ALAN WILSON
ATTORNEY GENERAL

October 16, 2024

David A. Root, Esq.
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Dear Mr. Root:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter requests an opinion addressing the following:

> As we discussed last week, I serve as the County Attorney for Oconee County, South Carolina. The Oconee County Council requested that I seek an Attorney General's opinion with respect to the potential use of public funds on private property in the context of FEMA's grant program for rehabilitating High Hazard Potential Dams (HHPD). I have attached a highlighted copy of the Notice of Funding Opportunity from DHS/FEMA for this grant opportunity, which is lengthy, but relatively easy to flow through via the summary and table of contents. My primary concern is noted on page 11, regarding ongoing maintenance and operations responsibilities. (I have also included the federal code section establishing this requirement.) This is a requirement that the subrecipient (Oconee County in this instance) commit to provide operation and maintenance of the grant funded project for the life of the dam, and while the HOA / private owner of the dam will in all likelihood be the first obligor for these costs, it seems clear that there is no means by which to totally absolve the County from ultimate responsibility. I have communicated with SCDES on this issue, and they understand my concern but did not have a ready answer in this context.
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> That all said, my ultimate question is whether this operations and maintenance obligation (which will not be grant funded) relative to private property runs afoul of the general prohibition against spending public funds on private property. ...

> Also, please note that the subject dam, the Chattooga Lake Dam, is owned by the Chattooga Lake Club, a gated, private (non-profit) community consisting of approximately eighty members, with the subject lake being approximately 45 acres. The area is surrounded by the Sumter National Forest. Based on information gleaned from the Emergency Action Plan for the Chattooga Lake Dam, SC ID: D1637, the dam is an earthen dam built in 1954, with the 44.9-acre lake fed from Taylor Creek and six mountain streams directly from Sumter National Forest. Surrounded by National Forest, Chattooga Lake feeds downstream to Taylor Creek and Lake Leroy in the headwaters of the Chauga River. In addition to recreational use and habitat for fish and wildlife, Chattooga Lake serves as a reservoir for emergency fire services at the local and US Forest Service level. There are at least twenty-nine sites that fall within the identified inundation zone that may be at risk in the event of dam failure, and [High] Hazard Class D1639 Lake Leroy Dam is located downstream. Eight roads:
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> Chattooga Lake Rd, Ball Park Rd, Village Creek Rd, Moxley Dr, Bethlehem Trl, Coppermine Rd, Highlands Hwy (OCONEE S-28), and Chattooga Ridge Rd (OCONEE S-258) which has an average daily traffic count of 150, fall within the inundation boundary and will likely be impacted in the event of dam failure.

Law/Analysis

Initially, it must be noted that this Office cannot find facts in our opinions. As we have explained:

> Because this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions. Unlike a fact-finding body such as a legislative committee, an administrative agency or a court, we do not possess the necessary fact-finding authority and resources required to adequately determine ... factual questions....

Op. S.C. Att'y Gen., 1989 WL 406130 (April 3, 1989) (1989) (alterations in original). As a result, this opinion will assume the facts as described in order to provide guidance on the issues raised.

The HHPD grant program is a federally created program administered by the Federal Emergency Management Agency (FEMA) "to provide technical, planning, design, and construction assistance in the form of grants to States for rehabilitation of eligible high hazard potential dams." 33 U.S.C. § 467f-2(a).[1] These grants may be used for the "repair, removal, or

[1] This Office's opinions have repeatedly noted, "The examination of federal law and the policies of a federal agency are beyond the scope of an opinion of this Office." Op. S.C. Att'y Gen., 2011 WL 2648714 (June 16, 2011); see also Op. S.C. Att'y Gen., 2013 WL 3362068 (June 25, 2013) (providing questions regarding

any other structural or nonstructural measures to rehabilitate an eligible [HHPD]." 33 U.S.C. § 467f-2(b). The South Carolina Department of Environmental Services (SCDES) published guidance documents that explain while privately-owned dams are eligible to receive grant funds, private owners are not eligible to apply for such a grant themselves. See SCDES, Notice of Funding Opportunity- Federal Fiscal Year 2024 High Hazard Potential Dams Rehabilitation Grant Rev. 0 (October 2, 2024). "Non-federal governments (i.e., state, county, municipal) and 501(c)(3) or 501(c)(4) non-profit organizations are the only entities eligible to apply. An eligible applicant as defined above may choose to act as a Project Sponsor for a privately-owned dam solely at its own discretion and at its own risk." Id. When an eligible entity acts as a project sponsor for a privately-owned dam, it is required to "provide[] an assurance, with respect to the dam to be rehabilitated by the eligible subrecipient, that the dam owner will carry out a plan for maintenance of the dam during the expected life of the dam." 33 U.S.C. § 467f-2(c)(2)(C). The project sponsor, as a subrecipient, is also required to "commit to provide operation and maintenance of the project for the expected life of the dam following completion of rehabilitation." 33 U.S.C.A. § 467f-2(d)(2)(C) (emphasis added).

The central concern raised in your letter is that if the County sponsors the Chattooga Lake Club's grant application, the federal grant requirements regarding operations and maintenance (hereinafter "O&M") of the privately-owned dam appear to put the County at risk of violating the South Carolina Constitution's prohibition on spending public funds for a private purpose.[2] Sections 5 and 11 of Article X of the South Carolina Constitution set parameters on how public funds may be spent. Section 5 of Article X states, "No tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled. Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied." S.C. Const, art. X, § 5. The South Carolina Supreme Court has interpreted section 5 to mean that any expenditure of public funds must be made for a public purpose. See S.C. Pub. Interest Found, v. S.C. Dep't of Transportation, 421 S.C. 110, 123, 804 S.E.2d 854, 861 (2017). Further, section 11 of Article X states, "The credit

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the interpretation or application of federal regulations or policy are beyond the scope of an Attorney General's opinion). Relevant federal statutes are listed to establish the parameters of the HHPD grant program and the potential conflicts with the laws of South Carolina.

[2] This Office cannot anticipate how interested parties may attempt to address this issue. The SCDES Notice of Funding Opportunity states, "Where the Project Sponsor is not the dam owner, a separate agreement will be required between Project Sponsor and dam owner." SCDES, Notice of Funding Opportunity- Federal Fiscal Year 2024 High Hazard Potential Dams Rehabilitation Grant Rev. 0 (October 2, 2024). FEMA's Rehabilitation of High Hazard Potential Dams Grant Program Guidance, 36 (June 2020) suggests "all applicable parties enter a legally binding contract to provide O&M of the project for the 50-year period following completion of rehabilitation" and also develop an O&M Financial Plan to "demonstrate[] the subrecipient will have adequate funding resources for O&M activities…" Perhaps such agreements can be drafted to adequately demonstrate the political subdivision's commitment to O&M for the expected life of the dam without the potential use of public funds.

of neither the State nor of any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association, corporation, or any religious or other private education institution except as permitted by Section 3, Article XI of this Constitution." S.C. Const, art. X, § 11. Our Supreme Court has construed this section to prohibit the expenditure of public funds or resources for the primary benefit of private parties. See State ex rel. McLeod v. Riley, 276 S.C. 323, 329, 278 S.E.2d 612, 615 (1981), *overruled on other grounds by* WDW Prop. v. City of Sumter, 342 S.C. 6, 535 S.E.2d 631 (2000). Therefore, if a political subdivision intends to sponsor a privately-owned dam's HHPD grant application and is required to spend public funds to provide O&M, it must have a valid public purpose for doing so.

> The South Carolina Supreme Court described what constitutes a public purpose.
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> In deciding whether governmental action satisfies a public purpose, we look to the object sought to be accomplished. As a general rule a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof.

Id. at 123, 804 S.E.2d at 861 (citations omitted). In Elliott v. McNair, 250 S.C. 75, 88, 156 S.E.2d 421, 428 (1967), the Court explained that "the question of whether an act is for a public purpose is primarily one for the Legislature, and this court will not interfere unless the determination by that body is clearly wrong." In Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 163 (1986), the Court reaffirmed its four-part test for determining whether a legislative finding of a "public purpose" is valid.

> The Court should *first* determine the ultimate goal or benefit to the public intended by the project. *Second*, the Court should analyze whether public or private parties will be the primary beneficiaries. *Third*, the speculative nature of the project must be considered. *Fourth*, the Court must analyze and balance the probability that the public interest will be ultimately served and to what degree.

Id. at 429, 351 S.E.2d at 163 (emphasis in original). Therefore, the question of whether a particular project serves a public purpose is initially one for county council to decide.

In South Carolina Public Interest Foundation v. South Carolina Department of Transportation, the South Carolina Supreme Court addressed a factually similar case to the one presented in your letter where the Department of Transportation inspected three bridges located within a private gated community and issued a report addressing its findings. See S.C. Pub. Int.

Found., 421 S.C. at 115, 804 S.E.2d at 857. The Court held that these inspections violated Article X, section 5 of the South Carolina Constitution.

> We find the inspection of the bridges did not serve a public purpose. We do not doubt that the inspection was conducted to assuage safety concerns. However, the owners of the bridges were the beneficiaries of the inspection, not the public at large, whose access to the bridges is limited to the authorization provided by the homeowners. In short, it is not the public's responsibility to pay the maintenance costs of bridges located within a gated community that seeks to exclude the public from enjoying the use of the bridges. Thus, because it did not serve a public purpose, we find the inspection was unconstitutional.

S.C. Pub. Int. Found., 421 S.C. at 123, 804 S.E.2d at 861 (emphasis added). This Office has previously opined, "[T]hese authorities can be understood to prohibit the expenditure of public funds on the private roads and bridges where the public at large is denied access to use that same infrastructure." Op. S.C. Att'y Gen., 2023 WL 4830898, at 5 (July 5, 2023). Similarly, if a political subdivision undertakes O&M responsibilities for a recreational dam within a private gated community without further justification of its public purpose, a court would likely hold those activities are unconstitutional.

Your letter describes two reasons to support finding public purpose regarding use of funds for the Chattooga Lake Dam. The first stated reason is that "Chattooga Lake serves as a reservoir for emergency fire services at the local and US Forest Service level." Certainly, counties are authorized to provide fire protection as a recognized public purpose. See S.C. Code § 4-9-30(5) (2021)("[E]ach county government … shall have the following enumerated powers … to assess property and levy ad valorem property taxes … for functions and operations of the county, including, … including … public safety, including police and fire protection, disaster preparedness …."); S.C. Code § 4-21-10 (2021) ("The governing body of any county may by ordinance or resolution provide that the county shall provide fire protection services, ambulance services and medical clinic facilities"). However, as stated above, this Office cannot find facts in an opinion and is, therefore, unable to evaluate how likely it is a court would uphold a legislative finding of public purpose based solely on the extent the lake is used to provide fire services under the Nichols test.

The second stated reason is to limit the risk posed to those persons, roads, and other infrastructure falling with the inundation boundary in the event of the dam's failure. While counties are authorized by S.C. Code § 4-9-30(5) to provide "public safety, including police and fire protection, disaster preparedness," the General Assembly adopted the Dams and Reservoirs Safety Act, S.C. Code §§ 49–11–110 to –260 (2008), with the stated purpose to "provide for the

certification and inspection of certain dams in South Carolina in the interest of public health, safety, and welfare in order to reduce the risk of failure of the dams, prevent injuries to persons and damage to property, and confer upon the department the regulatory authority to accomplish the purposes." S.C. Code § 49-11-130 (2008). The Act designates SCDES with the "authority for the safe maintenance of the dams and reservoirs of this State and the powers of inspection and certification." S.C. Code § 49-11-140 (2008). Therein, the General Assembly established that the responsibility for maintaining a dam or reservoir lies with its owner.

> The owner of a dam or reservoir constructed in this State solely is responsible for maintaining the dam or reservoir in a safe condition throughout the life of the structure. … The owner of a dam or reservoir whose failure likely would cause loss of life or substantial property damage, a dam or reservoir classified as a high or significant hazard under existing regulations, shall provide the department a current emergency action plan in the format the department by regulation requires.

S.C. Code § 49-11-150 (2008) (emphasis added). The Act also permits SCDES to issue "an order directing the owner of a dam or reservoir to make at his expense the necessary maintenance, alteration, repair, or removal" if it is found the dam or reservoir is "unsafe and is dangerous to life or property," "not maintained in good repair or operating condition," or not maintained "in accordance with the terms and conditions of the certificate of completion and operation issued by the department." S.C. Code § 49-11-160 (2008) (emphasis added). Because SCDES is authorized to certify and inspect dams to prevent failure and injuries to persons and damage to property and because the responsibility for maintenance lies with the dam owner, it is unlikely a court would find a county has a public purpose for obligating itself to maintain a privately owned dam within its jurisdiction.

Conclusion

The central concern raised in your letter is that if the County sponsors the Chattooga Lake Club's grant application, the federal grant requirements regarding O&M of the privately-owned dam appear to put the County at risk of violating the South Carolina Constitution's prohibition on spending public funds for a private purpose. If a political subdivision intends to sponsor a privately-owned dam's HHPD grant application and is required to spend public funds to provide O&M, it must have a valid public purpose for doing so. See S.C. Const, art. X, § § 5, 11. The question of whether a particular project serves a public purpose is initially one for county council to decide. A court would evaluate this determination according to the four-part test laid out in Nichols, supra. In a recent case where the Department of Transportation inspected three bridges located within a private gated community, the South Carolina Supreme Court held that use of public funds violated the South Carolina Constitution when it explained, "It is not the public's responsibility to pay the maintenance costs of bridges located within a gated community that seeks to exclude the public from enjoying the use of the bridges." South Carolina Public Interest

Foundation, 421 S.C. at 123, 804 S.E.2d at 861. As is discussed more fully above, it is this Office's opinion that if a political subdivision undertakes O&M responsibilities for a recreational dam within a private gated community without further justification for its public purpose, a court would likely hold those activities are unconstitutional.

Since the primary issue expressed in your letter concerns the potential O&M obligations under the program, dam removal may be a consideration as it is a listed use for funds awarded under the HHPD grant program and would not entail the same O&M obligations for the County.[3] Alternatively, a privately owned dam does not need to be sponsored by a political subdivision of the State. Non-profit organizations registered as either a 501(c)(3) or 501(c)(4) are eligible to "apply for an HHPD grant on any eligible dam, including dams that are privately owned." SCDES, High Hazard Potential Dams Rehabilitation Grant, https://des.sc.gov/programs/bureau-water/dams-reservoirs/high-hazard-potential-dams-rehabilitation-grant (last visited Oct. 10, 2024). Such an organization could apply as a project sponsor for the Chattooga Lake Dam and its O&M obligations would not present the same issue of using public funds for private purposes. Finally, as this Office has repeatedly noted in regard to maintenance of private roads, if private property is irrevocably dedicated to and accepted by a political subdivision for public use, then maintaining such property with public funds would constitute a valid public purpose and be permissible. See Op. S.C. Att'y Gen., 2024 WL 2034557 (April 30, 2024) (addressing issues related to maintenance and improvements to privately owned dirt roads, or, alternatively, public dedication of such roads into a county road system). Of course, the Club could also solve the problem by admitting the public.

Sincerely,

Matthew Houck
Assistant Attorney General

[3] See 33 U.S.C. § 467f-2(b) ("A grant awarded under this section to a State may be used by the State to award grants to eligible subrecipients for- (1) repair; (2) removal; or (3) any other structural or nonstructural measures to rehabilitate an eligible high hazard potential dam.") (emphasis added); see also SCDES, Notice of Funding Opportunity- Federal Fiscal Year 2024 High Hazard Potential Dams Rehabilitation Grant Rev. 0 (October 2, 2024) ("10. Dam removals are considered "rehabilitation" under this grant program; therefore, planning, preliminary engineering, design engineering, and construction activities associated with dam removal are eligible. … [D]am removal represents the greatest amount of risk reduction of any type of "rehabilitation" project ...").

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General