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FILE NO. S-1209

CONSTITUTION:

Whether Borrowing by
Illinois Educational
Consortium Violated
Section 9, Article IX of
Illinois Constitution.

Honorable Robert Cronson
Auditor General
Lincoln Tower Plaza
524 South Second
Springfield, Illinois 62706

Dear Mr. Cronson:

This responds to your letter wherein you ask whether a transaction whereby the Illinois Educational Consortium borrowed more than two hundred thousand dollars for the purchase of computer equipment and then entered into a lease/purchase agreement with Illinois State University violated section 9 of article IX of the Illinois Constitution of 1970.

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The Illinois Educational Consortium is incorporated under the General Not for Profit Corporation Act (Ill. Rev. Stat. 1975, ch. 32, par. 163a et seq.). Members of the Consortium are the governing systems of public higher education. These are: the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents, and the Board of Governors of State Colleges and Universities.

On July 1, 1976 the Consortium borrowed \$234,000 from a bank for the purchase of computer equipment; in order to secure the loan, the bank required the granting of a security interest in the equipment and the assignment of the Consortium's rights to its lease/purchase agreement with Illinois State University. On the same day, the Consortium entered into a lease/purchase agreement with the Board of Regents, acting for Illinois State University. According to this agreement, the University pays for the use of the computer equipment from funds appropriated by the General Assembly for that purpose. Paragraph 11 of the agreement provides in pertinent part:

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to be subject to the section's debt limitation. For example, in Loomis v. Keehn (1948), 400 Ill. 337, the Illinois Supreme Court held that the debts of the Illinois State Armory Board did not create a debt against the State. The Illinois Armory Board Act authorized the Armory Board to borrow money for the purpose of purchasing property for armory purposes. The Board was also given the power to enter into lease/purchase agreements with the State for this property; the rent was paid by the State from annual appropriations by the General Assembly. The court in Loomis ruled that the debts incurred by the Armory Board for property that was leased to the State did not create a State debt.

Section 9 of article IX of the 1970 Constitution does not contain a limitation on the amount of State debt. Instead, the section attempts to control State debt by defining the term "State debt" so that the same restrictions apply whenever debts are secured by the full faith and credit of the State or are required to be repaid from tax revenue. The drafters of section 9 deliberately made the definition of "State debt" broad enough to include the type of arrangement

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this lease over the then present worth of the then fair rental value of such item for such period.

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Paragraph 10 of the lease/purchase agreement gives the University an option to purchase the equipment with appropriated funds. On July 15 the Consortium assigned its rights in the lease/purchase agreement to the bank that loaned the Consortium the \$234,000.

Section 9 of article IX of the Constitution defines "State debt" and provides the manner in which State debt may be incurred. It is my opinion that the Consortium's loan of \$234,000 was a "State debt" as that term is defined in paragraph (a) of section 9, and that because the debt was not incurred according to the requirements of section 9, the loan violated the provisions of section 9.

Section 18 of article IV of the Illinois Constitution of 1870 provided that, except for the purpose of repelling invasion, suppressing insurrection, or defending the State in war, the State could only contract debts in excess of \$250,000 when authorized by referendum. Section 18 led to the creation of various State agencies which were held not

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* * *

Notwithstanding any contrary provision in the Agreement, University may terminate the Lease if funds authorized or appropriated to it for the rental or acquisition of this or functionally similar equipment have been exhausted and it is not otherwise able to meet its obligations hereunder. However, University agrees that: (i) any funds authorized or appropriated to it for the rental or acquisition of this or functionally similar equipment in any fiscal year shall be applied to the payment of Charges hereunder until such funds are exhausted; (ii) it has not to date and will not in the future agree to give priority or parity to the application of such funds to the lease or acquisition of other functionally similar equipment; and (iii) it will use its best efforts to obtain authorization and appropriation of such funds including, without limitation, the inclusion in its budget for each fiscal year during the term hereof, a request for adequate funds to meet its obligations in full. * * *"

Paragraph 11 further states that if the University fails to carry out its obligations under the lease/purchase agreement for any reason other than a deficiency in its annual appropriations, the Consortium

"* * * shall have the right to recover from University any and all amounts which may have accrued to the date of such termination and also to recover from University as damages for loss of equipment which represents the excess of present worth, at the time of such termination, of all rents for such item which would otherwise have accrued hereunder from the date of such termination to the end of the term of

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that the court in Loomis held not to be a State debt. Paragraph (a) of section 9, which defines "State debt", reads as follows:

"(a) No State debt shall be incurred except as provided in this Section. For the purpose of this Section, 'State debt' means bonds or other evidences of indebtedness which are secured by the full faith and credit of the State or are required to be repaid, directly or indirectly, from tax revenue and which are incurred by the State, any department, authority, public corporation or quasi-public corporation of the State, any State college or university, or any other public agency created by the State, but not by units of local government, or school districts."

The foundation for the definition of "State debt" was laid in the first proposal of the Committee on Revenue and Finance of the Sixth Constitutional Convention (7 Committee Proposals, Sixth Illinois Constitutional Convention 2174 (hereinafter cited as Committee Proposals).) This proposal provided that section 9 of the Revenue Article should apply as follows:

"This section shall apply to every department, authority, public corporation and quasi-public corporation of the State, and to State colleges and universities and other agencies of the State, whether established by this Constitution or by law, but shall not apply to any local government."

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The Committee's intention was to make all forms of borrowing by the State and all its agencies and authorities subject to the same restrictions. The Committee explained its proposal at pages 2175-76:

"These provisions apply to all state agencies including state colleges and universities, toll road authorities, building authorities and any agency set up in the future which might, through lease or other arrangement, attempt to by-pass the requirements for authorizing the incurrence of debt." (Emphasis added.)

After the Committee's proposal was adopted on First Reading, the Style, Drafting and Submission Committee reordered the sequence of section 9 and defined "State" and "debt" separately as follows:

"(a) No State debt shall be incurred except as provided in this Section. For the purposes of this Section, 'State' includes every department, authority, public corporation and quasi-public corporation of the State; every State college and university; and every other public agency created by the State; but does not include units of local government or school districts. For purposes of this Section, 'debt' includes bonds or other evidence of indebtedness whether secured by the full faith and credit of the State or by specific tax or non-tax revenue."
(7 Committee Proposals 2255.)

The Style Committee did not alter the Revenue Committee's attempt to impose the same requirements on incurring State

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debt on all agencies of the State. The Style Committee stated at pages 2256-57:

"The draft adopted on First Reading included the words 'whether established by this Constitution or by law' at the end of the 'definition' of 'State.' The purpose of the phrase was to limit to the maximum extent the possibility of creating an 'agency' which the courts might hold was not an 'agency of the State.' The proposed substitution, 'public agency created by the State,' serves the same purpose."

The basic intent of the Constitutional Convention was to prevent circumvention of the State debt restrictions by creation of agencies, separate corporations and similar devices. Thus Delegate Johnson said: "We wanted to avoid these backdoor type of operations that are costly to the people of the state, and they are a simple circumvention of constitutional restrictions". (3 Record of Proceedings, Sixth Illinois Constitutional Convention 1927.) Similarly Delegate Netsch spoke of these "devious ways of incurring debt". 5 Proceedings 3849.

The definition of "State debt" in section 9(a) as ratified by the voters reflects the intent to impose the same restrictions whenever debts are secured by the full faith and credit of the State or are required to be repaid

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directly or indirectly, by tax revenue. These restrictions are set out in paragraphs (b) through (e) of section 9 which read as follows:

"(b) State debt for specific purposes may be incurred or the payment of State or other debt guaranteed in such amounts as may be provided either in a law passed by the vote of three-fifths of the members elected to each house of the General Assembly or in a law approved by a majority of the electors voting on the question at the next general election following passage. Any law providing for the incurring or guaranteeing of debt shall set forth the specific purposes and the manner of repayment.

(c) State debt in anticipation of revenues to be collected in a fiscal year may be incurred by law in an amount not exceeding 5% of the State's appropriations for that fiscal year. Such debt shall be retired from the revenues realized in that fiscal year.

(d) State debt may be incurred by law in an amount not exceeding 15% of the State's appropriations for that fiscal year to meet deficits caused by emergencies or failures of revenue. Such law shall provide that the debt be repaid within one year of the date it is incurred.

(e) State debt may be incurred by law to refund outstanding State debt if the refunding debt matures within the term of the outstanding State debt."

In considering the proper manner in which to construe the Illinois Constitution, our Supreme Court has established the following rules: (a) the Constitution is

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to be liberally construed; (b) the meaning of constitutional language is best ascertained by considering the purpose of the provision in question; (c) such provision should be construed to give effect to the spirit in which it was adopted; (d) narrow, technical reasoning should not be applied; and (e) that which is within the intention is within the provision even if not within the letter. (Hirschfield v. Barrett (1968), 40 Ill. 2d 224; People v. Turner (1964), 31 Ill. 2d 197; Wolfson v. Avery (1955), 6 Ill. 2d 78; People ex rel. Rogerson v. Crawley (1916), 274 Ill. 139; People v. Vickroy (1914), 266 Ill. 384; People ex rel. Gaines v. Garney (1868), 47 Ill. 246.) Applying of these rules of construction to section 9 of article IX, I am convinced that the transaction described in your letter created a "State debt" that had to be approved by law.

Paragraph (a) of section 9 clearly prohibits a State College or university from incurring a debt that is required to be repaid from tax revenue appropriated to it unless the debt is sanctioned by law as provided in paragraphs (b) through (e). The State is subject to the same prohibition. In order to assure that the provisions of

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paragraphs (b) through (e) are followed whenever a debt is required to be repaid by tax revenue, the definition of "State debt" in paragraph (a) explicitly includes all agencies and public corporations created by the State. The State thus cannot avoid the limitations of section 9 by creating a corporation. Although corporations created by State colleges and universities are not explicitly included in the definition of "State debt" colleges and universities cannot escape the prohibition in paragraph (a) by means of a corporation created by them. Section 9's purpose of requiring the approval by law of all debts which are repaid by tax revenue would be thwarted if a corporation created by colleges and universities were allowed to incur debt that is ultimately to be repaid by tax revenue appropriated to a State university without being approved by law.

State colleges and universities may establish not-for-profit corporations to administer programs of interinstitutional cooperation (Ill. Rev. Stat. 1975, ch. 144, par. 283). The Illinois Educational Consortium is a not-for-profit corporation established by the governing systems of public

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higher education; the Consortium assists State colleges and universities in developing computer technology information systems. The Consortium can certainly improve the computer services available to colleges and universities. However, a State university cannot use the Consortium to escape the provisions of section 9 of article IX of the Constitution.

Section 5.1 of the Illinois Purchasing Act (Ill. Rev. Stat. 1975, ch. 127, par. 132.5-1) authorizes State universities and other State agencies to enter into lease/purchase agreements for electronic data processing equipment. Section 5.1 reads in pertinent part as follows:

"State agencies may enter into contracts for the leasing of electronic data processing equipment and such contracts may contain a provision that the lessee acquires title to such leased equipment after a specified period.
* * *"

Illinois State University is permitted to enter into lease/purchase agreements for computer equipment pursuant to section 5.1. If the University had leased the computer equipment from an independent party, there would have been no violation of section 9 of article IX.

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The transaction described in your letter violated the Constitution because the Consortium, which is a corporation created and controlled by State universities and colleges, incurred a debt on behalf of Illinois State University and the University in its lease agreement promised to repay this debt from its annual appropriation. The fact that the Consortium is a corporation created and controlled by State universities and colleges coupled with the terms of the Consortium's loan, its lease/purchase agreement and its assignment of that agreement leads to the conclusion that the Consortium borrowed the \$234,000 as an agent for Illinois State University. The loan, the lease/purchase agreement and the assignment were all part of one transaction. The practical effect of this transaction is that Illinois State University has promised to use tax revenue appropriated to it in order to repay the Consortium's loan. The Consortium's loan must be considered a "State debt"; any other result would permit Illinois State University and other State universities and colleges to avoid the limitations of section 9 of article IX by merely borrowing money through an intermediary corporation which they created and control.

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Since the Consortium's loan created a "State debt" as that term is defined in paragraph (a) of section 9, it was required to be approved by law as provided in paragraphs (b) through (e) of section 9. Because the Consortium's loan was not approved by law, it is my opinion that the loan violated section 9 of article IX of the Constitution.

Since it is clear that the Consortium acted as an agent of the University and the bank loan constituted State debt because of that relationship, it is not necessary in this opinion to consider as separate questions whether the Consortium in its own right is "a quasi-public corporation of the State" or "a public agency created by the State" within the meaning of those designations contained in section 9(a) of article IX of the Constitution.

Very truly yours,

A T T O R N E Y G E N E R A L