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FILE NO. S-565

COUNTIES:

County Board -
Power of County Board to
retain legal counsel

Honorable Henry D. Sintzenich
State's Attorney
McDonough County
Macomb, Illinois 61455

Dear Mr. Sintzenich:

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."

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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:

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(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 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 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.

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(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.

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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. 267; 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. Russel, 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.

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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.

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The law is well settled that when the constitution or the laws of the State create an

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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.

Very truly yours,

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