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Opinion No. 06-081

Interlocal Agreements under Tenn. Code Ann. §§ 12-9-101, *et seq.*

QUESTIONS

1. Is a municipal utility system legally authorized to enter into an interlocal agreement with other municipal utility systems to form a for-profit corporation?

2. May a municipality or a municipal utility system that enters into an interlocal agreement with other municipalities or municipal utility systems to form a for-profit corporation be made financially responsible for the losses of that corporation?

3. Are there any restrictions, other than the provisions of an interlocal agreement, on the ability of municipalities or municipal utility systems to be financially responsible for the losses of an entity created by the agreement?

4. When municipalities or municipal utility systems form a new entity by means of an interlocal agreement, do the statutory restrictions regarding bid limits, budget requirements, or any other statutory requirements regarding public finances of governmental entities apply to the new entity?

5. When a new entity is formed by means of an interlocal agreement between municipalities or municipal utility systems with different levels of statutory powers, may the new entity have powers greater than those of the municipality with the most restrictive statutory powers?

OPINIONS

1. No.

2. In light of our answer to Question 1, Question 2 is moot.

3. The agreement must be statutorily authorized, either by the Interlocal Cooperation Act or some other statute or charter provision. Further, Article II, Section 29, restricts the authority of a county, city, or town to own stock "with others" or to pledge its credit in aid of any "person, company, association or corporation" without the approval of three-fourths of the voters at a

referendum. This Office has also concluded that, absent statutory authority, local governments may not agree to indemnify private parties or other governmental entities.

4. The administrative entity created by an interlocal agreement is subject to the bid limits, budget requirements, or any other statutory requirements regarding public finances that apply to each of the participating agencies. Where the different agencies are subject to different requirements, the created entity should comply with the most restrictive limit.

5. No.

ANALYSIS

This opinion addresses several questions about the scope of local governmental powers under the Interlocal Cooperation Act, Tenn. Code Ann. §§ 12-9-101, *et seq.* (the "Interlocal Act"). The purpose of the Interlocal Act is to:

> permit local governmental units the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of local communities.

Tenn. Code Ann. § 12-9-102. Tenn. Code Ann. § 12-9-104(a)(1) provides in relevant part:

> Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state, including those provided in § 6-54-307 or § 68-221-1107(b), may be exercised and enjoyed jointly with any other public agency of this state having the power or powers, privilege or authority . . .. The authority for joint or cooperative action of political subdivisions shall apply to powers, privileges or authority vested in, funded by, and/or under the control of their governing bodies and relative to which the governing bodies may make other types of contracts. No joint or cooperative agreement shall be entered into affecting or relating to the constitutional or statutory powers, privileges or authority of officers of political subdivisions, or of agencies of political subdivisions with a separate governing board and having powers granted by statute independent of the governing body.

Subdivision (a)(2) provides:

> Agencies of political subdivisions that have governing boards separate from the governing bodies of the political subdivisions may make agreements for joint or cooperative action with other such agencies and with other public agencies. The power to make joint or cooperative agreements includes any power, privilege or authority exercised or that may be exercised by each of the agencies that is a party

> to the agreement. Agreements between agencies of political subdivisions that have separate governing boards and other such agencies and agreements between such agencies and public agencies shall substantially conform to the requirements of this chapter. The governing bodies of such political subdivisions shall require agreements made by their agencies pursuant to this chapter to be submitted to the governing body for approval before the agreements take effect.

As used in the Interlocal Act, the term "public agency" includes any political subdivision of Tennessee. Tenn. Code Ann. § 12-9-103(1)(A).

1. Authority to Create a "For-Profit" Corporation

The first question is whether a municipal utility system is legally authorized to enter into an interlocal agreement with other municipal utility systems to form a for-profit corporation. A definitive answer to this question depends on the statutory powers of the entity operating the utility system. Municipal utility systems are operated by different governmental entities under many different statutes of general applicability and private acts. But, as a general matter, we think an entity operating a municipal utility system, regardless of the particular statutes governing its ownership and operation, would be a "political subdivision" or the agency of a political subdivision and, therefore, a "public agency" authorized to enter into joint agreements with other municipal utility systems. Under Tenn. Code Ann. § 12-9-104(c)(2), a joint agreement under the Interlocal Act must specify, among other matters, "[t]he precise organization, composition and nature of any separate legal or administrative entity or entities created thereby, *which may include, but is not limited to, a corporation not for profit,* together with the powers delegated to such a corporation." (Emphasis added). The statute, therefore, expressly authorizes public agencies to create a not-for-profit corporation to implement an interlocal agreement. But the statute mentions only this type of corporation. When construing statutes, Tennessee courts apply the legal maxim that the mention of one subject in a statute excludes other subjects that are not mentioned. *State v. Adler*, 92 S.W.3d 397, 400 (Tenn. 2002); *Penley v. Honda Motor Co., Lt.*, 31 S.W.3d 181, 186 (Tenn. 2000). Under this principle, by mentioning only one type of corporation that public agencies may form under the statute, the General Assembly meant to exclude other types. A municipal utility system, therefore, is not authorized to enter into an interlocal agreement with other municipal utility systems to form a for-profit corporation.

This conclusion is also consistent with subsection (e)(1) of § 12-9-104, which provides:

> No agreement made pursuant to this chapter *shall relieve any public agency of any obligation or responsibility imposed upon it by law*, except that, to the extent of actual and timely performance thereof by a joint board or other legal or administrative entity or entities created by an agreement made hereunder, those performances may be offered in satisfaction of the obligation or responsibility.

(Emphasis added). The Interlocal Act, therefore, does not purport to relieve public agencies of the limits under which they act individually. Some statutory schemes expressly limit a municipality's

authority to operate a utility system for profit. For example, under Tenn. Code Ann. § 7-34-115(a), "No public works shall operate for gain or profit or as a source of revenue to a governmental entity, but shall operate for the use and benefit of the consumers served by such public works and for the improvement of the health and safety of the inhabitants of the area served." Under Tenn. Code Ann. § 7-35-414, a municipality operating a water system under that statutory scheme must charge "just and equitable" rates and charges for its water services. This restriction, however, does not necessarily prohibit a municipality from recovering a reasonable profit for providing services. Op. Tenn. Att'y. Gen. 93-59 (September 3, 1993) (a utility district is not prohibited from recovering a net profit when supplying water to a city).

2. Responsibility for Losses of For-Profit Corporation

The next question is whether a municipality or municipal utility system that has entered into an interlocal agreement implemented by a for-profit corporation may legally be made financially responsible for the losses of that corporation. Since we have concluded that the act does not authorize the creation of a for-profit corporation, this question is moot.

3. Restrictions on Responsibility for Losses of a Corporation Created Under the Interlocal Act

The next question is whether there are any restrictions other than the provisions of an interlocal agreement on the ability of municipalities or municipal utility systems to be financially responsible for the losses of an entity created by the agreement. The agreement must be statutorily authorized, either by the Interlocal Act or some other statute or charter provision. Further, Article II, Section 29, of the Tennessee Constitution restricts the authority of a county, city, or town to own stock "with others" or to pledge its credit in aid of any "person, company, association or corporation" without the approval of three-fourths of the voters at a referendum. This Office has also concluded that, absent statutory authority, local governments may not agree to indemnify private parties or other governmental entities. Op. Tenn. Att'y Gen. 93-01 (January 4, 1993).

4. Limits on Power Exercised Jointly under the Interlocal Act

The next question is whether the statutory restrictions regarding bid limits, budget requirements, or any other statutory requirements regarding public finances of governmental entities apply to a new entity those entities create under the Interlocal Act. The Interlocal Act does not discuss in any detail the authority of any new entity that participating local governments may create under an interlocal agreement. But the act authorizes the joint exercise of "[a]ny power or powers, privileges, or authority exercised or capable of exercise by a public agency of the state." Tenn. Code Ann. § 12-9-104(a)(1). The same statute provides that, "[t]he authority for joint or cooperative action of political subdivisions shall apply to powers, privileges or authority vested in, funded by, and/or under control of their governing bodies and relative to which the governing bodies may make other types of contracts." *Id.* In addition, as noted in the answer to Question 1, Tenn. Code Ann. § 12-9-104(e)(1) provides that, "[n]o agreement made pursuant to this chapter *shall relieve any public agency of any obligation or responsibility imposed upon it by law . . ..*" (Emphasis added).

The Interlocal Act, therefore, does not purport to relieve public agencies of the limits under which they act individually. For this reason, the administrative entity created by an interlocal agreement is subject to the bid limits, budget requirements, or any other statutory requirements regarding public finances that apply to each of the participating agencies. Where the different agencies are subject to different requirements, the created entity should comply with the most restrictive limit.

5. Powers of Entity Created Under the Interlocal Act

The last question is whether a new entity created to implement an interlocal agreement may have powers greater than those of the participating public agency with the most restrictive statutory powers. As discussed above, the Interlocal Act authorizes public agencies to exercise their powers jointly. But it does not expand any individual public agency's authority, and it expressly provides that each is still subject to all obligations and responsibilities imposed by law. This Office has concluded in that past that the power to be exercised jointly by public agencies under an interlocal cooperative agreement must be independently possessed by the public agencies entering into the agreement. Op. Tenn. Att'y Gen. 77-418 (December 8, 1977). The statutory language upon which this conclusion is based has not been materially altered. For this reason, a new entity created under the Interlocal Act may not have powers greater than those of the participating public agency with the most restrictive statutory powers.

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