OPINION
71-167

August 2, 1971 (OPINION)

Mr. Ken Raschke

Commissioner

State Board of Higher Education

RE: Higher Education - Revenue Buildings - Expenses

This is in response to your letter in which you make reference to Section 15-55-21 which was created by Chapter 199 of the 1971 Session Laws and then ask if its provisions apply to the following facts and circumstances relating to the Winter Sports Building at the University of North Dakota, Grand Forks:

"1. The 1969 Legislature first authorized this winter sports building by Chapter 204 of the 1969 Session Laws. The total amount of such building was limited to $1,600,000.00. The limit of the expenditure was increased by the 1971 Legislature, Chapter 212, to $1,800,000.00. The increase was in contributions of private funds and other funds.

2. The architectural contract for this structure was executed on March 4, 1970.

3. In early 1970 students at UND voted in favor of paying the $5.00 per semester mandatory fee to be used in the construction of the winter sports building. Board approval to collect such fees was granted in March of 1970. The collection of the $5.00 per semester fee was begun in September of 1970.

4. The community fund drive in support of the winter sports building began early in 1970 and was completed by the fall of 1970.

5. A contract for steel to be used in the structure was executed in June of 1971.

6. The winter sports building includes an ice arena but nevertheless a substantial portion of the structure will be used for academic purposes."

You further advise that the University of North Dakota with the approval of the Board of Higher Education prior to the 1971 Legislative Session prepared a financial plan and employed an architect for the construction of a winter sports building including an ice arena on the campus. As part of the financial planning, the board authorized the establishment of a $5.00 per semester mandatory fee to be paid by each student, which fees were to be used for the amortization of bonds and as a part of the construction costs of the building. Prior to the approval by the Board of Higher Education of the mandatory fee, a vote was conducted by the students and a

majority of the students voted in favor of the fee for the purpose stated.

You further advise that pledges were given by private citizens on the basis of a financing plan which did not take into account the provisions of Section 15-55-21 as created by the 1971 Legislative Assembly. The financing plan was in accordance with the then existing laws and practices.

You also state that a contract for the purchase of approximately a quarter of a million dollars worth of steel was entered into prior to July 1, 1971 with the Egger Steel Company of Sioux Falls, South Dakota.

Section 15-55-21 provides as follows:

> "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 provide that such payments shall not be charged to the gross revenues."

The revenue bond study contained in the North Dakota Legislative Council Report for the Forty-second Legislative Assembly on pages 10 and 11 indicates that the Legislature was concerned with the costs of furnishing heat, light, power, water, janitorial and other services to revenue bond facilities. The revenue bond facilities which were under consideration were basically and primarily dormitory type facilities which were constructed through the use of revenue-producing bonds. The Legislature apparently believed that the cost of furnishing utilities including janitorial services should be borne by the revenue-producing building rather than by the university from general fund appropriations. The report also indicates that the Legislature was desirous of making the revenue-producing buildings self-supporting in all respects.

Section 15-55-20 to which Section 15-55-21 makes reference includes revenue-producing buildings or other revenue-producing campus improvements. Neither of these terms are defined by statute, and taken at face value would encompass almost any type of building structure or improvement from which revenue is derived. We are satisfied that the Legislature did not wish to ascribe such broad meaning to these terms because in such broad concept it would include many educational or academic facilities which in one form or another produce revenue. The revenue may be minimal, but yet they would produce revenue. We are thus inclined to believe that the Legislature had in mind dormitories, student housing and other similar facilities which were not used primarily for academic or educational purposes. However, we are not resting solely on this concept in disposing of the question you presented.

The Legislature apparently was aware that both the Constitution of the United States and of the state of North Dakota prohibited it from impairing obligations or contracts. We believe it is for this reason that an exception was placed in Section 15-55-21 which provides as

follows:

> "* * *except in those instances where contracts or revenue bond indentures in existence on the effective date of this section provide that such payments shall not be charged to the gross revenues."

The effective date is July 1, 1971.

Part of the exception rests on the existence of contracts or revenue bond indentures prior to the effective date of the act. We do not believe that the term "contracts' in it plural sense is significant, meaning that more than one contract would have to be in existence to make the exemption operative. While not necessarily controlling in itself, but yet to be considered, is Section 1-01-35 which provides that words used in the singular number include the plural and words used in the plural number include the singular, except when a contrary intention plainly appears.

We would further note that the Legislature did not define the type of contract it had in mind; consequently, we assume that it used the term in its conventional sense and meant any type of contract appropriate to the particular situation. Thus, the term "contract" is really an agreement to do or not to do a certain thing or an obligation which is imposed by law by which a person is bound to do or not to do a certain thing. A contract may be oral or it may be in writing; however, some contracts because of the statutory and common law concept must be in writing. The main purpose of this reference is to indicate that there are many types of contracts, depending on the nature of the transaction.

From the facts given here, it is clearly indicated that contracts pertaining to the construction of the winter sports building were executed prior to July 1, 1971. For that matter, many of the transactions were executed and completed prior to the consideration of Sections 15-55-20 and 15-55-21 by the North Dakota Legislature.

We therefore conclude that the contracts were entered into prior to the effective date of Section 15-55-20.

The exception, however, contains two major provisions; one, the existence of contracts, and the other, that the contracts contain provisions that the payments (utilities and janitorial costs) shall not be charged to the gross revenue.

Numerous transactions, commitments and agreements were completed prior to the existence of the statute in question. All of the transactions heretofore mentioned were accomplished under the then existing statutes and practices. We can safely assume that the students, in voting for the $5.00 per semester mandatory fee, did so on the basis of the then existing law and practices in effect. We must reach the same conclusion with reference to the pledges which were obtained from private citizens. It would be questionable if the same results would have been obtained, had the provisions of Section 15-55-21 been in effect at the time these transactions took place.

In reviewing the transaction, such as obtaining pledges, and voting

on the $5.00 per semester mandatory fee, we arrive at the conclusion that these were all accomplished with the firm understanding that the winter sports building would be treated substantially in the same manner as other revenue-producing buildings heretofore had been treated, and that the cost of utilities and janitorial services would be provided for by the University.

We are also mindful that the winter sports building is also a building which will be utilized for academic purposes and that the mere fact that it contains an ice arena should not distinguish it from a football field or a basketball floor. Such sport activities have become a historical part of institutions of higher learning. We are further advised that the winter sports building will be used for academic and educational purposes, which sheds a different light upon the building even though it may be generally classified as a revenue-producing building or revenue-producing improvement.

It is therefore our opinion, based on the totality of circumstances and facts, that the winter sports building authorized by Chapter 204 of the 1969 Session Laws, and as further amended by Chapter 212 of the 1971 Session Laws, comes within the exception stated in Section 15-55-21. As such, it will not be necessary to pay heat, light, water, janitorial costs, and other related costs from the gross revenue produced by the building. Such costs may be borne and paid for by the university in the same manner as such costs were paid for prior to existing revenue-producing buildings.

HELGI JOHANNESON

Attorney General