



State of West Virginia

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The Honorable Savannah Hill Wilkins
Tucker County Prosecuting Attorney
Tucker County Courthouse Annex
211 First Street, Suite 207
Parsons, WV 26287

Dear Prosecutor Wilkins:

Your office has asked for an Opinion of the Attorney General about the ownership and ongoing maintenance of a dike or diversion wall on property that is currently legally owned by the City of Parsons. This Opinion is being issued under West Virginia Code § 5-3-2, which provides that the Attorney General “may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office.” When this Opinion relies on facts, it depends solely on the factual assertions in your correspondence with the Office of the Attorney General.

You explain that the Tucker County Commission was a sponsor for several different projects following a severe flood in 1985, including a dike that is currently owned by the City of Parsons. With the Commission serving as a sponsor, the City contacted the U.S. Soil Conservation Service, now known as the U.S. Natural Resources Conservation Service (NRCS), to obtain funding for dike repairs through the Emergency Watershed Protection (EWP) program. Most recently, the Commission served as a sponsor to secure additional funding in August 2014 to repair damage to the dike. Citing a federal regulation, the Prosecuting Attorney at that time concluded that the County Commission was deemed the owner of the dike because the Commission had served as the sponsor for the project. The dike is once again in need of repairs, and the City of Parsons is insisting that the Tucker County Commission be responsible for these repairs.

With these facts in mind, your letter raises the following questions:

1. *Does the County Commission “own” the dike because of its sponsorship assistance in funding?*
2. *What ongoing duty does the County Commission have for the maintenance and repair of the dike?*

We conclude that, under the facts you have described, the County Commission is not the owner of the dike. We also conclude that the 1986 Tucker County Commission likely agreed to be responsible for maintaining the dike for at least some time. But the terms and duration of that maintenance are likely limited by agreement or by public policy.

Discussion

The U.S. Department of Agriculture administers several programs to help affected areas recover from natural disasters. Relevant here, the Emergency Watershed Protection (EWP) program offers financial and technical assistance to relieve imminent threats to life and property caused by natural disasters that impair a watershed. You ask whether the county’s involvement in securing funds for the Parsons dike through the EWP program has obliged the county to maintain and repair the dike indefinitely.

I. The County Commission Does Not Own the Dike.

First, the County Commission does not own the dike simply by serving as the project sponsor.

All EWP projects must have a project sponsor, which can include any “local unit of government ... with a legal interest in or responsibility for the values threatened by a watershed emergency.” 7 C.F.R. § 624.4(g). These project sponsors must be able to “obtain[] necessary land rights” and “carry[] out any operation and maintenance responsibilities that may be required.” *Id.* But nothing in the relevant regulations requires the sponsor to *own* the project. Indeed, the regulations contemplate the existence of both the project sponsor and the “landuser”: one who is the “owner” of the “land involved.” *Id.* § 654.2 (defining “Landuser”). Likewise, the regulations repeatedly refer to “landowners” and “sponsors” separately. *See, e.g., id.* §§ 624.2, 654.2. But in contrast, the Sponsor is there to “provide local responsibility for [the] ... financially-assisted local project.” *Id.* § 654.2; *cf. id.* § 624.4 (defining “project sponsor” as the state government entity “with a legal interest in or responsibility for the values threatened by a watershed emergency ... and is capable of ... maintain[ing]” it.). “In a given statute, the same term usually has the same meaning and different terms usually have different meanings.” *Pulsifer v. United States*, 601 U.S. 124, 149 (2024).

In short, landusers (that is, owners) and sponsors play distinct roles. Because the regulatory scheme contemplates a difference between the landowner and the project sponsor and provides no direct language requiring project sponsors to own the land, the County Commission did not become the Dike’s owner by agreeing to sponsor its development.

II. The County Commission Was Likely Responsible for At Least Some Repairs and Maintenance.

Second, the County Commission likely accepted responsibility in 1986 for the dike's maintenance under an operation and maintenance agreement.

When the County Commission agreed to sponsor the dike, it did so under the regulations provided by the Emergency Watershed Protection program and the program's administrator, the Natural Resources Conservation Service. *See* 7 C.F.R. § 624.1 ("The Natural Resources Conservation Service (NRCS) ... [is] responsible for administering the Emergency Watershed Protection (EWP) Program."). These regulations discuss the need for a project sponsor to handle the ongoing maintenance for federally funded projects, like the prior dike repairs. In particular, "[s]ponsors must ... [a]gree to provide for any required operation and maintenance of the completed emergency measures." *Id.* § 624.6(a)(2)(iii). "Typically, the word 'must' is afforded a mandatory connotation." *Guido v. Guido*, 222 W. Va. 528, 532, 667 S.E.2d 867, 871 (2008) (cleaned up).

The details for the sponsor's operation and maintenance obligations are to be found in an "operation and maintenance agreement" (O&M agreement). *See* 7 C.F.R. §§ 654.40-41; *see also id.* § 624.8(c) ("Before the release of financial assistance, NRCS will enter into a Cooperative Agreement with a sponsor that specifies the responsibilities of the sponsor under this part, including any required operation and maintenance responsibilities."). When a sponsor applies for funds for a particular project under the EWP program—as the County Commission did—the State Conservationist "determine[s]" if an "O&M agreement is necessary." *Id.* § 654.40. However, the State Conservationist does not have full discretion. An O&M agreement is required if the EWP project "needs to be operated and maintained in order to serve its intended purpose" or "to insure that [the project] will not become hazardous." *Id.* § 654.41(a)(1)-(2).

Given the 2014 repairs and current repair needs, it seems likely that the dike project would have satisfied that definition and, thus, had an O&M agreement. After all, the dike's original purpose was to "deflect[] the river flow"—a purpose that is plainly undermined by breaches in the dike. *See* Letter from Bernard R. Lindstrom, Colonel, Corps of Eng'rs, to David B. McKinley, W. Va. House Rep. (undated) (on file with Commission). And the project could become hazardous if flood waters are allowed to flow unabated, as evidenced by the flooding in 1985.

The O&M agreement should have laid out the terms and duration of the County Commission's maintenance duties for the dike. By regulation, the O&M agreement "shall include" the sponsor's "known and anticipated" maintenance for the project, the sponsor's "explanation of how the [maintenance] activities may be carried out," the sponsor's "general time frame" for inspecting and maintaining the project, and how the sponsor will record and report their obligations. 7 C.F.R. § 654.19.

In short, even though the County Commission doesn't own the dike, it may still be responsible for the dike's ongoing maintenance because, in its role as project sponsor, it "[a]gree[d] to provide for any required operation and maintenance of the completed emergency

measures.” *Id.* § 624.6(a)(2)(iii); *see also id.* § 654.11(a) (providing that a sponsor is “responsible for financing and performing ... needed operation and maintenance (O&M) of project measures”); *cf. id.* § 624.6(b)(2)(ii) (providing that “EWP assistance will not be used to perform operation or maintenance, such as the periodic work that is necessary to maintain the efficiency and effectiveness of a measure to perform as originally designed and installed”).

III. Lacking More Information, We Are Unable To Determine The Extent Of Any Continuing Obligations Of The County To Maintain the Dike.

We have requested but have not received any record of an O&M agreement. Although we have received a copy of a project agreement between the Soil Conservation Service and the County Commission, the agreement does not include any provisions speaking specifically to operation and maintenance.

The O&M agreement could not require the County Commission to maintain the dike forever. After all, the regulation says an O&M agreement must define the “duration” of the sponsor’s maintenance. 7 C.F.R. § 654.14. The start date of that duration begins when the project is completed and may “continue through (1) the evaluated life of the project”; “(2) the evaluated life of measures that are economically evaluated as a unit”; or “(3) the useful life of cost-shared measures that are for land conservation or land utilization.” *Id.* In short, the O&M agreement should have told the signing County Commission the duration of its dike maintenance obligations. But lacking any copy of the agreement, we are unable to offer any opinion on its limits.

Any ongoing duty of the County Commission to maintain the dike may face legal challenges beyond the O&M agreement. As with all county commissions, the Tucker County Commission is “created by statute, and possessed only of such powers as are expressly conferred by the Constitution and legislature, together with such as are reasonably and necessarily implied in the full and proper exercise of the powers so expressly given.” Syl. pt. 1, *State ex rel. State Line Sparkler of WV Ltd. v. Teach*, 187 W. Va. 271, 418 S.E.2d 585 (1992); *see generally* W. VA CONST. art. IX, § 11 (“Powers of county commissions”).

Our Supreme Court has observed that it is against public policy for county commissions to enter long-term commitments that tie the hands of future commissions. “[I]t is beyond the power of the governing body of a municipality to tie the hands of future governing bodies in exercising the full jurisdiction of their office by depriving them of a discretion which public policy demands remain unimpaired.” *Rogers v. City of South Charleston*, 163 W. Va. 285, 293, 256 S.E.2d 557, 562 (1979). So, for instance, the Court rejected a three-year employment contract that would allow a county court the “power to extend through contracts the period of their control long beyond the terms for which they were elected, and thus to deprive their regularly elected successors of the important right to exercise some of the functions normally incident to the office.” *Barbor v. Cnty. Ct. of Mercer Cnty.*, 85 W. Va. 359, 362, 101 S.E. 721, 722 (1920). These long-term contracts are “overrule[ed]” by “[p]ublic policy” because they “cramp the powers of the town, defeat the performance of some of its essential functions, and [are] very hurtful to public interests.” *Bradford v. W. Va. Solid Waste Mgmt. Bd.*, 246 W. Va.

17, 25, 866 S.E.2d 82, 90 (2021) (quoting *Town of Davis v. Filler*, 47 W. Va. 413, 415, 35 S.E. 6, 7 (1900)).

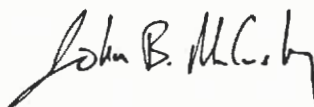
Although there is relatively little West Virginia case law applying the public-policy analysis, the key theme is protecting local governments' statutory "discretion." In cases like *Davis*, *Barbor*, *Rogers*, and *Bradford*, the Court's refrain is that because a municipality is a creation of statute, it may not act to limit a future municipality's statutorily granted discretion. That's because letting a local government's governing body bind a future governing body's discretion would, in fact, elevate the current body above its originating statute and de facto allow it to amend a statutory grant of power.

We recognize that these standards do not provide a simple, timebound, brightline test (e.g., no contracts over two years). Instead, the analysis requires a clear sense of what a local government is statutorily entitled to do and what the current or past governing body has agreed to. Because we do not have the O&M agreement, we cannot definitively complete that analysis. Even so, it appears likely that the County Commission would have exceeded its powers if it tied the hands of the current commission by somehow agreeing to maintain the dike forever.

Conclusion

The Tucker County Commission does not own the dike and likely does not have a duty to maintain it. Without a copy of the possible O&M agreement though, it is impossible to answer your second question (concerning the duration of these obligations) definitively.

Sincerely,



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