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November 13, 2020

**CONFIDENTIAL & PRIVILEGED ATTORNEY-CLIENT COMMUNICATION**

**Via Email**

Larry Suffredin  
Cook County Commissioner – 13th District  
Cook County Board of Commissioners  
118 N. Clark Street  
Chicago, Illinois 60602

**Re: Proposed Substitute Amendment to Cook County Board Item No. 20-4415**

Dear Commissioner Suffredin:

The Cook County Board of Commissioners (“Board”) is considering a proposed substitute to Item No. 20-4415, which modifies the Cook County Code to reflect the upcoming elimination of the Office of the Cook County Recorder of Deeds (“Recorder”) and assumption of the Recorder’s duties by the Office of the Cook County Clerk (“Clerk”). The proposed substitute introduces an amendment to Chapter 2, Article IV, Division 2, Section 2-162 of the Cook County Code (the “Proposed Ordinance”). You have asked the State’s Attorney’s Office for advice regarding the legality of the Proposed Ordinance. The question presented, our conclusion, and a discussion detailing the reasons supporting our conclusion follow.

**QUESTION PRESENTED**

Does the Board have the power to pass and enforce the Proposed Ordinance regarding Recorder employees’ rights upon the Clerk’s assumption of duties?

**CONCLUSION**

Most likely not. The Proposed Ordinance would require that Recorder employees “be afforded the right to transfer” to positions in the Clerk’s Office. It would also force the Clerk to “initially adopt the job descriptions and duties that existed or were in effect within” the Recorder’s Office during the year before the Clerk’s assumption of duties. But the case law indicates that the Board does not have the authority to

control the hiring, firing, promotion, or compensation of the personnel in the Clerk's Office. In addition, there is some question whether the Proposed Ordinance improperly attempts to supersede the Clerk's collective bargaining agreements ("CBAs") in violation of the Illinois Public Labor Relations Act.

## **DISCUSSION**

### **I. Background.**

#### **A. The Clerk's Assumption of Duties.**

The 2016 binding referendum that led to the elimination of the Recorder's Office was presented to voters this way:

Shall the Office of the Cook County Recorder of Deeds be eliminated and all duties and responsibilities of the Office of the Cook County Recorder of Deeds be transferred to, and assumed by, the Office of the Cook County Clerk by December 7, 2020?

Although the elimination of the Recorder has perhaps been referred to in shorthand by some as a "merger," the referendum only established the elimination of the Recorder's office and the Clerk's assumption of the Recorder's duties; it did not purport to effectuate a merger of the two offices in any corporate sense.

#### **B. The Proposed Ordinance.**

The Proposed Ordinance provides that Recorder employees "must be afforded the right to transfer" to the Clerk's office from the Recorder's office. Proposed Ordinance, Sec. 2-162(a). The Proposed Ordinance also directs the Clerk to adopt the Recorder's existing job descriptions until the Clerk has conducted collective bargaining with the labor organization representing the Recorder employees.<sup>1</sup> Proposed Ordinance, Sec. 2-162(b). The Proposed Ordinance further attempts to prohibit the Clerk from subcontracting certain duties that had been performed by the Recorder's Office until the Clerk has provided the impacted employees' representative with five months' notice of the start of such subcontracting, and until the Clerk has made "every reasonable effort to place adversely affected employees in other bargaining unit positions." Proposed Ordinance, Sec. 2-162(e).

As such, the Proposed Ordinance would prevent the Clerk from hiring her choice of individuals to fill non-exempt positions in her offices. Under Section 2-162(a), not only would current Recorder employees "be afforded the right to transfer to" positions in the Clerk's Office involved with performing the duties previously performed by the Recorder, but to *any* non-exempt vacancy or newly created position across the Clerk's office. The Clerk would not be permitted to select the best person for the job; even among the Recorder employees she is forced to hire, she would be required to hire Recorder employees meeting the minimum qualifications in the order of their seniority with the Recorder. These transfer rights may last for

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<sup>1</sup> We understand that SEIU Local 73 ("SEIU") is the exclusive bargaining representative of both the Recorder employees and the Clerk employees who are covered by a CBA.

as long as three years, so the Clerk could face a three-year period of mandatory absorption of displaced Recorder staff before being permitted to resume hiring the most qualified person for each non-exempt job.

## **II. Analysis.**

### **A. The Proposed Ordinance Infringes Upon the Clerk's Right to Control the Staffing of Her Office.**

The position of the Clerk is established by statute in the Counties Code, 55 ILCS 5 §§3-2001 – 3-2014. The Clerk is an elected officer of the County, separate from the Board. *See* 55 ILCS 5/3-2001. The General Assembly has conferred upon the Clerk to power to “control the internal operations of the [C]lerk’s office” and “appoint deputies, assistants and personnel to assist in the performance of the [C]lerk’s duties.” *See* 55 ILCS 5/3-2003.1 and 3-2003.2.

The Board has the authority to appropriate funds for the Clerk’s use in running the internal operations of her office, but the statute clearly delegates to the Clerk the power to control the employment of personnel hired by the Clerk, within the budgetary constraints imposed by the Board. For example, in *Kotche v. County Bd. of Winnebago County*, 87 Ill. App. 3d 1127 (2nd Dist. 1980), the Illinois Appellate Court found that the county board had the authority to appropriate funds for the clerk of court to hire, but did not have the power to control the hiring, firing, promotion, or compensation of the clerk of court’s personnel. Although *Kotche* concerned the clerk of the court, the statutory language regarding the clerk of court’s authority to control her operations was substantially similar to the language in 55 ILCS 5/3-2003.1 regarding county clerks, and the same reasoning applies.

Likewise, in *Heller v. County Bd. of Jackson County*, 71 Ill. App. 3d 31, 34 (5th Dist. 1979), the Appellate Court affirmed an injunction stopping the county board from interfering in the operation of the supervisor of assessment’s office “by removing from his direction and supervision his statutorily imposed duties and responsibilities; by establishing job descriptions for the employees of his office without his consent; [and] by hiring employees for his office without his consent[.]” (internal quotation omitted). In that case, the county board had requested a study of the supervisor’s office which led to a recommendation that job descriptions be promulgated. *Id.* at 34-35. The county board then tried to reorganize the office by adopting job descriptions for the supervisor and his employees, but this exceeded the county board’s authority. *Id.* at 35, 38.

Finally, and perhaps most importantly, in *Burnette v. Stroger*, 389 Ill. App. 3d 321 (1st Dist. 2009), the Appellate Court found that the Cook County Board President lacked the authority to specify who in the Public Defender’s office would be fired due to budget cuts. In that case, the board had the right to fix the number and compensation of the public defender’s staff, while the public defender had the right, within that fixed number, to hire and fire individuals. *Id.* at 333, 335-36. Arguably, the Board has even less power over a separately elected clerk’s ability to hire, fire, and compensate personnel than it does over the appointed public defender.

Critically here, *Burnette* concerned Cook County, the only home rule county in Illinois. The *Burnette* court reached its conclusion notwithstanding that (i) the Counties Code does not preempt the exercise of home rule authority in a manner consistent with the County's home rule powers; and (ii) the Illinois Constitution vests county officers with "the duties, powers or functions derived from common law or historical precedent unless altered by law or county ordinance." 1970 Ill. Const. Art. VII, § 4(d).

Thus, following the reasoning of *Burnette*, the Board likely cannot inject itself into the Clerk's hiring as the Clerk assumes the Recorder's duties. The Proposed Ordinance would force both specific employees and certain job descriptions upon the Clerk, infringing upon her inherent authority to decide what the roles in her office should be, and who should fill them. Accordingly, we believe the Proposed Ordinance would be vulnerable to a court challenge.

### **B. The Proposed Ordinance Appears to Conflict with the Clerk's CBAs.**

As an analytically separate matter, the Proposed Ordinance is, at a minimum, in tension with the Illinois Public Labor Relations Act ("Act") and the Clerk's CBAs.<sup>2</sup>

Section 15 of the Act establishes that if an ordinance conflicts with the Act or a CBA negotiated thereunder, the Act or the CBA "shall prevail and control." 5 ILCS 315/15(a), (b). Section 15(c) preempts home rule units from exercising concurrent jurisdiction over the matters covered by the Act. In addition, Section 2.1 of the Clerk CBA states that "where an ordinance of the Board of Commissioners of Cook County adopted after the date on which this Agreement is adopted by the Board of Commissioners is inconsistent with any specific and express term of this Agreement shall control with respect to employees covered by this Agreement, to the extent permitted by law." (sic) Although not grammatical, the intent of this sentence is apparently to give effect to the CBA over a later-passed ordinance, to the extent permissible by law.

Examples of the ways in which the Proposed Ordinance appears to conflict with the CBA are discussed below.

#### **1. Ability to Implement New Job Descriptions.**

Section 4 of the Act states that "[e]mployers shall not be required to bargain over matters of inherent managerial policy" such as "the functions of the employer [and] the organizational structure and selection of new employees[.]" 5 ILCS 315/4. Section 6.2 of the Clerk CBA allows the Clerk to change job classifications and duties, "provided that a major alteration of the classification structure shall not be made." Section 6.2 requires the County and SEIU to "meet and bargain the terms and conditions of employment for that new classification" within 30 days, but the Clerk "may put the new and changed job classifications or duties into effect after timely notice to [SEIU]." However, under the Proposed Ordinance, the Clerk would have to "initially adopt the job descriptions and duties" in effect within the Recorder's Office, and new job classifications or duties could not go into effect "until the Office of the

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<sup>2</sup> For purposes of rendering this opinion, we reviewed the Clerk's CBA with SEIU covering Administrative Support Staff (the "Clerk CBA").

Cook County Clerk has fulfilled its obligation to bargain in good faith with a labor organization which is the exclusive bargaining representative of the employees involved.”

2. Right to transfer.

Section 2-162(a) of the Proposed Ordinance would give Recorder employees who meet the “minimum qualifications” the right to transfer to vacant or new positions in order of seniority, before any other individuals may fill the positions. Section 5.3 of the CBA states that applicants for a position “shall meet the qualifications of the job description,” allows the Clerk to consider specific factors such as ability and education in her selection, and provides that seniority “shall govern the selection” only “among relatively equal bidders.” As such, the Proposed Ordinance appears to conflict with the CBA, to the disadvantage of current Clerk employees.

3. Seniority.

Section 2-162(f) of the Proposed Ordinance provides that Recorder employees placed with the Clerk’s Office shall have their seniority for time worked in the Recorder’s Office credited to them for all purposes where seniority is a factor in the Clerk’s Office. But Section 5.2 of the CBA defines seniority as “an employee’s length of most recent continuous employment with the [Clerk] since his/her last hiring date[.]”

4. Subcontracting.

Section 2-162(e) states that the Clerk may not subcontract work the Recorder’s Office performed until the Clerk has provided five months’ notice to the union, and until the Clerk “makes every reasonable effort to place adversely affected employees in other bargaining unit positions. In contrast, Section 14.5 of the CBA contains the same five-month notice requirement, but allows subcontracting “where circumstances warrant, but only where there is no way to achieve the same level of service provision as efficiently and effectively by utilizing its employees.”

With respect to any conflict between the Proposed Ordinance and the CBA, we acknowledge that there is little incentive for SEIU to grieve or challenge such a conflict, because the Proposed Ordinance benefits the Recorder employees that SEIU represents. In addition, there is “saving” language in Section 2-162(g) (“Nothing in this chapter shall be deemed to interfere with, impede, or in any way diminish the rights of employees to bargain collectively with their employers...”). However, this language does not protect the rights of either the employer Clerk or the existing Clerk employees in the case of a conflict, leaving questions about whether the Proposed Ordinance would be vulnerable to a challenge on this basis. As such, it may be preferable to encourage the Clerk and SEIU to bargain over issues related to how to incorporate any Recorder staff the Clerk may elect to hire, rather than for the County Board to attempt to legislate in a manner that disturbs the normal operation of the CBA.

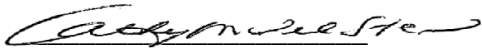
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Larry Suffredin  
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Please feel free to contact our office should you have any additional questions about this letter or the opinion sought. We condition this opinion upon the facts presented and may wish to revisit this matter should new information be made available.

Very truly yours,

KIMBERLY M. FOXX  
State's Attorney of Cook County

By:   
Cathy McNeil Stein  
Chief, Civil Actions Bureau