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December 23, 2008

Honorable Steven Oroho
Honorable Alison Littell McHose
Honorable Gary R. Chiusano
115 Demarest Road, Suite 2B
Sparta, New Jersey 07871

Dear Senator Oroho, Assemblywoman McHose and Assemblyman Chiusano:

This letter is written in response to your request for information concerning the legality of a municipality co-signing for a loan with a private organization for the repair of a dam to a privately owned lake, and then charging a special assessment against specific properties to repay the loan. The co-signing practice is legal and, in fact, required when a private lake association applies for State funds to remediate an unsafe dam pursuant to the "Dam, Lake and Stream Project Fund," established pursuant to a 2001 law, N.J.S.A.58:4-11 et seq. In addition, N.J.S.A.58:4-12 requires that payment of principal and interest costs on these loans be assessed in the same manner as assessments are made for local improvements against the real estate benefitted by those improvements (for example, sewers and sidewalks).

General Constitutional Prohibitions

Generally, the New Jersey Constitution prohibits lending funds or the credit of the State or its political subdivisions in aid of an individual, private association, or corporation. See, Article VIII, Section II, para. 1 and Section III, para. 2 and 3. These prohibitions are aimed at assuring that public money is raised and used for public purposes only. The public purpose doctrine was enunciated by the New Jersey Supreme Court in *Roe v. Kervick*, 42 N.J. 191, 207 (1964).

The *Roe* court fashioned a two-part test to determine if the expenditure of public funds constitutes a prohibited use: (1) Whether the legislative provision for financial assistance had

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a public purpose, and if so, (2) whether the method of relief provided was so consonant with accomplishment of the public purpose as to be beyond the constitutional prohibitions on the use of public money laid down by Article VIII. *Roe* at 212. Two subsidiary questions also needed to be answered: (1) Whether the recipient's agreement to accomplish the public purpose of the statute (i.e., dam restoration in the subject matter) was the paramount factor in the contract, and (2) whether any private advantage was incidental or subordinate. *Roe* at 218. (See also *N.J. Citizen Action v. County of Bergen*, 391 *N.J. Super.* 598 (2007), cert. den. 192 *N.J.* 597 (2007) concerning the lease and operation of a public hospital by a private, for-profit entity.)

State Provisions for Dam Safety

The State's interest in maintaining dam safety for the protection of the public is well established by statute and regulation. In 1981, the Legislature enacted the "Safe Dam Act," *N.J.S.A.58:4-8.1 et al.*, authorizing the NJDEP to establish, by rule, a periodic dam safety inspection and reporting procedure. Subsection b. of *N.J.S.A.58:4-5* provides:

b. If, in the judgment of the [NJDEP] commissioner, any reservoir or dam is not sufficiently strong to resist the pressure of water that is or may be upon it or there is reasonable cause to believe that danger to life or property may be anticipated from the reservoir or dam, or if for any other cause the commissioner shall determine the reservoir or dam to be unsafe or improperly maintained, the commissioner shall take any action authorized pursuant to this section to compel compliance

Accompanying regulations under *N.J.A.C.7:20* establish safe dam standards for the design and maintenance of dams to protect the public from danger to life and property resulting from the improper construction and deterioration of dams. The "Safe Dam Act" was amended in 1994 to establish a municipality as an interested party in the decommissioning of a dam or reservoir and to require a public hearing, with 30 days' public notice thereof, pursuant to P.L.1994, c.84. The Act was further amended in 2005 to strengthen NJDEP's authority to take action through the assessment of additional penalties for violations of the act, and to charge owners for repairs to dams pursuant to P.L.2005, c.228.

In 1992, the Legislature made monies available for loans to assist local government units, private lake associations/organizations or owners of private dams, as co-applicants with local government units, to meet the costs of dam restoration projects pursuant to the "Green

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Acres, Clean Water, Farmland and Historic Preservation Bond Act of 1992," P.L.1992, c.88. [It should be noted that pending Senate Bill No. 1310 of 2008 appropriates 1992 bond act monies for loans to fund dam restoration projects.] In 2001, the Legislature recognized the need for additional funding by establishing the "Dam, Lake and Stream Project Fund," *Id.*, finding and declaring that:

the condition of many dams, lakes, and streams throughout the State has been deteriorating at an alarming rate due to a chronic lack of maintenance, and that the deterioration was exacerbated by unusually heavy amounts of rainfall during the summer of 2000, particularly the storms occurring on August 12 and August 13 that created a state of emergency in several counties.

The Legislature further finds and declares that these conditions have led to the collapse of dams, polluted lakes, stream flooding and property damage to homes, businesses, lake communities and public utilities; and that federal, State and local financial resources have not met adequately the costs of remediating the sites and facilities affected by these conditions.

The Legislature therefore determines that *it is in the public interest to provide additional funding for State programs that are responsible for remediating, and for providing assistance to other public or private entities to remediate, the conditions described herein.* N.J.S.A.58:4-11 (emphasis added)

Specifically, paragraph (1) of subsection d. of N.J.S.A.58:4-12 requires a municipality to act as co-applicant for the loan and requires local assessments for loan costs as follows:

d. (1) Loans awarded under this section to owners of private dams or lake associations *shall require local government units to act as co-applicants. The cost of payment of the principal and interest on these loans shall be assessed, in the same manner as provided for the assessment of local improvements generally under chapter 56 of Title 40 of the Revised Statutes, against the real estate benefited thereby in*

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proportion to and not in excess of the benefits conferred, and such assessment shall bear interest and penalties from the same time and at the same rate as assessments for local improvements in the municipality in which they are imposed, and from the date of confirmation shall be a first and paramount lien upon the real estate assessed to the same extent, and be enforced and collected in the same manner, as assessments for local improvements.
(emphasis added)

In addition, paragraph (2) of subsection d. of N.J.S.A.58:5-12 provides:

no project for which loans to owners of private dams or lake associations are awarded under this section shall be considered a municipal capital improvement, nor shall the amount of any such loan be considered part of the municipal capital budget, and no such loan shall be subject to the review or approval of the Local Finance Board established under P.L.1974, c.35 (C.52:27D-18.1).

Conclusion

My research has not revealed any judicial challenge to the enabling statute for the "Dam, Lake and Stream Project Fund." Based upon existing law and on information supplied, we conclude that the State has declared dam restoration to be a public purpose and expenditures made to accomplish that purpose, that are subject to NJDEP oversight, are beyond the constitutional prohibitions against loaning money to private associations. Consequently, by law, a municipality has an obligation to co-sign a loan with a private lake organization when applying for State funds from the "Dam, Lake and Stream Project Fund," and payment of principal and interest costs on these loans are required to be assessed as provided for the assessment of local improvements against the real estate benefitted thereby. That translates into people living closest to the dam (and lake) paying more than people living at a greater distance.

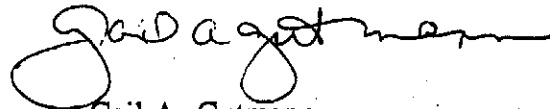
Whether a particular property in the municipality is benefitted by a dam may also depend on the purpose of the dam. A dam that merely creates a lake for the exclusive recreational enjoyment of members of a private community will probably be deemed only to benefit those properties the ownership of which include the right to use the lake. If, however, the lake serves some general municipal public safety or welfare purposes, such as recreation,

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fire suppression, or flood control, then the property owners in the private community may not be responsible for all of the repair and maintenance costs since some of the benefits conferred by the dam are attributable to other municipal residents, or to the municipality as a whole.

We hope that this information is useful to you. Should you have any questions, please do not hesitate to contact me at (609) 292-4625.

Sincerely yours,



Gail A. Gutmann
Special Assistant

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