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OHIO UNIVERSITY—PRESIDENT AND TRUSTEES—UNDER EXERCISE OF SOUND DISCRETION MAY PLEDGE RECEIPTS OF OPERATION OF ANY DORMITORIES UNDER THEIR CONTROL — NOT OTHERWISE ENCUMBERED — BORROW MONEY TO PURCHASE LAND—SITE FOR FUTURE DORMITORY CONSTRUCTION—NOT NECESSARY SPECIFIC DORMITORY PROJECT PLANNED AT TIME LAND PURCHASED—SECTION 3337.07 RC.

## SYLLABUS:

The President and Trustees of the Ohio University, acting under the provisions of Section 3337.07, Revised Code, and in the exercise of a sound discretion, may pledge the receipts of the operation of any dormitories under their control, not otherwise encumbered, for the purpose of borrowing money to purchase land as a site for future dormitory construction, even though no specific dormitory project is planned at the time of such purchase.

Columbus, Ohio, March 22, 1956

Mr. Paul R. O'Brien, Secretary, Board of Trustees  
Ohio University, Athens, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The Board of Trustees of Ohio University \* \* \* instructed me to request an opinion from your office to determine whether they have authority to borrow money for the purchase of land for the purpose of erecting dormitories in the future, and to pledge excess dormitory revenues, not needed for the retirement of the present outstanding dormitory bonds, for the payment of these notes.

"I am attaching a copy of the last bond indenture issued by the President and Trustees of Ohio University for your information. This indenture is similar to all the other outstanding indentures.

"\* \* \* Section 3337.07 of the Revised Code says in part that the President and Trustees of Ohio University may purchase sites for the construction of dormitories and further that they may borrow money for this purpose.

“As you know, Ohio University is located in the center of Athens and space for the erection of buildings is at a premium. The Trustees have found that if we purchase property at the time the owner wishes to sell, we are able to obtain much better prices than if we wait until we are ready to construct the buildings and then attempt to purchase the land. In the past we have purchased properties from our excess dormitory revenues at the time the owner desires to sell and have operated these properties as part of the dormitory system until we were ready to construct new dormitories. We then raze the properties and construct dormitories on the site.

“We shall be glad to furnish any further information you may require relative to this question.”

Section 3337.07, Revised Code, to which you have referred provides as follows:

“The body corporate known as the president and trustees of the Ohio university may purchase a site therefor and construct, equip, maintain, and operate thereupon or upon sites within the campus of the university as it may designate therefor, buildings to be used as dormitories for students and members of the faculty and servants of the university, and to pay for same out of any funds in its possession derived from the operation of any dormitories under its control, or out of funds borrowed therefor, or out of funds appropriated therefor by the general assembly, or out of funds or property received by it by gift, grant, legacy, devise, or otherwise, for such purposes, and to borrow funds for such purposes upon such terms as it deems proper and to issue notes or other written instruments evidencing such indebtedness, provided that such indebtedness shall not be a claim against or a lien upon any property of the state or any property of or under the control of the president and board of trustees of the Ohio university excepting such part of the receipts of the operation of any dormitories under its control as the president and board of trustees of the Ohio university may pledge to secure the payment of any such indebtedness.”

The problem now confronting the trustees is that they wish to purchase land for the purpose of eventually constructing thereon dormitories pursuant to the provisions of the above section. They propose to borrow money for the purchase of this land and as security for the loan propose to issue notes pledging so-called “excess dormitory revenues.” I take it that these revenues are “the receipts of the operation of \* \* \* dormitories under [their] control” referred to in the statute.

Passing for the time being the question of the present availability

of excess revenues, it is my opinion that the literal wording of the statute clearly confers authority on the trustees to pledge dormitory receipts for the purpose of purchasing a site upon which to construct additional dormitories. The only remaining question arises from the fact that the trustees do not at present have a specific dormitory in mind, but seek to acquire land which will eventually be used for dormitory purposes. Can they now make such a purchase to be financed in the manner set out above?

It is my opinion that the only rule which I can lay down is that the trustees are governed by the exercise of a sound discretion, which they may exercise honestly and which they should not abuse. I realize that only in rare cases can the trustees acquire a piece of land and contract to construct a dormitory thereon simultaneously; and I do not believe that their power is limited to such a transaction. On the other hand I do not believe that they are free to use dormitory funds under their control as a general land-purchase account from which they attempt to anticipate or control the future action of the General Assembly, or attempt to provide for contingent needs of the University beyond the reasonably foreseeable future. Somewhere between these two extremes they may properly exercise their powers. They should always be cognizant of the fact that if in a particular case they should be held to have exceeded their powers, they undoubtedly would be held liable in their individual capacities for any obligations which they had assumed or for any public funds which they had unlawfully expended.

The second question which is inherent in your inquiry involves the present availability of so-called "excess dormitory revenues" in view of certain existing bond indentures executed by the trustees. You have furnished me with a copy of one such indenture with the notation that it is "similar" to all the other outstanding indentures. My opinion as to whether any "excess" funds are available to the trustees beyond those encumbered by this indenture is not controlling, inasmuch as the trustee or the bondholders might choose to disregard it. However, I deem it appropriate that I examine the indenture and advise the trustees as to their power to pledge further the revenues in question.

The indenture which you have submitted to me provides in pertinent part as follows:

"RESOLUTION AUTHORIZING THE ISSUANCE OF 3% AND  
3 $\frac{1}{8}$ % DORMITORY REVENUE BONDS BY THE OHIO  
UNIVERSITY IN THE PRINCIPAL AMOUNT OF  
THREE MILLION FIVE HUNDRED  
THOUSAND DOLLARS

"WHEREAS, by authority of Section 3345.07 of the Revised Code of Ohio, the President and the Board of Trustees of Ohio University is authorized to construct, equip, maintain and operate upon sites within the campus of said University, buildings to be used as dormitories for students, members of the faculty, and servants of said University, and to borrow funds for such purposes upon such terms as it shall deem proper, and to issue negotiable written instruments evidencing such indebtedness and pledge the revenue from the operation of dormitories and dining halls under its control to secure the payment of such indebtedness, and whereas, said President and Trustees desires to construct, equip, maintain and operate upon sites within the campus of said University additional dormitories; and

"WHEREAS, said President and the Board of Trustees desires to borrow money for such purposes in the sum of \$3,500,000 and to issue negotiable or registered bonds evidencing such indebtedness, and to secure the same by a pledge of the revenues derived from the operation of all dormitories and dining halls, except Bryan Hall, under the control of said President and Trustees, including the dormitories to be constructed and equipped from the proceeds of this issue of bonds, after deducting the reasonable expenses of maintenance and operation of said dormitories, including interest payments on this issue, until all the principal and interest of such bonds shall have been paid. The net revenues from the proposed dormitories and from present dormitories, except Bryan Hall, and dining halls shall be irrevocably pledged to the payment of this issue of bonds in accordance with the schedule of maturities herein set forth, except for the prior liens of such revenues as follows:

"\* \* \* NOW THEREFORE BE IT RESOLVED by the President and Board of Trustees of Ohio University,

"*Section 1.* That in order to obtain funds for the purpose of constructing and equipping new dormitory buildings, the President and the Board of Trustees of Ohio University shall issue, pursuant to the provisions of said Section 3345.07 of the Revised Code of Ohio, its negotiable or registered bonds in the sum of \$3,500,000; said bonds to be designated as Ohio University Dormitory Revenue Bonds; said bonds to be dated July 1, 1955, to be of the denomination of \$10,000 each and numbered from 1 to 350 both inclusive; said bonds to mature in their consecutive serial order as follows:

"\* \* \* *Section 2.* Said bonds shall be in substantially the following form:

United States of America  
State of Ohio

Number..... \$10,000

THE PRESIDENT AND BOARD OF TRUSTEES

of

OHIO UNIVERSITY

Athens, Ohio

3% and 3½% SERIAL

DORMITORY REVENUE BONDS

Dated July 1, 1955

“KNOW ALL MEN BY THESE PRESENTS, that the President and Board of Trustees of Ohio University, Athens, Ohio, hereby acknowledges itself to owe, and for value received, promises to pay to the bearer, but only from the revenues mentioned below, the sum of TEN THOUSAND DOLLARS on the First Day of April, 19... , together with interest thereon from the date hereof \* \* \*.

“This bond is one of an issue of 350 serial bonds of like tenor and effect, except as to maturity, and interest rate, numbered from One (1) to Three Hundred Fifty (350) both inclusive, each of said bonds being of the denomination of \$10,000, aggregating in amount Three Million Five Hundred Thousand Dollars (3,500,000), all of which bonds are of even date herewith and are issued under authority of Section 3345.07 of the Revised Code of Ohio, and pursuant to a resolution duly adopted by said Board of Trustees on the 31 day of March 1955, authorizing an issue of dormitory revenue bonds in the aggregate principal amount of \$3,500,000 for the purpose of constructing and equipping new dormitory buildings. All payments of interest on this bond shall be made only out of the gross revenues of all the dormitories and dining halls under the control of said President and Board of Trustees, excepting therefrom Bryan Hall, and additional dormitories and dining halls to be constructed from the proceeds of this issue of bonds.

“All payments of principal on this bond shall be made only from the net revenues of all of the dormitories and dining halls under the control of said President and Board of Trustees of Ohio University, and the additional dormitories and dining halls to be constructed from the proceeds of this issue of bonds, excepting therefrom Bryan Hall.

“\* \* \* *Section 3.* BE IT FURTHER RESOLVED that the interest on this issue of bonds, together with that on any other issue outstanding or that may hereafter be issued for dormitory purposes, shall be payable out of the gross revenues from all of the dormitories and dining halls under the control of the President and Board of Trustees of Ohio University, and the additional dormitories and dining halls to be constructed from the proceeds of this issue of bonds, excepting therefrom Bryan Hall, and shall be considered to be an operating expense, deductible before determining the amount of net earnings, and that such gross revenues for the purpose of this section and other sections of this resolution shall be held to include all revenues of said dormitories from whatever source

derived, and the earnings from the operation of all dining halls under the control of said President and Board of Trustees.

"On or before October 1, 1955, and on or before each October 1, and April 1, thereafter, so long as any of the bonds of this issue are outstanding, an amount equal to the next succeeding interest payment shall be deposited in the 'Ohio University Dormitory Revenue Bond Issue, of July 1, 1955, Interest and Sinking Fund Account' created in Section 4 hereof. The principal sum of this issue shall be payable from the net earnings from all of said dormitories and dining halls and the additional dormitories and dining halls to be constructed from the proceeds of this issue of bonds, excepting therefrom Bryan Hall, under the control of said President and Board of Trustees, after deduction of the reasonable expenses of administration and operation, including interest payments and such expenses for maintenance of said dormitories as may be necessary to preserve the same in good repair.

"*Section 4.* BE IT FURTHER RESOLVED that in order to provide for the payment of the principal of the bonds as they respectively mature, in addition to the provisions for interest herein above set forth, the President and Board of Trustees of Ohio University hereby covenants and agrees to deposit with the Athens National Bank, in a fund to be known as 'Ohio University Dormitory Revenue Bond Issue of July 1, 1955, Interest and Sinking Fund Account' on or before the 1st day of October of each year, commencing April 1, 1959, out of the net earnings of said dormitories and dining halls, and the additional dormitories and dining halls to be constructed from this issue of bonds, excepting therefrom Bryan Hall, under the control of the President and Board of Trustees, a sum equal to the next succeeding principal maturity requirement as set forth in the schedule of bond maturities contained in Section 1 hereof.

"Out of the funds on deposit in said 'Ohio University Revenue Bond Issue of July 1, 1955, Interest and Sinking Fund Account,' there shall be paid, when due, the interest upon this issue of bonds, also the principal of said bonds, as the same become due and payable. All sums deposited in said account, for the purpose of paying the principal and interest upon the bonds herein authorized, shall be kept in a separate bank account, distinct from all other funds or accounts of the said University, and any money in said fund shall be used only for the payment of principal and interest upon said bonds, and is hereby irrevocably pledged and appropriated for said purpose or purposes.

"\* \* \* *Section 6.* BE IT FURTHER RESOLVED that while any of the bonds herein authorized are outstanding, the President and Board of Trustees of Ohio University shall not issue any additional bonds or other evidence of indebtedness payable from the revenues of all dormitories and dining halls under the control of the President and Board of Trustees, and additional dormitories and dining halls to be constructed from the proceeds of this issue of bonds, excepting therefrom Bryan Hall, unless the lien on the revenues of such dormitories and dining halls, securing the principal of such additional bonds or other evidence of indebtedness, is made junior and subordinate in all respects to the lien securing the bonds herein authorized. \* \* \*"

It is true that the "whereas" clauses at the beginning of the indenture and certain language in the bond form are in general terms, and standing alone might be construed to pledge all of the dormitory revenues under the control of the trustees. However, the specific pledges set out in Sections 3 and 4 of the indenture are to set aside the necessary principal and interest for each semi-annual payment, and to pay over the money so segregated. It is my opinion that any "excess" revenues over those necessary to carry out these specific pledges are available to the trustees for other dormitory purposes.

Needless to say, the above opinion applies only to the bond indenture actually before me and to any other couched in *identical* terms.

In view of the above, it is therefore my opinion that the President and Trustees of the Ohio University, acting under the provisions of Section 3337.07, Revised Code, and in the exercise of a sound discretion, may pledge the receipts of the operation of any dormitories under their control, not otherwise encumbered, for the purpose of borrowing money to purchase land as a site for future dormitory construction, even though no specific dormitory project is planned at the time of such purchase.

Respectfully,  
C. WILLIAM O'NEILL  
Attorney General