



WILLIAM J. SCOTT

ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD

February 13, 1974

NO. S-696

CITIES AND VILLAGES:
Powers to Contract under the
Intergovernmental Cooperation Act

David Fogel
Executive Director
Illinois Law Enforcement Commission
150 North Wacker Drive
Chicago, Illinois 60606

Dear Mr. Fogel:

I have your letter of recent date in which you request an opinion concerning the powers of municipalities to contract. Under a proposed contract with the Illinois Law Enforcement Commission, the city of Vandalia will expand and upgrade its police department and will in addition, provide police services to some smaller municipalities in Fayette County. Under existing contracts between Vandalia and the participating smaller munici-

David Fogel - 2.

palties, existing police officers in the smaller municipalities will be given preference in applying for the additional positions within Vandalia's police department. Whether these officers or other individuals are added to the police force, its membership will increase substantially.

Since Vandalia has a population of over 5,000, it is required under the provisions of the Police Pension Fund (Ill. Rev. Stat. 1971, ch. 108 1/2, pars. 3-101 to 3-149), to maintain a police pension fund. The increase in the size of the police force will increase the obligation of Vandalia with regard to its fund. All other contracting municipalities are under 5,000 in population and, therefore, do not fall within the mandatory provisions of the pension fund. These municipalities are willing as a contractual matter, to pay on a yearly basis such an additional amount as shall reimburse Vandalia on a proportionate basis for the increase in size of its police force.

Your specific question is with regard to the power of the contracting smaller municipalities to bind themselves to reimburse Vandalia for possible future claims for disability and retirement pensions, assuming that the inter-municipal

David Fogel - 3.

contracts are terminated at some future date. Assuming the various contracting municipalities can agree among themselves as to the manner in which all the other contracting parties are to obligate themselves to Vandalia with regard to reimbursement to Vandalia for some or all of the members of Vandalia's police department, do these other municipalities have the power to bind themselves to pay presently unascertainable amounts of money, based upon future events which may not occur?

The authority for the municipalities to enter into basic contracts for police protection, is found in the Intergovernmental Cooperation Act (P.A. 78-785.) This Act is authorized by section 10 of article VII of the Illinois Constitution of 1970, which provides as follows:

"(a) Units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function, in any manner not prohibited by law or by ordinance. Units of local government and school districts may contract and otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or by ordinance. Participating units of government may use their credit, revenues, and other resources to pay costs and to service debt related to intergovernmental activities.

* * *

"

David Fogel - 4.

Section 6 of the Intergovernmental Cooperation Act provides:

"An intergovernmental contract may, among other undertakings, authorize public agencies to jointly self-insure and authorize each public agency member of the contract to utilize its funds to protect, wholly or partially, any public agency member of the contract against liability or loss in the designated insurable area."

Although most of the provisions of the Intergovernmental Cooperation Act were taken from a model act which has been passed in several other States, section 6 was added by the Illinois General Assembly and as far as I have been able to ascertain, is not specifically found in other States' intergovernmental cooperation acts. Since this provision is new and has not been enacted in other States, there are no court decisions for guidance as to what the language means. Therefore, we must rely solely on the language of the provision itself.

Both retirement and disability pension liabilities could be designated in the contract as "insurable areas", as provided in section 6, and the smaller municipalities could "contract to utilize [their] funds to protect, wholly or partially, [Vandalia] against liability or loss in [this]

David Fogel - 5.

designated insurable area". This provision of the contract could be written to be effective, even if all or some of the participating municipalities decide at a future date to discontinue the contract for purposes of providing basic police service.

Having reached this conclusion, however, there are other areas of concern which should be considered. As stated in your letter, since all the smaller municipalities are under 5,000 in population, they are not required to establish a police retirement fund. Since they are not so required, none of the provisions of the Police Pension Fund, supra, are applicable to them.

Of greater concern is section 8-1-7 of the Municipal Code (Ill. Rev. Stat. 1971, ch. 24, par. 8-1-7), which provides as follows:

"§8-1-7. No contract shall be made by the corporate authorities, or by any committee or member thereof, and no expense shall be incurred by any of the officers or departments of any municipality, whether the object of the expenditure has been ordered by the corporate authorities or not, unless an appropriation has been previously made concerning that contract or expense. Any contract made, or any expense otherwise incurred, in violation of the provisions of this section shall be null and void as to the municipality, and no money belonging

thereto shall be paid on account thereof. However, pending the passage of the annual appropriation ordinance for any fiscal year, the corporate authorities may authorize heads of departments or other separate agencies of the municipality to make necessary expenditures for the support thereof upon the basis of the appropriations of the preceding fiscal year. However, if it is determined by two-thirds vote of the corporate authorities then holding office at a regularly scheduled meeting of the corporate authorities that it is expedient and in the best public interest to begin proceedings for the construction of a needed public work, then the provisions of this section shall not apply to the extent that the corporate authorities may employ or contract for professional services necessary for the planning and financing of such public work.

This section shall not apply to municipalities operating under special charters."

The purpose and effect of this provision has been summarized in Beling v. City of East Moline, 14 Ill. App. 2d 263, at pp. 272-274:

"* * * [T]he purpose of the statute being to protect the municipal treasury against the incurring of liabilities which exceed the appropriation or for which none has been made. Avery v. City of Chicago, 345 Ill. 640, 651. Without a prior appropriation, it is impossible for a city to create a liability against itself payable out of its general funds. Gathemann v. City of Chicago, 263 Ill. 292, 298. This law is mandatory and was enacted for the protection of the taxpayer. Empire Voting Mach. Co. v. City of Chicago (C.C.A.

7th Cir.) 267 Fed. 162 (Certiorari denied, 65 Law Ed. 453); *People v. Sergel*, 269 Ill. 619, 622; *Avery v. City of Chicago*, supra. The law is intended to operate as a limitation upon the powers of all the officers and departments of the municipal corporation. *DeKam v. City of Streator*, supra, at 132; *Empire Voting Machine Co. v. City of Chicago*, supra, at 164, 165. Neither evasion nor circumvention of the statute is tolerated by the courts. Nor may one do indirectly what he could not lawfully do directly. *DeKam v. City of Streator*, supra; *Simpson v. City of Highwood*, supra; *Branigar v. Village of Riverdale*, supra; *Galion Iron Works & Mfg. Co. v. City of Georgetown*, 322 Ill. App. 498, 502, 505. And in the event the municipality for any reason fails or neglects to interpose the defense of nullity in an action brought to recover under such contract, any taxpayer may sue to restrain the payment by the municipality of any of its funds on account thereof. *Litz v. Village of West Hammond*, 230 Ill. 310; *DeKam v. City of Streator*, supra.

* * *

It is settled law in our state that where payment for engineering services under a contract such as we have here under consideration is to come from the general fund of the city, an appropriation for the payment of said services must be made prior to the execution of the contract, otherwise the contract is void. *DeKam v. City of Streator*, 316 Ill. 123; *Galion Iron Works & Mfg. Co. v. City of Georgetown*, 322 Ill. App. 498, 54 N.E. 2d 601.

The law is well settled that where a city enters into a contract for the construction of a public works including engineering services, that provides for the payment of said services out of a special fund such agreement is valid. *Simpson v. City of Highwood*, 372 Ill. 212, 23 N.E. 2d 62; *DeLeuw, Cather & Co. v. City of Joliet*, 327 Ill. App. 453, 64 N.E. 2d 779.

* * *

David Fogel - 8.

If this provision is applicable to the proposed inter-governmental contract for police services, it would prevent the smaller municipalities from contracting with Vandalia to reimburse Vandalia for possible future claims for disability and retirement pensions since these sums are not ascertainable and the smaller municipalities could not possibly provide for them by a prior appropriation.

I am of the opinion that this is not the case and that the Intergovernmental Cooperation Act, supra, since it is the later of the two Acts, impliedly partially repeals or amends section 8-1-7 of the Municipal Code, supra, insofar as it relates to intergovernmental contracts.

The rule concerning implied repeal has been set forth in Rosehill Cemetery Co. v. Lueder, 406 Ill. 458 at 465-466:

"* * * As a general rule repeals by implication are not favored. (Village of Glencoe v. Hurford, 317 Ill. 203; Brotherhood of Railroad Trainmen v. Elgin, Joliet and Eastern Railway Co. 382 Ill. 55; Caruthers v. Fisk University, 394 Ill. 151.) An implied repeal results from some enactment the terms and necessary operation of which cannot be harmonized with the terms and necessary effect of an earlier act, and therefore the last expression of law prevails, since it cannot be supposed that the law-making power intends to contradict and enforce laws which are contradictions. It is also essential that the implication, to be operative, must be necessary, and, if it arises out of repugnancy between two acts, the later abrogates the earlier one to the extent that it is inconsistent and irreconcilable with it, but

a later and older statute will, if possible and reasonable to do so, be always construed together, so as to give effect not only to distinct parts or provisions of the older law not inconsistent with the new law, but to give it effect as a whole, subject only to restrictions or modifications, when such seems to have been the legislative purpose. People ex rel. Mathews v. Board of Education, 349 Ill. 390; People v. Shader, 326 Ill. 145; Schneider v. Board of Appeals, 402 Ill. 536.

* * *

Self-insurance naturally implies that the entity is undertaking a risk which could result in a liability of an uncertain amount. It is this very type of undertaking which section 6 of the Intergovernmental Cooperation Act authorizes. If section 8-1-7 of the Municipal Code were applicable to this situation, it would make section 6 of the Intergovernmental Cooperation Act inoperable. Since we must presume that the legislature intended that section 6 be effective, we must also assume that it impliedly partially repealed or amended section 8-1-7 of the Municipal Code insofar as it relates to intergovernmental contracts. I, therefore, am of the opinion that the municipalities have the power to contract to bind themselves to reimburse Vandalia for retirement and disability

David Fogel - 10.

pension liabilities.

Although this opinion means that municipalities may enter into such contracts under the authority of the Intergovernmental Cooperation Act, it should not be construed to mean that municipalities may enter into such contracts without regard to other provisions of the statutes which do not conflict with the Intergovernmental Cooperation Act and the Constitution of Illinois which are relevant to contracts and debts of municipalities.

Very truly yours,

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