

**OPINION
63-229**

November 19, 1963 (OPINION)

STATE BOARD OF HIGHER EDUCATION

RE: Refunding Bonds - Limitations

This is in response to your letter in which you state that the Board of Higher Education is considering refinancing about fourteen bond issues. You then ask for an opinion on the following questions:

1. Does the Board have authority to do this under existing North Dakota law, and particularly Chapter 176 of the 1963 Session Laws?
2. If the law permits refinancing, do the bond resolutions for these various issues allow it?"

The 1963 Legislature amended section 15-55-02 by Chapter 171, (Senate Bill No. 121). The section, as amended, provides as follows:

BOARD MAY BORROW MONEY AND ISSUE BONDS - CONDITIONS - BONDS TAX FREE. For the purpose of paying all or part of the cost of construction, equipment and furnishing of any such buildings or any addition to existing buildings, or in order to refund any outstanding bonds issued for such purpose the state board of higher education may borrow money on the credit of the income and revenue to be derived from the operation of the said building or buildings, and, in anticipation of such collections of such income and revenues, may issue negotiable bonds in such an amount, as in the opinion of said board, may be necessary for such purposes, all within the limits of the authority granted by the legislative assembly in each instance, and may provide for the payment of such bonds and the rights of the holders thereof as provided in this chapter. Such bonds shall be payable serially, and may be issued in one or more series, may bear such date or dates, may mature at such time or times not exceeding forty years from their date, may be in such denomination or denominations, may be in such form, either coupon or registered, may carry such registration and conversion privileges, may be executed in such manner, may be payable in such medium of payment at such place or places, may be subject to such terms of redemption with or without premium, and may bear such rate or rates of interest as may be provided by resolution or resolutions to be adopted by the state board of higher education. Such bonds may be sold in such manner and at such price or prices not less than par plus accrued interest to date of delivery, as may be considered by the board to be advisable, but interest cost to maturity for any bonds issued hereunder shall not exceed five percent per annum, computed on the basis of average maturities according to standard tables of bond values. Such bonds shall have all of the qualities and incidents of negotiable paper, and shall not be subject to taxation by the state of North Dakota, or by any county, municipality, or political subdivision therein. The board, in

its discretion may authorize one issue of bonds hereunder for the construction, furnishing and equipment of more than one building and may make the bonds payable from the combined revenues of all buildings acquired in whole or in part with the proceeds thereof, and where bonds are so issued the words 'the building', as herein used, shall be construed to refer to all the buildings so acquired." (Underscoring ours).

The underscored language is new and the result of the amendment by Chapter 176, (Senate Bill No. 121), which was introduced and passed with only one amendment to the original bill. The Legislature amended Senate Bill No. 121 by inserting the word "outstanding" between the words "any" and "bonds" of the new language. The purpose of the amendment was to authorize the State Board of Higher Education to issue refunding bonds. The authority, however, is limited to outstanding bonds.

In direct response to your first question, it is our opinion that the Board of Higher Education has the authority to issue "refunding bonds" under the existing laws, particularly pursuant to section 15-55-02, as amended by Chapter 176 of the 1963 Legislature. The "refunding bonds", however, must conform to the provisions of section 15-55-02. This conclusion is also based on section 15-55-10, which was amended by Chapter 176 of the 1963 Session Laws. The amended section provides as follows:

LIMITATION ON BUILDINGS AND ISSUANCE OF BONDS. No building or buildings shall be erected, and no bonds shall be issued for the payment of the cost of any building or buildings under the terms of this chapter, save and except for such specified buildings as may be from time to time designated and authorized by legislative act, nor shall any such building or buildings be erected at a cost exceeding the amount fixed by the legislature in such act as the maximum to be expended for each such building. Refunding bonds may be issued by the state board of higher education under the provisions of this chapter without legislative act to refund, at or prior to the maturity of or pursuant to any privilege of prepayment reserved in or granted with respect to, any bonds issued to pay the cost of buildings designated and authorized by legislative act." (Underscoring ours).

The underscored language is the result of the amendment by Chapter 176. You will note that refunding bonds may be issued without a specific legislative act on each prior bond issue. This, however, does not mean that the board may issue bonds for any purpose. The refunding bonds are limited to instances where the Legislature had previously authorized the construction of a building at a certain location and for a certain amount under chapter 15-55. The authorization here is limited to refunding of such prior bond issues.

As to question number two, the language of the bond or resolution thereon in itself is not controlling on the question whether or not the board may issue refunding bonds. The language of the bond resolution or the bond itself will be determinative as to the manner in which the original bond issue or bond may be paid off. If the original bond itself will permit prepayment or a "calling in" prior

to the maturity date, such may be done by giving the appropriate notice set forth in the bond itself. However, where the original bond does not provide for a prepayment or a "calling in", the holder of such bond or bonds may insist upon full payment or at a discount agreed to by the holder of such bond.

If the bond does not contain language authorizing a prepayment or "calling in", the prepayment or earlier "calling in" of said bond becomes a matter to be negotiated with the bondholder or holders. Thus, in direct response to your second question, the conditions under which the bonds may be prepaid or called in, to a great degree, depend upon the language of the bond itself. Even though a bond does not provide for a prepayment or an "earlier calling in", the board may still issue refunding bonds. However, the factor to be considered by the board at this point is whether or not the refunding bonds will carry a rate of interest sufficiently low enough to offset the difference of the overall cost involved. It stands to reason that if the rate of interest on the refunding bonds is not sufficiently low enough it might well not warrant the issuance of refunding bonds.

Upon being furnished with a copy of each original bond issued on which the board is considering issuing refunding bonds, we will be able to advise the conditions of such bond or bonds as pertaining to prepayment, etc.

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