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62706

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FILE NO. S-994

**MUNICIPAL CORPORATIONS:
Annexation of Adjacent Highways**

Honorable Dallas C. Ingemunson
State's Attorney
Kendall County
Yorkville, Illinois 60560

Dear Mr. Ingemunson:

I have your letter wherein you state that the United City of the Village of Yorkville has adopted an annexation ordinance which does not include an adjacent highway in the legal description of the territory annexed. You then ask whether, under section 7-1-1 of the Illinois Municipal Code (Ill. Rev. Stat. 1973, ch. 24, par. 7-1-1):

(1) The actual boundary of the city extends to the far side of the highway.

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(2) Whether the city has assumed responsibility for maintenance of the highway.

Section 7-1-1 of the Illinois Municipal Code (Ill. Rev. Stat. 1973, ch. 24, par. 7-1-1) reads in pertinent part:

"Any territory which is not within the corporate limits of any municipality but which is contiguous to a municipality, may be annexed thereto as provided in this article. * * * The new boundary shall extend to the far side of any adjacent highway and shall include all of every highway within the area annexed." (emphasis added.)

The answer to your first question is, in my opinion, controlled by the decision of the Illinois Appellate Court for the Second District in In re Petition to Annex Territory, 1 Ill. App. 3d 773. Asked to interpret the provision of section 7-1-1 dealing with the annexation of adjacent highways, the court at page 777 held:

"The language is clear and unambiguous that the new boundary of any annexed territory 'shall' extend to the far side of any adjacent highway, provided the territory being annexed is not within the corporate limits of any municipality. As the language of the statute is clear and explicit, the annexation must be exercised in the circumstances and manner prescribed in the statute. (People v. Village of Lyons, 400 Ill. 82.) The requirement that all highways be included is a part of the annexation process and such requirement cannot be deemed directory only * * *."

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The language of the court leaves no doubt that the statutory provision involved is mandatory and not merely directory. As a result the legal description of the territory annexed by Yorkville should have included the adjacent highway you describe.

The consequences of failure to comply with a mandatory statutory provision are generally well settled. In Hester v. Kamykowski, 13 Ill. 2d 481, at 484, the court noted that: "Failure to comply with a mandatory provision will render void the proceeding to which it relates. * * *"

This general principle was applied to the portion of section 7-1-1 under consideration here in In re Petition to Annex v. Chicago Title & Trust, 10 Ill. App. 3d 181, at 182. The court there held that the failure to include an adjacent highway in the legal description of territory to be annexed rendered the petition to annex "fatally defective".

More recently in People ex rel. City of Des Plaines v. Mt. Prospect, 29 Ill. App. 3d 807, the Appellate Court for the First District was asked specifically to determine the status of an annexation ordinance which failed to include both sides

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of an adjacent highway. The court held at page 815 that such an ordinance was invalid.

In my opinion, therefore, Yorkville's annexation ordinance should have included by legal description the adjacent highway you describe. Failure to include the highway resulted in a fatal defect rendering the annexation ordinance void. Thus, in answer to your first question, the boundary of the city does not extend to the far side of the highway in question because the entire annexation ordinance is invalid. Under Illinois law an invalid ordinance of this kind is totally inoperative and the territory involved retains its original status. (People ex rel. Village of Worth v. Ihde, 23 Ill. 2d 63.) Should the city adopt a valid ordinance including the adjacent highway then, of course, its boundary will "extend to the far side of the adjacent highway".

Your second question is whether, assuming that the city should adopt a valid annexation ordinance, responsibility for that portion of the adjacent highway abutting the annexed

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territory will rest with the city.

It appears to be a generally accepted proposition that a municipality has control over and responsibility for public highways located within its corporate limits. In Mushbaugh v. Village of East Peoria, 260 Ill. 27, the Supreme Court of Illinois stated at page 31:

"In the United States, township, county or other local authorities usually have control or supervision over ordinary public highways in the country, while the corporate authorities of cities, villages and incorporated towns usually have such control within their respective limits. Whether such jurisdiction and power in the one are exclusive depends upon the intention of the legislature. As a general rule, however, a grant to a city, incorporated village or incorporated town of power to control and regulate the streets confers exclusive authority over the streets, and vests in such authorities the power and jurisdiction to regulate and control highways which have heretofore been under the control of township or county organizations and transfers to such city or village the duty of maintaining and repairing them, unless the statute otherwise provides. * * *

In a case involving the regulation of streets in an area annexed by the City of Chicago the court held in The People v. Chicago Tel. Co., 245 Ill. 212, at 136 that:

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"Upon the annexation of the territory known as Austin to the City of Chicago the power to regulate and control the use of the streets and alleys and public ways in that territory was immediately transferred from the town of Cicero to the City of Chicago. * * *"

Similarly, in McQuillin, Municipal Corporations, 3rd Ed., it is said in Volume 2 at page 517:

"When territory has been lawfully and finally annexed, the new area becomes, ipso facto, a part of the municipality, subject to municipal jurisdiction, and it may be governed as the original municipal territory was governed prior to change, subject, of course, to terms and provisions of the annexation, requiring variation in government. Newly-annexed territory is entitled, moreover, to share in the municipal services and benefits accorded to the other portions of the municipal territory upon a footing of substantial equality. * * *"

At page 525:

"All public highways in annexed territory become, without any action on the part of the municipal authorities, streets of the municipality, and it assumes the same duties and liabilities as to them as rests upon it in reference to the public ways of its original territory. * * * On change of municipal limits the control over highways passes by virtue of law from one political subdivision of the state to the other accordingly as the highways are in

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the one or the other. Thus where corporate limits are extended to embrace territory in which there is a public highway formerly under the jurisdiction of a county, its control passes to the municipal corporation. The city does not merely succeed to the rights of the county in the highway, but holds the highway under the authority of the state just as it holds any other street and with all the powers over it and rights in it which it may exercise as to its other streets. * * *

It is, therefore, my opinion that should the city adopt a valid annexation ordinance and thus include the adjacent highway, it will assume the responsibility for the maintenance of that highway.

Very truly yours,

A T T O R N E Y G E N E R A L