OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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I - 06-002

COUNTIES:
Use of County Property
to Recover Private
Property for a Fee

The Honorable Allan Lolie
State's Attorney, Shelby County
301 East Main Street
Shelbyville, Illinois 62565

Dear Mr. Lolie:

I have your letter inquiring whether a non-home-rule county may authorize the use of county property to engage in the recovery of private property and to charge a fee to the owner in return for such services. Because of the nature of your inquiry, I do not believe that the issuance of an official opinion is necessary. I will, however, comment informally on your question.

The information you have provided indicates that the Shelby County Dive Team, a unit of the Shelby County Rescue Squad, has requested authorization from the Shelby County Board to recover lost private property from bodies of water located in the county. The dive team proposes to use county property and equipment in its recovery efforts. You have asked whether the Shelby County Board is authorized to allow the use of county property by the Shelby County

Dive Team in such recovery efforts and, if so, to charge a fee to those owners who have requested assistance.[1]

It is well established that non-home-rule counties may exercise only those powers that have been expressly granted to them by the constitution or by statute, together with those powers that are necessarily implied therefrom to effectuate the powers which have been expressly granted. *Redmond v. Novak*, 86 Ill. 2d 374, 382 (1981); *Heidenreich v. Ronske*, 26 Ill. 2d 360, 362 (1962). Sections 5-1015 and 5-1016 of the Counties Code (55 ILCS 5/5-1015, 1016 (West 2004)), respectively, authorize a county board to "take and have the care and custody of all the real and personal estate owned by the county" and to "manage the county funds and county business, except as otherwise specifically provided." A county board's power to manage county property, however, is limited by article VIII, section 1, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. VIII, §1), which provides, in pertinent part:

> (a) Public funds, property or credit shall be used only for public purposes.

Article VIII, section 1(a), of the Constitution clearly limits the use of public property to public purposes. See *Redmond*, 80 Ill. 2d at 382. In several decisions, the Illinois Supreme Court has discussed what constitutes a "public purpose":

> 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. [Citations.] 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. [Citations.] 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

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[1] We have not been provided with specific information concerning the organization of the Shelby County Rescue Squad or the relationship between it and the Shelby County Board. It is not clear, therefore, the statutory authority under which the Shelby County Rescue Squad is organized. *See* 20 ILCS 3305/10 (West 2004); 70 ILCS 705/0.01 *et seq.* (West 2004); 70 ILCS 2005/1 *et seq.* (West 2004)). Because your question concerns only the authority of the Shelby County Board to authorize the Shelby County Rescue Squad to recover private property using county property, the resolution of this issue does not rely on a determination of the organizational structure of the Shelby County Rescue Squad. This opinion will therefore focus solely on the county's authority to authorize the rescue squad to use county property without consideration of the statutory authority pursuant to which the rescue squad was organized.

least to great respect." *Block v. Hirsh*, 256 U.S. 135, 154, 65 L. Ed. 865, 870, 41 S. Ct. 458, 459 (1921).

This court has previously set forth guidelines for this inquiry:

"In deciding whether such purpose is public or private, courts must be 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*, 307 Ill. at 474.

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. *In re Marriage of Lappe*, 176 Ill. 2d 414, 429-30 (1997).

Similarly, in opinion No. S-825, issued October 31, 1974 (1974 Ill. Att'y Gen. Op. 297, 299-300), Attorney General Scott advised that:

It has been variably stated that a public purpose means "a purpose approved and authorized by law" (*Frohmiller v. The Bd. of Regents*, (Ariz.) 171 P.2d 356) which has as its objective the promotion of public health, safety, morals, security, prosperity, contentment, and general welfare of all of the inhabitants (*Clifford v. The City of Cheyenne*, (Wyo.), 487 P.2d 1325; *United Community Service v. Omaha Nat'l. Bank*, 162 Neb. 786, 77 N.W.2d 576; *Lott v. The City of Orlando*, 142 Fla. 338, 196 So. 313); a purpose or use necessarily for the common good and welfare of the people of the municipality (*Kearney v. The City of Schenectady*, 325 N.Y.S. 2d 278), which confers direct public benefit of a reasonably general character as distinguished from a removed or theoretical benefit (Opinion of the Justices to the House of Representatives, (Mass.) 197 N.E.2d 691); and which not only serves to benefit the community as a whole but is also directly

related to the functions of government. *Roe v. Kervick*, 42 N.J. 191, 199 A.2d 834; *Port Authority of the City of St. Paul v. Fisher*, 269 Minn. 276, 132 N.W.2d 183.

The constitutional limitation on the use of public property is not avoided merely because a unit of government may be compensated for the private use of its property. *Redmond*, 86 Ill. 2d at 382; *Yakley v. Johnson*, 295 Ill. App. 77, 81 (1938). If the principal purpose and objective of a governmental activity is public in nature, it does not matter that there will be an incidental benefit to private interests. *People ex rel. City of Salem v. McMackin*, 53 Ill. 2d 347, 355 (1972). Conversely, if the primary benefit of the use of public funds or property is private, an incidental benefit to the public will not justify a use or expenditure. The issue, therefore, is whether the use of county property by the rescue squad to recover personal items for a fee is a "purely private" matter, or one that would serve "a proper public purpose."

If the sole interest to be served by such activity is the private interest of the persons for whom property is recovered and returned, then it would be inappropriate to use public property for that purpose. In that circumstance, public property would be used for a purely private purpose, which is not permissible under article VIII, section 1(a), of the Constitution.

There may be, however, public purposes to be served by the use of county property to recover private property from bodies of water. For example, there is a public interest in keeping bodies of water safe and free of pollution or debris. There may be a public interest in the recovery of artifacts of historical or cultural significance. Further, there may be a public interest in the training of dive team members and the testing of equipment in a non-emergency situation. In these circumstances, the use of public property could potentially serve a public purpose and be allowed by article VIII, section 1(a), of the Constitution.

Accordingly, it appears that the use of public property by a county dive team to engage in the routine business of the recovery of private property would be prohibited by the constitutional limitation discussed above. If, however, a public purpose is primarily served, the dive team would not be constitutionally prohibited from using public property for its recovery activities even if there is an incidental benefit to a private interest. Accordingly, the county would not be prohibited from authorizing the use of county property by the dive team if such service benefits the interests of the county and its residents. This necessarily requires a factual determination that must be made based on the specific circumstances involved.

With regard to the collection of a fee for providing recovery services, although a county board may authorize the use of public property to recover personal property in appropriate circumstances, the county board has no statutory authority to charge a fee for the recovery of personal items by the dive team. As was stated previously, non-home-rule counties may exercise

only those powers that have been expressly granted to them by the Constitution or by statute, together with those powers that are necessarily implied therefrom to effectuate the powers which have been expressly granted. We have identified no statutory or constitutional authority for a county or any of its officers or agencies to assess or collect a fee for the recovery of lost property. Thus, it appears that the county board has no authority to authorize the charging of a fee for the dive team's recovery of personal property. You may wish to consider a legislative amendment to authorize the collection of such a fee. *Cf.* 70 ILCS 705/11f(a) (West 2004) (A fire protection district is authorized to charge "and collect fees not exceeding the reasonable cost of the service for all services rendered by the district against persons * * * who are not residents of the fire protection district.")

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Very truly yours,

[redacted]

LYNN E. PATTON
Senior Assistant Attorney General
Chief, Opinions Bureau

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