



ALAN WILSON  
ATTORNEY GENERAL

September 11, 2019

J. Raleigh West, III  
Executive Director  
South Carolina Conservation Bank  
1201 Main Street, Ste. 1820  
Columbia, SC 29201

Dear Mr. West:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter asks the following:

South Carolina Code Section § 48-59-80(D) requires the SC Conservation Bank ("Bank") to "be named as an insured on a title insurance policy acceptable to the board ..." Code Section § 48-59-80(B) prohibits the Bank from holding or possessing "any interest in land or other interest in real property." An entity must own or possess an "insurable interest" in real property in order to qualify as a named party on a title insurance policy, which Code Section § 38-75-3250(A) defines as "any lawful and substantial economic interest in the safety or preservation of property from loss, destruction, or pecuniary damage."

The Bank awards grant funding to qualified third parties to purchase interests in real property for conservation purposes, but the Bank does not acquire any interest in the real estate itself, in accordance with § 48-59-80(B). These qualified entities are then required to purchase title insurance at an amount not less than the grant award. The challenge arises at this point in the closing process as title insurance companies have been reluctant to consider the Bank's award of grant funding as rising to the level of an insurable interest in the subject real property and, in turn, to name the Bank as an additional insured on the title policy.

I interpret the principal purpose of § 48-59-80(D) to be ensuring that the Bank will be reimbursed its grant funding in the event that a successful claim against title arises after the subject real estate transaction has closed. To that end, I would

propose that the Bank could satisfy its obligations under the statute by requiring all qualified grant recipients to agree to:

- (a) Purchase a title insurance policy in an amount not less than the Bank's grant, which is the current customary practice;
- (b) Agree as a condition of accepting grant funding that the qualified grant recipient shall return the Bank's proportional share from title insurance proceeds in the event a successful title claim arises; and
- (c) Memorialize these conditions in an executed grant agreement between the Bank and the qualified grant recipient.

In effect, the above proposal would achieve the purpose of § 48-59-80(D) via a collateral grant agreement in lieu of naming the Bank as an additional insured on a title policy, which is a challenge because of the prohibition against the Bank owning an insurable interest in the subject property.

Please let me know if the solution offered above would satisfy the Bank's statutory obligations under § 48-59-80(D).

#### Law/Analysis

It is this Office's opinion that a court likely would find the South Carolina Conservation Bank (the "Bank") is not required to be named as an insured on a title insurance policy when it awards grant funds. The South Carolina Conservation Bank Act (the "Act"), S.C. Code Ann. § 48-59-10 et seq., was enacted to "establish an ongoing funding source to acquire interests in land from willing sellers" to meet the purposes of "preservation of, and public access to, wildlife habitats, outstanding natural areas, sites of unique ecological significance, historical sites, forestlands, farmlands, watersheds, and open space." S.C. Code Ann. § 48-59-20. The Act established the Bank and granted it the power to "(1) award grants to eligible trust fund recipients for the purchase of interests in land ... [and] (2) make loans to eligible trust fund recipients for the purchase of interests in land ..." S.C. Code Ann. § 48-59-50. When the Bank makes a loan or awards a grant to eligible trust fund recipients, it must "be named as an insured on a title insurance policy" or "be indemnified as to title in the amount of any grants it makes" respectively. S.C. Code Ann. § 48-59-80(D). In full, Section 48-59-80(D) reads as follows:

The bank must be named as an insured on a title insurance policy acceptable to the board and obtained by the loan recipient for loans it makes to eligible trust

fund recipients. The bank must be indemnified as to title in the amount of any grants it makes to eligible trust fund recipients, and this indemnification must be secured by a title insurance policy acceptable to the board and obtained by the grant recipient. These requirements for title insurance and indemnification as to title may be waived by the board in extraordinary cases where insurable title is unobtainable, the risk of adverse claims to title are small, the land in question presents a particularly valuable conservation opportunity according to the purposes of this chapter and the criteria of Section 48-59-70, and the cost of the interest in land acquired reflects the lack of insurable title.

S.C. Code Ann. § 48-59-80(D) (emphasis added).

The first sentence of Section 48-59-80(D) that requires the Bank to be named as an insured on a title insurance policy applies when the bank provides a loan. According to the plain language of Section 48-59-50, the Bank's authority to award a grant and the authority to make a loan are separate powers. When the Bank makes a loan, it is not prohibited from holding an interest in land. The Act defines "[i]nterests in lands" to mean "fee simple titles to lands or conservation easements." S.C. Code § 48-59-30(8). As stated in the request letter, the Bank is generally prohibited from holding an interest in land or other interest in real property. However, Section 48-59-80(B) provides an exception "for mortgage interests as security for loans made from the trust fund."<sup>1</sup> Therefore, when the Bank makes a loan, it is required to be named as an insured on a title insurance policy, and the Bank is permitted to hold an interest in land "as security for loans made from the trust fund." Id.

In contrast, the second sentence of Section 48-59-80(D) requires the Bank to "indemnified as to title in the amount of any grants it makes to eligible trust fund recipients, and this indemnification must be secured by a title insurance policy acceptable to the board and obtained by the grant recipient." According to the plain language of the statute, the requirement to be named as an insured on a title insurance policy applies to a separate circumstance from when the Bank awards a grant. When the Bank awards a grant, it is required to be indemnified in the amount of the grant it makes with the indemnification being secured by a title insurance policy. The request letter notes that this is the Bank's "current customary practice" when it grants an award. It is this Office's opinion that a court would likely hold the practice described generally appears to comply with the requirement in Section 48-59-80(D) to have an indemnification secured by a title insurance policy. Please note that this Office cannot opine on a specific indemnification agreement's compliance with all requirements of the Act as that would

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<sup>1</sup> In full, Section 48-59-80(B) states, "The bank may not hold or possess any interest in land or other interest in real property, except for mortgage interests as security for loans made from the trust fund as provided for in subsection (J), and leasehold interests in office space secured for bank operations and staff."

require factual determinations reserved to the courts and beyond the scope of this Office's opinions. See Op. S.C. Att'y Gen., 1989 WL 508567, at 6 (July 17, 1989) (Fact-finding is beyond the scope of an opinion and is more appropriately reserved to "the province of the courts.").

Finally, Section 48-59-80(D) permits the requirements for title insurance and indemnification as to title to be waived in "extraordinary circumstances" by the board. The statute lists four considerations for the board when it is presented with a circumstance to grant such a waiver: (1) insurable title is unobtainable, (2) the risk of adverse claims to title are small, (3) the land in question presents a particularly valuable conservation opportunity, and (4) the cost of the interest in land acquired reflects the lack of insurable title. Because the statute describes the waiver as extraordinary, the Bank should follow the requirements for title insurance and indemnification as to title as described in the first two sentences of section 48-59-80(D) before considering a waiver.

#### Conclusion

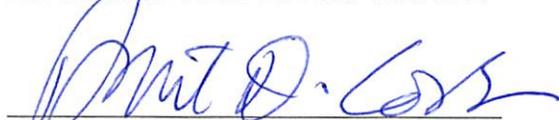
It is this Office's opinion that a court likely would find the South Carolina Conservation Bank (the "Bank") is not required to be named as an insured on a title insurance policy when it awards grant funds. According to the plain language of S.C. Code Ann. § 48-59-80(D), the requirement to be named as an insured on a title insurance policy applies to a separate circumstance from when the Bank awards a grant. When the Bank awards a grant, it is required to be indemnified in the amount of the grant it makes with the indemnification being secured by a title insurance policy. Id. The request letter notes that this is the Bank's "current customary practice" when it grants an award. It is this Office's opinion that a court would likely hold the practice described generally appears to comply with the requirement in Section 48-59-80(D) to have an indemnification secured by a title insurance policy.

Sincerely,



Matthew Houck  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General