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ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

January 13, 1976

FILE NO. S-1034

COUNTIES:
Public Meetings

Honorable Robert A. Downs
State's Attorney of Fulton County
100 Main Street
Lewistown, Illinois 61542

Dear Mr. Downs:

This responds to your request for an opinion regarding the propriety of an executive session held by the Fulton County Board in light of "AN ACT in relation to meetings". Ill. Rev. Stat. 1973, ch. 102, pars. 41 et seq.

One of the items on the agenda at the June meeting of the Board concerned the approval of certain reclamation plans of the Metropolitan Sanitary District of Greater Chicago. The District owns a substantial amount of surfaced-mined land which is zoned for agricultural use and to which the District is applying liquid sludge. The Fulton County zoning ordinance

provides that agriculturally zoned lands which have been surface-mined may be reclaimed under a plan approved by the county planning commission and county board. The Metropolitan Sanitary District of Greater Chicago filed reclamation plans on each portion of the surface-mined land which they own and were using. The plans filed at the June meeting were an attempt to comply with the zoning ordinance and were a refiling of plans previously denied at a March 1975 meeting.

In March 1974 the Fulton County Board and the Metropolitan Sanitary District were made joint defendants in a lawsuit filed by a citizen's group to enjoin the County from allowing the District further operation in Fulton County. The County filed a motion to dismiss and that motion was granted. Leave was granted to the plaintiff to file an amended complaint, which was filed. Thereafter, a second motion to dismiss was filed but no formal action had been taken on that motion.

The County Board at the June meeting decided to reconsider the reclamation plans which had been denied in March. At that meeting a motion was made to approve the plans and certain members of the Board requested an executive session to discuss the plans. The chairman did declare an executive

session and discussion was held concerning the reclamation plans filed by the District and ramifications as concerned the pending lawsuit. Much of the discussion was concerned with the effect of approval or disapproval upon the pending lawsuit; what legal action the District might take should the plan be disapproved, and the personal liability of the county board members in this matter.

After the executive session the meeting was declared open and further discussion was held. A motion was made to approve the reclamation plans of the District and properly seconded. The motion was approved by roll call vote.

Your specific questions regarding this entire procedure are:

1. Does the county board have the right to go into executive session concerning matters which are involved in a lawsuit in which the county is a party?

2. If the county board does not have the right to such an executive session, what is the effect of the subsequent approval of the reclamation plans of the District at the June meeting?

Under section 2 of "AN ACT in relation to meetings" (Ill. Rev. Stat. 1973, ch. 102, par. 42) all meetings of public agencies must be public meetings except when otherwise provided

by the Act. Section 2 provides inter alia that meetings may be closed to the public "where a pending court proceeding against or on behalf of the particular governmental unit is being considered". This exception only applies to discussion of litigation which is actually pending in court and does not include preliminary discussion before suit is filed. (People ex rel. Hopf v. Barger, 30 Ill. App. 3d 525.) Under this exception it is clear that any discussion of the approval or disapproval of the reclamation plans as it relates to the pending lawsuit could be held in executive session. In addition, the court in the Barger case recognized an exception for legal consultation on prospective litigation between a public body and its attorney. Under this exception the possibility of future court action by either the citizen's group or landowner, and its effect on the county and individual board members, could be discussed.

You will have to decide from a consideration of the facts whether the discussion in executive session went beyond the permitted scope. In making that determination you should bear in mind that the exceptions discussed above should be narrowly construed. It is the public policy of this State that all actions of public agencies be taken openly and that

their deliberations be conducted openly. The exceptions to that public policy are few and as stated by the court in Illinois News Broadcasters v. City of Springfield, 22 Ill. App. 3d 226 at 228, they "must be narrowly construed because they derogate the general policy of open meetings". The court in the Barger case warned that the exception for consultations with an attorney must not be abused. In discussing this exception the court stated at page 538:

" * * *

> This does not mean, of course, that consultations by a governing body with an attorney in private may be used as a device to thwart the liberal implementation of the policy that the decision-making process is to be open and that confidentiality is to be strictly limited. The balance between the two must always be resolved in the public interest on a case-by-case basis.

* * * "

Until you determine whether the terms of "AN ACT in relation to meetings", supra, were actually violated, you have no bona fide need for an answer to your second question concerning the effect of the subsequent approval of the plans. I, therefore, must respectfully decline to answer it. See Point 4 of the Statement of Policy of the Attorney General relating to furnishing written opinions. I note, however, that

there is no provision in the Act which specifically voids action taken at an improperly closed meeting, and no Illinois court has ever so held, stating that the question was moot, either because the issues were otherwise resolved (see Illinois News Broadcasters, supra,) or that corrective action had been taken. See Illinois Toll Highway Authority v. Karn, 9 Ill. App. 3d 784.

Very truly yours,

ATTORNEY GENERAL