

**OPINION
50-12**

February 10, 1950 (OPINION)

BONDS

RE: Revenue Producing Bonds Not General Obligations of State

This is in reply to your letter of February 6, 1950, advising that the State Board of Higher Education has adopted a resolution for the issuing and sale of bonds under chapter 154 of the 1947 Session Laws and chapter 161 of the 1949 Session Laws.

You request an opinion as to whether or not such bonds are now or may become obligations of the State of North Dakota.

Chapter 154 of the Session Laws of North Dakota for 1947 authorizes the construction of revenue producing buildings for higher educational institutions of the state. The title of the Act is broad and provides as follows:

Providing for the construction, equipping and furnishing of revenue producing buildings or additions to existing buildings on the campuses of the several institutions under the control of the state board of higher education; providing for the financing of all or part of the cost thereof through the issuance of revenue bonds; authorizing the board of higher education to fix rents, charges and fees to assure payment of principal and interest of such bonds, and to operate and maintain such buildings or additions to existing buildings; authorizing the making of appropriate covenants and agreements to effect the purposes of this Act; authorizing the making of agreements with the United States of America or any agency or instrumentality thereof; providing for approval of such bonds by the attorney general; making such bonds lawful investments and collateral security for certain funds and exempting such buildings or additions to existing buildings and equipment from taxation."

Section 1 of the Act provides as follows:

1. BOARD OF HIGHER EDUCATION MAY SET ASIDE PORTIONS OF CAMPUSES FOR AUTHORIZED REVENUE PRODUCING BUILDINGS. That subject to and in accordance with the terms of this Act, the state board of higher education, for and on behalf of the several institutions now and hereafter under its supervision and control, from time to time, may set aside such portions of the respective campuses of said institutions as may be necessary and suitable for the construction thereon of such revenue producing buildings as, from time to time, may be authorized by the legislative assembly of the state of North Dakota, and including additions to existing buildings used for such purposes, and may construct such buildings or additions thereon and may equip, furnish, maintain and operate such buildings."

Section 2 of the Act provides, among other things, that 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 buildings constructed under the provisions of the Act, and authorizes the board to issue negotiable bonds in an amount which in the opinion of the board may be necessary for such purposes, and provides in detail the form and serials of the bonds to be issued. It provides also that the 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, and other details in connection with the issuing of the bonds.

Section 3 of the Act provides:

3. The bonds issued under the provisions of this Act shall not be an indebtedness of the state of North Dakota nor of the institution for which they are issued nor of the state board of higher education thereof, nor of the individual members, officers or agents thereof, nor shall any building or the land upon which it is situated, or any part thereof be security for or be levied upon or sold for the payment of said bonds, but the said bonds shall be special obligations payable solely from the revenues to be derived from the operation of the building, and the board is authorized and directed to pledge all or any part of such revenues to the payment of principal of and interest on the bonds. In order to secure the prompt payment of such principal and interest and the proper application of the revenues pledged thereto the board is authorized by appropriate provisions in the resolution or resolutions authorizing the bonds.* * *

The remainder of section 3 goes into detail as to the operation of the buildings, the fixing of rentals and charges, and other matters in connection with the use of the buildings.

Section 7 of the act provides as follows:

All bonds issued under the provisions of this Act, shall have endorsed thereon, a statement to the effect that the same do not constitute an obligation of the state of North Dakota, the state board of higher education, nor the individual members, officers or agents thereof, nor of the institution upon the campus of which the building is located, and that the said bonds are payable solely and only out of the revenues to be produced and received from the operation of said building. Such bonds shall be submitted to the attorney general of North Dakota for his examination and when such bonds have been examined and certified as legal obligations by the attorney general in accordance with such requirements as he may make, shall be incontestable in any court in this state unless suit thereon shall be brought in a court having jurisdiction thereof within thirty days from the date of such approval. Bonds so approved by the attorney general shall be prima facie valid and binding obligations according to their terms and the only defense which may be offered thereto in any suit instituted after such thirty day period shall have expired shall be

forgery, fraud, or violation of the constitution."

Section 9 of the Act provides as follows:

Nothing in this Act shall be construed to authorize or permit the state board of higher education, or any officer or agency of the state, to create any state debts, or to incur any obligations of any kind or nature, except as shall be payable solely and only from the special funds to be created from the revenues of the building or buildings erected under the terms and provisions of this Act, nor shall the state of North Dakota or any funds or moneys of this state other than the special funds derived from the income of said building or buildings respectively ever be deemed obligated for the payment of the said bonds or any part thereof."

The legislative assembly of 1949 enacted chapter 161, giving additional powers to the state board of higher education in the matter of constructing and operating revenue producing buildings. One of the additional powers granted by chapter 161 of the 1949 Session Laws is found in subsection (1) of said chapter and authorizes the state board of higher education to cover into the interest and principle fund for bonds issued the rental income from dormitories which are not encumbered or impressed with any lien and which are located upon the campuses of such institutions, and subsection (3) provides as follows:

The rental income from said dormitories and the proceeds of insurance thereon shall be irrepealably pledged to the payment of the principal and interest of the bonds issued as in this chapter provided."

Section 2 of the Act provides as follows:

The rental income from the dormitories, as defined herein, of any educational institutions of higher learning of the state shall be covered into the bond payment fund for the payment of the cost of a new dormitory or dormitories for such educational institution and not to any other institution."

It is clear, therefore, that it was the intention of the legislative assembly, in enacting both of these statutes, that the bonds issued by the state board of higher education under the powers granted in said acts are neither general nor special obligations of the state of North Dakota as such, but that the source of payment of such bonds is the income from buildings or dormitories that are about to be constructed, and the income from dormitories already completed and which are not encumbered or impressed with any lien.

It has been suggested that pledging the income from buildings which are not encumbered or impressed with any lien is in fact the pledging of funds of the state of North Dakota and would therefor result in obligating the state to the payment of these bonds to that extent. We believe that this suggestion was without merit.

By the provisions of the legislative acts under consideration the rentals paid by the student occupants of the dormitories constitute a

special fund for the payment of the bonds to be issued by the state board of higher education and may be considered institutional collections subject to control and disbursement by the board of higher education.

Subsection (e) of section 6 of article 54 of the amendments to the state constitution, which establishes a board of higher education, gives to such board broad powers with reference to the control of the funds of such institutions. It provides as follows:

The said State Board of Higher Education shall have the control of the expenditure of the funds belonging to, and allocated to such institutions and also those appropriated by the legislature, for the institutions of higher education in this State; provided, however, that funds appropriated by the legislature are specifically designated for any one or more of such institutions, shall not be used for any other institution."

As pointed out, the constitutional amendment vests the state board of higher education with broad powers. It (board) shall have the control of the expenditure of the funds belonging to and allocated to such institutions and also those appropriated by the legislature.

The legislature, of course, may appropriate any sum deemed necessary for the maintenance of several state institutions, but the legislature has no control over other institutional funds; or stating differently, the legislature has control over all funds raised by any method of taxation, but the state board of higher education under its constitutional powers has the control over other funds, such as institutional collections, income and interest, belonging to and allocated to the several state institutions, and rentals from dormitories and other buildings located on the campuses of the several institutions.

The special fund doctrine was considered and approved in the case of State v. Jones, 74 N.D. 465, 23 N.W. 2d, 54. We quote from the opinion in that case as follows:

There is no question but that in recent years the 'special fund doctrine' has been established - that is, the theory that the revenue obtained from some utility or any public improvement is devoted to the debt created by that utility or improvement as the sole source of payment of the indebtedness and thus does not become a public debt of the state within the meaning of the term indebtedness used in consideration of debt limits. We have so held in this state. See Lang v. Cavalier, 59 ND 75, 228 NW 819. In this case cited we were considering the provisions of section 183 of the constitution dealing with the debt limit of cities; but the principle therein announced is applicable to the debt limit of the state. The general theory set forth in the Lang Case cited is the prevailing rule. Where a law provides for public utilities or improvements, for a revenue therefrom and that all indebtedness created is payable solely from that revenue and not from state taxation this indebtedness is not taken into consideration in determining the debt limit of the state or municipality."

It has also been suggested that the use of the rentals from the dormitories constructed or to be constructed for the payment of the bonds issued under chapter 154 of the 1947 Session Laws and chapter 161 of the 1949 Session Laws would be in violation of section 185 of our constitution, as amended by article 32, which provides that "neither the state nor any political subdivision thereof shall other wise loan or give its credit or make donations to or in aid of any individual, association or corporation * * * nor subscribed to or become the owner of capital stock in any association or corporation."

The application of the rentals from the dormitories to the payment of the bonds issued under the chapters referred to can certainly not be held to be loans or donations, nor the extension of credit by the state in aid of any individual, association, or corporation. It is, in fact, a use of institutional income for the benefit of the institution on whose campus the dormitory is constructed, and ultimately results in benefit to the state itself.

In drafting and enacting the statutes herein considered, (chapter 154 of the 1947 S.L., and chapter 161 of the 1949 S.L.), the legislature employed language with meticulous care so as to express clearly that the bonds authorized were not intended to be or to become obligations of the state.

We are unable to find any language in either chapter 154 of the 1947 Session Laws or chapter 161 of the 1949 Session Laws which, by a fair and reasonable construction, can be held to obligate the state or to pledge its credit to the payment of the bonds authorized by the provisions thereof.

It is, therefore, my opinion that the bonds issued, or to be issued by the State Board of Higher Education under the provisions of chapter 154 of the 1947 Session Laws and chapter 161 of the 1949 Session Laws are not and cannot become general obligations of the state of North Dakota.

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