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FILE NO. 9505

COUNTIES:
Zoning Commissioners

Honorable Lawrence E. Johnson
State's Attorney
Champaign County
Courthouse
Urbana, Illinois 61801

Dear Mr. Johnson:

I have your recent letter wherein you state in part:

"During approximately March, 1971, members were appointed to the Champaign County Zoning Commission. All of the members so appointed were also members of the Champaign County Board of Supervisors.

The Zoning Commission, as then constituted, conducted a series of public hearings and presented the proposed County Zoning Plan to citizens in attendance at said meetings. A question arose as to the compatibility of County Board members serving as members of the Zoning Commission and your opinion was sought on this question.

On September 24, 1971, you issued your opinion on this question finding membership on the County Board and Zoning Commission to be incompatible. Pursuant to your opinion the commission members originally appointed resigned and new commission members were appointed. The Zoning Commission as presently constituted does not have any

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members who are also members of the County Board of Supervisors.

In light of these developments I have been requested to seek your opinion on two questions. The questions are as follows:

1. May the newly constituted Zoning Commission utilize the information gathered by the prior Zoning Commission in the course of the several public hearings and use such information as a basis for any decisions the Commission hereinafter makes?

2. The original members of the Zoning Commission obtained per diem payment for conducting the Commission hearings. Is it necessary for the members of the original Zoning Commission to now make rebate to the County for all monies received and paid them as members of the Zoning Commission?"

In order to answer your first question, it is necessary to discuss the validity of the appointments made to the prior zoning commission.

The county board, acting pursuant to Section 2 of "An Act in relation to county zoning" (Ill. Rev. Stat. 1969, ch. 34, par. 3152) which provides for the appointment of members of the zoning commission by the chairman or president of a county board, subject to confirmation by the county board, appointed from its

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membership, the county zoning commissioners.

In my opinion No. NP-343, September 24, 1971, I held that any member of the Board of Supervisors is prohibited by statute from being appointed as a member of the zoning commission. Section 1 of "An Act to prevent fraudulent and corrupt practices in the making or accepting of official appointments * * *", provides:

"§ 1. No supervisor or county commissioner, during the term of office for which he is elected, may be appointed to, accept or hold any office other than chairman of the county board or member of the regional planning commission by appointment or election of the board of which he is a member. Any such prohibited appointment or election is void. This Section shall not preclude a member of the county board from being selected or from serving as a member of the County Personnel Advisory Board as provided in Section 12--17.2 of 'The Illinois Public Aid Code', approved April 11, 1967, as amended, or as a member of a County Extension Board as provided in Section 7 of the 'County Cooperative Extension Law', approved August 2, 1963, as amended."
(Emphasis supplied) Ill. Rev. Stat., 1969, ch. 102, par. 1.

Under the above provision, a member of the county board, during the term for which he is elected, cannot be appointed to any office other than those offices specifically

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excepted, by the county board of which he is a member. Further, any such prohibited appointment is void.

In the absence of a statutory definition indicating a different legislative intention, the courts will assume that statutory words have their ordinary and popularly understood meanings (Farrand Coal Co. v. Halpin, 10 Ill. 2d 507). The word void has been defined as having no legal force or binding effect. Black's Law Dictionary 1745 (4th ed. 1951).

By interjecting the ordinary definition of the word void into the above provision, it is evident that the appointments to the zoning commission had no legal force or binding effect and were therefore null and void; as a corollary, any and all acts of the zoning commission are by necessity also without legal force or binding effect.

Generally, where the constitution or statutes declare that persons holding one office shall be ineligible for election or appointment to another office, either generally or of a certain kind, the prohibition has been held to incapacitate the incumbent of the first office to hold the second so that any attempt to hold the second is void. 67 C.J.S. officers §23 (1950).

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Since illegal and void acts cannot be ratified (County of Cass v. Kicker, 39 Ill. App. 301, 304), I am of the opinion the newly constituted zoning commission should not utilize the information gathered by the prior zoning commission in the course of its public hearings and as a basis for any decisions the commission hereinafter makes.

Although it can be argued the zoning commissioners are de facto officers and therefore their actions valid, I am of the opinion they should not be accorded the status of de facto officers.

A de facto officer, generally stated, is one having the reputation of being the officer he assumes to be, and who performs the functions of such office, but is not entitled to the office in point of law. (Howard v. Burke, 248 Ill. App. 224.) To constitute a de facto officer, the duties of the office must be exercised under color of a known election or appointment which is void for want of power in the electing or appointing body, or for some defect or irregularity in its exercise, such as ineligibility, want of power or defect being unknown to the public. McQuillin, Municipal Corporations §12.102 (3rd ed. Rev., J. H. Dray, 1968). (Emphasis supplied)

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The acts of a de facto officer, although his title may be defective, are valid so far as they concern the public or third persons who have an interest in the thing done. (People v. Wheeler, 353 Ill. 147, 150). The acts of de facto officers are validated only from motives of public policy to preserve the rights of third persons and the public. However, the reason for validating the acts of a de facto officer do not exist if the public and third persons are aware of defects in the officers title and are not deceived thereby. McQuillin, supra, §12.106.

Assuming from your letter that the zoning commission's only actions were to hold public hearings, without the passage of a zoning ordinance, no rights have been adversely affected so as to validate the hearings.

Further, the public is charged with knowledge of the defect in the titles of the zoning commissioners. Everyone is presumed to know, and is bound to take notice of, the public law (18 I.L.P. Evidence §24, 1956). As earlier stated, Section 1 of An Act to prevent fraudulent and corrupt practices in the making or accepting of official appointments * * *. (Ill. Rev. Stat.,

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1969, ch. 102, par. 1) prohibits the appointment of a member of the county board to the zoning commission.

The appointments of the members of the County Board to the zoning commission were not secretive and the dual capacity in which those persons were acting was a matter of public knowledge. Therefore, the zoning commissioners were not de facto officers.

Since appointment of County Board members to the zoning commission was void and illegal, the decision in County of Cass v. Kloker, 239 Ill. App. 301 is controlling on the question of rebate of funds received for conducting commission hearings. In Kloker, a county commissioner was refused the right to retain funds paid him by the county board, of which he was a member, for services rendered as overseer of the poor. The court, in construing the following statutory provision:

"That it shall be and is hereby declared unlawful for any supervisor or county commissioner, during the term of office for which he is elected, to be appointed to, accept or hold any office, by appointment or election of the board of which he may be a member; and any and all appointments and elections by the board of supervisors or county commissioners, whereby any member or members of said board, or either of them, may be selected to fill any official position, shall be absolutely null and void." (Ill. Rev. Stat., 1925, ch. 102, par. 1)

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held that the county commissioner should not have been appointed to the position and therefore could not be paid. (Id. 304).

In Saxby v. Senneman, 318 Ill. 600, a member of the state legislature was required to return funds paid as compensation for duties performed as an assistant attorney general where he was prohibited by Article 3 of the Illinois Constitution of 1870 from performing such duties.

Since the appointments to the zoning commission were void, the members of the zoning commission should not have received per diem payments for conducting commission hearings. Rebate of these funds should be made.

Very truly yours,

ATTORNEY GENERAL