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SPRINGFIELD

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FILE NO. S-1111

**HIGHWAYS:
Power of County to Impose
Fees for Disturbances to
County Highways**

Honorable John J. Bowman
State's Attorney of DuPage County
207 South Reber Street
Wheaton, Illinois 60187

Dear Mr. Bowman:

I have your letter wherein you state in pertinent part:

"There have been many occasions where non-governmental, private persons or entities desire to disturb certain already constructed and completed county highways for the purposes of connecting their premises to certain utilities or other facilities located below the surface of the county highway in question, and do so with the permission of the county. In order to be assured that the highway in question is properly repaired, according to lawful standards, the

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county highway department, using its employees and obtaining the necessary materials, makes the required repairs, and then charges said private person or entity the value of the labor and materials involved.

To accomplish this in an orderly manner, the highway department has set up, with the County Board's approval, a schedule of charges, termed 'permit fees', for various types of disturbances to the county highways."

You then ask the following questions:

"Does a non-home rule county possess the authority to make such charges? If so, does the county have the authority to increase the fees or charges to reflect the cost of manpower, materials, clerical functions, and the cost of supervision, and further to increase the charges when economic conditions, such as an increase in labor charges, etc., so dictate?"

For the reasons discussed below, it is my opinion that the county is authorized to set up a schedule of "permit fees" which may be charged to anyone who seeks the county's permission to disturb a county highway. The fee schedule must bear a reasonable relationship to the actual costs of repair which are ultimately incurred by the county, and for this reason the fees may be changed to reflect changes in the cost of materials, labor and other expenses.

It is well established that, unless otherwise provided by statute, anyone who damages a public highway must bear the

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cost of its repair. (Henderson County v. C., B., & Q. R.R. Co., 320 Ill. 608.) In City of Chicago v. P., C., C., & St. L. R.R. Co., 146 Ill. App. 403, the court stated at page 414:

"At common law, whenever any person or corporation for his or its own gain or advantage, convenience, or necessity, interferes with, cuts into or across the highway, it devolves upon that person or corporation, at his or its own cost and expense, to restore the highway to as good condition as before."

The county board has authority to consent to the disturbances of county highways in accordance with section 9-113 of the Illinois Highway Code. (Ill. Rev. Stat. 1975, ch. 121, par. 9-113.)

"§ 9-113. No ditches, drains, track, rails, poles, wires, pipe line or other equipment of any public utility company, municipal corporation or other public or private corporation, association or person shall be located, placed or constructed upon or along any highway, or any township or district road, other than a highway or road within a municipality without first obtaining the written consent of the appropriate highway authority as hereinafter provided for in this Section.

Upon receipt of a petition therefor, consent to so use a highway may be granted subject to such terms and conditions not inconsistent with this Code as the highway authority deems for the best interest of the public. The petitioner shall pay to the owners of property abutting upon the affected highways established as though by common law plat all damages the owners may sustain by reason of such use of the highway, such damages to be ascertained and paid in the manner provided by law for the exercise of the right of eminent domain.

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Such consent shall be granted by the Department in the case of a State highway; by the county board in the case of a county highway; by either the highway commissioner or the county superintendent of highways in the case of a township or district road, provided that if consent is granted by the highway commissioner, a copy thereof shall be filed with the county superintendent of highways at least 10 days before the date of grant, and if consent is granted by the county superintendent of highways, the petitioner has given written notice of his intention to file such a petition to the highway commissioner at least 10 days prior to the filing thereof. * * *

Section 9-117 of the Illinois Highway Code (Ill. Rev. Stat. 1975, ch. 121, par. 9-117) makes it a petty offense "if any person injures or obstructs a public highway by * * * placing or digging any ditch or other opening thereon * * * without the permission of the highway authority having jurisdiction over such highways". Under section 9-117, the appropriate highway authority may recover the costs of repairing a public highway which is damaged by anyone who has excavated into it, without permission of the appropriate highway authority, and who has failed to repair it himself.

The issue is whether the county may enforce this obligation to pay for damage by conditioning its consent to disturbances of the highway surface upon the prepayment of a set fee which is calculated to reimburse the county for its

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undertaking to make the repairs itself. It has been held that a county has those powers expressly conferred upon it by statute, and those necessary for the performance of the powers expressly conferred. (Ashton v. Cook County, 384 Ill. 287; LeFevre v. County of Lee, 353 Ill. 30.) A similar rule exists for cities. (Chicago Cosmetic Co. v. City of Chicago, 374 Ill. 384; City of Bloomington v. Wirrick, 381 Ill. 347.) The powers of a city and a county are thus tested by the same rule. Accordingly, the decisions of the courts of this State relating to the powers of cities to enact regulatory ordinances under the police power and to charge a fee as incidental thereto may, by analogy, be extended to and made applicable to counties. See 1953 Ill. Att'y. Gen. Op. 71.

In Fr. Basil's Lodge v. City of Chicago, 393 Ill. 246, it was held that the regulatory powers of a municipality might be exercised by exacting a license fee. The court stated at page 253:

"If power is given a city to regulate certain subject matter, such power includes also the authority to exact a license fee for the purpose of defraying all or a part of regulation or inspection. (Larson v. City of Rockford, 371 Ill. 441.)"

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It, therefore, is apparent that in pursuance of its power to consent to disturbances to the county highway upon such terms and conditions as are consistent with the Highway Code and in the best interests of the public (Ill. Rev. Stat. 1975, ch. 121, par. 9-113), the county may exact fees in return for its permission. According to your letter, repairs are undertaken by the county to assure that the repaired highway will conform to appropriate standards. By undertaking to repair the highway on its own, the county is assured that the job will be done correctly the first time and needless expense which may be occasioned by improper repairs by an individual is minimized. Under the plan the fee schedule is calculated to reflect only the actual costs of the materials, labor, clerical functions and supervision. The financial burden is ultimately placed upon the individual who seeks to disturb the highway for his own purposes.

Where a fee is imposed in pursuance of regulatory powers, the amount charged must bear a reasonable relation to the additional burdens imposed due to the necessary expense involved in investigating, inspecting and exercising proper police regulation. (Ward Baking Co. v. City of Chicago, 340

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Ill. 212; Lanere v. City of Chicago, 391 Ill. 552.) Because the fee charged must be reasonably related to the extra burden imposed by the permitted activity, it is appropriate for the county fee schedule to reflect any increases in cost factors which are used as determinants in arriving at the fee schedule.

Very truly yours,

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