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DeKalb County State's Attorney**

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August 16, 2019

*Via E-Mail & U.S. Mail*

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Gentlemen,

Over the last few weeks I have been contacted by numerous citizens and elected officials as to the currently developing events surrounding the elected office of City Clerk in the City of DeKalb. In particular, there has been concern over efforts being made to alter the functions of that office, as well as make it an appointed office in the future. While it was my hope that intervention by this office would not be necessitated, the events on August 12, 2019 demonstrate that the City is on the cusp of committing an egregious error in regard to the elected offices within the City, and in doing so, raising the need for my office to consider taking action to cease these developments before they damage your municipality further.

It has been well covered in the media recently that there is a disagreement as to the running of the Offices of City Clerk and the City Manager, and that there have been events unfolding that raise concerns for many involved. In particular, there are strong indications that Open Meetings Act violations may have occurred on July 22, 2019 in regard to the City Clerk, an elected official, being discussed in closed executive session. To be clear – it is our position that when appointed to an elected position, Ms. Fazekas was, and is, holding an elected office with the same powers and responsibilities as if elected by vote. I believe you understand this as well, and that is why you have not taken the approach of trying to dismiss the “appointed” Clerk pursuant to 65 ILCS 5/3.1-35-10. That being the case, the Open Meetings Act does not

allow for discussion of elected officials, or “occupants of public office”, in executive session.<sup>1</sup> Our concern that this may have occurred has now been substantiated by Mayor Smith himself, who recently spoke at the August 12, 2019 City Council Meeting and stated, “Little had I realized that the issue of the city seal, and its unavailability to Deputy Clerk Scott while Clerk Fazekas was not in her office, would lead to City Manager Nicklas requesting an executive session after the July 22, 2019 council meeting to discuss what his office felt was a personnel issue impacting City Hall business. Following the discussion, with clear consensus on the part of our aldermen, I was directed to ask for Fazekas’ resignation.”<sup>2</sup>

Now, with the understanding that this issue has already been opened by the Attorney General’s Public Access Counselor for investigation, we are not going to further complicate the matter. However, we are of the opinion that because the closed session was dealing with Ms. Fazekas and seeking her resignation, the audio from that executive session should be released to the public as the discussion was not properly held behind closed doors.

More importantly at this juncture are Ordinances 2019-054 and 2019-055, which passed their first reading before the City Council on August 12, 2019. These ordinances are simple enough in purpose, as one is titled – “Ordinance 2019-055 Providing that the City Clerk Shall be an Appointed Officer of the City of DeKalb.” However, a legitimate basis for how the City believes it is legally authorized to change an elected office to an appointed one is not clearly provided. Of course, the City of DeKalb is a Home Rule Municipality, as allowed for under the Illinois Constitution. This allows for certain powers and abilities that could not be exercised by non-home rule units. Yet, the Illinois Constitution does appear to limit your powers on this issue with the following language:

“A home rule unit shall have the power subject to approval by referendum to adopt, alter or repeal a form of government provided by law, except that the form of government of Cook County shall be subject to the provisions of Section 3 of this Article. A home rule municipality shall have the power to provide for its officers, their manner of selection and terms of office only as approved by referendum or as otherwise authorized by law...” Illinois Const., Art. VII, § 6(f)

As is commonly understood, the City of DeKalb chose, via referendum, to be under “The Managerial Form of Municipal Government” as allowed for under 65 ILCS 5/5-1-1, *et seq.* Prior to that time, I have not been informed that the City ever operated under the Commission form of government, eliminating the need for analysis of ILCS 5/5-1-2.

Under the Managerial Form, there is a section on the election of the City Clerk that could cause confusion and appears to be doing just that currently. It discusses that the position is in fact elected, and lays out a process that it sets akin to that for the Council and Mayor. It then states:

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<sup>1</sup> See PAC Opinion 17-013 (November 21, 2017) and PAC Opinion 18-015 (October 30, 2018).

<sup>2</sup> There is an August 12, 2019 video of Mayor Smith giving this statement located at <https://youtu.be/gf8U-GjOqE8> and starting at the 53:00-minute mark. Also See <https://www.daily-chronicle.com/2019/08/13/dekalb-mayor-jerry-smith-sharing-transparency-on-city-clerk-battle/ay9n59c/> for the statement in print.

“However, in any city not exceeding 100,000 inhabitants which adopts this Article 5 **and** elects a mayor and aldermen or councilmen **as provided** in Section 5-2-12 [65 ILCS 5/5-2-12], or Sections 5-2-18 through 5-2-18.8 [65 ILCS 5/5-2-18 through 65 ILCS 5/5-2-18.8], the council may, in lieu of electing a clerk and treasurer as provided in the above paragraph, provide by ordinance that the clerk or treasurer or both for such city be appointed by the mayor with the approval of the city council. If such officers are appointed their terms of office, duties, compensation and amount of bond required shall be the same as if they were elected.” *65 ILCS 5/5-2-19. (Emphasis added).*

This was cited as the basis for Ordinance 2019-055. That language allows for an Ordinance to be created altering the elected Clerk position into an appointed one – if the City population is under 100,000 and has a city council elected at large, whether by whole or in part. As I understand it - the DeKalb City Council is not elected at large<sup>3</sup> and as such, this cannot be relied upon to alter the method of choosing the City Clerk.

The City has attempted through two previous referendums to alter the role of the City Clerk – both of which failed. This was the process utilized because it is what the law calls for.<sup>4</sup> So, this leads to a direct question expressed by the electorate and left unanswered; Why is a referendum not necessary this time? I believe one is necessary.

Under the facts provided to the public thus far, there is no legal basis to avoid another referendum should you seek to change the City Clerk to an appointed position. As such, we are requesting that you table consideration of the subject ordinance and allow the voters to decide the issue. In the very least, you must present a legal basis for this action that is defensible, or my office may be left with no choice but to file a Declaratory Judgment action in the Circuit Court, whether by quo warranto or otherwise, so as to challenge the authority of the City to take these actions against another elected official and their statutory powers.

I want to end this letter by expressing my concern that the Office of State’s Attorney is brought into what should be city affairs on multiple issues lately. It is my hope to work in coordination with DeKalb County’s municipal bodies to create positive and cooperative local government relationships. However, in regard to this situation, I felt it necessary to point out that it is simply improper to bypass failed referendums and force a result through ordinance. To do so without expecting the citizens of your community to seek answers is not only unrealistic, but is a disservice to them all. I truly hope that you will take this opportunity to consider the propriety of this course of action and to allow your voters to control how offices

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<sup>3</sup> “The City of DeKalb is governed by a City Council consisting of the Mayor, who is elected from the City at large, and seven aldermen elected on a ward basis.” See <https://cityofdekalb.com/333/City-Council>

<sup>4</sup> “[T]he constitutional mandate requires that changes in the manner of selecting officers of a home rule municipality or their terms are reserved to the voters by article VII, section 6(f), and can be effected only by referendum unless otherwise authorized by legislative enactment.” *Leck v. Michaelson*, 111 Ill. 2d 523, 528 (1986). (See also *Henyard v. Village of Dolton*, 2016 IL App (1st) 153374).

are elected or appointed in the future, as they have in the past. The Illinois Constitution, as well as good conscious call for it.

Very truly yours,

Rick Amato  
DeKalb County State's Attorney  
DeKalb County, Illinois

cc: Sarah Pratt, Public Access Counselor, Office of the Attorney General, 500 S. 2nd Street, Springfield, Illinois 62701  
Lynn Fazekas, DeKalb City Clerk, City Clerk's Office, 200 South Fourth Street, Room 202, DeKalb, IL 60115