OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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April 15, 2005

FILE NO. 05-003

ELECTIONS:
Authority of County Clerk
to Restrict Third Parties
from Distributing Absentee
Ballot Applications

The Honorable Rod Irvin
State's Attorney, Hamilton County
Hamilton County Courthouse
100 South Jackson
McLeansboro, Illinois 62859

Dear Mr. Irvin:

I have your predecessor's letter wherein he inquired whether a county clerk:

(1) may restrict the distribution of applications for absentee ballots by requiring either that the application be delivered personally to the absent voter at the county clerk's office or that the application be mailed from the clerk's office directly to the voter; and

(2) may refuse to accept an absentee ballot application, properly completed in the statutory form, because the application was not mailed or hand delivered to the voter in accordance with the clerk's policy.

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For the reasons hereinafter stated, it is my opinion that: (1) a county clerk does not possess the authority to restrict the availability of absentee ballot applications to either personal delivery to the absent voter at the county clerk's office or mail from the clerk's office; and (2) the clerk is also without the authority to refuse to accept an absentee ballot application, properly completed in the statutory form, because the application was not mailed or hand delivered to the voter in accordance with the clerk's policy.

According to the information we have been provided, in 1988, the State Board of Elections sent a letter to all election authorities recommending that each election authority self-impose strict administrative controls to monitor the flow of absentee ballot applications. It is our understanding that the Hamilton County Clerk has historically allowed absentee ballot applications to be distributed by persons not connected with the clerk's office, including "party officials, candidates, relatives, and other interested parties assisting absentee voters." Prior to the consolidated election on April 1, 2003, however, the clerk instituted a new policy whereby blank applications for absentee ballots would not be provided to "party workers, candidates, or other interested persons." Instead, applications could only be obtained by prospective absentee voters who appeared in person at the county clerk's office or who received the applications by mail directly from the clerk's office. Concomitantly, the county clerk will not accept any applications for absentee ballots, although properly completed in the statutory form, that were not distributed in accordance with the foregoing policy. Believing that the county clerk's policy "unduly

burdens" an absent voter's right to vote, your predecessor questioned the propriety of the clerk's restrictions on obtaining an absentee ballot application.

Article 19 of the Election Code (the Code) (10 ILCS 5/19-1 *et seq.* (West 2002)) governs the procedures for voting by absentee ballot. References to an "election authority" in the Code refer to both county clerks and local boards of election commissioners, as the case may be. *See* 10 ILCS 5/1-3(8) (West 2002). Section 19-2 of the Code, which generally prescribes the circumstances under which a voter may obtain an absentee ballot and the timeframe in which to make application for an absentee ballot, provides:

> Any elector as defined in Section 19-1 expecting to be absent from the county of his residence or any such elector who because of being appointed a judge of election in a precinct other than the precinct in which he resides or who because of physical incapacity or the tenets of his religion in the observance of a religious holiday or who because of election duties for the office of an Election Authority, the State Board of Elections, or a law enforcement agency will be unable to be present at the polls on the day of such election may *by mail*, not more than 40 nor less than 5 days prior to the date of such election, *or by personal delivery* not more than 40 nor less than one day prior to the date of such election, make application to the county clerk or to the Board of Election Commissioners for an official ballot for the voter's precinct to be voted at such election. (Emphasis added.) 10 ILCS 5/19-2 (West 2002).

Section 19-2.1 of the Code (10 ILCS 5/19-2.1 (West 2003 Supp.)) sets out the procedures for voting by absentee ballot and also includes a general reference to the distribution of absentee ballot applications:

> *The clerks of all municipalities, townships and road districts may distribute applications for absentee ballot for the use*

> *of voters who wish to mail such applications to the appropriate election authority.* Such applications for absentee ballots shall be made on forms provided by the election authority. Duplication of such forms by municipal, townships or road district clerks is prohibited. (Emphasis added.)

The statutory form for the absentee ballot application is contained in section 19-3 (10 ILCS 5/19-3 (West 2002)), which also makes reference to the procedure for obtaining an absentee ballot application, and states:

> Application for such [absentee] ballot shall be made on blanks to be furnished by the election authority and duplication of such application for ballot is prohibited, except by the election authority.

Upon receipt of an application for an absentee ballot "either *by mail*, not more than 40 days nor less than 5 days prior to such election, or *by personal delivery* not more than 40 days nor less than one day prior to such election," the county clerk must verify the voter's qualifications to vote by absentee ballot. (Emphasis added.) 10 ILCS 5/19-4 (West 2002). If it is determined that the applicant is qualified to vote by absentee ballot, the county clerk must post certain information concerning the applicant and "within 2 business days thereafter * * * *mail*, postage prepaid, or *deliver in person* in such office an official ballot or ballots if more than one are to be voted at said election." (Emphasis added.) 10 ILCS 5/19-4 (West 2002). Pursuant to section 19-6 of the Code, after voting, the absentee voter must endorse the certification upon the back of the envelope in which the ballot is to be included, and then, "the envelope shall be *mailed in person by such voter*, postage prepaid, to the election authority issuing the ballot or, if

more convenient, it may be delivered *in person*." (Emphasis added.) 10 ILCS 5/19-6 (West 2002).

Against this background, your predecessor first inquired whether a county clerk possesses the authority to limit the distribution of absentee ballot applications by requiring that the application can only be obtained by the voter at the county clerk's office or by mail sent to the voter directly from the clerk's office. In reviewing the propriety of the county clerk's policy, it is important to note that article III, section 3, of the Illinois Constitution of 1970 requires that "[a]ll elections shall be free and equal" (Ill. Const. 1970, art. III, §3), and that this clause not only guarantees the right to vote in Illinois, but also reflects a broad public policy to expand the opportunity to vote. *See Orr v. Edgar*, 283 Ill. App. 3d 1088, 1101 (1996). Moreover, it is axiomatic that as public officers, county clerks possess only those powers that are expressly granted to them by the Constitution or by statute, together with those powers that may be necessarily implied therefrom to effectuate the powers that have been granted. *See McKenzie v. Arthur T. McIntosh & Co.*, 50 Ill. App. 2d 370, 377 (1964); Ill. Att'y Gen. Op. No. 00-012, issued October 12, 2000; *see also Nichols v. Board of Education of the City of Chicago*, 236 Ill. App. 3d 522, 528-29 (1992), *appeal denied*, 152 Ill. 2d 563 (1993).

As quoted above, section 19-2.1 of the Code specifically provides that "clerks of all municipalities, townships and road districts may distribute applications for absentee ballot for the use of voters who wish to mail such applications to the appropriate election authority." It is well established that where statutory language is clear and unambiguous, it must be given effect

as written. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 426 (2002). Clearly, the express language of the Code contemplates that officers other than the county clerk will distribute blank absentee ballot applications, and no language is contained in the Code that would allow the county clerk to restrict the authority of the other public officers in this regard.

In addition, the language of the Code is clear that, pursuant to sections 19-2 and 19-4 thereof, the application for an absentee ballot must be returned to the county clerk either by mail or in person by the voter, and the ballot itself, pursuant to section 19-4, must be mailed or personally delivered to the voter. Similarly, under section 19-6, after the ballot has been marked, it must be mailed or personally delivered to the county clerk's office. Although the Code is very specific regarding the procedures for returning an application for an absentee ballot and for returning the ballot itself, the Code is silent regarding any similar restrictions on obtaining an application for an absentee ballot. Had the General Assembly intended to authorize county clerks to restrict the distribution of applications to personal delivery by, or mail from, the clerk's office only, it may be presumed that the General Assembly would have so provided in terms similar to those employed with respect to the return of the application and the distribution and return of the ballot. By not doing so, the General Assembly has made a policy decision not to place any limitations on the distribution of absentee ballot applications. The Code instead simply mandates that county clerks furnish absentee ballot applications.

It is well established that to depart from the plain language by reading into a statute exceptions, limitations or conditions which conflict with the clearly expressed intent of

the General Assembly is improper. *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 60 (2002). Because nothing in the language of the Constitution, the Code or the other pertinent statutes grant county clerks the express or implied authority to limit access to absentee ballot applications only to mail or to personal service to the voter at the clerk's office, recommendations of the State Board of Elections notwithstanding, it must be concluded that a county clerk has no such power to adopt such a restriction. *See generally* 1976 Ill. Att'y Gen. Op. 99, 100 ("Nothing in the statute grants the county clerk the power to dictate the mode of receipt or return of a ballot by an absentee voter who requests the ballot on some authorized ground other than physical incapacity to appear at the clerk's office."). Consequently, it is my opinion that, absent specific statutory language, a county clerk may not restrict the distribution of applications for absentee ballots.

Your predecessor also inquired whether the county clerk may refuse to accept an absentee ballot application, properly completed on the statutory form, if the blank application was not initially hand delivered or mailed to the voter by the county clerk's office. Section 19-4 of the Code sets forth the procedure for returning completed absentee ballot applications and the duty of the county clerk to determine that the applicant is entitled to receive an absentee ballot. Pursuant to this section, immediately upon receipt of a completed absentee ballot application, the county clerk must verify that the "applicant is lawfully entitled to vote as requested," meaning that the application is timely and the applicant is qualified to vote. *See* 10 ILCS 5/19-4 (West 2002); *see also Talbott v. Thompson*, 350 Ill. 86, 101 (1932); *People ex rel. Ciaccio v. Martin*, 220 Ill. App. 3d 89, 92 (1991), *appeal denied*, 143 Ill. 2d 647 (1992); 1976 Ill. Att'y Gen. Op. 99,

100. Nothing in this section or any other provision of the Code, however, grants a county clerk the authority to refuse to provide an absentee ballot to an applicant because the blank application for the ballot was not received in person from the clerk's office or because the blank application was not mailed to the voter from the clerk's office. *See* 1976 Ill. Att'y Gen. Op. 99, 101 ("[T]he county clerk has no power to limit the mailing of absentee ballots to only those applicants who are physically incapacitated; nor may the clerk require that absentee ballots, from other than incapacitated voters, be voted in person at his office."); *see generally Frese v. Camferdam*, 76 Ill. App. 3d 68, 70-75 (1979); *Clark v. Quick*, 377 Ill. 424, 429-31 (1941). Again, it is within the purview of the General Assembly's authority to establish the public policy of the State. It may be assumed that, had the General Assembly intended to limit acceptance of absentee ballot applications to only those instances where the blank application for the ballot was distributed by mail from the county clerk's office or in person at the clerk's office, it could have so provided in express terms. By failing to do so, the county clerk is without authority to impose a policy of refusing to accept an application that has been properly completed in the statutory form because the blank application itself was not mailed or hand delivered to the voter from the clerk's office.

For the foregoing reasons, it is my opinion that a county clerk does not have the authority to restrict the distribution of blank absentee ballot applications to either personal delivery to the absent voter at the county clerk's office or mail from the clerk's office, and the clerk is also without the authority to refuse to accept an absentee ballot application, properly

completed in the statutory form, because the blank application was not mailed or hand delivered to the voter in accordance with the clerk's policy.

Very truly yours,

LISA MADIGAN
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