

OFFICE OF THE ATTORNEY GENERAL STATE OF ILLINOIS

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December 17, 2009

FILE NO. 09-003

STATE MATTERS: Sale of the Thomson Correctional Center

The Honorable Tom Cross
House Republican Leader
State Representative, 84th District
316 State House
Springfield, Illinois 62706

Dear Representative Cross:

have your letter raising a number of questions regarding the sale of the Thomson

Correctional Center to the Federal government. Specifically, you have asked: (1) whether the State Facilities Closure Act (30 ILCS 608/5-1 et seq. (West 2008)) would apply to the sale of the Thomson Correctional Center (the TCC); (2) whether real property may be sold and conveyed if

fixtures attached to the property were constructed using bond funds and the bonds have not been retired; and (3) whether the sale of the TCC is subject to the provisions of the State Property

Control Act (30 ILCS 605/1 et seq. (West 2008)). For the reasons set out below, it is my opinion

that the sale of the TCC is subject to the State Facilities Closure Act and the State Property

Control Act. With regard to the sale of real property upon which fixtures were constructed using bond proceeds and for which bonds remain outstanding, I would note that, immediately after receiving your opinion request, we contacted the Governor's office to ask for information regarding the bonds used to construct the TCC. To date, we have not received the necessary details from the Governor's office regarding the bond issues.

BACKGROUND

Guantanamo Bay Naval Base

Under the presidency of George W. Bush, the United States constructed a detention camp at Guantanamo Bay Naval Base in Cuba to house suspected terrorists captured by United States forces. Military Order of November 13, 2001, 66 Fed. Reg. 57833 (November 16, 2001). On January 22, 2009, by Executive Order (*see* Exec. Order No. 13492, 74 Fed. Reg. 4897 (January 27, 2009)), President Barack Obama ordered the closure of those detention facilities "as soon as practicable, and no later than 1 year from the date of" his Executive Order. At the time of the closure of the Guantanamo Bay detention facilities, any individuals remaining in detention are to be "returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States." Exec. Order §3.

Currently, the Secretary of Defense and the United States Bureau of Prisons are seeking a detention facility to house Guantanamo Bay detainees, as well as to alleviate the Bureau of Prisons' shortage of maximum security cell space. On December 15, 2009, the Obama

administration announced that the Federal government will seek to acquire the TCC to house Federal inmates and a limited number of terrorist suspects currently held at Guantanamo Bay.¹

Thomson Correctional Center

The TCC is located within the Village of Thomson in Carroll County, Illinois.

The State completed construction of the prison's facilities in November 2001. According to information from the Illinois Department of Corrections (the IDOC), the TCC is comprised of two security categories: a 1,600-bed, maximum security unit and a 200-bed, minimum security unit. The IDOC has operated the facility as a minimum security prison since August 2006. The maximum security portion of the facility, however, has never been used. Although we have not received any details regarding the possible terms of a sale of the TCC to the Federal government, it is our understanding that the Federal government seeks to acquire all of the buildings and facilities of the TCC.²

¹See Letter from Hillary Rodham Clinton, Secretary of State; Robert M. Gates, Secretary of Defense; Eric H. Holder, Jr., Attorney General; Janet Napolitano, Secretary of Homeland Security; and Dennis C. Blair, Director of National Intelligence, to The Honorable Pat Quinn, Governor of Illinois, (December 15, 2009) ("We write to inform you that the President has directed, with our unanimous support, that the Federal Government proceed with the acquisition of the facility at Thomson").

²A memorandum from the Executive Office of the President, Council of Economic Advisers, notes that the Bureau of Prisons will occupy 75% of the TCC and that the Department of Defense will occupy the remaining 25%. This memorandum was appended to the recommendation from the Illinois Department of Corrections to the Commission on Government Forecasting and Accountability regarding the closure of the Thomson Correctional Center (Director Michael P. Randle, Illinois Department of Corrections, Thomson Correctional Center Closure, Recommendation to the Commission on Government Forecasting & Accountability (November 25, 2009) (TCC Closure Recommendation), app. at 2-3).

ANALYSIS

State Facilities Closure Act

You have asked whether the State Facilities Closure Act (the Closure Act) would apply to the sale of the TCC. The Closure Act, enacted by the General Assembly in 2004,³ establishes procedures that the State must follow before closing a "State facility." In responding to your inquiry, it is helpful to summarize briefly the Closure Act's process.

Subsection 5-10(a) of the Closure Act (30 ILCS 608/5-10(a) (West 2008)) requires the State executive branch officer with jurisdiction over the facility to file a notice of the proposed closure with the Commission on Government Forecasting and Accountability (the Commission) within 2 days after the first public announcement of any planned or proposed closure of a State facility, unless all the functions and employees of the State facility are to be relocated to another State facility within 10 miles of the closed facility. 30 ILCS 608/5-10(e) (West 2008). No later than 10 days after it receives the notice, the Commission, "in its discretion, may require the State executive branch officer with jurisdiction over the facility to file a recommendation for the closure of the facility with the Commission." 30 ILCS 608/5-10(a) (West 2008). In the case of the proposed closure of a "prison * * * operated by the Department of Corrections[,]" the "Commission must require the executive branch officer[] to file a

³See Public Act 93-839, effective July 30, 2004.

⁴The Closure Act defines the term "State facility" to include "any facility (i) that is owned and operated by the State or leased and operated by the State and (ii) that is the primary stationary work location for 25 or more State employees. 'State facility' does not include any facility under the jurisdiction of the legislative branch, including the Auditor General, or the judicial branch." 30 ILCS 608/5-5 (West 2008).

recommendation for closure."⁵ A recommendation "must be filed within 30 days after the Commission delivers the request for recommendation to the State executive branch officer." 30 ILCS 608/5-10(a) (West 2008).⁶ The IDOC filed its recommendation regarding the closure of the TCC on November 25, 2009.

The Closure Act provides for a 30-day public comment period to follow the filing of a recommendation. 30 ILCS 608/5-10(b) (West 2008). Further, in the case of the proposed closure of a prison, the Commission "must conduct one or more public hearings on the recommendation." 30 ILCS 608/5-10(b) (West 2008). The Commission must conduct the public hearings no later than 35 days after the filing of the recommendation, and at least one public hearing must occur at a convenient location within 25 miles of the facility involved. 30

⁵The Closure Act mandates the filing of a recommendation for the following categories of facilities: (i) a prison, youth center, work camp, or work release center operated by the Department of Corrections; (ii) a school, mental health center, or center for the developmentally disabled operated by the Department of Human Services; or (iii) a residential facility operated by the Department of Veterans' Affairs. 30 ILCS 608/5-10(a) (West 2008).

⁶Subsection 5-10(a) contains a non-exhaustive list of information that the executive branch officer must include in a recommendation, such as: the location, identity, and condition of the State facility to be closed; the location and condition of facilities to which the functions or employees of the State facility would be moved; and other information concerning the impact of the proposed closure on State employees, State services, State operational costs, environmental costs, and the economies and infrastructures of communities in the vicinity of the existing or potential State facilities.

⁷The Commission must provide reasonable notice of the comment period and any public hearings to the public and to units of local government and school districts located within 25 miles of the facility. 30 ILCS 608/5-10(b) (West 2008). In this matter, because the IDOC filed its recommendation on November 25, 2009, the 30-day comment period generally would expire on December 25, 2009. Because that day is a State holiday, however, under section 1.11 of the Statute on Statutes (5 ILCS 70/1.11 (West 2008)), the public comment period will be extended to December 28, 2009.

ILCS 608/5-10(b) (West 2008).⁸ The Commission has scheduled a public hearing on the closure of the TCC for December 22, 2009.

Pursuant to subsection 5-10(c) of the Closure Act (30 ILCS 608/5-10(c) (West 2008)), within 50 days after the State executive branch officer files the required recommendation, the Commission must issue an advisory opinion on the recommendation. During that 50-day period, "[n]o action may be taken to implement the recommendation for closure of [the] State facility[.]"

Proposed Closure of Thomson Correctional Center

The closure of a State facility is subject to the Closure Act if: (1) it is the "primary stationary work location for 25 or more State employees" (30 ILCS 608/5-5 (West 2008)); and (2) "the functions and employees of a State facility are relocated to another State facility that is" more than 10 miles from the closed facility (30 ILCS 608/5-10(e) (West 2008)). In apparent conformance with the Closure Act, the IDOC notified the Commission of its intent to close the TCC by letter dated November 25, 2009, and stamped as received by the Commission on that date. The TCC Closure Recommendation indicates that on October 31, 2009, the IDOC employed 78 people at the TCC. TCC Closure Recommendation at 3. Further, the TCC Closure Recommendation indicates that the IDOC will offer State employees affected by the closing

⁸Because the IDOC filed its recommendation regarding the closure of the TCC on November 25, 2009, the 35-day period in which to conduct a hearing expires on December 30, 2009.

⁹Subsection 5-10(c) of the Closure Act states that the Commission shall file the advisory opinion with the appropriate State executive branch officer, the Governor, the General Assembly, and the Index Department of the Secretary of State, and make copies of the advisory opinion available to the public upon request. The 50-day period within which the Commission must issue its advisory opinion expires on January 14, 2010.

positions at the East Moline Correctional Center, which is located 38 miles from Thomson, or the Dixon Correctional Center, which is 39 miles from Thomson. TCC Closure Recommendation at 3. Because the TCC employs more than 25 State employees and the IDOC plans to relocate the functions and employees of the TCC to facilities that are more than 10 miles from the TCC, it is my opinion that the Closure Act would apply to the sale of the TCC. Accordingly, the Closure Act's requirements that the recommendation include information regarding the impact of the proposed closure, as well as the required public comment period and public hearing, apply to the closure of the TCC.

You also inquire whether subsection 5-10(d) of the Closure Act limits "the initiation of activities ancillary to a real estate conveyance[.]" By way of example, you have asked whether the State may sign a letter of intent, extend an offer for purchase, negotiate with the collective bargaining representatives regarding employees currently staffing the TCC, or take any employment action with respect to the TCC employees.

Subsection 5-10(d) of the Closure Act provides:

(d) No action may be taken to implement the recommendation for closure of a State facility until 50 days after the filing of any required recommendation.

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Illinois Department of Healthcare & Family Services v. Warner*, 227 Ill. 2d 223, 229 (2008). Legislative intent is best evidenced by the language used in the statute. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). Where statutory language is clear and unambiguous, it must be given effect as written. *DeLuna*, 223 Ill. 2d 59.

Under the language of subsection 5-10(d), a State executive branch officer may not act "to implement the recommendation for closure of a State facility until 50 days after the filing of any required recommendation." The term "implement," however, is not defined in the Act. Undefined statutory terms must be given their ordinary and popularly understood meanings. Wauconda Fire Protection District v. Stonewall Orchards, LLP, 214 Ill. 2d 417, 430 (2005).

The term "implement" commonly means "CARRY OUT, ACCOMPLISH; esp: to give practical effect to and ensure of actual fulfillment by concrete measures" (Merriam-Webster's Collegiate Dictionary 624 (11th ed. 2004)). Accordingly, a State executive branch officer may not undertake any action to carry out, accomplish, or give effect to the recommendation for closure of a State facility until 50 days after the filing of any required recommendation. Whether any particular actions would constitute "implement[ing] the recommendation for closure" based on the commonly understood meaning of the term "implement," is a factual question that must be determined based on the specific action at issue.

You have also asked whether subsection 5-10(d) limits the State's ability to "negotiat[e] with the collective bargaining representatives regarding employees currently staffing the Thomson Correctional Center, or tak[e] any employment action with respect to those employees." That question necessarily depends on what exact steps are contemplated. If, for

¹⁰Under a Memorandum of Understanding (Memorandum of Understanding, Closure of a Facility, American Federation of State, County & Municipal Employees-State of Illinois Department of Central Management Services, July 1, 1986 (renewed September 5, 2008)), referenced in the Agreement between AFSCME Council 31 and the State of Illinois (Agreement, American Federation of State, County & Municipal Employees-State of Illinois Department of Central Management Services, September 5, 2008, through June 30, 2012), addressing the "Closure of a Facility[,]" the State is required to negotiate "over such matters that may impact upon employees covered by this Agreement on questions of wages, hours and other conditions of employment" "within sixty (60) days of the Employer's announcement of the closure * * * of a facility[.]" Agreement at 251-52. As used in the Memorandum, the term "facility" refers to "[a] building or group of buildings which constitute a facility in the Departments of Human Services, Corrections, Children and Family Services, or Veterans' Affairs[.]" See Agreement, Definition of Terms (d)(2), at 2.

example, the State, pursuant to a collective bargaining agreement, merely provides notice to the TCC employees that the facility may be subject to closure and that their collective bargaining rights, including negotiating over conditions of employment, may be exercised, such notice would not, in my opinion, constitute "action * * * to implement the recommendation for closure" within the commonly understood meaning of the phrase. Whether any particular "negotiating" steps constitute "action * * * to implement the recommendation for closure" is a factual question that must be analyzed based on the particular activity.

State Property Control Act

You also inquire whether the TCC is subject to the State Property Control Act (the Property Control Act). Specifically, you ask whether the TCC constitutes "surplus real property" as that term is used in section 7.1 of the Property Control Act (30 ILCS 605/7.1 (West 2008), as amended by Public Act 96-660, effective August 25, 2009).

In responding to your question, it is helpful to provide an overview of the Property Control Act's provisions. The Property Control Act authorizes the Director of the Department of Central Management Services (CMS), as administrator (30 ILCS 605/1.03 (West 2008)), to supervise and control the use and disposition of State-owned real and personal property (30 ILCS 605/1.02, 3 (West 2008)). Through this statute, the legislature set up a process for the State executive branch to dispose of State-owned real property without requiring the involvement of the General Assembly in every sale. Under the Property Control Act, each director of an

Annual Real Property Utilization Report that, among other things, describes the real property owned by the State that is under the director's control, sets out the plans for the future use of currently unused real property, and contains a declaration of any surplus real property. CMS must distribute a copy of this report annually to the General Assembly. The report must contain a list of surplus property indexed by legislative district. 30 ILCS 605/7.1(b) (West 2008), as amended by Public Act 96-660, effective August 25, 2009.

Following the receipt of the annual report, CMS is to notify all State "agencies" of all declared surplus property. Any State agency may submit a written request to have the property transferred to that agency. Any surplus property not transferred to another State agency "shall be disposed of by the Administrator." 30 ILCS 605/7.1(c), (d) (West 2008), as amended by Public Act 96-660, effective August 25, 2009.

If CMS determines that the fair market value of the property is over \$5,000, subsection 7.1(d) requires CMS to obtain three appraisals for the property. The fair market value

¹¹The IDOC is created as a Department of State government in section 5-15 of the Departments of State Government Law (20 ILCS 5/5-15 (West 2008), as amended by Public Act 96-328, effective August 11, 2009). The head of the IDOC is the Director of Corrections (20 ILCS 5/5-20 (West 2008), as amended by Public Act 96-328, effective August 11, 2009), "who shall, subject to the provisions of the Civil Administrative Code of Illinois [(20 ILCS 5/1-1 et seq. (West 2008))] execute the powers and discharge the duties vested by law in his or her respective department."

¹²The legislature amended section 7.1 of the Property Control Act through Public Act 96-527, effective January 1, 2010, to change the date for submission of the Annual Real Property Utilization Report to CMS from "by October 30 of each year" to "by July 31 of each year[.]"

¹³The term "agency" is defined to include "any State officer, executive code department, institution, university, college, board, bureau, commission, or other administrative unit of the State government or any State Constitutional Convention." 30 ILCS 605/1.05 (West 2008).

of the property is determined by averaging the three appraisals, plus the costs of obtaining the appraisals. Prior to offering the property for sale to the public, CMS shall give notice of the upcoming sale to the governing bodies of the county and all municipalities in the county where the property is located. The units of local government have the option of obtaining the property at fair market value within 60 days of the notice. After the 60-day period has passed, CMS may sell the property at public auction following the statutory notice requirements. The Property Control Act grants CMS "all power necessary to convey surplus real property under this Section." 30 ILCS 605/7.1(d) (West 2008), as amended by Public Act 96-660, effective August 25, 2009.

Turning to your question, section 7.1 of the Property Control Act provides:

(a) Except as otherwise provided by law, all surplus real property held by the State of Illinois shall be disposed of by the administrator as provided in this Section. "Surplus real property," as used in this Section, means any real property to which the State holds fee simple title or lesser interest, and is vacant, unoccupied or unused and which has no foreseeable use by the owning agency. 30 ILCS 605/7.1(a) (West 2008), as amended by Public Act 96-660, effective August 25, 2009.

The term "vacant, unoccupied or unused" is not defined in the Property Control Act, the administrative rules promulgated under that law, or in any other pertinent Illinois statutes. As noted above, undefined statutory terms must be given their ordinary and popularly

¹⁴The terms "vacant industrial buildings conservation area" and "vacant area" are defined in the Industrial Jobs Recovery Law (see 65 ILCS 5/11-74.6-10(f), (t) (West 2008), as amended by Public Act 96-606, effective August 24, 2009), and the term "vacant land" is defined in the Tax Increment Allocation Redevelopment Act (65 ILCS 5/11-74.4-3(v) (West 2008), as amended by Public Acts 96-328, effective August 11, 2009; 96-680, effective August 25, 2009). Neither of these statutes is relevant to your inquiry.

understood meaning. The term "vacant" commonly means "being without content or occupant" and "not put to use[.]" Merriam-Webster's Collegiate Dictionary 1380 (11th ed. 2004). The term "unoccupied" generally means "not lived in" (Merriam-Webster's Collegiate Dictionary 1371 (11th ed. 2004)), while the term "unused" means "not put to use: IDLE." Merriam-Webster's Collegiate Dictionary 1374 (11th ed. 2004). Based on the commonly understood meaning of these terms, real property that is not put to use, not lived in, or is idle would constitute "surplus real property."

The TCC Closure Recommendation states that as of November 17, 2009, the IDOC was housing 186 inmates at the 1800-bed facility. TCC Closure Recommendation at 3. At this time, the IDOC has not implemented plans to transfer the TCC inmates to another facility. As a result, the TCC cannot currently be characterized as idle.

The TCC Closure Recommendation, however, describes a plan in which the TCC inmates would be subject to release from custody or transferred to another prison facility.

Further, the TCC Closure Recommendation references a plan to transfer the TCC employees to two neighboring prison facilities. TCC Closure Recommendation at 2-3. Assuming that all the TCC inmates are released or transferred to other facilities and that the TCC employees are transferred to other facilities as appropriate, the TCC will be "without * * * occupant[s]" and "not put to use[.]" Under this scenario, the TCC would be rendered idle. At such time, the IDOC will have to make a policy determination as to whether it has "no foreseeable use" for the property. If the IDOC makes such a finding, then the TCC would constitute "surplus real"

property" under the Property Control Act and "shall be disposed of by the administrator as provided in [section 7.1]." 30 ILCS 605/7.1(a) (West 2008), as amended by Public Act 96-660, effective August 25, 2009.

Sale of the Thomson Correctional Center Under the State Property Control Act

In general, your letter asks whether legislative action is required before the State may sell the TCC to the Federal government. As described above, it is my opinion that if the IDOC closes the prison according to the provisions of the Closure Act, the Property Control Act will apply to this proposed transaction. Through this statute, the General Assembly has given the executive branch express authority to sell property, including the TCC, for not less than fair market value without further legislative action.

CMS routinely uses the Property Control Act to sell surplus real property. The December 2009 CMS surplus property list (*see* Illinois Department of Central Management Services, Annual Surplus Property Report to the General Assembly (December 2009)) includes, among other properties, a former State Police district headquarters and three parcels at Joliet Correctional Center totaling over 174 acres. In 2007, according to its records, CMS used the Property Control Act process to sell the former Illinois Youth Center in St. Charles, Illinois, including 28 buildings on 46 acres, to the Forest Preserve District of Kane County.

In certain circumstances, when the State seeks to sell surplus real property under terms that differ from the Property Control Act, the sale has been approved by specific legislative action. When the State intends to sell the property to a unit of local government for less than fair

market value or seeks to direct the sale proceeds to a particular fund, for example, the legislature has taken action to authorize a sale under those terms.¹⁵ See, e.g., Public Act 95-604, effective September 11, 2007 (authorizing the sale of Department of Human Services Henry Horner site to the City of Chicago); Public Act 95-019, effective August 1, 2007 (authorizing the sale of 200 acres of Stateville Correctional Center with the proceeds to be deposited in the Road Fund). When CMS plans to follow the requirements of the Property Control Act, however, legislative action to authorize the sale of surplus real property is not necessary.

Exclusive Federal Jurisdiction over Thomson Correctional Center

I should note that, after the sale, the Federal government may decide to seek exclusive jurisdiction over the TCC. The transfer of jurisdiction would require General Assembly action. Specifically, providing the Federal government with exclusive jurisdiction over the TCC requires that the legislature pass a law to cede concurrent jurisdiction over the property to the Federal government. The General Assembly has enacted a number of statutes ceding jurisdiction over certain Illinois properties to the Federal government. *See*, *e.g.*, 5 ILCS 530/1 (West 2008) (ceding concurrent civil and criminal jurisdiction over the United States courthouse annex and parking facility in the City of Chicago to the United States); 5 ILCS

¹⁵As noted above, the Property Control Act defines "fair market value" and prohibits CMS from conveying any surplus real property for less than fair market value. 30 ILCS 605/7.1(d) (West 2008), as amended by Public Act 96-660, effective August 25, 2009. It also specifically states that "[a]II moneys received for the sale of surplus real property shall be deposited in the General Revenue Fund," except where the money spent to acquire the property came from a special fund that still exists. 30 ILCS 605/7.1(d) (West 2008), as amended by Public Act 96-660, effective August 25, 2009. In that situation, the Property Control Act requires that the proceeds of the sale be used to reimburse the special fund, with any excess deposited in the General Revenue Fund. 30 ILCS 605/7.1(d) (West 2008), as amended by Public Act 96-660, effective August 25, 2009.

517/10-5 (West 2008) (ceding concurrent jurisdiction over the Federal correctional institutions at Pekin, Illinois and Greenville, Illinois to the United States). The decision to request the cession of jurisdiction by the State, however, lies within the discretion of the Federal government (40 U.S.C. §3112(a) (2006) (providing that the Federal government need not obtain exclusive jurisdiction over land or an interest in land that it acquires in the United States)).

CONCLUSION

It is my opinion that, because of the number of employees at the Thomson Correctional Center and the Department of Corrections' plan to transfer the functions and employees of the TCC to other facilities located more than 10 miles away, the closure of that prison is subject to the requirements of the State Facilities Closure Act. Further, it is my opinion that the proposed sale of the Thomson Correctional Center to the Federal government would be subject to the State Property Control Act. If the Department of Corrections releases or transfers the inmates held at the Thomson Correctional Center, transfers the TCC employees to another prison facility, and determines that it has "no foreseeable use" of the property, the Department of Corrections then may declare the prison to be "surplus real property" under the State Property Control Act.

If the executive branch follows the provisions of the State Facilities Closure Act and the State Property Control Act, these statutes provide the requisite authority to sell the Thomson Correctional Center. ¹⁶ The executive branch's authority to close and sell this facility

¹⁶As I noted above, this opinion is contingent on the resolution of the questions surrounding the outstanding bond issue.

does not require action by the General Assembly. Should the Federal government decide after the sale to seek exclusive jurisdiction over the Thomson Correctional Center property, however, legislative approval would be required to cede State jurisdiction over the property.

Very truly yours,

LISA MADIGAN

ATTORNEY GENERAL

cc:

The Honorable Michael J. Madigan The Honorable John J. Cullerton

The Honorable Christine Radogno