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July 10, 1995

FILE NO. 95-003

STATE MATTERS:
Governor's Consent to Settlement of
Loans in Insured Mortgage Pilot Program

The Honorable Penny Severns
State Senator, 51st District
311 State House
Springfield, Illinois 62706

Dear Senator Severns:

I have your letter wherein you inquire whether the consent of the Governor would be required to consummate the Treasurer's proposed settlement of outstanding loans in the Illinois Insured Mortgage Pilot Program. For the reasons hereinafter stated, it is my opinion that the Governor's consent would be a prerequisite to settling these loans.

In order to respond fully to your inquiry, a summary review of the history of the Illinois Insured Mortgage Pilot Program (hereinafter referred to as "IIMPP" or "the Program") is necessary. The IIMPP was developed in 1982 by Governor James Thompson and Treasurer Jerry Cosentino as a stimulus for economic development. The need was perceived for such a program by the

parties thereto because, under the prevailing economic conditions:

" * * *

* * * both the cost and non-availability of funds has depressed and discouraged the construction, development and ownership of new structures and rehabilitation of existing structures intended to house industrial, commercial and similar activities within the State, including office buildings, hotels, retail and industrial facilities and other projects; has increased unemployment in the State; has reduced commercial and economic development of the State; and has adversely affected the State's tax base; * * *

* * *

"

(Illinois Insured Mortgage Pilot Program Purchase Agreement, Trust Indenture and Servicing Agreement, dated July 14, 1982, at 1.)

Thus, the circumstances were deemed appropriate for intervention by the State, acting through the Governor and the Treasurer.

The IIMPP provided the framework for the State to invest in securities backed by a pool of commercial mortgages, thereby making available to several industrial and commercial enterprises construction and start-up financing that would otherwise have been unavailable due to the market conditions at the time. The program, as implemented, consists of two distinct and separate, although interrelated, components: an investment of State funds, which initially provided a pool of capital; and a trust and servicing agreement, pursuant to which loans were made to qualifying projects from the pool of funds.

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The original investments were made under section 22.5 of the Deposit of State Moneys Act (15 ILCS 520/22.5 (West 1994)), which authorizes the Treasurer, with the approval of the Governor, to invest State funds that are not needed for current expenditures in specified forms of investments. As amended by Public Act 82-785, effective July 13, 1982, the third and fifth paragraphs of this section provided:

" * * *

The State Treasurer may, with the approval of the Governor, invest or reinvest any State money in the Treasury which is not needed for current expenditure due or about to become due, or any money in the State Treasury which has been set aside and held for the payment of the principal of and the interest on any State bonds, in investment certificates and other forms of investment securities of banks incorporated under the laws of this State or any other state or under the laws of the United States; provided, however, that investments may be made only in those banks which are insured by the Federal Deposit Insurance Corporation.

* * *

The investment certificates or other forms of investment securities described in the preceding two paragraphs shall not be required to be insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation or to be secured by any pledge of securities.

* * *

"

The General Assembly added this language to section 22.5 for the purpose of facilitating the creation of the construction loan program which would eventually become known as the Illinois

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Insured Mortgage Pilot Program. (See Remarks of Sen. Carroll, July 1, 1982, Senate Debate on Senate Bill No. 1452, Second Conference Report, at 53; Remarks of Rep. Barr and Rep. Vinson, July 1, 1982, House Debate on Senate Bill No. 1452, Second Conference Report, at 94-95.) By conditioning the Treasurer's authority to invest in certificates of this sort upon the consent of the Governor, the General Assembly clearly recognized and accepted the role to be played by the Governor in creating and administering the Program.

Although section 22.5 was amended by Public Act 87-331, effective January 1, 1992, to delete these two paragraphs, the amendment had no impact on the existing program and investments.

The IIMPP was created and implemented through the execution of a Purchase Agreement, Trust Indenture and Servicing Agreement (hereinafter referred to as the "Trust Agreement") by the State of Illinois, acting by and through its Treasurer, with the concurrence of its Governor, the American National Bank and Trust Company of Chicago (hereinafter referred to as "ANB") and the American National Bank and Trust Company of Chicago as Trustee (hereinafter referred to as "Trustee") on July 14, 1982. There have subsequently been several amendments to the Trust Agreement, each of which was executed by the Treasurer and the Governor, but the essential provisions of the Program have not changed.

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Pursuant to the terms of the Trust Agreement, the State deposited \$120 million in State funds with ANB and received in return investment certificates issued by ANB. ANB deposited the funds in the trust, which made interim investments as approved by the State. ANB arranged construction loans for selected projects, and funds from the trust in the amount of the loans were paid to ANB, which issued bank investment certificates to the trust. ANB assumed the credit risk during construction. Upon completion of each project, the loan was converted to a seven year mortgage loan which ANB assigned to the Trustee, redeeming the bank investment certificates. Private mortgage insurance, and, subsequently, letters of credit or bonds, were obtained to cover 15% of the outstanding principal of each loan. The remaining risk was incurred by the State, which now holds investment certificates in a trust with assets consisting of pooled commercial mortgage-backed loans. The proposed compromise and sale of two of those loans has occasioned your inquiry.

The Trust Agreement, as amended, does not authorize the Trustee to settle mortgage loans for an amount less than their full value. The buy-sell agreement embodying the proposed settlement specifically recites that it does not supersede, alter or amend the prior loan documents or other agreements, presumably including the Trust Agreement. Therefore, unless the Trust Agreement is amended, at the direction of the State, the Trustee has no authority to surrender or execute the documents necessary

to close the proposed transaction. The State, as the sole investment certificate holder, can require that the Trust Agreement be amended. Articles 14 and 15 thereof set forth the procedures for amending the Trust Agreement or creating a supplementary agreement. The Trust Agreement does not specify the form in which consent to amend is to be given to the Trustee on behalf of the State.

It is important to reiterate, at this point in the analysis, that the IIMPP constitutes more than just a mechanism for the investment of State funds. It is a sophisticated, multi-million dollar loan program which required the investment of State funds at its inception to provide necessary capital, but which encompasses much more. Under the Constitution, the Treasurer's duties relate only to the safekeeping and investment of funds and securities, and the disbursement of funds. (See Ill. Const. 1970, art. V, sec. 18.) The Treasurer did not in 1982 have, and does not now have, authority to make a direct loan of money to be secured by real estate mortgages. More critically, the Treasurer did not in 1982 have, and does not now have, the authority to create a program of this sort, which extends to matters far in excess of the Treasurer's statutory and constitutional duties.

The authority of the executive branch to address issues relating to economic development, unemployment and similar matters of State-wide concern necessarily reposes, to the extent

not otherwise distributed, in the Governor as the chief executive officer of the State, in whom the supreme executive power has been vested. (See Ill. Const. 1970, art. V, sec. 8.) No other officer of the executive branch had the authority individually to create a program of this sort. Thus, because the creation of the program was an exercise of the fundamental power of the State to address matters of State-wide concern, the involvement of the Governor was indispensable to the creation and ongoing operation of the IIMPP, apart from his approval of the investments used to provide necessary capital.

The proposal to compromise and settle the two loans which constitute assets of the trust for an amount substantially less than the amount currently due and owing affects not only the investment of State funds, a matter which is delegated primarily to the Treasurer, but also the operation of the Program and the terms of the Trust Agreement. The settlement would have a significant impact upon an economic development program in the creation of which the Governor's involvement was essential, require significant modifications to the Trust Agreement, to which the Governor is a signatory, and do so for less than the current value of the loans. It is clear, therefore, that the Governor's approval is a prerequisite to the settlement. It is noteworthy that in 1992, when a similar outstanding loan was settled, the Governor's signature was affixed to the direction

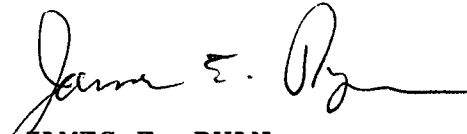
authorizing the Trustee to execute the instruments necessary to accept the settlement.

The Agreement itself provides only that amendments thereto, or supplemental agreements which may affect the parties' rights, shall be effective upon receipt of the written consent of the holder(s) of certificates aggregating at least 66% of the trust estate. The State of Illinois is, of course, the only certificate holder under the Program. As previously suggested, the Agreement does not specify who shall execute the consent on behalf of the State, as the sole certificate holder, or the form the consent shall take. The Trust Agreement, and subsequent amendments thereto, however, provide that the parties to the Agreement include the Trustee and the State of Illinois, which is described as "acting by and through its Treasurer * * *, with the consent of its Governor * * *". Thus, it was clearly contemplated by the parties that the representatives of the State, for purposes of acting under the Trust Agreement, are the Treasurer and the Governor, and that the concurrence of both the Governor and the Treasurer is necessary to validate actions taken on behalf of the State thereunder. Consequently, it is my opinion that both the Governor and the Treasurer must authorize the

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amendment of the Trust Agreement and give their consent to the proposed transaction in order to effectuate it.

Sincerely,

A handwritten signature in cursive script, appearing to read "James E. Ryan". The signature is written in dark ink and is positioned above the typed name.

JAMES E. RYAN
ATTORNEY GENERAL