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Erica Firnhaber
Shelby County Treasurer
301 E Main Street
Shelbyville, IL 62565

Dear Ms. Firnhaber:

You have asked me for a legal opinion on the legality of a lease entered into between Shelby County and Jim Hampton as well as the potential for criminal prosecution under a revised set of circumstances. Last fall, I provided an opinion to you on this same topic. However, at that time the State's Attorney had not issued an opinion on this topic and as I understand it was unwilling to take a position at that time. Further, I understand the current State's Attorney is advising the Shelby County Board to enter into a license agreement

Although, I disagree with the Shelby County State's Attorney for a number of reasons, criminally you may rely upon her position on the lawfulness of the payment. Unless the issue is tested in a court, you are left with the reality that the sitting State's Attorney is opining that the license transaction is lawful. Accordingly, as it relates to the official misconduct statute, you can rely upon the Shelby County State's Attorney's determination so as not to be concerned about a criminal prosecution for making the payment as directed by the County Board in conformity with the State's Attorney's determination. This is true, even if it later turns out that such a determination is erroneous because you would lack the necessary criminal intent. In short, you cannot be exposed to criminal liability by following the determination of the sitting states attorney. You can however exercise your right to seek judicial review even after following that advise for the same reasons set forth in the appellate brief, I recently filed on your behalf. You have also asked me to explain the determination of the Illinois Supreme Court in *Millennium Park Joint Venture LLC v Houlihan*. 241 Ill. 2d 281. (2010) as it realates to the proposed license and the impact of entering into a license at this time.

In *Millennium Park*, the Park District had an ownership interest in a particular park. The park in question was an expansion of Grant Park under former Mayor Daly. According to Lois Wille's 1972 history of the shoreline, "Forever Open, Clear, and Free," Montgomery Ward began his battle when he looked out his window at 6 N. Michigan Ave. one summer day and, appalled by what he saw, called out to his lawyer and friend George Merrick: "Merrick, this is a damned shame! Go and do something about it." Ward went to court three times between 1890 and 1909 to get the area, then known as Lake Park, cleared off and preserved as park space-and won each

time. He forced the city to create and maintain the now 200-acre Grant Park and won legal recognition of citizens' rights to have a say about the city's parks. Long after Mr. Ward passed on to his eternal reward, a section of the Illinois Central Railroad was abandoned and Grant Park was expanded to include Millennium Park.Construction on Millennium Park began in 1997 and is known more generally for its Polished bean than the concession stand at the center of the litigation. The Park opened in 2004 and is situated on Michigan Avenue, and is generally an attraction in winter has an ice scatting rink and an outdoor theater.

The case, *Millennium Park*, involved the powers of a home rule unit which is different than other units of government. The issue there was the power of the assessor to tax a license as opposed to a lease of real estate. Importantly, in *Millennium Park* the unit of government exercised control over the plaintiff's operations and the Supreme court found a public purpose to the license. That is the Unit of government involved was in control over the licensee's conduct. The proposed lease, as I understand it, is not like the situation in *Millennium Park*, in that the control over the activities on the farm are vested in the licensee and not the Government. Thus, its distinguishable. *Millennium Park* is also distinguishable because the license did not grant the plaintiff full enjoyment and exclusive possession of the area it conducted business. This too is different as no one else will be growing a crop on the farm and the tenant/licensee will have full occupancy or else he would have no emblements to claim at harvest. In short, *Millennium Park* was highly determinative as to the facts and circumstances. Those facts and circumstances are not analogous here because with the growing of a crop on county land and calling it a license is not the same as establishing the land open to public use and asserting control over the land by the public body.

Section la of Article VIII of the Illinois constitution of 1970 states.:

ºPublic funds, property or credit shall be used only for public purposes,"

In addition ·to this constitutional mandate courts have repeatedly held that the use of public money for private purposes is a violation of due process. *People ex rel. Greening v. Bartho1f* (1944), 388 Ill, 445, *4491 Winter v. Barrett* (1933), 352 Ill. 441, 468 Chicago Motor. Club v. Kinney (1928h 328 Ill, · 120, 130. According to the Attorney General, It is not who receives the money .or property, but rather the purpose of the use, which is dispositive of its constitutional validity. Thus, even though private interests may benefit indirectly from a sale, lease, or conveyance of public land, the transaction is nevertheless valid if done for a public purpose or invalid for a non-public purpose. See Opinion of Attorney General File S- 1288, Citing to *People ex rel. City of Salem v. McMackin* (1972), 53 Ill. 2d 347, 355, *People ex rel. Adamowski V Chicago Railroad.Terminal Authority* (1958), 14 Ill. 2d 230, 236; *People ex.rel Gutknetc v. City of Chicago* (1953), 414 Ill 600, 611-612.

The basic premise of all government spending is that all public monies must be used for a public purpose. This is black letter law. When any public official undertakes action to facilitate payment of public funds for a non-public purpose, the action is official misconduct. It may also be official misconduct for a public official administering the office of States attorney to advise engaging in an unlawful act. Nothing I have been shown shows a public purpose behind a farmer farming land for profit and retaining the fruits of his labor. Where is

the public purpose. However framed, however contrived, the issue here is the purpose, not the form of the agreement.

"It is a well established rule that the powers of the multifarious units of local government in our State, including counties, are not to be enlarged by liberally construing the statutory grant, but, quite to the contrary, are to be strictly construed against the governmental entity. *Inland Land Appreciation Fund L.P. v. Cty. Qf Kane*, 344 Ill. App. 3d 720, 724, 800 N.E.2d 1232, 1236 (2003). Nowhere in the statutory scheme for counties did the legislature provide to the county board the power to ratify or approve an action directly contrary to the constitutional prohibition against use of public money for non-public purposes. Article V Ill, section I(a), of the Illinois Constitution, provides that "Public funds, property or credit shall be used only for public purposes." See People v Howard, 888 N.E.2d 85, 228 111.2d 428 (2008).

This is the fundamental issue in the case of the real estate taxes and the question that must be asked is:

"What is the public purpose?".

In short, the absence of a public purpose makes it clear that the payment of taxes imposed in arrears under a new license theory is unlawful. The use at the time the taxes were generated were to that non-public use. A license created today do not travel through time to the point when the use created the tax. For the treasure to make a payment that is patently illegal as with the proposed payment, the Treasurer, without court order, is exposed to being charged with felonious official misconduct. See People v Howard, 888 N.E,2d 85, 228 Ill .2d 428 (2008). Nevertheless, the recent development that the state's attorney who has the ultimate charging power is advising that a license would be lawful and that the license would cure in hindsight the taxes for the prior tax years.

Implication of tax in arrears.

I cannot reconcile the concept that a license today would impact taxes imposed for yesterday's conduct. The prior leasehold that existed at the time the taxes were imposed, that is why the taxes were levied. Moreover, the assessor should have taxed the tenant, not the county! I do not believe the County Assessor has any power to tax the County. IN the absence of having the power to tax the county the bill should not be paid. The *Millennium Park* actually supports the idea that the tax ought to have been imposed upon the tenant and not the county. The former State's Attorney had a duty to object to the county being taxed but for whatever reason failed to adhere to that duty.

None of these issues would exist had the Assessor properly taxed the Tenant or in the alternative the former states attorney failed to object to the imposition of the tax. Governmental units cannot tax other governmental units, so it is a substantial question if a Government can tax itself. This is not something that regularly occurs. What happens if the Government doesn't pay the tax on itself? Does it take a tax deed in three years?

Legality of the lease or proposed license still hinges on the use not the form of the agreement.

The Illinois Supreme Court in rendering its decision in People v Howard strictly construed the Illinois Constitutional prohibition against use of even the credit of the government for a non-public purpose in holding the conduct of Mr. Howard was unlawful. There, Mr. Howard used his government issued credit card to take a cash advance and re-paid the money back to the unit of government. In the intervening period he gambled with the funds advanced. Even though there was no loss to the unit of government, the court still held that use of the public purse requires a public purpose. Nothing in the set of facts associated with the lease or license to Mr. Hampton demonstrates a public purpose. Was the lease or license even put out for public bid? What is the total amount to be paid under the lease?

The lease or license is devoid of any public purpose. Rather, it is strictly a commercial purpose in which the county is the owner of the fee simple estate to a parcel of real estate. Because the property is being used for a commercial purpose the property is subject to taxation. That tax arises from the use by the tenant, not by the government's conduct or ownership. Accordingly, the use and the leasehold estate create the application of the real estate taxes. But the leasehold is the item subject to tax. This the assessor ought to understand. The assessors duty is to tax the interest in the land properly and has not done so.

Moreover, the lease itself is unlawful because it promotes the use of public land for non-public purposes and the lease does not articulate the correlation of taxes to the non-public purpose. Accordingly, It is my opinion based upon these facts that the lease dated February 13, 2019 between Mr. Hampton and the county committee is unlawful and void ab inito. It is also unclear if the county board ever voted on the lease. Nevertheless, based on the language of the lease and the absence of a discussion concerning the real estate taxes such a vote is a non sequitur, a nullity. Importantly, the Lease at issue does not correlate the amount of' taxes to be raised with the cost of the services to be rendered. This deprives the taxpayers of their right to have separately stated the purposes which the public money is appropriated or expended. (See *People ex rel. Wilson v. Wabash Co*. (1938), 368 Ill. 497, 14 N.E. 2d 650.) A similar issue was raised in *Elk Grove Township Rural Fire Protection Dist.. v. Mt. Prospect*. 228 Ill. App. 3d 228, 233, 592 N.E.2d 549, 552, 1992 Il l . App. LEXIS 567, 170 Ill. Dec. 1 13. 1 16. There the appellate court voided the agreement for the very reason there was no description of the purposes of the agreement to allow splitting of the taxes then due.

Accordingly, based on this authority and the additional authority, I have reviewed lead me to conclude that a court of competent jurisdiction properly vested with jurisdiction would decide the lease or license is void ab initio.

Legality of the Payment of Real Estate Taxes.

As noted above, the existing lease is presumptively void in the absence of a public purpose. Further the taxes spring into existence by virtue of the use of the land for non-public purposes. Here, the non-public purpose was established by the Assessor when he elected to tax the parcel. This finding by the assessor also furthers the argument of the illegality of the lease/license at issue. Nevertheless, disbursing for the payment of the real estate taxes is solely for the benefit of the tenant, Mr. Hampton. Mr. Hampton has enjoyed the use of the land in the period in which it was taxed and it is his prior use that the taxes spring into existence. Therefore, to pay the real estate taxes out of the public treasurer is unlawful because the payment would be for a non-public purpose and solely benefit Mr. Hamption

alone. Thus you expose yourself to a criminal indictment and prosecution for official misconduct, if you disburse knowing there was no public purpose to the use of the land. I previously said that any attorney advising you to disburse would be foolish. Like all things in the law there are exceptions. If the concern is the potential to be charged with official misconduct, the State's Attorney cannot on one hand tell you its legal and then charge you claiming it is not.

Accordingly, any person acting in furtherance of the payment solely benefiting Mr. Hampton is potentially subject to criminal prosecution, there can be an affirmative defense. It is on this basis that I advise that you to obtain a written position from the States Attorney on the public use and lawfulness of payment and that the written instrument form the State's Attorney be incorporated into the minutes of the public meeting and her opinion be Part of the public record before making any payment.

I further advise that you confer with the assessor so that the assessor can properly tax the leasehold interest the next time he assesses the property. It is clear that the assessment is also wrongful.

Respectfully

Robert T. Hanlon