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STATE OF NEBRASKA
OFFICIAL
MAR 17 1994
DEPT. OF JUSTICE

DATE: March 16, 1994

SUBJECT: Scope of Authority Granted to the Coordinating Commission for Postsecondary Education to Review "Capital Construction Projects"

REQUESTED BY: Bruce G. Stahl, Executive Director
Coordinating Commission for Postsecondary Education

WRITTEN BY: Don Stenberg, Attorney General
Lauren L. Hill, Assistant Attorney General

The Coordinating Commission for Postsecondary Education ("Commission") has requested an opinion from the Attorney General as to the scope of the Commission's authority to review "capital construction projects" which have been proposed by public institutions of higher education. The issue of whether the Commission may review a parking lot demolition/pedestrian plaza construction project, which is estimated to cost under $500,000, has been raised by the University of Nebraska. The University contends that such a project does not fall within the statutory definition of "capital construction project" contained in Neb. Rev. Stat. § 85-1402(1) (Cum. Supp. 1992) and, therefore, that the project is not subject to review by the Commission.

Outline of Pertinent Provisions of Law

Pursuant to the Nebraska Constitution, the Commission "shall, under the direction of the Legislature, be vested with the authority for the coordination of public postsecondary educational institutions." Neb. Const. art. VII, § 14. The Constitution expressly defines the term "coordination" to include "[a]uthority to review, monitor, and approve or disapprove each public postsecondary institution's . . . capital construction projects which utilize tax funds designated by the Legislature. . . ." *Id.*

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The Constitution specifies that such authority is vested in the Commission "in order to provide compliance and consistency with the comprehensive [statewide] plan [for postsecondary education] and to prevent unnecessary duplication. . . ." *Id.*

In accordance with this constitutional mandate, the Legislature has enacted the "Coordinating Commission for Postsecondary Education Act," Neb. Rev. Stat. § 85-1401 to § 85-1420 (Cum. Supp. 1992 and Supp. 1993). For purposes of the Act, the term "capital construction project" is defined as follows:

> every proposed new **capital structure**, addition to or renovation or remodeling of an existing **capital structure**, lease-purchase agreement for a **capital structure**, or other construction contract for a **capital structure**, the total cost of any of which (a) is five hundred thousand dollars or more or (b) is less than five hundred thousand dollars and the commission determines that it is of a type that should be reviewed and approved by the commission in order to carry out its purposes under the act. In determining the types of projects which should be reviewed and approved under subdivision (b) of this subdivision, the commission may by rule and regulation either determine which types of such projects should be subject to review and approval or determine which types of such projects should not be subject to review and approval. The criteria in the rules and regulations shall be based on serving the purpose of commission review of projects using tax funds designated by the Legislature that could (i) unnecessarily duplicate other projects, (ii) conflict with the statewide facilities plan, or (iii) otherwise conflict with the comprehensive statewide plan;

Neb. Rev. Stat. § 85-1402(1) (Cum. Supp. 1992) (emphasis added).

While the term "capital structure" has not been defined in either the Constitution or by statute, the Commission has specified the meaning of the term in regulations promulgated pursuant to the Act. As defined by the Commission, "capital structure" "shall mean anything constructed or erected, the use of which requires permanent location on the ground or an addition to an existing capital structure having a permanent location on the ground." 281 NAC 9, § 004.03 (1992). Having been properly adopted and filed with the Secretary of State, this definition has the force and effect of statutory law. ***Nucor Steel v. Leuenberger***, 233 Neb. 863, 448 N.W.2d 909 (1989).

Discussion

It is your understanding that the University does not believe the parking lot demolition/pedestrian plaza construction project to constitute a "capital structure" as defined by 281 NAC 9, § 004.03. In support of its position, the University has suggested the following definition of a "structure": "a combination of units constructed and so interconnected, in an organized way, as to provide rigidity between its elements; any edifice." *See Dictionary of Architecture and Construction.*

The University asserts that the project is not a "capital structure," and, thus, not a "capital construction project" as defined by Neb. Rev. Stat. § 85-1402(1). Therefore, the University contends that the project is not subject to Commission review. We disagree with the University's analysis for several reasons.

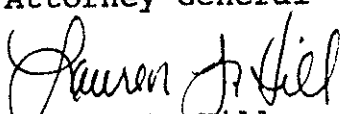
First, the University's reliance upon an alternative definition of the term "structure" is misplaced. The definition contained within the Commission's regulations has been properly promulgated and has the force and effect of statutory law. *See Nucor Steel,* 233 Neb. at 866. Next, the Commission's interpretation of the term "structure" as contained within 281 NAC 9 must be given significant weight. *Dep't of Health v. Lutheran Hospitals & Homes Society of America,* 227 Neb. 116, 416 N.W.2d 222 (1987). Finally, the Commission's definition of the term "structure" is consistent with the Constitution's mandate that "all capital construction projects which use tax funds designated by the Legislature" be subject to Commission review. Neb. Const. art. VII, § 14.

The Commission's regulatory definition of the term "structure" is also consistent with other interpretations of the term. According to *Black's Law Dictionary* (6th ed. 1990), a "structure" is "[a]ny construction, or any production or piece of work artificially built up or composed of parts joined together in some definite manner; [t]hat which is built or constructed; an edifice or building of any kind; [a] combination of materials to form a construction for occupancy, use or ornamentation whether installed on, above, or below the surface of a parcel of land." *Id.* at 1424. Similarly, *Black's Law Dictionary* defines the terms "capital improvement" or "capital expenditure" to mean "[a]n outlay of funds for the acquisition or improvement of a fixed asset which extends the life or increases the productivity of the asset." *Id.* at 209. Therefore, assuming that the parking lot demolition/ pedestrian plaza construction project is one which utilizes "tax funds designated by the Legislature," it appears to us that denying the Commission authority to review the project would be in direct contravention to the constitutional duty imposed upon the

Commission to coordinate taxpayer funds expended by public universities and colleges upon major construction projects. *See* Neb. Const. art. VII, § 14.

Respectfully submitted,

DON STENBERG
Attorney General



Lauren L. Hill
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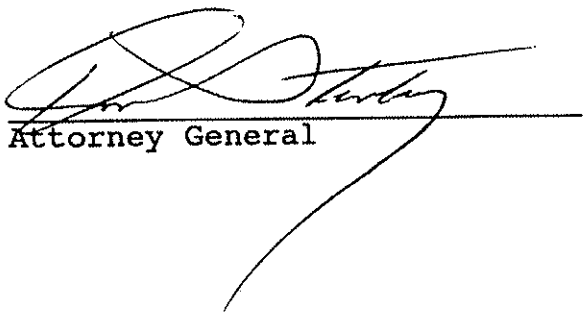

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