ALAN WILSON
ATTORNEY GENERAL

November 12, 2015

Paul M. Fata, Esq.
PO Drawer 568
Bishopville, SC 29010

Dear Mr. Fata:

As Lee County Attorney, you have requested an opinion regarding whether being declared a disaster area affects the use of public funds and equipment on private property. Specifically, you ask the following:

> the President of the United States has declared Lee County a disaster area as a result of the recent flood. Many property owners have had their driveways and access roads[1] significantly damaged as a result of flood waters inundating their property. Several of these property owners have requested that Lee County assist them by hauling dirt and scraping driveways. Lee County is aware of the prohibition against using public equipment and labor on private property; however, does the fact that Lee County was declared a disaster area create an exception allowing Lee County to assist these property owners?

LAW/ANALYSIS:

Traditionally, public funds, equipment, and labor were not to be used on private property. In a February 3, 2005 opinion, we summarized our prior opinions on this topic and explained their rationale. We stated the following:

> [t]his office has repeatedly recognized that public funds must be used for public and not private purposes. See, e.g., Opinion of the Attorney General dated October 8, 2003 citing decisions of the South Carolina Supreme Court in Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967); Haesloop v. Charleston, 123 S.C. 272, 115 S.E.2d 596 (1923). In an opinion dated August 29, 2003, we advised that, "[T]he Due Process Clause of the Constitution (federal and state) requires that public funds must be expended for a public purpose." Moreover, Article X, Section 5 of the State Constitution requires that taxes (public funds) be spent for public purposes. While each case must be decided on its own merits, the notion of what constitutes a public purpose has been described by our Supreme Court in Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975) as follows:

[1] You informed us by telephone that you consider an "access road" to be a long driveway to a private residence.

> (a)s a general rule a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment for all the inhabitants or residents, or at least a substantial part thereof...Legislation (i.e., relative to the expenditure of funds) does not have to benefit all of the people in order to serve a public purpose.

See also: WDW Properties v. City of Sumter, 342 S.C. 6, 535 S.E.2d 631 (2000); Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986); Carll v. South Carolina Jobs-Economic Development Authority, 284 S.C. 438, 327 S.E.2d 331 (1985); Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798 (1953). An opinion of this office dated December 18, 2000 commented that the constitutional requirement of "public purpose...was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests or by engaging in non-public enterprises." Furthermore, Article X, Section 11 of the State Constitution provides that:

> (t)he 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 private education institution except as permitted by Section 3, Article XI of this Constitution.

This provision proscribes 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 (1981). The term "credit" has been construed as any "pecuniary liability" or "pecuniary involvement". Elliott v. McNair, supra.

In Nichols, the court established the following test to determine whether the "public purpose" requirement has been met:

> (t)he 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.

318 S.E.2d at 163. In Bauer v. S.C. State Housing Authority, 271 S.C. 219, 256 S.E.2d 869 (1978), the Supreme Court warned that "(i)t is not sufficient that an undertaking bring about a remote or indirect public benefit to categorize it as a project within the sphere of public purpose."

> Applying these general principles of constitutional law, we have recognized on numerous occasions that counties and municipalities cannot expand public funds or use equipment or employees to perform work on private property unless a public purpose can be demonstrated. See, e.g. Op. S.C. Atty. Gen., April 2, 1987 ["(t)his Office has opined on numerous occasions that county equipment and personnel ... may not be used for work on private property."]; Op. S.C. Atty. Gen., August 2, 1985 ["this Office has ruled on numerous occasions that public funds or other resources could not be used to perform work or otherwise improve private property."]; Op. S.C. Atty. Gen., January 9, 1976 [removing dead animals from private property is a proper public purpose for the health and safety of the community and is thus permissible under the State Constitution]; Op. S.C. Atty. Gen., Op. No. 3968 (February 10, 1975) [a statute authorizing public funds or equipment to be used on private property for no public purpose is invalid]; Op. S.C. Atty. Gen., February 26, 1971 [use of county prison labor on private property for no public purpose violates the State Constitution]; Op. S.C. Atty. Gen., August 18, 1967 [county may not use road machinery of county for private purposes].

Op. S.C. Atty. Gen., February 3, 2005 (2005 WL 469070).

We stand by our prior opinion and agree with Lee County that there is a prohibition against using public equipment and labor on private property. The issue is whether being declared a disaster area would serve as an exception to this prohibition. The President of the United States declared certain counties in South Carolina a major disaster area. See Press Release, The White House Office of the Press Secretary, President Obama Signs South Carolina Disaster Declaration (October 5, 2015). Lee County was later added to the disaster declaration. See Federal Emergency Management Agency [FEMA], FEMA Amendment No. 7 to Notice of a Major Disaster Declaration, Docket ID FEMA 2015-0002 (October 20, 2015).

To provide some background on federal disaster assistance, the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Act"), 42 U.S.C.A. § 5121 *et seq.*, has been enacted to provide federal assistance to victims of disasters when state and local resources are determined to be insufficient. It reflects the "intent of Congress. . . to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters. . . ." 42 U.S.C.A. § 5121. According to a legal annotation,

> [t]he Act provides for four triggers for federal disaster relief. The two most widely used are presidential declarations of a major disaster[2] or an emergency situation[3]. A 'major disaster' is defined as any natural or

[2] The President of the United States declared the counties in South Carolina a major disaster area.

[3] See 42 U.S.C.A. § 5170b(c) and 42 U.S.C.A. § 5191(b) for the other two triggers.

> man-made catastrophe anywhere in the United States which, in the determination of the President, causes damage 'of sufficient severity and magnitude to warrant major disaster assistance ... to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby,' 42 U.S.C.A. § 5122(2). . . A presidential declaration follows the request by a governor for assistance, after making 'a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary,' 42 U.S.C.A. § 5170. . . .

14 A.L.R. Fed. 2d 173.

In order to make a request for assistance, the Governor must:

> (1) respond appropriately under state law, such as by activating the National Guard; (2) execute the state's emergency plan; (3) insure that information has been provided to the Federal Emergency Management Authority regarding the amount and nature of the state and local resources that have been committed; and (4) certify that the state will comply with cost-sharing provisions under the statute.

53 Am. Jur. 2d Military and Civil Defense § 14 (citing 42 U.S.C.A. § 5170).

The Federal Emergency Management Agency ("FEMA") "is directed to 'coordinate all disaster relief assistance (including voluntary assistance) provided by Federal agencies, private organizations, and State and local governments,' 42 U.S.C.A. § 5192(a)(2). . . .FEMA provides aid mainly through emergency assistance, temporary housing assistance, and the Individual and Family Grant Program." 14 A.L.R. Fed. 2d 173. "Assistance can include money for temporary rental assistance and essential home repairs for primary homes, low-cost loans to cover uninsured property losses, and other programs to help survivors recover from the effects of the disaster." See Press Release, Federal Emergency Management Agency [FEMA], "Three More South Carolina Counties Designated for Federal Assistance after Flooding," Release Number DR-4241-SC NR 001 (October 7, 2015). Financial assistance in the means of medical, dental, child care, and funeral expenses can also be provided. See 42 U.S.C.A. § 5174.

The Act provides a means for the federal government to take certain action to supplement state and local resources to assist the victims of a major disaster. Its purpose is not to grant local governments the ability to do that which is prohibited by state law. Furthermore, Governor Haley was required to provide FEMA the amount and nature of the State and local resources that were committed to disaster relief in order to obtain federal assistance. She most likely would not have included public funds and equipment in Lee County that were prohibited from use under South Carolina law. Accordingly, we do not believe that being declared a major disaster area by the President provides an exception to the State law prohibition against using public funds, equipment, and labor on private property.

CONCLUSION:

In conclusion. the fact that Lee County was declared a major disaster area under the Robert T. Stafford Disaster Relief and Emergency Assistance Act does not grant Lee County the power to use public funds and equipment to perform work on private property to repair driveways damaged as a result of the flood.

Please be aware that this is only an opinion as to how this Office believes a court would interpret the law in this matter.

Sincerely,

Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General