Here, the proposed licensing agreement is (1) revocable; (2) non-assignable; and (3) permits the county to maintain access and control over its real property and crop by the express right of the licensor to physically access the property and also by the supervision of farming operations through a farm manager working on behalf of the county. The proposed agreement is consistent with the distinguishing features of a license detailed by the Illlinois Supreme court in the Millenium Park case and is similar to the agreements at issue in the Jackson and Roswell cases.

TAX LIABILITY

It should be noted that the Shelby County Property Tax website reads "taxes were forfeited at tax sale. To recover, call your county treasurer for amounts due." The county property tax website is inaccurate. The taxes are unpaid; however, they have not been forfeited.

The Illinois Appellate Prosecutor's Office contracts with the law firm of Giffin Winning Cohen & Bodewes, P.C. Because Shelby County contracts with the Appellate Prosecutor's Office, the firm's services are available to the Shelby County State's Attorney's Office. The firm specializes in municipal and local government law as well as civil litigation. The firm has provided a written opinion to Shelby County, free of cost, regarding tax liability. The firm opined that the County is responsible for the payment of past real estate taxes. The Shelby County State's Attorney's Office agrees with the reasoning and conclusion of the written opinion provided by Giffin Winning Cohen & Bodewes, P.C. (see attached).

Further, even if the County were able to prove that the tenant is liable for payment of past taxes, the liability is unenforceable in court. 35 ILCS 200/21-16 addresses recovery of delinquent taxes on property owned by a taxing district. The statute reads that "if a lessee is

suppliers and repair and maintenance activities. 224 Ill.2d at 312. Because the business operation was subject to the extensive control of the public entity with which it entered into the agreement, the Court held that the agreement at issue created an untaxable license as opposed to a taxable lease. 224 Ill.2d at 314-5.

Similarly, in Jackson Park Yacht Club v. Illinois Department of Local Government Affairs, 93 Ill.App.3d 542 (1st Dist., 1981), the court upheld an agreement as a tax-exempt license rather than a taxable lease because the public entity maintained control over the property, the rights and privileges accorded by the agreement were not assignable without written consent of the government, and the agreement was revocable by either party upon written notice. 93 Ill.App.3d at 547. In Jackson, the private entity used certain parcels of real estate belonging to the Chicago Park District as a yacht club. Because there was no intent to convey an interest in realty (as is the intent in a lease agreement), the court held that the agreement constituted an untaxable licensing agreement.

In another case, the First District Appellate Court held that an agreement between the City of Chicago and a private entity which operated parking facilities constituted a non-taxable license rather than a lease. The court held that "an agreement which merely entitles one party to use property subject to the management and control of the other party does not constitute a lease, but rather grants only a license. Application of Roswell v. City of Chicago, 69 Ill.App.3d 996 at 1001 (1st Dist. 1979). The court noted that the clear language of the agreement characterized payments made to the private entity as payments for services and that the City retained control of the premises. For those reasons, the agreement constituted a non-taxable license as opposed to a taxable lease.

Caselaw Distinguishing a Lease from a License

The Illinois Supreme Court case of Millennium Park Joint Venture v. Houlihan, Cook County Assessor, 224 Ill.2d 281 (2010) distinguished a lease from a license. Millennium Park in Chicago is owned by one or more tax-exempt entities and is considered "tax exempt" under the Property Tax Code. The Park entered into a concession permit agreement with a private party which allowed the private party to use Millennium Park to operate a food concession service. The County Assessor found that the agreement constituted a taxable lease as opposed to an untaxable license. The Illinois Supreme Court overruled the county assessor and determined that the agreement at issue was a tax-exempt license, rather than a taxable lease.

The Court held, "a license generally provides the licensee with less rights in real estate than a lease. If the contract gives exclusive possession of the premises against all the world, including the owner, it is a lease, but if it merely confers a privilege to occupy the premises under the owner, it is a license." Further, a license "is permission to do an act or a series of acts upon the land of another without possessing any estate or interest in the land." 224 Ill.2d at 310. The Court additionally noted that "Although some control is inherent in any granting of a license, it is the degree of possession and control that must be considered to determine whether a lease rather than a license has been granted." 224 Ill.2d at 310. The Court detailed the three primary distinguishing features of a license. Licenses are: (1) generally not assignable; (2) ordinarily revocable at the will of the grantor and, most crucially, (3) permit the owner to maintain some degree of possession and control over the land. 224 Ill.2d at 310.

Recognizing that the degree of possession and control over the land as the most crucial distinguishing characteristic between a lease and a license, the Court noted that many critical areas of Millennium Park's day-to day operations were regulated, including products and

agreement with a private entity for coal mining operations on land owned by Edwards County. Citing to In re Essex Coal Co., 411 Pa. 618, 192 A.2d 675 at 678 (1963), the Attorney General noted "the fact that an instrument is called a 'lease' is not material, it is the character of the transaction that is controlling." The Attorney General's Office wrote that "because the lease is in actuality a sale of the coal belonging to the county, it is not necessary that a public purpose be shown before leasing, as a county is authorized to sell or convey its property under [the County Code]." The Attorney General's Office concluded that a sale in place of coal was "a permissible action by the county under its power to sell or convey the property of the county."

Similar to the Edwards County case, under a licensing agreement to farm, Shelby County would be exercising its statutory power to purchase, sell or convey the property of the county: crops. Under the proposed licensing agreement to be presented for approval of the Shelby County Board, the County would receive 100% of the profit from the crop sale and the county would maintain control over its real property and the operations thereon. Selling and holding its property (real and personal) is expressly authorized by the County Code (as the Attorney General acknowledged in Opinion S-941).

Further, the Fourth District Court upheld the licensing agreement in the Charlton case, even though the Park District Code did not expressly grant Park Districts the power to enter into licensing agreements. The court held that the power "to contract in furtherance of any of its corporate purposes" was sufficient to authorize the licensing agreement. The holding in Charlton supports the position that Shelby County has the authority to enter into a contract to purchase, hold, sell and convey its property through a licensing agreement.

(all other acts) so that it can maintain and hold its real property and sell its personal property (crops).

In the case of Charlton v. Champaign Park District, 110 Ill.App.3d 554 (4th Dist., 1982), residents of a park district sought declaratory judgment that an agreement (determined to be a license by the appellate court) granted to a corporation to construct and operate a water slide in the park was invalid. The residents asserted that the Park District had only the powers granted to it by statute and no power to enter into a contract of this nature had been granted. Both parties agreed that park districts, like other non-home-rule units of government, can only exercise those powers expressly granted to them by statute or necessarily implied from such a grant. The Park District Code did not expressly grant to park districts the power to enter into leases, licenses, or concessions with a private entity for operation on district property of a business of profit to the private party. 110 Ill.App.3d at 556. The Park District relied upon the section of the Code which permits park districts "to contract in furtherance of any of its corporate purposes."

The Court ruled in favor of the Park District and determined that the agreement at issue was a license. The Court further held that the Park District had "implied power" to enter into the license, especially when sufficient control of the premises was retained by the park district (rendering the agreement a license rather than a lease). 110 Ill.App. 3d at 558. The court further reasoned, "we recognize the problems that might arise if a unit of local government completely abrogated its function or surrendered control of its property to an independent contractor. That has not occurred here...The District has maintained sufficient control over the waterslide operation..." 110 Ill.Ap..3d at 560.

In another case, the Illinois Attorney General's Office in S-941 provided a written opinion to Edwards County regarding the ability of Edwards County to enter into a lease

FARM LICENSE AGREEMENT

As an alternative to leasing the County Farm, it is the opinion of the Shelby County State's Attorney that the County is legally authorized to enter into a Licensing Agreement with a private farmer. As Licensee, the private farmer would be responsible for planting and harvesting the crop, for the benefit of Shelby County as Licensor.

Authority to License

Shelby County is not a home rule unit. Counties which are not home rule units generally have only those powers granted to them by law (Illinois Constitution, Article VII. Section 7) plus those powers that may be implied as necessary to carry out specific statutory powers. Goodwine v. County of Vermillion, 271 Ill. 266, Heidenreich v. Ronske, 26 Ill.2d 360, see also, Attorney General Opinion, S-691.

Pursuant to 55 ILCS 5/5-1005(3), counties have the power "to make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers." One power of Illinois counties is "to purchase and hold the real and personal estate necessary for the uses of the county." 55 ILCS 5/1005(1). Another power of Illinois counties is "to sell and convey…any…personal estate owned by the county."

Because the County Code (chapter 55 ILCS 5/5-1005) authorizes counties to purchase and hold real and personal property, the County is authorized to purchase and hold farmland (real property) and to purchase and hold seed and crops (personal property). Further, because the County Code authorizes counties to *contract and do all other acts* in relation to the property, the County is authorized to enter into a licensing agreement (a contract) and procure seed, fertilizer

Nichole D. Kroncke

Shelby County State's Attorney

301 E. Main Street
Shelbyville, IL 62565
p. (217) 774-5511
statesattorney@shelbycounty-il.com

To: **Members of the Shelby County Board**

From: **Nichole Kroncke, Shelby County State's Attorney**

Re: **Written opinion regarding Shelby County Farm**

Date: **March 8, 2021**