



TYRONE C. FAHNER

ATTORNEY GENERAL
STATE OF ILLINOIS

SPRINGFIELD
November 9, 1982

FILE NO. 82-037

COUNTIES:

Amenability of Drainage District
to County Floodplain Ordinance

Honorable Theodore J. Floro
State's Attorney
McHenry County
2200 North Seminary Avenue
Woodstock, Illinois 60098

Dear Mr. Floro:

I have your letter in which you ask the following questions:

1. Can McHenry County enforce its floodplain ordinance requirements within the Coon Creek Drainage District?
2. If there is a conflict, which has priority within a district - the county ordinance or the drainage district authority?

For the reasons hereinafter stated, it is my opinion that McHenry County can enforce its floodplain ordinance within the Coon Creek Drainage District. The floodplain ordinance, however, will not be enforceable against the drainage district

Honorable Theodore J. Floro - 2.

where there is an irreconcilable conflict between such ordinance and the drainage district's statutory powers and duties.

The authority to form drainage districts is found in section 3-1 of the Illinois Drainage Code (Ill. Rev. Stat. 1981, ch. 42, par. 3-1):

"Drainage Districts. Drainage districts may be formed to construct, maintain or repair drains or levees or to engage in other drainage or levee work for agricultural, sanitary or mining purposes."

Once a drainage district is formed, it is a body politic and corporate. (Ill. Rev. Stat. 1981, ch. 42, par. 3-24.)

A drainage district is governed by a board of commissioners, who are given the powers specified in subsection 4-14(c) of the Code (Ill. Rev. Stat. 1981, ch. 42, par. 4-14(c)):

"The commissioners constitute the corporate authorities of the district and shall exercise the corporate functions conferred by law. The commissioners are empowered to: * * * (c) do all acts necessary for the purpose of surveying, constructing, altering, enlarging, protecting, repairing and maintaining any drain, levee or other work of the district and go upon lands either within or outside of the district for the purpose of examining the same in connection with the work of the district and making surveys, doing no more damage than the occasion may require; * * * ."

Certain powers, such as the duty to keep the system in repair and to make minor improvements, are exercisable within the sole discretion of the commissioners. (Ill. Rev. Stat. 1981, ch. 42, par. 4-15.) Other powers may be exercised only subject to court approval:

"When authorized by the court, the commissioners may: (a) construct additional drains, ditches, levees or other works necessary for the drainage or protection of the lands in the district, including the construction of one or more pumping plants; (b) alter, enlarge, extend, improve, deepen, widen or straighten any drain, levee, pumping plant or other work within the district and may do any such work outside the district when necessary to obtain a proper outlet or to protect the lands in the district; (c) change the method of construction, route, size, capacity, termini or plans of any proposed drain, levee or other work of the district; (d) purchase, acquire or lease and maintain and operate dredge boats, draglines, bulldozers or other machinery or equipment necessary for the construction, repair, maintenance and preservation of any drain, levee or other work of the district; (e) purchase mowing machines, tractors, sprayers or other like equipment for keeping the drains, levees, banks and right-of-way free from weeds, brush or other obstructions; (f) construct access roads when such roads are necessary to protect or maintain any drain, levee, pumping plant or other work or structure of the district; (g) level spoil banks and excavated material to permit cultivation or use for roadway or other lawful purposes; (h) construct headwalls, bulkheads, spillways, surface water inlets and tile outlets as a part of the drainage system of the district; and (i) abandon any drain, levee or other work of the district, or any part thereof, when the same is no longer of value or service to the district or has been adequately replaced or superseded by other works." (Ill. Rev. Stat. 1981, ch. 42, par. 4-16.)

In addition to the powers set forth above, a drainage district has the power to acquire property necessary to the district, and may exercise the power of eminent domain. (Ill. Rev. Stat. 1981, ch. 42, par. 4-17.) The combined effect of these provisions is to give drainage districts the power to acquire land and to perform those functions necessary to promote drainage for agricultural, sanitary and mining purposes.

Honorable Theodore J. Floro - 4.

Section 1 of "AN ACT in relation to county zoning"
(Ill. Rev. Stat. 1981, ch. 34, par. 3151) states, in pertinent
part, as follows:

"For the purpose of promoting the public health,
safety, morals, comfort and general welfare, conserv-
ing the values of property throughout the county,
lessening or avoiding congestion in the public streets
and highways, and lessening or avoiding the hazards to
persons and damage to property resulting from the
accumulation or runoff of storm or flood waters, the
board of supervisors or board of county commissioners,
as the case may be, of each county, shall have the
power to regulate and restrict the location and use of
buildings, structures and land for trade, industry,
residence and other uses which may be specified by
such board, to regulate and restrict the intensity of
such uses, to establish building or setback lines on
or along any street, trafficway, drive, parkway or
storm or floodwater runoff channel or basin outside
the limits of cities, villages and incorporated towns
which have in effect municipal zoning ordinances;
* * *

* * *

(Emphasis added.)

Pursuant to section 1, the McHenry County Board has enacted a
floodplain ordinance.

The ordinance defines the terms "Flood Plain" and
"Flood Hazard Area" as follows:

"Flood Plain: The continuous area contiguous to
a lake, watercourse, stream or stream bed, depression-
al pocket or area, the elevation of which is greater
than the normal water level or pool elevation, but
equal to or lower than the flood base elevation.

* * *

Flood Hazard Area: Any area composed of flood
plain as defined above.

* * *

Honorable Theodore J. Floro - 5.

Further, the ordinance prohibits certain activities within a flood hazard area without prior issuance of a Conditional Use by the county board:

"Without the prior issuance of a Conditional Use by the County Board, it shall be unlawful for any person to conduct any of the following activities upon the flood hazard areas, or in any watercourse, lake, stream, channel, wetland, marsh or swamp, as determined by the Official Flood Hazard Maps and Reports of McHenry County.

1. To erect any building or structure, or portion thereof, or to structurally modify or expand any existing building, for living purposes as a dwelling, residence, hotel, townhouse or institutional home.
2. To place or deposit, or permit to be replaced or deposited, any fill or debris, effluent or waste material including but not limited to structures, building materials, excavated spoil, earth fill from beyond the site; abandoned automobiles and septic systems.
3. To dig, dredge, or in any way alter or remove any materials, soils, or substances, including but not limited to the deepening of any channels.
4. To construct any culverts, docks, dams, bulkheads or boathouses.
5. To remove natural vegetation and thereby expose soil surfaces upon flood plain land or upon any adjacent areas, which would result in erosion and sediment deposition upon any flood plain or into any watercourse."

The scope of the restrictions imposed by the ordinance is such that, if it were to be applied to drainage districts, a great deal of the power to decide the location and nature of drainage

Honorable Theodore J. Floro - 6.

district projects, together with jurisdiction over the repair and maintenance of these projects, would be vested in the county, and not in the drainage district or the court.

In opinion No. S-1421, issued April 11, 1979 (1979 Ill. Att'y Gen. Op. 40), my predecessor advised that a county zoning and building code, imposed pursuant to section 1 of "AN ACT in relation to county zoning", would not apply to a Forest Preserve District within the county when compliance with such code would interfere with the accomplishment of the Forest Preserve District's statutory mandate. My predecessor relied, in part, on Decatur Park District v. Becker (1938), 368 Ill. 442, in which appellant argued that a park district, with statutory power to condemn land for park and playground purposes, could exercise its power only in areas appropriately zoned by the city of Decatur. In response to appellant's argument, the court, at page 447, stated:

" * * *

* * * If appellants' contention is correct, it would be necessary for the appellee to locate its city parks and playgrounds in commercial and industrial zones exclusively. The appellee is given authority to locate parks, and the city is given authority to adopt a zoning ordinance. The legislature did not empower cities to exclude parks from residence districts. The two statutes should be construed so that the ordinance of the park district and the zoning ordinance of the city will be given effect in their respective fields of operation. Regardless of the fact that this property was zoned as 'A' residence property, the park district could condemn and use it for park purposes.

* * *

"

Honorable Theodore J. Floro - 7.

This principle was reaffirmed in City of Des Plaines v. Sanitary District (1971), 48 Ill. 2d 11, which related to a proposal by the Metropolitan Sanitary District of Greater Chicago to build a sewage treatment plant in the city of Des Plaines. At the time of the decision of this case, the city of Des Plaines was not a home rule unit. The Sanitary District argued that it could proceed with the proposed use even though the zoning ordinance of Des Plaines prohibited it. The court held for the Sanitary District, stating at page 14:

" * * *

* * * The statute clearly authorized the taking of the property in question in the City of Des Plaines. To find that the condemnation power of the district is subject to the restrictions of local municipal zoning ordinances would be to relegate the authority of the district to that of a private land owner, and would thereby frustrate the purpose of the statute. If the district is exercising power within the statutory grant, such exercise is not subject to zoning restrictions imposed by the host municipality.
* * *

* * *

"

Following the effective date of the 1970 Illinois Constitution on July 1, 1971, the principle expressed in Decatur Park District and City of Des Plaines was examined against the powers of home rule units. In O'Connor v. City of Rockford (1972), 52 Ill. 2d 360, the principle was upheld regarding the zoning ordinance of a non-home-rule county. In

Honorable Theodore J. Floro - 8.

City of Chicago v. Pollution Control Board (1974), 59 Ill. 2d 484, however, the court concluded that a home rule unit could legislate concurrently with the State on environmental control. The court did not expressly confine its holding to home rule units, just as the O'Connor court did not confine its holding to non-home-rule units. The court in Carlson v. Village of Worth (1975), 62 Ill. 2d 406, followed the decision of the court in O'Connor, in a case involving a non-home-rule village. However, since the court in Carlson did not confine its holding to non-home-rule units, the decision was viewed as casting doubt on the continued vitality of City of Chicago, even as to home rule units. (See Carlson v. City of Worth (1976), 62 Ill. 2d 406, 411, 424-26; Metropolitan Sanitary District v. City of Des Plaines (1976), 63 Ill. 2d 256, 260.) Finally, in County of Cook v. John Sexton Contractors (1979), 75 Ill. 2d 494, 514-15, the court upheld the decisions of the courts in O'Connor v. City of Rockford (1972), 52 Ill. 2d 360, and Carlson v. Village of Worth (1975), 62 Ill. 2d 406, as far as non-home-rule units are concerned.

In view of the foregoing rulings, it is my opinion that McHenry County, which is not home rule, does not have power to enforce its floodplain ordinance against the Coon Creek Drainage District to the extent that such enforcement would prevent the drainage district from carrying out its statutory powers and duties.

Honorable Theodore J. Floro - 9.

This does not mean that, in the absence of an irreconcilable conflict, the drainage district can proceed in disregard of the lawful ordinances of McHenry County, nor does it mean that the McHenry County floodplain ordinance is not enforceable within the drainage district. The rationale of the Decatur Park District and Des Plaines cases applies only where there is an irreconcilable conflict between local ordinances and a clear statutory mandate. Where the statutory mandate and the local ordinance are not irreconcilable, effect must be given to both.

In Village of Swansea v. County of St. Clair (1977), 45 Ill. App. 3d 184, a village attempted to prevent the construction of a dog pound by the county. Relying on the Des Plaines case, the court held that the construction was not subject to the village zoning ordinances. The court went on to hold, however, that the county did have to comply with the village's building, sewer, and electrical and plumbing ordinances. As the court stated at page 188:

" * * *

For the foregoing reasons, we believe that defendant can build and operate its proposed pound despite the zoning ordinances of the plaintiff. However, we do not think that defendant can proceed in total disregard of plaintiff's building, sewer, electrical and plumbing ordinances. The North Shore and Des Plaines cases are limited to noncompliance with zoning ordinances; they do not purport to excuse compliance with building, sewer, electrical and plumbing ordinances. The distinction is obvious, for these latter ordinances are not by their very nature

Honorable Theodore J. Floro - 10.

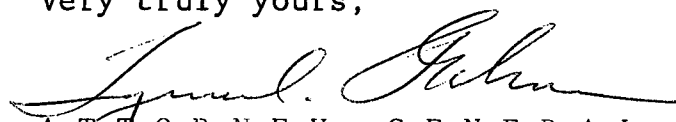
capable of thwarting the proposed building project. There, such ordinances as these are designed to promote public health and public safety. Thus, in line with our above conclusions, we believe defendant must comply with these ordinances unless such compliance interferes with defendant's functions under the Animal Control Act. Since there is insufficient evidence in the record on this latter point, we remand for hearing to determine whether or not compliance with building, sewer, electrical and plumbing ordinances would prevent defendant from carrying out the purposes of the Animal Control Act.

* * *

"

On the basis of the above discussion, it is my opinion that McHenry County is authorized to enforce its floodplain ordinance within the Coon Creek Drainage District, but not where there is an irreconcilable conflict between the floodplain ordinance and the drainage district's statutory powers and duties.

Very truly yours,


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