that effect."). Thus, it would be wholly inappropriate for the county to now attempt to shift the 2019 real estate tax liability to the lessee, particularly in light of the facts that the lease agreement does not provide for it and the county has historically been responsible for the taxes for over 40 years. See *Marty v. Brown*, 34 Ill. App. 3d 660, 666 (5th Dist. 1975) ("While leasehold estates are subject to assessment and taxation, we do not believe the Revenue Act authorizes such casual or arbitrary action on the part of the officials charged with the duty of administering the tax laws.").

Based on the foregoing, it is our conclusion that Shelby County is responsible for payment of the 2019 real estate taxes because (1) Section 9-175 of the Property Tax Code provides that the owner of the real estate is liable unless either (a) there is a contractual agreement to the contrary or (b) the leasehold interest is separately listed, assessed, and taxed to the tenant, and (2) neither exception applies under the facts presented.

III. Conclusion

We have enjoyed the opportunity to provide you with our opinion on this matter. Please feel free to contact us if we can provide any further assistance.

Sincerely,

GIFFIN, WINNING, COHEN
& BODEWES, P.C.

Christopher E. Sherer

CES/SAB

Section 15-60 of the Property Tax Code provides that "all property owned by a taxing district that is being held for future expansion or development [is exempt], except if leased by the taxing district to lessees for use other than public purposes." 35 ILCS 200/15-60. The facts presented to us are that the Shelby County Farm was "leased by the taxing district to lessees for use other than public purposes." Therefore, the property cannot be said to be exempt from real estate taxes, even though it is owned by the county, because the Property Tax Code specifically provides otherwise.

In certain situations, Section 9-195 of the Property Tax Code provides for the listing and assessment of a leasehold interest in real estate. It states, in pertinent part:

> ***Except as provided in*** Sections 15-35, 15-55, ***15-60***, 15-100, 15-103, 15-160, and 15-185, when property which is exempt from taxation is leased to another whose property is not exempt, ***and the leasing of which does not make the property taxable***, the leasehold estate and the appurtenances shall be listed as the property of the lessee thereof, or his or her assignee. Taxes on that property shall be collected in the same manner as on property that is not exempt, and the lessee shall be liable for those taxes.

35 ILCS 200/9-195 (emphases added). This section, however, does not apply to the current situation. For Section 9-195 to apply ("[e]xcept as provided in" Section 15-60), it requires that "the leasing of [the exempt property] does not make the property taxable". As noted, the mere leasing of the Shelby County Farm "to lessees for use other than public purposes" removed the exemption that was available pursuant to Section 15-60. Therefore, it would be inappropriate for the Shelby County Farm to be "listed as the property of the lessee thereof" pursuant to Section 9-195.

It is our understanding that, because the leasehold interest has never been assessed and taxed, the real estate taxes have historically been billed to Shelby County, who has paid them (at least until 2020). Under the facts presented, it was and is entirely appropriate for Shelby County to pay the taxes because Shelby County has been and is legally responsible for them. The Property Tax Code provides that, because the fee was assessed and taxed (and not the leasehold estate pursuant to Section 9-195), Shelby County, as the owner of the property, is "liable for the taxes of that year". 35 ILCS 200/9-175. Although the county could have shifted the tax liability to the tenant in the lease agreement, it failed to do so. See *Ceres Terminals, Inc. v. Chicago City Bank & Tr. Co.*, 259 Ill. App. 3d 836, 864 (1st Dist. 1994) ("it is well established that the owner of land is obligated to pay all real estate taxes and can shift its tax liability to the lessee only if there is a clear agreement to

persuasive indicator that a public purpose exists. As the Illinois Supreme Court explained in *Empress Casino*:

> In deciding whether a purpose is public or private, courts are
>
> > " 'largely influenced by the course and usage of the government, the object for which taxes and appropriations have been customarily and by long course of legislation levied and made, and what objects have been considered necessary to the support and for the proper use of the government. ***Whatever lawfully pertains to this purpose and is sanctioned by time and the acquiescence of the people may well be said to be a public purpose and proper for the maintenance of good government.***' *Hagler* [*v. Small*], 307 Ill. [460,] 474[, 138 N.E. 849 (1923)]." *In re Marriage of Lappe,* 176 Ill.2d at 430, 223 Ill.Dec. 647, 680 N.E.2d 380.
>
> See also *In re Marriage of Lappe,* 176 Ill.2d at 437, 223 Ill.Dec. 647, 680 N.E.2d 380 ("If the principal purpose of the enactment is public in nature, it is irrelevant that there will be an incidental benefit to private interests"). If the purpose sought to be achieved by the legislation is a public one and it contains elements of public benefit, then ***the question of how much benefit the public derives is for the legislature, not the courts***. *McMackin,* 53 Ill.2d at 357-58, 291 N.E.2d 807.

Empress Casino, 231 Ill. 2d at 87 (citations and alterations in original) (emphases added).

Accordingly, it is our opinion that the answer to your first question is "Yes." Based on the foregoing, the county ***does*** have authority to lease real estate to a private party to be used by such individual for a private farming operation for an annual cash rental paid to the county, so long as there is some public purpose served by doing so. Otherwise, without any public purpose, the leasing of the real estate without any public purpose or benefit would violate article VIII, section 1(a) of the Illinois Constitution.

II. Responsibility for Real Estate Taxes

Based on the facts that you have outlined, there does not appear to be any disagreement as to whether the Shelby County Farm has properly been assessed and taxed. To be sure, taxation is the rule in Illinois; tax exemption is the exception. See, *e.g., Oswald v. Hamer*, 2018 IL 122203, ¶ 12. You have also indicated that neither the tenant nor Shelby County has ever applied for a real estate tax exemption.

In *Paley*, the Urbana city council adopted an ordinance that provided for the borrowing of $40,000 to purchase a parcel of land for redevelopment and for the issuance of eight general obligation municipal bonds of $5,000 each to fund the purchase. The Urbana mayor refused to sign the bonds and was sued in mandamus. The mayor argued that the public purpose was not met because the contemplated purchase was "merely a collaboration between the city and a private developer to take property from one individual and give it to another in a scheme 'designed to bring financial reward to private developers.'" *Paley*, 68 Ill. 2d at 75.

The *Paley* court, however, concluded that there was, in fact, a public purpose, stating:

> It is apparent that the city of Urbana intends to undertake the redevelopment in question primarily for the purpose of revitalizing an economically stagnant downtown area. The purpose of the project is therefore clearly and predominantly a public purpose, and the benefit reaped by private developers is merely an inevitable incident thereto. Consequently, on the basis of *McMackin* and the other authorities cited above, the mayor's objection to the private benefit which will result from the proposed redevelopment is without merit.

Paley, 68 Ill. 2d at 75-76.

Based on the foregoing authorities and the cases cited therein, it is clear the courts have refused to engraft an additional term into article VIII, section 1(a) of the Illinois Constitution by interpreting it to state that "public funds, property, and credit shall only be used ***exclusively*** for public purposes." Accordingly, insofar as Opinion S-995 can be read to opine that the Illinois Constitution creates a general prohibition against leasing county-owned real estate to a private party for private purposes, we do not believe that to accurately state the law as it exists today. Rather, as noted above, the question is whether there is ***some*** public purpose or benefit.

Here, it may be argued that the county's receipt of nearly $40,000 annually from the Shelby County Farm serves a public purpose because the land is generating income on land that the county would otherwise be expending resources on to maintain. That argument may be strengthened if it can be shown that the amount of cash rent that the county receives (which averages approximately $166.36 per acre) is consistent with prevailing market rates.

Perhaps the most significant factor in this analysis, however, is that the county's leasing arrangement has existed for over 40 years. That fact alone is a

Focusing momentarily on the court's use of Justice Holmes' quote, we note that the Property Tax Code (discussed *infra*) contemplates the leasing of public property to lessees for use other than public purposes. See, *e.g.*, 35 ILCS 200/9-195 & 15-60. Also, while not necessarily controlling legal authority, the Illinois Department of Revenue's publication *The Property Tax System* recognizes that government-owned real estate might be leased to a farmer. See Ill. Dep't of Revenue, *The Property Tax System*, at p. 6 ("Leaseholders pay property taxes on real property leased from an owner whose property is exempt (*e.g.*, the state owns agricultural property and leases it to a farmer).").

The *Empress Casino* court continued:

> What is a 'public purpose' is not a static concept, but is flexible and capable of expansion to meet the changing conditions of a complex society. Moreover, the power of the State to expend public moneys for public purposes is not to be limited, alone, to the narrow lines of necessity, but the principles of wise statesmanship demand that those things which subserve the general wellbeing of society and the happiness and prosperity of the people shall meet the consideration of the legislative body of the State, though they ofttimes call for the expenditure of public money. ***The consensus of modern legislative and judicial thinking is to broaden the scope of activities which may be classified as involving a public purpose.***

Id. (internal quotation marks and citations omitted) (quoting *In re Marriage of Lappe*, 176 Ill. 2d 414, 430-31 (1997)) (emphasis added).

In *Empress Casino*, the court also cited to its 1977 decision in *People ex rel. City of Urbana v. Paley*, 68 Ill. 2d 62 (1977), wherein it explained:

> We have frequently defined the law on this issue, most recently in *People ex rel. City of Salem v. McMackin*, 53 Ill.2d 347, 355 [(1972)]:
>
> > "We have held on a number of occasions that if the principal purpose and objective in a given enactment is public in nature, it does not matter that there will be an incidental benefit to private interests.
> >
> > We have indicated that there is no constitutional prohibition against the use of public funds which inure to the benefit of private interests, so long as the money is utilized for a public purpose."
>
> The above is no more than a statement of a widely accepted rule of law.

Paley, 68 Ill. 2d at 75-76 (citations omitted).

Illinois Constitution, the opinion then observed that the Appellate Court of Illinois, Third District previously explained the rule as follows:

> Counties are mere political divisions of the territory of the State, as a convenient mode of exercising the political, executive and judicial powers of the State. They were created to perform public, and not private, functions. They are wholly public in their character, and are a portion of the State organization. All their powers are conferred, and duties imposed, by the constitution and statutes of the State. They are public, and all the property they hold is for public use. It belongs to the public, and the county is but the agent invested with the title to be held for the public.

Opinion S-995 (quoting *Yakley v. Johnson*, 295 Ill. App. 77, 81 (3d Dist. 1938)).

Although Opinion S-995 might seem to have articulated a bright-line rule that would lead to the conclusion that the answer to your first question is "No", the body of Illinois law that has developed since that opinion was issued draws such a conclusion into question. In other words, we do not believe that the Illinois Constitution categorically prohibits a county from leasing real estate to a private party to be used by such individual for a private farming operation for an annual cash rental paid to the county.

In determining whether article VIII, section 1(a) of the Illinois Constitution has been violated, "the crucial test is whether the attempted use of municipal property subserves the public interest and benefit a private individual or corporation only incidentally. If the private benefits are purely incidental to the public purposes of the act, then art. VII, section 1(a) of the Illinois Constitution is not violated." *O'Fallon Dev. Co. v. City of O'Fallon*, 43 Ill. App. 3d 348, 355 (5th Dist. 1976). In *Empress Casino*, the Illinois Supreme Cour framed the issue as whether "governmental action has been taken which directly benefits a private interest without a corresponding public benefit." *Empress Casino Joliet Corp. v. Giannoulias*, 231 Ill. 2d 62, 85 (2008). It explained:

> This court has long recognized that what is for the public good and what are public purposes are questions which the legislature must in the first instance decide. In making this determination, the legislature is vested with a broad discretion, and the judgment of the legislature is to be accepted in the absence of a clear showing that the purported public purpose is but an evasion and that the purpose is, in fact, private. In the words of Justice Holmes, "a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect."

Id. at 294 (internal quotation marks and citations omitted) (quoting *Friends of the Parks v. Chicago Park Dist.*, 203 Ill. 2d 312, 320 (2003)).

- Neither the tenant nor Shelby County has ever applied for a real estate tax exemption.

- The taxes have historically been assessed and billed in Shelby County's name. In the past, Shelby County has paid the real estate taxes associated with the Shelby County Farm. Last year, however, the Shelby County Treasurer did not pay the 2019 real estate taxes (billed in 2020), and those taxes remain unpaid.

- The current lease agreement provides for Shelby County to receive two annual payments of $19,630 as cash rent.

You have asked the following questions:

1. Does the county have authority to lease real estate to a private party to be used by such individual for a private farming operation for an annual cash rental paid to the county?

2. Which party is responsible for payment of the 2019 real estate taxes?

For the reasons hereinafter stated, it is our opinion that the Illinois Constitution does not prohibit a county from leasing county-owned farmland to a private tenant so long as there is some public purpose. Further, it is our opinion that Shelby County is responsible for payment of the 2019 real estate taxes, as explained below.

I. Power of County to Lease for Non-Public Purpose

The Counties Code permits a county to "sell and convey or lease any real or personal estate owned by the county." 55 ILCS 5/5-1005. However, the Illinois Constitution limits that power and provides that "public funds, property, and credit **shall only be used for public purposes**." Illinois Constitution, Article VIII, Section 1(a) (emphasis added).

In 1975, the Illinois Attorney General issued an opinion to the Logan County State's Attorney based on facts that appear to be very analogous to those that you have outlined. See generally Illinois Attorney General Opinion S-995 (hereinafter, "Opinion S-995"). The requesting State's Attorney noted that the Attorney General had "consistently" held "that leases of a County farm for non-governmental purposes" was beyond a county's statutory authority to lease property. The opinion reaffirmed that "[t]he power to lease public property * * * does not authorize counties to lease their property for private purposes." *Id.* After citing article VIII, section 1(a) of the

GIFFIN WINNING
COHEN & BODEWES, P.C.
ATTORNEYS AT LAW

ESTABLISHED 1911

TELEPHONE (217) 525-1571
www.giffinwinning.com

Christopher E. Sherer
Attorney
csherer@giffinwinning.com

HERMAN G. BODEWES
R. MARK MIFFLIN
DAVID A. HERMAN
CREIGHTON R. CASTLE
CHRISTOPHER E. SHERER
MATTHEW R. TRAPP
JASON E. BROKAW

JOHN M. GABALA
SAMANTHA A. BOBOR
JACKSON B. FREDMAN
JASON R. VINCENT

Of Counsel:
ROBERT S. COHEN
JOHN L. SWARTZ
RONALD W. PERIARD

March 8, 2021

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Ms. Nichole Kroncke
Shelby County State's Attorney
Courthouse
Shelbyville, IL 62565

- VIA EMAIL ONLY -

Re: Office of State's Attorney's Appellate Prosecutor
Request for Legal Opinion: Real Estate Tax Issue

Dear Ms. Kroncke:

You contacted us on February 11, 2021, inquiring as to the responsibility for the payment of property taxes on farmland owned by Shelby County and leased to third party tenant, who farms the ground and pays cash rent to the county. On February 18, 2021, you provided us with a written summary and shared a copy of your letter to the Illinois Attorney General's Office dated January 11, 2020 (which, because the letter references your recent election, we assume should have been dated January 11, 2021). Based on your communications, it is our understanding that:

- Shelby County owns approximately 236 acres of real estate, which is referred to as the "Shelby County Farm". The Shelby County Farm has been leased to a private party (or private parties) since the 1970's. The lease agreement has provided that the Shelby County Farm is to be used for agricultural purposes only.

- The lease agreement has always been silent as to which party is responsible for the payment of real estate taxes.