WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS

CHICAGO OFFICE
160 NORTH LA SALLE STREET
60601

TELEPHONE
793-3500

August 1, 1975

FILE NO. S-940

CONSTITUTION:
Home-Rule Powers--Authority of City to Contract For and Fund Segment of Interstate Highway Wholly Within its Boundaries

Honorable Norbert T. Tiemann
Federal Highway Administrator
U.S. Department of Transportation
400 Seventh Street S.W.
Washington, D.C. 20590

RE: HCC-40

Dear Mr. Tiemann:

I have your letter wherein you state:

"Your advice is requested on whether the city of Chicago has legal authority under the Illinois Constitution and statutes to agree to fund the non-Federal share of the proposed Chicago Cross-town Expressway...

Chicago seeks to contribute the non-Federal share to finance this Interstate highway under 23 U.S.C. 103(b), (P.L. 93-87, §110(b), August 13, 1973 (87 Stat. 256)), which provides:

> (h) Notwithstanding subsections (e) (2) and (g) of this section, in any case where a segment of the Interstate System was a designated part of such System on June 1, 1973, and is entirely within the boundaries of an incorporated city and such city enters into an agreement with the Secretary to pay all non-Federal costs of construction of such segment, such segment shall be constructed.

This provision was particularly adopted to permit Chicago, in contrast to the State of Illinois, to finance the Chicago Crosstown Expressway as an Interstate highway. See H. Conf. Rep. No. 355, 93rd Cong., pp. 57-58 (July 27, 1973) 119 Daily Cong. Rec. S15345-S15348 (August 1, 1973), H7407-H7409, H7411-H7415 (August 3, 1973).

This agency's regulations adopted to further 23 U.S.C. 103(h) provide in part (23 CFR 476.610(a), 39 F.R. 20668, June 12, 1974):

> (a) Any city that has filed a notification of intent under §476.610 shall, on or before January 1, 1975, submit the following information to the Federal Highway Administrator.
>
> (1) Opinion of the incorporated city's legal counsel that the city has the constitutional and statutory authority to embark upon such a capital improvement and that the governing body of the city has the legal authority to approve any agreement between the city and the Federal government to undertake such a project and to commit local funding.
>
> (2) * * *

...As the question involved is largely one of State law, we believe it would be particularly appropriate to have your views as the principal

> law officer of the State of Illinois on the matter. See Lehman Bros. v. Schein, 416 U.S. 386, 94 S. Ct. 1741 (1974)...
>
> * * *"

I understand from the foregoing that you are asking for my opinion on whether, under the circumstances set forth above, the City of Chicago has legal authority under the Illinois Constitution and statutes to agree with the Federal government to fund the non-Federal share of the proposed Chicago Crosstown Expressway and to undertake the capital improvement required by the Expressway. Accordingly my opinion is confined to these questions of constitutional and statutory power and does not consider or pass upon any collateral matters, such as construction contracts, the terms and effect of ordinances, matters of title or of land acquisitions, or other legal issues, which might arise in giving effect to the mandate of 23 U.S.C. 103(h) that on compliance with its requirements by a city "such segment [of an interstate system] shall be constructed".

It is my opinion, for the reasons hereinafter set forth, that the City of Chicago does have the legal authority under the Illinois Constitution and statutes to agree with the Federal government to fund the non-Federal share of the proposed Crosstown Expressway and to undertake the capital

improvement required by that Expressway. Such authority may be exercised by the due adoption of an appropriate home-rule ordinance by the City Council of Chicago.

A major and fundamental development controlling the answer to the questions you have asked occurred on July 1, 1971. On that date the new Illinois Constitution of 1970 became effective. The home-rule provisions of the new Constitution completely reversed, for home-rule units such as Chicago, the fundamental law theretofore governing their legal powers and authority. In addition, the new Constitution expressly granted broad powers for inter-governmental cooperation to all units of local government (whether home-rule units or not) including authority for cities to contract with the United States government.

In setting forth the reasons and basis for my opinion, I will deal separately with these two major constitutional developments which are of controlling significance.

HOME-RULE POWERS

Prior to the adoption of the new Constitution, Illinois municipalities were totally dependent upon the General Assembly for their authority to carry on local activities. This dependent status was described in a passage from

Judge Dillon's treatise on municipal law which became known as Dillon's Rule (1 Dillon, Municipal Corporations 448 (1911)):

> "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, --not simply convenient but indispensable." (Emphasis supplied).

The reversal or abrogation of Dillon's Rule was expressly stated to be a major intention and objective of the delegates to the Sixth Constitutional Convention as evidenced by the Record of Proceedings of that Convention (herein called Proceedings). That major goal is demonstrated in committee reports and in debates on both the home-rule and the intergovernmental cooperation powers (VII Proceedings 1604, 1748; IV Proceedings 3024-25, 3039).

The great change made by the 1970 Constitution and the broad powers thereby granted to home-rule units have been emphasized by the Supreme Court in Kanellos v. County of Cook, 53 Ill. 2d 161, 166 (1972), the leading case on home-rule powers:

> "The concept of home rule adopted under the provisions of the 1970 constitution was designed

> to drastically alter the relationship which previously existed between local and State government. Formerly, the actions of local governmental units were limited to those powers which were expressly authorized, implied or essential in carrying out the legislature's grant of authority. Under the home-rule provisions of the 1970 constitution, however, the power of the General Assembly to limit the actions of home-rule units has been circumscribed and home-rule units have been constitutionally delegated greater autonomy in the determination of their government and affairs. To accomplish this independence the constitution conferred substantial powers upon home-rule units subject only to those restrictions imposed or authorized therein." (Emphasis supplied)

The controlling provisions of the new Constitution which reverse Dillon's Rule and furnish the new source of municipal power for Illinois home-rule units are found in Section 6 of Article VII of the Illinois Constitution; they state in pertinent part as follows:

> "(a) A County which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000 are home rule units. Other municipalities may elect by referendum to become home rule units. Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.
>
> * * *
>
> (g) The General Assembly by a law approved by the vote of three-fifths of the members elected

to each house may deny or limit the power to tax and any other power or function of a home rule unit not exercised or performed by the State other than a power or function specified in subsection (1) of this Section.

(h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in subsection (1) of this Section.

(i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.

(j) The General Assembly may limit by law the amount of debt which home rule counties may incur and may limit by law approved by three-fifths of the members elected to each house the amount of debt, other than debt payable from ad valorem property tax receipts, which home rule municipalities may incur.

(k) The General Assembly may limit by law the amount and require referendum approval of debt to be incurred by home rule municipalities, payable from ad valorem property tax receipts, only in excess of the following percentages of the assessed value of its taxable property: (1) if its population is 500,000 or more, an aggregate of three percent; (2) if its population is more than 25,000 and less than 500,000, an aggregate of one percent; and (3) if its population is 25,000 or less, an aggregate of one-half percent. Indebtedness which is outstanding on the effective date of this Constitution or which is thereafter approved by referendum or assumed from another unit of local government shall not be included in the foregoing percentage amounts.

* * *

(m) Powers and functions of home rule units shall be construed liberally."

The key question under section 6(a) is whether undertaking the capital improvement embodied in the Expressway and agreeing to fund the non-Federal share thereof constitute the exercise by the City of a home-rule "power" or "function pertaining to its government and affairs".

The answer to this key home-rule question is found (a) in the plain and ordinary meaning of the words "any power ...and any function pertaining to its government and affairs" as used in section 6(a); (b) in the fact that Illinois municipalities have long exercised highway powers and functions under the highway and Federal grant statutes adopted before the 1970 Constitution; and (c) in the Federal recognition of the scope of municipal powers and functions, evidenced by 23 U.S.C. 103(h).

To state the question in constitutional terms is to answer it. The plain meaning of the words used is that (except as limited by section 6 itself) any power and any function may be exercised or performed by a home-rule unit as long as the power or function pertains to its government and affairs. If undertaking the capital improvement embodied in the Expressway and if agreeing to fund the non-Federal

share thereof are the exercise of powers pertaining to the government and affairs of the City of Chicago clearly the City has directly from the 1970 Constitution the power to undertake the improvement embodied in the Expressway and to agree to fund the non-Federal share. This meaning is demonstrated by the context in which the words appear in section 6(a):

> "...a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." (Emphasis supplied)

As a matter of the ordinary meaning of words, these specified powers clearly embrace highway powers and funding thereof.

The principle has long been established in Illinois law that the plain meaning of words used in a constitution must be given effect according to their usual signification. In Graham v. Dye, 308 Ill. 283, 286-7 (1923), the Supreme Court ruled:

> "...The intent and meaning of the constitution are to be determined from the language used in its provisions. We said in People v. Stevenson, 281 Ill. 17: 'As a constitution is dependent upon adoption by the people, the language used will be understood in the sense most obvious to the common understanding. The language and words of a constitution unless they be technical words and phrases, will be given effect according to their

> usual and ordinary signification, and courts will not disregard the plain and ordinary meaning of the words used, to search for some other conjectural intention..."

But the answer need not stop there. Pre-1970 statutes, and the acts and practices of the State and of municipalities thereunder, demonstrate that Illinois municipalities have long exercised extensive powers both independently of, and concurrently with, the State in the laying out, financing and construction of streets, highways, and freeways within city limits. These statutes whether they permit concurrent actions by the State and a municipality or independent action by a municipality alone, evidence long-established recognition and understanding by the State that such highway powers and functions do indeed pertain "to the government and affairs" of municipalities such as the City of Chicago.

The pre-1970 statutes above referred to granted power to Chicago and other municipalities to designate, lay out, construct streets, highways, freeways, and, in accordance with the Federal Aid Road Act, 23 U.S.C. sec. 101 et seq., Federal-aid urban system highways, within their boundaries. See sections 1-102, 2-104, 2-207, 3-104.1, 3-108, 7-101, 7-203.2, and 8-101 of the Illinois Highway Code

(Ill. Rev. Stat. 1973, ch. 121, pars. 1-102, 2-104, 2-207, 3-104.1, 3-108, 7-101, 7-203.2 and 8-101), and sections 11-61-1 and 11-61-2 the Illinois Municipal Code (Ill. Rev. Stat. 1973, ch. 24, pars. 11-61-1 and 11-61-2). Section 8-101 of the Highway Code, for example, authorizes municipalities to

> "...designate and establish any existing or proposed highway...as a freeway...and to plan, locate,...construct...maintain...and regulate the use of such freeway..."

For further illustration see also section 3-104.1 of the Highway Code, supra, which provides that any street or highway included in the Federal aid primary type II system or the Federal aid urban system may be constructed jointly at the expense of the Federal government and a municipality in accordance with the Federal Aid Road Act, supra.

Municipal "power" and "function" in Federal aid highways are further recognized by section 3-108 supra of the Highway Code which provides that any highway constructed as a Federal aid highway shall be a part of the State highway system:

> "...unless, under the provisions of Section ...3-104.1...there is an agreement or provision made for its maintenance by the...municipality, in which case it shall be part of the...municipal

street system." (Emphasis supplied.)

While prior to 1970 the Illinois Department of Transportation was authorized by section 3-103 of the Highway Code (Ill. Rev. Stat. 1973, ch. 121, par. 3-103) to enter into all agreements with the Federal government relating to the selection, construction and maintenance of highways under the provisions of the Federal Road Aid Act, supra, the primacy of that authority was superseded by the plenary home-rule power granted by the Constitution. Even prior to 1970 the section was an authorizing provision; it does not purport to express exclusivity.

Neither the Highway nor the Municipal Code provisions discussed above, nor any other provisions of those codes, expressed or implied any exclusive power in the State over highways, freeways, or Federal aid highways or over the making of contracts with, or the accepting of grants or loans from the Federal government pursuant to "AN ACT enabling units of local government in this State to finance public works projects" (Ill. Rev. Stat. 1973, ch. 29, par. 33a). On the contrary, the Highway Code expressly provides that the State, counties, townships, and municipalities will exercise concurrent powers and cooperate and work together. This legislative intent is expressed in section 1-102 of the

Highway Code, supra:

> "...It is further declared that highway transportation system development requires the cooperation of State, county, township, and municipal highway agencies and coordination of their activities on a continuous and partnership basis and the legislature intends such cooperative relationships to accomplish this purpose."

All those concurrent powers which heretofore permitted a municipality to act concurrently in highway matters are confirmed and continued in effect by the express provisions of section 6(i) of Article VII of the Constitution, which reads as follows:

> "(i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive."

The General Assembly has neither specifically limited the exercise of any of the above concurrent powers nor declared the State's exercise thereof to be exclusive.

The State of Illinois is not alone in recognizing by its laws that highway matters are a valid concern of a municipality. The Congress of the United States takes the same view in the 1973 amendment of the Federal Aid Highway Act (23 U.S.C. 103(h), P.L. 93-87, sec. 110(b), August 13, 1973). The amendment added subsection (h) to section 103 as follows:

> "(h) Notwithstanding subsections (e) (2) and (g) of this section, in any case where a segment of the Interstate System was a designated part of such System on June 1, 1973, and is entirely within the boundaries of an incorporated city and such city enters into an agreement with the Secretary to pay all non-Federal costs of construction of such segment, such segment shall be constructed."

You advise in your letter that this provision

> "...was particularly adopted to permit Chicago, in contrast to the State of Illinois, to finance the Chicago Crosstown Expressway as an Interstate Highway..."

Thus statutes passed before the adoption of the 1970 Constitution and acts and practices of the State, as well as municipalities, demonstrate that municipalities in Illinois have long exercised extensive powers both independently of, and concurrently with, the State in the laying out, financing, and constructing of streets, highways, and freeways within city limits.

The conclusions set forth above are confirmed and supported by examining three specific powers, pertinent to your inquiry, which are expressly identified in section 6(a) as included in powers and functions of home-rule units "pertaining to their government and affairs" (VII Proceedings 1622). The last sentence of section 6(a) ends as follows:

> "...exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals

and welfare;...to tax; and to incur debt." (Emphasis Supplied)

The first named of these powers in section 6(a) is "...the power to regulate for the protection of the public health, safety, morals and welfare;...", or, as the drafting Committee put it, "this basic 'police power'" (VII Proceedings 1623). The words used in 6(a) are those customarily used in referring to the police power, that is, the general regulating power inherent in any civil government (LaSalle National Bank of Chicago v. City of Chicago, 5 Ill. 2d 344, 350 (1955); Sherman-Reynolds, Inc. v. Mahin, 47 Ill. 2d 323, 326 (1970)).

It has been generally recognized the concept of "police power" encompasses within its scope the power to control public streets and regulate their use (People by Attorney General v. Barbuas, 230 Ill. App. 560 (1923); City of Decatur v. Chasteen, 19 Ill. 2d 204 (1960)); the concept also includes the power to lay-out and construct streets and highways and improvements connected therewith (Western Union Telegraph Co. v. Louisville & N.R. Co., 270 Ill. 399, 417 (1915); Escanaba and Lake Michigan Transp. Co. v. City of Chicago, 107 U.S. 78 (1883); People ex rel. Curren v. Schommer, 392 Ill. 17 (1945)).

Court decisions have confirmed this conclusion: Peters v. City of Springfield, 57 Ill. 2d 142 (1974) reduction of mandatory retirement age for policemen and firemen from 63 to 60; City of Chicago v. Pollution Control Board, 59 Ill. 2d 484 (1974) environmental protection; Johnny Bruce Co. v. City of Champaign, 24 Ill. App. 3d 900 (1974) zoning; Liquor Control Commission v. City of Calumet, 28 Ill. App. 3d 279 (1975) prohibiting sale of wine or beer to 19 and 20 year olds.

The second and third specific home-rule powers conferred by section 6(a) are the powers "to tax; and to incur debt." They are stated in as plain and unqualified terms as the English language permits. They support the conclusion that the City of Chicago as a home-rule unit has the power to fund the non-Federal cost of the expressway segment.

The Illinois Supreme Court has sustained home-rule taxing ordinances in the following illustrative cases: Bloom v. Korshak, 52 Ill. 2d 56 (1972) cigarette tax; Jacobs v. City of Chicago, 53 Ill. 2d 421 (1973) parking tax; Rozner v. Korshak, 55 Ill. 2d 430 (1973) wheel tax; and Paper Supply Co. v. City of Chicago, 57 Ill. 2d 553 (1974) Employer's Expense Tax.

The broad home-rule power to incur debt is demonstrated by Kanellos v. County of Cook, 53 Ill. 2d 161, 165 (1972), in which the Supreme Court said:

> "...The power of a home-rule county to incur debt is singularly of local concern..."

That home-rule powers have been sustained in numerous cases is doubtless due to the clear reversal of Dillon's Rule, the broad powers so plainly stated in the Constitution, and the strong record of the Convention's purposes shown in its Proceedings. In addition the Constitution itself mandated in section 6(m) that "Powers and functions of home-rule units shall be construed liberally." The Supreme Court has ruled that this mandate must be fulfilled. (Ryan v. Korshak, 52 Ill. 2d 56, 59 (1972); Paper Supply Co. v. City of Chicago, 57 Ill. 2d 553, 572 (1974)).

Furthermore, the Court has recognized that home-rule powers are granted directly by the Constitution itself. They are self-executing in the sense that no legislation is needed to make them effective (Kanellos v. Cook County, 53 Ill. 2d 161, 162, 164 (1972); IV Proceedings 3426; VII Proceedings 1748).

The only manner in which home-rule powers may be limited or denied is set forth in sections 6(g), (h), (i),

(j), and (k) of Article VII quoted above. The General Assembly is authorized under Section 6 to limit or prohibit home-rule powers when it takes the express and specific action prescribed by sections 6(g), (h), (i). By similar action it may impose limits on, or require a referendum for the incurring of certain kinds and amounts of debts, as specified by sections 6(j) and (k). If the legislature seeks to limit or deny home-rule powers its action must be both express and specific. Kanellos v. Cook County, 53 Ill. 2d 162, 167 (1972); City of Chicago v. Pollution Control Board, 59 Ill. 2d 484, 489 (1974). An examination of the Illinois Revised Statutes from July 1, 1971, to date discloses that no action has been taken by the General Assembly limiting or denying the home-rule powers herein considered.

Even if a pre-1970 statute purported to deny or limit a home-rule power, that conflicting statute would be superseded by the home-rule ordinance exercising any such power.

In Kanellos the Supreme Court held that section 40 of the Counties Act adopted prior to 1970 and in conflict with a home-rule ordinance, did not limit or deny the home-rule power exercised by that ordinance. The Court

said (pp. 166-167)

> "...It was enacted prior to and not in anticipation of the constitution of 1970 which introduced the concepts of home rule and the related limitation of sections 6(g) and 6(h). Such considerations were totally foreign in the contemplation of legislation adopted prior to the 1970 constitution. The statute is therefore inconsistent with the provisions of section 6(g) and the Transition Schedule. (See Helman and Whalen, Constitutional Commentary, S.H.A. Const. of 1970, art. VII, sec. 6, p. 26.) While a referendum requirement may be imposed upon a home-rule county to regulate a 'power or function not exercised or performed by the State,' such restriction must be specifically enacted by the General Assembly with the requisite legislative majority."

Accord: People ex rel. Hanrahan v. Beck, 54 Ill. 2d 561, 565-6 (1973); Rozner v. Korshak, 55 Ill. 2d 430, 434 (1973); Peters v. City of Springfield, 57 Ill. 2d 142, 147-149 (1974); Clarke v. Village of Arlington Heights, 57 Ill. 2d 50, 54 (1974).

The clear language of the constitutional home-rule provisions coupled with the interpretation which those provisions have received in the courts of the State support the conclusion herein above expressed.

INTERGOVERNMENTAL COOPERATION POWERS

The home-rule powers conferred by Section 6 of Article VII are powerfully reinforced by another new provision of the 1970 Constitution. Section 10 of Article VII

directly grants to all municipalities broad intergovernmental cooperation powers. It confirms and amplifies the home-rule powers of the City of Chicago, conferred by section 6(a), to undertake an expressway project and finance the non-Federal costs thereof. Section 10 provides in pertinent part:

> "Section 10. Intergovernmental Cooperation (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. ... Participating units of government may use their credit, revenues, and other resources to pay costs and to service debt related to intergovernmental activities.
>
> * * *
>
> (c) The State shall encourage intergovernmental cooperation and use its technical and financial resources to assist intergovernmental activities." (Emphasis supplied)

This section, like section 6(a), is self-executing (VII Proceedings 1748; IV Proceedings 3426). It requires no further authorization or legislative support from the General Assembly. In Connolly v. County of Clark, 16 Ill. App. 3rd 947, 951 (1973), the Court said:

> "Thus Dillon's Rule of strictly construing legislative grants of authority to local governmental units has been abrogated by Section 10 of

> Article VII of the 1970 Constitution when local governments voluntarily cooperate to share services on a partnership or joint venture basis. ..."

To the same effect, citing Helman and Whalen's Commentary (S.H.A. Const. Art. VII, Sec. 10), is Village of Elmwood Park v. Forest Preserve District of Cook County, 21 Ill. App. 3d 597, 601 (1974).

The significance of Section 10 of Article VII to the present inquiry lies in the constitutional policy which it strongly enunciates, namely, encouragement of inter-governmental cooperation and the use of technical and financial resources to assist inter-governmental activities.

Under this section the City of Chicago in the exercise of its home-rule powers has broad authority to contract with the United States. The words "any power or function" in section 10 echo the home-rule language of section 6(a). Thus the City has all the home-rule powers and functions conferred by that section and may contract with the United States in relation thereto. Finally, section 10 gives express power "to pay costs and service debt" under any such contract and to use the City's credit, revenue, or other resources therefor. This is just what an agreement to fund the non-Federal share would require and provide. It might be noted that the Intergovernmental

Cooperation Act of 1973 (Ill. Rev. Stat. 1973, ch. 127, pars. 742-745) supplements section 10.

It is therefore my opinion that the home-rule powers of section 6, and the intergovernmental cooperation powers of section 10 of Article VII of the Illinois Constitution confer authority on the City of Chicago to agree to fund the non-Federal share of the proposed Chicago Crosstown Expressway and undertake the capital improvement involved therein.

Very truly yours,

William J. Scott

ATTORNEY GENERAL