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MEMORANDUM

TO: Mayor Chasity Wells-Armstrong, City of Kankakee
Dennis Baron, Alderman, City of Kankakee
Carl Brown, Alderman, City of Kankakee
All City Aldermen, City of Kankakee

FROM: Ross D. Secler, Odelson & Sterk, Ltd.
Burton S. Odelson, Odelson & Sterk, Ltd.

CC: Mark Wakat, Representative, City of Kankakee
Bruce W. Adams, Mayor, Village of Bradley
Paul Schore, Mayor, Village of Bourbonnais
Brian Stump, Mayor, Village of Aroma Park

Michael J. McGrath, Odelson & Sterk, Ltd.

DATE: August 3, 2018

RE: City Officers Serving as Director of the Kankakee River Metropolitan Agency

You have inquired about the laws governing the Kankakee River Metropolitan Agency (the "KRMA"), a Municipal Joint Sewage Treatment Agency, and whether elected municipal officers (i.e. Mayor, Aldermen) from the City of Kankakee (the "City"), may simultaneously serve as Directors of the KRMA.

In short, **YES**, as discussed herein, the Illinois Constitution and the Illinois Intergovernmental Cooperation Act, 5 ILCS 220/1, *et seq.*, clearly establish the authority for an elected municipal officer of a participating municipality to sit as a director of the KRMA. Certain arguments and allegations made to the contrary reflect a fundamental misunderstanding of the constitutional authority and policy in favor of intergovernmental cooperation in addition to well-established principles of municipal law. Not only are the allegations, on their own, inherently incorrect, there is overwhelming constitutional and legislative support for the legal validity of the current makeup of the KRMA's Board of Directors.

The KRMA and its Board of Directors clearly reflects the exact spirit of the Illinois Constitution and the Intergovernmental Cooperation Act's intention to foster maximum local authority and flexibility to cooperate for the efficient provision of services to taxpayers. The only further recommendation for the KRMA Board of Directors, although not required, would be to slightly amend the IGA and By-Laws to bolster and explicitly provide additional qualifications for appointed Directors. Nevertheless, as will be discussed herein, the current makeup of the Board of Directors is completely legal in all respects under Illinois law.



INTRODUCTION & BACKGROUND

The KRMA exists, pursuant to the “Amended and Restated Municipal Joint Sewage Treatment Agency Intergovernmental Agreement” (the “IGA”) and the KRMA By-Laws, all of which were adopted by the participating municipalities pursuant to, *inter alia*, Section 3.4 of the Intergovernmental Cooperation Act. The KRMA is responsible for treating wastewater from the four-member municipalities (Kankakee, Aroma Park, Bourbonnais, and Bradley), which jointly established, operate, and utilize the “Regional Wastewater Treatment Facility” located in Kankakee. The Current version of the IGA was executed in 1999 and the By-Laws are from 1996.

The KRMA is governed by a seven-member Board of Directors consisting of four persons appointed by the Mayor of the City of Kankakee, and one person appointed from, and appointed by the Mayors of, each of the Villages of Aroma Park, Bourbonnais, and Bradley. IGA, Art. II, A & C; *see also* 5 ILCS 220/3.4(b) (“The composition and manner of appointment of the Board of Directors shall be determined pursuant to the intergovernmental agreement.”)

It is also our understanding that, at all relevant times hereto, the Board of Directors of the KRMA has been composed of, at least in part, the elected mayor(s) and aldermen of member municipalities.

In addition to listing specific, additional powers of the KRMA, the IGA specifies that the KRMA Board of Directors has “any and all powers enumerated or implied in the Municipal Joint Sewage Treatment Act” (5 ILCS 220/3.4). *See* IGA, Art. II, B.

ANALYSIS

Because the KRMA is itself an agency considered a “municipal corporation” that constitutes a form of “special district” and because the KRMA is an agency created under the Illinois Intergovernmental Cooperate Act, there is (i) clear legal authority to expressly allow officers of member municipalities to serve on the KRMA Board of Directors, and (ii) there are no applicable, valid prohibitions against same and any allegations raised arguing as much, should be disregarded as nothing more than erroneous, frivolous, and incompetent rantings common in the current hyper-partisan, hyper-connected, “twitter media” era.



I. The Illinois Constitution and the Illinois Intergovernmental Cooperation Act Provide Authority for the KRMA's Creation and the Ability of Member Municipality Officers to Serve on the KRMA Board of Directors

The KRMA is a “municipal corporation,” as designated both by statute and by the IGA, with a considerable amount of autonomy to form a type of “special district” as used in Article VII, Section 1 of the Illinois Constitution. *See Chicago Transit Auth. v. Danaher*, 40 Ill. App. 3d 913, 914, 917 (1st Dist. 1976) (finding that the Chicago Housing Authority and Chicago Transit Authority were both “special districts” because they are relatively autonomous, possess a structural form, an official name, perpetual succession, and the right to make contracts and to dispose of property). These qualities translate to the powers and authority vested to the KRMA.

The caveat to the KRMA constituting its own “special district” like, for example, the Metropolitan Water Reclamation District of Greater Chicago or other, *independent* districts that are created, *sua sponte*, by statute (or after passage of a referendum), the KRMA exists as a result of the IGA entered by the member municipalities, which is authorized by the Illinois Constitution and the Illinois Intergovernmental Agreement Act.

Article VII, Section 10 of the Illinois Constitution specifically addresses, and allows for, “intergovernmental cooperation.” Article VII, Section 10 intentionally provides “maximum local authority and flexibility to cooperate without prior legislative permission.” 1977 Il. Atty. Gen. Op. No. S-1324 at 4 (citing the Record of Proceedings for the 1970 Illinois Constitutional Convention). The Illinois Intergovernmental Act is similarly broad to codify and encourage intergovernmental cooperation. *See id.*

While both the Illinois Constitution and the Illinois Intergovernmental Agreement Act provide broad authority for municipalities (and other units of government) to enter into intergovernmental agreements and jointly exercise powers, privileges and authorities therein, the Illinois Constitution speaks directly to the issue raised herein with respect to the ability of elected officials of a member municipality to serve on the Board of Directors of an agency created by intergovernmental agreement.

Article VII, Section 10 (b) of the Illinois Constitution provides:

Officers and employees of units of local government and school districts may participate in intergovernmental activities authorized by their units of government without relinquishing their offices or positions.

Ill. Const. art. VII, § 10(b).



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The Illinois Attorney General has previously opined that, based on the constitutional language and based on the Report of the Illinois Constitutional Convention, Article VII, Section 10(b) of the Illinois Constitution “is intended to allow officers and employees of any participating unit to take part in the administration of intergovernmental activities. 1977 Il. Atty. Gen. Op. No. S-1324 at 7. The Illinois Attorney General thus opined that an officer of a participating unit of government could sit on a joint administrative board created by intergovernmental agreement without having to step down from the former office. *Id.*

Hence, there is clear, explicit Constitutional authority that allows officers of a KRMA member municipality to directly participate in the governance and administration of the KRMA, through its Board of Directors. Because the KRMA is a governmental entity created by intergovernmental agreement, the member municipalities are the “stakeholders” whose interests the KRMA serves. The Illinois Constitution clearly envisions the desirability of both intergovernmental cooperation *and* the ability for participating governmental officers to directly administer an agency created by intergovernmental agreement, particularly when the participating municipalities have agreed to do so.

This is further bolstered by section 3.4 of the Illinois Intergovernmental Cooperation Act, which directs that to the underlying intergovernmental agreement determines the manner of appointment and composition of the board of directors for a municipal joint sewage treatment agency. 5 ILCS 220/3.4(b). The IGA for the KRMA specifies that the Mayors of the member municipalities appoint Directors (4 from Kankakee, and one from Aroma Park, Bourbonnais, and Bradley each). IGA, Art. II, C; *see also* KRMA By-Laws, Art. II, §1. There is no stated prohibition therein against the Mayor(s) appointing him or herself. Finally, if member municipalities so choose, they can agree to change the IGA (or the By-Laws) to best suit their needs.

Therefore, the current KRMA Board of Directors absolutely qualifies under the governing agreement, relevant statute, and the Illinois Constitution.

This opinion does not change even when considering other parts of Illinois statutes generally discussing certain “incompatibility of office” prohibitions, as erroneously alleged by certain, seemingly faux-media internet outlets. The allegations brought to our attention are baseless, frivolous and should be ignored.

II. The Illinois Municipal Code and the Public Officer Prohibited Activities Act do not Disqualify Any Member of the Current KRMA Board of Directors

While there is ample, clear, affirmative authority for elected officers of the member municipalities to serve on the KRMA Board of Directors, neither the Illinois Municipal Code, 65 ILCS 5/1-1, *et seq.*, the Public Officer Prohibited Activities Act, 50 ILCS 105/0.01, *et seq.*, nor common law doctrine of incompatibility of office apply to prohibit any of the current



KRMA Board of Directors members from serving. The allegations made to the contrary are, simply, wrong.

i. Section 3.1-15-15 of The Illinois Municipal Code

Section 3.1.-15-15 of the Illinois Municipal Code provides:

Holding other offices. A mayor, president, alderman, trustee, clerk, or treasurer shall not hold any other office ***under the municipal government*** during the term of that office, except when the officer is granted a leave of absence from that office or except as otherwise provided in Sections 3.1-10-50, 3.1-35-135, and 8-2-9.1. Moreover, an officer may serve as a volunteer fireman and receive compensation for that service. 65 ILCS 5/3.1-15-15 (emphasis added).

This section of the Illinois Municipal Code does not apply to affect the eligibility of any current the KRMA Directors. Section 3.4 of the Illinois Intergovernmental Cooperation Act and the KRMA IGA and By-Laws establish KRMA as a “municipal corporation and a public body politic and corporate,” 5 ILCS 220/3.4. KRMA is itself a separate entity from the its member municipalities. By its nature, the area KRMA serves extends well beyond the boundaries of one municipality and KRMA is not governed as a type of department or sub-agency “under” one municipality or its government. The governing authority of one member municipality cannot itself establish, direct, and oversee KRMA’s policies and procedures. Consequently, the KRMA Board of Directors is not “under the municipal government” of any municipality and, therefore, the allegations that any KRMA Director is disqualified pursuant to Section 3.1-15-15 of the Illinois Municipal Code is erroneous and ignorant of the law and facts herein.

ii. Section 2 of the Public Officer Prohibited Activities Act

Section 2 of the Public Officer Prohibited Activities Act (the “POPAA”) states:

No alderman of any city, or member of the board of trustees of any village, during the term of office for which he or she is elected, may accept, be appointed to, or hold any office by the appointment of the mayor or president of the board of trustees, unless the alderman or board member is granted a leave of absence from such office, or unless he or she first resigns from the office of alderman or member of the board of trustees, ***or unless the holding of another office is authorized by law.***



The alderman or board member may, however, serve as a volunteer fireman and receive compensation for that service. The alderman may also serve as a commissioner of the Beardstown Regional Flood Prevention District board. Any appointment in violation of this Section is void. Nothing in this Act shall be construed to prohibit an elected municipal official from holding elected office in another unit of local government as long as there is no contractual relationship between the municipality and the other unit of local government. This amendatory Act of 1995 is declarative of existing law and is not a new enactment. 50 ILCS 105/2 (emphasis added).

Assuming, *arguendo*, that every Director is an “officer,” as discussed in detail above, elected officers (whether aldermen, trustees, or mayors) of the member municipalities are specifically authorized by the Illinois Constitution, the Illinois Intergovernmental Cooperation Act, and the KRMA IGA to simultaneously serve as KRMA Directors. Accordingly, the POPPA does not disqualify any current KRMA Directors and the borderline libelous accusation that POPPA has, somehow, been violated and that certain Directors may have committed felonies is baseless and frivolous. This rhetoric is dangerous fodder for political partisans to attempt to litigate their grievances and, hopefully, the unsupported, albeit published, allegations stay where they belong – in the trash.

iii. Common Law Doctrine of Incompatibility of Office

Neither statutory officeholder prohibitions nor any “common law” principles concerning incompatible offices prohibit the KRMA Board of Directors from being composed of member municipality elected officers. The common law doctrine of incompatibility of office *can* apply even if there is no statutory prohibition, but the doctrine does not affect any current KRMA Director in any event.

As stated in the often-quoted case, *People ex rel. Myers v. Haas*:

Incompatibility . . . is present when the written law of a state specifically prohibits the occupant of either one of the offices in question from holding the other and, also, where the duties of either office are such that the holder of the office cannot in every instance, properly and fully, faithfully perform all the duties of the other office. This incompatibility may arise from multiplicity of business in the one office or the other, considerations of public policy or otherwise.



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A potential conflict of interest is not necessarily sufficient to give rise to a “conflict of duties” and establish incompatibility of offices. *People v. Claar*, 293 Ill. App. 3d 211, 217 (3d Dist. 1997). “Conflict of duties” requires a showing that the “duties of either office are such that the holder of the office cannot in every instance, properly and fully, faithfully perform all the duties of the other office” whereas certain conflicts of interest “are routinely cured through abstention or recusal on a specific matter”. *Id.*

No allegation has (or could) be made that serving as a KRMA Director represents a sufficient, likely “conflict of duties” that would prohibit a Director from simultaneously holding elected office in a member municipality. KRMA exists as a result of the IGA entered into by each member municipality. KRMA exists *due* to the fiduciary duties owed to the *individual*, member municipalities not any independent fiduciary duty owed to KRMA itself. The composition of the KRMA Board of Directors is such that each director’s duty is to represent the appointing member municipality. Therefore, there is no “conflict of duties” here and, instead, serving as a KRMA Director is *in furtherance of* the fiduciary duties owed by the elected and appointed member municipality officers.

CONCLUSION

Based on the explicit grant authority by the Illinois Constitution, the Illinois Intergovernmental Agreement Act, and the KRMA IGA and By-Laws, elected officers of the KRMA member municipalities are qualified to be appointed to, and serve on, the KRMA Board of Directors. The various provisions of the Illinois Municipal Code and the Public Officer Prohibited Activities Act do not apply to disqualify any current KRMA Director. Nor do any common law principles of incompatibility of office affect a member municipality officer from serving as a KRMA Director. In fact, the common law, in conjunction with the Illinois Constitution and Illinois Intergovernmental Agreement Act, **support** the ability of current, elected member municipality officers to serve their respective municipalities and represent the municipal interests on the KRMA Board of Directors. The allegations to the contrary are mistaken in law and fact and should be wholly disregarded.

Should you require any information on any additional issues or topics, or should you require any further information or have any questions whatsoever, please do not hesitate to contact our office.

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