ALAN WILSON
ATTORNEY GENERAL

December 11, 2019

Ms. Elise F. Crosby
City Attorney
City of Georgetown
P.O. Box 939
Georgetown, South Carolina 29442

Dear Ms. Crosby:

We received your letter requesting an opinion of this Office concerning a proposed public-private partnership between the City of Georgetown (the "City") and Habitat for Humanity. In your letter, you state:

> In August 2019, Habitat for Humanity of Georgetown County created a pilot project "Habitat Georgetown Repairs and Revitalizes" to facilitate making repairs to existing owner-occupied homes in the West End neighborhood whose owners are unable to make the repairs and are eligible under Habitat's requirements . . . .
>
> The City Council expects to consider participation in the program through a public-private partnership with Habitat for Humanity by voting at its regular meeting December 19, 2019, on a contract proposal for the payment of up to $35,000 to Habitat for program implementation. Terms the City would include in a contract include provisions that city monies used for work on private property would be used for purchase of materials to be used for exterior revitalization projects visible to the public . . . .
>
> The funding for the program would come from the City's General Fund, included in the Department of Housing and Community Development's budget designated to address dilapidated housing.

Based on this information, you ask

> [m]ay the City Council authorize payment of public funds budgeted from the General Fund for the Department of Housing and Community Development to be paid to Habitat for Humanity to fund Habitat's purchase of materials for

improvements and repairs to private homes in an area the City has designated for revitalization?

If so, what if any role may the City take in identifying or selecting applicants?

Law/Analysis

As you mentioned in your letter, section 5 of article X of the South Carolina Constitution (2009) 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." Accordingly, any expenditure made by the City must made for a public purpose. In Anderson v. Baehr, 265 S.C. 153, 162, 217 S.E.2d 43, 47 (1975), our Supreme Court described "public purpose" as follows:

> The courts have, as a rule, been reluctant to attempt to define public purpose as contrasted with a private purpose, but have generally left each case to be determined on its own peculiar circumstances. 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. 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 as contrasted with a public purpose merely because some individual makes a profit as a result of the enactment.

In addition, section 11 of article X of the South Carolina Constitution (2009) provides "[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 other private education institution except as permitted by Section 3, Article XI of this Constitution." This Section has been interpreted 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, 535S.E.2d631 (2000).

As we stated in several opinions, the determination of whether a specific expenditure is for a public purpose is a question of fact. Op. Att'y Gen., 1997 WL 569010 (S.C.A.G. July 16, 1997); Op. Att'y Gen., 1995 WL 803662 (S.C.A.G. May 19, 1995). This Office cannot make factual determinations in a legal opinion. Op. Att'y Gen., 1995 WL 803662 (S.C.A.G. May 19, 1995). However, as stated by Supreme Court: "It is uniformly held by courts throughout the land that the determination of public purpose is one for the legislative branch. This has been made manifest in a long line of decisions of this Court." Nichols v. S.C. Research Auth., 290 S.C. 415, 426, 351 S.E.2d 155, 161 (1986). Accordingly, the City must decide whether providing funds to

Habitat for Humanity ("Habitat") serves a public purpose considering both sections 5 and 11 of article X.

Under the circumstances presented in your letter, the City is considering contracting with Habitat to purchase materials and to perform the repairs on private residences located in an area targeted for revitalization. In a prior opinion, we considered whether a city could contract with a private entity to provide recreation programs for city residents. Acknowledging the constitutional provisions cited above, we noted:

> Courts in other jurisdictions have permitted appropriations to private entities which use funds to perform a proper "function for the state." Dickman v. Defenbacher, 128 N.E.2d 59 (Ohio 1955); Bedford County Hospital v. Browning, 225 S.W.2d 41 (Tenn. 1949); People v. Green, 47 N.E.2d 465 (Ill. 1943); Hager v. Kentucky Children's Home Society, 83 S.W.2d 605 (Ky. 1904). In such cases, the direct appropriation of public funds to these private entities is, in effect, an exchange of value which results in the performance by those entities of a public function for the State.

Op. Att'y Gen., 1997 WL 87873 (S.C.A.G. Jan. 8, 1997). Finding "recreation is an appropriate function for the expenditure of public funds," we opined that "public funds may ordinarily be expended for recreation." Id.

Accordingly, the City may appropriate funds to a nonprofit, such as Habitat, so long as those funds are used to perform a function of the City. Thus, we must consider whether the City may purchase materials and repair private homes. In other opinions, this Office opined that public equipment and labor cannot be used on private property. In a 1978 opinion, we advised that installing water service lines on private property owned and used by an eleemosynary corporation is precluded because it "cannot be construed as serving a public purpose." Op. Att'y Gen., 1978 WL 34976 (S.C.A.G. July 11, 1978). Similarly, in 2015, we advised that public funds and equipment could not be used to perform work on private property to repair driveways damaged as a result of a flood. Op. Att'y Gen., 2015 WL 7573851 (S.C.A.G. Nov. 2, 2015). In each of these opinions, we based our opinions on the fact that the private parties would primarily benefit from these efforts.

In your letter, you mention the City enacted a nuisance abatement ordinance to address dilapidated houses unfit for human habitation. You state the City Council could "make a finding . . . that improving exterior conditions would prevent further deterioration that could render the homes unfit to habilitate." You also state that in 2003, City Council approved the West End Redevelopment Plan aimed at revitalizing the neighborhood the Habitat project targets. You indicate the partnership could encourage redevelopment furthering the aims of the Redevelopment Plan. Lastly, you informed us that the City's Comprehensive Plan states the City needs to address the challenges associated with its aging housing stock and provides "As home values are not solely dependent upon an individual property, but are more dependent on the

neighborhood in which a home is located, concentration should be given on the neighborhood level to address the needs of . . . Property maintenance, rehabilitation, and dilapidated housing removal."

In Wolper v. City Council of City of Charleston, 287 S.C. 209, 336 S.E.2d 871 (1985) our Supreme Court considered whether redevelopment of blighted areas serves a public purpose. The Court concluded: "The elimination of decaying and unhealthy areas within a city directly benefits the public." Id. at 216, 336 S.E.2d at 875. In addition, while discussing the benefit to a developer of the blighted area, the Court continued on to state "an incidental benefit to private individuals is not fatal to a finding of public purpose." Id.

Based on the authority cited above, an argument can be made that appropriating funds to Habitat furthers redevelopment, which is a recognized public purpose by our Supreme Court. However, because the proposed appropriation would directly benefit private property owners, we caution the City to carefully weigh whether the primary benefit is to the property owners or the City as a whole.

In addition to asking us about the efficacy of an appropriation to Habitat, you also inquire as whether the City may participate in identifying or selecting applicants for the program. As we mentioned above, the City must consider whether it is appropriating funds to Habitat for a City function. If the City is simply paying Habitat to purchase materials and make repairs the City could perform directly, then we do not find any reason why the City could not be involved in identifying and selecting applicants to receive the repairs. Moreover, the City's involvement in the selection of applications could help to insure the applications selected are ones that will provide the greatest benefit the City.

Conclusion

The determination of whether a particular expenditure of City funds satisfies a public rather than a private purpose involves a determination of the facts. This Office has no jurisdiction or authority to determine facts. Op. Att'y Gen., 2005 WL 2250209 (S.C.A.G. Aug. 31, 2005) ("[A]n opinion of the Attorney General cannot investigate or determine facts."). Only the City, after considering all of the relevant facts and circumstances, can determine whether to expend public funds. However, we note the City must consider the public purpose for which the expenditure is made and whether in this case, it primarily benefits the homeowners or the City as a whole. If the City determines Habitat is simply performing a function of the City in exchange for the appropriation and the benefit received by the homeowners is incidental to that received by the City, we believe the City could be involved in the selection of applicants to receive the repairs in order to insure the greatest benefit for the City.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General