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# New Jersey State Legislature

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April 8, 2010

Honorable Steven V. Oroho  
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Dear Senator Oroho:

You have requested a legal opinion addressing whether a local government unit is legally obligated to accept Department of Environmental Protection (DEP) loan moneys and use those moneys for the repair of a particular dam if the Legislature has appropriated funds to the DEP for the provision of such loans, and the appropriations bill (Senate Bill No. 922 of 2010) provides that certain of the moneys appropriated therein "shall be allocated" by the DEP for the purposes of that specific dam repair project. For the reasons set forth below, it is our opinion that a local government unit is not so obligated.

### A. Factual Background

Lake Neepaulin Dam in Wantage Township, Sussex County is a dam that is privately-owned and maintained by the Friends of Lake Neepaulin, Inc. (FOLN). See Dam Rehabilitation - FAQs, at <http://foln.embarqspace.com/#/dam-rehabilitation/4530694859>; Christina Tanu, *Wantage mulls possible repairs to dam*, New Jersey Herald, at <http://www.njherald.com/printerfriendly/31NEEPAULINVOTE-web>. The FOLN is an exclusive 125 member non-profit group that allows only its paying members to make use of Lake Neepaulin - the lake that has been created, and that is sustained, by the existence of the dam. Ibid.

The DEP has designated Lake Neepaulin Dam as a "significant hazard dam," and has ordered its repair - a repair order which is long-standing. See Ordinance Authorizing Special Tax Assessment for Lake Neepaulin Dam Reconstruction, Ordinance #2008-16, at [http://wantagewp.com/municipal/2008/ordinances/Ordinance\\_2008\\_16.pdf](http://wantagewp.com/municipal/2008/ordinances/Ordinance_2008_16.pdf); Dam Rehabilitation - FAQs, supra. However, the FOLN cannot afford the costs associated with the ordered dam repair. See Dam Rehabilitation - FAQs, supra; Wantage mulls possible repairs to dam,

Honorable Steven V. Oroho

Page 2

April 8, 2010

supra. Although the FOLN has submitted an application to obtain a DEP loan for this purpose, because it was prohibited by law from applying for such a loan without the partnership of a local government unit, the Township of Wantage agreed to, and did, sign as co-applicant with the FOLN on its DEP loan application. See Dam Rehabilitation - FAQs, supra; Ordinance Authorizing Special Tax Assessment, supra.

As an indication of its commitment to assist the FOLN with regard to its DEP loan request, the Township Committee of the Township of Wantage also passed Ordinance 2008-16, which authorized the levying of a special property tax assessment on township residents in order to subsidize the costs associated with repayment of the DEP loan. Ordinance Authorizing Special Tax Assessment, supra. However, residents vocally opposed the passage of this ordinance, contending that they should not be responsible for financing the repairs of a dam that was privately-owned by the FOLN, and that it was unfair to lay the costs of dam repair on township residents who were prevented from using or enjoying the associated lake due to the exclusive nature of the FOLN. See Tom Hoffman, Township weighs options for lake dam, The Advertiser News, at [http://www.strausnews.com/articles/2009/05/15/advertiser\\_news/news/7.txt](http://www.strausnews.com/articles/2009/05/15/advertiser_news/news/7.txt); Minutes of the Special Meeting of the Mayor and Committee of the Township of Wantage, held at the High Point Regional High School Auditorium, Wantage, New Jersey on June 1, 2009, at [http://www.wantagetwp.com/municipal/2009/minutes/mc\\_0601.pdf](http://www.wantagetwp.com/municipal/2009/minutes/mc_0601.pdf). In June of 2009, following a public hearing at which several residents challenged the appropriateness of the tax assessment, the township indicated its intent to recede from the agreement to aid the FOLN in seeking a DEP dam repair loan. Subsequently, it passed Ordinance 2009-16, which rescinded the earlier ordinance that would have permitted the special property tax assessment for loan repayment purposes. See Minutes of the Special Meeting of the Mayor and Committee of the Township of Wantage, supra; An Ordinance Rescinding a Special Tax Assessment for the Lake Neepaulin Dam Reconstruction, Ordinance #2009-16, at [http://www.wantagetwp.com/municipal/2009/ordinances/Ordinance\\_2009\\_16.pdf](http://www.wantagetwp.com/municipal/2009/ordinances/Ordinance_2009_16.pdf).

Senate Bill No. 922, which, as of March 22, 2010, has passed both Houses, would appropriate \$16,950,000 to the DEP for use in providing loans for dam repair and restoration projects. The bill provides a list of particular dam repair and restoration projects to which the appropriated moneys "shall be allocated," and that list specifically includes a \$1 million allocation of appropriated funds to finance the Lake Neepaulin Dam project loan.

You have indicated that a constituent who lives near, but not on, Lake Neepaulin, is concerned that the passage of S-922, which includes the legislative direction that certain funds appropriated therein "shall be allocated" for the specific purpose of financing the Lake Neepaulin Dam repair loan, will effectively obligate Wantage Township to assist the FOLN in its repair efforts through acceptance of DEP loan moneys and imposition of a property tax

Honorable Steven V. Oroho  
Page 3  
April 8, 2010

assessment, despite the township's reluctance to provide any such assistance. Accordingly, the issue is whether Wantage Township, as a co-signatory on the DEP loan application, can legitimately refuse to proceed with the loan request in the event that S-922 is enacted into law and the DEP is directed thereby to allocate certain appropriated funds for the purposes of financing the Lake Neepaulin Dam repair loan.

B. Allocation by DEP of Legislatively Appropriated Funds

As a practical matter, the legislative appropriation of funds to the DEP and the specification in the appropriations bill of projects to which funds "shall be allocated" does not necessarily guarantee that the appropriated funds will, in fact, be allocated by DEP in the exact manner provided. In fact, DEP regulations related to dam repair loans specifically provide that any funds that have been appropriated for a particular loan and that remain unused are to be "retained by the State and deposited in the Fund to be applied to other dam restoration and inland water projects, as appropriate . . . ." N.J.A.C. 7:24A-4.7.

S-922 specifically provides that the \$16,950,000 appropriated therein is money that has been ". . . made available due to project cancellations, withdrawals, and cost savings . . . ." The accompanying bill statement provides, moreover, that the sum appropriated for dam repair ". . . represents unexpended balances made available due to project cancellations, withdrawals, or cost savings *for projects previously approved by law for funding . . . .*" (emphasis added). In practice, because the DEP will not always agree to provide a loan applicant with all the funds needed to proceed with an approved project, and because the commencement and completion of the project may be contingent on the applicant's receipt of appropriate permits, any failure by the applicant to obtain the necessary additional funds or permits may result in the cancellation or withdrawal of the project prior to any allocation of funds thereto by the DEP. See, e.g., subsection (c) of N.J.A.C. 7:24A-3.2.

Although S-922 provides that funds "shall be allocated" in accordance with the list of specified dam repair projects, the DEP Bureau of Dam Safety has confirmed that the word "shall," in this context, is not interpreted by the DEP, in practice, to mean that the moneys "must" be allocated as provided in the bill. The term "shall" in this context is understood to provide a non-mandatory prescription - a suggestion for fund allocation, and a flexible directive that the appropriated moneys "should" be allocated for particular projects, so far as is possible. A close evaluation of DEP regulations discloses that such a flexible interpretation is necessary since the legislative appropriation and suggested allocation of funds occur prior to the DEP's finalization of the loan award agreement, which is the document that commits the borrowers to accept the awarded funds and to complete the relevant project for which funds have been awarded.

Honorable Steven V. Oroho

Page 4

April 8, 2010

C. Regulatory Procedure for DEP Loan Applications and the Execution of DEP Loan Award Agreements

N.J.A.C. 7:24A-1.4 provides for three distinct phases in the DEP loan application and approval process: (1) the application phase, (2) the development phase, and (3) the implementation phase. The application phase consists of a pre-application conference, the submission of the application, the DEP review of the application, the DEP priority ranking of the project, and the applicant's receipt of a notice of qualification. See subsection (a) of N.J.A.C. 7:24A-1.4. Significantly, the notice of qualification received during this phase does not indicate that the loan, itself, has been approved, but indicates only that the DEP has "approv[ed] the application for priority ranking and [a] possible loan." See N.J.A.C. 7:24A-2.6; N.J.A.C. 7:24A-2.7. The application phase, therefore, results only in a determination that the applicant is eligible and qualified for a potential loan. See paragraph 4 of subsection (a) of N.J.A.C. 7:24A-2.5; N.J.A.C. 7:24A-2.6. As explained by the DEP Bureau of Dam Safety, a township's signature on a DEP loan *application* indicates an intent on the part of the township only to establish *its eligibility* for a loan award, and it signifies only that the township is *considering* signing onto the formal loan award agreement. If a formal loan award agreement is executed at all, it will not be executed until late in the development phase of the loan application and approval process. See subsection (b) of N.J.A.C. 7:24A-1.4.

DEP regulations make a significant distinction between an "applicant" for a loan and a "borrower" of loan moneys. See N.J.A.C. 7:24A-1.7. An "applicant" is defined to mean ". . . any local government unit that applies independently, or a private lake association or similar organization or private dam owner who has a local government unit as a co-applicant, for a loan . . ." N.J.A.C. 7:24A-1.7. A "borrower," on the other hand, is defined to mean ". . . an applicant *who has been awarded a loan pursuant to the Act and this chapter, and who has executed a loan award agreement.*" N.J.A.C. 7:24A-1.7 (emphasis added). An "applicant," therefore, does not become a "borrower" until a formal loan award agreement is executed.

Pursuant to DEP regulations, "[t]he loan award shall become effective upon execution of a loan award agreement by the Department and the applicant, and shall constitute an obligation of the Fund in the amount and for the purposes stated in the loan award agreement." Subsection (b) of N.J.A.C. 7:24A-3.3. In other words, an applicant for a loan is not bound to accept loan award moneys or to complete the project for which a loan is sought, until the loan award agreement has been formally executed and the "applicant" has become a "borrower." This is supported by N.J.A.C. 7:24A-2.7, which provides that an *applicant* for a loan who has received a notice of qualification may, at any time prior to the awarding of the loan, notify the DEP that the applicant has decided to forego the project. Although the regulations provide that, absent notification of project cancellation by the applicant, the DEP "shall" award the

Honorable Steven V. Oroho

Page 5

April 8, 2010

loan thereto, the regulations provide that the award may only be made “. . . subject to available appropriations, [and the] execution of a loan award agreement.” Subsection (c) of N.J.A.C. 7:24A-2.7. Because a loan cannot be awarded if the DEP lacks the necessary funds needed to finance the loan, and because the DEP will be required to fulfill its obligations under the loan once the loan becomes effective, the formal loan award agreement cannot be executed and finalized until *after* the Legislature has made the necessary appropriation of funds to the DEP. See N.J.A.C. 7:24A-1.5 (“[f]unding of loans shall be conditioned upon the appropriation by the legislature of funds” from a relevant bond act). Hence, at the time legislative appropriations are made, no formalized loan agreement can exist between the DEP and the applicant, and the signatories on the loan application will remain unbound “applicants” for the loan, even after the passage of a relevant appropriations bill, until such time as a formalized loan award agreement is executed.<sup>1</sup>

Because Wantage Township has not signed a formalized loan award agreement, the township has not yet agreed to become a borrower on the loan requested by the FOLN. The township's agent's signature on the loan application indicates only that the township was *considering* acting as a co-borrower at the time the application was submitted to the DEP. Because the township's agent's signature on the initial loan *application* did not have the effect of binding the township to an agreement, the township has not bound itself to the terms of the loan, and it can, therefore, refuse to sign the loan award agreement even after S-922 is enacted into law, and despite the fact that the DEP is specifically directed thereby to allocate certain appropriated funds for the purposes of the Lake Neepaulin Dam repair project.<sup>2</sup> The DEP will not force the township to sign the loan award agreement simply because the township has

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<sup>1</sup> John Ritchey of the DEP Bureau of Dam Safety has confirmed that no formalized loan award agreement has yet been executed in this case, and, moreover, that no such loan award agreement will be executed until *after* the appropriations bill has been passed.

<sup>2</sup> Although a court may, in the interests of fairness, invoke estoppel concepts to compel certain contractual action in the absence of an express, written contract, where one party has detrimentally relied on the fulfillment of an explicit or implicit promise made and later broken by another party, it is unlikely that a court would do so in this case. See County of Morris v. Fauver, 153 N.J. 80, 104 (1998) (equitable estoppel); Malaker Corp. Stockholders Protective Committee v. First Jersey Nat'l Bank, 163 N.J. Supcr. 463, 479-484 (App. Div. 1978), cert. den., 79 N.J. 488 (1979) (promissory estoppel). Even if the FOLN could establish that the township made or implied a promise to become a co-signatory on the final loan award agreement, it appears that the FOLN has not expended any funds, and in fact, has had no change in financial or other status as a result of this “promise.” Moreover, it does not appear that the “promise” has caused the FOLN to forego any other options that were available with regard to the ordered repairs, as the FOLN has freely admitted that it never intended to pay for the dam repairs itself or seek out the necessary funds from other sources, and that it would elect to disband the organization and allow the DEP to breach the dam in the event the township did not agree to assist it in securing the DEP loan. See Dam Rehabilitation - FAQs, supra.

Honorable Steven V. Oroho  
Page 6  
April 8, 2010

indicated its intent to act as a co-borrower by signing on as a co-applicant on the FOLN's previously-submitted loan application.

D. Conclusion

Based on the foregoing analysis and authority, it is our opinion that Wantage Township will not be obligated by the passage of S-922 to accept DEP loan moneys and proceed with the Lake Neepaulin Dam repair project, or to impose the associated property tax assessment. It is our opinion, moreover, that the township may refuse to continue with the Lake Neepaulin Dam repair loan application process at any time prior to the execution of the formalized loan award agreement.

Very truly yours,

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