



Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

May 10, 2022

Willie Griffin, Esq.
Attorney for Washington County Board of Supervisors
Post Office Box 189
Greenville, Mississippi 38702-0189

Re: County's Authority to Perform or Pay to Elevate Private Properties to Mitigate Flood Damage

Dear Mr. Griffin:

The Office of the Attorney General has received your request for an official opinion.

Background

According to your request, Washington County (the "County") granted exemptions or variances to the Flood Damage Prevention Ordinance (the "Ordinance") to certain private property owners. We understand from discussions with the County's Flood Plain Director following the receipt of your request that the County adopted this Ordinance as a condition for the County's residents to be able to purchase flood insurance through the National Flood Insurance Program ("NFIP"). It now appears that those properties do not meet the requirements for continued participation in the NFIP. You state that the Mississippi Emergency Management Agency ("MEMA") is requiring Washington County to perform the work or pay the cost of elevating certain properties that were constructed pursuant to variances to the Ordinance granted by the County. You assert that should MEMA report alleged failures to comply with NFIP eligibility requirements to FEMA, the County would be in jeopardy of being suspended from participation in the NFIP.

Questions Presented

- 1) Does the County have authority to perform or pay the cost of mitigation work to elevate certain private properties to the level required by the Ordinance?
- 2) What authority does MEMA have to order the County to upgrade private property to bring such property into compliance with the Ordinance?

Brief Response

- 1) Washington County does not have authority to use public funds to perform work on private property for the benefit of said property owners. To do so would be a violation of the statutory and constitutional prohibitions against unlawful donations.
- 2) Your second question asks about MEMA's powers to compel the elevation of certain property. Because this office cannot opine on questions involving the official duties of someone other than the requestor, we are unable to answer your second question.

Applicable Law and Discussion

The board of supervisors of each county, while vested with broad authority over many aspects of county governance and maintenance, is prohibited from granting any donation. Miss. Code Ann. § 19-3-40(3). The prohibition against granting donations is also found in Article 4, Section 66 of the Mississippi Constitution of 1890, which provides: "No law granting a donation or gratuity in favor of any person or object shall be enacted except by the concurrence of two-thirds of the members elect of each branch of the legislature, nor by any vote for a sectarian purpose or use."

As a general rule, "the board of supervisors of a county may not use any public funds, equipment, supplies or materials for any private purpose, nor may they grant any donation." MS AG Op., *Gamble* at *1 (Apr. 14, 1993) (opining that the county did not have authority to pay for survey, drafting, and engineering work requested by private property owners in order to establish their property as a subdivision). There are certain circumstances where a board of supervisors may incur costs and pay necessary expenses to clean or clear drainage ditches, creeks, channels, or conduits on private property but only after a finding is made and entered on the minutes "that such work and/or expenses are necessary in order to promote the public health, safety and welfare of the citizens of the county. . . ." MS AG Op., *Roberson* at *1 (July 31, 2020) (quoting Miss. Code Ann. § 19-5-92.1(2)). However, this office has made clear that such "drainage work may not be performed solely to benefit private property owners, but where the drainage work is necessary for the public welfare, incidental benefits to a landowner will not render the improvements unlawful." MS AG Op., *Brown* at *2 (Nov. 14, 2016) (citations omitted).

In the circumstances you describe, the County is being asked to perform or pay for mitigation work to bring the elevation of privately owned properties to the level required by the Ordinance. There is no drainage work as authorized by statute.¹ Therefore, it is the opinion of this office that the County does not have authority to perform or pay for the work required to elevate privately owned properties to bring them to the level required by the Ordinance because to do so would result in an unlawful donation to the private property owners.²

¹ Your request does not explain the type, size, location, or number of privately owned properties. This office has previously issued opinions related to the applicability of local flood ordinances to hunting and fishing camps. MS AG Op., *Ross* at *2-3 (Oct. 5, 2012).

² To the extent that MS AG Op., *Shepard* at *1-2 (May 13, 2016), which opines that the county may pay for the cost of providing Flood Elevation Certificates but must seek reimbursement from property owners, is inconsistent with our reasoning herein, *Shepard* is hereby modified.

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Your second question asks about MEMA's powers to compel the elevation of certain property. Because this office cannot opine on questions involving the official duties of someone other than the requestor, we are unable to answer your second question. MS AG Op., *Crimm* at *1 (Aug. 17, 2007) (finding that an Attorney General's opinion cannot "address questions of law regarding an office other than the requestor's").

We suggest the County consult with the MEMA Office of Mitigation to determine the best course of action to ensure continued participation in the NFIP. There may be grants or other sources of funding through FEMA that could be used for mitigation modifications on private property.

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: */s/ Misty Monroe*

Misty Monroe
Special Assistant Attorney General

OFFICIAL OPINION