OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Jim Ryan
ATTORNEY GENERAL

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FILE NO. 98-008

ZONING:
Application of County Zoning
Regulations to Interstate
Crude Oil Pipelines

The Honorable Gary W. Pack
State's Attorney, McHenry County
2299 North Seminary Avenue
Woodstock, Illinois 60098

Dear Mr. Pack:

I have your letter wherein you inquire whether a proposed interstate crude oil pipeline that will, if constructed, transport crude oil to refineries in Illinois would fall within the public utilities exception contained in section 5-12001 of the Counties Code (55 ILCS 5/5-12001 (West 1996), as amended by Public Acts 90-261, effective January 1, 1998 and 90-522, effective January 1, 1998), thereby precluding a non-home-rule county from exercising its zoning powers to require the owners of the pipeline to obtain a conditional use permit. For the reasons

500 South Second Street, Springfield, Illinois 62706 (217) 782-1090 • TTY: (217) 785-2771 • FAX: (217) 782-7046
100 West Randolph Street, Chicago, Illinois 60601 (312) 814-3000 • TTY: (312) 814-3374 • FAX: (312) 814-3806
1001 East Main, Carbondale, Illinois 62901 (618) 457-3505 • TTY: (618) 457-4421 • FAX: (618) 457-5509

hereinafter stated, it is my opinion that although the operation of an oil pipeline does not fall within the public utilities exception in section 5-12001 of the Counties Code, counties are preempted by Federal law from requiring compliance with their zoning regulations in the siting of such pipelines.

It is my understanding that the Lakehead Pipe Line Company has developed plans to construct an interstate pipeline into Illinois. Specifically, the pipeline would originate in the oil fields of the Northwest Territories of Canada and the Province of Alberta and transport crude petroleum and other liquid hydrocarbons through McHenry, Kane and Kendall Counties to numerous Illinois refineries for conversion into refined products and consumer goods, as well as to other pipelines that carry crude petroleum to refineries in Minnesota, Wisconsin and Indiana.

Pursuant to the provisions of the Common Carrier by Pipeline Law (220 ILCS 5/15-100 et seq. (West 1996)), Lakehead filed an application with the Illinois Commerce Commission for a certificate in good standing, the granting of which is necessary for the construction of interstate pipelines only if a common carrier wishes to obtain eminent domain authority under State

Law. (220 ILCS 5/15-401 (West 1996).) As required by the Common Carrier by Pipeline Law and the rules promulgated thereunder (see 83 Ill. Adm. Code 300.01 et seq. (1997)), the Commerce Commission conducted a hearing on Lakehead's application in order to determine whether the application was properly filed; whether a need for the service existed; whether Lakehead was fit, willing, and able to provide service in compliance with the Pipeline Law and the Commission's rules and orders; and whether public convenience and necessity required the issuance of the certificate. (220 ILCS 5/15-401(a) (West 1996).) After reviewing the record of the hearing and other information submitted with regard to the application, the Commission determined, inter alia, that Lakehead had not established a public need for the proposed pipeline and denied Lakehead's request for a certificate in good standing. Lakehead appealed the denial. The Illinois Appellate Court subsequently affirmed the decision of the Illinois Commerce Commission. (Lakehead Pipeline Co. v. Illinois Commerce Commission (3rd Dist. 1998), No. 3-97-0524.) During the pendency of the appeal, however, Lakehead has continued to negotiate for right of way with property owners along the proposed route. You have inquired whether the transportation of crude oil by pipeline

constitutes the operation of a public utility for purposes of county zoning exemptions.

It is well established that non-home-rule counties may exercise only those powers that have been expressly granted to them by constitution or by statute, together with those powers that 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.) Under Division 5-12 of the Counties Code (55 ILCS 5/5-12001 through 5-12019 (West 1996)), counties have been granted the authority, through zoning ordinances, to regulate and to restrict the use of specified real property. Section 5-12001 of the Code provides, in pertinent part:

" * * *

> 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, indus-

> try, residence and other uses which may be specified by such board, * * *
>
> The power by this Division given shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted;* * * nor shall any such powers include the right to specify or regulate the type or location of any poles, towers, wires, cables, conduits, vaults, laterals or any other similar distributing equipment of a public utility as defined in The Public Utilities Act, if the public utility is subject to The Messages Tax Act, The Gas Revenue Tax Act or The Public Utilities Revenue Act, or if such facilities or equipment are located on any rights of way and are used for railroad purposes, nor shall any such powers be exercised in any respect as to the facilities, as defined in Section 5-12001.1, of a telecommunication carrier, as also defined therein, except to the extent and in the manner set forth in Section 5-12001.1. * * *
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> * * * "
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> (Emphasis added.)

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. (Atkins v. Deere & Co. (1997), 177 Ill. 2d 222, 233.) Legislative intent is best evidenced by the language used in the statute. (Burrell v. Southern Truss (1997), 176 Ill. 2d 171, 174.) Where statutory language is clear and unambiguous, it must be

given effect as written. In re B.C. (1997), 176 Ill. 2d 536, 542.

The language of section 5-12001 of the Counties Code clearly precludes a county from enforcing zoning restrictions against distribution equipment utilized by certain public utilities. Specifically, section 5-12001 prohibits county boards from exercising their zoning powers with regard to facilities of those public utilities that fall within the definition of that term, as it is used in the Public Utilities Act (220 ILCS 5/1-101 et seq. (West 1996)), and that are subject to any one of the three expressly enumerated tax acts. Consequently, in order to determine whether oil pipelines are excluded from zoning regulation under section 5-12001, it will be necessary to review the pertinent provisions of the Public Utilities Act and the specified tax statutes.

Section 3-105 of the Public Utilities Act (220 ILCS 5/3-105 (West 1996), as amended by Public Act 90-561, effective December 16, 1997) provides, in pertinent part:

> "* * * 'Public utility' means and includes, except where otherwise expressly provided in this Section, every corporation, company, limited liability company, association, joint stock company or association,

> firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever that owns, controls, operates or manages, within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with, or owns or controls any franchise, license, permit or right to engage in:
>
> a. the production, storage, transmission, sale, delivery or furnishing of heat, cold, power, electricity, water, or light, except when used solely for communications purposes;
>
> b. the disposal of sewerage; or
>
> c. the conveyance of oil or gas by pipe line.
>
> * * * "
>
> (Emphasis added.)

It is clear, under the language quoted above, that the General Assembly intended to include the conveyance of oil by pipeline within the definition of "public utility", if the conveyance is for a "public use". You have questioned whether, in the current circumstances, the conveyance of crude oil by pipeline to a refinery for the production of consumer goods is for a public use. I do not believe, however, that it is necessary to make this determination in order to resolve your inquiry.

As previously noted, to be included as a "public utility," for purposes of section 5-12001 of the Counties Code,

an activity must not only fall within the definition of the term "public utility" set forth in the Public Utilities Act, but must also be subject to the provisions of either the Messages Tax Act (35 ILCS 610/1 et seq. (West 1996)), the Gas Revenue Tax Act (35 ILCS 615/1 et seq. (West 1996)) or the Public Utilities Revenue Act (35 ILCS 620/1 et seq. (West 1996)). Under the provisions of the Messages Tax Act (now repealed), there was "* * * [a tax] imposed upon persons engaged in the business of transmitting messages and acting as a retailer of telecommunications * * *." (35 ILCS 610/2a.1 (West 1996), repealed by Public Act 90-154, effective January 1, 1998.) Similarly, under the Gas Revenue Tax Act, "[a] tax is imposed upon persons engaged in the business of distributing, supplying, furnishing or selling [natural] gas to persons for use or consumption and not for resale at the rate of 2.4 cents per therm of all gas which is so distributed * * *." (35 ILCS 615/2 (West 1996).) Moreover, the Public Utilities Revenue Act authorizes the imposition of a tax upon electric cooperatives, electric utilities and alternative retail electric suppliers. (35 ILCS 620/1 and 2a.1 (West 1996), as amended by Public Act 90-561, effective January 1, 1998.)

The conveyance of oil by pipeline is not subject to taxation under any of these Acts. Consequently, it is my opinion that the conveyance of crude oil by pipeline does not fall within the exemption from county zoning regulations granted to public utilities under section 5-12001 of the Counties Code.

A complete analysis of this issue, however, must include a review of the pertinent Federal laws regulating hazardous liquid pipeline facilities (see 49 U.S.C. § 60101 et seq.) and the rules promulgated thereunder (49 C.F.R. § 195 et seq. (1996)). Specifically, 49 U.S.C. § 60104 preempts States from imposing any additional safety standards on interstate pipelines by providing that "[a] state authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." (49 U.S.C. § 60104(c).) Moreover, 49 U.S.C. § 60102 requires the Secretary of Transportation to establish "minimum safety standards for pipeline transportation and pipeline facilities." Pursuant to this statutory mandate, the Department of Transportation has prescribed pipeline safety standards which, inter alia, address pipeline location based on public safety concerns. (See, e.g., 49 C.F.R. §§ 195.210 and 195.250 (1996).)

Where Congress has unmistakenly ordained a field for exclusive Federal regulation, there is no room for any State regulation whether it is consistent with, or more or less stringent than the Federal legislation. (Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc. (1981), 452 U.S. 264, 290, 101 S. Ct. 2352, 2367, 69 L. Ed.2d 1; Florida Lime & Avocado Growers, Inc. v. Paul (1963), 373 U.S. 132, 142, 83 S. Ct. 1210, 1217, 10 L. Ed.2d 248, rehearing denied, 374 U.S. 858, 83 S. Ct. 1861, 10 L. Ed.2d 1082 (1963).) Under the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. § 2001-2014 (Supp. 1987)), the precursor to the current Federal pipeline safety provisions, the Federal courts concluded that safety regulation of interstate pipelines by both State and local bodies was preempted by language virtually identical to that which is quoted above. (Shell Oil Co. v. City of Santa Monica (9th Cir. 1987), 830 F.2d 1052, 1065, cert. denied, 487 U.S. 1235, 108 S. Ct. 2901, 101 L. Ed.2d 934 (1988).) The Federal preemption extends to local zoning regulations, which are founded on considerations of public safety. (See Northern Border Pipeline Co. v. Jackson County, etc. (D.C. Minn. 1981), 512 F. Supp. 1261.) Therefore, it is my opinion that the application of local zoning regulations to

interstate pipelines used to transport hazardous liquids, including crude petroleum, is preempted by Federal law.

Sincerely,

JAMES E. RYAN
ATTORNEY GENERAL