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SPRINGFIELD

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FILE NO. 85-020

ADMINISTRATIVE LAW:
Authority of Capital Development
Board to Determine Whether a
Community College Building Was
Defectively Designed or Constructed

Gary J. Skoien, Executive Director
Capital Development Board
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401 South Spring Street
Springfield, Illinois 62706

Dear Mr. Skoien:

I have your letter wherein you pose the following questions:

1. May the Capital Development Board [CDB], under section 5-12 of the Public Community College Act (Ill. Rev. Stat. 1983, ch. 122, par. 105-12), determine whether building defects in a community college building are the result of design error or defective construction when the parties have settled the claim or claims arising from the building defects thereby precluding a judicial determination on causation or fault?

2. Does a release executed by the college in question and the Illinois Building Authority [IBA] in the course of settling the claim or claims emanating from building defects in a college building, as hereinafter described, preclude the CDB from using State funds, pursuant to section 5-12 of the Public Community College Act, to correct the building defects?

You have advised this office of the factual background which has precipitated your questions. In January, 1968, the IBA entered into an agreement with a general contractor for the construction of a building at Sauk Valley College. A certificate of substantial completion was issued to the contractor in November, 1969, but prior to the actual completion of the construction project, Sauk Valley College, hereinafter referred to as the College, observed cracking and spalling in the cast-in-place exterior concrete and in four concrete load-bearing columns. Secondary to these problems, water penetration of the walls and other interior damage occurred. It appears that, at that juncture, the contractor had not been paid in full. In 1972, the contractor brought suit against the IBA, the College and the architect/engineer [A/E] of the project for damages resulting from the delay in payment. The contractor alleged that the plans and specifications given to it were incomplete and inaccurate, that performance of certain contractual obligations was impossible, and that the A/E failed to carry out its duties under its contract with the IBA properly. In turn,

the IBA and the College counterclaimed against the contractor for defective work.

In 1977, however, the parties settled the lawsuit on the following terms:

A. The contractor released the IBA, the College, and the A/E from all claims arising out of the construction of the building.

B. The A/E agreed to pay the contractor $100,000.

C. The IBA released the contractor and the A/E from all claims arising out of design and construction of the College building.

D. The College released any claims it had against the contractor and the A/E and agreed to assume $100,000 of repair costs. Since at the time of the settlement the repair costs were estimated at $200,000, the IBA agreed to seek the additional $100,000 from the CDB and the General Assembly.

E. The A/E released the IBA, the College, and the contractor from all claims.

Subsequent to the above-described settlement, the College was advised that the repair costs would be much higher than the original estimate of $200,000, and as a consequence thereof, the College has requested the CDB to provide State funding to correct the building defects pursuant to section 5-12 of the Public Community College Act. You have not indicated that the College and the IBA did not use due diligence to ascertain the true amount of damages or that they did not reasonably and in good faith enter into the settlement.

Section 5-12 of the Public Community College Act (Ill. Rev. Stat. 1983, ch. 122, par. 105-12), provides as follows:

> "In the event the Capital Development Board determines that a facility previously provided for a community college under this Article was defectively designed or constructed, the cost of any necessary corrective work shall be fully funded by monies appropriated pursuant to the Capital Development Bond Act of 1972, as now or hereafter amended. In such an instance, the community college shall not be required to provide any portion of the cost of the corrective work.
>
> Should a community college district recover damages against any party responsible for the defective design or construction of a community college facility, the community college district shall reimburse the State of Illinois for any funds provided by the State to correct building defects.
>
> No provision of this Section shall preclude or delay litigation by a community college district to recover damages for such defective design or construction from the party or parties responsible for same."

In construing a statute, the intent of the General Assembly should be ascertained and given effect. (City of Springfield v. Board of Election Commissioners of the City of Springfield (1985) 105 Ill. 2d 336, 340-41; Illinois National Bank v. Chegin (1966), 35 Ill. 2d 375, 378.) Legislative intent is ascertained primarily from a consideration of the statute's language. (Droste v. Kerner (1966), 34 Ill. 2d 495, 503, cert. denied, 385 U.S. 456, 87 S. Ct. 612 (1967); People v. Crete (1985), 133 Ill. App. 3d 24, 32.) If the legislative intent can be ascertained from the language of the statute, it must prevail and be given effect. General Motors Corp. v. Industrial Commission (1975), 62 Ill. 2d 106, 112.

Moreover, it is fundamental that an agency of government possesses only those powers conferred by express provision of the law or those powers which are incident to express powers conferred for the purpose of effectively accomplishing the objectives for which the agency was created. Aurora East Public School District No. 131 v. Cronin (1982), 92 Ill. 2d 313, 326; City of Waukegan v. Pollution Control Board (1974), 57 Ill. 2d 170, 184; City of Chicago v. State and Municipal Teamsters (1984), 127 Ill. App. 3d 328, 336.

Pursuant to section 5-12 of the Public Community College Act, the General Assembly has expressly delegated to the CDB the power to determine whether a community college facility was defectively designed or constructed. Furthermore, the General Assembly has provided that, in the event that a community college recovers damages from a responsible party, the CDB must be reimbursed for the funds provided by the State. On the basis of these provisions, it is clear that the General Assembly intended that the CDB independently exercise its power to make determinations regarding defective design and construction and that the exercise of such power is not contingent upon any judicial findings or rulings on the issue. While the resolution of the issues of defective design and construction may involve complicated questions of fact, it is clear that a governmental agency has the authority to decide such

questions in the performance of the agency's duty. (See Peterson v. Board of Trustees of the Firemen's Pension Fund of the City of Des Plaines (1973), 54 Ill. 2d 260, 262-63; Dunn v. Director, Department of Labor (1985), 131 Ill. App. 3d 171, 173.) Accordingly, it is my opinion that under section 5-12 of the Public Community College Act, the Capital Development Board may determine whether building defects in a community college building are the result of design error or defective construction even though a lawsuit resulting from such building defects has been settled and that settlement effectively works to preclude a judicial determination on causation or fault regarding the building defects.

As to your second question, it is my opinion that, under the factual circumstances you have presented, the release executed by Sauk Valley College and the IBA in the course of settling the claim or claims emanating from the building defects in question does not preclude the CDB from using State funds to correct the defects pursuant to section 5-12 of the Public Community College Act.

As stated above, section 5-12 imposes a duty upon a community college which receives funding under section 5-12 to reimburse the State if the college recovers damages against the party responsible for the defects. Moreover, it may reasonably be contended that the CDB acquires a right of subrogation from

the college when it provides funding to correct building defects under section 5-12. (See generally 83 C.J.S. Subrogation § 1 et seq. (1953); 34 I.L.P. Subrogation § 1 et seq. (1958).) A release, however, extinguishes and discharges its subject claims and bars or prevents any further action thereon. (Touhy v. Twentieth Century-Fox Film Corp. (1979), 69 Ill. App. 3d 508, 512; Smith v. Lehn & Fink Products Corp. (1977), 46 Ill. App. 3d 1002, 1009.) Since a party with the right of subrogation, i.e., a subrogee, has no greater rights than the subrogor and can enforce only the rights of the subrogor (McCormick v. Zander Reum Co. (1962), 25 Ill. 2d 241, 244; Blume v. Evans Fur Co. (1984), 126 Ill. App. 3d 52, 54), the general rule is that a release executed by the subrogor in favor of the original obligor without the consent of the subrogee destroys the right of subrogation and relieves the subrogee from paying on the claim or debt to the same extent that the original obligor is relieved. (See generally McHenry State Bank v. Y & A Trucking, Inc. (1983), 117 Ill. App. 3d 629, 633; Grundy County National Bank v. Cavanaugh (1982), 105 Ill. App. 3d 718, 721; Oak Brook Bank v. Hawthorne Bank of Wheaton (1980), 90 Ill. App. 3d 642, 647; Aupperle & Sons, Inc. v. American Indemnity Co. (1979), 75 Ill. App. 3d 722, 724; Priess v. Buchsbaum (1947), 332 Ill. App. 565, 574-75.) Assuming arguendo that the CDB possesses a right of subrogation for

providing funds to remedy building defects in a community college building, the release of the parties responsible for the defects without the consent of the CDB could serve to relieve the CDB from funding the corrective work. Such action also adversely affects the CDB's statutory right to reimbursement since no action can be instituted to recover damages. Under the factual circumstances you have presented, however, it appears that the CDB may not now rely upon the College's release of the parties allegedly responsible for the building defects to escape its responsibility to fund the work to rectify the defects.

As you know, pursuant to section 10.01A of the Capital Development board Act (Ill. Rev. Stat. 1983, ch. 127, par. 780.01A), the CDB is the successor agency to the IBA, and all the powers, functions and duties of the IBA have been transferred to the CDB. As the successor to the IBA, the CDB stands in the place of the IBA, and therefore, the actions of the IBA essentially have become the actions of the CDB with respect to the subject College building. You have advised that the IBA consented to the release of the building A/E and contractor by the College by participating and jointly releasing those parties in the course of settling the lawsuit. Consequently, the release by the IBA constitutes release by the CDB as the successor to the IBA. Accordingly, the CDB will be estopped

from claiming that its rights have been adversely affected by the release. Therefore, it is my opinion that, under the facts you have provided, the release does not preclude the CDB from using State funds, pursuant to section 5-12 of the Public Community College Act, to correct building defects in the community college building which are the result of design error or defective construction.

Very truly yours,

ATTORNEY GENERAL