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STATE OF ILLINOIS
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FILE NO. S-1283

STATE MATTERS:
Power of Department
of Conservation to
Acquire Land in Less
Than Fee Simple

David Kenney
Director
Department of Conservation
State of Illinois
605 State Office Building
Springfield, Illinois 62706

Dear Director Kenney:

This is in response to your request for my opinion as to whether the Department of Conservation may acquire, purchase and develop State property held in less than fee simple. In my opinion the Department is authorized to acquire or purchase land in less than fee simple only in specific situations defined by statute, as will be outlined below. In situations not covered by statute, the Department of

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Conservation may develop land only in accordance with section 2 of the Fraud in Public Contracts Act. Ill. Rev. Stat. 1975, ch. 127, par. 132.52.

The powers of the Department are specifically granted by statute. The statutory provisions are sections 63a17, 63a18, 63a19 and 63a29 of the Civil Administrative Code (Ill. Rev. Stat. 1975, ch. 127, par. 63a17, 63a18, 63a19 and 63a29) and sections 2 and 2a of "AN ACT in relation to the acquisition, control, maintenance, improvement and protection of State parks and nature preserves". (Ill. Rev. Stat. 1975, ch. 105, par. 466 and 466a.) I agree with the strict interpretation of these powers given by my predecessor in opinion No. 281 (1962 Ill. Att'y. Gen. Op. 332) in which he states: "Unless the authority to accept less than a title in fee simple absolute can be found in the Act authorizing the acquisition, the Department of Conservation is not authorized to accept merely an * * * easement to the land in question".

Section 63a17 provides that the Department has authority:

"To acquire jurisdiction by lease, purchase, contract or otherwise, over any lands held by or otherwise under the jurisdiction of the Federal

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government for the purpose of carrying out any power or duty conferred upon the Department and to locate, relocate, construct and maintain roadways and parking areas on such lands and to supply all facilities necessary for public use of the areas." (Emphasis added.)

This provision expressly authorizes the Department to acquire jurisdiction by lease, purchase, contract or otherwise over lands under control of the Federal government. This provision relates only to acquiring jurisdiction over land under Federal control, but provides no limits on the manner of acquiring jurisdiction as long as the land is acquired for purposes of carrying out the powers or duties of the Department.

Section 63a18 provides that the Department has authority:

"To lease from individuals, corporations, or any other form of private ownership, from any municipality, public corporation, or political subdivision of this State, or the United States, any lands or waters for the purpose of developing outdoor recreational areas for public use and to acquire all necessary property or rights-of-way, for the purposes of ingress or egress to such lands and waters, and to construct buildings and other recreational facilities including roadways, bridges and parking areas as the Department deems necessary or desirable for maximum utilization of recreational facilities for public use of the areas." (Emphasis added.)

Under this provision the Department has power to lease lands

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or waters and to acquire property or rights-of-way for ingress or egress to said lands or waters from private owners, political subdivisions of this State or the United States. However, authority both to lease and to acquire rights-of-way is limited to lands or waters intended for development of outdoor recreational areas.

Section 63a19 authorizes the Department:

"To acquire the fee or any lesser interests, including scenic easements, in real property in order to preserve through limitation of future use, areas of great natural scenic beauty or areas whose existing openness, natural condition or present state of use, if retained would enhance the present or potential value of abutting or surrounding recreational area development, or would maintain or enhance the conservation of natural or scenic resources." (Emphasis added.)

This provision expressly refers to purchase of title in real property, and in this regard, allows the Department to acquire the fee or lesser interests such as scenic easements. No limitation is placed upon source of purchase, but rather authority to acquire property is limited to areas of natural scenic beauty, areas abutting or surrounding recreational area development, and areas which would maintain or enhance the conservation of natural or scenic resources.

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Section 63a29 authorizes the Department:

"To acquire, for purposes authorized by law, any real property in fee simple subject to a life estate in the seller in not more than 3 acres of the real property acquired, subject to the restrictions that the life estate shall be used for residential purposes only and that it shall be non-transferable." (Emphasis added.)

This provision authorizes the acquisition of property in fee simple subject to a life estate in the seller. In this situation, estate size is limited to three non-transferable acres which are intended for residential use.

Section 2 of "AN ACT in relation to the acquisition, control, maintenance, improvement and protection of State parks and nature preserves" delegates authority to the Department of Conservation as follows:

" * * *

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 under the Eminent Domain Act, 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." (Emphasis added.)

The Department is authorized to purchase or acquire special types of easements as well as title to lands intended for

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use as State parks. With respect to the meaning of title in this provision, my predecessor in opinion No. 446 (1958 Ill. Att'y. Gen. Op. 129) stated "in acquiring property * * * it is necessary that the Department of Conservation obtain such title and right in the premises as will enable it to discharge its duties. The public in its use of the premises and the Department in providing the facilities and appurtenances * * * must not be subject to paramount rights which could hinder such use or prevent such development". This language conveys the principle that when a statute allows the Department to acquire less than a fee simple interest in land, the interest that the Department does acquire must be large enough so that the holder of any other interest in the land cannot interfere with the public's use of it.

In addition, section 2a of this Act authorizes acquisition of property for the establishment of nature preserves as follows:

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* * *

The Department of Conservation is authorized, in behalf of the State of Illinois and subject to the approval of the Illinois Nature Preserves Commission and of the Governor, to acquire by

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gift, purchase, grant, exchange, dedication or condemnation pursuant to 'An Act to provide for the exercise of the rights of eminent domain', approved April 10, 1872, as heretofore and hereafter amended and to dispose of, the fee or any lesser right or interest in real property, and to hold and manage the same within or without the system of nature preserves in a manner approved by the Illinois Nature Preserves Commission." (Emphasis added.)

For this purpose, the Department is allowed to acquire the fee or any lesser right or interest in real property.

In my opinion, therefore, the Department of Conservation on behalf of the State of Illinois is authorized to acquire a less than fee simple interest in land only in situations covered by statute. Whenever the Department seeks to develop public land it must comply with section 2 of "AN ACT to punish fraud or extravagance in the expenditure of monies appropriated for public improvements" (Ill. Rev. Stat. 1975, ch. 127, par. 132.52) which reads as follows:

"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

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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, provided, however, that in the case of a fee simple title or easements acquired by the State for highway right-of-way, the acquisition of rights or easements of access, crossing, light, air or view to, from or over a Freeway, vested in abutting property, or easements for other purposes, when the consideration to be paid therefor does not exceed \$2500, the approval of the Attorney General, shall not be required and the State Comptroller may draw a warrant in payment of such consideration without requiring such approval of title by the Attorney General.

This Section does not apply to any otherwise lawful expenditures for the construction, completion, remodeling, maintenance and equipment of buildings and other facilities made in connection with and upon premises owned by the Illinois Building Authority."

It is thus 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.

Very truly yours,

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