormitory in question was planned, bids let and construction started long before House Bill 1042 was ever introduced into the Legislative Assembly.

In this instance, while the bonds will not actually be delivered before July 1, 1971, the bids for the sale of such bonds will be awarded and a contract entered into prior to July 1, 1971, the effective date of the Act. Furthermore the Board has already executed a trust indenture which provides the expenses referred to will not be payable from gross revenues of the project. In our opinion the contract for sale of the bonds and the trust indenture, as well as the contract for room rentals, are "contracts or revenue bond indentures" within the meaning of section 15-55-21 as enacted by House Bill 1042 and therefore it is our further opinion that the above-captioned project would be exempt from the requirements of section 15-55-21.

HELGI JOHANNESON

Attorney General