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ATTORNEY GENERAL

State of Louisiana
DEPARTMENT OF JUSTICE
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OPINION 15-0051

Mr. Randy Wagley
President
Ward One South Gravity
Drainage District #1
232 St. Ann St.
Opelousas, LA 70570

22-1 DRAINAGE & DRAINAGE DISTRICTS

La. Const. art. VII, § 14
La. R.S. 38:1751 *et seq.*

The Ward One South Gravity Drainage District #1 has the authority to financially assist private landowners who undertake erosion control and/or repair projects on private property only if it determines that the work will benefit the public and that the public benefit is equivalent to or greater than the expenditure of public funds. Cooperative endeavor agreements with the private landowners are an option for structuring the project and corresponding financial assistance.

Dear Mr. Wagley:

You have requested an opinion from this Office regarding: 1) the extent, if any, to which erosion control and/or repair projects may be undertaken by the Ward One South Gravity Drainage District #1 ("Gravity Drainage District"), as constituted pursuant to La. R.S. 38:1751 *et seq.*; and 2) the legality of the Gravity Drainage District's use of public funds to partially reimburse private landowners for erosion control and/or repair projects undertaken on their private properties.

According to your request, the Gravity Drainage District is facing erosion issues within its jurisdiction caused by overflow or runoff of water. The erosion can reduce the capacity of drainage ditches and add to the Gravity Drainage District's maintenance costs. In some instances, the erosion can also endanger private structures adjacent to drainage ditches. Due to the magnitude of the erosion issues experienced in your district and in light of the limited resources at your disposal, you seek clarification as to the extent to which you are authorized to undertake erosion control and/or repair projects and whether the Gravity Drainage District can incentivize private landowners to undertake such projects on or adjacent to their properties by offering a partial reimbursement of the total project cost.

As an initial matter, in order for any expenditure of public funds to be permissible, "the public entity must have the legal authority to make the expenditure."¹ Gravity drainage districts derive their authority from La. R.S. 38:1751 *et seq.* Of specific relevance to your question is La. R.S. 38:1767, which states, in pertinent part:

The board of drainage commissioners may open all natural drains which they deem necessary in their respective districts and perform all work connected therewith, which they may deem necessary to make the opening of the natural drains effective. . . In order to carry

¹ La. Atty. Gen. Op. No. 14-0095.

out the drainage works, the drainage commissioners may enter into contracts for the performance of these works, or purchase machinery and have the work performed under their supervision, and **perform all other acts necessary to fully drain all the land in their districts and maintain the drainage when established.**²

Your correspondence states that the contemplated erosion control and/or repair measures would reduce soil and other debris from falling into drains and obstructing drainage. Assuming the accuracy of this assertion, erosion control and/or repair measures would therefore qualify as "other acts necessary to fully drain all the land...and maintain the drainage," which the Gravity Drainage District has the authority to undertake pursuant to La. R.S. 38:1767.

La. R.S. 38:1764 grants the Gravity Drainage District additional authority to construct, maintain, and operate "such works of improvement as land treatment for watershed protection." Thus, it is the opinion of this office that the Gravity Drainage District has the legal authority to undertake erosion control and/or repair projects that improve drainage, maintenance, or watershed protection within its jurisdictional boundary.

Having determined that the Gravity Drainage District has the authority to undertake erosion control and/or repair projects within its jurisdictional boundary, we now turn to the question of whether the Gravity Drainage District may reimburse private landowners for such work undertaken on drainage laterals adjacent to their properties. In subsequent correspondence, you clarified that these drainage laterals are generally on private property encumbered by a public drainage right of way.

A question involving the expenditure of public funds on private property must be examined through the lens of La. Const. art. VII, § 14(A). The State and its political subdivisions are generally barred from expending public funds on private interests without receiving a reciprocal benefit.

Louisiana Const. art. VII, § 14 provides, in pertinent part, as follows:

Section 14(A) Prohibited Uses. Except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private ...

The Louisiana Supreme Court has determined that this constitutional provision "is violated when public funds or property are gratuitously alienated." *Board of Directors of the Industrial Development Board of the City of Gonzales, Louisiana*,

² La. R.S. 38:1767 (emphasis added).

Inc. v. All Taxpayers, Property Owners, Citizens of the City of Gonzales, 05-2298 (La. 9/6/06), 938 So. 2d 11, 20 (the "*Cabela's*" case) (repudiating the prior analysis, propounded in *City of Port Allen v. Louisiana Mun. Risk Mgmt. Agency, Inc.*, 439 So.2d 399 (La. 1983), that La. Const. art. VII, §14(A) is violated "whenever the state or a political subdivision seeks to give up something of value when it is under no legal obligation to do so.").

Our office has interpreted *Cabela's* to mean that, in order for an expenditure or transfer of public funds to be permissible under art. VII, Sec. 14(A), the public entity must have the legal authority to make the expenditure and must show: 1) a public purpose for the expenditure or transfer that comports with the governmental purpose for which the public entity has legal authority to pursue; 2) that the expenditure or transfer, taken as a whole, does not appear to be gratuitous; and 3) that the public entity has a demonstrable, objective, and reasonable expectation of receiving at least equivalent value in exchange for the expenditure or transfer of public funds.³

Accepting the representations in your correspondence, erosion control and/or repair projects may provide a public benefit of improving drainage while reducing the cost of maintaining drainage infrastructure and the amount of pollutants from entering the watershed. As stated above, La. R.S. 38:1767 and 38:1764 grant the Gravity Drainage District the legal authority to operate, maintain, and manage drainage infrastructure and related projects and protect the watershed, respectively, within its jurisdiction. It is thus our further opinion that the public purposes of the erosion control and/or repair projects comports with the purposes that the Gravity Drainage District has the legal authority to pursue.

Next, we must determine whether the expenditure, taken as a whole, does not appear to be gratuitous. Your correspondence notes that one of the motivating factors in extending erosion control assistance to private landowners is the threat of erosion to a structure (home, driveway, etc.). If the primary purpose of the expenditure is solely to ease the burden of erosion on private landowners, then the expenditure would likely violate La. Const. art. VII, § 14(A). In general terms, our office has consistently opined that public funds and/or equipment may not be used to repair private property.⁴ The majority of these prior opinions involved the use of public funds to repair private roads or access routes. Your correspondence, however, notes that providing financial assistance to private landowners for erosion control and/or repair projects might be more cost-effective for the Gravity Drainage District than removing eroded soils and other debris from the drains at a later time if these projects are not addressed.

Ultimately, the third prong of the *Cabela's* test determines whether the expenditure is gratuitous. The Gravity Drainage District must demonstrate an

³ See, e.g., La. Atty. Gen. Op. No. 15-0031, 15-0003, 12-0233, 10-0264.

⁴ La. Atty. Gen. Op. Nos. 10-0201, 08-0109, 05-0299, 88-384, 81-1223.

objective, reasonable expectation of receiving at least equivalent value in exchange for the expenditure. In other words, any public assistance to a private landowner must provide a public benefit equal to or exceeding the cost.

Your correspondence states that the Gravity Drainage District contemplates reimbursing the private landowner 25% of the cost of an erosion control and/or repair project. The Drainage District borrowed this "25% policy" from its participation in a federal erosion control program whereby the Drainage District contributed 25% of the program's total funding. It is the opinion of this office that this uniform cost-share policy, as applied to the contemplated reimbursement scheme, may violate La. Const. art. VII, § 14(A). The Gravity Drainage District must determine the value of a given erosion control and/or repair project in order to determine whether a "25% policy" comports with La. Const. art. VII, § 14(A). In other words, each project must be considered on a case-by-case basis in order to ensure that the amount reimbursed by the Gravity Drainage District equals the value received by the public. Such a determination is fact-specific and must be undertaken by the Gravity Drainage District or a court of competent jurisdiction.

Based on the foregoing, it is the opinion of this office that if the Gravity Drainage District determines that financially assisting erosion control and/or repair projects on private property is for the benefit of the drainage system rather than the private landowner, then the Gravity Drainage District has the authority to spend public funds for that purpose. If the Gravity Drainage District chooses to make this expenditure, it must also ensure that the benefit to be received by the public will be proportionate to the public funds spent.

In the event it determines an erosion control and/or repair project provides a sufficient public benefit, the Gravity Drainage District seeks advice as to the proper structuring of the project and reimbursement. While there are multiple methods to administer such a reimbursement program, according to your request, the Gravity Drainage District contemplates a process whereby it enters into an agreement with a private landowner to reimburse a stipulated amount or percentage of an erosion control and/or repair project. The Gravity Drainage District would oversee the bids or proposals that the landowner solicits and receives and would reimburse the landowner the stipulated cost-share after the landowner enters into a contract with the lowest bidder.

It is the opinion of this office that a cooperative endeavor agreement with the private landowner is an option available to the Gravity Drainage District. Pursuant to La. Const. art. VII, § 14(C), "[f]or a public purpose, the state and its political subdivisions or political corporation may engage in cooperative endeavors with each other, with the United States or its agencies, or with any public or private association, corporation, or individual." As a political subdivision, the Gravity Drainage District has the authority to enter into cooperative endeavor agreements. Such an option appears appropriate for such a scenario as the one currently contemplated by the Gravity Drainage District. This opinion is bolstered

by La. R.S. 38:1764 and 38:1767, which allow the Gravity Drainage District to incur contract obligations and enter into contracts for the performance of drainage related work, respectively.

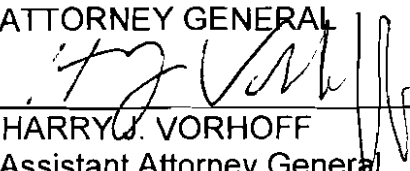
In summary, it is the opinion of this office that the Gravity Drainage District has the authority, pursuant to La. R.S. 38:1764 and 38:1767, to undertake erosion control and/or repair measures that improve drainage, reduce maintenance costs, or increase watershed protection within its jurisdictional boundary. It is our further opinion that the Gravity Drainage District may enter into cooperative endeavor agreements with private landowners to financially assist in the implementation of erosion control and/or repair projects on private property as long as the Gravity Drainage District receives at least equivalent value in exchange for the financial assistance, thereby complying with La. Const. art. VII, § 14. The Gravity Drainage District must, therefore, determine the value of the contemplated erosion control and/or repair projects to the Gravity Drainage District before it can proceed with a reimbursement program, let alone with a uniform 25% reimbursement policy.

We hope this sufficiently answers your inquiry; however, if we may be of further assistance please do not hesitate to contact our office.

Sincerely yours,

JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

By: _____


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