STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 10-86

The State's Sovereign Immunity From Local Air Pollution Control Requirements

QUESTIONS

1. Does Tenn. Code Ann. § 68-201-115 grant qualified local air pollution control programs any authority to require permits or refuse to issue permits for activities of the State of Tennessee, in particular, the Underground Storage Tank Division of the Tennessee Department of Environment and Conservation?

2. Does the above referenced statute allow the Tennessee Air Pollution Control Board to bestow any powers that would waive the State's immunity to suit from such local programs?

OPINIONS

1. No. While the waiver of sovereign immunity in the Tennessee Air Quality Act, Tenn. Code Ann. §§ 68-201-101 et seq., subjects state agencies to this state air pollution control law, neither Tenn. Code Ann. § 68-201-115 nor any other provision of the Act waives sovereign immunity by explicitly making state agencies subject to qualified local air pollution control programs. The Tennessee Air Quality Act and the implementing regulations, not local law, would govern whether the Underground Storage Tank Division needed a permit for an activity conducted in a city or county with a qualified air pollution control program.

2. No. The Tennessee Air Pollution Control Board, pursuant to Tenn. Code Ann. § 68-201-115, does not have the authority to waive the State's sovereign immunity as that authority is reserved solely to the General Assembly under the Tennessee Constitution.

ANALYSIS

1. This opinion request concerns the authority of municipalities and counties, which have established local air pollution control programs and received certificates of exemption under Tenn. Code Ann. § 68-201-115, to impose local air pollution control requirements on a state agency, the Tennessee Department of Environment and Conservation's Division of Underground Storage Tanks ("Division"). According to the opinion request, the Division is currently contracting to remediate numerous sites that have been contaminated with petroleum releases from leaking underground storage tanks. The request states these cleanup activities will result in a small amount of air pollution at these sites. Some of the sites where the Division is planning to conduct work are located in counties that have established local air pollution control

programs and received certificates of exemption under Tenn. Code Ann. § 68-201-115. These counties include Davidson, Hamilton, Knox, and Shelby. According to the opinion request, all of these programs have indicated to the Division that they have the authority to require the Division to obtain local air pollution control permits prior to commencing any cleanup in such counties.

The Tennessee Air Quality Act, Tenn. Code Ann. §§ 68-201-101 *et seq*. ("Act"), allows any municipality or county in Tennessee to enact by ordinance or by resolution "air pollution control regulations not less stringent than the standards adopted for the state" pursuant to the Act. *See* Tenn. Code Ann. § 68-201-115(a). Before such ordinances or resolutions become effective, the municipality or county must apply for and receive from the Tennessee Air Pollution Control Board ("Board") a certificate of exemption. *See* Tenn. Code Ann. § 68-201-115(b). The Board shall grant the exemption if the Board determines that the municipality or county's regulations controlling air pollution are "not less stringent" than the provisions of the Act and will be adequately enforced. *See* Tenn. Code. Ann. § 68-201-115(b)(3). Courts have construed the "not less stringent" language in this provision as pertaining to the Act's standards and not to enforcement methods. *See General Portland v. Chattanooga-Hamilton County Air Pollution Control Bd.*, 560 S.W.2d 910, 914 (Tenn. Ct. App. 1976); *See also Blaylock & Brown Construction Co., v. Collierville Bd. of Mayor and Aldermen*, 23 S.W.3d 316, 322 (Tenn. Ct. App. 1999). Tenn. Code Ann. § 68-201-115 essentially provides a mechanism whereby the State may allow cities and counties to have the primary responsibility for regulating air pollution control within their boundaries. *See* Tenn. Op. Att'y Gen. 83-404 (Dec. 6, 1983). Even when a certificate of exemption is granted, the Act reserves to the State the right to enforce such local provisions if the municipality or county fails to obtain compliance with those requirements. *See* Tenn. Code Ann. § 68-201-115(b)(5).

Because the question posed in this opinion request concerns the authority of local governments to impose restrictions on a state agency, this question necessarily implicates principles of sovereign immunity. Sovereign immunity is "a principle of the common law as old as the law itself, that the king is not bound by any statute, if he be not expressly named to be so bound." *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 848 (Tenn. 2008)(citations omitted). "[S]overeign immunity encompasses both the principle of immunity from suit and the principle of immunity from liability." *Colonial Pipeline*, 263 S.W.3d at 851 (citing 81A Am.Jur.2d *States* § 534 (2004)). The doctrine of sovereign immunity is embodied in the Tennessee Constitution, which provides that "[s]uits may be brought against the State in such manner and in such courts as the Legislature may by law direct." *See id.* at 849 (quoting Tenn. Const. art. I, § 17). Courts have construed this provision of the Tennessee Constitution to mean that suits against the State may not be brought "unless explicitly authorized by statute." *Id*. (citing *N. British & Mercantile Co. v. Craig*, 106 Tenn. 621, 62 S.W. 155, 157 (1900) (citation omitted)). The doctrine of sovereign immunity is reinforced by a statute enacted by the General Assembly that prevents state courts from hearing suits against the State absent a waiver of sovereign immunity. *See* Tenn. Code Ann. § 20-13-102(a). "The doctrine of sovereign immunity, therefore, has both a constitutional and statutory basis." *Wells v. Tennessee Board of Regents*, 231 S.W.3d 912, 916 (Tenn. 2007) (citation omitted). Finally, the sovereign immunity of the State "generally extends to state agencies and state officers acting in their official capacity." *Colonial Pipeline*, 263 S.W.3d at 849 (citing 81A Am.Jur.2d States § 533 (2004)).

While the legislature may waive the State's sovereign immunity, such waiver "must be explicit, not implicit." *Id.* at 853 (citations omitted). *See also Wells v. Tenn. Bd. of Regents*, 231 S.W.3d 912, 917 (Tenn. 2007) (quoting *Northland Ins. Co. v. State*, 33 S.W.3d 727, 731 (Tenn. 2007) (waiver of sovereign immunity must be provided for in "plain, clear, and unmistakable terms")). As a general rule, a statute waiving sovereign immunity is "strictly construed" by the courts. *Beare Company v. Olsen*, 711 S.W.2d 603, 605 (Tenn. 1986) (citing *State ex rel. Allen v. Cook*, 171 Tenn. 605, 608, 106 S.W.2d 858, 860 (1937)).[1]

In *State ex rel. Allen v. Cook*, the Tennessee Supreme Court, in strictly construing a statute subjecting the State to garnishment, held that the statute was insufficient as a waiver of sovereign immunity. In that enactment, the legislature had expressly provided for the garnishment of salaries, wages, or other compensation due from the State to any of its officers or employees. 171 Tenn. at 607-08. Although the General Assembly made the State subject to the substantive provisions of the garnishment law, the enactment was inadequate to waive sovereign immunity because the "Legislature failed to designate a full and complete 'manner' in which the state can be sued in a garnishment proceeding." *Id*. at 610. As held by the Court, a statute "authorizing suits against the state must strictly pursue the constitutional requirements, and be so plain, clear, and unmistakable in its provisions as to the manner and form in which such suits may be brought as to leave nothing to surmise or conjecture." *Id*. at 611.

In the Act, the General Assembly has defined "person" to specifically include "an agency, authority, commission, or department . . . of the state of Tennessee government." Tenn. Code Ann. § 68-201-102(7). When a violation of the substantive provisions of the Act or the implementing regulations occurs, the Technical Secretary of the Board is authorized to "issue an order for correction to the responsible person." Tenn. Code Ann. § 68-201-116(a). That "person" is also subject to civil penalties and damages assessed by the Technical Secretary. Tenn. Code Ann. § 68-201-116(b). In defining "person" to include agencies of the State, the legislature has waived sovereign immunity by plainly, clearly, and unmistakably subjecting these agencies to the substantive air pollution control requirements of the Act and the regulations, and to enforcement by the Technical Secretary for violations thereof.

But neither Tenn. Code Ann. § 68-201-115 nor any other provision of the Act waives sovereign immunity by explicitly making state agencies subject to the air pollution control laws of municipalities and counties receiving certificates of exemption under the Act.[2] Thus, the Act and the implementing regulations, not local law, would govern whether the Underground Storage

[1] The only exception to the strict construction rule is when the General Assembly has expressly provided for a sovereign immunity waiver to be liberally construed. *See Stewart v. State*, 33 S.W.3d 785, 791 (Tenn. 2000) ("If the legislature intends that its statutes waiving sovereign immunity are to 'be liberally construed,' then the courts should generally defer to this expressed intention in cases where the statutory language legitimately admits of various interpretations").

[2] In contrast, the federal Clean Air Act does contain a sovereign immunity waiver expressly providing that federal agencies "shall be subject to, and comply with, . . . local requirements . . . respecting the control and abatement of air pollution." 42 U.S.C. § 7418(a).

Tank Division, or any other state agency, would need a permit from the Technical Secretary for an activity conducted in a city or county with a certificate of exemption.[3]

2. The authority to waive the State's sovereign immunity is vested with the General Assembly under Article I, Section 17, of the Tennessee Constitution. *See Lanius v. Nashville Electric Service*, 181 S.W.3d 661, 664 (Tenn. 2005). *See also Hawkins v. Tennessee Department of Correction*, 127 S.W.3d 749, 754 (Tenn. Ct. App. 2002)("[o]nly the legislature has constitutional authority to determine how, or even if, lawsuits against the State may be brought.") (citing *Lynn v. City of Jackson*, 63 S.W.3d 332, 337 (Tenn. 2001)). Because only the General Assembly has the authority to waive the State's sovereign immunity, the Board under Tenn. Code Ann. § 68-201-115 does not have the authority to waive the State's sovereign immunity and subject the State or its agencies to local air pollution control requirements.

ROBERT E. COOPER, JR.
Attorney General and Reporter

GINA J. BARHAM
Deputy Attorney General

WILSON S. BUNTIN
Assistant Attorney General

[3] Tenn. Code Ann. § 68-201-116(b)(2)(A) does provide that a "municipality or county operating under a certificate of exemption under Tenn. Code Ann. § 68-201-115 may issue an assessment against any *person* responsible for the violation or damages." (Emphasis supplied). *See also* Tenn. Code Ann. § 68-201-117. But cities and counties with qualified air pollution control programs are not authorized to enforce violations of state law under the Act. And although state agencies are within the Act's definition of "person," the Act does not subject these agencies to the substantive requirements of qualified local air pollution control programs. If state agencies are not subject to local substantive requirements, then they cannot be subject to local assessments. Thus, as regards state agencies, the intent of this provision is subject to "surmise or conjecture." *Cook*, 171 Tenn. at 611. And as a result, this provision cannot be a "plain, clear, and unmistakable" expression of the General Assembly's intent to waive sovereign immunity. *Id.*

Requested by:

Commissioner James H. Fyke
Tennessee Department of Environment and Conservation
401 Church Street
Nashville, TN 37243