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FILE NO. S-806

COUNTIES:

Referenda Concerning the Issuance
of General Obligation Bonds and
Raising Tax Rate Limitation for
the Purpose of Remodeling County
Convalescent Center

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

Dear Mr. Bowman:

This is to acknowledge receipt of your letter in which you state that the county board of DuPage County is contemplating the remodeling and extension of the county convalescent center, which is being operated under the authority of section 24(7th) of "AN ACT in relation to counties" (Ill. Rev. Stat. 1973, ch. 34, par. 303(7)) and

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"The County Home Act" (Ill. Rev Stat. 1973, ch. 34, pars. 5361 et seq.) You state that the county board is considering the possibility that the improvements might be financed by means of a bond issue and referendum under the authority of section 40 of "AN ACT in relation to counties" (Ill Rev. Stat. 1973, ch 34, par. 306.) You have raised several questions concerning such possible referendum.

With regard to your first question, you state:

"* * * Chapter 34, Section 306 of the Illinois Revised Statutes uses the words 'duties imposed upon them by law', when it speaks of county board deeming it necessary to issue bonds to enable them to perform any of those duties.

* * *

In Chapter 34, Section 303 (7th) and Section 5361, et sequitur is found the words 'each county shall have the power' and 'the county board shall have the power'. We inquire at this time, whether or not the phrase 'duties imposed upon them by law' would include within its ambit 'power' as distinguished from a 'duty' imposed by law."

Section 40 of "AN ACT in relation to counties"

(Ill. Rev. Stat. 1973, ch. 34, par. 306) provides in part:

"When the county board of any county deems it necessary to issue county bonds to enable them to perform any of the duties imposed upon them by law, they may, by an order, entered of record, specifying the amount of the bonds required,

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and the object for which they are to be issued, submit to the legal voters of their county, at any general or special election, the question of issuing such county bonds. * * *

In Goodwine v. County of Vermilion, 271 Ill. 126 (1915), several taxpayers attempted to enjoin the issuance and sale of bonds for the construction of roads and bridges which had been authorized by the affirmative vote of the electors of the county under section 40. The issue which was raised in the case is similar to that which you have posed. The Illinois Supreme Court stated at page 131:

"The appellants argue that a difference is recognized in the statute between duties imposed by law and powers conferred upon the county board; that the powers conferred by section 25 on the county board are to be exercised in the discretion of the county board, and that the duties referred to in section 40 are only those specified in section 26 of the act, stating that it shall be the duty of the county board of each county to do certain things. In our judgment there is no such distinction. The duties imposed upon the county board by law include not only those things which the county board is directed to do by the express mandate of the legislature, but also those things for the performance of which the legislature has conferred power upon the county board when the public interest requires that those things should

be done. The county has no powers except those expressly conferred upon it by statute or necessary for the performance of the powers which are expressly conferred. Whatever duty it owes is necessarily a duty imposed by law. Whenever the public interest requires that an act which the county board is authorized to do should be done and it is within the power of the county board to do it, then it is the duty of the county board to do that act. The duty may be one which cannot be enforced by mandamus. It may not be absolute but relative, dependent upon time, place, manner or condition. The financial condition of the county may make impossible what would otherwise be a pressing duty, and several urgent demands may require the postponement of one or more in favor of another. When the county board, however, deems it necessary, to enable it to perform any of its duties, to issue county bonds, it may submit the question to the legal voters of the county. When the board arrived at the determination that the public interests of the county demanded that it should aid in the construction of roads and bridges, then it was the duty of the county board to aid in their construction, and that duty was imposed upon it by law. Under those circumstances section 40 expressly authorized the submission to the people of the question of issuing bonds for the purpose of raising money."

It is clear from the above cited passage that those "duties imposed by law" on the county board under section 40 include not only those duties which the legislature has specifically directed the board to perform, but also those

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things that the legislature has authorized the county board to perform when the public interest so requires. See, also, 1952 Op. Atty. Gen. 129.

It is, therefore, my opinion that a bond issue to finance the remodeling of a county convalescent center is authorized under section 40 if the county board determines that the public interest requires that it be done.

With regard to your second question, you ask:

"[I]n the event that a bond issue in this matter can be held under section 306 and the tax monies needed to retire the bonds would exceed the .10 tax rate presently in effect in the County of DuPage, would another referendum be needed within the requirements of chapter 34, section 501?"

Section 27 of "AN ACT in relation to counties" (Ill. Rev. Stat. 1973, ch. 34, par. 501) provides in part:

"Whenever the county board deems it necessary to assess taxes the aggregate of which exceeds the taxes which are authorized to be levied without a vote of the people as provided in Section 25.05 of this Act, the county board may * * * provide for the submission of the question of assessing the additional rate required to a vote of the people of the county * * *"

A tax to pay the interest and principal on bonds issued under section 40, supra, for a county convalescent

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or nursing home is not a tax which is authorized to be levied without a vote of the people as enumerated in section 25.05. (Ill. Rev. Stat. 1973, ch. 34, par. 406.) It is, therefore, my opinion that should the tax revenue needed to retire the bonds exceed the .10% rate limitation presently in effect in DuPage County, the question of a raise in the tax rate limitation would have to be submitted to the voters of the county.

You next ask:

"* * * [W]ould the referendum pursuant to section 306 be within the scope of Article VII, Section 11, of the 1970 Illinois Constitution and Chapter 46, Article 28-3, and/or Chapter 46, Article 28-4 of the Illinois Revised Statutes?"

First, section 11(b) of article VII of the Constitution of 1970 does not apply to a referendum authorized under section 40, supra. Section 11(b) is limited to "referenda required by this Article".

Second, section 28-4 of the Election Code (Ill. Rev. Stat. 1973, ch. 46, par. 28-4) likewise does not apply to a referendum under section 40, supra, as section 28-4 is limited to "any case in which article VII or paragraph (a) of section 5 of the Transition Schedule of the Constitution authorizes any action to be taken."

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Third, section 28-3 of the Election Code (Ill. Rev. Stat. 1973, ch. 46, par. 28-3) does apply to referendum authorized pursuant to section 40. Section 28-3 provides in part:

"If any statute of this State provides for the submission to a public vote, upon petition or order of a court or otherwise. * * * of any question relating to the issuance of bonds, levy of taxes, incurring of indebtedness, * * * such question may be submitted under this section by reference hereto. * * *"

In your fourth question, you ask:

"* * * [W]hat is the time requirement prior to election that county board action needs to be taken?"

Section 28-3 of the Election Code, supra, provides in part:

"* * * If the preliminary steps prescribed by such statute, whether they be petition or order of court or otherwise, have been taken, such questions shall be submitted on ballots prepared in accordance with Section 16-7 hereof, at a general or special election and upon such notice as such statute may prescribe. If such question is submitted under this section, all parts and sections of this Act applicable at general elections in the territory where such question is submitted, shall govern such election, except as such statute may otherwise provide. * * *"
(emphasis added.)

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It should be noted that all sections of the Election Code which govern general elections shall govern the submission of the question relating to the issuance of bonds to the voters. Absent specific requirements under section 40, the only time limitations in the Election Code which are applicable to a section 40 referendum are section 16-5.01 (Ill. Rev. Stat. 1973, ch. 46, par. 16-5.01) which requires that the county clerk have a sufficient number of ballots printed, and available for mailing to absentee voters, at least 45 days prior to the election; and section 12-1 (Ill. Rev. Stat. 1973, ch. 46, par. 12-1) which requires publication of notice 30 days before any general election. Therefore, the county board must act prior to the 45 day period so that a sufficient number of ballots can be printed and be available for mailing.

In your final question, you ask:

"If the referendum is not put on the ballot for the next general election, can a special election be called subsequent to the November 5, 1974 election?"

Section 40 of "AN ACT in relation to counties",

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supra, provides that when the county board has determined that it is necessary to issue county bonds, "* * * they may by an order, entered of record * * * submit to the legal voters of their county, at any general or special election, the question of issuing such county bonds."

The phrase "or special election" was added by an amendatory Act of 1936 (Laws 1935-36, First Special Session, p. 61, sec. 1.) A special election is defined in section 1-3(3) of the Election Code (Ill. Rev. Stat. 1973, ch. 46, par. 1-3(3)) as: "an election, either general or municipal, not regularly recurring at fixed intervals, irrespective of whether it is held at the same time and place and by the same election officers as a regular election." An election is defined in section 1-3(1) (Ill. Rev. Stat. 1973, ch. 46, par. 1-3(1)) as: "the submission of all questions of public policy, propositions, and all measures submitted to popular vote, and includes primary election when so indicated by the context. * * *"

Under the above definitions, the submission of the question of issuing general obligation bonds under section 40 is a special election. (See, Bilek, v. The City

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of Chicago, 396 Ill. 445.) It should also be noted that section 28-3 of the Election Code, supra, clearly indicates that the question may be submitted at either a general or special election.

With regard to the submission of the question of assessing a tax in addition to the tax rate limitation, section 27 of "AN ACT in relation to counties" (Ill. Rev. Stat. 1973, ch. 34, par. 501) requires the submission of such question at the next election for county officers. However, section 28 of "AN ACT in relation to counties" (Ill. Rev. Stat. 1973, ch. 34, par. 505) provides in part:

"If it shall be deemed necessary to submit to a vote of the people at the same election, the question of issuing bonds and the raising of such additional tax, either in excess of the statutory or constitutional limit, the same may be included in one proceeding * * *"

From a review of the above cited sections, it is my opinion that: (a) a special election may be called by order of the county board to submit to the voters of the county the question of issuing bonds under section 40; (b) pursuant to section 28, supra, a referendum to increase the

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tax rate limitation may be held simultaneously with the special election on the bond issue; and (c) both questions may be submitted at the next general election.

Very truly yours,

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