From the above, it would seem that the Department has clear statutory authority to purchase air rights and, therefore, your answer to Question No. 3 would be in the affirmative. It is noted that the purchase of air rights of land pursuant to this statutory provision is subject to certain considerations such as the requirement that payment be made out of appropriations made by the Legislature for any such purpose and other specifically stated conditions set forth in this paragraph. Your attention is specifically called to the fact that funds appropriated for such purposes are subject to the conditions set out in paragraph 22.41 of the same chapter. It would, therefore, of course, be necessary that any work anticipated for which payment is to be made out of funds appropriated for this purpose shall be expended only upon projects which are in the State airport plan or in the State airway system as prepared or revised from time to time by the Department, etc.

It is noted that Paragraph 22.74, Illinois Revised Statutes 1967, Chapter 15½, provides as follows:

"In exercising its powers and performing its functions under the laws of this State pertaining to aeronautics, when it is necessary for the use and benefit of the public, pursuant to such laws, that private property be taken or damaged or entry be made on private property, for the purpose of constructing and installing any airport, restricted landing area or other air navigation facility, including buildings, structures and other improvements in connection therewith, the Department in the name of the State, within the limitations of available appropriations, shall have the right to purchase the necessary land, rights in land, or easements, including avigation easements, from the owner thereof and purchase from the owner the right of entry, or if compensation therefor cannot be agreed upon between the Department and the owner, to have just compensation ascertained and to acquire and pay for such property, land, easement or right of entry, in the manner provided for in 'An Act to provide for the exercise of the right of eminent domain,' approved April 10, 1872, as amended. When the Department, in the name of the State, files a petition to condemn any private property, rights in land, or easement, as herein provided, the Department may enter upon the land and premises, and the buildings or structures located thereon, notwithstanding that the damage or compensation in connection with such condemnation has not theretofore been determined and paid."

General power is given to the Department for exercise of eminent domain when it is necessary for the purpose of acquiring title, rights in land or easements including avigation easements. This statutory provision would appear to be broad enough to cover any exercise of the power of eminent domain as anticipated in your Question No. 4. The answer, therefore, to Question No. 4 is in the affirmative.

It is noted that the various statutory provisions in Chapter 15½ dealing with the title to land or easements therein either through purchase or condemnation limit the activities of the State through your Department to items that will be paid for out of appropriations made by the Legislature for the particular purpose under consideration. In this connection, your attention is called to specific language on this

subject contained in Paragraph 22.34 quoted above. An appropriation must be available to the Department for the purposes anticipated in your Questions No. 3 and 4. The appropriation, of course, need not be so specific as to designate the particular airport concerned with. As you will note by reference to my Opinion No. UP-937 referred to above the question as to whether or not funds appropriated for a specific type of work or use and earmarked by the Department for one airport was found to be available for use at another airport for the same type of work or use since the appropriation bill itself did not restrict the use to any particular airport.

(No. F-2028—November 22, 1968)

COUNTIES AND COUNTY BOARDS—*Authority of County Boards to Retain Private Attorneys in Regard to Bonds Issued Pursuant to the County Public Works Act.* The County Public Works Act authorizes a county board to retain private legal counsel in connection with the public work projects authorized by said Act. The duties of these attorneys should be directed toward rendering an opinion concerning the validity and merchantability of the revenue bonds. Private attorneys may also be retained where general obligation bonds are used as an alternative method of financing.

STATUTES CONSTRUED—Illinois Revised Statutes 1967, Chapter 34, Paragraphs 3117 and 3123.

Honorable William V. Hopf, State's Attorney, DuPage County, Court House, Wheaton:

I have your letter in which you inquire as follows:

"The County of DuPage, in accordance with the County Public Works Act has created a Public Works Department and has issued Revenue Bonds thereunder. The County is now desirous of invoking an overall County Plan for the collection and treatment of sewage. In order to finance such a plan it is necessary to issue General Obligation Bonds. It is contemplated that a Countywide Referendum requesting authority for the issuance thereof will be held.

Your Opinion is respectfully requested to be on the following questions:

1. Section 17 of the County Public Works Act (1965 Illinois Revised Statutes, Chapter 34, Section 3117) provides that bonds may be issued 'to pay the cost of the construction . . . of any waterworks properties or sewage facilities . . . including . . . legal . . . fees and costs . . .' There appears to be no restriction on what lawyers may be employed. Question: Is there any reason why the County may not employ lawyers who are specialists in this field and whose opinions are 'marketable' and necessary to effect a sale of the bonds?

2. Section 23 of said Act (1965 Illinois Revised Statutes, Chapter 34, Section 3123) authorizes a County to issue General Obligation bonds to acquire waterworks properties or sewage facilities. It is recognized practice to include legal costs as part of the cost of acquisition and there appears to be no restriction as to what lawyers may be employed. Is there any reason why the County may not employ lawyers or specialists in this field and whose opinions are 'marketable' and necessary to see the bonds and pay for such services out of the proceeds of the bond issue?

3. In the case of a general bond issue requiring an election a situation may arise where the election does not carry. The services of lawyers who are specialists in setting up the election machinery authorizing the bonds are as necessary as when bonds are issued and delivered. If there are no proceeds of a bond issue as when an election does not carry, is there any reason why the County may

not pay for services rendered? Section 3102 of said Act provides that the County Board may employ a superintendent of Public Works and 'such other employees for the administration of the department as may be necessary.' In the alternative, may general corporate funds of the County be used?

The basic problem existing is whether or not the State's Attorneys office must be used by the County in handling either a General Obligation Bond issue or a Referendum Bond issue. Can the County under these circumstances hire outside Specialists and pay them from the General fund or in the alternative from the proceeds of a bond issue?"

Paragraph 3117, Chapter 34, Illinois Revised Statutes 1967, (which you cite) provides, in part, as follows:

"In order to pay the cost of the construction, acquisition by condemnation, purchase or otherwise of any waterworks properties or sewage facilities, or a combination thereof, as the case may be, and the improvement or extension from time to time thereof, including engineering, inspection, *legal and financial fees and costs*, working capital, interest on such bonds during construction and for a reasonable period thereafter, establishment of reserves to secure such bonds and all other expenditures of such county incidental and necessary or convenient thereto, the county board is authorized to issue and sell revenue bonds payable solely from the income and revenue derived from the operation of the waterworks properties or sewage facilities, or a combination thereof, as the case may be, and may also from time to time issue revenue bonds to refund any bonds at maturity or pursuant to redemption provisions, or at any time before maturity with consent of the holders thereof. ° ° °" (Emphasis supplied)

It must be noted that the legal costs or legal services authorized by Paragraph 3117 pertain only to the specific public work projects as are defined by the statute itself; the statute does not grant a county board broad power to retain attorneys. On the other hand Paragraph 3117 clearly provides that in connection with the funding of county waterworks and sewage facilities that legal costs can be incurred by the county board. It would seem that the power to incur legal costs necessarily entails the power to select attorneys and to enter into a contractual relationship with the attorneys selected.

In short, Paragraph 3117 authorizes the county board to retain private attorneys. The legal issue is, therefore, whether the statute as so construed, unconstitutionally places, with private persons, the powers of the office of the State's Attorney, which is a constitutional office under the provisions of Article 6, Section 21 of the Illinois Constitution.

A resolution of the issue presented compels, at the outset, reference to the case of *Fergus* v. *Russel*, 270 Ill. 304 (1915). There the Court held that the Legislature could not appropriate money to the Insurance Superintendent for legal services and for traveling expenses of attorneys and court costs in prosecutions for violations of insurance laws for the reason that the Attorney General as a constitutional officer was vested by the constitution with all the common law powers of the office and was therefore the only officer legally empowered to represent the people in any legal proceeding in which the state was a

party. The Court in *Fergus* pointed out the contradistinction between the office of Attorney General and the offices of other legal representatives, extant at common law, and at page 342 commented as follows:

"It is true there were other representatives of the crown in the courts at common law, but they were all subordinate to the Attorney General. By our constitution we created this office by the common law designation of Attorney General and thus impressed it with all its common law powers and duties. *As the office of Attorney General is the only office at common law which is thus created by our constitution* the Attorney General is the chief law officer of the State, and the only officer empowered to represent the people in any suit or proceeding in which the State is the real party in interest, except where the constitution or a constitutional statute may provide otherwise. ° ° °" (Emphasis supplied.)

The *Fergus* decision was found to be germane to a statute which uniquely regulated the office of State's Attorney. *People ex rel. Kunstman* v. *Nagano*, 389 Ill. 231, 247 (1945). This case dealt with an Illinois statute which allowed an alien to hold title to realty in Illinois for a certain period of time. After the expiration of that period the statute made it the duty of the State's Attorney to bring an action to divest the alien of title. The statute provided that if the State's Attorney did not act, that any private citizen, with the aid of his own attorney, could bring the action. The statute further provided for a forced sale by competitive bidding subject to outstanding leins. Defendant, the alien, challenged the constitutionality of the statute on the ground that the statute attempted to confer the public duties of the State's Attorney upon private citizens.

The Court declared the statute unconstitutional, and found the principles of *Fergus* to be generally applicable. However, at page 249, it made the following comment:

"It thus appears from a rather extended line of cases by this court that we have always viewed a State's Attorney as a constitutional officer with rights and duties analogous to or largely coincident with the Attorney General, *though not identical*, and the one to represent the county or People in matters affected with a public interest. ° ° °" (Emphasis supplied.)

Although the Court in the *Nagano* case did base its holding on the theory that the statute authorized an unconstitutional curtailment of the powers of the State's Attorney, it seems that the Court also objected to the statute for the reason that a private person, in the capacity of relator, might utilize the statutory plan improperly by parting the alien from his realty at a consideration favorable to the relator. (In fact it seems that the statute licensed such conduct by allowing the private relator to be a competitive bidder at the forced sale and by further allowing such bidder and his attorney reasonable fees for their services, to be taxed as costs as directed by the Court, but not exceeding 20 per cent of the ultimate purchase price.) It is an understatement to declare that the statute, considered here, could not be so abusively utilized.

In *Nagano* the Court distinguished the case of *People ex rel. Hoyne* v. *Newcomer*, 284 Ill. 315 (1918). The issue involved in *Newcomer* was the extent of the power of the State's Attorney to enter a *nolle prosequi* in a criminal case in the Municipal Court of Chicago. The judge of the court had refused to enter the *nolle prosequi* of record and thereafter the State's Attorney had brought an action for a writ of *mandamus* to compel him to do so. There was no state statute regulating the entry of a *nolle prosequi*. In denying the writ the Court questioned the wisdom of allowing the State's Attorney unlimited power in this area and also based its decision, in part, on the theory that the discretionary decision of the respondent judge was not reviewable in a *mandamus* proceeding.

The Court in *Nagano* found the *Newcomer* case to be supportive of its decision in that (as implied by the Court at page 250) both cases approached the problem from the viewpoint of the public interest to be served by allowing or disallowing the alleged encroachment upon the powers and prerogatives of the State's Attorney.

Whatever independent significance this analysis might have, it must also be noted that the Court in *Newcomer* rejected the argument of relator that as State's Attorney he possessed all the power possessed at common law by the Attorney General and therefore had absolute power to enter a *nolle prosequi*. The Court at pages 323 to 324 stated:

"The court will not consider the powers of the Attorney General of the State, who under our constitution is a State officer and a member of the executive department of the State representing the sovereignty of the people, but does not regard the powers of the State's Attorney as co-extensive with those of the Attorney General, who is a chief law officer of the State and head of the legal department. (*Fergus* v. *Russel*, 270 Ill. 304) The State's Attorney is a county officer elected for and within a county to perform his duties therein and is by statute charged with certain duties. (*Cook County* v. *Healy*, 222 Ill. 310.) ° ° °"

The case of *Ashton* v. *County of Cook*, 384 Ill. 287 (1943) also did not pertain to the constitutionality of a statute allegedly curtailing the power of the State's Attorney, but rather it concerned the question of the power of the board of commissioners of Cook County to retain private attorneys to institute legal proceedings for the collection of forfeited real estate taxes and penalties. The Court held that the contracts of employment were *ultra vires*.

Although no specific statute authorized the board of commissioners to incur the legal costs, it is of more importance to note that a statute (now in substance Sub-paragraphs 1 and 2, Paragraph 5, Chapter 14, Illinois Revised Statutes 1967) did then empower the State's Attorney:

" 'to commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in any court of record in his county, in which the people of the state or county may be concerned,' and second, 'to prosecute all forfeited bonds and recognizances, and all actions and proceedings for the recovery of debts, revenues, moneys, fines, penalties and forfeitures accruing to the state or his county, or to any school district or road district in his county, ° ° ° which may be prosecuted in the name of the People of the State of Illinois.' " (See page 297 of opinion.)

The Court seemed to confine the scope of its decision to a statutory and not a constitutional-common law theory. The following comments found, respectively, at pages 299 and 300 of the opinion are illustrative of this point:

"It is alleged in appellants' pleadings that the occasion for employing private counsel was created by the increase of the number of defaults in the payment of taxes and that the State's Attorney did not have the time, in connection with his other duties, to institute such suits. County boards can exercise only such powers as are expressly given by law or such as arise by necessary implication from the powers granted or are indispensable to carry into effect the object and purpose of their creation. (*Marsh v. People*, 226 Ill. 464; *County of Cook* v. *Gilbert*, 146 Ill. 268.) No provision is made in the law which authorizes a board to employ private counsel in collection of delinquent taxes under the emergency pleaded, even though the State's Attorney approves the contracts as to form and gives his silent acquiescence to the procedure adopted. *His consent cannot operate to supply the board with a power which the legislature has seen fit to withhold.*
° ° ° ° °

"The law is well settled that when the constitution or the laws of the State create an office, prescribe the duties of its incumbent and fix his compensation, no other person or board, *except by action of the legislature*, has the authority to contract with private individuals to expend public funds for the purpose of performing the duties which were imposed upon such officer. (*Fergus* v. *Russel*, 270 Ill. 304; *Stevens* v. *Henry County*, 218 Ill. 468; *Hope* v. *City of Alton*, 214 Ill. 102.) ° ° °" (Emphasis supplied.)

This analysis of the *Ashton* case is for the most part applicable to *The People ex rel. Courtney* v. *Ashton*, 358 Ill. 146 (1934) where it was held that the State's Attorney had procedural authority to bring an action to enjoin certain officers and members of the board of commissioners of Cook County from paying upon the contracts made with these private attorneys who were to prosecute these tax collection cases. The doctrine of *Fergus* was relied upon more strongly in the *Courtney* case than in *Ashton*.

In the *Ashton* case the cases of *Mix* v. *People*, 116, Ill. 265 (1886), *Ottawa Gas Light Co.* v. *People*, 138, Ill. 336 (1891), and *People* v. *Straus*, 355 Ill. 640 (1934) were distinguished.

It is also arguable that *Ashton* overruled these decisions. See page 300 of the opinion in *Ashton* where the Court stated: "The statements in those cases which are counter to the conclusions reached are not adhered to."

In each of these cases private counsel had been retained to prosecute tax foreclosure and collection suits and in each defendant questioned the authority of private counsel to represent the public interest. The holdings in these cases did not sustain this contention. The Court

in *Ashton* found these cases to be inapposite for the reason that there a collateral attack, upon the authority of private counsel, was made by the defendant delinquent taxpayers; the point was not raised, as it was in *Ashton,* by direct and separate litigation which tested the authority of private counsel.

In an article entitled "The Relationship Between The Attorney-General and The State's Attorney in Illinois," Vol. 1949 U. Ill. L.F. 507, 509 the cases (with the exception of *Ashton* v. *County of Cook, supra*) cited above are discussed and based upon such discussion the argument is made that although the State's Attorney is a legal officer unknown at common law and therefore not logically a possessor of inherent powers as is the Attorney General, nevertheless:

". . . . . the nature of the office and the similarity of its functions with those of the Attorney-General would give force to the view that he should have the common law powers of the Attorney-General. And this was the construction adopted by the Illinois Supreme Court. . . . . ."

This statement is questionable. A preferable determination, on the basis of these cases, is that the office of State's Attorney, as a constitutional office, should be given deference in order to prevent its legislative obliteration, and that curtailments of the prerogatives of such a constitutional office should be dealt with by examining, on a case by case basis, the exigencies affected by allowing or disallowing the alleged infringement.

In the factual context in which it is stated, the rule of constitutional and statutory construction set forth in *The People* v. *Toll Highway Commission,* 3 Ill. 2d 218, 236 (1954) is particularly applicable. There provisions of the State Toll Highway Commission Act were alleged to be invalid in that the commission was authorized to appoint assistant attorneys and to retain special counsel with the consent and approval of the Attorney General. Another provision of the Act declared the Attorney General to be the Commission's legal adviser and attorney. The Court relied upon the rule of construction which is to the effect that a statute should not be so literally construed so as to render it unconstitutional, and held that these statutes merely invested the commission with the power to defray the cost of legal expenses from toll highway expenses. The attorneys retained were held to be subordinates of the Attorney General and subject to his control.

On the basis of the foregoing discussion, your first question must be given a qualified, affirmative answer. It is my opinion that Paragraph 3117 authorizes the County Board to retain private counsel whose duties should be directed toward rendering an opinion concerning the validity and merchantability of these revenue bonds. The duties of these attorneys would not exclude such preparatory legal advice as would assure the rendition of an integral opinion.

Your questions two and three can be combined, in that, what is involved is the effect of the alternative method of financing provided by

Paragraph 3123, Chapter 34, Illinois Revised Statutes 1967. Paragraph 3123 allows the county board to issue general obligation bonds to finance the projects authorized by the Act.

Paragraphs 3117 and 3123 must be construed together, and also with the other provisions of the Act. Legislative intent is to be determined by consideration of the nature and objectives of a statute, and the consequences of different constructions. *Electrical Contractors Ass'n.* v. *Illinois Building Authority,* 33 Ill. 2d 587, 591 (1966); *Carrigan* v. *Liquor Control Commission,* 19 Ill. 2d 230, 233 (1960).

Paragraph 3117 in its introductory language seems to limit the payment of the items thereafter set forth solely to the moneys derived from the sale of the revenue bonds. Moreover, Paragraph 3123 would seem to reinforce this conclusion for the reason that the method of financing provided by Paragraph 3123 is contingent upon a favorable vote.

This conclusion must be rejected. It ignores the fact that Paragraph 3117 also sets out "financial fees and costs" as an item of expense. It is clear that this term refers to financial counseling and underwriting expenses. These expenses, together with the legal expenses, are preparatory in nature. In this regard it is important to note that in Paragraph 3117, the similar preparatory nature of these legal and financial costs is emphasized in that both items are juxtaposed within commas.

In addition, Paragraph 3118 seems to commit to a County Board, issuing revenue bonds, the duty of adopting an ordinance which "shall also set out the total estimated cost of the project, fix the amount of bonds proposed to be issued, the maturity or maturities, the interest rate and all details in respect thereof, and the covenants and undertakings of the county. . . ." This provision would, at least, entail that the county incur some "financial" expenses before the board adopts a revenue bond ordinance.

Your attention is also directed to the third sub-paragraph of Paragraph 303, Chapter 34, Illinois Revised Statutes 1967 which authorizes a county to make all contracts necessary to the exercise of its corporate powers and in relation to its property.

The legislative intent expressed by these provisions seems to be that the county board must secure certain financial and legal information before issuing these bonds. Neither the introductory language of Paragraph 3117, nor the contingent effect of Paragraph 3123, should be construed so as to deny to the county board this necessary information.

Therefore, your second and third questions are answered in the affirmative. However, this answer is limited in regard to the duties of these private attorneys in the same respect as is the answer to question number one set out above.

provisions of section 14 of "AN ACT concerning fees and salaries, etc.", *supra*, require filing fees based upon the pleading rather than the number of parties involved in the litigation. This appears to be the general scheme throughout section 14, *supra*, and is thus evidence of the legislative intent in its enactment.

It is a cardinal rule of statutory construction that a statute must be construed so as to ascertain and give effect to the intention of the General Assembly as expressed in the statute. (*Lincoln Nat. Life Ins. Co.* v. *McCarthy*, 10 Ill. 2d 489.) As the intent of the legislature was to provide for a filing fee based upon the pleading, rather than the parties involved in that pleading, I am of the opinion that the circuit clerk may not charge a filing fee to each tax objector named in the tax objection complaint. It is apparent that the filing fee can be charged only for each paper or document filed, rather than the number of parties to that document.

(No. S-565—March 28, 1973)

OFFICERS—*State's Attorney*. The State's Attorney is the attorney and legal advisor for the county.

COUNTY BOARDS—*Powers*. The board does not have the authority to hire an attorney to advise it with regard to the establishment of a public building commission.

CONSTITUTION CONSTRUED—Illinois Constitution of 1970, article VI, section 19.

Hon. Henry D. Sintzenich, State's Attorney, McDonough County, Macomb, Illinois.

I have your letter wherein you state:

"I hereby request your opinion on the following matter:

Does the County Board have power to hire or authorize a standing committee of the County Board to hire legal counsel without regard as to whether or not the State's Attorney of the County can provide the necessary legal information and or services?

For example: Where the County Board authorizes a standing committee to hire legal counsel to provide advice and information concerning the establishment of a building commission with the County."

It is my understanding that the county board of McDonough County does not wish to create a county office but merely desires to employ an attorney to advise the county board with regard to establishing a public building commission.

The office of state's attorney is created by section 19 of article VI of the Illinois Constitution of 1970. Said section 19 reads as follows:

"A State's Attorney shall be elected in each county in 1972 and every fourth year thereafter for a four year term. One State's Attorney may be elected to serve two or more counties if the governing boards of such counties so provide and a majority of the electors of each county voting on the issue approve. A person shall not be eligible for the office of State's Attorney unless he is a United States citizen and a licensed attorney-at-law of this State. His salary shall be provided by law."

The duties of the state's attorney are delineated in section 5 of "AN ACT in regard to attorneys general and state's attorneys". (Ill. Rev. Stat. 1971, ch. 14, par. 5.) Said section 5 reads as follows:

"The duty of each State's attorney shall be:

(1) To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned.

(2) To prosecute all forefeited bonds and recognizances, and all actions and proceedings for the recovery of debts, revenues, moneys, fines, penalties and forfeitures accruing to the State or his county, or to any school district or road district in his county against railroad or transportation companies, which may be prosecuted in the name of the People of the State of Illinois.

(3) To commence and prosecute all actions and proceedings brought by any county officer in his official capacity.

(4) To defend all actions and proceedings brought against his county, or against any county or State officer, in his official capacity, within his county.

(5) To attend the examination of all persons brought before any judge on habeas corpus, when the prosecution is in his county.

(6) To attend before judges and prosecute charges of felony or misdemeanor, for which the offender is required to be recognized to appear before the circuit court, when in his power so to do.

(7) To give his opinion, without fee or reward, to any county officer in his county, upon any question or law relating to any criminal or other matter, in which the people or the county may be concerned.

(8) To assist the attorney general whenever it may be necessary, and in cases of appeal from his county to the Supreme Court, to which it is the duty of the attorney general to attend, he shall furnish the attorney general at least 10 days before such is due to be filed, a manuscript of a proposed statement, brief and argument to be printed and filed on behalf of the people, prepared in accordance with the rules of the Supreme Court. However, if such brief, argument or other document is due to be filed by law or order of court within this 10 day period, then the State's attorney shall furnish such as soon as may be reasonable.

(9) To pay all moneys received by him in trust, without delay, to the officer who by law is entitled to the custody thereof.

(10) To perform such other and further duties as may, from time to time, be enjoined on him by law.

(11) To appear in all proceedings by collectors of taxes against delinquent taxpayers for judgments to sell real estate, and see that all the necessary preliminary steps have been legally taken to make the judgment legal and binding."

A non-home rule county has only the powers expressly granted to it by the Constitution or by law plus the powers necessarily incidental to its express powers. (Ill. Const., art. VII, sec. 7; *Goodwine* v. *County of Vermilion*, 271 Ill. 126.) McDonough County is a non-home rule county.

The Illinois Supreme Court has held that the state's attorney is the attorney and legal adviser for the county. Absent specific enabling legislation, a county cannot employ an attorney to render legal advice to the county board or to do legal work for the county. (*Ashton* v. *County of Cook*, 384 Ill. 287; *Abbott* v. *County of Adams*, 214 Ill. App. 201.) Any contract with a private attorney that was not supported by specific enabling legislation would be *ultra vires*.

When the Constitution or the laws of the State create an office and prescribe its duties, no other person or board, except when authorized by the legislature, has the authority to contract with private individuals to expend public funds for the purpose of performing the duties which were imposed upon such officer. *Fergus* v. *Russell*, 270 Ill. 304; *Stevens* v. *County of Henry*, 218 Ill. 468.

In *Ashton* v. *County of Cook*, 384 Ill. 287, the Cook County Board had employed a private attorney to collect delinquent taxes. The legality of the contract between the county and the private attorney was challenged.

The Illinois Supreme Court pointed out that if there was specific legislation authorizing the county board to hire an attorney to collect delinquent taxes the contract would be legal. However, in this case there was no such specific statutory authorization and thus the county board did not have the authority to enter into the contract. Therefore, the contract was void.

"It is alleged in appellants' pleadings that the occasion for employing private counsel was created by the increase of the number of defaults in the payment of taxes and that the State's Attorney did not have the time, in connection with his other duties, to institute such suits. County boards can exercise only such powers as are expressly given by law or such as arise by necessary implication from the powers granted or are indispensable to carry into effect the object and purpose of their creation. (*Marsh* v. *People*, 226 Ill. 464; *County of Cook* v. *Gilbert*, 146 Ill. 268.) No provision is made in the law which authorizes a board to employ private counsel in collection of delinquent taxes under the emergency pleaded, even though the State's Attorney approves the contracts as to form and gives his silent acquiescence to the procedure adopted. His consent cannot operate to supply the board with a power which the legislature has seen fit to withhold.

* * *

The law is well settled that when the constitution or the laws of the State create an office, prescribe the duties of its incumbent and fix his compensation, no other person or board, except by action of the legislature, has the authority to contract with private individuals to expend public funds for the purpose of performing the duties which were imposed upon such officer. (*Fergus* v. *Russel*, 270 Ill. 304; *Stevens* v. *Henry County*, 218 Ill. 468; *Hope* v. *City of Alton*, 214 Ill. 102.) The contracts of employment under which appellants claim were *ultra vires* and void."

There is no specific legislation authorizing the county board to hire an attorney to advise the board with regard to establishing a public building commission. Thus, it is the responsibility of the

state's attorney to advise the board on this matter. Any action by the board to hire a private attorney to perform this task would be *ultra vires*.

In answer to your question, the county board does not have the authority to hire an attorney to advise the board with regard to establishing a public building commission.

(No. S-567—March 28, 1973)

OFFICERS—*State's Attorney—Powers.* The State's Attorney appoints the Assistant State's Attorneys and has the concomitant power to discharge them.

COUNTY BOARDS—*Powers—Assistant State's Attorneys.* The board has the power to determine the number of Assistant State's Attorneys to be employed by the county and their salaries.

STATUTES CONSTRUED—Illinois Revised Statutes 1971, chapter 53, paragraph 18.

Hon. Henry D. Sintzenich, State's Attorney, McDonough County, Macomb, Illinois.

I have your letter wherein you state:

"I hereby request your opinion on the following matter:

Where the County Board has fixed the number of Assistant State's Attorneys and has appropriated under their annual budget an amount of money for the payment of the salary of each of the assistants, is it the County Board or is it the State's Attorney who actually sets the salary within the limits of the appropriation? And secondly, is it the State's Attorney or the County Board that appoints the Assistant State's Attorney and also has the power to terminate employment of an Assistant State's Attorney?"

Section 2 of "AN ACT fixing and providing for the payment of the salaries of State's attorneys and their assistants, defining their duties, providing for the appointment of assistants, and to provide for the collection and disposition of fees, fines, forfeitures and penalties provided by law to be paid to the state's attorney, and to repeal all Acts in conflict herewith" (Ill. Rev. Stat. 1971, ch. 53, par. 18), [hereinafter referred to as the State's Attorneys Salaries Act], provides as follows:

"Where assistant State's Attorneys are required in any county, the number of such assistants and the salaries to be paid such assistants shall be determined by the board of county commissioners or supervisors, as the case may be, and the salaries of such assistants shall be paid out of the county treasury in quarterly annual installments, on the order of the county board on the treasurer of said county. Such assistant State's Attorneys to be named by the State's Attorney of the county, and when so appointed shall take oath of office in like manner as State's Attorneys, and shall be under the supervision of the State's Attorney."

If the language of a statute is plain and unambiguous, there is no need for construction of the statute. (*People ex rel. Nelson* v. *Olympic Hotel Building Corp.*, 405 Ill. 440.) An unambiguous statute must be held to mean what it plainly expresses (*Levinson* v. *Home*

"AN ACT in relation to the budget of counties not required by law to pass an annual appropriation bill." (Ill. Rev. Stat. 1973, ch. 34, par. 2103.) That section reads as follows:

"After the adoption of the county budget, no further appropriations shall be made at any other time during such fiscal year, except as provided in this Act. Transfers from one appropriation of any one fund to another of the same fund, not affecting the total amount appropriated, may be made at any meeting of the board by a two-thirds vote of all the members constituting such board, * * *. By a like vote the board may make appropriations in excess of those authorized by the budget in order to meet an immediate emergency."

(No. S-863—February 4, 1975)

COUNTIES: *Powers of County Board.* The state's attorney is the legal advisor of a county. The county board has no power to hire a private attorney to advise the county board or other county officers.

CONSTITUTION CONSTRUED: Illinois Constitution of 1970, article VII, section 1.

Hon. C. Brett Bode, State's Attorney, Tazewell County, Pekin, Illinois.

I have your letter wherein you state in part:

"At its Annual Budgetary Session recently, the Tazewell County Board enacted an Appropriation Ordinance which provided, in part, the appropriation of the sum of Eight Thousand Five Hundred Dollars ($8500.00) for attorney's fees. This particular appropriation was listed under the budget for the Zoning Department; and I have been advised that the sum is to be used to hire and pay for an attorney to attend and give advice to the County Zoning Board of Appeals and the County Board.

My question is this:

May the County Board appropriate County funds to pay for legal services and advice independent of the State's Attorney's office? In other words, may the County Board unilaterally hire independent legal counsel to advise the County Board, its sub-committees, and lawfully established County Committees such as the Zoning Board of Appeals without the express consent and the concurrence of the State's Attorney by way of the appointment of such an attorney as an assistant?"

It is well established in Illinois that a county in addition to its constitutional powers possesses only those powers expressly granted by statute (Ill. Const., art. VII, sec. 1), and those that arise by necessary implication from those powers granted. (*Heidenreich* v. *Ronske*, 26 Ill. 2d 360; *Crumpler* v. *County of Logan*, 38 Ill. 2d 146.) I am unable to find any statute which either expressly or impliedly authorizes a county to expend public funds to employ private counsel in the factual situation which you present.

The Illinois Supreme Court has held that the state's attorney is the attorney and legal adviser for the county. Absent specific enabling legislation, a county cannot employ an attorney to render legal advice to the county board or to do legal work for the county. (*Ashton* v. *County of Cook*, 384 Ill. 287; *Abbott* v. *County of Adams*, 214 Ill. App. 201.) Any contract with a private attorney that was not supported by specific enabling legislation would be *ultra vires*.

In *Ashton* v. *County of Cook, supra*, a case involving a contract between Cook County and a private attorney employed to collect delinquent taxes, the court stated at pages 299, 300:

"It is alleged in appellants' pleadings that the occasion for employing private counsel was created by the increase of the number of defaults in the payment of taxes and that the State's Attorney did not have the time, in connection with his other duties, to institute such suits. County boards can exercise only such powers as are expressly given by law or such as arise by necessary implication from the powers granted or are indispensable to carry into effect the object and purpose of their creation. (*Marsh* v. *People*, 226 Ill. 464; *County of Cook* v. *Gilbert*, 146 Ill. 268.) No provision is made in the law which authorizes a board to employ private counsel in collection of delinquent taxes under the emergency pleaded, even though the State's Attorney approves the contracts as to form and gives his silent acquiescence to the procedure adopted. His consent cannot operate to supply the board with a power which the legislature has seen fit to withhold.

* * *

The law is well settled that when the constitution or the laws of the State create an office, prescribe the duties of its incumbent and fix his compensation, no other person or board, except by action of the legislature, has the authority to contract with private individuals to expend public funds for the purpose of performing the duties which were imposed upon such officer. (*Fergus* v. *Russel*, 270 Ill. 304; *Stevens* v. *Henry County*, 218 Ill. 468; *Hope* v. *City of Alton*, 214 Ill. 102.) The contracts of employment under which appellants claim were *ultra vires* and void."

I previously issued opinion No. S-565, March 28, 1973, which held that a county board does not have the authority to hire an attorney to advise the board with regard to establishing a public building commission.

Since the state's attorney is the attorney and legal adviser for a county, a county board cannot hire a private attorney to advise the county board or any other county officers or boards. Any such action by a county board would be *ultra vires*.

(No. S-864—February 4, 1975)

COUNTIES: *Powers of a County.* A county has only those powers expressly granted to it by the Constitution or by law plus those which are necessary to carry out such express powers.

COMPENSATION: *Salary of Circuit Court Clerk.* The county board must set the salary of circuit court clerk within the amount set by statute.

OFFICERS: *Office of Circuit Court Clerk.* The circuit court clerk is not an officer of a unit of local government but rather an officer of the judicial branch of the State government. The provisions of section 9(b) of article VII of the Illinois Constitution of 1970 are not applicable to the office of circuit court clerk.

CONSTITUTION CONSTRUED: Illinois Constitution of 1970, article VII, sections 7 and 9(b).

STATUTES CONSTRUED: Illinois Revised Statutes 1973, chapter 53, paragraph 37a.

If the Board chooses to direct the applicant to comply with the Act and the applicant obtains alternate facilities which are in compliance with the Act and the Board's rules and regulations, including the appropriate mileage limitation, the applicant may amend its application in regard to the location of its race meetings and keep its allotted dates. If the Board takes the other alternative and rejects the application, the applicant may, upon finding adequate alternate facilities, file a late application. (Ill. Rev. Stat. 1976 Supp., ch. 8, par. 37-20.) In the latter situation, however, the Board has the authority to allot the dates which were previously allotted to the applicant, to any other applicant which is in compliance with the Act.

(No. S-1236—May 4, 1977)

CIVIL RIGHTS: *Duty of the Illinois Commission on Human Relations to Monitor the Anti-Solicitation Act.* The Supreme Court has ruled unconstitutional those provisions of "AN ACT to create a Commission on Human Relations" authorizing the Commission to monitor the solicitation of real estate.

STATUTES CONSTRUED: Illinois Revised Statutes 1975, chapter 38, paragraph 70-51 *et seq.*; chapter 127, paragraph 214.4-1.

Connie Seals, Executive Director, Illinois Commission on Human Relations, Springfield, Illinois.

I have your letter wherein you request an opinion on whether the recent Illinois Supreme Court decision, *People of the State of Illinois* v. *Betts Realtors, Inc.*, ____ Ill. 2d ____ means the Illinois Commission on Human Relations is again charged with the duty of monitoring "AN ACT to prohibit the solicitation or inducement of sale or purchase of real estate on the basis of race, color, religion or national origin or ancestry" (Ill. Rev. Stat. 1975, ch. 38, par. 70-51). Section 1 of the Act provides in pertinent part:

"It shall be unlawful for any person or corporation knowingly:

* * *

(d) To solicit any owner of residential property to sell or list such residential property at any time after such person or corporation has notice that such owner does not desire to sell such residential property or does not desire to be solicited to sell or list for sale such residential property. For the purpose of this paragraph, a person has such notice (1) when the Human Relations Commission has mailed to him, pursuant to Section 4.1 of 'An Act to create a Commission on Human Relations and to define its powers and duties', approved August 8, 1947, as now or hereafter amended, a list containing the name and address of such owner, or (2) when he has been notified in writing that the owner does not desire to sell or list for sale such residential property."

In *People of the State of Illinois* v. *Betts Realtors, Inc.*, ____ Ill. 2d ____ the court upheld that part of the Act which prohibits solicitation by a person after he had received notice in writing by the owner that the

owner does not desire to sell his residential property. The court held:

"

* * *

The General Assembly has concluded that limiting the solicitation of the sale or listing for sale of residential property serves to further the goals which the Act is intended to achieve and in the light of these authorities we see no constitutional infirmity in section 1(d)(2) (Ill. Rev. Stat. 1973, ch. 38, par. 70-51(d)(2)).

* * *

"

You now ask whether this decision requires the Human Relations Commission to enforce the Act. The Supreme Court in *People* v. *Tibbits* (1973), 56 Ill. 2d 56, determined that the Commission's authority to enforce the Act was unconstitutional. The decision in the *Betts* case does not overrule or otherwise change the *Tibbits* case.

In *Tibbits*, the court held unconstitutional section 4.1 of "AN ACT to create a Commission on Human Relations" (Ill. Rev. Stat. 1975, ch. 127, par. 214.4-1) which required that the Human Relations Commission should cause copies of lists of owners who did not wish to be solicited to sell their residential property to be mailed to those real estate agents who were known or believed by the Commission to be solicited owners of residential property for the sale of such property in the area covered by such lists. The court found the provision to be both vague and indefinite and therefore unconstitutional.

This section provided the only authority for the Commission to enforce "AN ACT to prohibit the solicitation or inducement of sale or purchase of real estate on the basis of race, color, religion or national origin or ancestry" (Ill. Rev. Stat. 1975, ch. 38, par. 70-51 *et seq.*). Therefore, because it was found unconstitutional the Commission has no authority to enforce the Act.

The decision in the *Betts* case does not change or contradict the decision in the *Tibbits* case. The *Betts* case dealt only with subparagraph 1(d)(2) of the Act which dealt with notice by the individual owners.

(No. S-1237—May 25, 1977)

COUNTIES: *Merit Commission—Power to Retain Private Counsel.* County merit commission may not retain private counsel.

OFFICERS: *State's Attorney—Duty to Advise Merit Commission.* State's Attorney may not advise merit commission concerning a discharge proceeding which he is prosecuting before the commission.

STATUTES CONSTRUED: Illinois Revised Statutes 1975, chapter 14, paragraph 5; chapter 34, paragraph 859.1.

Hon. Bruce W. Black, State's Attorney, Tazewell County, Pekin, Illinois.

I have your letter wherein you ask the following questions:

1. May the Tazewell County Merit Commission retain private counsel to advise it regarding the submission of the standard pay plan or the revision of its rules, regulations or procedures?

2. Must the Tazewell County State's Attorney advise the Merit Commission concerning a discharge proceeding in which he is the prosecuting attorney?

The Tazewell County Merit Commission administers the deputy sheriff merit system in Tazewell County. The Commission is responsible for promulgating rules, regulations, and procedures for the operation of the merit system. Ill. Rev. Stat. 1975, ch. 34, par. 859.1.

The State's Attorney is the attorney and legal advisor for the county. Section 5 of "AN ACT in regard to attorneys general and state's attorneys" (Ill. Rev. Stat. 1975, ch. 15, par. 5) provides in pertinent part as follows:

"§ 5. The duty of each State's attorney shall be:

(1) To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned.

* * *

(3) To commence and prosecute all actions and proceedings brought by any county officer in his official capacity.

(4) To defend all actions and proceedings brought against his county, or against any county or State officer, in his official capacity, within his county.

* * *

(7) To give his opinion, without fee or reward, to any county officer in his county, upon any question or law relating to any criminal or other matter, in which the people or the county may be concerned.

* * *"

I have previously advised that county officers may not retain private counsel unless there is specific enabling legislation. (1975 Ill. Att'y. Gen. Op. 12; No. NP-760, issued May 24, 1974; 1973 Ill. Att'y. Gen. Op. 18.) The county merit commission has no specific statutory authority to retain private counsel. Therefore, my answer to your first question is No.

In regard to your second question, in opinion No. S-328 (1971 Ill. Att'y. Gen. Op. 82) I advised that according to recognized merit principles of public employment, discharge proceedings against a deputy should be instituted by the sheriff of the county. Subparagraph (3) of section 5 of "AN ACT in regard to attorneys general and state's attorneys" requires the State's Attorney to prosecute all proceedings brought by a county officer in his official capacity. Therefore, as State's Attorney of Tazewell County, you have a duty to represent the sheriff in discharge proceedings before the merit commission if you determine that there is a cause for removal of a deputy. See, 1975 Ill. Att'y. Gen. Op. 330.

As an attorney you may not represent conflicting interests or undertake to perform inconsistent duties. Thus, you may not advise the merit commission concerning a discharge proceeding which you are prosecuting before the commission. In a case such as this, the merit commission could receive legal advice from a special State's Attorney who would be appointed to advise the merit commission in a particular matter. However, I should point out that the appointment of a special State's Attorney is in the discretion of the court. *Hutchens* v. *Wade* (1973), 13 Ill. App. 3d 787.

(No. S-1238—May 25, 1977)

HOME RULE: ***Preemption—Power of City of Chicago to License and Regulate Methadone Maintenance Clinics.*** **Because the legislature has specifically provided that the power to license and regulate facilities for the treatment of drug addicts is to be exercised exclusively by the Dangerous Drugs Commission, the city of Chicago may not license and regulate methadone maintenance clinics.**

CONSTITUTION CONSTRUED: Illinois Constitution of 1970, article VII, sections 6(a), (h) and (i).

STATUTES CONSTRUED: Illinois Revised Statutes 1975, chapter 91½, paragraphs 120.14 and 120.28; Illinois Revised Statutes 1976 Supplement, chapter 91½, paragraph 120.13.

LeRoy P. Levitt, M.D., Chairman, Dangerous Drugs Commission, Chicago, Illinois.

This responds to your letter in which you ask whether the city of Chicago may license and regulate methadone maintenance clinics. You state that the Chicago Health Department has attempted to regulate these clinics pursuant to chapter 118 of the Chicago Municipal Code which requires clinics that dispense drugs to obtain a license from the city of Chicago. It is my opinion that the city of Chicago has no authority to license and regulate methadone maintenance clinics because the General Assembly has specifically provided that the power to license and regulate clinics for the treatment of controlled substance addicts is an exclusive State power.

As a home rule unit of government, the city of Chicago has the power to license and regulate for the protection of the public health. (Ill. Const. of 1970, art. VII, sec. 6(a).) However, the General Assembly has the authority under the Constitution to prevent home rule units from exercising a home rule power. If the General Assembly specifically provides that a power shall be exclusively exercised by the State, home rule units may not exercise the power. In the absence of a specific provision, the power may be exercised concurrently by the State and home rule units. Sections 6(h) and 6(i) of article VII of the Illinois Constitution of 1970 reads as follows:

"(h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in subsection (1) of this Section.

(i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive."

In section 28 of the Dangerous Drug Abuse Act (Ill. Rev. Stat. 1975, ch. 91½, par. 120.28) the General Assembly has provided specifically that the powers expressly delegated to the Dangerous Drugs Commission in the Act are exclusive State powers. Section 28 provides as follows:

"It is declared to be the public policy of this State, pursuant to paragraphs (h) and (i) of Section 6 of Article VII of the Illinois Constitution of 1970, that the powers and functions set forth in this Act and expressly delegated to the Dangerous Drugs Commission are exclusive

Honorable Franklin D. Yoder, M.D., M.P.H., Director, Department of Public Health, Springfield:

I have your recent letter concerning the above subject which reads as follows:

"We are enclosing herewith a file containing a certified copy of the birth certificate of James Moon, an application for correction of his birth certificate and correspondence between the Department of Public Health and Mr. James Moon-Bey and Mr. Jesse McGee-Bey Sheik. As you will observe, this application for correction requests that the Department amend the birth certificate to reflect the name of 'James Davis Moon-Bey' in lieu of the name 'James Moon' which appears on the certificate as filed. Further, as you will observe, the Department's policy regarding the amendment of a certificate to reflect a change of name is outlined in the November 21, 1969 letter of Leo A. Ozier and the December 12, 1969 letter of Robert S. Gleason.

Your attention is directed to the December 16, 1969 letter from Mr. McGee-Bey Sheik in which he contends that this amendment should be made since Mr. Moon-Bey is not changing any name, but is only accepting his national name. Also, this letter contends that the charter of the Moorish Science Temple of America which is recorded in the office of the Recorder of Deeds of Cook County has legalized the names 'El' and 'Bey'.

We respectfully request your opinion as to whether the policy of the Department as stated in the attached correspondence is in agreement with the provisions of Section 22 (4) of the Vital Records Act (Chapter 111½, Paragraph 73-22). Also, we would appreciate your opinion as to whether the submission of a certified copy of a Court Order changing the name of a person born in this state is the exclusive method under which the Department of Public Health is authorized to amend the original certificate of birth to reflect a change of name or whether the facts and circumstances outlined by Mr. McGee-Bey Sheik would authorize the Department to amend the certificate of James Moon in this case."

Illinois Revised Statutes 1969, chapter 96, paragraph 1 reads as follows:

"If any person, being a resident of this state, and having resided therein 6 months shall desire to change his name, and to assume another name by which to be afterwards called and known, such person may file a petition in the circuit court of the county wherein he shall reside, praying for such relief; and upon its appearing to the court that the conditions hereinafter mentioned have been complied with, and there appearing no reason why the prayer should not be granted, the court, by an order to be entered on its record, may direct and provide that the name of such person shall be changed in accordance with the prayer in said petition. A petitioner may include his spouse and his adult unmarried children with their consent, and his minor children where it appears to the court that same is for their best interest, in his petition and prayer and the court's order shall then include such spouse and children. Whenever any infant has resided in the family of any person for the space of 3 years, and has been recognized and known as an adopted child in the family of such person, the application herein provided for may be made by the person having such infant in his family."

As can be seen the above quoted statutory provision provides the method whereby a resident of this state may appear before the circuit court of the county wherein he resides and secure an order that has

the effect of changing his name. I find no other statutory provision dealing exclusively with the purposes of this particular statutory provision although, as you are aware, a name may, under certain circumstances, be changed in a divorce proceeding and for that matter an individual may, within limitations, assume any name or title he desires.

Illinois Revised Statutes 1969, chapter 111½, paragraph 73-22 provides the statutory method for amendment of certificates of record under the Vital Records Act. Sub-paragraph (4) of paragraph 73-22 reads as follows:

"Upon receipt of a certified copy of a court order changing the name or names of a person born in this State, the official custodian shall amend the original certificate of birth to reflect the changes."

It would seem clear that the above quoted statutory provision prescribes the sole authority upon which the Department may alter the original certificate of birth to reflect the change of a name. Reading this statutory provision together with paragraph 1, chapter 96, Illinois Revised Statutes 1969, it would follow that in order to effect an amendment to the original certificate of birth under the situation outlined in your letter it would be necessary for the person wishing the amendment to the original certificate to appear before the circuit court in the county in which he resides and petition the court to enter an order having the effect of changing his name. Upon securing such an order a certified copy thereof should be furnished the Department. Under the facts presented in your letter of inquiry it is my opinion that the method outlined above is the exclusive method under which the Department of Public Health is authorized to amend the original certificate of birth.

(No. S-180—May 20, 1970)

COUNTIES—*Community Mental Health Act*—Community Mental Health Board is a county agency established to carry out the purposes of the Community Mental Health Act. Employees of the Community Mental Health Board of the county are employees of the county and are therefore subject to the provisions of Paragraph 7-132 of Chapter 108½, 1969 Illinois Revised Statutes. State's Attorney has duty of furnishing legal advice to county Community Mental Health Board. Community Mental Health Board may not employ independent counsel concerning acts in its official capacity.

STATUTES CONSTRUED—Illinois Revised Statutes 1969, Chapter 91½, Paragraphs 302 and 303a; Chapter 108½, Paragraph 7-132; Chapter 14, Paragraph 5.

Honorable Robert J. Neely, State's Attorney, Massac County, Metropolis:

I have your recent letter wherein you state:

"A Community Mental Health Board for Massac County has been appointed by the Chairman of the County Board of Commissioners of Massac County with the advice and consent of that body pursuant to the provisions of

the Community Mental Health Act of the State of Illinois and has been functioning for sometime. This Community Mental Health Board has a number of employees and taxes have been levied to support its activities, taxes have been collected for that purpose, and together with certain grants from the State of Illinois these funds have been used for those purposes.

A considerable disagreement has been developed as to whether employees of such a Community Mental Health Board are employees of Massac County, the governmental unit responsible for the appointment of the Board, the levy of taxes for the Board, and in some ways the supervising authority of that Board pursuant to the Community Mental Health Act provisions. I would appreciate your advice as to whether such employees should be considered employees of Massac County.

If such employees are to be considered employees of Massac County, I presume that they are subject to the mandatory provisions of Section 7-132, Chapter 108½, Illinois Revised Statutes, requiring their participation in the Illinois Municipal Retirement Fund. If in your judgment they are employees of Massac County, I would appreciate your confirmation of this assumption or your advice otherwise.

I would also appreciate your advice as to whether it is my responsibility as State's Attorney of Massac County to furnish legal advice to this Community Mental Health Board and to generally represent them as counsel.

In the event that I do have the responsibility of representing this Board, I would appreciate your advice as to whether it would be proper for the Board to employ independent counsel on either an hourly or a yearly basis."

A question similar to the one which you have presented arose in *Kohler et al.* v. *Cobb* (N.J.), 157 Atl 2d 681. The issue was whether a member of a municipally created sewerage authority holds an office in the municipality and is therefore a person appointed to an office in the municipality within the meaning of a statute requiring such persons to take and subscribe to required oaths. The court held that such person did hold an office in the municipality. The court, at page 683, quoted from *In Camden County* (N.J.) 105 Atl 2d 509 as follows:

"'the * * * authority, like the municipality which gave it being, is yet an agency or instrumentality for local administration in the vital field of sanitation and health, an area of government that is a primary responsibility of the municipality itself * * * it is * * * the alter ego of the municipality in the service of this essential public need.'"

The court went on to say on the same page:

"The statute thus shows a close relationship between the municipality and the sewerage authority. Cf. *State* v. *Parking Authority of City of Trenton*, 29 N.J. Super. 335, 337, 102 A2d. 669 (App. Div. 1954). This leads to a clear conclusion that a member of a municipality created sewerage authority holds an office 'in' in the creator 'municipality.' Therefore a person appointed to such an office must comply with the oath provisions of R. S. 40:46-191 N.J.S.A."

At page 207 of Volume 3 of McQuillan's "The Law of Municipal Corporations," (Section 12.39 of Article IV, Chapter 12) is found the following statement:

"It is an integral part of our governmental system that certain activities be conducted under supervision and control of duly constituted boards and commissions."

This office has previously considered the question of whether members of the county board of school trustees are county officers and whether it was the duty of the state's attorney to represent the county board of school trustees. In Opinion No. 19, issued on April 9, 1953, found at pages 68 through 70, this office held that members of a county board of school trustees are county officers and that it was the duty of the state's attorney to act as the board's legal representative and adviser.

In *The People* v. *Dunn*, 255 Ill. 289, one of the questions determined was whether the State Board of Health was a branch of the executive branch of the State. The court held that the right given to the State Board of Health to sue for and recover penalties for violations of the Medical Practice Act is not contrary to that clause of section 22 of Article IV of the Illinois Constitution prohibiting the granting of special or exclusive privileges to any corporation, association or individual, as such board is a branch of the executive department of the State and is not within the meaning of said clause.

An examination of the Community Mental Health Act indicates that a Community Health Board is merely a governmental agency which is established to carry out the purposes of the Act. It is an agency of the governmental unit and consequently, I am of the opinion that employees of the Community Mental Health Board of the county are employees of the county.

Paragraph 302 of Chapter 91½, 1969 Illinois Revised Statutes gives to a county power to construct, maintain, and regulate mental health facilities and to provide mental health services. Paragraph 303a declares that the Community Mental Health Board of a county is appointed by the Chairman of the County Board with the advice and consent of the County Board. Other provisions of the Community Mental Health Act declare that expenses of the Community Mental Health Board are paid by the county which may levy a tax for necessary funds. The Community Mental Health Board submits to the County Board an annual budget and annual report. It is not declared to be a body politic and corporate.

Because of the foregoing I am of the opinion that a Community Health Board of a county is a county agency created to carry out the purposes of the Community Mental Health Act. Consequently employees of the Community Mental Health Board of the county should be considered employees of Massac County. As employees of the county they are subject to the provisions of Paragraph 7-132 of Chapter 108½, 1969 Illinois Revised Statutes.

Since a Community Mental Health Board of a county is an agency of the county, I am of the opinion you, as State's Attorney, have the duty of furnishing legal advice to your county Community Mental

Health Board. Paragraph 5 of Chapter 14, 1969 Illinois Revised Statutes states as follows:

"• • • • •

"First—To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the state or county may be concerned.

• • • • •

"Third—To commence and prosecute all actions and proceedings brought by any county officer in his official capacity.

"Fourth—To defend all actions and proceedings brought against his county, or against any county or state officer, in his official capacity, within his county.

• • • • •

"Seventh—To give his opinion, without fee or reward, to any county officer in his county, upon any question or law relating to any criminal or other matter, in which the people or the county may be concerned.

• • • • •"

In your last question you have inquired whether the Board could employ independent counsel on either an hourly or a yearly basis even though you have the responsibility of representing said Board. I call your attention to the case of *Ashton* v. *County of Cook*, 384 Ill. 287 which states the general rule at page 299 as follows:

"It is alleged in appellants' pleadings that the occasion for employing private counsel was created by the increase of the number of defaults in the payment of taxes and that the State's Attorney did not have the time, in connection with his other duties, to institute such suits. County boards can exercise only such powers as are expressly given by law or such as arise by necessary implication from the powers granted or are indispensable to carry into effect the object and purpose of their creation. (*Marsh* v. *People*, 226 Ill. 464; *County of Cook* v. *Gilbert*, 146 Ill. 268.) No provision is made in the law which authorizes a board to employ private counsel in collection of delinquent taxes under the emergency pleaded, even though the State's Attorney approves the contracts as to form and gives his silent acquiescence to the procedure adopted. His consent cannot operate to supply the board with a power which the legislature has seen fit to withhold."

At page 300 of this same opinion is found the following statement:

"The law is well settled that when the constitution or the laws of the State create an office, prescribe the duties of its incumbent and fix his compensation, no other person or board, except by action of the legislature, has the authority to contract with private individuals to expend public funds for the purpose of performing the duties which were imposed upon such officer. (*Fergus* v. *Russel*, 270 Ill. 304; *Stevens* v. *Henry County*, 218 Ill. 468; *Hope* v. *City of Alton*, 214 Ill. 102.) The contracts of employment under which appellants claim were *ultra vires* and void."

Because of the foregoing I am of the opinion that your county Community Mental Health Board may not employ independent counsel to represent it concerning acts in its official capacity. It would seem, however, that you could appoint an Assistant State's Attorney to represent your county Community Health Board, provided your County Commissioners authorized such action. See *People* v. *Hanson*, 290 Ill. 370. In such instance he would act under your direction and supervision.

(No. S-182—May 28, 1970)

HEALTH—Illinois Clinical Laboratories—A director of a clinical laboratory may, under specific statutory provision, continue to direct such clinical laboratory although qualifications are provided by statute that he cannot meet.

STATUTES CONSTRUED—Illinois Revised Statutes 1969, chapter 111½, paragraphs 621-102, 623-101, 626-101, 626-102.

Honorable Franklin D. Yoder, M.D., M.P.H., Director, Department of Public Health, Springfield:

This is to acknowledge receipt of your recent letter wherein reference is made to the Illinois Clinical Laboratory Act (Illinois Revised Statutes 1969, chapter 111½, paragraphs 621-101 through 631-103). You request my opinion as to whether in the administration of the above Act the Department may adopt a policy that those persons who do not possess the educational requirements set forth in paragraph 626-102 may direct more laboratories than they were directing on August 23, 1965, the effective date of the Act.

The objects and purposes of the Act are set out in paragraph 621-102 of chapter 111½. This paragraph reads as follows:

"The operation of Clinical Laboratories in the State of Illinois is declared to affect the public health, safety and welfare. It is further declared that the purpose of this Act is to provide for the better protection of public health: (1) through the development, establishment, and enforcement of standards for the licensure of clinical laboratories; (2) by providing qualifications for the director of such clinical laboratories, and (3) by insuring that the tests performed by the clinical laboratories are performed with a high degree of scientific and professional competency. This Act shall be liberally construed to carry out these objects and purposes."

In paragraph 623-101 of chapter 111½ provision was made to the effect that no person may open, conduct or maintain a clinical laboratory unless a license has been obtained. The qualifications of a director of a clinical laboratory are set out in paragraph 626-101 of chapter 111½. This paragraph describes five categories of applicants and sets out certain pertinent qualifications.

The legislature saw fit to make provision for an individual to continue to direct a clinical laboratory, under certain circumstances, even though he did not meet the qualifications set out in the Act referred to above. This matter is treated in paragraph 626-102 of chapter 111½ which reads as follows:

"An individual listed as *the director of a clinical laboratory* which was registered with the Department prior to August 23, 1965, under the provisions of the 'Illinois Clinical Laboratory Registration Act', approved August 21, 1963, may

NEIL F. HARTIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

February 17, 1983

FILE NO. 83-001

COUNTIES:
Liability for Fees of
Attorneys Privately Retained by
County Officers

Honorable Jon C. Anderson
State's Attorney
Crawford County
Robinson, Illinois 62454

Dear Mr. Anderson:

I have your letter in which you inquire whether Crawford County is liable for attorney's fees and litigation expenses incurred by its supervisor of assessments and one member of its board of review in challenging certain petitions for the submission of public questions to referendum. For the reasons hereinafter stated, I agree with your opinion that Crawford County is not liable for such expenses.

You describe the following facts and circumstances which have prompted your question: on August 16, 1982, two petitions were filed in the office of the Crawford County clerk proposing that two public questions be submitted to the electorate by referendum at the November, 1982, general election. One petition proposed a referendum on the question "Shall the office of the Supervisor of Assessments be elective rather than appointive?"; the second proposed a referendum on the question "Shall the office of member of the Board of Review be elective rather than appointive?".

On August 19, 1982, the supervisor of assessments requested and received from you a letter stating that because the State's Attorney is by statute denominated as a member of the county officers electoral board (Ill. Rev. Stat. 1981, ch. 46, par. 10-9), which board is required to hear and pass on objections to petitions proposing the submission of questions of public policy relating to the county to referendum (Ill. Rev. Stat. 1981, ch. 46, par. 28-4), you would be unable to advise or otherwise represent him in such matters. Immediately thereafter the supervisor of assessments and one member of the board of review filed objections to the petitions in the office of the Crawford County clerk.

The county officers electoral board subsequently sustained the objections and dismissed the petitions. During the

pendency of the proceedings before the board, both objectors were represented by privately retained counsel. Both objectors claim to have filed their objections in their official capacity as county officers, and have requested the Crawford County board to pay the fees and litigation expenses of the attorneys retained by them to challenge the petitions. Apparently, it is their contention that it was the duty of the State's Attorney to represent them in this proceeding, and because of the conflict of interest created by your responsibility as a member of the county officers electoral board, they were entitled to retain private counsel.

Section 5 of "AN ACT in regard to attorneys general and state's attorneys" (Ill. Rev. Stat. 1981, ch. 14, par. 5) provides in pertinent part:

> "The duty of each State's attorney shall be:
>
> (1) To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned.
>
> * * *
>
> (3) To commence and prosecute all actions and proceedings brought by any county officer in his official capacity.
>
> (4) To defend all actions and proceedings brought against his county, or against any county or State officer, in his official capacity, within his county.
>
> * * * "

The State's Attorney is the attorney and legal adviser for the county. (Ashton v. County of Cook (1943), 384 Ill. 287, 299-300.) It is the State's Attorney's duty, pursuant to statute, to commence and prosecute all actions and proceedings brought by any county officer in such officer's official capacity. (Ill. Rev. Stat. 1981, ch. 14, par. 5; Ill. Att'y Gen. Op. No. NP-760, issued May 24, 1974.) When a conflict of interest prevents a State's Attorney from fulfilling this duty, a special State's Attorney may be appointed pursuant to section 6 of "AN ACT in regard to attorneys general and state's attorneys" (Ill. Rev. Stat. 1981, ch. 14, par. 6). Lavin v. Comm'rs of Cook County (1910), 245 Ill. 496, 502.

Section 6 of "AN ACT in regard to attorneys general and state's attorneys" provides in pertinent part:

> "Whenever the attorney general or state's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding, and the attorney so appointed shall have the same power and authority in relation to such cause or proceeding as the attorney general or state's attorney would have had if present and attending to the same * * *." (Emphasis added.)

If, because of the State's Attorney's interest in a proceeding, a special prosecutor is appointed to prosecute or defend an action, the county becomes liable for his fees and litigation

expenses. (In re Petition of McNulty (1978), 60 Ill. App. 3d 701; Lavin v. Comm'rs of Cook County (1910), 245 Ill. 496, 502.) The appointment of a special State's Attorney involves the exercise of judicial discretion upon a showing of cause (People ex rel. Baughman v. Eaton (1974), 24 Ill. App. 3d 833, 834; Abbott v. County of Adams (1919), 214 Ill. App. 201, 207), and the fact that an appointment of one or more special State's Attorneys would require a county to bear the expense of both prosecuting and defending a suit, does not limit the power of a court to make such appointments. (Armentrout v. Dondanville (1979), 67 Ill. App. 3d 1021, 1029-30.) Without the requisite court appointment, however, private counsel is not entitled to payment of fees and expenses from county funds. Hutchens v. Wade (1973), 13 Ill. App. 3d 787, 790.

In opinion No. NP-760, issued May 24, 1974, Attorney General Scott addressed the question of the liability of a county for private attorney's fees where a county board member retained private counsel to seek an injunction to prohibit county deputies from picketing a business which he owned. Attorney General Scott advised therein:

" * * *

> The action instituted by the County Board member through private counsel, depending upon the allegations contained in and relief sought by the application for injunction, could be characterized as either an action brought by said member in his capacity as a private individual for the purpose of protecting his

> private business from economic or other harm that could have ensued from said picketing, or an action brought by said member in his capacity as a county official for the purpose of restraining county deputies from picketing. It is my opinion that regardless of the purpose of the injunctive proceeding, the Tazewell County Board cannot legally reimburse, nor be held liable to, said County Board member for the legal fees incurred in said action.
>
> * * *
>
> In regard to the hiring of a private attorney by a county official on behalf of the county, the Illinois Supreme Court, in holding that a state's attorney is the attorney and legal adviser for the county, stated that a county cannot employ an attorney to render legal advice to the county board or do legal work for the county. (Ashton v. County of Cook, 384 Ill. 287; Abbott v. County of Adams, 214 Ill. App. 201; Op. Atty. Gen. S-565, March 28, 1973.) * * *
>
> * * *
>
> Since the state's attorney is the attorney and legal adviser for a county, a county board cannot hire a private attorney, or reimburse a county board member who hires such an attorney, for the purpose of instituting an action to restrain public officials, such as county deputies, from picketing. Consequently, any such action by a county board would be ultra vires. * * *"

In the circumstances which you have described, it does not appear that the objections brought by the supervisor of assessments and the board of review member were actions or proceedings commenced in their official capacities, which the State's Attorney would be required to prosecute. Actions taken by an officer in his official capacity consist of actions taken either under color of his office or by virtue of his office.

(1974 Ill. Att'y Gen. Op. 274, 276.) Nothing in the statutory powers and duties of the offices in question authorizes an incumbent to take official action with regard to the method of selection pertaining to the office which he holds. Therefore, it does not appear that you would have been under a duty to advise or represent them in this matter.

For purposes of county liability for attorney's fees and litigation costs, however, it is of no consequence whether the actions of the supervisor of assessments and the board of review member were instituted in their official or private capacities, or if you as State's Attorney would have been under a duty to represent them in this matter. In the absence of the appointment of a special State's Attorney, Crawford County is not liable to pay attorney's fees and litigation expenses incurred by county officers. Therefore, any payment by the county in the present circumstance would be ultra vires.

Very truly yours,

[redacted]

ATTORNEY GENERAL

[redacted]

nected therewith as the board finds necessary. For those purposes, the board may acquire real and personal property within the county by gift, grant, devise, purchase or lease and may occupy, purchase, lease or erect an appropriate building or buildings for the use of such facilities and all related facilities and activities.
* * * "

The county itself has authority to provide facilities for mentally deficient persons without levying the tax authorized by section 1 of "AN ACT concerning the care and treatment of certain mentally deficient persons" (Ill. Rev. Stat. 1979, ch. 91½, par. 201). This section provides in pertinent part as follows:

"Any county may provide facilities or services for the benefit of its mentally deficient residents who are not eligible to participate in any such program conducted under Article 14 of the School Code, or may contract therefor with any privately or publicly operated entity which provides facilities or services either in or out of such county.

For such purpose, the county board may levy an annual tax of not to exceed .1% upon all of the taxable property in the county at the value thereof, as equalized or assessed by the Department of Local Government Affairs. * * *"

The aforesaid statute states that the county board "may" levy a tax. The word "may" is generally a sign of permission or power. (*Foutch et al.* v. *Zempel et al.* (1928), 332 Ill. 92, 198.) A tax is not required. I am of the opinion that this statute authorizes a county to provide facilities or services for mentally deficient persons who are not eligible to participate in any such program conducted under article 14 of The School Code, even though a tax, as authorized for this purpose, is not levied. Furthermore, section 24 of "AN ACT to revise the law in relation to counties" (Ill. Rev. Stat. 1979, ch. 34, par. 303) provides in pertinent part:

"Each county shall have power -- First -- To purchase and hold the real and personal estate necessary for the uses of the county, * * *.
* * * "

In opinion No. 225 (1962 Ill. Att'y Gen. Op. 217, 218), Attorney General Clark concluded that a county board has authority to appropriate funds for the purposes of "AN ACT concerning the care and treatment of certain mentally deficient persons". This includes the acquisition of necessary real property and facilities. I am in agreement with that opinion. It should be noted, however, that the annual county budget and appropriations in it must conform to the substantive and procedural requirements of "AN ACT in relation to the budgets of counties not required to pass an annual appropriation bill" (Ill. Rev. Stat. 1979, ch. 34, par. 1 *et seq.*).

If both the county board and the Care and Treatment Board believe that it is necessary or advisable to make a joint purchase of real estate, or for the Care and Treatment Board to contribute money to the county to make an independent purchase, each board has power to do either. A county board or county officers have not only such powers as are expressly given by law, but also those which arise by

necessary implication from the powers granted or are indispensable to carry into effect the object and purpose of its creation. *Dahnke* v. *People* (1897), 168 Ill. 102, 114; *McKenzie* v. *McIntosh* (1964), 50 Ill. App. 2d 370, 376; *Donlevy* v. *Sims* (1912), 175 Ill. App. 290, 294-296.

Regardless of whether the Care and Treatment Board and the county board separately or jointly acquire real property for eligible mentally deficient residents, title to such real estate should be held in the name of the county, for the benefit of the County Care and Treatment Board. This was my conclusion in opinion No. 80-032, issued September 25, 1980.

In your fifth question, you ask who is invested with authority to make binding decisions on the use and disposition of jointly acquired premises. I am of the opinion that if the county board and the Care and Treatment Board were to acquire real estate jointly to provide facilities for mentally deficient persons, the Care and Treatment Board would control the use and disposition of the premises. Section 4 of "AN ACT concerning the care and treatment of certain mentally deficient persons" (Ill. Rev. Stat. 1979, ch. 91½, par. 204), set forth above, provides that the Care and Treatment Board has the power to acquire real estate and establish and maintain facilities for the purposes of the Act. Section 3 (Ill. Rev. Stat. 1979, ch. 91½, par. 203) states that the Care and Treatment Board administers the Act. It seems clear that the intention of the General Assembly is that the Care and Treatment Board is to control the use and disposition of premises acquired for use in the care and treatment of mentally deficient persons.

(No. 80-032—September 25, 1980)

COUNTIES: *County Board's Authority to Supervise the Activities of the County Board for the Care and Treatment of Certain Mentally Deficient Persons.* Property acquired by the Care and Treatment Board should be held in the name of the county. The Care and Treatment Board has exclusive control over money deposited in the Mentally Deficient Persons' Fund and is authorized to hire personnel necessary to administer the Act. The county board has the final authority to determine and set the rate of tax to be levied under the Act and the State's Attorney is the legal representative of the Care and Treatment Board.

STATUTES CONSTRUED: Illinois Revised Statutes 1979, chapter 14, paragraph 1 *et seq.*; chapter 91½, paragraph 201 *et seq.*

Hon. Michael M. Mihm, State's Attorney, Peoria County, Peoria, Illinois.

I have your letter wherein you request an opinion on several questions relating to the Peoria County Board's authority to supervise the activities of the Peoria County Board for the Care and Treatment

of Certain Mentally Deficient Persons [Care and Treatment Board]. You have asked:

(1) Whether title to real property acquired by the Care and Treatment Board should be held in its own name or in the name of the county of Peoria;
(2) Whether the Care and Treatment Board, which provides services through contracts with social service agencies, is the sole authority for determining which agencies shall receive funding;
(3) Whether the Peoria County Board has the authority to amend or make changes in the budget submitted by the Care and Treatment Board in order to restrict or limit funding to certain organizations;
(4) Whether the County Board has any authority to exercise control over funds levied pursuant to the Act;
(5) Whether the Care and Treatment Board has the authority to hire personnel, including an administrator, accountant and legal counsel; and
(6) Whether the State's Attorney is the legal counsel for the Care and Treatment Board.

"AN ACT concerning the care and treatment of certain deficient persons" (Ill. Rev. Stat. 1979, ch. 91½, par. 201 *et seq.*) [Care and Treatment Act] provides that a county may:

"* * * [P]rovide facilities or services for the benefit of its mentally deficient residents who are not eligible to participate in any such program conducted under Article 14 of the School Code, or may contract therefor with any privately or publicly operated entity which provides facilities or services either in or out of such county.
* * *
"

The county is authorized to levy a tax for the purposes of providing such services. (Ill. Rev. Stat. 1979, ch. 91½, par. 201.) Upon proper request, the question of whether a tax will be levied for such purposes is to be put to the voters by referendum. (Ill. Rev. Stat. 1979, ch. 91½, par. 202.) Once a tax is levied, the county board is required to appoint a board of directors [Care and Treatment Board] to administer the Act. (Ill. Rev. Stat. 1979, ch. 91½, par. 203.)

The answer to your first question depends on whether the Care and Treatment Board may be characterized as an independent corporate entity. It is my opinion that it may not. (Ill. Rev. Stat. 1979, ch. 91½, par. 204.) The Care and Treatment Board has a broad grant of power, but its creation and continued existence are dependent upon the acts of the county board. (*See, People* v. *Wood* (1945), 391 Ill. 237.) The Care and Treatment Board is not a body politic and corporate and it may not sue or be sued in its own name. It is clear that the Care and Treatment Board is a creature of the county, created to administer the Care and Treatment Act and to efficiently deliver services to mentally deficient persons. Therefore, it is my opinion that title to real property acquired pursuant to the Act should be held in the name of the county of Peoria, for the benefit of the Care and Treatment Board.

In answer to your second and third questions, section 4 of the Act (Ill. Rev. Stat. 1979, ch. 91½, par. 204) provides:

"
* * *

The board shall have exclusive control of all money paid into the Mentally Deficient Persons' Fund and shall draw upon the county treasurer for all or any part of that fund required by the board in the performance of its duties and exercise of its powers under this Act.

The board may establish, maintain and equip facilities within the county, for the care and treatment of mentally deficient persons together with such auxiliary facilities connected therewith as the board finds necessary. For those purposes, the board may acquire real and personal property within the county by gift, grant, devise, purchase or lease and may occupy, purchase, lease or erect an appropriate building or buildings for the use of such facilities and all related facilities and activities.

The board may provide for the care and treatment of mentally deficient persons who are not residents of the county and may establish and collect reasonable charges for such services."

Since the Care and Treatment Board is charged by section 3 of the Act (Ill. Rev. Stat. 1979, ch. 91½, par. 203) with the administration of the Act, it may exercise not only those powers set forth specifically in section 4 of the Act (Ill. Rev. Stat. 1979, ch. 91½, par. 204) but also the general power granted to the county in section 1 (Ill. Rev. Stat. 1979, ch. 91½, par. 201) to:

"* * * contract [to provide facilities or services for the benefit of its mentally deficient residents] with any privately or publicly operated entity which provides facilities or services either in or out of such county."

The power to contract granted in section 1 (Ill. Rev. Stat. 1979, ch. 91½, par. 201), however, is a power granted specifically to the county and may be exercised by the county board at its discretion. Therefore, the Care and Treatment Board, though it has control of the amount of funding which might be given to a particular agency, does not have sole authority for determining which agencies receive funding.

With regard to the control of Mentally Deficient Persons' Fund monies, the use of the words "exclusive control" in section 4 of the Act (Ill. Rev. Stat. 1979, ch. 91½, par. 204) must be taken to be synonymous with sole control. In view of the express statutory language, therefore, it is my opinion that the Care and Treatment Board has sole control of the expenditure of funds from Mentally Deficient Persons' Fund and that the county board is not authorized to make changes in a budget submitted by the Care and Treatment Board to restrict or direct the expenditure of funds.

With regard to your fourth question, it has been held that the exclusive power to exercise control over funds raised through a tax levy does not impair the right of a taxing body to determine the total amount of money to be raised. (*Schlaeger* v. *Jarmuth* (1947), 398 Ill. 60; *Ickes* v. *Macon County* (1953), 415 Ill. 557.) In *Effertz* v. *Brzezinski* (1968), 91 Ill. App. 2d 202, the court was asked to consider whether the directors of a library board had the authority to determine the amount of money to be raised by tax levy for library purposes. Under the Library Act, the board had exclusive control of all money deposited in the library fund. The court held at page 207 that a:

"
* * *

* * * village board may not refuse to levy any taxes for library purposes and, pre-

sumably, the amount must be fair and reasonable. However, there is no requirement in the language or spirit of the Act that the village board must honor the recommendation of the library board as to the amount to be appropriated and levied * * *.
* * *
"

In my opinion, a similar result obtains under the Care and Treatment Act. Once the tax is levied, however, the county board may not direct the manner in which funds are expended. There is no language in the Act authorizing the county board to exercise control over the Mentally Deficient Persons' Fund, nor is there a requirement that the budget of the Care and Treatment Board be submitted to the county board for approval.

Your fifth question may be answered with reference to the language of the statute. Administrative agencies are authorized to exercise all powers which are expressly granted or necessarily incident to the exercise of express powers. (*Owen* v. *Green* (1948), 400 Ill. 380.) The power to provide services to mentally deficient residents of the county and the power to establish and maintain facilities for the care and treatment of mentally deficient persons (Ill. Rev. Stat. 1979, ch. 91½, par. 201, 204) carry with them, by necessary implication, the power to hire personnel necessary to provide such services or operate such facilities. Further, because the Care and Treatment Board is empowered to set maintenance rates for the use of facilities and services provided under the Act (Ill. Rev. Stat. 1979, ch. 91½, par. 207) and is directed to calculate rates and investigate the ability of persons to pay for services provided (Ill. Rev. Stat. 1979, ch. 91½, par. 208), the acquisition of financial expertise is necessary for the efficient administration of the Board's program. Therefore, it is my opinion that hiring of personnel such as accountants and administrators is within the Care and Treatment Board's power. The Board, however, has no power to hire legal counsel.

The portion of your fourth question concerning hiring legal counsel is related to your final question regarding the duties of the State's Attorney. The duties of the State's Attorney are set out in "AN ACT in regard to attorneys general and state's attorneys" (Ill. Rev. Stat. 1979, ch. 14, par. 1 *et seq.*). Section 5 of that Act provides that the State's Attorney shall act as the legal representative of the county. Section 11 of the Care and Treatment Act (Ill. Rev. Stat. 1979, ch. 91½, par. 211) specifically requires the State's Attorney to prosecute actions to recover charges on behalf of the Care and Treatment Board. In *Ashton* v. *County of Cook* (1943), 384 Ill. 287, 300, the Illinois Supreme Court held that a county may not hire private counsel to do county legal work absent specific statutory authorization. Since there is no specific authorization in the Care and Treatment Act to hire private counsel, it is my opinion that the State's Attorney is the proper legal representative of the Care and Treatment Board.

In consideration of the preceding discussion, it is my opinion that property acquired by the Care and Treatment Board should be held in

the name of the county; that the Care and Treatment Board has exclusive control over money deposited in the "Mentally Deficient Persons' Fund" and is authorized to hire personnel necessary to administer the Act; that the county board has the final authority to determine and set the rate of tax to be levied under the Act; and that the State's Attorney is the legal representative of the Care and Treatment Board.

(No. 80-033—September 25, 1980)

CRIMINAL LAW AND PROCEDURE: ***Liability for the Fees of a Private Attorney Appointed to Represent an Indigent Prisoner in Post-Conviction Proceedings Arising Out of His Conviction of a Crime Committed While Confined by the Department of Corrections.*** **The fees of a private attorney appointed to represent an indigent prisoner in post-conviction proceedings arising from his conviction of a crime committed while confined by the Department of Corrections are not "expenses of prosecution" under section 1003-6-5 of the Unified Code of Corrections and thus, the Department of Corrections is not liable for their payment.**

STATUTES CONSTRUED: Illinois Revised Statutes 1979, chapter 38, paragraphs 2-16, 122-1 *et seq.*, 1003-6-5.

Hon. William A. Schuwerk, Jr., State's Attorney, Randolph County, Chester, Illinois.

I have your letter wherein you set forth the following factual situation:

"Defendant was convicted of unlawful possession of a controlled substance while being confined as an inmate at the Menard Correctional Center. He was tried and convicted and the Department of Corrections paid the costs of prosecution including the costs of the court appointed attorney for the defendant. Following defendant's conviction, the defendant filed a post conviction petition and had court appointed counsel represent him at the hearing. The defendant at this time was still confined to the Menard Correctional Center. * * *"

Based upon the foregoing situation, you inquire whether the Illinois Department of Corrections or the county is liable for the fees of a private attorney who is appointed to represent an indigent resident of a correctional facility in post-conviction proceedings arising out of the resident's conviction of a crime committed while he was confined by the Department. For the reasons hereinafter stated, it is my opinion that the county where the facility is located, and not the Department of Corrections, is liable for these fees.

Post-conviction relief is governed by the provisions of article 122 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1979, ch. 38, par. 122-1 *et seq.*). Section 122-1 of the Code provides in pertinent part:

"Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under

ROLAND W. BURRIS
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

February 14, 1991

FILE NO. 91-008

PUBLIC HEALTH:
State's Attorney Is
Legal Advisor to County
Health Department

Honorable John B. Leonard
State's Attorney, Brown County
116 West North Street
Mt. Sterling, Illinois 62353

Dear Mr. Leonard:

I have your letter wherein you pose several questions relating to county boards of health and county health departments. You have stated that the Brown County Health Department was created by the county board in 1978. The health department receives revenue from the Brown County Tuberculosis Board pursuant to a contract, from the Illinois Department of Public Health, from Federal grants, and, since 1984, from a property tax levied pursuant to section 5-25003 of the Counties Code (Ill. Rev. Stat. 1989, ch. 34, par. 5-25003, formerly Ill. Rev. Stat., ch. 111 1/2, par. 20c1).

Your first question is whether the State's Attorney serves as legal advisor to the county board of health and health department. Pursuant to statute (Ill. Rev. Stat. 1989, ch. 34, par. 3-9005), the State's Attorney is under duty to represent and advise all county officers. It has been held that a county health department created by virtue of a county board action is a department of the county, and not a separate unit of local or State government. (County of Macon v. Bd. of Education of Decatur School Dist. No. 61 (1987), 165 Ill. App. 3d 1, 8.) The same conclusion was reached by Attorney General Scott in opinion No. S-602, issued June 27, 1973 (1973 Ill. Att'y Gen. Op. 108). Because the county health department is a department of the county, it is my opinion that its officers and the members of the board of health are county officers whom the State's Attorney has a duty to advise.

Your second question, relating to the first, is whether the board of health may make expenditures from the county health fund to pay for legal services provided by attorneys other than the State's Attorney. It is well established that, absent specific enabling legislation, county officers have no authority to retain private counsel. (See, e.g. 1977 Ill. Att'y Gen. Op. 59; 1975 Ill. Att'y Gen. Op. 12.) The Supreme Court has stated, with respect to the office of State's Attorney, that:

" * * *

The law is well settled that when the constitution or the laws of the State create an office, prescribe the duties of its incumbent and fix his compensation, no other person or board, except by action of the legislature, has the authority to contract with private individuals to expend public funds for the purpose of performing the duties which were imposed upon such officer.
* * *

* * * "

Ashton v. County of Cook (1943), 384 Ill. 287, 300.

The Court further stated that contracts for the payment of such fees were ultra vires and void. Similarly, in opinion No. 83-001, issued February 17, 1983 (1983 Ill. Att'y Gen. Op. 1), Attorney General Hartigan concluded that in the absence of the appointment of a special State's Attorney, a county was under no liability to pay any attorney's fees or litigation expenses incurred by county officers.

Therefore, since the State's Attorney is, by law, the legal advisor and representative of the county board of health, it is my opinion that funds from the county health fund may not be used to pay attorney's fees to private counsel retained by board of health members or health department officers. Such a payment would be ultra vires. You may wish to review Kinzer v. City of Chicago (1989), 128 Ill. 2d 437 and Chicago ex rel. Cohen v. Keane (1976), 64 Ill. 2d 559, and cases cited therein for guidance regarding remedies which may be available if such expenditures have been made.

Your third question concerns whether all receipts of the health department must be deposited in the county health fund. Section 5-25011 of the Counties Code (Ill. Rev. Stat. 1989, ch. 34, par. 5-25011) specifically provides that proceeds of the annual tax levy must be held in the county health fund. Further, section 5-25013 of the Code (Ill. Rev. Stat. 1989, ch. 34, par. 5-25013) provides that fees collected for services rendered must be credited to the county health fund. In addition to these sources, however, the Brown County Health Department receives funds from contracts with other entities and from State and Federal grants. There is no specific statutory requirement that these contract and grant funds be credited to the county health fund.

Section 5-25013 of the Act provides, in pertinent part, that the county board of health may:

> " * * *
>
> 2. Receive contributions of real and personal property;
>
> * * *
>
> 5. Enter into contracts with the State, municipalities, other political subdivisions and non-official agencies for the purchase, sale or exchange of health services;
>
> * * * "

Neither of these subparagraphs, in contrast to the subparagraph concerning the deposit of fees for services rendered, expressly requires receipts from these sources to be credited to the

county health fund. Further, section 5-25013 of the Code also requires the board of health to publish an annual report including "the sums of money received from all sources, giving the name of any donor, [and] how all moneys have been expended and for what purpose". The absence of a specific requirement that such funds be deposited in the county health fund, together with the broad reporting requirement, indicates a legislative intent that contract and grant money need not be deposited in the county health fund.

In this regard, however, I note that there appears to be no authorization for the board of health to maintain a fund outside of the county treasury. Therefore, it is my opinion that if miscellaneous funds are received by the board of health and are not deposited into the county health fund, they must be paid into one or more special funds established in the county treasury. These funds, like those of the county health fund, will be subject to budgeting and appropriation by the county board. (See Ill. Rev. Stat. 1989, ch. 34, par. 25-010; par. 6-1001 et seq.)

Your final question is whether the executive officer of the department, who is required by section 5-25013 of the Code to be either a medical health officer or public health administrator, and other professional employees or officers and employees referred to in section 5-25013, must be full-time employees of the department. Section 5-25001 of the Counties

Code (Ill. Rev. Stat. 1989, ch. 34, par. 5-25001) provides, in pertinent part:

" * * *

> A full-time health department is one whose personnel, other than consultants and clinicians, devote their full time during regular, standard working hours to health department duties. Reference hereinafter made to health departments means full-time health departments unless otherwise specified."

In essence, no provision is made in the Code for health departments which are not full-time. Different provisions of the same statute should be construed as being consistent rather than inconsistent, and should be interpreted as being in pari materia. (Mann v. Board of Education (1950), 406 Ill. 224, 230.) The terms "consultant" and "clinician" in section 5-25001 are distinct and different from the term "executive officer of the department" in section 5-25013. While it may be possible, in some instances, for a medical health officer or a public health administrator to be either a consultant or clinician or both, it would be contrary to the ordinary meaning of the language used to conclude that the executive officer of the department could be merely a consultant or clinician for the department. Therefore, because all personnel who are not consultants or clinicians are required by statute to devote their full time during regular, standard working hours to health department duties, it is my opinion that the executive officer of the department, whether a medical health officer or

a public health administrator, must be a full-time employee of the department.

Whether professional employees or other officers and employees of the department must devote full time during working hours to health department duties depends upon whether such employees can be considered to be consultants or clinicians. To assist you in determining this issue with respect to each class of employees, you may wish to refer to the Department of Public Health rules regarding minimum qualifications of personnel employed by full time local health departments. These rules are found in part 600 of Title 77 of the Illinois Administrative Code (77 Ill. Admin. Code § 600.100 et seq.).

Respectfully yours,

[redacted]

ROLAND W. BURRIS
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

January 9, 1997

Jim Ryan
ATTORNEY GENERAL

FILE NO. 97-001

COUNTIES:
Authority of State's Attorney
to Represent County in Civil Cases

Honorable James W. Glasgow
State's Attorney, Will County
14 West Jefferson Street
Joliet, Illinois 60432

Dear Mr. Glasgow:

I have your letter wherein you inquire regarding the extent of the authority of the State's Attorney to control the representation of the county and its officers with respect to tort claims pending against them. For the reasons hereinafter stated, it is my opinion that the exclusive authority to defend the county and county officers when sued in their official capacity is vested in the State's Attorney. Neither the county board nor any other county officer has the authority to retain counsel or to expend public funds to employ private counsel for such purposes, unless such counsel is designated by the State's Attorney to assist in carrying out his or her duties, or appointed by the court to serve as a Special State's Attorney in accor-

dance with section 3-9008 of the Counties Code (55 ILCS 5/3-9008 (West 1994)).

You have stated that a local law firm has been employed to represent the county and its officers in 13 pending cases. Recently, you directed the firm to transfer the cases to other counsel, but the firm has declined to do so without the concurrence of the county board. The firm contends that sections 1-206 and 9-107 of the Local Governmental and Governmental Employees Tort Immunity Act (hereinafter referred to as "Tort Immunity Act") (745 ILCS 10/1-206, 9-107 (West 1994)) authorize the county board, rather than the State's Attorney, to control the defense of tort claims against the county.

Section 3-9005 of the Counties Code (55 ILCS 5/3-9005 (West 1994)) provides, in part:

> "Powers and duties of State's attorney.
>
> (a) The duty of each State's attorney shall be:
>
> * * *
>
> (4) To defend all actions and proceedings brought against his county, or against any county or State officer, in his official capacity, within his county.
>
> * * * "

The phrase "all actions and proceedings" clearly includes tort claims filed against the county and against county officers in their official capacity.

In Ashton v. County of Cook (1943), 384 Ill. 287, the issue was whether attorneys with whom the county board had contracted for the collection of delinquent taxes and penalties could lawfully be paid for their services pursuant to the contract. Responding to the plaintiffs' argument that the county's statutory duty to take and order suitable and proper measures for the prosecution of all suits necessary to enforce collection of taxes authorized the contract, the court observed:

> " * * *
>
> * * * The direction in section 33 [of the Counties Act of 1874, now see 55 ILCS 5/1-6003 (West 1994)], that the county board shall take and order suitable and proper means for the prosecution of suits brought to enforce the collection of taxes, evidently means that the board, as the governing agency of the county in charge of expending the county's funds, has the duty of meeting the expenses necessarily incurred in such litigation. * * *
>
> * * * "
>
> (Ashton v. County of Cook (1943), 384 Ill. 287, 298.)

The court then concluded:

> " * * *
>
> The law is well settled that when the constitution or the laws of the State create an office, prescribe the duties of its incumbent and fix his compensation, no other person or board, except by action of the legislature, has the authority to contract with private individuals to expend public funds for the purpose of performing the duties which were imposed upon such officer. (Fergus v. Russel, 270 Ill. 304; Stevens v. Henry County, 218 Ill. 468; Hope v. City of

> Alton, 214 Ill. 102.) The contracts of employment under which appellants claim were ultra vires and void.
>
> * * *
>
> Ashton v. County of Cook (1943), 384 Ill. 287, 300."

In addition to Ashton v. County of Cook, there are numerous reported cases holding that a county has no authority to employ an attorney to perform duties which the State's Attorney is obligated to perform. (See Abbott v. County of Adams (1919), 214 Ill. App. 201, 206 (county board contract with "county" attorney ultra vires); Wilson v. County of Marshall (1930), 257 Ill. App. 220, 224-25 (suit against defaulting treasurer to recover on bond could be prosecuted only by state's attorney); People v. Wilkinson (3d Dist., November 15, 1996), No. 3-95-0775 (county board member's acceptance of reimbursement for legal fees incurred while in official capacity without first having attorney appointed as Special State's Attorney was act in excess of lawful authority).) Opinions of the Attorney General have reached the same conclusion. (See 1983 Ill. Att'y Gen. Op. 1 (private counsel cannot be employed to perform a duty of a State's Attorney without court appointment); 1975 Ill. Att'y Gen. Op. 12 (county board has no authority to employ independent legal counsel to advise the Zoning Board of Appeals); 1973 Ill. Att'y Gen. Op. 18 (county board has no authority to employ counsel to advise it on the establishment of a public building commission); 1925 Ill. Att'y Gen. Op. 64 (county board has no authority to

employ an attorney to perform the duties of a State's Attorney); 1927 Ill. Att'y Gen. Op. 469 (county board has no authority to employ an attorney to collect back taxes).) The only exception is in cases in which a Special State's Attorney is appointed by the court because of a conflict of interest on the part of the State's Attorney or one of the other reasons specified in section 3-9008 of the Counties Code.

The law firm which has refused to relinquish the county's cases relies upon sections 1-206 and 9-107 of the Tort Immunity Act for the proposition that the county board, rather than the State's Attorney, has authority to manage the county's tort liability program and to employ attorneys to represent the county pursuant thereto.

Section 9-107 authorizes a local public entity to levy a tax annually for the purpose of paying settlements or judgments and the cost of protecting itself from liability for tort claims. Section 1-206 defines the term "local public entity". Clearly, the county is a local public entity, for purposes of the Act, while a State's Attorney is not. Funds raised pursuant to the tax may be used "to pay the operating and administrative costs and expenses, including the costs of legal services and wages and salaries of employees in connection with defending or otherwise protecting itself against any liability or loss * * *". Section 9-107 thus gives the county board, rather than the State's Attorney, control of the funds raised by the tax. It does not pur-

port, however, to authorize the county board to retain counsel to carry out the duties specifically vested in the State's Attorney.

This argument is clearly analogous to that which was rejected by the court in Ashton v. County of Cook, and is no more persuasive now. The county board, as the governing agency of the county, clearly has the duty to provide for payment of the expenses necessarily incurred in tort litigation. It may use funds raised pursuant to section 9-107 to meet those expenses. Section 9-107 does not, however, authorize the county board to pay fees or expenses to attorneys other than the State's Attorney and those designated by the State's Attorney to assist him in carrying out his duties (55 ILCS 5/4-2003 (West 1994)), or those appointed by the court pursuant to statute.

In conclusion, it is my opinion that the State's Attorney possesses the exclusive authority to control the defense of all tort claims filed against the county and county officers in their official capacity, except in cases in which he or she is disqualified from acting and in which the circuit court has appointed a Special State's Attorney pursuant to section 3-9008 of the Counties Code. The county board has no authority to retain other counsel or to pay for the services of attorneys who are not duly designated by the State's Attorney or appointed by the court. Consequently, it is clear that a State's Attorney may terminate the authority of any attorney previously designated to represent the county in tort litigation, and, in conjunction

therewith, direct the attorney to transfer the files relating to that litigation to another attorney who has been properly designated.

Sincerely,

[redacted]

JAMES E. RYAN
ATTORNEY GENERAL

WILLIAM G. CLARK
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

May 11, 1962

COUNTIES AND COUNTY BOARDS:
State's Attorney Is Sole
Legal Representative and
Adviser.

COPY

Honorable Richard Stengel
State's Attorney
Rock Island County
Rock Island, Illinois

Dear Mr. Stengel:

I have your communication of April 26, 1962, wherein you state as follows:

"The Board of Supervisors of Rock Island County have been asked to join in a suit to test the constitutionality of the amended prevailing wage law as it applies to the employment of workers hired directly by municipalities. This question is of considerable interest to the County because of the adverse effect the law has on highway construction costs.

"The proposed litigation is originating with the City of Monmouth and the County of Warren. The officials of Monmouth and Warren County have proposed hiring a private law firm to represent

CP-614

all municipal parties in a test case at an estimated total cost of $22,000.00. They are seeking the voluntary joinder of at least thirty-six Counties as parties to the suit. The costs are to be allocated on the basis of property valuation, and Rock Island County would be required to contribute $1,200.00 to defray the expenses of the suit.

"I have noted the Supreme Court decision in Ashton v. County of Cook, 384 Ill. 287, where the Court ruled that the County Board couldnot employ private Counsel to collect delinquent taxes because the law imposes that duty upon the State's Attorney (See Ill. Rev. Stat., Chap. 14, Sec. 5). However, I am not certain whether that decision would apply to the joinder of the County in a test suit such as the one proposed here.

"Your opinion is respectfully requested upon the following question: May the Rock Island County Board join other Counties and municipalities as a party to test the constitutinnality of a statute and spend County funds to pay its portion of the costs of the suit, including fees of private legal counsel?

"Your prompt attention to this question will be appreciated."

In the Ashton case cited by you, the Supreme Court, in holding that a contract between the County of Cook and an attorney who was engaged to collect delinquent taxes was void, said:

"The law is well settled that when the constitution or the laws of the State create an office, prescribe the duties of its incumbent and fix his compensation, no other person or board, except by action of the legislature, has the authority to contract with private individuals to expend public funds for the purpose of performing the duties which were imposed upon such officer. (Fergus v. Russel, 270 Ill. 304; Stevens v. Henry County, 218 Ill. 468; Hope v. City of Alton, 214 Ill. 102.) The contracts of employment under which appellants claim were ultra vires and void.

* * * * * "

It is the statutory duty of the State's Attorney (Illinois Revised Statutes 1961, Chapter 14, Paragraph 5) to represent his County in all legal actions and proceedings.

Under the holding of the Supreme Court in the Ashton case supra, the County cannot expend funds to hire private attorneys to appear in litigation in which the County is a party.

Very truly yours,

Attorney General

WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD
62706

May 24, 1974

NP-760

COUNTIES:
Reimbursement of County Board
Member for Legal Fees Incurred

Honorable C. Brett Bode
State's Attorney, Tazewell County
Court House
Pekin, Illinois 61554

Dear Mr. Bode:

I have your letter in which you state:

"I request your opinion based on the following fact situation:

A recent dispute in Tazewell County over wages paid to county deputies resulted in the county deputies picketing the private furniture business of a member of the Tazewell County Board. The County Board member retained private counsel who sought an injunction in the Circuit Court to prohibit such picketing. The case in the Circuit Court was disposed of short of hearing by agreement of the parties. The County Board member incurred legal fees in the amount of $800.

WP 760

> The picketing had absolutely no connection whatsoever with the business of the County Board member and occurred strictly because of his status as a County Board member.

I request your opinion of the following questions:

> Can the Tazewell County Board legally reimburse the County Board member for the legal fees incurred?
>
> Is Tazewell County liable to the County Board member to the extent of his legal fees?"

The action instituted by the County Board member through private counsel, depending upon the allegations contained in and relief sought by the application for injunction, could be characterized as either an action brought by said member in his capacity as a private individual for the purpose of protecting his private business from economic or other harm that could have ensued from said picketing, or an action brought by said member in his capacity as a county official for the purpose of restraining county deputies from picketing. It is my opinion that regardless of the purpose of the injunctive proceeding, the Tazewell County Board cannot legally reimburse, nor be held liable to, said County Board member for the legal fees incurred in said action.

A county, in addition to its constitutional powers, possesses only those powers expressly granted by statute (Ill. Const. art. VII, sec. 1), and those that arise by necessary implication from those powers granted. (Heidenreisch v. Ronske, 26 Ill. 2d 360.) I am unable to find any statute which either expressly or impliedly authorizes a county to expend public funds to employ private counsel or reimburse a private individual who employs private counsel for the purpose of instituting an action designed to protect the private economic or other interests of said individual.

In regard to the hiring of a private attorney by a county official on behalf of the county, the Illinois Supreme Court, in holding that a state's attorney is the attorney and legal adviser for the county, stated that a county cannot employ an attorney to render legal advice to the county board or do legal work for the county. (Ashton v. County of Cook, 384 Ill. 287; Abbott v. County of Adams, 214 Ill. App. 201; Op. Atty. Gen. S-565, March 28, 1973.) In Ashton v. County of Cook, supra, a case involving a contract between Cook County and a private

attorney employed to collect delinquent taxes, the court stated at pages 299-300:

> "It is alleged in appellants' pleadings that the occasion for employing private counsel was created by the increase of the number of defaults in the payment of taxes and that the State's Attorney did not have the time, in connection with his other duties, to institute such suits. County boards can exercise only such powers as are expressly given by law or such as arise by necessary implication from the powers granted or are indispensable to carry into effect the object and purpose of their creation. (Marsh v. People, 226 Ill. 464; County of Cook v. Gilbert, 146 Ill. 268.) No provision is made in the law which authorizes a board to employ private counsel in collection of delinquent taxes under the emergency pleaded, even though the State's Attorney approves the contracts as to form and gives his silent acquiescence to the procedure adopted. His consent cannot operate to supply the board with a power which the legislature has seen fit to withhold.
>
> * * *
>
> The law is well settled that when the constitution or the laws of the State create an office, prescribe the duties of its incumbent and fix his compensation, no other person or board, except by action of the legislature, has the authority to contract with private individuals to expend public funds for the purpose of performing the duties which were

> imposed upon such officer. (Fergus v. Russel, 270 Ill. 304; Stevens v. Henry County, 218 Ill. 468; Hope v. City of Alton, 214 Ill. 102.) The contracts of employment under which appellants claim were ultra vires and void."

Since the state's attorney is the attorney and legal adviser for a county, a county board can not hire a private attorney, or reimburse a county board member who hires such an attorney, for the purpose of instituting an action to restrain public officials, such as county deputies, from picketing. Consequently, any such action by a county board would be ultra vires. Whether a county board could have the picketing of deputies restrained by action through its state's attorney, is not here decided.

Very truly yours,

A T T O R N E Y G E N E R A L

NEIL F. HARTIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD
62706

October 9, 1990

I - 90-046

COUNTIES:
Legal Representation and Competitive
Bidding Requirements for County
Emergency Telephone System Boards

Honorable Thomas F. Baker
State's Attorney, McHenry County
McHenry County Government Center
2200 North Seminary Avenue
Woodstock, Illinois 60098

Honorable William E. Herzog
State's Attorney, Kankakee County
450 East Court Street
Kankakee, Illinois 60901

Dear Mr. Baker and Mr. Herzog:

I have your letters regarding Emergency Telephone System Boards established by counties pursuant to the provisions of the Emergency Telephone System Act (Ill. Rev. Stat. 1989, ch. 134, par. 30.01 et seq.). State's Attorney Baker inquires whether it is the duty of the State's Attorney to provide legal representation to an Emergency Telephone System Board, and whether the county has a duty to defend and/or indemnify the Board. State's Attorney Herzog inquires whether the contracts of an Emergency Telephone System Board are subject to the competitive bidding requirements applicable to counties, and whether the provisions of the Open Meetings Act (Ill. Rev. Stat. 1989, ch. 102, par. 41 et seq.) apply to these Boards. Because of the nature of your inquiries, I do not

believe that the issuance of an official opinion is necessary. I will, however, comment informally upon the questions you have raised.

In response to State's Attorney Baker's inquiry regarding legal representation, the State's Attorney is the attorney and legal advisor for the county. (Ashton v. County of Cook (1943), 384 Ill. 287, 299-300.) It is the State's Attorney's duty, pursuant to statute, to represent county officers in relation to matters in which the people of the State or the county may be concerned. (Ill. Rev. Stat. 1989, ch. 34, par. 3-9005.) The duty to represent, therefore, is contingent upon whether an Emergency Telephone System Board (hereinafter "ETS Board") established by a county is an office or agency of the county.

Subsection 15.4(a) of the Emergency Telephone System Act (Ill. Rev. Stat. 1989, ch. 134, par. 45.4(a)), which governs the establishment of ETS Boards, provides, in pertinent part:

> "(a) The corporate authorities of any county or municipality that imposes a surcharge under Section 15.3 shall establish an Emergency Telephone System Board. The corporate authorities shall provide for the manner of appointment and the number of members of the Board, provided that the board shall consist of not fewer than 5 members * * *
>
> * * * "

Under subsection 15.4(a), the county has not only the authority to create a single county ETS Board, but also the power to determine the number of members of the board and the method of their appointment.

A single county ETS Board is not denominated a body politic and corporate. Consequently, the entity could not sue or be sued in its own name. (Mayes v. Elrod (N.D. Ill. 1979), 470 F. Supp. 1188, 1192; Lilly v. County of Cook (1978), 60 Ill. App. 3d 573, 579-80.) Although an ETS Board is granted certain statutory powers exercisable only by its governing board, the powers and duties of a single county ETS Board are defined by the county:

" * * *

(b) The powers and duties of the board shall be defined by ordinance of the municipality or county, or by intergovernmental agreement in the case of a joint board. Such powers and duties shall include, but need not be limited to the following:

(1) Planning a 9-1-1 system.

(2) Coordinating and supervising the implementation, upgrading or maintenance of the system, including the establishment of equipment specifications and coding systems.

(3) Receiving monies from the surcharge imposed under Section 15.3, and from any other source, for deposit into the Emergency Telephone System Fund.

(4) Authorizing all disbursements from the fund.

(5) Hiring, on a temporary basis, any staff necessary for the implementation or upgrade of the system.

* * * "

(Ill. Rev. Stat. 1989, ch. 134, par. 45.4(b).)

The funding of the ETS Board is also dependent upon the county since the Board has no independent powers of taxation. After approval by referendum, the county is authorized to levy a surcharge for the 9-1-1 System. (Ill. Rev. Stat. 1989, ch. 134, par. 45.3(a).) The county board, however, is not required to levy the full amount of the surcharge approved by referendum, but may determine at its own discretion the amount to be raised:

" * * *

(e) A municipality or county may at any time by ordinance change the rate of the surcharge imposed under this Section if the new rate does not exceed the rate specified in the referendum held pursuant to subsection (c).

* * * "

(Ill. Rev. Stat. 1989, ch. 134, par. 45.3(e).)

The fiscal relationship between the ETS Board and the county is similar to that which exists between the county and other county agencies. For example, in opinion No. 80-032, issued September 25, 1980 (1980 Ill. Att'y Gen. Op. 127), Attorney General Fahner determined that the Care and Treatment Board for Certain Mentally Deficient Persons (Ill. Rev. Stat. 1979, ch. 91 1/2, par. 201 et seq.) was an agency of the county. With respect to the county's authority to exercise control over funds levied for the Care and Treatment Board, Attorney General Fahner observed:

> " * * *
>
> * * * the exclusive power to exercise control over funds raised through a tax levy does not impair the right of a taxing body to determine the total amount of money to be raised. (Schlaeger v. Jarmuth (1947), 398 Ill. 60; Ickes v. Macon County (1953), 415 Ill. 557.) In Effertz v. Brzezinski (1968), 91 Ill. App. 2d 202, the court was asked to consider whether the directors of a library board had the authority to determine the amount of money to be raised by tax levy for library purposes. Under the Library Act, the board had exclusive control of all money deposited in the library fund. The court held at page 207 that a:
>
> * * *
>
> '* * * village board may not refuse to levy any taxes for library purposes and, presumably, the amount must be fair and reasonable. However, there is no requirement in the language or spirit of the Act that the village board must honor the recommendation of the library board as to the amount to be appropriated and levied * * *.
>
> * * *

In my opinion, a similar result obtains under the Care and Treatment Act. Once the tax is levied, however, the county board may not direct the manner in which funds are expended. There is no language in the Act authorizing the county board to exercise control over the Mentally Deficient Persons' Fund, nor is there a requirement that

> the budget of the Care and Treatment Board be submitted to the county board for approval.
>
> * * *"

(1980 Ill. Att'y Gen. Op. 127, 129-130.)

Like the Care and Treatment Board, the ETS Board has sole control of the expenditure of funds once they have been appropriated by the county:

> "* * *
>
> (c) All monies received by a board pursuant to a surcharge imposed under Section 15.3 shall be deposited into an Emergency Telephone System Fund. The treasurer of the municipality or county that has established the board or, in the case of a joint board, any municipal or county treasurer designated in the intergovernmental agreement, shall be custodian of the fund. All interest accruing on the fund shall remain in the fund. No expenditures may be made from such fund except upon the direction of the board by resolution passed by a majority of all members of the board. * * *
>
> * * *" (Emphasis added.) (Ill. Rev. Stat. 1989, ch. 134, par. 45.4(c).)

Because the county board exercises authority over a single county ETS Board through its powers to create the Board, appoint its members and control the level of its funding, it appears that the Board is an agency of the county. (See also 1974 Ill. Att'y Gen. Op. 107; 1973 Ill. Att'y Gen. Op. 108 (county health department is a county agency); opinion No. NP-813, issued October 15, 1974 (regional planning commission is county agency); 1977 Ill. Att'y Gen. Op. 71 (road district is not a county agency); 1973 Ill. Att'y Gen. Op. 181 (forest preserve district does not constitute a county agency); and 1970 Ill. Att'y Gen. Op. 111 (community mental health board is an agency of the county).) Although it possesses certain powers which only the ETS Board may exercise, the Board is not an autonomous, independent unit of government. Accordingly, as a county agency, it appears that it is the duty of the State's Attorney to provide legal representation to an ETS Board which is established by the county.

Given this analysis, I believe that it is unnecessary to address at length State's Attorney Baker's second inquiry regarding a county's duty to defend the ETS Board. As to the question of indemnification, counties are granted discretionary authority to indemnify officers and employees of the county for judgments based on tortious conduct arising out of the scope of their service. (Ill. Rev. Stat. 1989, ch. 85, par. 2-302; 1982 Ill. Att'y Gen. Op. 18, 19.) Because a county ETS Board is as an agency of the county, it appears that the county board may elect to indemnify the officers and employees of the ETS Board for the aforementioned conduct.

In response to State's Attorney Herzog's inquiry regarding whether the contracts of a county ETS Board are subject to competitive bidding requirements, section 5-1022 of the Counties Code (Ill. Rev. Stat. 1989, ch. 34, par. 5-1022) provides as follows:

> "Competitive bids. Any purchase by a county with fewer than 2,000,000 inhabitants of services, materials, equipment or supplies in excess of $10,000, other than professional services, shall be contracted for in one of the following ways:
>
> (1) by a contract let to the lowest responsible bidder after advertising for bids in a newspaper published within the county or, if no newspaper is published within the county, then a newspaper having general circulation within the county; or
>
> (2) by a contract let without advertising for bids in the case of an emergency if authorized by the county board.
>
> In determining the lowest responsible bidder, the county board shall take into consideration the qualities of the articles supplied, their conformity with the specifications, their suitability to the requirements of the county and the delivery terms.
>
> This Section does not apply to contracts by a county with the federal government or to purchases of used equipment, purchases at auction or similar transactions which by their very nature are not suitable to competitive bids, pursuant to an ordinance adopted by the county board."

Under this provision, competitive bidding is required for county purchases of services, materials, equipment or supplies exceeding $10,000, other than professional services. Because a county ETS Board is, as previously discussed, an agency of the county, it appears that contracts for the 911 telephone system would be subject to the competitive bidding requirements of section 5-1022, unless they are exempt under the professional services exception.

In response to State's Attorney Herzog's second question, the Open Meetings Act (Ill. Rev. Stat. 1989, ch. 102, par. 41 et seq.) requires that all meetings of public bodies be open to the public, subject to certain limited exceptions. (Ill. Rev. Stat. 1989, ch. 1.2, par. 42.) Section 1.02 of the Act (Ill. Rev. Stat. 1989, ch. 102, par. 41.02) defines the term "public body" to include:

> " * * *
>
> * * * all legislative, executive, administrative or advisory bodies of the state, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees or commissions of this State, and any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue * * *"

Under this statutory definition, it is clear that a county ETS Board is a public body for purposes of the Act. As such, the provisions of the Open Meetings Act would apply to the meetings of ETS Boards.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Very truly yours,

[redacted]

MICHAEL J. LUKE
Senior Assistant Attorney General
Chief, Opinions Division

ROLAND W. BURRIS
ATTORNEY GENERAL
STATE OF ILLINOIS

February 26, 1992

I - 92-013

COUNTIES:
State's Attorney as Legal Advisor
to Community Mental Health Board

Honorable Sherri L.E. Tungate
State's Attorney, Clay County
Clay County Courthouse
Louisville, Illinois 62858

Dear Ms. Tungate:

I have your letter wherein you inquire whether the State's Attorney is required to serve as the legal advisor of the county's community mental health board. Because of the nature of your inquiry, I do not believe that the issuance of an official opinion is necessary. I will, however, comment informally upon the question you have raised.

Community mental health boards are organized pursuant to the provisions of the Community Mental Health Act (Ill. Rev. Stat. 1989, ch. 91 1/2, par. 300.1 et seq.). Such boards are established by units of local government, but may receive funding from a variety of public, as well as private, sources. (See Ill. Rev. Stat. 1989, ch. 91 1/2, pars. 303a, 303e.)

In opinion No. S-180, issued May 20, 1970, Attorney General Scott concluded that a community mental health board established by a county was an agency of the county; therefore, the State's Attorney had the duty of furnishing legal advice to

the board. Attorney General Scott further concluded that a county community mental health board could not retain independent counsel.

In 1975, however, the General Assembly amended section 3e of the Community Mental Health Act (Ill. Rev. Stat. 1989, ch. 91 1/2, par. 303e) by adding the language underscored below, to provide that mental health boards may:

" * * *

(c) Employ such personnel, including legal counsel, as may be necessary to carry out the purposes of this Act and prescribe the duties of and establish salaries and provide other compensation for such personnel;

* * * "

(Emphasis added.)

As a result of the quoted amendment, it appears that county community mental health boards may now employ legal counsel to carry out the purposes of the Community Mental Health Act.

In general, county agencies which the State's Attorney is under duty to advise have no authority to retain other legal counsel. (Ashton v. County of Cook (1943), 384 Ill. 287, 300.) County community mental health boards, however, have been granted express authority to retain legal counsel. Therefore, because a community mental health board is not required to accept the advice or representation of the State's Attorney, it appears that the State's Attorney is no longer under duty to advise or represent the board. I note, however, that this conclusion does not necessarily prohibit a State's Attorney, in his or her discretion, from agreeing to advise or represent the board; since a county community mental health board is a county agency, the rendition of such services would appear to be proper. The State's Attorney is not under duty to do so, however.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Very truly yours,

[redacted]

MICHAEL J. LUKE
Senior Assistant Attorney General
Chief, Opinions Division

ROLAND W. BURRIS
ATTORNEY GENERAL
STATE OF ILLINOIS

November 1, 1994

I - 94-058

COUNTIES:
Authority of County Emergency
Telephone System Board to
Retain Private Legal Counsel

Honorable James W. Creason
State's Attorney, Marion County
Marion County Courthouse
Post Office Box 157
Salem, Illinois 62881

Dear Mr. Creason:

I have your letter wherein you inquire whether a county emergency telephone system board has the authority to retain independent legal counsel to advise or represent it. Because of the nature of your inquiry, I do not believe that the issuance of an official opinion of the Attorney General is necessary. I will, however, comment informally upon the question you have raised.

In responding to your question, it is helpful to review the relationship between a county emergency telephone system board and the county which created it. County emergency telephone system boards are organized pursuant to the provisions of the Emergency Telephone System Act (50 ILCS 750/0.01 et seq. (West 1992)). Under the terms of the Act, every local public agency in a county with a population of 100,000 or more inhabitants is required to establish and operate either a basic or a sophisticated emergency telephone system (50 ILCS 750/3 (West 1992)), that being a telephone service which, at a minimum, automatically connects a person dialing the digits "911" to an established public safety answering point through normal tele-

phone service facilities. (50 ILCS 750/2.07, 750/2.08 (West 1992).) Other public agencies are authorized, but not required, to implement emergency telephone systems. (50 ILCS 750/3 (West 1992).) The term "public agencies" include all units of local government which are empowered to provide emergency services.

Subsection 15.4(a) of the Emergency Telephone System Act (50 ILCS 750/15.4(a) (West 1993 Supp.)), which governs the establishment of emergency telephone system boards, provides, in pertinent part:

> "(a) The corporate authorities of any county or municipality that imposes a surcharge under Section 15.3 shall establish an Emergency Telephone System Board. The corporate authorities shall provide for the manner of appointment and the number of members of the Board, provided that the board shall consist of not fewer than 5 members * * *
>
> * * * "

Under the language quoted above, the county has not only the authority to create a single county emergency telephone system board, but also the power to determine the number of members of the board and the method of their appointment. It does not appear, however, that a single county emergency telephone system board has been denominated a body politic and corporate. Consequently, the entity could not sue or be sued in its own name. Mayes v. Elrod (N.D. Ill. 1979), 470 F. Supp. 1188, 1192; Lilly v. County of Cook (1978), 60 Ill. App. 3d 573, 579-80.

In addition to creating an emergency telephone system board, the corporate authorities of a county also define the powers and duties of the board by ordinance (see 50 ILCS 750/15.4(a) (West 1993 Supp.)). Under subsection 15.4(b) of the Act (50 ILCS 750/15.4(b) (West 1993 Supp.)), however, the board's powers must include:

> " * * *
>
> (1) Planning a 9-1-1 system.
>
> (2) Coordinating and supervising the implementation, upgrading or maintenance of the system, including the establishment of equipment of equipment specifications and coding systems.

> (3) Receiving monies from the surcharge imposed under Section 15.3, and from any other source, for deposit into the Emergency Telephone System Fund.
>
> (4) Authorizing all disbursements from the fund.
>
> (5) Hiring any staff necessary for the implementation or upgrade of the system.
>
> * * * "

Besides creating an emergency telephone system board and determining the extent of its duties, the corporate authorities of a county are authorized, with referendum approval, to impose a monthly surcharge on the billed subscribers of the network communication carriers to fund the implementation of the system. (50 ILCS 750/15.3 (West 1992).) The county board, however, is not required to levy the full amount of the surcharge approved by referendum, but may determine at its own discretion the amount to be raised:

> " * * *
>
> (e) A municipality or county may at any time by ordinance change the rate of the surcharge imposed under this Section if the new rate does not exceed the rate specified in the referendum held pursuant to subsection (c).
>
> * * * "
>
> (50 ILCS 750/15.3(e) (West 1992).)

A review of the funding provisions of the Emergency Telephone System Act indicates that the fiscal relationship between the emergency telephone system board and the county is similar to that which exists between the county and other county agencies. For example, in opinion No. 80-032, issued September 25, 1980 (1980 Ill. Att'y Gen. Op. 127), Attorney General Fahner determined that the Care and Treatment Board for Certain Mentally Deficient Persons (Ill. Rev. Stat. 1979, ch. 91½, par. 201 et seq.) [now the County Board for Care and Treatment of Mentally Deficient Persons (55 ILCS 105/0.01 et seq. (West 1992))] was an agency of the county. With respect to the county's authority to exercise control over funds levied for the Care and Treatment Board, Attorney General Fahner observed:

" * * *

* * * the exclusive power to exercise control over funds raised through a tax levy does not impair the right of a taxing body to determine the total amount of money to be raised. (Schlaeger v. Jarmuth (1947), 398 Ill. 60; Ickes v. Macon County (1953), 415 Ill. 557.) In Effertz v. Brzezinski (1968), 91 Ill. App. 2d 202, the court was asked to consider whether the directors of a library board had the authority to determine the amount of money to be raised by tax levy for library purposes. Under the Library Act, the board had exclusive control of all money deposited in the library fund. The court held at page 207 that a:

' * * *

* * * village board may not refuse to levy any taxes for library purposes and, presumably, the amount must be fair and reasonable. However, there is no requirement in the language or spirit of the Act that the village board must honor the recommendation of the library board as to the amount to be appropriated and levied * * *.

* * *

In my opinion, a similar result obtains under the Care and Treatment Act. Once the tax is levied, however, the county board may not direct the manner in which funds are expended. There is no language in the Act authorizing the county board to exercise control over the Mentally Deficient Persons' Fund, nor is there a requirement that the budget of the Care and Treatment Board be submitted to the county board for approval.

* * * "

(1980 Ill. Att'y Gen. Op. 129-30.)

Like the Care and Treatment Board, under subsection 15.4(c) of the Act (50 ILCS 750/15.4(c) (West 1993 Supp.)) a county emergency telephone system board has sole control of the

expenditure of funds once they have been appropriated by the county:

> " * * *
>
> (c) All monies received by a board pursuant to a surcharge imposed under Section 15.3 shall be deposited into a separate interest-bearing Emergency Telephone System Fund account. The treasurer of the municipality or county that has established the board or, in the case of a joint board, any municipal or county treasurer designated in the intergovernmental agreement, shall be custodian of the fund. All interest accruing on the fund shall remain in the fund. No expenditures may be made from such fund except upon the direction of the board by resolution passed by a majority of all members of the board. * * *
>
> * * * "

Because the county board exercises authority over a single county emergency telephone system board through its powers to create the board, appoint its members and control the level of its funding, it appears that the board is an agency of the county. Although the emergency telephone system board possesses certain powers which only it may exercise, the board is not an autonomous, independent unit of government. Accordingly, since it is a county agency, it is the duty of the State's Attorney to provide legal representation to an emergency telephone system board which is established by the county.

Against this background, you have inquired whether an emergency telephone system board may make expenditures from the county emergency telephone system fund to pay for legal services provided by attorneys other than the State's Attorney. Subsection 15.4(c) of the Act authorizes the board to make payments for certain costs, providing, in pertinent part:

> " * * *
>
> * * * Expenditures may be made only to pay for the costs associated with the following:
>
> (1) The design of the Emergency Telephone System.

(2) The coding of an initial Master Street Address Guide data base, and update and maintenance thereof.

(3) The repayment of any monies advanced for the implementation of the system.

(4) The charges for Automatic Number Identification and Automatic Location Identification equipment, and maintenance, replacement, and update thereof.

(5) The non-recurring charges related to installation of the Emergency Telephone System and the ongoing network charges.

(6) The acquisition and installation, or the reimbursement of costs therefor to other governmental bodies that have incurred those costs, of road or street signs that are essential to the implementation of the emergency telephone system and that are not duplicative of signs that are the responsibility of the jurisdiction charged with maintaining road and street signs.

(7) Other products and services necessary for the implementation, upgrade and maintenance of the system and any other purpose related to the operation of the system, including costs attributable directly to the construction, leasing, or maintenance of any buildings or facilities or costs of personnel attributable directly to the operation of the system. Costs attributable directly to the operation of an emergency telephone system do not include the costs of public safety agency personnel who are and equipment that is dispatched in response to an emergency call.

* * * "

It is well established that, in the absence of specific enabling legislation, county officers have no authority to retain private legal counsel. (See, e.g., 1977 Ill. Att'y Gen. Op. 12.) Under the language quoted above, there is no grant of authority to an emergency telephone system board to expend monies from the emergency telephone system fund for private legal services.

Moreover, with respect to the office of the State's Attorney, the supreme court has stated that:

> " * * *
>
> * * * the law is well settled that when the constitution or the laws of the State create an office, prescribe the duties of its incumbent and fix his compensation, no other person or board, except by action of the legislature, has the authority to contract with private individuals to expend public funds for the purpose of performing the duties which were imposed upon such officer.
>
> * * * "
>
> (Ashton v. County of Cook (1943), 384 Ill. 287, 300.)

The court further indicated that contracts for the payment of such fees were ultra vires and void. Similarly, in opinion No. 83-001, issued February 17, 1983 (1983 Ill. Att'y Gen. Op. 1), Attorney General Hartigan concluded that in the absence of the appointment of a special State's Attorney, a county was under no liability to pay any attorney's fees or litigation expenses incurred by county officers.

Therefore, since the State's Attorney is, by law, the legal advisor and representative of the county emergency telephone system board, and because nothing in the language of the Emergency Telephone System Act authorizes the board to employ private counsel, it appears that monies in the emergency telephone system fund may not properly be used to pay attorney's fees to private legal counsel retained by emergency telephone system board members. Such a payment would be ultra vires.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Very truly yours,

[redacted]

MICHAEL J. LUKE
Senior Assistant Attorney General
Chief, Opinions Division

MJL:LP:dn

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Jim Ryan
ATTORNEY GENERAL

October 8, 1996

I - 96-042

COUNTIES:
Emergency Telephone System
Board as a County Agency
Entitled to Representation
by the State's Attorney

Honorable Vincent Moreth
State's Attorney, Macoupin County
Macoupin County Courthouse
Post Office Box 287
Carlinville, Illinois 62626

Dear Mr. Moreth:

I have your letter wherein you inquire: 1) whether a single county emergency telephone system board is an agency of the county which is entitled to representation by the State's Attorney; and 2) if so, whether the State's Attorney may represent the interests of the county board and the county emergency telephone system board simultaneously without creating a conflict of interest. Because of the nature of your inquiry, I do not believe that the issuance of an official opinion of the Attorney General is necessary. I will, however, comment informally upon the questions you have raised.

In reviewing the materials you have provided with your request, it appears that on November 8, 1994, the voters of Macoupin County approved a referendum authorizing the imposition of a surcharge to support a single county emergency telephone system. Subsequently, on February 14, 1995, the Macoupin County Board passed an ordinance that, inter alia, established the Macoupin County Emergency Telephone System Board (Board), prescribed an annual budgeting and appropriation procedure for the Board and provided that the Board "* * * is not part of nor

governed by the Macoupin County Board * * * and operates independently of the Macoupin County Board." (Emphasis in original.)

Against this background, you have inquired, firstly, whether a single county emergency telephone system board is an agency of the county which is entitled to representation by the State's Attorney. As you have noted, informal opinion No. I-90-046, issued October 9, 1990, addressed the issue of whether it is the duty of the State's Attorney to provide legal representation to a single county emergency telephone system board. That opinion reviewed the relationship between a county emergency telephone system board and the county that created it. Specifically, the opinion examined the various statutory provisions that authorize a county to establish an emergency telephone system board (50 ILCS 750/15.4(a)(West 1994)), to define the emergency telephone system board's powers and duties (50 ILCS 750/15.4(b)(West 1994)) and to provide for the funding of the county's emergency telephone system (50 ILCS 750/15.3 and 15.4(c)(West 1994)). The opinion then concluded that:

> " * * *
>
> Because the county board exercises authority over a single county ETS [Emergency Telephone System] Board through its powers to create the Board, appoint its members and control the level of its funding, it appears that the Board is an agency of the county. (See also 1974 Ill. Att'y Gen. Op. 107; 1973 Ill. Att'y Gen. Op. 108 (county health department is a county agency); opinion No. NP-813, issued October 15, 1974 (regional planning commission is county agency); 1077 Ill. Att'y Gen. Op. 71 (road district is not a county agency); 1973 Ill. Att'y Gen. Op. 181 (forest preserve district does not constitute a county agency); and 1970 Ill. Att'y Gen. Op. 111 (community mental health board is an agency of the county).) Although it possesses certain powers which only the ETS Board may exercise, the Board is not an autonomous, independent unit of government. Accordingly, as a county agency, it appears that it is the duty of the State's Attorney to provide legal representation to an ETS Board which is established by the county.
>
> * * * "

The relationship between a county and a county emergency telephone system board was subsequently discussed in informal opinion No. I-94-058, issued November 1, 1994. In that opinion, the issue was whether a county emergency telephone system board had the authority to retain independent legal counsel to advise or represent it. The opinion again examined the statutory provisions authorizing a county to establish an emergency telephone system board, to define the emergency telephone system board's powers and duties and to provide for the funding of the county's telephone emergency system and concluded that a county emergency telephone system board is a county agency; therefore, the board had no authority to employ independent counsel.

A review of the pertinent statutes and the cases decided thereunder has not disclosed any statutory amendments or judicial decisions that would lead to a result contrary to that reached in informal opinions No. I-90-046 and No. I-94-058. Consequently, it appears that a county emergency telephone system board is an agency of the county which is entitled to legal representation and advice by the State's Attorney pursuant to the provisions of section 3-9005 of the Counties Code (55 ILCS 5/3-9005 (West 1994), as amended by Public Act 89-395, effective January 1, 1996). See Ashton v. County of Cook (1943), 384 Ill. 287, 299-300, cert. denied, 322 U.S. 731, 64 S.Ct. 944 (1944).

You have referred to the provisions of the Macoupin County Emergency Telephone System Board ordinance indicating that the Board "* * * is not part of nor governed by the Macoupin County Board [and] * * * operates independently of the Macoupin County Board" as evidence that the Board is not an agency of the county. It is well established that "[a]n ordinance cannot add to, subtract from, or affect the provisions of a statute * * *." (Village of Riverwoods v. County of Lake (1970), 122 Ill. App. 2d 254, 260; Traders Development Corp. v. Zoning Bd. of Appeals (1959), 20 Ill. App. 2d 383, 392.) Where an ordinance does so, it is void. Traders Development Corp. v. Zoning Bd. of Appeals (1959), 20 Ill. App. 2d at 392.

In reviewing the pertinent provisions of the Emergency Telephone System Act (50 ILCS 750/0.01 et seq. (West 1994)) and the Counties Code (55 ILCS 5/1-1001 et seq. (West 1994)), it does not appear that a county board has been granted the authority to sever its relationship with the county's emergency telephone system board. Clearly, the General Assembly contemplated that there would be an ongoing relationship between a county and the county's emergency telephone system board. (See, e.g., 50 ILCS 750/15.3(e) (West 1994) (county may at any time change the rate of the surcharge imposed under the Act); 50 ILCS 750/15.4(c)

(West 1994) (county treasurer to be custodian of all monies received pursuant to emergency telephone system surcharge).) Therefore, to the extent that Macoupin County's Emergency Telephone System Board ordinance conflicts with State law, it cannot be given effect.

You have also inquired whether a State's Attorney may simultaneously represent and advise a county board and a county emergency telephone system board without creating a conflict of interest. It is well established that a State's Attorney has three statutory clients: the people, the county board and the county's officers. (People v. Ashton (1934), 358 Ill. 146, 152; 1975 Ill. Att'y Gen. Op. 143, 144.) In opinion No. 91-008, issued February 14, 1991 (1991 Ill. Att'y Gen. Op. 14), Attorney General Burris concluded that because a county health department was a county agency, its officers and the members of the board of health were county officers. Based upon similar reasoning, it appears that the members of a county emergency telephone system board should also be considered county officers.

As you have noted, it is foreseeable that the interests of the county board and the county emergency telephone system board could come into conflict and disputes could arise between them. In this regard, I direct your attention to opinion No. S-921, issued June 20, 1975 (1975 Ill. Att'y Gen. Op. 143), wherein Attorney General Scott was asked to determine whether a State's Attorney was required by section 5 of "AN ACT in regard to attorneys general and state's attorneys" (Ill. Rev. Stat. 1973, ch. 14, par. 5), the precursor to section 3-9005 of the Counties Code, to draft a resolution that the State's Attorney felt was "* * * unlawful and discriminatory and would, if adopted, result in a lawsuit * * *." In that opinion, Attorney General Scott advised that "* * * an attorney * * * cannot represent conflicting interests or undertake to discharge inconsistent duties. * * *" Thus, he concluded that "* * * when the interests of the county board and county officers conflict, [the State's Attorney] must determine which position is correct and represent the party with such position or interest."

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Sincerely,

[redacted]

MICHAEL J. LUKE
Senior Assistant Attorney General
Bureau Chief, Opinions

MJL:LP:dn

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 30, 2017

I - 17-010

COUNTIES:
Liability for Fees of Attorney
Privately Retained by the
County Clerk and Recorder

The Honorable Jayson M. Clark
State's Attorney, Saline County
Saline County Law Enforcement
& Detention Center
1 North Main Street, Suite 3
Harrisburg, Illinois 62946

Dear Mr. Clark:

I have your letter inquiring whether Saline County is liable for the payment of attorney fees incurred by its county clerk and recorder (county clerk) for services of a private attorney. For the reasons stated below, absent the appointment of a Special State's Attorney pursuant to section 3-9008 of the Counties Code (55 ILCS 5/3-9008 (West 2016)), Saline County is not liable for the payment of attorney fees of a private attorney retained by the county clerk.

BACKGROUND

According to the information you provided, there has been an ongoing disagreement between the Saline County clerk, an elected county officer,[1] and the Saline County Board concerning

[1]*See* Ill. Const. 1970, art. VII, §4(c); 55 ILCS 5/3-2001, 3-5001 (West 2016). The county clerk in a county with a population of less than 60,000 inhabitants also serves as the recorder in the county. 55 ILCS 5/3-5001 (West 2016). According to 2010 Federal decennial census figures, Saline County has a population of 24,913 inhabitants. Illinois Blue Book 448 (2017-2018).

whether the clerk is required to report to the county board and the county treasurer the fees collected by her office, in addition to other information relating to the financial status of her office. As Saline County State's Attorney, you and your predecessor have advised the clerk on the matters related to the dispute. Without initiating proceedings pursuant to section 3-9008 of the Counties Code, the clerk retained a private attorney to advise her on the same issues. The clerk subsequently submitted claims to the Saline County Board requesting payment of attorney fees owed to the private attorney in relation to the dispute. The Saline County Board has refused to pay the claims, and the clerk has continued to submit claims to the county board for payment.

ANALYSIS

Section 3-9005 of the Counties Code (55 ILCS 5/3-9005 (West 2016)) sets out the powers and duties of the several State's Attorneys. Specifically, subsection 3-9005(a)(7) of the Counties Code (55 ILCS 5/3-9005(a)(7) (West 2016)) provides that it is among a State's Attorney's duties to act as the legal advisor to the county's officers:

> (a) The duty of each State's attorney shall be:
>
> * * *
>
> (7) To give his opinion, without fee or reward, to any county officer in his county, upon any question or law relating to any criminal or other matter, in which the people or the county may be concerned.

Under the plain and unambiguous language of subsection 3-9005(a)(7), the State's Attorney is to act as the attorney and legal advisor for county officials with respect to all official business of the county. *Ashton v. County of Cook*, 384 Ill. 287, 297 (1943); *People v. Savage*, 361 Ill. App. 3d 750, 756 (2005), *appeal denied*, 217 Ill. 2d 621 (2006). You have indicated that the county clerk retained a private attorney to advise her regarding matters relating to her official duties. This falls squarely within a State's Attorney's duties under subsection 3-9005(a)(7) of the Counties Code.

Illinois courts have consistently held that county officers have no authority to retain an attorney to perform duties that the State's Attorney is obligated to perform, unless either: (1) the court has appointed a Special State's Attorney; or (2) the county officer is expressly authorized by statute to retain a private attorney. *See, e.g., Ashton*, 384 Ill. at 299-300 (because a county board is not expressly authorized to retain a private attorney, a contract between the county board and private attorneys to perform work falling within the scope of duties prescribed to the State's Attorney by statute is *ultra vires* and void); *People v. Wilkinson*, 285 Ill. App. 3d 727, 735 (1996) ("a public official acts in excess of his lawful authority when he fails to obtain the court appointment of legal counsel to act as a special assistant State's Attorney and accepts public funds to pay for * * * privately retained legal counsel"); *Hutchens v. Wade*, 13 Ill. App. 3d 787, 789-90 (1973) (private attorneys were not entitled to payment

from county funds for attorneys fees where a county board retained private counsel to represent the sheriff without a court's appointment of a Special State's Attorney). This office has issued numerous opinions reaching the same conclusion.[2]

With regard to the first exception to the general rule that a county officer may not retain a private attorney for matters falling within the scope of the State's Attorney's duties, section 3-9008 of the Counties Code governs the appointment of a Special State's Attorney.[3] You have indicated that the

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[2]*See, e.g.*, Ill. Att'y Gen. Op. No. 97-001, issued January 9, 1997 (in the absence of an appointment of a Special State's Attorney, neither the county board nor any other county officer has the authority to retain private counsel); 1991 Ill. Att'y Gen. Op. 14, 15 (because the State's Attorney is the legal adviser of the county board of health and the county health department and because the board has no statutory authority to retain private counsel, funds from the county health fund may not be used to pay attorney fees to private counsel retained by board of health members or health department officers); 1983 Ill. Att'y Gen. Op. 1 (where there was no appointment of a Special State's attorney, the county is not liable to pay attorney fees and litigation expenses incurred by its supervisor of assessments and one member of its board of review); 1977 Ill. Att'y Gen. Op. 59, 60 (absent specific statutory authority, a county merit commission may not retain private counsel to advise it regarding the submission of the standard pay plan or the revision of its rules, regulations, or procedures); 1975 Ill. Att'y Gen. Op. 12 (county board has no authority to employ independent legal counsel to advise the zoning board of appeals); 1973 Ill. Att'y Gen. Op. 18, 20-21 (a county board does not have the authority to hire an attorney to advise the board with regard to establishing a public building commission); Ill. Att'y Gen. Inf. Op. No. I-94-058, issued November 1, 1994, at 7 (county emergency telephone system board has no statutory authority to employ private counsel, therefore, emergency telephone system funds may not be used to pay for private legal fees).

[3]Section 3-9008 of the Counties Code provides, in pertinent part:

> (a-5) The court on its own motion, or an interested person in a cause or proceeding, civil or criminal, may file a petition alleging that the State's Attorney is sick, absent, or unable to fulfill his or her duties. The court shall consider the petition, any documents filed in response, and if necessary, grant a hearing to determine whether the State's Attorney is sick, absent, or otherwise unable to fulfill his or her duties. If the court finds that the State's Attorney is sick, absent, or otherwise unable to fulfill his or her duties, the court may appoint some competent attorney to prosecute or defend the cause or proceeding.
>
> (a-10) The court on its own motion, or an interested person in a cause or proceeding, civil or criminal, may file a petition alleging that the State's Attorney has an actual conflict of interest in the cause or proceeding. The court shall consider the petition, any documents filed in response, and if necessary, grant a hearing to determine whether the State's Attorney has an actual conflict of interest in the cause or proceeding. If the court finds that the petitioner has proven by sufficient facts and evidence that the State's Attorney has an actual conflict of interest in a specific case, the court may appoint some competent attorney to prosecute or defend the cause or proceeding.
>
> * * *
>
> (a-20) Prior to appointing a private attorney under this Section, the court shall contact public agencies * * * to determine a public prosecutor's availability to serve as a special prosecutor at no cost to the county and shall appoint a public agency if they are able and willing to accept the appointment. An attorney so appointed shall have the same power and authority in relation to the cause or proceeding as the State's Attorney would have if present and attending to the cause or proceedings.

county clerk did not initiate any proceedings under section 3-9008 prior to retaining private counsel. Therefore, this exception is inapplicable in these circumstances.

Turning to the second exception, a review of the functions, powers, and duties of a county clerk set forth in sections 3-2003 through 3-2003.5 and sections 3-2007 through 3-2013 of the Counties Code (55 ILCS 5/3-2003 through 3-2003.5, 3-2007 through 3-2013 (West 2016)), has failed to identify any statutory authorization to retain private counsel. Additionally, division 3-5 of the Counties Code (55 ILCS 5/3-5001 *et seq.* (West 2016)), which prescribes the functions, powers, and duties of a county recorder, contains no provision for the employment of private legal counsel. Finally, the Property Tax Code (35 ILCS 200/1-1 *et seq.* (West 2016)), which imposes additional duties on county clerks, does not authorize the county clerk to hire a private attorney. Accordingly, the Saline County Board is not responsible for the payment of private attorney fees incurred by its county clerk.

CONCLUSION

For the reasons stated above, the State's Attorney is the legal advisor to the county clerk and recorder regarding matters pertaining to her official duties. A county clerk and recorder is not statutorily authorized to retain private legal counsel. Accordingly, in the absence of the appointment of a Special State's Attorney pursuant to section 3-9008 of the Counties Code, a county is not liable for the payment of attorney fees of a private attorney retained by the county clerk and recorder to advise her regarding her official duties.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

[redacted]Very truly yours

[redacted]

LYNN E. PATTON
Senior Assistant Attorney General
Chief, Public Access and Opinions Division

LEP:KMC:SRF:lh