ALAN WILSON
ATTORNEY GENERAL

February 7, 2013

Tracey C. Easton, Esquire
S.C. State Housing Finance and Development Authority
300-C Outlet Point Blvd.
Columbia, South Carolina 29210

Dear Ms. Easton,

We received your letter requesting an opinion on behalf of your client, the S.C. State Housing Finance and Development Authority (the "Authority"), as to whether the Authority may enter into a "Financial Responsibility" agreement with Fannie Mae. By way of background, you provide us with the following information:

> [The Authority] offers mortgage loans to qualified South Carolina homebuyers. Due to the current financing structure that the Authority is utilizing, we currently only offer mortgage loans secured with FHA insurance. The Authority would like to re-enter the conventional marketplace, however, our current financing structure requires us to enter into an agreement with either Fannie Mae or Freddie Mac for this purpose. I have been in conversations with Fannie Mae for years concerning their indemnification provisions and our inability to agree to them.
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> Negotiations had been unsuccessful for years until a changing of the guard at Fannie Mae led to the resolution of a similar issue with the Pennsylvania Housing Authority. The Pennsylvania Housing Authority ultimately negotiated an agreement with Fannie Mae; however, Fannie Mae subsequently requested the Pennsylvania Housing Authority to seek an opinion from the Pennsylvania Attorney General's Office that the agreement would be binding on the Pennsylvania Housing Authority.
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> Fannie Mae presented the same agreement to us and after further negotiations (including a provision that references the SC Tort Claims Act), we believe we have an agreement that both Fannie Mae and the Authority could agree to. We are now at the position where Fannie Mae is requesting our Attorney General's Office review and advise the Authority whether the Authority may enter into the Agreement.

A copy of the proposed "Financial Responsibility Agreement" (the "Agreement") has been provided for our review. The Agreement itself expressly states, in relevant part, the following with regards to the "Modification of Certain Indemnification Obligations":

(a) The terms and conditions of the Indemnification Obligations set forth in **Exhibit A** are deleted in their entirety and replaced with the terms and conditions of the Financial Responsibility Obligations set forth in **Exhibit B**. The Authority absolutely and unconditionally agrees to be Financially Responsible to Fannie Mae (including its successors and assigns and its employees, officers, and directors individually when they are acting in their corporate capacity) for any and all Contractual Obligations set forth in the Contractual Agreements, including but not limited to, the obligations set forth in **Exhibit B**, regardless of whether the Losses may also arise as a result of a Tort claim against the Authority and/or its employees, contractors, or agents acting within or outside the scope of their employment (the **"Authority's Representatives"**).

(b) To the extent that Losses arise (i) solely as a result of a Tort claim against the Authority and/or the Authority's Representatives and (ii) not as a result of, in whole or in part, a breach or alleged breach of the Authority or the Authority's Representatives to satisfy a Contractual Obligation, the Authority is not obligated to indemnify Fannie Mae for such Losses to the extent prohibited by applicable principles of Sovereign Immunity. To the extent that Losses arise both as a result of a Tort claim against the Authority and/or the Authority's Representatives and as a result of, in whole or in part, from a breach or alleged breach of the Authority or the Authority's representatives to satisfy a Contractual Obligation, the Authority is obligated to be Financially Responsible for such Losses. Any Tort claims are subject to the South Carolina Tort Claims Act (S.C. Code Ann. §§ 15-78-10, et seq.).

....

Exhibit A is entitled "Indemnification Obligations in Contractual Agreements," and its provisions essentially provide that the Authority agrees to indemnify and hold harmless Fannie Mae against any losses, damages, judgments, or legal expenses resulting from a breach of warranty under the contract, as well as the Authority's failure to perform its services and duties under the contract. Exhibit B is entitled "Financial Obligations in Contractual Agreements," and its provisions essentially state that the Authority agrees to be financially responsible to Fannie Mae for all losses, damages, judgments, or legal expenses resulting from, *inter alia*, the Authority's: breach of warranty under the contract; failure to perform its services and duties in connection with servicing mortgages or managing or disposing of property under the contract or Fannie Mae's "Guides"; and breach or alleged breach of selling warranties or representations or its origination or selling activities related to Fannie Mae-owned or Fannie Mae-securitized mortgages. In addition, Exhibit B repeatedly states that the Authority is only liable to Fannie Mae for legal expenses if the Authority determines that such expenses serve its interests. However, several of its provisions also indicate that Fannie Mae will manage its defense for any claim in accordance with its own judgment, including the right to determine whether it will retain its own separate counsel. In such cases where Fannie Mae chooses its own counsel, Exhibit B indicates the Authority is obligated to pay Fannie Mae's legal fees and costs.

After further discussion, it is our understanding that the issue central to your request is whether the Agreement is proper or enforceable under State law in light of the fact it purports to make the Authority "financially responsible" as opposed to indemnifying Fannie Mae and clarifies that the South Carolina Torts Claim Act is applicable.

**Law/Analysis**

As a threshold matter, we note that this Office ordinarily does not review and interpret contractual agreements "where it has not participated in the negotiation thereof." Op. S.C. Att'y Gen., 2007 WL 4686606 (Dec. 6, 2007). Therefore, the conclusions of this opinion are limited in scope to the specific issued raised, i.e., whether the Agreement improperly indemnifies Fannie Mae or subjects the Authority to liability in a manner inconsistent with the principles of sovereign immunity and the provisions of the Tort Claims Act. We express no opinion as to any other legal issues that may be implicated by the terms and provisions of the Agreement.

With that being said, it is a general rule that "[t]he sovereign immunity of a state may only be waived by the State Legislature by legislative action." Op. S.C. Att'y Gen., 1989 WL 406133 (April 10, 1989) (citing S.C. Constitution Art. X, § 10); see also Ops. S.C. Att'y Gen., 1968 WL 12768 (Jan. 8, 1968) ("It is a general rule of law that no State agency is liable for suit except as provided by statute or constitutional provision"). Consistent with this rule, we have repeatedly advised government agencies that, in the absence of specific legislative authority, they do not possess the authority to execute indemnification or "hold harmless" agreements. See, e.g., Ops. S.C. Att'y Gen., 2011 WL 1444706 (March 18, 2011) ("governmental agencies, in the absence of specific authority, do not have the authority to execute 'hold harmless' or indemnity agreements"); 1972 WL 25992 (Sept. 27, 1972) (the State is generally prohibited from executing "hold harmless" clauses by which "the State thereby subjects itself to tort action, for which there is no authority absent legislative authorization"). As we stated in a 1972 opinion:

> It is has been the consistent opinion of this Office that governmental agencies, in the absence of specific authority thereof, do not have the authority to execute such "hold harmless" clauses. The basis for this conclusion is that the State possesses sovereign immunity, with certain deviations therefrom in limited circumstances.... The execution of a "hold harmless" clause is nothing more nor less than subjection of the State or one of its political subdivisions to tort liability and, in the opinion of this Office, can only be done by the State itself through legislative enactment.

Op. S.C. Att'y Gen., 1972 WL 25432 (Aug. 15, 1972).

Consistent with these prior opinions, we have concluded on at least one occasion that the execution of such a "hold harmless" agreement by a state agency was authorized by statute. In Op. S.C. Att'y Gen., 2010 WL 1808721 (April 6, 2010), we addressed whether the State Ports Authority was authorized to enter into an agreement with the United States Army Corps of Engineers for work on certain dredge disposal facilities even though a provision in the agreement purported to hold the United States government "harmless from damages arising from construction or operation and maintenance of the project not caused by the negligence of the United States Government." Based on the language of § 3-7-10 which expressly authorized State agencies entering into such agreements "to adopt resolutions or

ordinances of assurances required by the Secretary of the Army or Chief of Engineers ... [and] to hold the United States safe and harmless ... as required by the Secretary of the Army or in the congressional documents covering the particular project," we concluded the State Ports Authority was statutorily authorized to enter into the agreement. See also Op. S.C. Att'y Gen., 1989 WL 406133 (April 10, 1989) (advising DSS that one way by which the agency may obtain the authority to enter into indemnification agreements is to seek legislative authorization "to give such assurances on behalf of the State as may be required under the provisions of Federal laws").

In addition to the principles of sovereign immunity, the validity of the Agreement's provisions must be considered in light of the Tort Claims Act, §§ 15-78-10 et seq., by which the State has "partially waived its immunity from liability in tort so as to allow suits against it for limited monetary damages only in certain circumstances." Op. S.C. Att'y Gen., 1989 WL 406133 (April 10, 1989). In describing the intent underlying the adoption of the Tort Claims Act, § 15-78-20(b) provides that "[t]he remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b)." See also § 15-78-200 (the Tort Claims Act "is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty"). In consideration of § 15-78-20(b) and § 15-78-200, we have previously stated that the General Assembly intended "to preclude governmental entities from being called upon to answer for their torts in any manner other than via the Tort Claims Act." Op. S.C. Att'y Gen., 2012 WL 889087 (March 6, 2012); see also Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 280, 607 S.E.2d 711, 714 (Ct. App. 2005) ("The Tort Claims Act governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees").

S.C. Code § 15-78-40 provides that a state agency is liable for its torts "subject to the limitations upon liability and damages, and exemptions from liability and damages, contained" in the provisions of the Tort Claims Act. For example, the amount a governmental entity is liable for in damages under the Tort Claims Act is limited by § 15-78-120. In addition, a governmental entity is not liable for loss resulting from, among other things, discretionary acts or the conduct of an employee that is outside the scope of his official duties. § 15-78-60(5), (17). However, nothing in the Tort Claims Act "affects liability based on contract nor does it affect the power of the State or its political subdivisions to contract." § 15-78-20(d); see also Sloan Const. Co., Inc. v. Southco Grassing, Inc., 377 S.C. 108, 118, 659 S.E.2d 158, 164 n.6 (2008) ("A sovereign is not immune from a suit based on its breach of a contractual obligation") (citing Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)). In light of these provisions, we have advised that a state agency lacks the authority to enter into an agreement which could subject the agency to liability for an act or amount not contemplated by the Tort Claims Act. Op. S.C. Att'y Gen., 1989 WL 406133 (April 10, 1989).

With the above principles of sovereign immunity and provisions of the Tort Claims Act in mind, we note that we are unaware of any provision in Title 31 of the S.C. Code applicable to housing authorities or elsewhere giving the Authority the power, when entering into agreements with Fannie Mae, to give such assurances as may be required by federal law or to otherwise hold Fannie Mae harmless. In the absence of such statutory authorization, the Authority lacks the power to enter into an indemnification or "hold harmless" agreement with Fannie Mae. Accordingly, we believe it was proper for the Authority to decline to agree to the provisions in Exhibit A as its terms would expressly indemnify and hold Fannie Mae harmless, thus constituting an improper waiver of liability without statutory authorization. With this

in mind, we must now look to the terms of the Agreement and Exhibit B which are the focus of this opinion.

Under the terms of the Agreement and Exhibit B, there is no provision which, if agreed to by the Authority, would expressly "indemnify" or "hold harmless" Fannie Mae.[1] Instead, the Agreement purports to merely hold the Authority "financially responsible" to Fannie Mae for "all contractual obligations." Without considering more, it would appear that the Agreement does not indemnify or hold Fannie Mae harmless, instead merely holding the Authority liable under contract in conformity with the principles of sovereign immunity and the provisions of the Tort Claims Act.

However, the absence of any provision in the Agreement and Exhibit B indicating the Authority expressly agrees to "indemnify" or "hold harmless" Fannie Mae, or any variation of these terms, is not conclusive as to the determination of whether the execution of the Agreement would improperly subject the Authority to tort liability in a manner, or to an extent, that is not authorized by statute. In fact, we believe several aspects of the Agreement call into question its enforceability against the Authority under State law.

First, we do not believe the enforceability of the Agreement is any way strengthened by the use of language stating the Authority is "financially responsible" to Fannie Mae for certain losses as opposed to language indicating the Authority agrees to "indemnify" or "hold harmless" Fannie Mae. A look at the plain meaning of "indemnify" and "hold harmless" reveals that these terms have, in effect, the same meaning as "financially responsible." See Black's Law Dictionary (9th ed. 2009) ("Indemnify" means "[t]o reimburse (another) for a loss suffered because of a third party's or one's own act or default"); Id. (to "hold harmless" means "[t]o absolve (another party) from any responsibility for damage or other liability arising from the transaction").

The Agreement also purports to make the Authority "Financially Responsible to Fannie Mae ... regardless of whether the Losses may also arise as a result of a Tort claim against the Authority and/or its employees ... acting within *or outside* the scope of their employment." (Emphasis added). By its express terms, this provision would make the Authority liable for losses resulting from acts which are expressly exempt from liability under the Tort Claims Act. See § 15-78-60 ("The governmental entity is not liable for loss resulting from: ... (5) the exercise of discretion or judgment ... [or] (17) employee conduct outside the scope of his official duties ...."). Consistent with the prior opinions of this Office, the Authority lacks the power to execute such an agreement in the absence of specific legislative authorization.

Furthermore, several provisions in Exhibit B indicate the Authority is obligated to pay Fannie Mae's legal expenses whenever Fannie Mae, in its own discretion, chooses its own counsel to manage its defense. In a 2012 opinion, we concluded that a governmental entity, in the absence of specific legislative authorization, lacked the authority to defend, rather than indemnify, a private entity in claims against the private entity related to services it provided to the governmental entity. Op. S.C. Att'y Gen., 2012 WL 889087 (March 6, 2012). In support of this conclusion, we stated as follows:

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[1] Although variations of the term "indemnify" appear in several different headings of the Agreement in Exhibit B, the Agreement states that "[t]he headings and subheadings contained in this Agreement are inserted for convenience only and shall not affect the meaning or interpretation of this Agreement or any provision thereof."

> While we agree that there is a conceptual distinction between indemnity and defense, section 15-38-65[2] is one of several statutes that demonstrate the General Assembly's intent to preclude government entities from being called upon to answer for their torts in any manner other than via the Tort Claims Act. If a government entity could be called upon to defend a third party against a claim arising from the government's (or its employees') acts or omissions in a manner inconsistent with the Tort Claims Act, this intent would be defeated.
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> Therefore, it is the opinion of this Office that, absent specific statutory authorization, an agreement to appear and defend a contractor against claims arising from the District's tortious conduct would constitute an impermissible attempt to contract around the public policy of this State, which policy demands that claims arising from the conduct of government entities or their employees be pursued only in accord with the Tort Claims Act.

Id. (citations omitted). We believe the same conclusion applies to a governmental entity's agreement to pay a private entity's legal fees for managing its defense in claims related to services it provides to the governmental entity; i.e., the governmental entity lacks the authority to enter into such an agreement in the absence of express legislative authorization.

For the above reasons, we believe the Authority lacks the authority to enter into the proposed Agreement with Fannie Mae as it would have the effect of subjecting the Authority to liability in a manner, or to an extent, not contemplated by the provisions of the Tort Claims Act or principles of sovereign immunity. We note that although the Agreement states the Authority is not obligated to indemnify Fannie Mae for losses resulting from a tort claim "to the extent prohibited by applicable principles of Sovereign Immunity" and that "[a]ny Tort claims are subject to the South Carolina Tort Claims Act," we have previously advised that the insertion of similar language cannot change or alter a governmental agency's lack of authority to enter into such an agreement:

> It is our longstanding opinion that a state agency possesses no authority to enter into indemnification agreements. It is further our opinion that this conclusion is not changed by the addition of language "so far as the laws of the State permit" or any other language. Because a state agency possesses no authority to enter into indemnification agreements, insertion of the above-cited language or any other language cannot change or alter such lack of authority.

Op. S.C. Att'y Gen., 2004 WL 2247469 (Sept. 29, 2004). Accordingly, we do not believe the inclusion of such language has the effect of rendering an otherwise invalid agreement valid.

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[2] § 15-38-65 of the Uniform Contribution Among Tortfeasors Act provides:

> No payment shall be made from state appropriated funds or other public funds to satisfy claims or judgments against governmental entities or governmental employees acting within the scope of their official duties arising under the Uniform Contribution Among Tortfeasors Act. The South Carolina Tort Claims Act is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of his official duty. The Uniform Contribution Among Tortfeasors Act shall not apply to governmental entities.

Although we express no opinion as to other legal issues that may be implicated by the terms and provisions of the Agreement, we find it necessary to note that consideration should be given to other State law provisions in negotiating such an agreement with Fannie Mae. For instance, consideration should be given to § 31-13-280 which provides:

> The notes, bonds or other obligations of the Authority shall not be a debt or grant or loan of credit of the State or any political subdivision thereof and neither the State nor any political subdivision shall be liable thereon, nor shall they be payable out of any funds other than those of the Authority and all notes, bonds and other obligations issued pursuant to this chapter shall contain on the face thereof a statement to such effect.

See also § 31-3-1650 (bonds and other obligations of a housing authority are only payable out of funds of properties of authority, and do not constitute an indebtedness of any a city, county, the State, or any political subdivision thereof within the meaning of any constitutional or statutory debt limitation or restriction).

As our Supreme Court noted in Bauer v. S.C. State Housing Authority, 271 S.C. 219, 231-32, 246 S.E.2d 869, 875-76 (1978), the language of § 31-13-280 is sufficient to protect the State from pecuniary liability, thus preventing the State from pledging its credit to the benefit of a private entity in violation of Article X, § 11 of the South Carolina Constitution.[3] The Court further advised that any attempt by the Legislature to fund, directly or indirectly, any program of the Authority from tax revenues is prohibited by the Constitution. Id. at 232, 246 S.E.2d at 876. Therefore, the Authority is solely and exclusively liable for its own debts and obligations.

## Conclusion

It is the opinion of this Office that the proposed Agreement with Fannie Mae is not enforceable against the Authority on the basis it subjects the Authority to liability in manner inconsistent with the principles of sovereign immunity and to an extent not complicated by the Tort Claims Act. Consistent with the general rule that state agencies are immune from suit except to the extent such immunity is waived by legislative action, we have consistently advised governmental entities that they lack the authority to execute indemnification or "hold harmless" agreements in the absence of specific legislative authorization. Such concerns are not alleviated by the fact that the Agreement instead uses language indicating the Authority agrees to be "financially responsible" to Fannie Mae for certain losses as the plain meaning of "indemnify" and "hold harmless" means to be financially responsible to another party for damages or liability arising from an agreement or transaction.

In addition, one provision purports to make the Authority financially responsible to Fannie Mae for losses resulting from tort claims against the Authority or its employees for acts committed "within or outside the scope of their employment." Such a provision has the effect of making the Authority liable for loss resulting from acts which are expressly exempt from liability under the Tort Claims Act. See §

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[3] This provision states, in relevant part, that "[t]he credit of neither the State nor 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.

15-78-60 ("The governmental entity is not liable for loss resulting from: ... (5) the exercise of discretion or judgment ... [or] (17) employee conduct outside the scope of his official duties ...."). Furthermore, several provisions in Exhibit B of the Agreement indicate the Authority is obligated to pay Fannie Mae's legal expenses whenever Fannie Mae, in its own discretion, chooses its own counsel to manage its defense. Consistent with a prior opinion of this Office, we believe the Authority lacks the power, in the absence of specific legislative authorization, to pay Fannie Mae's legal fees incurred in managing its own defense in claims related to an agreement with the Authority.

For the reasons stated above, we believe the Authority has lacks the power to enter into the Agreement under the principles of sovereign immunity and the provisions of the Tort Claims Act. Although the Agreement states the Authority is not obligated to indemnify Fannie Mae for losses resulting from a tort claim "to the extent prohibited by applicable principles of Sovereign Immunity" and that "[a]ny Tort claims are subject to the South Carolina Tort Claims Act," we have previously advised that the insertion of similar language cannot change or alter a governmental agency's lack of authority to enter into such an agreement. Therefore, we do not believe the inclusion of such language has the effect of rendering an otherwise invalid agreement valid. We reiterate that this opinion is limited to the issues addressed herein, and should not be construed as an opinion as to the legality, validity, or propriety of any other issues that could be implicated by the provisions of the proposed Agreement.

Very truly yours,

Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:

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