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FILE NO. 96-003

COUNTIES:
Authority to Establish
Setbacks from Property Lines

Honorable Richard W. Ringhausen
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201 West Pearl Street
Jerseyville, Illinois 62052

Dear Mr. Ringhausen:

I have your letter wherein you inquire whether, in addition to its authority to establish setback lines from public roads, streets, traffic ways, drives and parkways under section 5-13001 of the Counties Code (55 ILCS 5/5-13001 (West 1994)), a non-home-rule county has the general authority to establish setbacks from property lines. For the reasons hereinafter stated, it is my opinion that county boards do have the authority to impose certain construction regulations and measurement controls including setbacks from property lines.

It is well established that non-home-rule counties possess only those powers which have been expressly granted to them by the constitution or by statute, together with those

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powers which are necessarily implied therefrom to effectuate the powers which have been expressly granted. (Redmond v. Novak (1981), 86 Ill. 2d 374, 382; Heidenreich v. Ronske (1962), 26 Ill. 2d 360, 362.) As you have correctly noted, counties have been granted the authority to establish setback lines from specified roadways under section 5-13001 of the Counties Code, which provides, in pertinent part:

"Establishment of building or set-back lines. In addition to the existing power and to the end that adequate safety may be secured and the congestion of public roads, streets, traffic-ways, drives and parkways may be lessened or avoided, the county board of each county is authorized and empowered to establish, regulate and limit the building or set-back lines on or along any road, street, traffic-way, drive or parkway in the county outside the corporate limits of any city, village or incorporated town, as may be deemed best suited to carry out the provisions of this Division. * * *"
(Emphasis added.)

While it is clear that counties may establish setbacks from specified roadways under the language quoted above, you have asked whether the phrase "in addition to the existing power" refers to other preexisting authority which would allow county boards to establish setbacks from property lines. In this regard, you have suggested that the clause may refer to section 5-1063 of the Counties Code (55 ILCS 5/5-1063 (West 1994)) which provides:

"* * * For the purpose of promoting and safeguarding the public health, safety, comfort and welfare, a county board may pre-

scribe by resolution or ordinance reasonable rules and regulations (a) governing the construction and alteration of all buildings, structures and camps or parks accommodating persons in house trailers, house cars, cabins or tents and parts and appurtenances thereof and governing the maintenance thereof in a condition reasonably safe from hazards of fire, explosion, collapse, electrocution, flooding, asphyxiation, contagion and the spread of infectious disease, where such buildings, structures and camps or parks are located outside the limits of cities, villages and incorporated towns, but excluding those for agricultural purposes on farms including farm residences, but any such resolution or ordinance shall be subject to any rule or regulation heretofore or hereafter adopted by the State Fire Marshal pursuant to 'An Act to regulate the storage, transportation, sale and use of gasoline and volatile oils', approved June 28, 1919, as amended; (b) for prohibiting the use for residential purposes of buildings and structures already erected or moved into position which do not comply with such rules and regulations; and (c) for the restraint, correction and abatement of any violations.

* * *

"

In responding to your question, it is helpful to review the legislative history of section 5-13001 of the Counties Code, which had its genesis in section 1 of "AN ACT to authorize county boards to establish building or set-back lines on or along any road, street, traffic-way, drive or parkway outside the corporate limits of cities, villages and incorporated towns" [hereinafter referred to as the County Building and Setback Line Act] (see Laws 1933, p. 421; Ill. Rev. Stat. 1935, ch. 34, par. 152e). In the County Building and Setback Line Act, the General Assembly

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also provided that the counties' authority under its provisions was "[i]n addition to the existing power * * *". Therefore, it is necessary to review the statutes in effect in 1933 to determine the intended reference of the introductory clause.

In this regard, I note that the provisions currently set forth in section 5-1063 of the Counties Code were not enacted until 1947. (See Laws 1947, p. 744; Ill. Rev. Stat. 1947, ch. 34, par. 25.13.) Consequently, the introductory language in section 5-13001, which was originally enacted in 1933, cannot be a reference to the powers granted by section 5-1063 of the Counties Code. Moreover, a review of the statutes in effect in 1933 has disclosed no other provisions which expressly authorized counties to establish building or setback lines, to adopt building or construction standards or restrictions or to enact zoning ordinances.

This necessarily raises the issue of why the introductory clause was included in section 1 of the County Building and Setback Lines Act if it served no purpose. It is probable that the clause was inadvertantly carried over from the language of a largely identical bill authorizing municipalities to impose building setbacks which was enacted by the General Assembly in the same session. (Laws 1933, p. 218.) At the time of the enactments, municipalities, in contrast to counties, did possess statutory authority to impose building setbacks in certain situations; thus, the introductory clause clarified that

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the power granted to municipalities under the new provision (see Ill. Rev. Stat. 1935, ch. 24, par. 73a) was cumulative to those existing powers. With respect to counties, however, it appears that the inclusion of the clause was mere surplusage and of no legal significance.

Although the introductory clause in section 5-13001 does not refer to another statutory provision expressly granting county boards the authority to establish setbacks from property lines, resolution of your question still necessitates the determination of whether county boards have been granted this authority under other provisions of the Counties Code. In section 5-1063 of the Code, the General Assembly has granted county boards the authority to prescribe reasonable rules governing the construction or alteration of buildings. It is apparent that the General Assembly granted this power in an effort to minimize the hazards associated with, inter alia, fire and building collapse. In order to control or prevent the spread of fire or the hazards associated with building collapse, it is foreseeable that a county would require that reasonable distances or open space areas be maintained between buildings. To ensure that these standards are met, it would be appropriate to institute measurements from a fixed point, such as a property line. Consequently, it is my opinion that under the provisions of section 5-1063 of the Counties Code, county boards possess

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implicit power to establish reasonable setbacks from property lines in order to minimize the hazards associated with fires and building collapse.

In addition, I note that division 5-12 of the Counties Code (55 ILCS 5/5-12001 through 5-12019 (West 1994)) grants counties the authority, through zoning ordinances, to regulate and to restrict the use of specified real property. Section 5-12001 of the Code, (55 ILCS 5/5-12001 (West 1994)) provides, in pertinent part:

"Authority to regulate and restrict location and use of structures. For the purpose of promoting the public health, safety, morals, comfort and general welfare, conserving 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 county board 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 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; to divide the entire county outside the limits of such cities, villages and incorporated towns into districts of such number, shape, area and of such different classes, according to the use of land and buildings, the intensity of such use (including height of buildings and structures and surrounding open

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space) and other classification as may be deemed best suited to carry out the purposes of this Division; * * *

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(Emphasis added.)

The language of section 5-12001 expressly grants to those counties which maintain a zoning commission (55 ILCS 5/5-12007 (West 1994)) the authority to establish building or setback lines through the exercise of their zoning powers. The plain language of the section, however, provides that counties are authorized to establish setback lines only "* * * on or along any street, trafficway, drive, parkway or storm or flood water runoff channel or basin * * *."

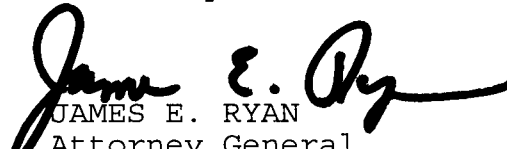
Although counties are not granted the express authority to establish setbacks from property lines under the setback provisions in section 5-12001 of the Code, other language in succeeding sentences grants to county boards the authority "* * * to regulate and restrict the location of buildings, [and] structures * * *" and to "* * * divide the entire county into districts * * * according to the use of land and buildings, [and] the intensity of such use (including height of buildings and structures and surrounding open space) * * *."

Based upon the language of section 5-12001 of the Code, the General Assembly has authorized county boards to control density, the intensity to which land is developed and the size and location of buildings on lots. It is well recognized that

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zoning regulations requiring open side and rear yard regulations are a valid exercise of a public corporation's police power in promoting public health, safety or welfare. (See Stemwedel v. Village of Kenilworth (1958), 14 Ill. 2d 470; Baker v. County of Peoria (1983), 116 Ill. App. 3d 518, appeal denied; 94 ALR 2d 394.) Consequently, it is my opinion that county boards also possess the authority, through the exercise of their zoning powers, to impose lot area, yard, height, lot coverage and other bulk regulations including setbacks from property lines.

Sincerely,


JAMES E. RYAN
Attorney General