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FILE NO. S-1010

COUNTIES:
Regulation of Private
Sewage Disposal

Honorable William J. Cowlin
State's Attorney
2200 North Seminary Avenue
Woodstock, Illinois 60098

Dear Mr. Cowlin:

I have your letter wherein you state:

"I have been requested by the Public Health Administrator of McHenry County to seek an opinion from you concerning the following questions:

1. Whether a proposed County Ordinance can legally limit the number of permits issued to septic pumpers or contractors for the purpose of promoting public welfare as a police power incidental to express statutory powers found in Chapter 34 of the 1973 Illinois Revised Statutes?

> 2. Whether the County can legally require residence within the County as a prerequisite to obtaining a permit as a septic pumper or contractor?"

It is my understanding that by "septic pumper" you refer to a person in the business of servicing septic tanks, including the transporting and disposing of waste from septic tanks, and by "contractor" you refer to a person in the business of constructing septic tanks. It is assumed that such persons would be private sewage disposal contractors within the meaning of the Private Sewage Disposal Licensing Act. (Ill. Rev. Stat. 1973, ch. 111 1/2, pars. 116.301 et seq.) Section 4 of the Act provides:

> "§ 4. After January 1, 1974, no person or private sewage disposal system contractor may construct, operate, maintain, or service a private sewage disposal system or transport and dispose of waste removed therefrom, in such a manner that does not comply with the requirements of this Act and the private sewage disposal code promulgated hereunder by the Department and all private sewage disposal contractors shall be licensed in accordance with this Act."

Section 10 of the Act specifically pertains to regulation by units of local government. Section 10 provides in part:

> "§ 10. This Act does not prohibit the enforcement of ordinances of units of local government establishing

> a system for the regulation and inspection of private sewage disposal contractors and a minimum code of standards for design, construction, materials, operation and maintenance of private sewage disposal systems, for the transportation and disposal of wastes therefrom and for private sewage disposal systems servicing equipment, provided such ordinance establishes a system at least equal to state regulation and inspection.
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> * * *

Section 10 clearly provides that regulation of private sewage disposal contractors by units of local government is not preempted by the Private Sewage Disposal Licensing Act.

It is my further understanding that by "permit" you refer to a license to be issued to persons in the business of servicing septic tanks or constructing septic tanks within McHenry County; you were not referring to a permit to construct a septic tank.

McHenry County is not a home rule unit. As such, the McHenry County Board can exercise only those powers granted to it by law or those that arise by necessary implication from expressly granted powers. Ill. Const., art. VII, sec. 7; Heidenreich v. Ronske, 26 Ill. 2d 360; Connelly v. County of Clark, 16 Ill. App. 3d 947, 949.

The provisions of "AN ACT in relation to the establishment and maintenance of county and multiple-county public health departments" (Ill. Rev. Stat. 1973, ch. 111 1/2, pars. 20c et seq.) are in full force and effect in McHenry County which has established a county health department. Section 25 of "AN ACT to revise the law in relation to counties" (Ill. Rev. Stat. 1973, ch. 34, par. 401, as amended by P.A. 79-388 and P.A. 79-956) provides:

> "§ 25. The county board of each county has the powers enumerated in Sections 25.01 through 25.42 subject to conditions therein stated. Powers conferred on counties are in addition to and not in limitation of their existing powers."

Section 25.12 of "AN ACT to revise the law in relation to counties" (Ill. Rev. Stat. 1973, ch. 34, par. 419) provides in pertinent part:

> "§ 25.12. During the period that 'An Act in relation to the establishment and maintenance of county and multiple-county public health departments', approved July 9, 1943, as amended, is in force in the particular county, to:
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> (1) do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease; including the regulation of plumbing and the fixtures, materials, design and installation methods of plumbing systems subject to the provisions of the Illinois

> Plumbing Code Law, enacted by the Seventieth General Assembly, and any further amendment thereof;
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> * * *

I am of the opinion that paragraph (1) of section 25.12 authorizes the McHenry County Board to regulate the activities of private sewage disposal contractors. The power to regulate carries with it the power to license. (Father Basil's Lodge v. City of Chicago, 393 Ill. 246.) The Illinois Supreme Court has declared that the most important of the police powers is that of caring for the safety and health of the community. In Biffer v. City of Chicago, 278 Ill. 562, 569, the court states:

> "Police power is hardly susceptible of exact definition. When the city council considers some occupation or thing dangerous to the health of the community and in the exercise of its discretion passes an ordinance to prevent such a danger, it is the policy of the law to favor such legislation. Municipalities are allowed a greater degree of liberty of legislation in this direction than in any other. The necessity for action is often more urgent and the consequences of neglect more detrimental to the public good in this than in any other form of local evil. (Gundling v. City of Chicago, 176 Ill. 340.) If the subject covered by the ordinance is merely debatable as to power the legislature is entitled to its own judgment. (Price v. Illinois, 238 U.S. 446.) The most important

> of the police powers is that of caring for the safety and health of the community. If the health of the public is indispensable to the city, surely the safety of citizens and protection against being maimed or killed are equally indispensable and a like liberal rule of construction should be adopted. (City of Chicago v. Kluever, 257 Ill. 317.) Municipal corporations can exercise only delegated powers, and in the absence of express statutory provisions to that effect courts are not authorized to indulge in any presumptions in favor of the validity of their ordinances. Schott v. People, 89 Ill. 195."

The specific provisions of any ordinance passed by the McHenry County Board in attempting to regulate private sewage disposal contractors must not, however, violate the due process clause of the Illinois and Federal Constitutions or other constitutional limitations. Also, the Illinois Supreme Court has required that police ordinances passed pursuant to legislative power delegated in general terms, as opposed to legislative power delegated in specific terms, must be "reasonable". (First National Bank & Trust Co. v. City of Evanston, 30 Ill. 2d 479; Catholic Bishop of Chicago v. Village of Palos Park, 286 Ill. 400.) This test of "reasonableness" seems to go beyond the fourteenth amendment due process reasonableness

test that the United States Supreme Court has demanded in cases of economic regulation. In Chicago Title & Trust Co. v. Village of Lombard, 19 Ill. 2d 98, the Illinois Supreme Court had occasion to consider the validity of an ordinance requiring that no filling station may be erected on a lot within 650 feet of any lot upon which another filling station was already situated. The court pointed out that this ordinance was passed pursuant to a delegation of legislative power conferred in general terms and as such the ordinance must constitute a reasonable exercise of the powers granted by the legislature. The court at page 105 delineated the test of "reasonableness" as follows:

> "Under the police power of the State new burdens may be imposed upon property and new restrictions placed upon its use when the public welfare demands it. The police power is, however, limited to enactments having reference to the public health, safety, comfort and welfare. An act which deprives a citizen of his liberty or property rights cannot be sustained under the police power unless a due regard for the public health, safety, comfort or welfare requires it. (State Bank and Trust Co. v. Village of Wilmette, 358 Ill. 311.) An ordinance, to be valid, must be reasonable. In determining the question of reasonableness the court may take into consideration the object to be accomplished by the ordinance and the means provided for its accomplishment. If the ordinance

> is not general in character, or if it does not operate equally upon all persons of the same class within the municipality, it cannot be sustained. People ex rel. Russell v. Andrews, 339 Ill. 157."

In Krol v. County of Will, 38 Ill. 2d 587, the Illinois Supreme Court considered the validity of a Will County ordinance which sought to require that the effluent from a sewage disposal system be finally discharged into a continuously flowing stream. The court declared the ordinance to be arbitrary and unreasonable. At page 590, the court states as follows:

> "A county is empowered to adopt appropriate police measures to promote health and suppress disease and to control and regulate the disposal of sewage within its borders. (Ill. Rev. Stat. 1965, chap. 34, pars. 419, 3111, 3116.) While courts will not inquire into the wisdom of an ordinance enacted under such authority they will consider whether such an ordinance has a definite and substantial relation to a recognized police-power purpose. (Thillens, Inc. v. Hodge, 2 Ill. 2d 45; Midland Electric Coal Corp. v. County of Knox, 1 Ill. 2d 200.) To put it otherwise, an ordinance, 'to be beyond the pale of constitutional infirmity, must bear a reasonable relation to the public health or other purpose sought to be served, the means being reasonably necessary and suitable for the accomplishment of such purpose * * *.' (Schuringa v. City of Chicago, 30 Ill. 2d 504, 509; accord, Strub v. Village of Deerfield, 19 Ill. 2d 401.) In deciding this question of reasonableness

> the court may consider 'all the facts and circumstances, the evil sought to be remedied, the purpose sought to be accomplished and the necessity for legislation on the subject.' City of Chicago v. Clark, 359 Ill. 374, 377.
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> Of course, the presumption is in favor of the validity of an ordinance and one who attacks its validity must affirmatively show wherein the ordinance is unreasonable. (Schuringa v. City of Chicago, 30 Ill. 2d 504; Palangio v. City of Chicago, 23 Ill. 2d 570.) However, an ordinance shown to impose unusual and unnecessary restrictions not definitely and substantially related to the preservation of the public health, safety, comfort or welfare is invalid as an unauthorized invasion of private rights. (See Chicago Title & Trust Co. v. Village of Lombard, 19 Ill. 2d 98; People v. Brown, 407 Ill. 565; Schneider v. Board of Appeals, 402 Ill. 536.) Similarly, regulation attempted where the threat to public health is remote may also be invalidated. City of West Frankfort v. Fullop, 6 Ill. 2d 609, 614."

In Tugman v. City of Chicago, 78 Ill. 405, an ordinance provided that after a designated date no distillery, slaughter house, rendering establishment or soap factory shall be erected or put into operation in any building not then used for such purpose, within certain described territory in the City of Chicago. In holding the ordinance unconstitutional, the Illinois Supreme Court said that the fact that certain persons were already engaged in the business within the designated area

provided no justification for depriving others of an opportunity to do so at a later period. The court pointed out that if one of the citizens of Chicago is permitted to engage in the business of slaughtering animals in a certain locality, an ordinance which would prevent another from engaging in the same business, would be unreasonable, and, for that reason, void.

In People ex rel. Deitenbeck v. Village of Oak Park, 331 Ill. 406, an ordinance defined as a residential district an area measuring 400 feet from the outer walls of a proposed building in every direction, within which area more than one-half of the buildings were used for residential purposes. The provision was held to be arbitrary and oppressive where it operated to prevent the erection of a gasoline filling station in a section of the city devoted chiefly to commercial pursuits and where the area included another filling station as well as garages.

McHenry County purports to limit the number of permits to be issued to private sewage disposal contractors. Such an ordinance imposes unusual and unnecessary restrictions not definitely and substantially related to the promotion of the

public health or the suppression of disease. As such, the proposed ordinance would be arbitrary and unreasonable.

I am also of the opinion that to require a prerequisite of residency within the county to be eligible to receive a permit is likewise an unusual and unnecessary restriction not definitely and substantially related to the promotion of the public health and the suppression of disease. Also, such a requirement is discriminatory. (City of Elgin v. Winchester, 300 Ill. 214.) Such a regulatory scheme based on residency would be subject to possible attack as violating the equal protection clause of the fourteenth amendment of the United States Constitution and such a regulatory scheme based on residency would be subject to possible attack as violating the privilege and immunities clause of the United States Constitution. U.S. Const., art. IV, sec. 2; Toomer v. Witsell, 334 U.S. 385; 92 L. Ed. 1460, 68 S. Ct. 1157 (1947).

This opinion advises only on the validity of a proposed McHenry County ordinance that limits the number of

permits or licenses to be issued to private sewage disposal contractors and requires that such contractors be residents of the county to be eligible to receive a permit or license; as such, this opinion ought not to be construed as commenting on any other legal questions.

Very truly yours,

ATTORNEY GENERAL