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ATTORNEY GENERAL
STATE OF ILLINOIS

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FILE NO. 93-005

STATE MATTERS:
Authority to Lease for
Expansion of Park Lodge

Mr. Brent Manning
Director
Illinois Department of Conservation
524 South Second Street
Springfield, Illinois 62701-1787

Dear Mr. Manning:

I have your letter wherein you inquire whether, pursuant to section 63a21 of the Civil Administrative Code (Ill. Rev. Stat. 1991, ch. 127, par. 63a21; 20 ILCS 805/63a21 (West 1992)), the Department of Conservation may lease an existing structure and appurtenant land in Illinois Beach State Park to a private corporation for the expansion, rehabilitation and reconstruction of a lodge complex to be maintained and operated by the private corporation. For the reasons hereinafter stated, it is my opinion that the Department's grant of authority to lease lands includes the power to lease

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buildings situated thereon, and further, that the work required by the project which you have described will be so extensive that it will constitute "construction", for purposes of section 63a21.

Section 63a21 of the Civil Administrative Code empowers the Department of Conservation:

> "To develop and operate public accommodation, educational and service facilities on lands over which the Department has jurisdiction, and to lease lands over which the Department has jurisdiction to persons or public or private corporations for a period not to exceed 99 years for the construction, maintenance and operation of public accommodation, educational and service facilities. Such public accommodation, education and service facilities include, but are not limited to marinas, overnight housing facilities, tent and trailer camping facilities, recreation facilities, food service facilities and similar accommodations.* * * All such leases or subleases, for whatever period, shall be made subject to the written approval of the Governor." (Emphasis added.)

In opinion No. S-464, issued June 23, 1972 (1972 Ill. Att'y Gen. Op. 128), Attorney General Scott advised that the Department of Conservation could not, under the authority of section 63a21, enter into a lease of the lodge at Illinois Beach State Park to a lessee who was to make "substantial improvements in the present facilities". He concluded that the use of the word "construction" in section 63a21 was indicative of a legislative intention to include only the building of a new facility rather than the improvement of an existing facility, and that the General Assembly's use of the term "lands"

in section 63a21 included only lands to which no buildings or structures were affixed. 1972 Ill. Att'y Gen. Op. 130.

According to Attorney General Scott, "a lease agreement made pursuant to section 63a21 must require that the following three activities be undertaken by the lessee: construction, maintenance and operation of a public accommodation facility." (1972 Ill. Att'y Gen. Op. 128, 129.) Assuming that maintenance and operation responsibilities were to be those of the lessee, he addressed the issue of whether the making of "substantial improvements in the present facilities", also referred to as "capital improvements in the lodge", constituted "construction", for purposes of the statute. He reasoned:

> " * * *
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> The word 'construction' in its ordinary sense means to build or erect something which theretofore did not exist. (The Board of Supervisors of Covington County v. State Highway Commission, 188 Miss. 274, 194 So. 743, 748). The word 'construct' is not synonymous with 'repair,' 'improve' or 'maintain' under the accepted terminology. (People v. New York Cent. R. Co., 397 Ill. 247). Construction means the creation of something new, rather than the repair or improvement of something already existing. Cabell v. City of Portland, 153 Ore. 528, 57 P. 2d 1292, 1297.
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> I am of the opinion that the legislature intended by the word 'construction' as used in section 63a21 that a new facility be built rather than the improvement of one that already exists.
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> * * * "

1972 Ill. Att'y Gen. Op. 129-30.

A term used in a statute will, unless otherwise defined, be given its ordinary and popularly understood meaning only where to do so would not defeat the perceived legislative intent. (People v. Fink (1982), 91 Ill. 2d 237, 240.) In ascertaining legislative intent, existing circumstances, contemporaneous conditions, the reason or necessity for and the object to be achieved by the statute, and the meaning of the words, enlarged or restricted, according to their real intent, should be considered. Petterson v. City of Naperville (1956), 9 Ill. 2d 233, 245.

The cases cited by my predecessor in opinion No. S-464 do support the proposition that the term "construction" ordinarily connotes the building of something completely new. They do not, however, suggest that the word may be given only that meaning in every situation.

In Cabell v. City of Portland (S. Ct. Ore. 1936), 57 P.2d 1292, the issue was whether the use of the term "construction" empowered a highway commission to construct highways that had not yet been established when the statute in question was enacted, not whether the term included lesser activities such as improvement or repair. Since the term had been used in conjunction with other terms such as reconstruct, pave, improve, repair and maintain, the word "construct" would have been meaningless in that context, if it did not refer to the establishment of a new highway. (Cabell v. City of Portland, 57 P.2d at 1297.) The meaning of the term "construction" was

not even at issue in Board of Supervisors of Covington County v. State Highway Commission (S. Ct. Miss. 1940), 194 So. 743.) The proposition for which that case was cited was part of a quotation from and discussion of another case, Trahan v. State Highway Commission (S. Ct. Miss. 1940), 151 So. 178. (Board of Supervisors of Covington County v. State Highway Commission, 194 So. at 748.) At issue in Trahan was actually the meaning of the word "designate", for purposes of a statute allowing the legislature "to designate certain highways as "state highways" * * * under the control of the state highway commission, for construction and maintenance". It was argued that the legislature could designate a highway as a state highway only if it was in existence prior to the designation. The court held, however, that such an interpretation of the statute would require the court to "cut down" the meaning of the word "construction" and make it the equivalent of "reconstruction". Trahan v. State Highway Commission, 151 So. at 181-82.

In People ex rel. Prindable v. New York Central Railroad Co. (1947), 397 Ill. 247, also cited by my predecessor, the issue facing the court was whether a county levy "for the purpose of improving, constructing, maintaining and repairing the highways" pursuant to a particular statute was a levy for a single purpose under section 156 of the Revenue Act of 1939 (Ill. Rev. Stat. 1943, ch. 120, par. 637), or was invalid as a levy for more than one purpose. The statute to which the

levy referred empowered the county to levy a tax for the purpose of "improving, maintaining and repairing" certain highways. For purposes of the Revenue Act, the court found that the term "construction" was not synonymous with improvement, maintenance and repair; that construction was a separate purpose; and that the levy was therefore invalid.

The court relied upon two other cases in reaching its conclusion. In one, People ex rel. Gill v. Devine Realty Trust (1927), 366 Ill. 418, 425, the court invalidated a tax levy for constructing and maintaining a zoological park where the levy did not separate the amount levied for "constructing" from that levied for "maintaining". In the other, People ex rel. Reynolds v. Atchison, Topeka & Santa Fe Railway Co. (1921), 300 Ill. 415, the court invalidated a levy for the establishment and maintenance of a county detention home for the same reason. In that case, the court stated, at page 417:

> " * * *
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> * * * The terms 'establish' and 'maintain' do not mean one and the same thing. The term 'establish' must be given its ordinary definition, in the absence of language showing that a special meaning is intended. To establish means to create, to institute, to build. While a tax levied under the act for the establishment of a detention home would include purchasing, erecting, leasing and otherwise providing, and such tax could be used to enlarge, improve or add to such home, such purpose must not be confused with that of maintenance.
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> * * * "

(Emphasis added.)

It may be inferred from Reynolds that the term "construction" may also include enlargement, improvement or expansion, in the proper context.

Cases from other jurisdictions support this conclusion, the word "construction" having been said to be one of variable meaning. (Goben v. Akin (S. Ct. Iowa 1929), 227 N.W. 400, 401; Larson v. Crescent Planing Mill Co (Mo. App. 1949), 218 S.W. 2d 814, 820.) In Hlubeck v. Beeler (S. Ct. Minn. 1943), 9 N.W. 2d 252, the court considered whether certain remodeling work violated an ordinance making it unlawful to build, erect or construct a wooden building in a particular area of the city. In determining whether the work constituted rebuilding or repair, the court stated:

> " * * *
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> * * * Whether repairs are so extensive as to amount to a rebuilding depends upon the facts of the particular case. If the work substantially changes the building or enlarges it or greatly enhances its value, it is said to be a rebuilding. [Citation omitted.] If a building is so changed in plan, structure, or general appearance that it 'might, according to common understanding, in common parlance, be called "a new building,"' then the work is properly called 'building' or 'rebuilding' and not 'repair'. [Citation omitted.]
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> * * * "
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> (9 N.W. 2d at 257.)

It follows that the term "construction" can also include acts which might otherwise be referred to as reconstruction or renovation.

Other cases have concluded that the word "construction" can include within its meaning the erection of part of a building (D'Ambra v. Zoning Board of Appeal (S. Ct. Mass. 1949), 324 Mass. 84 N.E. 2d 456, 457 (there was no "construction" where there was no additional building, no enlargement, no exterior work and no change in exterior appearance of the building)), reconstruction (Bell v. Maish (S. Ct. Ind. 1894), 36 N.E. 358, 359 (reconstruction is a form of construction, a construction again of what had first been constructed)), renovation that improves an already existing building (Reliable Properties, Inc. v. McAllister (App. Ct. N.C. 1985), 336 S.E. 2d 108, 110), enlargement (People v. Farmers' High Line Canal & Reservoir Co. (S. Ct. Colo 1912), 123 P. 645, 647), or acquisition. Ostrander v. City of Salmon (S. Ct. Idaho 1911), 117 P. 692, 695-96.

According to the information you have provided, the lodge at Illinois Beach State Park was built in 1958, is in need of significant reconstruction and has been closed due to a major asbestos removal project. A consultant engaged to evaluate the facility's potential estimated its fair market value to be $850,000. The proposed project includes: the construction of 16 new guest rooms in an open area, an aspect of the project that will require the construction of new exterior walls; the complete reconstruction of all exterior walls in a way that will change their appearance and will replace windows

with window-walls that may be opened and closed; the complete redesign and reconstruction of public areas and operations offices, including, the redesign of the main entrance, enlargement of the lobby and dining area, construction of new conference facilities and enhancement of the club and swimming pool; and complete rehabilitation of the 96 existing guest rooms, including all fixtures. The total cost of the expansion and rehabilitation is estimated to be $7.1 million.

Section 63a21 of the Civil Administrative Code authorizes the Department to lease lands for up to 99 years for the construction, maintenance and operation of facilities for public accommodation and service, or to develop and operate such facilities itself. One of the obvious purposes of section 63a21 is to provide a mechanism through which private sector funds may be used to finance major capital investments in facilities that a private venture would operate and maintain on lands under the Department's jurisdiction. If the meaning of "construction" was limited solely to construction where no facility was already in existence, then, once a facility had been constructed, there could be no substantial capital improvements to the existing facility by subsequent lessees, even though the improvements would be funded by a private operator. The only way to provide for a larger facility at other than public expense would be to abandon or destroy the old and build a completely new facility. I see no reason for

the statute to be interpreted in such a restrictive and wasteful way. Therefore, contrary to my predecessor's conclusion, it is my opinion that for purposes of section 63a21 of the Civil Administrative Code of Illinois, the term "construction" includes not only construction where no structure previously existed, but also projects such as the one that you have described which involve substantial expansion and reconstruction.

My predecessor also concluded in opinion No. S-464 that the General Assembly did not intend for section 63a21 to authorize the Department to lease lands other than lands without buildings or structures. (1972 Ill. Att'y Gen. Op. 128, 130.) He did so without consideration of the commonly understood meaning of the term "lands" in the law; rather, he drew that conclusion from the fact that the General Assembly had specifically referred to "buildings or structures affixed to lands" in section 63a6 of the Civil Administrative Code (Ill. Rev. Stat. 1991, ch. 127, par. 63a6; 20 ILCS 805/63a6 (West 1992)), which authorizes the Department:

> "To do and perform each and every act or thing considered by the Director to be necessary or desirable to fulfill and carry out the intent and purpose of all laws pertaining to the Department of Conservation including the right to rehabilitate or sell at public auction, buildings or structures affixed to lands over which the Department has acquired jurisdiction when in the judgment of the Director such buildings or structures are obsolete, inadequate or unusable for the purposes of the Department and to lease

> such lands with or without appurtenances for a consideration in money or in kind for a period of time not in excess of 4 years for such purposes and upon such terms and conditions as the Director considers to be the best interests of the State when such lands are not immediately to be used or developed by the State.
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> * * * "

The fact that the General Assembly has, in section 63a6 of the Code, authorized the Department to rehabilitate or sell obsolete, inadequate or unusable buildings or structures affixed to land and to lease such lands does not necessarily require construing a reference to "lands" in another provision of the Code as excluding buildings and structures.

In order to ascertain the intent of the General Assembly, it is appropriate to take into consideration the whole of an act, the law as it existed prior to the act's passage, the changes made by the new act and the purpose for making the changes. (People ex rel. Shriver v. Frazier (1944), 386 Ill. 620, 624.) The General Assembly granted the Department the power now described in section 63a6 by means of an amendment to section 63a of the Code in 1949. (1949 Ill. Laws 1530.) The Department was not given the power to construct lodges, cabins and other structures (other than living quarters for custodians) in State parks until 1953 (1953 Ill. Laws 1596), and was not given the power to lease lands for the construction, maintenance and operation of public accommodation facilities until 1965. (1965 Ill. Laws 2392.) It is highly

unlikely, therefore, that section 63a6 was intended to act as any kind of a limitation on powers subsequently granted, especially in light of the basic grant of section 63a6, which is the power to do and perform each and every act necessary or desirable to carry out or fulfill laws pertaining to the Department. The leasing provision of section 63a6 is designed to give the Department a means to deal with unusable buildings affixed to lands that the Department acquires; it was not related to its power to lease lands for the construction of lodges or other places of public accommodation.

Although he relied exclusively on the ordinarily understood meaning of "construction" in construing that term, my predecessor did not even consider the accepted meaning of the term "lands". In Croskey v. Northwestern Manufacturing Co. (1868), 48 Ill. 481, 483, the court held that the term "land", as used in a statute relating to mechanics' liens, included land with improvements thereon. Further, the court stated in Lenfers v. Henke (1874), 73 Ill. 405, at 408:

" * * *

> * * * By reference to the authorities, we find, at common law, the wife was entitled to be endowed of all lands and tenements of which the husband died seized. The import of those terms is well known in the law. Land comprehends all things of a substantial nature, which includes any ground, soil or earth whatever, and hath in its legal signification an indefinite extent upwards as well as downwards. 'Therefore,' says Blackstone,' if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters and his houses, as well as his fields and meadows.' * * *

* * * "

In Stevenson v. Bachrach (1897), 170 Ill. 253, the court stated, at pages 256-57:

" * * *

> * * * 'The grant of a tract of land passes everything standing upon the land. * * * By the delivery of the deed, which was executed by Dawson to appellee, the grantor therein conveyed to appellee, not only the land, but the portion of the building upon the land. * * * Lord Coke says, that the word 'land,' in its legal signification, comprehends any ground, soil, or earth whatever, and it also has an indefinite extent upwards as well as downward; and that, therefore, it includes all castles, houses and other building standing thereon. * * *

* * * "

When a statute employs a word having a well-known legal significance, the courts will, in the absence of any expression to the contrary, assume that the General Assembly intended the word to be given that meaning. (Harris v. Manor Healthcare Corp. (1986), 111 2d 350, 364.) Section 63a6 does not, in my opinion, constitute an expression of legislative intent to use the term "lands" in any way other than in accordance with its well-known meaning.

It is my opinion, therefore, that the Department of Conservation has authority to lease lands to which buildings are affixed for the construction of public accommodations under section 63a21 of the Civil Administrative Code of Illinois. To the extent that opinion No. S-464 concludes to the contrary, it is overruled.

Respectfully yours,

Roland W. Burris

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