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FILE NO. 92-028

STATE MATTERS:
Operation of a Bank
in the State House

Honorable Patrick Quinn
Treasurer
State of Illinois
State House, Room 219
Springfield, Illinois 62706

Mr. Mal Hildebrand
Executive Director
Legislative Space Needs Commission
William G. Stratton Building, Suite 602
Springfield, Illinois 62706

Gentlemen:

I have your letters pertaining to the propriety of an agreement under which the State Treasurer proposes to authorize a private banking corporation to establish a branch facility in a portion of the space allocated to the Treasurer in the State House. For the reasons hereinafter stated, it is my opinion that the State Treasurer is not authorized to enter into such an agreement.

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By way of background, it has been noted that the Treasurer's office has, for some time, operated a teller facility in Room 203 of the State House, which has provided check cashing services to State employees and others who regularly do business in the Capitol Complex. Although the operation of the teller service is not expressly authorized by statute, it is a longstanding practice, having apparently developed from the Treasurer's functions in honoring State warrants and accepting monies for deposit into the State Treasury.

The proposed agreement between the Treasurer and First of America Bank (hereinafter referred to as "FOA") does not merely provide for FOA to operate the existing teller service but provides for the replacement of this existing, limited service with a branch banking facility operated by FOA. This branch facility, which has been approved by the Comptroller of the Currency, would provide a number of banking services (including deposit services and opening of new accounts; the acceptance of loan payments; the sale of travelers checks, cashiers checks and money orders; payments for City Water, Light and Power services, Visa and Mastercard cash advances; and tax deposit services) to FOA customers and the general public.

In consideration for the use of the State House facilities and the furnishing of security, FOA would agree to provide

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enumerated financial services to the State of Illinois, including automated clearinghouse operations, check cashing, processing of bond payments and processing of agency deposits into the treasury. It is estimated that the value of such services to the State could amount to approximately \$50,000 annually.

The powers of the Treasurer are set forth in the Constitution (Ill. Const. 1970, art. V, sec. 18) and statutes implementing the constitutional grant of powers. Article V, section 18 of the Constitution provides:

"The Treasurer, in accordance with law, shall be responsible for the safekeeping and investment of monies and securities deposited with him, and for their disbursement upon order of the Comptroller." (Emphasis added.)

The State Treasurer's Act (Ill. Rev. Stat. 1991, ch. 130, par. 1 et seq.) pertains to the Treasurer's responsibility for the receipt, safekeeping and disbursement of funds. The Deposit of State Moneys Act (Ill. Rev. Stat. 1991, ch. 130, par. 19m et seq.) provides for the selection of depositories and for security for deposits of State funds. The State Finance Act (Ill. Rev. Stat. 1991, ch. 127, par. 140.1 et seq.) governs the accounting, appropriation and expenditure of State funds. The Public Funds Investment Act (Ill. Rev. Stat. 1991, ch. 85, par. 900 et seq.) provides for the investment of funds by the Treasurer. The State Officers and Employees Money Disposition Act (Ill. Rev. Stat. 1991, ch. 127, par. 170 et seq.) requires

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officers and employees to account for and pay over to the Treasurer funds which are received on behalf of the State. Lastly, the State Treasurer's Bank Services Trust Fund Act (Public Act 87-1035, effective September 11, 1992) creates a fund from which the Treasurer may pay financial institutions for services employed in connection with the collection of funds.

It is well established that public officers possess only those powers which are expressly granted by the Constitution or by statute, together with those powers which are necessarily implied therefrom as an incident to achieving the objectives for which the office was created. (Vermont Accident Insurance Co. v. Burns (Vt. S. Ct. 1944), 40 A.2d 707, 710; California State Retirement Association v. Whitlow (Cal. App. Ct. 1976), 129 Cal. Rptr. 824, 827.) No State officer can enter into a valid contract without first having been delegated that power by the State constitution or the legislature. (Aetna Insurance Co. v. O'Malley (1938), 343 Mo. 1232, 124 S.W.2d 1164, 1166; Lingo-Leeper Lumber Co. v. Carter (1932), 161 Okla. 5, 17 P.2d 365, 368; Wadsworth v. State (1932), 225 Ala. 118, 142 So. 529, 531.) The State is not bound by an officer's contract unless the subject matter of the contract is within the scope of the authority conferred upon the officer. Lingo-Leeper Lumber Co. v. Carter (1932), 161 Okla. 5, 17 P.2d

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365, 368; Jordan v. Iowa Department of Transportation (Iowa 1991), 468 N.W.2d 827, 831.

None of the provisions cited, either expressly or by reasonable implication, can be construed to authorize the Treasurer to operate a branch banking facility, to provide for the operation of such a facility within his office, to agree to compensate any financial institution for services rendered to the State by providing space and facilities for a branch bank in a public building, or to enter into an agreement of indefinite duration and for indefinite value for such services.

It has been held that the Treasurer's authority to receive and safely keep public funds, and to invest them in accordance with law, is constitutional in nature, and cannot be taken away by either the General Assembly or the courts. (Fairbank v. Stratton (1958), 14 Ill. 2d 307, 314-15; American Legion Post No. 279 v. Barrett (1939), 371 Ill. 78, 91; People ex rel. Nelson v. West Englewood Bank (1933), 353 Ill. 451, 465.) This principle, however, does not authorize the Treasurer to enter into agreements which do not involve the investment or deposit of public funds, but which, rather, concern the use of State property for private commercial purposes.

Moreover, the General Assembly has recently provided a means for the Treasurer to obtain many of the financial serv-

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ices which are the subject of the proposed agreement. (Public Act 87-1035, effective September 11, 1992.) Public Act 87-1035 created the State Treasurer's Bank Services Trust Fund to provide a fund from which the cost of banking services provided by financial institutions for the collection of revenue may be paid. Section 2 of the Act (to be codified at 30 ILCS 212/2) specifically notes the General Assembly's dissatisfaction with the practice of compensating for these services through the deposit of funds in the institutions, which may result in over compensation. It is stated to be in the public's interest to pay financial institutions for these services at a level commensurate with charges. In view of this recent expression of legislative will, it is particularly inappropriate for the Treasurer to use an alternative, unsanctioned means for obtaining these services.

It has also been suggested that the proposed agreement, if executed, would result in a use of public property for private purposes in violation of article VIII, section 1(a) of the Constitution, which provides:

"(a) Public funds, property or credit shall be used only for public purposes.

* * *

There are few cases construing section 1(a) as it applies to use of public property. (See, e.g., Redmond v. Novak (1981), 86 Ill. 2d 374, 382; O'Fallon Development Co.,

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Inc. v. City of O'Fallon (1976), 43 Ill. App. 3d 348, appeal after remand, 71 Ill. App. 3d 220.) The same principles apply to the use of public property, however, as apply to the use of public funds and public credit for private purposes. (People ex rel. City of Urbana v. Paley (1977), 68 Ill. 2d 62, 71-72.) A number of cases hold that if the principal purpose and objective in a given enactment is predominantly public in nature, the Constitution is not violated by a mere incidental benefit to private interests. (People ex rel. City of Salem v. McMackin (1972), 53 Ill. 2d 347, 355.) Thus, industrial revenue bond projects have been upheld as being constitutional in People ex rel. City of Urbana v. Paley (1977), 68 Ill. 2d 62, 71-72 and People ex rel. City of Salem v. McMackin (1972), 53 Ill. 2d 347, 355. Both these cases and others which follow them (see, e.g., Marshall Field & Co. v. Village of S. Barrington (1981), 92 Ill. App. 3d 360) state that the determination of what constitutes public purposes is one primarily for the General Assembly to make.

The General Assembly has, in certain circumstances, authorized the lease of space in State-owned buildings when it is determined to be in the best interests of the State. (See Ill. Rev. Stat. 1991, ch. 127, par. 63b13.24.) Determinations have been made to allow private commercial use of portions of State facilities in circumstances where the value of such

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facilities placed in such uses is of greater benefit to the State than their use for purely governmental purposes. An example of such use is evidenced in certain portions of the State of Illinois Center.

Against this background, the instant proposal may not point to a per se violation of article VIII, subsection 1(a), but it does arise in a circumstance much different from others in which State facilities are given over to ostensibly private uses. The most significant distinguishing factor is that the General Assembly has not provided by law for such a use. Further, this area, in the center of a facility dedicated to governmental purposes, is quite different from prime commercial property or surplus property which might be made available on the market at a considerable benefit to the State. More importantly, however, the proposed use has all the hallmarks of an unfair license to a single financial institution, in which license the private benefit appears to outweigh greatly any incidental public one.

Therefore, for the reasons stated above, it is my opinion, that the Treasurer is not authorized to agree, under the proposal described, to the location of a branch banking facility in the State House.

Respectfully yours,



ROLAND W. BURRIS
ATTORNEY GENERAL