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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

January 26, 2006

Paul S. League, Deputy Chief Counsel
South Carolina Department of Natural Resources
Post Office Box 167
Columbia, South Carolina 29202

Dear Mr. League:

This opinion is in response to your letter, in which you expressed concern regarding the expenditure of funds by the South Carolina Department of Natural Resources (the "SCDNR") from the Water Recreational Resources Fund (WRRF) of the State of South Carolina "for the dredging of accumulated sediment in Saluda Lake in Greenville and Pickens Counties."

By way of background, you provided us with some history of Saluda Lake and its problems with the accumulation of sediment. We will attempt to summarize the information you provided. "Saluda Lake is a privately operated impoundment on a waterway deemed navigable by various State agencies." The lake was created in 1905 for purposes of generating hydroelectric power. Several different power companies have maintained ownership of the lake since its creation. Until 1996, the use of lake for hydroelectric power was regulated under the Federal Power Act. However, after the Federal Energy Regulatory Commission notified Duke Energy, the owner of the lake at the time, that the impounded waters were not deemed a federal navigable waterway, Duke Energy declined the offer to voluntarily maintain its licence under the Federal Power Act and sold the project to another power producer. To your knowledge, the current owner/operator does not provide any facilities for public recreation on the lake. "Ownership of land surrounding the lake can be broken down into four categories: (I) the Saluda dam and land owned by Northbrook [the current owner of the lake and power producer]; (ii) private residential development on the lake; (iii) one privately owned store, boat ramp, and parking area (this is an single facility); and land owned by the Easley Combined Utilities." However, you acknowledge "This office does not possess information on ownership of all land under and around the lake." "Easley Combined Utilities withdraws raw water from Saluda Lake for treatment and distribution through its public water system." You add, to your knowledge, Easley Combined Utilities does not provide any recreational opportunities on the lake.

As a result of sediment studies conducted in 1979 and 1995, the legislative delegations of Greenville and Pickens Counties authorized the use of $386,500 from the WRRF to be combined

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with funds from a proposed special tax district established by both counties to be used for the dredging of the lake. However, you indicate:

> [f]ollowing the authorization by the county delegations of expenditures of WRRF funds, the SCDNR Deputy Director for Administration sought advice from the SCDNR legal office on the use of WRRF funds. By memorandum dated July 24, 1996, DNR counsel Paul League advised Deputy Director John B. Reeves:
>
> > While the waters of Saluda Lake most likely constitute a water recreational resource, the expenditure of funds from the Water Recreational Resources Fund to dredge a portion of the lake would not be a public improvement consistent with the Department criteria and the restrictions in Article X, Sections 5 and 11 of the South Carolina Constitution.
>
> This conclusion was driven by the lack of public access to and use of the lake, particularly when compared to the likely benefits to lakeside landowners and the one commercial marina operating on the lake.

You attached a copy of your July 24, 1996 memorandum (the "1996 Memorandum") to your opinion request. Despite the position of SCDNR's counsel as evidenced in the 1996 Memorandum, the SCDNR released the $386,500 in funds from the WRRF in 2001 to the Saluda Lake Special Tax District for dredging. Your letter indicates "some dredging took place; however, anecdotal reports of this office indicate that the work has done little to open navigation in the lake. Therefore, interested parties once again are seeking WRRF funds for additional dredging." You suggest, your concern with further appropriation of funds from the WRRF to dredge the lake lies in the continuing problem of lack of public access to the lake. You indicate "[v]arious proposals have been made that the Recreation District for Greenville County lease the parking area and boat ramp at one privately owned business on the lake." Enclosed in your request, we found a copy of a draft of a lease reflecting this arrangement. As you point out, "the draft lease provides that the current facility owner will manage the property and collect fees for parking and boat launching in lieu of a rental fee from the Recreation District."

Based on the above information, you request our opinion "on the authority of the SCDNR to release funds from the WRRF for use in the dredging project proposed by Saluda Lake Owners Association at Saluda Lake." Additionally, your letter states: "The dredging project proponents have asked the SCDNR to accept the lease (upon execution) as the necessary provision of lake access for public recreation." Therefore, per a telephone conversation with this Office, you also asked us to address whether the proposed lease between the Recreation District and the private marina owner would satisfy the constitutional public purpose requirement.

Law/Analysis

Statutory Considerations

In your 1996 Memorandum, you discussed at length whether the dredging of Lake Saluda meets the requirements of section 12-27-390 of the South Carolina Code. In 1996, this statute provided, in pertinent part: "All of the funds must be allocated based upon the number of boats or other watercraft registered in each county pursuant to law and expended, subject to the approval of a majority of the county legislative delegation . . . for the purpose of water recreational resources." Section 12-37-390 did not provide further guidance on the meaning of "water recreational resources." Your 1996 Memorandum pointed to an opinion of this Office, as well as, a letter from the SCDNR to a member of the legislature and internal SCDNR memorandums explaining the SCDNR's criteria in evaluating requests for appropriations from the WRRF to determine whether the dredging of Lake Saluda constituted a "water recreation resource." Op. S.C. Atty. Gen. Op. No. 88-53 (July 14, 1988). You stated:

> At first blush the Saluda Lake Restoration Project seems like a project encompassed by § 12-27-390. The declared purpose of the project is "to restore lost recreation areas and to prevent future sediment deposition to maintain a good quality recreation facility." Thus, the project will affect physically a resource that apparently is capable of supporting recreation.

However, in your 1996 Memorandum, you concluded the expenditure of funds from the WRRF inappropriate because such an expenditure would not be for a public benefit, a requirement you found to be implicit in the statute.

In 2002, the General Assembly substantially revised this statute, now codified at section 12-28-2730 of the South Carolina Code (Supp. 2005). Most significantly, the General Assembly removed the authority to approve expenditures from the WRRF from the legislative delegations. Currently, the SCDNR is charged with the determination as to the expenditure of the funds. S.C. Code Ann. § 12-28-2730(C). However, "[e]ach county delegation may make recommendations to the South Carolina Department of Natural Resources for projects to acquire, create, or improve water recreational resources. The department must give these recommendations primary consideration over any other projects." S.C. Code Ann. § 12-28-2730(C). In addition, the General Assembly added clarification by defining "water recreational resources." S.C. Code Ann. § 12-28-2730. This statute now reads, in pertinent part:

> (B) The fund must be apportioned based upon the number of registered boats or other watercraft in each county and expended by the department to acquire, create, or improve water recreational resources. As used in this section, "water recreational resources" means public waters which are naturally occurring or which provide

> habitat for fish, aquatic animals, or waterfowl and which must provide public recreational opportunities. These funds may be used to promote activities that take place on the water for recreation provided that no more than ten percent of each annual allocation may be used for this purpose beginning July 1, 2003.

Id.

In regard to whether the dredging of Lake Saluda constitutes acquiring, creating, or improving water recreational resources pursuant to the revised section 12-28-2730 of the South Carolina Code, we find the SCDNR to be in the best position to make this determination. Our Supreme Court stated in numerous opinions it "gives deference to an administrative agency's interpretation of an applicable statute or its own regulation." Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Dunton v. South Carolina Bd. of Examiners In Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987). Thus, if the SCDNR finds the dredging project does not meet the requirements of section 12-28-2730, we will defer to its judgment absent a compelling reason. Additionally, to make the determination as to whether the dredging of Saluda Lake meets the requirements of section 12-28-2730 would require us to investigate and determine facts, which are beyond the scope of an opinion of this Office and best left to the courts to determine. See eg. Op. S.C. Atty. Gen., November 28, 2005. Therefore, we leave the interpretation of section 12-28-2730 to the SCDNR, subject to judicial review.

Moreover, as previously noted, the 2002 amendments to section 12-28-2730 place the decision of whether to fund a particular project with the SCDNR. S.C. Code Ann. § 12-28-2730. In addition and consistent with prior opinions, we recognize an agency is given broad discretion in its decision to grant funds. See Op. S.C. Atty. Gen., January 17, 1996. Thus, even if the SCDNR finds the dredging of Lake Saluda to be a project for which funds may be expended under section 12-28-2730, we recognize its discretion to decide whether or not to fund a particular project.

Constitutional Considerations

If the SCDNR determines the Saluda Lake dredging project meets the requirements of section 12-28-2730 of the South Carolina Code, your letter indicates your concern then shifts to whether section 12-28-2730 complies with the South Carolina Constitution. Specifically, your letter highlights your apprehension as to whether the expenditure of such funds would be for "a public improvement consistent with Article X, Sections 5 and 11 of the South Carolina Constitution."

Article X, Section 5 of the South Carolina Constitution (Supp. 2005) provides:

> 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.

This constitutional provision "requires that all taxes must be levied for a valid and distinctly stated public purpose." Bus. License Opposition Comm. v. Sumter County, 304 S.C. 232, 403 S.E.2d 638 (1991).

Article X, Section 11 of the South Carolina Constitution (Supp. 2005) provides, in relevant part:

> The credit 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.

The South Carolina Supreme Court interpreted this provision to prohibit the expenditure of public funds for the primary benefit of private parties. 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).

The determination of whether or not an action by a legislative body is for a public purpose is primarily made by the legislative body. Caldwell v. McMillan, 224 S.C. 150, 158, 77 S.E.2d 798, 801 (1953). "[T]he courts will not interfere unless it appears that the legislative body was clearly wrong. Id. In Nichols v. South Carolina Research Authority, 290 S.C. 415, 429, 351 S.E.2d 155, 163 (1986), the South Carolina Supreme Court overruled Byrd v. Florence County, 281 S.C. 402, 315 S.E.2d 804 (1984), but reaffirmed the four-prong test established in Byrd for determining whether funds are appropriately expended for a public purpose:

> 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.

(quoting Byrd, 281 S.C. at 407, 315 S.E.2d at 806).

Because the findings of the General Assembly are afforded great weight in the determination of a public purpose, we defer to the General Assembly's judgment of whether section 12–28-2730 meets this requirement. In addition, applying the Nichols test, as presented above, to determine whether expenditures pursuant to section 12-28-2730 satisfy the public purpose requirement would

require this Office to make a factual determination as to whether the expenditure of WRRF funds pursuant to 12-28-30 would be for the benefit of the public. Because this Office may not investigate or determine facts, we must leave this factual determination to the courts. See eg. Op. S.C. Atty. Gen, November 28, 2005. Thus, SCDNR must apply the Nichols test to determine whether the expenditure of funds in question promotes a public purpose. See Op. S.C. Atty. Gen., June 4, 1990 (stating Richland County, as the legislative body, must determine whether the expenditure of public funds for the scraping of roads is for a public purpose).

However, we note prior case law and opinions of this office which may prove relevant in determining whether section 12-28-2730 meets the public purpose requirement. This Office, on several occasions recognized the promotion of recreation as a public purpose. Op. S.C. Atty. Gen., January 8, 1997; Op. S.C. Atty. Gen., April 2, 1987. In addition, our Supreme Court recognized a particular project may be "public" in nature "even though in reality it is seldom used." Greenwood County v. McDonald, 302 S.C. 157, 159, 394 S.E.2d 325, 326 (1990) (citations and quotations omitted) (finding condemnation of land for a proposed road is for a public because "[i]t is this right of the general public to use the road which is determinative, not the number who actually exercise the right").

In addition to your inquiry of whether expenditures of funds under section 12-28-2730 meet the public purpose requirement, you also sought our guidance on whether the proposed lease to be entered into by the private marina owner and the Recreation District satisfies the public purpose requirement. As we understand it, your concern lies with the fact that although the Recreational District will obtain all of the rights of a lessee under the lease, the marina owner will receive all of the revenue from the operations.

Here again, the Nichols test, as provided above, would be used to evaluate whether or not the proposed lease met the public purpose requirement. However, we note our Supreme Court found "legislation may subserve a public purpose even though it (1) benefits some more than others and, (2) results in profit to individuals. Legislation does not have to benefit all of the people in order to serve a public purpose. At the same time legislation is not for a private purpose merely because some individual makes a profit as a result of the enactment." WAW Prop. v. City of Sumter, 342 S.C. 6, 15, 535 S.E.2d 631, 635 (2000) (citing Nichols, 290 S.C. at 425-26, 351 S.E.2d at 161). As previously stated, because the determination of whether the lease meets the public purpose requirement is a factual determination, we will not address such a finding in this opinion. But, we suggest the SCDNR keep in mind that the private marina owner may profit from the lease, while the lease simultaneously facilitates a public purpose.

Conclusion

In summary, because section 12-28-2730 of the South Carolina Code is applicable to the SCDNR, like the courts, we will give great deference to the SCDNR's interpretation of this statute, as well as, its decision to fund the project in question. In addition, we will also defer to the General Assembly for determination as to whether section 12-28-2730 meets the constitutional requirement

of serving a public, rather than a private purpose. Finally, in resolving whether the Recreation District's decision to enter into a lease agreement with a private marina owner, we defer in the first instance to the SCDNR's determinations, subject to judicial review, because such a decision would require us to evaluate the facts, which is beyond the scope of an opinion of this Office.

Very truly yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General