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Chairman Kent Leonhardt
Commissioner, West Virginia
Department of Agriculture
State Capitol Building 1, Room E-28
1900 Kanawha Blvd., East
Charleston, WV 25305

Dear Commissioner Leonhardt:

You have asked for an Opinion of the Attorney General about the binding nature of sponsorship and operation and maintenance agreements concerning almost 200 flood-control dams and channels across the State. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General “shall give written opinions and advise upon questions of law, . . . whenever required to do so, in writing, by . . . any . . . state officer, board, or commission.” To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Office of the Attorney General.

In your letter, you explain that the federal Natural Resources Conservation Service (“NRCS”) has worked with local “sponsoring organizations” in West Virginia—that is, local governments, and sometimes the State Conservation Committee (“SCC”) or the West Virginia Conservation Agency (“WVCA”) (collectively, the “Agencies”)—to build 170 small-watershed dams and 22 flood control channels across the State. Broadly speaking, the NRCS paid the majority of up-front construction costs for these facilities, and required the sponsoring organizations to sign agreements providing that they would operate the dams and channels and provide annual, ongoing funding for their upkeep (“sponsorship agreements”).

As many of the dams are now over 50 years old, the costs to maintain and repair these facilities continue to grow. You explain that although the Agencies do not have formal financial responsibilities under the various sponsorship agreements (either because they were never “sponsoring organizations,” or the original agreements have since been modified), in recent years

the Agencies have taken on an increasing share of the maintenance burden. Specifically, the Agencies have contributed \$221,000 per year since fiscal year 2013 to match contributions from local government sponsors, and have provided an estimated \$2 million in additional funding to address specific repair and maintenance needs.

In light of the critical role these dams and channels serve in protecting West Virginia residents from flooding—you estimate that over 60% of the State’s residents benefits from these structures—your letter raises a series of concerns about the enforceability of sponsorship agreements, as well as the Agencies’ authority to provide ongoing and emergency maintenance funding. These issues can be distilled into three legal questions:

First, whether sponsorship agreements are enforceable against local government sponsoring organizations as a matter of state or federal law, and if not, what elements must a sponsorship agreement include to be enforceable?

Second, whether the Agencies are required to fulfill the requirements of any sponsorship agreements that are not enforceable against local government sponsoring organizations, and whether state law authorizes the Agencies to enter agreements regarding dam and channel maintenance or otherwise provide for inspection, maintenance, or repair of these structures?

Third, whether local governments or private landowners who own the land on which these structures are built are liable for maintenance or emergency repairs as a matter of state law?

We conclude that to the extent sponsorship agreements require annual, ongoing funding commitments, the restrictions on county- and municipal-debt in the West Virginia Constitution likely make them unenforceable, outside of limited, fact-specific circumstances, against local governments. Similarly, sponsorship agreements are likely not binding against the Agencies, although other statutory provisions provide some mechanisms by which the Agencies may help provide for ongoing maintenance needs. Finally, we conclude that responsibility for emergency repairs and upkeep is a fact-specific and ultimately unresolved question in the context of an invalid sponsorship agreement, but that in some cases a private landowner or local government may be liable for emergency repairs.

Enforceability of Existing Sponsorship Agreements

Your first set of questions asks whether sponsorship agreements—which in most cases were signed years ago by county commissions, municipalities, or other political subdivisions—are still enforceable against these local-government signatories. In light of the constraints in the West Virginia Constitution against incurring public debt, we conclude that they likely are not.

Our State’s Constitution bars counties and municipalities from incurring debt “in any manner, or for any purpose,” that in the aggregate exceeds “five per centum on the value of the taxable property therein.” W. Va. Const. art. X, § 8. Any debt below this limit must be “submitted to a vote of the people” and approved by a three-fifths margin, and financed by an annual property

tax sufficient to pay off the debt within thirty-four years. *Id.* Article X, Section 4 contains separate requirements governing debts of the State and state agencies. *See, e.g., Winkler v. State Sch. Bldg. Auth.*, 189 W. Va. 748, 756, 434 S.E.2d 420, 428 (1993) (applying Section 4's restrictions to state agency). Although the requirements for lawfully incurring debt vary under Section 4 and Section 8, the "same rationale" applies in both contexts when determining the threshold question of what obligations constitute "debt." *State ex rel. Clarksburg Mun. Bldg. Comm'n v. Spelsberg*, 191 W. Va. 553, 556, 447 S.E.2d 16, 19 (1994); *see also State ex rel. Cty. Com'n of Boone Cty. v. Cooke*, 197 W. Va. 391, 396 nn.8-9, 475 S.E.2d 483, 488 nn.8-9 (1996).

The "underlying purpose of [constitutional] debt restrictions is to 'protect the fiscal integrity of the State [and counties] by prohibiting creation of any present indebtedness that would obligate subsequent legislatures to make appropriations.'" *Spelsberg*, 191 W. Va. at 557, 447 S.E.2d at 20 (citations omitted). The Supreme Court of Appeals has applied this principle in a functional, rather than formalistic, manner. In *Winkler*, for example, the Court concluded that revenue bonds that were to be paid through legislative appropriations from the general fund were debts, even though the bonds stated that the State had no legal obligation to pay them. 189 W. Va. at 760, 434 S.E.2d at 432. The Court concluded that because there was no other source of funds for the revenue bonds, "it defies logic to say that the Legislature has no obligation to fund" them. *Id.* at 761, 434 S.E.2d at 433. More generally, whether an obligation constitutes "debt" turns on its effect on "the existing tax structure" and "general revenue." *Cooke*, 197 W. Va. at 396 nn.8-9, 475 S.E.2d at 488 nn.8-9. Debt is thus created wherever "payment [is] postponed to future dates" for "services performed[] or to be performed," including for projects such as "the building of water works[] or any other municipal improvement." *Allison v. City of Chester*, 69 W. Va. 533, 72 S.E. 474, 473 (1911).

To be sure, not every long-term contract is an Article X debt. Local governments do not incur debt when entering into utility contracts, for example, where the amount owed is tied to actual annual consumption. *Allison*, 72 S.E. at 474. Nor does an agreement for "necessary services" trigger Article X if parties pay for services as they are rendered, rather than agreeing to pay predetermined amounts as they come due each year. *State ex rel. Council of City of Charleston v. Hall*, 190 W. Va. 665, 668, 441 S.E.2d 386, 389 (1994) (holding enforceable ongoing service contracts for solid waste disposal). In both cases, the critical factor is that the amount of the entity's financial burden, if any, is determined each year. Obligations funded by special revenue sources are likewise not debts under Article X. *Winkler*, 189 W. Va. at 760, 434 S.E.2d at 432. For example, there is no constitutional barrier to issuing bonds to finance construction of a city building where the city makes all payments on the bonds with revenue derived from renting that building. *Id.* Similarly, there is no "debt" where a political subdivision funds an obligation entirely from "service fees" paid by "people who use the service." *United States v. City of Charleston*, 149 F. Supp. 866, 872 (S.D. W. Va. 1957) (applying Article X to programs funded with federal assistance).

Under these principles, a court would likely find that the sponsorship agreements you have described create Article X debts. Given the fact-specific nature of this inquiry, we cannot comment on every sponsorship agreement made over the past several decades, but from our discussions with you and the example agreements you provided, it appears that most of these agreements involve

predetermined, ongoing obligations. The agreements prescribe annual funding commitments, with no indication that they can be cancelled at the discretion of future elected bodies or that the contracting entity could control the amount owed in any given year. They also do not designate a special revenue source from which the obligations are paid, and we are aware of no service fees or similar sources of revenue that serve this function. A “functional” analysis thus strongly indicates that the sponsorship agreements are debts subject to the requirements of Article X.

As discussed above, Article X, Section 8 of the West Virginia Constitution sets forth the requirements for permitted county and municipal debt. This inquiry is also fact-specific, and because we lack information about the manner in which these agreements were formed, we cannot assess whether any particular sponsorship agreement satisfies the constitutional elements. Any agreement that incurs a debt without satisfying these requirements would be deemed void. *Davis v. Wayne Cty. Court*, 18 S.E. 373, 374 (1893); *see also Cooke*, 197 W. Va. at 402, 475 S.E.2d at 494. This means that if the amount owed under a sponsorship agreement exceeds “five per centum on the value of the taxable property” in the city or municipality—or causes that entity’s aggregate debt to exceed five percent—that agreement is void. W. Va. Const. art. X, § 8. For agreements below the five-percent threshold, enforceability turns on whether “all questions connected with” the sponsorship agreement were submitted to a vote and the voters approved a special tax to finance the obligation. *Id.* From the information you provided it appears that these procedures may not have been followed for many or all of the sponsorship agreements—which would render such agreements void and unenforceable against their local-government signatories.

Other provisions of West Virginia or federal law likely would not alter this result. You asked, for instance, whether West Virginia Code Section 7-1-3u places an independent obligation on counties and municipalities to honor sponsorship agreements. This statute makes clear that political subdivisions have authority to enter into agreements like the sponsorship agreements, provided that they satisfy other constitutional and statutory requirements. The text expressly “empower[s]” political subdivisions to “protect people and property from floods” through actions like “rechannel[ing] and dredg[ing] streams.” W. Va. Code § 7-1-3u. The Legislature gave counties and municipalities broad powers to accomplish these goals, including buying property, exercising eminent domain, accepting money from public and private sources, and—as most relevant here—laying levies and issuing bonds. *Id.* Nonetheless, the statute expressly requires that any levy must be “within all constitutional and statutory limitations,” and any bonds sold must be “within the constitutional and statutory limitations prescribed by law.” *Id.* Thus, even if a statute could supplant a constitutional provision—and it cannot—*this* statute does the opposite by affirming Article X’s limits on public debt.

Your letter also references West Virginia Code Section 11-8-26. This statute provides additional limits on the ability of “a local fiscal body” to “expend money or incur obligations.” A local entity may not create a financial obligation in an “unauthorized manner” or for an “unauthorized purpose,” or in an amount above that allocated in a levy order or beyond “the funds available for current expenses.” W. Va. Code § 11-8-26(a)(1)-(4). This provision does not provide an independent basis for a county or municipality to disavow an existing contract, as your letter suggests some sponsorship agreement signatories have tried to do, but neither does it insulate an agreement made in violation of the Article X requirements. If anything, debt incurred outside of

the Article X, Section 4 process would run afoul of this provision as well, as an obligation incurred in an “unauthorized manner.”

We also do not believe that federal law or NRCS policy would salvage any sponsorship agreements that are otherwise void under Article X. At least one federal court has concluded that contracts imposing financial obligations on a state entity in exchange for federal funding are still subject to Article X. *City of Charleston*, 149 F. Supp. at 872. More generally, although under the Supremacy Clause of the U.S. Constitution federal law may trump state constitutional debt limitations in appropriate circumstances, this principle applies only where States are required to make expenditures as a matter of federal law. For example, the Supreme Court of Appeals held that West Virginia’s employment security bonds need not satisfy all of Article X’s requirements because federal law would “tax the lifeblood” from the State’s citizens if it failed to incur those obligations. *State ex rel. Dept. of Employment v. Manchin*, 178 W. Va. 509, 513-14 & n.6, 361 S.E.2d 474, 478-79 & n.6 (1987). Other state supreme courts have allowed a similar exception for expenditures “require[d] by federal law” without addressing debts associated with “voluntary participation in a federal program.” *Fletcher v. Commonwealth*, 163 S.W.3d 852, 867-68 (Ky. 2005). Because the NRCS’s sponsorship programs are voluntary—States and local governments may opt into sponsorship agreements in order to apply for federal aid, *see* Pub. L. No. 83-566 §§ 4(3), 5, 68 Stat. 667 (1954); Pub. L. No. 78-534 §3, 58 Stat. 889 (1944)—there is no reason Article X would *not* control. Indeed, one of the operative statutes contemplates that sponsorship agreements may be subject to state-law limits, providing that an entity may join an agreement only if it possesses “authority under State law.” Pub. L. No. 83-566 § 2(2), 68 Stat. 666 (1954).

In light of these legal principles—and absent additional facts indicating that the procedural and substantive requirements of Section 8 were followed in specific cases—we conclude that many or all of the sponsorship agreements you have described would likely not be enforceable against local-government sponsoring organizations. Of course, this analysis does not call into question the authority of a local body to continue appropriating funds for maintaining dams and channels *on an annual basis*, as your letter indicates most sponsoring organizations have indeed continued to do. Local governments have broad authority to “protect people and property from floods,” W. Va. Code § 7-1-3u, and prioritizing local funding to maintain the structures at issue in sponsorship agreements is fully consistent with this responsibility. Further, Section 7-1-3u expressly authorizes counties and municipalities to accept federal “benefits, moneys, services and assistance” for flood-prevention measures. We believe that voluntarily honoring sponsorship agreements by making annual appropriations in the agreed amounts is consistent with this authority and would help ensure that the potential for future federal benefits is not called into doubt.

Finally, you have asked what elements an enforceable sponsorship agreement would need to include. It is beyond the scope of this opinion whether existing sponsorship agreements can be amended or if new agreements would be required, or how including new elements in these agreements would affect the relationship between sponsoring organizations and the federal government. Nonetheless, the presence of some or all of the elements below may substantially increase the likelihood that a sponsorship agreement would survive an Article X challenge:

- As discussed above, sponsorship agreements funded by a dedicated, special funding source would likely not be viewed as incurring debt for purposes of Article X, because the obligation would not burden “general revenues” into future years. *Winkler*, 189 W. Va. at 760, 434 S.E.2d at 432.
- Similarly, if the local body has discretion to cancel a contract in any given year, then that contract does not bind the general revenue of future years and therefore is not a “debt.” *Spelsberg*, 191 W. Va. at 558, 447 S.E.2d at 21; *Winkler*, 189 W. Va. at 758, 434 S.E.2d at 758.
- An agreement modeled on long-term service contracts and contracts for “necessary services” would also be more likely to withstand constitutional scrutiny. Rather than setting annual funding commitments, these contracts provide local bodies some discretion over annual expenditure limits because they commit to pay for services as they are rendered. *Hall*, 190 W. Va. at 668, 441 S.E.2d at 389; *Allison*, 72 S.E. at 474. In this context, for example, a contract might include a provision in which a local government sponsor agrees to pay a contractor for maintenance and emergency repairs on an as-needed basis.
- Finally, an agreement similar to existing sponsorship agreements would not be void, provided that the five-percent debt limit is satisfied and the procedural requirements for debts under this amount (public vote, imposition of a special levy, and maximum thirty-four year debt term) are followed at the time the contract is made. W. Va. Const. art. X, § 8.

The Agencies’ Powers and Obligations

Your second set of questions asks whether the sponsorship agreements could be enforced against the Agencies, and whether state law gives the Agencies other authority to take ongoing and emergency steps to maintain the facilities described in existing sponsorship agreements. We conclude that to the extent any sponsorship agreement might purport to impose an ongoing financial obligation on the Agencies, such an agreement would be void. Nevertheless, the fact that specific sponsorship agreements may be unenforceable does not limit the Agencies’ broad statutory power to work with local governments to protect West Virginians from flooding, within the constraints of legislative funding appropriations and constitutional debt limits.

Your letter explains that the Agencies do not have any formal financial responsibilities under the current sponsorship agreements, but that in recent years they have assumed an increasing share of the operation and maintenance costs for the State’s dams and channels. You represent that these voluntary financial contributions are made in addition to the annual contributions of local-government sponsoring organizations, not in place of them. Accordingly, it does not appear that the Agencies have stepped into a quasi-contractual relationship with respect to the sponsorship agreements themselves. At most, the “match[ing] contributions” your letter describes may indicate the existence of *separate* agreements with counties and municipalities, but not an assumption of any rights or responsibilities under the agreements with the NRCS.

There does not appear to be any basis under which the Agencies could choose to assume binding responsibilities under the sponsorship agreements, either. Article X, Section 6 of the West Virginia Constitution provides that the State shall not “ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person.” W. Va. Const. art. X, § 6. To the extent the sponsorship agreements create debt, this provision would bar the Agencies from taking it on voluntarily. Similarly, Article X, Section 4 prohibits the State and state agencies from assuming debt on their own behalf “except to meet casual deficits in the revenue, to redeem a previous liability of the state, to suppress insurrection, repel invasion or defend the state in time of war.” W. Va. Const. art. X, § 4. There is no colorable argument that the sponsorship agreements fall within one of these enumerated categories. Thus, to the extent the sponsorship agreements incur “debt” for purposes of Article X—and as discussed above, the same analysis governs this question for purposes of Sections 4 and 8, *Spelsberg*, 191 W. Va. at 556, 447 S.E.2d at 19—they would be void against the Agencies for similar reasons as those grounding our conclusion that they are likely void against local-government signatories.

Your letter also asks whether state law allows the Agencies to form *other* agreements providing for the inspection, operation, maintenance, and repair of state dams and channels, and whether the Agencies have statutory authority to perform any of the responsibilities that Section 7-1-3u gives counties and municipalities to protect against flooding. Nothing in state law authorizes the Agencies to override their constitutional debt limitations. That said, the Agencies possess significant authority within these limits to work with local governments to maintain and operate flood-control structures across the State.

West Virginia Code §§ 19-21A-1 to 14 set forth the Agencies’ statutory authority to preserve and protect farm and grazing lands and prevent soil erosion. W. Va. Code § 19-21-A-2(a)-(b). These enumerated powers include authority to buy or acquire other “rights or interests” in property, and to “maintain, administer, operate and improve any properties acquired.” *Id.* § 19-21A-4(9). In other words, the Agencies may take proactive steps to ensure the upkeep of flood-control structures on any property the Agencies own or in which they possess other property rights or interests.

For structures in which the Agencies do not possess ownership interests, the Agencies are empowered to work with local conservation districts across the State. The Agencies may “[o]ffer appropriate assistance” to these conservation districts “in the carrying out of any of their powers and programs,” “[c]oordinate the programs of the several conservation districts so far as this may be done by advice and consultation,” and “[s]ecure the cooperation and assistance of the United States” and any federal or state agencies “in the work of the districts.” *Id.* § 19-21A-4(3), (6). Conservation districts, in turn, are granted powers similar to those described in Section 7-1-3u regarding counties and municipalities: They may “construct, improve, operate, and maintain” flood control structures, and take over and administer (through purchase or lease) any “flood-prevention” project within its boundaries. *Id.* § 19-21A-8(7), (9), (13).

The Agencies are also specifically empowered to accept appropriations, grants, and benefits from the federal government and the State of West Virginia, and either expend that money to carry out the Agencies' direct responsibilities, or allocate it to conservation districts "in order to assist them in carrying out their operations." *Id.* § 19-21A-4(8).

Together, these statutory provisions make clear that the Agencies may directly maintain flood-control structures where they own a property interest, or assist and direct funding to relevant conservation districts where they do not. Importantly, nothing in the statute limits the Agencies' authority in situations purportedly governed by a sponsorship agreement. This means that the question whether a particular sponsorship agreement is enforceable is separate from whether the Agencies may provide voluntary funding (directly or through a conservation district) to address ongoing and emergency needs for specific dams and channels. Of course, as a practical matter, the Agencies may be limited in their ability to act by the level of appropriations or other sources of funding available in a given year. Particularly in light of concerns that maintenance costs are growing rapidly as these structures age, securing additional funding through the Legislature and other sources of state and federal aid may become a priority.

Liability under the Dam Control Act

Finally, you asked whether the Dam Control Act, W. Va. Code § 22-14-1 *et. seq.*, may require local governments or private landowners to provide emergency repairs to flood-control structures, even if a sponsorship agreement is deemed unenforceable. This question is unresolved and fact-specific. Nevertheless, in limited circumstances a court may interpret the Dam Control Act as imposing liability on a private landowner or local government for upkeep and emergency repairs.

The Dam Control Act provides that "[t]he owner of a dam has the primary responsibility for determining when an emergency involving a dam exists," and the owner "shall take necessary remedial action." W. Va. Code § 22-14-10. In extreme circumstances where the condition of a dam or flood conditions pose immediate danger to the public, the Secretary of the Department of Environmental Protection may also assume control over the dam and take necessary remedial action, but the owner remains liable for the cost of these measures. *Id.* § 22-14-22. An owner is also responsible for the costs to repair a "deficient dam," which includes dams with "design, maintenance or operational problems" that may over time or during inclement weather "cause loss of life or property." *Id.* § 22-14-3(g).

An "owner," in turn, is anyone who "(1) holds legal possession, ownership, or partial ownership of an interest in a dam, its appurtenant works or the real property the dam is situated upon; (2) has a lease, easement or right-of-way to construct, operate or maintain a dam; or (3) is a sponsoring organization with existing or prior agreement with the [NRCS]" under, *inter alia*, the federal program creating the sponsorship agreements at issue here. W. Va. Code § 22-14-3(k). The identity of the "owner" of any given dam thus depends on the specific legal arrangements at issue. For example, you explain that the Agencies often negotiate easements with a private landowner to access a dam, which would qualify the Agencies as an "owner" under Section 22-14-3(k)(2). A local government body may also be an "owner" if it holds a full or partial

ownership interest in a dam, or if it qualifies as a “sponsoring organization with existing or prior” agreement with the NRCS. *Id.* § 22-14-3(k)(1)-(3). Finally, private parties may be “owners” if they retain even partial ownership interests in a dam or the property on which a dam sits. *Id.* § 22-14-3(k)(1). Under the circumstances you have described, liability under the Dam Control Act may fall on any or all of these parties.

Nevertheless, in certain circumstances the statute absolves a private landowner from responsibility for upkeep and emergency repairs. Where the dam is “owned, maintained or operated by a sponsoring agency,” then the “owner of the land” “is not responsible for or liable for repairs, maintenance or damage,” provided that the owner “does not intentionally damage or interfere with the regular operation and maintenance of the dam.” W. Va. Code § 22-14-3(k)(3). Because the critical factor for applying this exception is whether a dam on private land is maintained by a “sponsoring agency,” a successful Article X challenge to a sponsorship agreement may invalidate this protection.

This outcome, however, is far from certain. A sponsoring organization includes a governmental entity with an “existing *or prior* agreement” with the NRCS. W. Va. Code § 22-14-3(k)(3) (emphasis added). In general, agreements that violate Article X are void, and treated as having no legal effect. *See, e.g., Shonk Land Co. v. Joachim*, 96 W. Va. 708, 123 S.E. 444, 448 (1924) (holding that parties were not entitled to equitable remedies when contract held void under Article X). Applying this principle, a court could conclude that a “void” sponsorship agreement never existed, and thus does not qualify as a “prior agreement.” Nevertheless, in appropriate circumstances, courts may exercise their discretion to void a contract prospectively only. In *Winkler*, for instance, the Supreme Court of Appeals refused to hold invalid bonds issued prior to its opinion—even though they were issued in violation of Article X’s restrictions—because “voiding those bonds would bring considerable financial chaos to the State.” 189 W. Va. at 764, 434 S.E. 2d at 436. A court may reach a similar result here, concluding that unwinding the sponsorship agreements retroactively may result in “financial chaos.” In that case, the Dam Control Act’s exception for private landowners may still apply on the basis that a local government entity had a “prior” sponsorship agreement with the NRCS.

As with many of the questions you have raised, the result in any particular case will be fact-dependent. Information developed in the context of a specific proceeding may, for example, suggest that the less “chaotic” outcome would be to hold a private landowner liable as an “owner”—such as in cases where a local-government sponsor owns multiple structures requiring significant repairs, and lacks sufficient funding options and the ability to incur debt. Without further guidance in the statute or from case law, it is difficult to assess whether the landowner exception would be available in situations where a sponsorship agreement is deemed void. This uncertainty may be an additional reason for the Agencies to pursue increased funding that would enable them to prioritize ongoing maintenance pursuant to W. Va. Code § 19-21A-1—before emergency situations arise.

Sincerely,



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Lindsay S. See
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Thomas T. Lampman
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cc: Brian Farkas, Executive Director
West Virginia Conservation Agency