ALAN WILSON
ATTORNEY GENERAL

November 7, 2016

Francenia B. Heizer, Esquire
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P.O. Box 11390
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Dear Ms. Heizer,

Attorney General Alan Wilson has referred your letter dated August 1, 2016 to the Opinions section regarding at least two private property owners' requests that the Central Midlands Regional Transit Authority (the "Authority") include agreements to indemnify such property owners as a condition for granting the Authority easements. Your opinion request describes the relevant circumstances as follows:

> The Authority is undertaking a program to improve its bus stops by adding benches, shelters, bike racks, trash cans and other amenities. Many of these improved bus stops will be located on private property pursuant to an easement granted by the property owner. In connection with negotiations for at least two of these easements, the Authority has been requested to include in the documentation an agreement to indemnify such property owner from any and all losses, costs, damages, expenses, liabilities, demands and causes of action and any expenses incident to the defense thereof incurred by the property owner arising as a result of the exercise, use or enjoyment of any rights or easement granted for the benefit of the Authority or its customers.
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> While we are aware of the Attorney General's position on indemnification provisions in contracts of the State, State agencies and political subdivisions, it is not clear that the view would be the same for a contract entered into by a regional transit authority. The Authority possesses the powers and duties specifically set forth in Section 58-25-50 of the Code which are broad and expansive. For example, Section 58-25-50(h) states: "The Authority may acquire, purchase, hold, lease as a lessee, and use any franchise or property, real, personal or mixed, tangible or intangible, or any interest therein, necessary or desirable for carrying out the purposes of the authority, and sell, lease as lessor, transfer, and dispose of any property or interest therein acquired by it." As another example, Subsection (l) states: "The Authority may make contracts of every name and nature and execute all instruments necessary or convenient for the carrying on of its business."
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> While the legal authority to enter into an agreement with indemnification provisions is not expressly included, there is no language suggesting that the legal authority does not exist.

The question presented by this opinion request is "whether the general view that the State of South Carolina (the "State"), State agencies and political subdivisions are without legal authority to enter into

agreements that contain indemnification provisions applies to the Authority which is organized under and pursuant to the terms of Title 58, Chapter 25 of the Code of Laws of South Carolina, 1976, as amended (the "Code")."

Law/Analysis

As noted in the opinion request, this Office has consistently stated that the State agencies and political subdivisions of the State possess no authority to enter into indemnification agreements. Your request raises the question of whether in this Office's opinion regional transportation authorities are otherwise authorized to execute such an agreement. It is this Office's opinion that regional transportation authorities organized under and pursuant to the terms of Title 58, Chapter 25 of the Code of Laws of South Carolina are political subdivisions of the State of South Carolina and possess no authority to enter into indemnification agreements. In this Office's February 7, 2013 opinion we described the basis for this prohibition as follows:

> [I]t 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:
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> > 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.
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> 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").

Op. S.C. Atty. Gen., 2013 WL 650578 (February 7, 2013).

These opinions are applicable to the Authority because this Office has also consistently found that regional transportation authorities are political subdivisions of the State. Ops. S.C. Atty. Gen., 2002 WL 31728840 (November 12, 2002) ("[A] Regional Transportation Authority is clearly a governmental body see, Title 58 of the Code..."); 1980 WL 120987 (December 3, 1980) ("Beaufort/Jasper Regional Transportation Authority is a political subdivision of the State..."); 1976 WL 30811 (September 20, 1976) (opining that Pee Dee Region Transportation Authority is a political subdivision of the State). Therefore, to determine whether there is a relevant exception to the general prohibition against entering into an indemnification agreement, we must identify a legislative enactment, either within Title 58, Chapter 25 of the Code of Laws of South Carolina or other statute, by which the General Assembly authorized regional transportation authorities to enter into such agreements.

As noted by the opinion request, the General Assembly granted several powers and duties to regional transportation authorities in Section 58-25-50. After review of Section 58-25-50, it is this Office's opinion that these powers and duties do not grant the Authority the power to enter into an indemnification agreement. Subsection (l), which states the Authority may "[m]ake contracts of every name and nature and execute all instruments necessary or convenient for the carrying on of its business," could be construed to allow the Authority to execute hold harmless or indemnification agreements. However, this Office has consistently concluded that if the General Assembly had intended to authorize such a waiver of the State's sovereign immunity, it would have stated so expressly by statute.[1] In an October 20, 1971 opinion, this Office found that the South Carolina Highway Department did not have the authority to indemnify Central Electric Power Cooperative, Inc., and the South Carolina Public Service Authority in connection with the construction and maintenance of two paved roads on property over which Central had an easement for its power lines. Op. S.C. Atty. Gen., 1971 WL 22726 (October 20, 1971). In interpreting the South Carolina Highway Department's statutory authorization to contract as necessary to fulfill its duties, we concluded as follows:

> While the Department is authorized by statute to 'enter into such contracts as may be necessary for the proper discharge of its functions and duties,' Section 33-72, Code of Laws of South Carolina (1962), such is not viewed by this Office as an extension of that limited liability and does not authorize the entry into indemnification or 'hold harmless' agreements.

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[1] Dep't of Revenue v. Blue Moon of Newberry, Inc., 397 S.C. 256, 261, 725 S.E.2d 480, 483 (2012) ("[T]he words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the regulation's operation.").

Id. In contrast, where this Office has concluded a State agency or a political subdivision of the State is authorized to execute an indemnification agreement, the statutory authority explicitly used the words "to hold the United States safe and harmless." Op. S.C. Att'y Gen., 2010 WL 1808721 (April 6, 2010). This Office's review of Chapter 25 to Title 58 has not found comparable language which would grant the Authority the power to waive sovereign immunity. Therefore, in accordance with this Office's prior opinions, it is this Office's opinion that a court would likely find the Authority does not have the power to enter into an indemnification agreement with private property owners.

Conclusion

For the reasons discussed above, it is this Office's opinion that a court would likely find the Authority does not have the power to enter into an indemnification agreement with private property owners. This Office is, however, only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20 (1976 Code, as amended). If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General