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SPRINGFIELD

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STATE MATTERS:

Land Acquisition by Contract for
Deed; State Debt; Public Works and
Improvements; Fraud in Public
Contracts Act

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Dear Mr. Witte:

I have your predecessor's letter wherein he requested my opinion on several questions regarding the authority of the Department of Conservation [DOC] to purchase land by contract for deed pursuant to section 63a33 of The Civil Administrative Code of Illinois (Ill. Rev. Stat. 1983, ch. 127, par. 63a33). You first inquire whether a contract for deed constitutes State debt under section 9 of article IX of the Illinois Constitution

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of 1970. For the reasons stated below, it is my opinion that a properly drafted contract for deed does not create State debt within the meaning of section 9 of article IX of the Constitution.

Section 63a33 of The Civil Administrative Code authorizes the Department of Conservation:

"[t]o purchase land for State park purposes by contract for deed under the terms and restrictions of Section 2 of 'An Act in relation to the acquisition, control, maintenance, improvement and protection of State parks and nature preserves', approved June 26, 1925, as now or hereafter amended. Such purchase restrictions thereunder shall include and take into consideration any purchases by contract for deed under Sections 63a10, 63a17, 63a18, 63a19 and 63a29 of this Act."

Section 2 of "AN ACT in relation to the acquisition, control, maintenance, improvement and protection of State parks" (Ill. Rev. Stat. 1983, ch. 105, par. 466) [hereafter State Parks Act] provides, in pertinent part:

" * * *

The Department of Conservation is authorized in behalf of the State of Illinois to accept by donation or bequest, to purchase or acquire by condemnation proceedings in the manner provided for the exercise of the power of eminent domain under Article VII of the Code of Civil Procedure or by contract for deed payable over a period of time not to exceed 10 years, or in any other legal manner, the title to all such lands, waters or regions, and the easements appurtenant or contributory thereto, which shall be in accord with such policy in respect to a system of State parks, for the purpose of which the General Assembly may make an appropriation. Purchases by

contract for deed under this Section shall not exceed \$20,000,000 in total purchase price for land under contract at any one given time." (Emphasis added.)

A contract for deed, which is also referred to as an installment contract and a land contract, is a method of purchasing real estate wherein the purchaser delivers to the seller a down payment with the balance of the purchase price payable in installments. The purchaser receives the deed to the subject real estate when all the installments, as described in the contract, have been paid. (R. Kratovil & R. Werner, Real Estate Law § 287 (7th ed. 1979).) In the event of a default by the purchaser in making such installments, the contract generally prescribes that the seller has the remedy of forfeiture. In other words, upon the purchaser's default, the seller has the right to declare a forfeiture of the rights of the purchaser under the contract so that the seller regains possession of the subject real estate, and the purchaser forfeits his or her payments under the contract, which are retained by the seller as liquidated damages. See Kingsley v. Roeder (1954), 2 Ill. 2d 131, 137; Morey v. Huston (1967), 85 Ill. App. 2d 195, 199; R. Kratovil & R. Werner, Real Estate Law § 340 (7th ed. 1979).

Section 9 of article IX of the Illinois Constitution of 1970 provides, in pertinent part, as follows:

"(a) No State debt shall be incurred except as provided in this Section. For the purpose of this Section, 'State debt' means bonds or other evidences of indebtedness which are secured by the full faith and credit of the State or are required to be repaid, directly or indirectly, from tax revenue and which are incurred by the State, any department, authority, public corporation or quasi-public corporation of the State, any State college or university, or any other public agency created by the State, but not by units of local government, or school districts.

(b) State debt for specific purposes may be incurred or the payment of State or other debt guaranteed in such amounts as may be provided either in a law passed by the vote of three-fifths of the members elected to each house of the General Assembly or in a law approved by a majority of the electors voting on the question at the next general election following passage. Any law providing for the incurring or guaranteeing of debt shall set forth the specific purposes and the manner of repayment.

* * *

(f) The State, departments, authorities, public corporations and quasi-public corporations of the State, the State colleges and universities and other public agencies created by the State, may issue bonds or other evidences of indebtedness which are not secured by the full faith and credit or tax revenue of the State nor required to be repaid, directly or indirectly, from tax revenue, for such purposes and in such amounts as may be authorized by law."

The issue of whether a particular transaction constitutes a debt of the State is a judicial question. (Baro v. Murphy (1965), 32 Ill. 2d 453, 461.) State debt, as used in the Constitution, has been held to be any obligation or liability, whether actual or contingent, of the State to pay an

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amount. (People ex rel. Capron v. Nelson (1931), 344 Ill. 46, 53; see also People ex rel. Ogilvie v. Lewis (1971), 49 Ill. 2d 476, 488; Loomis v. Keehn (1948), 400 Ill. 337, 344.) In deciding that certain notes issued by State officers constitute State debt, the Illinois Supreme Court held that the phrase "State debt" must be given its plain, ordinary meaning. The court stated:

" * * *

* * * A debt is that which is due from one person to another; whether money, goods or services; that which one person is bound to pay to another, or perform for his benefit; a thing owed. * * *

* * *

"
(People ex rel. City of Chicago v. Barrett (1940), 373 Ill. 393, 402.)

Not all financial structures or transactions that the State has entered, however, create State debt. See Berger v. Howlett (1962), 25 Ill. 2d 125; Loomis v. Keehn (1948), 400 Ill. 337.

Loomis v. Keehn dealt with the Illinois State Armory Board, which was created by the General Assembly as a governmental corporation to construct armories, and Berger v. Howlett dealt with the Illinois Building Authority, which was created by the General Assembly as a governmental corporation to provide other State facilities. In both cases, the governmental corporations were authorized to issue bonds to accomplish their building purposes. The enabling statutes

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provided that the bonds and obligations would be retired from rent payments derived from leasing the facilities to the State of Illinois. In the event of default by the State under the leases, the governmental corporations could lease the facilities to other parties to enable the governmental corporations to continue meeting the obligations under the bond issues. The court stated in Loomis v. Keehn (1948), 400 Ill. 337:

" * * *

* * * We are of the opinion that the pledge of rentals, income, and property of the armories owned by the Illinois State Armory Board does not create a debt of the State of Illinois, and that the holder of such bond or bonds of such Armory Board so secured does not have a claim against the State of Illinois by reason thereof, and that the sole security of such bondholder is the property or income pledged in the indenture or instrument executed by authority of the State Armory Board.

* * *

(Emphasis added.) (Loomis v. Keehn (1948), 400 Ill. 337, 342.) "

In Berger v. Howlett (1962), 25 Ill. 2d 125, 134, the court held:

" * * *

* * * [L]eases to the State or its agencies shall provide that the rents shall be payable from appropriations made by the General Assembly at each session for such purpose, and, in case such rental is unpaid, it is entirely clear that no claim is preserved against the State inasmuch as the Authority is given the power to lease the building or facility to others for any suitable purposes. [Citations.]

* * *

(Emphasis added.) "

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It is clear that the pivotal fact upon which the courts have held that such financial structures do not constitute State debt is that in each instance no claim was preserved against the State in the event of the State's default. (Rosemont Building Supply, Inc. v. Illinois Highway Trust Authority (1970), 45 Ill. 2d 243, 252.) As stated above, in a contract for deed, forfeiture is generally the prescribed remedy of the seller in the event of the purchaser's default, and if a seller declares a forfeiture under the contract and takes possession of the real estate, the seller is precluded from instituting an action for damages under the contract. (Morey v. Huston (1967), 85 Ill. App. 2d 195, 199; see also Wollenberger v. Hoover (1931), 346 Ill. 511.) Accordingly, no claim is preserved against the State once a seller exercises forfeiture. However, unless the contract explicitly provides otherwise, the seller may, as an alternative to forfeiture, pursue an action for breach of contract. In Hooven v. Woodiel (1975), 27 Ill. App. 3d 467, 470-71, the court held as follows:

" * * *

Forfeiture of an installment contract for sale of real estate is an act disaffirming the contract. An action for damages for breach, however, treats the contract as continuing in full force and effect. The two actions are inconsistent. * * * Thus, plaintiff's forfeiture of the agreement barred any subsequent action for damages.

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We do not hold * * * that forfeiture was the only remedy available to plaintiff under the agreement. Plaintiff could have treated the contract as subsisting. In such event, the agreement lacking a provision for acceleration of payments in the event of breach, plaintiff could have sued for installments as they came due.
* * *

* * *

"

See also People ex rel. Smith v. Mersinger (1960), 18 Ill. 2d 486, 488.

Based upon the foregoing, it is my opinion that a properly drafted contract for deed does not create State debt. Such contract must provide that, in the event of a default by the State, forfeiture is the sole and exclusive remedy of the seller thereby barring an election by the seller to sue for damages under a breach of contract cause of action. Under a contract drafted in such a manner, no claim would be preserved against the State in the event of default.

You next inquire concerning the proper method for appropriating funds for payments to be made under a contract for deed authorized by section 63a33 of The Civil Administrative Code. You ask whether a contract for deed is binding upon the State so as to authorize payment in subsequent years without an appropriation. For the reasons hereinafter presented, it is my opinion that payments under such contracts are not authorized in the absence of a specific appropriation therefor.

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Section 2(b) of article VIII of the Illinois Constitution of 1970 provides, in pertinent part, that:

"The General Assembly by law shall make appropriations for all expenditures of public funds by the State. * * *"

Section 30 of "AN ACT in relation to State finance" (Ill. Rev. Stat. 1983, ch. 127, par. 166) [hereafter State Finance Act] provides as follows:

"No officer, institution, department board or commission shall contract any indebtedness on behalf of the State, nor assume to bind the State in an amount in excess of the money appropriated, unless expressly authorized by law." (Emphasis added.)

Based upon these two provisions (and their predecessors), it has been firmly established that no expenditure of State funds may be made unless supported by a current and valid appropriation by the General Assembly or unless it is otherwise expressly authorized by law. (People ex rel. Board of Trustees v. Barrett (1943), 382 Ill. 321, 341; 1977 Ill. Att'y Gen. Op. 99, 101.) Moreover, the State has no obligation to make payments under a contract which is entered into by a State agency in excess of its appropriations. (1978 Ill. Att'y Gen. Op. 169.) Therefore, it is my opinion that payments due under a contract for deed entered into pursuant to section 63a33 of The Civil Administrative Code are not authorized in absence of a current and valid appropriation therefor.

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You also inquire whether a contract for deed entered into by the State is valid only if there is an appropriation to make the payments agreed upon under the contract. As stated above, a State agency may not enter into contracts in excess of money appropriated to the agency unless such contract is "expressly authorized by law". See section 30 of the State Finance Act (Ill. Rev. Stat. 1983, ch. 127, par. 166). Thus, a contract binding the State to an amount in excess of the money appropriated is valid if it is "expressly authorized by law". The precise question to be resolved, therefore, is whether, under section 2 of the State Parks Act, the Department of Conservation is "expressly authorized by law" within the meaning of section 30 of the State Finance Act to contract any indebtedness on behalf of the State in an amount in excess of the money appropriated therefor.

In Fergus v. Brady (1917), 277 Ill. 272, the Illinois Supreme Court construed the phrase "expressly authorized by law" as that phrase was used in a similar provision in section 19 of article IV of the Illinois Constitution of 1870:

"* * * That authority is express which confers power to do a particular, identical thing set forth and declared exactly, plainly and directly, with well defined limits, and the only exception under which a contract exceeding the amount appropriated for the purpose may be valid is where it is so expressly authorized by law. An express authority is one given in direct terms, definitely and explicitly, and not left to inference or to implication, as distinguished

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from authority which is general, implied or not directly stated or given. * * *" Fergus v. Brady (1917), 277 Ill. 272, 279.

Under this construction of the phrase, it is clear that the power of DOC to enter into a contract for deed on behalf of the State pursuant to section 63a33 of The Civil Administrative Code and section 2 of the State Parks Act is "expressly authorized by law". Firstly, the power is expressly given in both statutes. It is conveyed in plain and direct terms; there is no need to imply any aspect of the authority granted. Additionally, the authorization is specific in purpose and expressly limited in its scope. Section 63a33 of The Civil Administrative Code expressly limits the Department's authority "[t]o purchase land for State park purposes by contract for deed under the terms and restrictions of Section 2 of [the State Parks Act] * * *." (Emphasis added.) In turn, section 2 of the State Parks Act restricts the Department's power to acquire "* * * the title to all such lands, waters or regions, and the easements appurtenant or contributory thereto, which shall be in accord with [the] policy [specified in this section] in respect to a system of State parks * * *". (Emphasis added.) Also, section 2 limits the agency's spending authority to a definite dollar amount. Therefore, the agency's authority under section 63a33 of The Civil Administrative Code

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and section 2 of the State Parks Act to contract an indebtedness on behalf of the State is "expressly authorized by law" within the meaning of section 30 of the State Finance Act. For this reason, it is my opinion that a contract executed pursuant to these provisions is valid even in the absence of a specific appropriation therefor. Of course, if the General Assembly fails to make an appropriation to make the payments agreed under the contract, thereby compelling the State to default under the contract, the seller may declare a forfeiture as discussed above.

Furthermore, I recommend that any contract for deed that DCC contemplates entering contain a "non-appropriation of funds contingency clause". Such a clause typically provides that the contract is conditioned upon and subject to termination and cancellation by the State in any year in which the General Assembly fails to make an appropriation to make the payments required by the State under the terms of the contract. Because no payment can be compelled under the contract in the absence of a valid and current appropriation therefor, it is advisable, in my opinion, to include a non-appropriations contingency clause in all contracts entered into pursuant to section 63a33 of The Civil Administrative Code.

You also ask whether the contract must be supported by an original appropriation to cover the full contract value with

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subsequent annual reappropriation necessary for the unpaid balance. Most appropriations are annual in character, covering expenditures of a fiscal year. (Ill. Rev. Stat. 1984 Supp., ch. 127, par. 161.) However, subsection 2(b) of article VIII of the Illinois Constitution of 1970 was intended to leave the choice of methods of appropriation to the General Assembly, thereby eliminating further doubts concerning the validity of "no year" and continuing appropriations. (See People ex rel. Ogilvie v. Lewis (1971), 49 Ill. 2d 476, 490; 1977 Ill. Att'y Gen. Op. 99, 101.) Therefore, it is my opinion that in the context of the expenditure authority granted by section 2 of the State Parks Act, the General Assembly may fulfill its appropriation obligation with a continuing rather than annual appropriation. As explained above, however, an original appropriation to cover the full contract value is not required. The decision to employ a continuing appropriation or an annual appropriation lies with the General Assembly.

You next ask whether section 2 of "AN ACT to punish fraud or extravagance in the expenditure of moneys appropriated for public improvements" [hereafter Fraud in Public Contracts Act] (Ill. Rev. Stat. 1983, ch. 127, par. 132.52) prohibits the Department from developing property acquired under contract for deed pursuant to section 63a33 of The Civil Administrative Code prior to the time title vests in the State. For the reasons stated below, the answer to your question is in the affirmative.

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Section 2 of the Fraud in Public Contracts Act provides, in pertinent part:

"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 * * *.

* * *

"

Under the doctrine of equitable conversion, at the time a valid and enforceable land contract for deed is executed, the purchaser obtains only an equitable interest in the subject real estate; the seller retains legal title to the property in trust for the purchaser. (Shay v. Penrose (1962), 25 Ill. 2d 447, 449.) If default occurs on the part of the purchaser as to making payments, absolute legal title vests again in the vendor. (Chandler v. Chandler (1978), 64 Ill. App. 3d 97, 100.) Thus, in the instant case, the Department, as purchaser on behalf of the State, would not obtain full legal title to the subject real estate until it completes all payments due under the contract for deed.

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The word "title" in section 2 of the Fraud in Public Contracts Act has been consistently construed to mean a legal estate in fee simple. (1977 Ill. Att'y Gen. Op. 175, 176.) Section 2 of the Act was construed in a similar context as follows:

" * * *

* * * It is * * * the policy of this State that in order for the Department of Conservation to develop any land, such land must be held in fee simple by the State of Illinois unless there is a specific statutory authorization allowing development upon a less than fee simple interest in land." (1977 Ill. Att'y Gen. Op. 139, 142.)

Because the Department will not possess legal title to the property until all payments have been made under the contract, and because there is no other specific statutory authorization to develop property prior to possession of absolute legal title, it is my opinion that section 2 of the Fraud in Public Contracts Act prohibits DCC from making any public work or improvements on property purchased by contract for deed pursuant to section 63a33 of The Civil Administrative Code prior to the time it possesses full legal title to the property and such title is approved by the Attorney General.

This conclusion is in accordance with the policy behind section 2 of the Fraud in Public Contracts Act. By enacting section 2 of the Act, the General Assembly intended to avoid any situation in which the State would expend public

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funds for improvements on property without the certainty that the property will remain in State possession and control. (1977 Ill. Att'y Gen. Op. 175, 176.) In this case, the possibility of default on the contract and subsequent forfeiture of the property cannot be discounted. It is therefore appropriate to apply the plain language of section 2 of the Fraud in Public Contracts Act to property acquisition made under section 63a33 of The Civil Administrative Code.

Your final question is whether the Department's authority to purchase land by contract for deed under section 63a33 of The Civil Administrative Code applies to the Department's acquisition of land for fish and wildlife conservation under section 1.9 of the Fish Code of 1971 (Ill. Rev. Stat. 1983, ch. 56, par. 1.9) and section 1.9 of the Wildlife Code (Ill. Rev. Stat. 1983, ch. 61, par. 1.9).

Section 1.9 of the Fish Code of 1971 provides, in pertinent part:

"

* * *

The Department is empowered, or it may participate jointly with any municipality or other subdivision of this State, or the United States, to select and purchase, or lease, receive by donation or acquire, in accordance with the laws relating to eminent domain:

(a) Suitable waters for the breeding, hatching, propagation and conservation of aquatic life or

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(b) Waters to be used as public fishing and recreation areas, or

(c) Suitable waters or real property or both for the construction and operation thereon of conservation lakes and public fishing grounds, and to construct and maintain thereon such buildings, roads, bridges, and other recreational facilities as the Department deems necessary or desirable to a full and complete utilization thereof for the purposes herein set forth. The Department is further authorized to acquire all the necessary property or rights-of-way for the purposes of ingress and egress to such waters and lands, and to construct and maintain on such property or rights-of-way all necessary roads and bridges." (Emphasis added.)

Section 1.9 of the Wildlife Code provides, in pertinent part:

"The Department shall have the power and authority to select and purchase or lease, receive by donation or acquire, in accordance with the laws relating to eminent domain: (a) suitable lands for the breeding, hatching, propagation and conservation of birds or mammals, (b) lands or lands and waters, to be used as public hunting and fishing grounds, or (c) lands or lands and waters to be used as wildlife refuges." (Emphasis added.)

As noted above, the Department's authority to purchase land for State park purposes by contract for deed under section 63a33 of The Civil Administrative Code is expressly subject to the restrictions of section 2 of the State Parks Act which provides, in pertinent part:

"

* * *

The Department of Conservation is authorized in behalf of the State of Illinois to accept by donation or bequest, to purchase or acquire * * * by contract for deed payable over a period of time not to exceed 10 years, or in any other

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legal manner, the title to all such lands, waters or regions, and the easements appurtenant or contributory thereto, which shall be in accord with such policy in respect to a system of State parks * * *." (Emphasis added.)

Thus, the scope of the Department's authority to purchase land by contract for deed under section 63a33 must be determined in accordance with the policy of the State park system as stated in the State Parks Act.

This policy is expressed in section 2 of the Act which provides, in pertinent part:

"It shall be the policy of the State of Illinois to acquire a system of State parks which shall embody the following purposes and objectives:

* * *

(3) To preserve large forested areas and marginal lands along the rivers, small water courses, and lakes for a recreation use different from that given by the typical city park, and so that these tracts may remain unchanged by civilization, so far as possible, and be kept for future generations. Such areas also, should be acquired in units of 1,000 acres or more and may be available as fish and game preserves. * * *

* * *

"

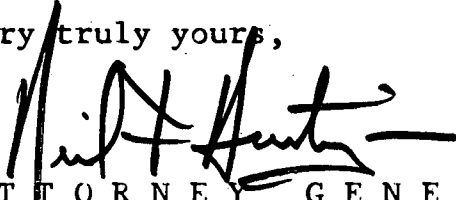
(Emphasis added.)

This language makes plain that the availability of fish and game preserves is one of the stated purposes of the State parks system. Since land acquisition pursuant to section 63a33 of The Civil Administrative Code is intended to further the stated policies of the State Parks Act, it is my opinion

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that the Department's authority to purchase land by contract for deed pursuant to that section extends to the acquisition of land and waters for fish and game preserves under section 1.9 of the Fish Code of 1971 and section 1.9 of the Wildlife Code.

Very truly yours,



A T T O R N E Y G E N E R A L