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FILE NO. 85-010

INTERGOVERNMENTAL COOPERATION:
Intergovernmental Cooperation
Agreements

David R. Pierce, Executive Director
Illinois Community College Board
Room 400 - 509 South Sixth Street
Springfield, Illinois 62701

Dear Mr. Pierce:

I have your letter in which you state that Illinois Community College District No. 525 of Will, Grundy, Cook, Kendall, LaSalle, Livingston and Kankakee Counties, commonly known as Joliet Junior College, and the Will County Metropolitan Exposition and Auditorium Authority, hereinafter referred to as the "Exposition Authority", have entered into an "intergovernmental agreement" under the terms of which Joliet Junior College, in return for specified annual compensation,

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will receive the use of certain improved real property for a term of 23 years. You ask whether this "intergovernmental agreement" constitutes a lease of the property, and if so, whether the agreement therefore violates section 3-38 of the Public Community College Act (Ill. Rev. Stat. 1983, ch. 122, par. 103-38), which prohibits the board of trustees of a community college district from entering into a lease for a term exceeding 20 years. For the reasons hereinafter stated, it is my opinion that the "intergovernmental agreement" in question is a lease to which section 3-38 of the Public Community College Act applies, and, consequently, the agreement is prohibited by the provisions of that section. Characterizing an instrument as an "intergovernmental agreement" authorized by article VII, section 10 of the Illinois Constitution of 1970 (Ill. Const. 1970, art. VII, § 10) does not permit the parties to avoid the existing statutory limitations on the power of Joliet Junior College to lease property for a term exceeding 20 years, where the instrument, "by the legal effect of its provisions", is a lease. See Holladay v. Chicago Arc Light & Power Co. (1894), 55 Ill. App. 463, 466-67.

The pertinent facts concerning the "intergovernmental agreement" between Joliet Junior College and the Exposition Authority may be summarized as follows: The Joliet Junior College Foundation, a not-for-profit corporation, leased

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certain real property and improvements to the Exposition Authority for the express purpose of facilitating its conveyance to Joliet Junior College under the "intergovernmental agreement" in question. That agreement between the Exposition Authority and Joliet Junior College recites that it is authorized by article VII, section 10 of the Illinois Constitution, which provides in part:

"Units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function, in any manner not prohibited by law or by ordinance.
Units of local government and school districts may contract and otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or by ordinance. Participating units of government may use their credit, revenues, and other resources to pay costs and to service debt related to intergovernmental activities.

* * *

(Emphasis added.)

Under the agreement, the Exposition Authority assigns to Joliet Junior College "all of its right, title and interest, obligations and duties and full, complete usage and control" of the property leased to the Exposition Authority by the Joliet Junior College Foundation, with certain minor exceptions, in return for specified annual payments to be made over the life of the agreement. Under the agreement, Joliet Junior College

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"agrees to accept such assignment and to assure said rights, obligations and duties" subject to the right of reentry in the event of a default in required payments, in which case the Joliet Junior College Foundation may be required to convey title to the demised property to the Exposition Authority. Joliet Junior College is required to maintain and insure the property, and is permitted to make changes and alterations in the property without prior consent of the Exposition Authority.

Section 3-38 of the Public Community College Act empowers a board of trustees of a community college district:

"To lease, with or without an option to purchase, for a period not to exceed 5 years or purchase under an installment contract extending over a period of not more than 5 years, with interest at a rate not to exceed 6% per year on the unpaid principal, such apparatus, equipment, machinery or other personal property as may be required when authorized by the affirmative vote of 2/3 of the members of the board. To lease for a period not to exceed 20 years such rooms, buildings and land, or any one or more of such items, as may be required when authorized by the affirmative vote of 2/3 of the members of the board. Any lease for rooms, buildings or land for a period exceeding 5 years must have the prior approval of the [Illinois Community College] * * * Board." (Emphasis added.)

In authorizing the board of trustees of a community college district to enter into leases for periods "not to exceed 20 years", the clear intent of section 3-38 is also to preclude a community college district from leasing property for a term longer than 20 years. If the "intergovernmental agreement" is,

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in fact, a lease, then it must be determined whether article VII, section 10 of the Constitution permits Joliet Junior College to do that which section 3-38 of the Public Community College Act expressly prohibits.

Leases, including subleases or assigned leases, are contracts for the exclusive possession of lands, tenements or hereditaments for life, for a term of years, or at will, or for any interest less than that of the lessor, usually for specified rent or compensation. (Urban Investment & Development Co. v. Maurice L. Rothschild & Co. (1975), 25 Ill. App. 3d 546, 550.) There is no indication in either the language or the context of section 3-38 of the Public Community College Act that the term "lease" was intended to be given other than its commonly recognized meaning as set out in the case cited above. Therefore, because the "intergovernmental agreement" is a contract which grants the exclusive use of the demised premises to Joliet Junior College for a term of years, in return for specified annual compensation, it is a lease which is subject to section 3-38 of the Public Community College Act. Whether the lease could be further categorized as a sublease or assigned lease is immaterial to the application of section 3-38. See, e.g., Irons Investment Co. v. Richardson (S. Ct. Wash. 1935), 50 P.2d 42, 44.

Counsel for Joliet Junior College contends, however, that the "intergovernmental agreement" does not constitute a

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lease but a mere license, which is not prohibited by section 3-38 of the Public Community College Act. A license in respect to real property is a permission or authority to do a particular act or series of acts upon the land of another without possessing any estate or interest in any land. (Lang v. Dupuis (1943), 382 Ill. 101, 106.) In Holladay v. Chicago Arc Light & Power Co. (1894), 55 Ill. App. 463, 466-67, the court set out the distinctions between leases and licenses:

" * * *

Whether a contract be a lease or a license will be determined, not from what the parties to it may choose to call it, nor from the language used, but from the legal effect of its provisions.

* * *

Whether a tenancy is created or not depends upon the intention of the parties, although this intention must in most cases be inferred from the circumstances which attend the case. 'In general, the question of possession will determine the matter.' Alwood v. Ruckman, 21 Ill. 200; see, also, Gunning Co. v. Cusack, 50 Ill. App. 290.

'An instrument that merely gives to another the right to use premises for a specific purpose, the owner of the premises retaining the possession and control of the premises, confers no interest in the land and is not a lease, but a mere license.' Wood's Landlord and Tenant, Sec. 227.

A lease possesses the property of passing an interest in the land, and partakes of the nature of an estate. Taylor's Landlord and Tenant, Sec. 14.

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A license is an authority to do some act on the land of an other, without passing an estate in the land, and 'being a mere personal privilege, it can only be enjoyed by the licensee himself, and is not therefore assignable so that an under tenant can claim privileges conceded to a lessee.' Ibid., Sec. 237a.

Exclusive possession is essential to the character of a lease. Central Mills v. Hart, 124 Mass. 123.

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Under the "intergovernmental agreement", the Exposition Authority has assigned all of its rights and interest in the demised premises to Joliet Junior College, with the exception of certain areas specifically reserved under the terms of the agreement. Except for the reserved areas, Joliet Junior College has been granted "complete usage and control of the property". Contrary to the assertions of Joliet Junior College, it is clear tht the "intergovernmental agreement" in question is a lease, and not a license. Having so concluded, it must next be determined whether the Intergovernmental Cooperation provisions of the Illinois Constitution empower Joliet Junior College to enter into a valid lease for a term of years otherwise prohibited by statute.

Community college districts possess only the powers granted to them by the Constitution and by statute. (See Ill. Const. 1970, art. VII, § 8.) Article VII, section 10 of the Constitution was intended to be a self-executing grant of power

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to units of local government to encourage cooperation between units and to remove the necessity of obtaining statutory authority for each cooperative venture. (Village of Sherman v. Village of Williamsville (1982), 106 Ill. App. 3d 174, 179; 1976 Ill. Att'y Gen. Op. 51, 52.) The Intergovernmental Cooperation provisions of the Constitution were not intended as a means whereby units of local government might acquire authority to engage in an activity in the first instance, when the authority is not specifically granted by the Constitution or by statute. (Ill. Att'y Gen. Op. No. NP-637, issued October 17, 1973, at 6.) Similarly, since it is not a grant of original power, article VII, section 10 of the Constitution cannot authorize agreements the effect of which would be to contravene an existing and explicit statutory prohibition. 1976 Ill. Att'y Gen. Op. 51, 53.

The effect of the "intergovernmental agreement" in question is to violate section 3-38 of the Public Community College Act, which prohibits the board of trustees of a community college district from leasing property for a term exceeding 20 years. Article VII, section 10 of the Constitution does not empower a community college district to perform any act expressly forbidden by law. For the reasons hereinabove stated, it is my opinion that the "intergovernmental agreement" between Joliet Junior College and the Will County

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Metropolitan Exposition and Auditorium Authority is a lease, and, because the lease extends over a period exceeding 20 years, it is prohibited by section 3-38 of the Public Community College Act.

Because it has not been contended that the "inter-governmental agreement" in question is authorized by the Intergovernmental Cooperation Act (Ill. Rev. Stat. 1983, ch. 127, par. 741 et seq., as amended), this opinion has been limited to the authority granted by article VII, section 10 of the Illinois Constitution of 1970. It suffices to state that nothing in the provisions of that Act purports to authorize an agreement such as that discussed herein.

Very truly yours,


ATTORNEY GENERAL