STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. M860728A

On July 28, 1986, a Petition for Advisory Opinion was received from The City University of New York, 535 East 80th Street, New York, New York 10021.

The issue raised is whether a mortgage to be presented for recording by The City University of New York (hereinafter "CUNY") with respect to the transaction described below is exempt from the mortgage recording tax imposed by New York Tax Law 253 and 253-a (hereinafter the "Mortgage Recording Tax").

The facts as presented are that CUNY has entered into a Capital Lease - Acquisition Agreement (hereinafter the "Lease") dated June 30, 1986 with Metropolis Realty Co., Inc., a New York corporation, Metropolis Studios Associates, a New York limited partnership, and James E. Fusco and Robert J. Reveley, individuals (collectively, "Original Landlord"), pursuant to which CUNY will lease certain premises (hereinafter the "Premises") located at Tenth Avenue between 58th and 59th Streets, New York City for use by John Jay College of Criminal Justice (hereinafter "John Jay"). The Lease is subject to the approvals of the State Budget Division and the State Departments of Law and Audit and Control.

The Lease requires Original Landlord to renovate existing improvements and construct an integrated annex on an adjacent vacant lot (collectively, "Landlord's Work"). The lease term will commence on the earlier of substantial completion of Landlord's Work or the third anniversary of the issuance of the certificates of participation (discussed below), at which time fee title to the Premises will be conveyed to the State of New York (hereinafter the "State"), subject to the Lease to CUNY. The State owns all CUNY senior college real property. (Education Law, 6219) The Lease term is 20 years.

Pursuant to a Trust Agreement (hereinafter the "Trust Agreement") to be entered into as of August 1, 1986 between Metropolis Realty Co., Inc. (hereinafter "Metropolis"), CUNY, and Chase Lincoln First Bank, N.A. (hereinafter the "Trust"), Certificates of Participation in the Lease (the "Certificates") in an aggregate principal amount of approximately $220,000,000 will be sold to the public. Approximately $155,000,000 of the proceeds from the sale of Certificates will be paid to Original Landlord in connection with Landlord's Work and the conveyance of the Premises to the State. The balance of the proceeds will be used to fund capitalized interest and other reserves, and to pay other issuance costs. The Certificates will be repaid solely from the basic rent paid by CUNY under the Lease, which will be funded from State appropriations for CUNY's operating budget. The Original Landlord has no responsibility to repay the Certificates. CUNY, not Original Landlord, will be the issuer of the Certificates for tax purposes. The interest is exempt from Federal and State income taxes. Thus, from the Certificate holder's point of view, the Certificates look very much like tax-exempt municipal bonds.

Original Landlord's obligation to perform Landlord's Work and to convey the Premises to the State will be secured by a mortgage (hereinafter the "Mortgage") for the benefit of CUNY. The Mortgage will be executed and recorded when the Certificates are issued. The mortgagor will be Original Landlord, the owner of the mortgaged property. The mortgagee will be CUNY.

The Mortgage plays two roles in the transaction. During the construction period, it secures the Original Landlord's obligations to CUNY to do the construction work required by the Lease. This is the primary function of the Mortgage. It was introduced into the transaction at CUNY's request in order to protect CUNY against a serious default by the Original Landlord in performing its construction work. During the construction period, CUNY exercises all rights of the mortgagee.

Under the Lease and the Mortgage, CUNY is required to present the Mortgage for recording and to pay all mortgage recording taxes. This is consistent with the basic economic deal between CUNY and Original Landlord that all expenses of the transaction (except Original Landlord's counsel fees) will by paid by CUNY, either directly or from the proceeds of the Certificates.

After approximately three years, pursuant to the Trust Agreement, CUNY will covenant to assign its interest in the Mortgage (hereinafter the "Assignment") to the Trustee. After the Assignment, the Mortgage will not secure any new or future indebtedness or obligation other than that secured by the original recorded Mortgage.

Based on the foregoing, Petition contends that since CUNY, as an instrumentality of the State, is immune from taxation (Education Law 6201 and 6203), the recording by CUNY of the Mortgage as well as the subsequent assignment of the Mortgage by CUNY to the Trustee are exempt from the Mortgage Recording Tax.

CUNY, as an instrumentality of the State of New York, is immune from all taxation. Accordingly, the recording of the Mortgage by CUNY is exempt from the Mortgage Recording Tax. City of New York v. Tully, (1982) 86 AD2d 330, 451 NYS 2d 261.

At the time of recording the mortgage, CUNY may establish its exemption by submitting to the recording officer an affidavit of an officer of CUNY asserting CUNY's right to the exemption. A copy of this opinion may be attached to the affidavit.

As for the taxability of the Assignment, such Assignment will not be subject to the Mortgage Recording Tax since the Assignment does not constitute a mortgage within the meaning and intent of Article 11 of the Tax Law. Matter of the Application of Joseph A. DeLorenzo, Decision of the State Tax Commission, December 8, 1976.

DATED: August 22, 1986

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.