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SPRINGFIELD

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FILE NO. 82-033

STATE MATTERS:

The Capital Development Board
May Acquire Title to Real Property
For a Public Improvement Where the
Mineral Interests Have Previously
Been Severed

Samuel K. Skinner, Chairman
Capital Development Board
State of Illinois
Suite 4700, One First National Plaza
Chicago, Illinois 60603

Dear Mr. Skinner:

I have your letter in which you state that the Capital Development Board, in conjunction with the Department of Corrections, is attempting to acquire real estate for a correctional facility. According to your letter, the Board and the Department have located a suitable parcel of property for which they can acquire all surface rights but for which they cannot acquire the mineral rights below 125 feet. You advise that failure to acquire the mineral rights below 125 feet will not in any way result in an impairment of the Department's use of the surface, and you ask whether the Board may acquire title

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to such real estate for the purpose of constructing a correctional facility thereon. For the reasons hereinafter stated, it is my opinion that the Board may acquire the property in question and that the improvement of such property will not result in a violation of section 2 of "AN ACT to punish fraud or extravagance in the expenditure of monies appropriated for public improvements" [the Fraud in Public Contracts Act] (Ill. Rev. Stat. 1981, ch. 127, par. 132.52).

Sections 4 and 4.01 of the Capital Development Board Act (Ill. Rev. Stat. 1981, ch. 127, pars. 774, 774.01) specifically authorize the Board:

"To build or otherwise provide hospital, housing, penitentiary, administrative, recreational, education, laboratory, parking, environmental equipment and other capital improvements for which money has been appropriated or authorized by the General Assembly."
(Emphasis added.)

Sections 9 and 9.01 of the Capital Development Board Act (Ill. Rev. Stat. 1981, ch. 127, pars. 779, 779.01) authorize the Board to:

" * * * provide for the acquisition, planning, construction, reconstruction, improvement and installation of capital facilities, consisting of buildings, structures and equipment and for the acquisition and improvement of real property and interest in real property required, or expected to be required, in connection therewith and for the acquisition, protection and development of land within the State of Illinois for open spaces, recreational and conservation purposes, as authorized by the General Assembly by appropriations from the Capital Development Bond Fund, the School Construction Fund, general revenue fund, other funds, or revenue bonds, but not including capital facilities provided entirely by

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local community college district or local school district funds or capital facilities at non-profit, non-public health service educational institutions." (Emphasis added.)

Thus, the Board has the power to provide for the acquisition, planning, construction, reconstruction, improvement and installation of capital facilities, consisting of buildings, structures and equipment, and "for the acquisition and improvement of real property and interest in real property required, or expected to be required, in connection therewith * * *" (Emphasis added.)

The first issue is whether the Board may acquire less than a complete interest in real property when a lesser interest is all which is required or expected to be required in connection with a capital improvement. The statute clearly authorizes the "acquisition * * * of real property". The term "real property" is not limited to a complete fee simple title. The court in Sanitary Dist. of Chicago v. Manasse (1942), 380 Ill. 27, 32-33, in construing the statutory authority of the Chicago Sanitary District to take fee simple title to property by eminent domain, stated that:

" * * *

The question here is, did the legislature by the provisions of the said Sanitary District act confer upon appellee the power to take fee simple title to the property by eminent domain. The statute provides the sanitary district 'may acquire by * * * condemnation or otherwise, any and all real * * * property, right-of-way and privilege, * * * and when not longer required for such corporate purposes, * * * may sell,

vacate, release, lease or otherwise convey any and all such real * * * property,' etc. The authority is not confined to acquiring an easement such as a right of way, but includes any real property or all real property. Real property is defined as including all interest held or claimed in lands in fee, for life or for years. (Cottingham v. Springer, 88 Ill. 90; Brandies v. Cochrane, 112 U.S. 344, 28 L.ed. 760; Floyd v. Carow, 88 N.Y. 560; Murphy v Superior Court, 138 Cal. 69, 70 Pac. 1070; Horney v. Price, 189 N.C. 820, 128 S.E. 321.) The term real property is coextensive with lands, tenements and hereditaments, and includes any interest in land. (Martinovich v. Mariscano, 137 Cal. 354, 70 Pac. 459; Ralston Steel Car Co. v. Ralston, 112 Ohio St. 306, 147 N.E. 513; Fretwell v. McLemore, 52 Ala. 124.) From the language used authority was granted the sanitary district by section 8 to acquire any interest in real estate that it deemed necessary and proper for its corporate purpose, and the judgment of the court in fixing the just compensation at the time it was acquired found that the compensation was for the full fee simple interest in the property. The right of such sanitary district to acquire the fee simple title, while not directly passed upon, has been recognized by this court in Pittsburgh, Ft. Wayne and Chicago Railway Co v. Sanitary District, 218 Ill. 286; Sanitary District v. Munger, 264 id. 256, and Sanitary District v. Murphy, 261 id. 269.) It must be held therefore that the legislature authorized the sanitary district to acquire any interest in real estate, including a fee simple interest, for its corporate purposes.

* * *

"

Because real property interests include fee simple and lesser interests, and because section 9.01 of the Act clearly empowers the Board to acquire "real property", the Board is authorized, pursuant to section 9.01, to acquire the real estate in question even though the mineral interests have been severed.

Section 2 of "AN ACT to punish fraud or extravagance in the expenditure of moneys appropriated for public improve-

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ments" [the Act] (Ill. Rev. Stat. 1981, ch. 127, par. 132.52) provides in pertinent part that:

"Any person or persons, commissioner or commissioners, or other officer or officers, entrusted with the construction or repair of any public work or improvement, as set forth in Section 1, who shall expend or cause to be expended upon such public work or improvement, the whole or any part of the moneys appropriated therefor, or who shall commence work, or in any wise authorize work to be commenced, thereon, without first having obtained a title, by purchase, donation, condemnation or otherwise, to all lands needed for such public work or improvement, running to the People of the State of Illinois; said title to be approved by the Attorney General, and his approval certified by the Secretary of State and placed on record in his office, shall be deemed guilty of a Class A misdemeanor, * * * ." (Emphasis added.)

Whenever the Board seeks to acquire property, it must comply with the relevant provisions of section 2 quoted above. By its own terms, section 2 requires only that an agency acquire "all lands needed for such public work or improvement". (Emphasis added.)

In Department of Conservation v. Harold's Farm, Inc. (1978), 68 Ill. App. 3d 148, one of the issues raised and specifically considered by the court was whether section 2 of the Fraud in Public Contracts Act mandates a State agency empowered to take by eminent domain, to take fee simple interest in land they seek to acquire when a lesser interest will serve its needs. In Harold's Farm the court determined that the Department of Conservation had the authority to condemn less than a complete fee simple interest and, conse-

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quently, could, pursuant to its statutory powers of eminent domain, take a fee simple interest in a tract of land excepting coal and mineral rights. One of the arguments asserted by appellees was that section 2 of the Fraud in Public Contracts Act required the Department of Conservation to acquire the land in fee simple. In response, the court, at page 154, stated that:

" * * *

The next argument of the defense, that the petitioner is required by section 2 of 'An Act to punish fraud or extravagance in the expenditure of moneys appropriated for public improvements' (Ill. Rev. Stat. 1973, ch. 127, par. 132.52) to acquire the land in fee simple, is without merit. That provision prohibits, through the imposition of criminal sanctions, the expenditure of moneys upon a public work or improvement without first having obtained title, by purchase, donation, condemnation or otherwise, to all land needed for such public work or improvement. Nothing therein mandates that the State agencies empowered to take by eminent domain must take a fee simple interest in the land they seek to acquire when they feel less will serve their needs. The State, under the Eminent Domain Act, may acquire a fee interest or a lesser estate. (Miller v. Commissioners of Lincoln Park (1917), 278 Ill.400, 406, 116 N.E. 178; Department of Public Works & Buildings v. Bozarth (4th Dist. 1968), 101 Ill. App.2d 99, 102, 242 N.E.2d 54.)

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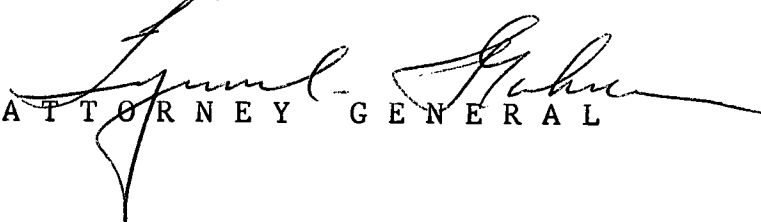
(Emphasis added.)

Consequently, for the reasons discussed above, it is my opinion that the Board may acquire title to real estate for a public improvement when the mineral interests have been previously severed if the interest in real property which it

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will obtain is all that is required and needed in connection
with the capital improvement.

Very truly yours,


ATTORNEY GENERAL