Complete copy of all three parts of the Edgar County Watchdogs' response to Kankakee's city attorney's memorandum on appointments to the Kankakee River Metropolitan Agency.

Read the original memorandum here: (***the memo***)

We used a reference letter written by us to quickly see the difference in appointments established by the legislature within the Intergovernmental Cooperation Act. (our letter)

We compared the prohibitions within the Illinois Municipal Code to those in the Public Officer Prohibited Activities Act. (here)

We referred to Article VII, Section 8 in the Illinois Constitution. (here)

We discussed the shortcomings of KRMA's By-laws. (here)

We discussed the shortcomings of KRMA's enabling Intergovernmental Agreement (here)

Original articles prompting Kankakee's attorney to produce the memorandum. (here and here)

Out three article responding to the memorandum (here, here, and here)

First, we must re-state the allegations we made:

1. *That six of the seven Directors are disqualified from serving on the KRMA*
2. *That the four Mayors are disqualified under the Illinois Municipal Code*
3. *That the two Aldermen are disqualified under the Illinois Municipal Code and the Public Officer Prohibited Activities Act*
4. *That the KRMA By-laws fail to provide for the "composition and manner of appointment" of the Directors*
5. *That the Intergovernmental Agreement establishing the KRMA fails to provide for the "composition and manner of appointment" of the Directors which would somehow permit how KRMA is currently operating*
6. *That the KRMA is "under" the various municipalities because no laws of this state, KRMA By-laws, or KRMA Intergovernmental Agreements grant the KRMA the power to sue or be sued as this Agency is currently operating.*
7. *That the KRMA has never submitted an Annual Financial Report ("AFR") to the Illinois State Comptroller as required by each and every stand-alone unit of local government*
8. *That both Kankakee and Aroma Park submit their AFRs to the Comptroller and both list the KRMA under Section 9 of the AFR where a local government lists governmental entities (KRMA) that are part of or affiliated with the primary government (Kankakee and Aroma Park)*

Kankakee:

> *"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."

ECWd:

We never questioned any authority under the Constitution nor the Intergovernmental Cooperation Act for the formation and operation of the KRMA. This memo is WRONG when it claims there is clearly established authority for an elected municipal officer to sit as director of the KRMA. Any claims purporting clearly established permissions in the case of the KRMA show a fundamental misunderstanding of statutory construction and legislative intent of the Intergovernmental Cooperation Act.

As for the last sentence, we disagree there is any legislative or constitutional support for the current appointees to the KRMA's Board of Directors.

Kankakee:

"*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*."

ECWd:

If everything is how it should be, then why would anyone recommend "slightly amending" the IGA and By-laws? Could it be because we were absolutely correct in our allegations?

Also, the Intergovernmental Cooperation Act does not permit *"providing for additional qualifications"* for appointed directors. It does, however, provide for the IGAs to provide for the *"composition and manner of appointments." "Composition"* means how many and from which member unit of local government, *"manner of appointments"* means who is their appointing authority.

Kankakee:

"*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."

ECWd:
We agree with all of this paragraph.

Kankakee:

"*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.")*"

ECWd:
We agree that the IGA states the "composition" (how many directors and from which unit of local government) and the "manner of appointment" (that the various Mayors appoint their Directors), but also state that the current makeup of the KRMA board is in violation of the law.

Kankakee:

"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."

ECWd:
We agree.

Kankakee:

"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."

ECWd:
Wrong.

The KRMA is a "municipal corporation" and "body politic" under the Intergovernmental Cooperation Act, which means it was created by the action of a law (***see this article***) and only has the powers granted it. However, (i) there is NO clear legal authority to expressly allow officers of member municipalities to serve on the KRMA Board of Directors, and, (ii) there ARE applicable, valid, statutory prohibitions against the same.

This does not mean the KRMA is not "under" the municipalities forming it.

Kankakee:

> "*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"*

ECWd:
Yes and No: Authority is certainly provided to establish the KMRA, but there is absolutely no authority for member municipal officers to serve on the KMRA Board of Directors. Read our comparison of the different grants of authority for appointed officers under the Intergovernmental Cooperation Act (***here***).

Kankakee:

> "*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*."

ECWd:
Yes, the KMRA is a municipal corporation, but as it is currently formed, with its current By-laws and IGAs, it is still "under the municipalities" forming it because it cannot sue and be sued in its own name and because it does not submit its own Annual Financial Reports to the Illinois Comptroller. Therefore, it is not autonomous.

Adopting new Intergovernmental Agreements granting it the authority to sue and be sued, and filing its own Annual Financial Reports to the Comptroller would fix this particular problem, and also fix the problem with Mayors serving as Director because it would no longer be "under" the municipality. No change could ever fix the problems of Aldermen being appointed by the Mayors in violation of the Public Officer Prohibited Activities Act.

Kankakee:

> "*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.*"

ECWd:

We agree with all of this paragraph.

Kankakee:

> *"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.*"

ECWd:

We agree with both paragraphs but must point out that the legislature would never have established a Constitution in which one Section would cancel out another Section of the same Article. As such, Kankakee cannot use Section 10(b) as authorization for elected officers of a municipality to serve as Directors of the KRMA.

Since Kankakee claims the KMRA is a "Special District" (and we agree) then it must also follow ***Article VII, Section 8***, which provides in part that "***the General Assembly shall provide by law for the selection of officers of the foregoing units***" (which includes special districts). Article VII, Section 10(b) cannot cancel out Section 8. It would make no sense. The General Assembly "*provided by law for the selection of officers"* (of the KRMA) in both the Public Officer Prohibited Activities Act and the Intergovernmental Cooperation Act.

Kankakee:

> *"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 crated by intergovernmental agreement without having to step down from the former office. Id."*

ECWd:

Yes, the AG did ***write such an opinion***, however, it did not consider the Public Officer Prohibited Activities Act (we believed this was adopted after the AG's Opinions). . . and, the "joint administrative board" the AG was writing about was not its own unit of local government, not considered a municipal corporation, and not a Special District. So this AG opinion is irrelevant to the issue at hand with the KRMA.

Kankakee:

> *"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."*

ECWd:

Wrong. Notice the additional word Kankakee used: "directly" participate? Additionally, the Illinois Constitution clearly envisioned this type of Special District thru the inclusion of Section 8 of Article VII. The current makeup of the KRMA board violates state law.

Kankakee:

> "*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.*"

ECWd:
Yes, and that is exactly what we have alleged, that the IGA governs, and additionally alleged that the IGAs cannot violate state law, such as the Municipal Code or the Public Officer Prohibited Activities Act. We noticed that the Kankakee memo never mentioned "Aldermen" in this paragraph, only "Mayors" – which makes us think that was intentional since the Public Officer Prohibited Activities Act contains stronger language directed at the prohibition of Aldermen from being appointed to another office by the Mayor.

Kankakee:

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

ECWd:
WRONG! They are absolutely disqualified.

Kankakee:

> *"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."*

ECWd:
WRONG! Yes it does change when applying other statutes expressly prohibiting this activity. We believe it to be dangerous for a law firm to state as fact otherwise. It placed elected officials, and particularly Aldermen, in the unenviable position of running afoul of the law. Stretching the boundaries of advocating for a client to the point where it cannot be substantiated is wrong. Throwing personal attacks to somehow discredit the messenger(s) is equally as wrong and only shows you cannot support the "facts" you purport are on the side of the KMRA.

We are as much "faux-news" as this memo's authors are "faux-attorneys."

Kankakee:

> "*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."*

ECWd:
Actually, as the Board's By-laws, and Intergovernmental Agreements stand today, both the Illinois Municipal Code [65 ILCS 5/3.1-15-15] and Public Officer Prohibited Activities Act [50 ILCS 105/2] prohibit elected mayors and aldermen of the member municipalities from serving as a Director of the KMRA. With a "slight change" to the IGA (making the KRMA an actual stand-alone agency), by granting it the power to sue and be sued, and the KRMA filing its own Annual Financial Reports, the Mayors could serve as Directors. Aldermen can never serve on this Board unless the Legislature changes the statute(s).

Kankakee:

> "*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*."

ECWd:
YES, this Section does apply to the to the current KMRA Directors. Being a public body politic and corporate only means they are their own public body. The Intergovernmental Cooperation Act gave the member municipalities the power to grant the KRMA the powers to sue and be sued. For some unknown reason, they all chose to withhold that power from the KRMA. Since they do not have the power to sue and be sued, they must rely on their member municipalities, and are "under" those municipalities. If the KRMA does something to where they would get sued, the suit would name the municipalities making up the KRMA. If they were truly a "Special District" as we understand they want and intend to be, their IGA must be changed.

According to their By-laws, one member municipality, Kankakee, has the absolute power to establish, direct, and oversee KRMA's policies and procedures. Kankakee forever makes up the majority of the KRMA Board of Directors with appointment authority for 4 of the 7 seats. Majority of a quorum rules for nearly every situation in the KRMA and Kankakee can pretty

much do whatever, whenever they damn well please with the KRMA and the other member municipalities cannot stop it.

Kankakee:

> "*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*."

ECWd:

This part of their memo should be used for toilet paper. There was nothing political or partisan about these allegations as this attorney would have you believe. Truth cannot be a "borderline libelous accusation" – when the attorneys have nothing to stand on, their personal attacks begin again.

We stated previously, the Public Officer Prohibited Activities Act expressly prohibits an Alderman from accepting this appointment as a Director of the KRMA. There is no other authorization in any law for an alderman to hold this office. We fail to understand how this can be so badly misinterpreted. The Illinois Constitution, Article VII, Section 8 does not authorize an Alderman to hold this office, the Intergovernmental Cooperation Act does not authorize an Alderman to hold this office, and the KRMA Intergovernmental Agreement does not authorize and Alderman to hold this office.

<u>This is not a borderline libelous accusation:</u> We believe the Aldermen appointed by the Mayor of the City of Kankakee are in violation of the Public Officer Prohibited Activities Act and the penalties for violations are spelled out in Section 4:

> Sec. 4. Any alderman, member of a board of trustees, supervisor or county commissioner, or other person holding any office, either by election or appointment under the laws or constitution of this state, who violates any provision of the preceding sections, is guilty of a Class 4 felony and in addition thereto, any office or official position held by any person so convicted shall become vacant, and shall be so declared as part of the judgment of court.

Kankakee:

> *"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..*"

ECWd:

Wrong. Try reading the Public Officer Prohibited Activities Act, Section 2 again. Their own words prove our point:

"*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 . . .*"
The "written law of the state" – the Public Officer Prohibited Activities Act – specifically prohibits the occupant of the office of Alderman (Kankakee) from holding the office of Director (KRMA) by appointment of the Mayor unless he first takes a leave of absence or resigns from the office of Alderman.

Kankakee:

> *"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."

ECWd:
The Legislature saw the "*conflict of interest"* by the way they wrote the Intergovernmental Cooperation Act. As you can see in our memo on this point at ***this link***. Additionally, the legislature clearly saw the potential conflict of interest when they wrote the Public Officer Prohibited Activities Act and established clear Prohibitions.
As far as conflicts of interests being "routinely cured through abstention or recusal on a specific matter", such abstentions or recusals are only permitted as outlined in the applicable statute for the public body that includes numerous key factors that must be met for taking such action. The fact the attorney talks of ways to cure conflicts of interests is most telling as it would appear he is acknowledging that there actually *could* be a conflict, otherwise, why mention the cure? Regardless of potential conflicts, our point was about prohibitions as outlined in the law.

Kankakee:

"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."

ECWd:
Wrong. **All of it**. As we have demonstrated in this and previous articles, there is **absolutely no** "explicit grant of authority" in the Illinois Constitution, the Intergovernmental Cooperation Act, or the Intergovernmental Agreements or By-laws of the KRMA for any elected officers of any municipality to be appointed to or serve on the LRMA Board of Directors. I suggest Kankakee obtain a written opinion from a non-interested attorney and ask the appropriate questions for such an opinion.