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

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Opinion No. 12-24

Real Estate Commission Rulemaking Authority for Vacation Lodging Services

QUESTIONS

1. Does the Tennessee Real Estate Commission have the authority to implement rules requiring vacation lodging service licensees to acquire and maintain a surety bond?

2. If the answer to the above question is yes, can the Commission implement rules requiring a separate surety bond for each vacation lodging service firm and its designated agent?

OPINIONS

1. No. While the question is not without doubt, a court would likely find that the Commission cannot require licensees to post and maintain a surety bond because this would supplant the Legislature's existing financial viability measures expressly set forth in the statutes governing vacation lodging services.

2. This question is pretermitted by the answer to Question 1.

ANALYSIS

The question posed is whether the Tennessee Real Estate Commission may promulgate rules to require vacation lodging service providers to obtain a surety bond pursuant to the Commission's statutory authority to license and regulate the business of providing management, marketing, booking, and rental services related to vacation lodging in Tennessee.

The statutory authority creating the Tennessee Real Estate Commission and granting it the authority to promulgate rules and regulations governing the real estate industry in general and the vacation lodging services industry specifically is codified at Tenn. Code Ann. §§ 62-13-201 to -209. The Real Estate Commission "shall have the power to do all things necessary and proper for carrying out this chapter not inconsistent with the laws of this state," including promulgating and adopting "bylaws, rules and regulations that are reasonably necessary for such purposes." Tenn. Code Ann. § 62-13-203(a). The Tennessee Real Estate Broker License Act of 1973,[1] which created the Commission, "is designed to protect the public from irresponsible or

[1] Tenn. Code Ann. § 62-13-101 states: "This chapter shall be known and may be cited as the „Tennessee Real Estate Broker License Act of 1973.'"

unscrupulous persons dealing in real estate." *Business Brokerage Centre v. Dixon*, 874 S.W.2d 1, 3 (Tenn. 1994). Specific to the vacation lodging services industry, the Commission is empowered to grant licenses to only those vacation lodging service firms that "bear a good reputation for honesty, trustworthiness, integrity and competence to transact the business of providing vacation lodging services *in a manner to safeguard the interest of the public.*" Tenn. Code Ann. § 62-13-104(b)(3)(A) (emphasis added).

While regulatory agencies, such as the Real Estate Commission, have historically been granted broad discretion to promulgate rules, such discretion must necessarily remain consistent with the governing statutory authority. It is a well established legal principle that administrative agencies must have statutory authority for the rules they promulgate. *Tennessee Cable Television Ass'n v. Public Service Commission*, 844 S.W.2d 151, 161 (Tenn. Ct. App. 1992); *Knox County ex rel. Kessel v. Knox County Personnel Bd.,* 753 S.W.2d 357, 360 (Tenn. Ct. App. 1988). Agency rules must be grounded in either an express statutory grant of authority or must arise by necessary implication from such a grant. *Sanifill of Tennessee, Inc. v. Tennessee Solid Waste Disposal Control Bd*., 907 S.W.2d 807, 810 (Tenn. 1995). Accordingly, any analysis pertaining to whether a suggested rule is within the authority of the regulating agency begins with an examination of the relevant enabling statutes and the rule sought to be promulgated.

The rule at issue would require all vacation lodging services firms to post a one-year surety bond in the amount of $25,000 for each office location and for each designated agent. The stated purpose of this rule is to protect the public from irresponsible and unscrupulous vacation lodging service providers. The opinion request observes that many vacation lodging service providers are often located out of state or in parts of Tennessee that are a considerable distance from the actual lodging location. Modern electronic commerce makes it relatively easy for these merchants to obtain credit card or other electronic payments via telephone or on-line transactions. Thus, traditional fixed brick-and-mortar locations are no longer essential in operating such businesses, and therefore the Commission has experienced difficulty in tracking down and regulating irresponsible businesses. The Commission has stated that unscrupulous vacation lodging providers may take advantage of consumers because of the long-distance nature of the transactions. The suggested rule requiring substantial surety bonds would therefore ensure that vacation lodging service firms and their designated agents adhere to Tennessee law governing the industry and provide a ready means of recovery for their customers.

The enabling statutes empowering the Commission to regulate the vacation lodging service industry are silent as to surety bonds; the statutes neither expressly provide for such bonds nor prohibit them. However, other financial accountability measures for vacation lodging service providers are established at Tenn. Code Ann. § 62-13-104(b)(3)(C). Each vacation lodging service is required to keep an escrow or trustee account of funds "deposited with the firm and relating to vacation lodging services" and to maintain specific records regarding this account. No funds "shall be distributed from the escrow/trustee account until the customer's stay is complete, unless the distribution is in accordance with terms disclosed to the renter in writing." Tenn. Code Ann. § 62-13-104(b)(3)(D)(i). A vacation lodging service provider is exempt from the escrow account requirements if the provider submits an irrevocable letter of credit approved by the Commission. Tenn. Code Ann. § 62-13-104(b)(3)(D)(ii). In lieu of the irrevocable letter of credit, the Commission is authorized to accept equivalent security. Tenn.

Code Ann. § 62-13-104(b)(3)(D)(ii). Either the irrevocable letter of credit or equivalent security "shall be" in an amount equivalent to the licensees' average advanced monthly deposits or "other lesser amount reasonably determined by the commission to protect the renters and owners." Tenn. Code Ann. § 62-13-104(b)(3)(D)(ii). Thus, the Legislature has expressly stated that vacation lodging service providers may meet the State of Tennessee's financial accountability mandates by electing to comply with one of three options: (1) maintaining an escrow account, (2) posting an irrevocable letter of credit, or (3) providing equivalent security.

The question thus presented is whether the Legislature's establishment of specific financial viability requirements for vacation lodging service providers preempts the Commission from adopting additional requirements. In this Office's opinion, the Legislature's action here likely would be found to have foreclosed the Commission from creating different or additional financial viability measures.

Our review of this issue is guided by well-established principles of statutory construction and administrative law. The primary objective in reviewing these statutes is to determine and implement the Legislature's intent without limiting or expanding the statutes' coverage beyond what the Legislature intended. *Brown v. Tennessee Title Loans, Inc*. 328 S.W.3d 850, 855 (Tenn. 2010); *Shelby County Health Care Corp. v. Nationwide Mutual Insurance Corp.* 325 S.W.3d 88, 92 (Tenn. 2010). An administrative agency's authority must be based on an express grant of statutory authority or must arise by necessary implication therefrom. *Wayne County v. Tennessee Solid Waste Disposal Control Bd*., 756 S.W.2d 274, 282 (Tenn. Ct. App. 1988); *Tennessee Pub. Serv. Comm'n v. Southern Ry.*, 554 S.W.2d 612, 613 (Tenn. 1977). If an administrative agency or board is statutorily authorized to make rules and regulations, the rules and regulations promulgated by the agency or board may not be inconsistent with the enabling statute. *Holiday Inns, Inc. v. Olsen*, 692 S.W.2d 850, 853 (Tenn. 1985). An administrative agency, created by the Legislature, cannot by promulgation of a rule thwart the direct will of the Legislature. *Tennessee Department of Mental Health v. Allison*, 833 S.W.2d 82, 85-6. (Tenn. Ct. App. 1992). Thus, imposing a regulatory requirement that is overbroad, inconsistent with, or that impermissibly expands upon a requirement expressly provided by the Legislature necessarily exceeds an agency's rulemaking authority and renders such a rule invalid. *Holiday Inns, Inc.,* 692 S.W.2d at 853; *Cady v. Tennessee Board of Veterinary Medical Examiners*, No. M2008-02551-COA-R3-cv, 2009 WL 2707398 at *10 (Tenn. Ct. App. Aug. 27, 2009).

Applying these principles to the issue presented, this Office is of the opinion that the suggested rule requiring all vacation lodging service firms and agents to obtain a $25,000 surety bond would effectively substitute the Commission's financial viability measures for the existing financial viability standards established by Tenn. Code Ann. § 62-13-104(b)(3)(C). Such an action is contrary to the legislative directive on how Tennessee is to hold vacation lodging service providers financially accountable. The Legislature has expressly set forth three ways in which the Commission may hold licensees financially accountable. A blanket surety bond requirement for all firms and brokers is not one of the Legislature's expressly prescribed accountability measures. Accordingly, the proposed rule to impose a $25,000 surety bond on all vacation lodging service firms and all of their designated agents is overbroad and amounts to an impermissible expansion of the Commission's delegated authority. Thus it is the opinion of this Office that the rule, as proposed, exceeds the Commission's rulemaking authority. Of course, the Commission has been granted the authority to accept surety bonds as "equivalent security" as

expressly provided in Tenn. Code Ann. § 62-13-104(b)(3)(D)(ii), but the amount of the bond may not exceed the average advanced monthly deposits for the vacation lodging service firm.

We note there are multiple examples of existing Tennessee rules and regulations that require various licensees to obtain and maintain surety bonds for financial viability purposes. While many of these rules cite to express statutory provisions granting the governing board or commission authority to require a form of security such as a surety bond,[2] there are multiple examples of such rules and regulations requiring a surety bond that are not based on an express statutory mandate to require a bond.[3] Rather, these rules are based on a general and broad grant of authority, such as the authority to promulgate all rules necessary and proper to administer the governing act or the authority to ensure the safety and wellbeing of the public. However, in each of these instances, there was no existing legislative mandate imposing financial accountability measures that was supplanted by the agency's surety bond requirements.

For the reasons stated above, a rule requiring all vacation lodging service firms as well as their designated agents to maintain a surety bond would expand upon and conflict with the existing consumer protection measures already in place in the enabling statute. Accordingly, such broad rules would likely to be found to exceed the Commission's rulemaking authority.

ROBERT E. COOPER, JR.
Attorney General and Reporter

[2] There are more than twenty examples of Tennessee rules and regulations requiring the posting of security such as a surety bond that are keyed to express statutory grants of authority authorizing the bond requirements. *See, e.g.,* Tenn. Comp. R. & Regs. 0145-01-.03 (8) (the Athletic Commission requires those with a promoter's license to post a bond pursuant to express authority granted in Tenn. Code Ann. § 68-115-204 (f)); Tenn. Comp. R. & Regs. 0160-01-.25(2)(c) (the Auctioneer Commission requires applicants for a public automobile auction license to post a surety bond pursuant to express authority granted in Tenn. Code Ann. § 62-19-128(b)); Tenn. Comp. R. & Regs. 1340-06-01-.06(1)(a) (the Division of Commercial Vehicle Enforcement requires all motor carriers engaged in the transportation of passengers or property for hire to post security such as a surety bond pursuant to express authority granted in Tenn. Code Ann. § 65-15-110(a)).

[3] *See, e.g.*, Tenn. Comp. R. & Regs. 0680-05-.02(1)(e) (the Tennessee Board for Licensing Contractors requires a surety bond for those providing pre-licensing courses); Tenn. Comp. R. & Regs. 1200-02-10-.12(4)(d) (the Tennessee Bureau of Environmental Health Services requires those licensed in the radiological health industry to file security such as a surety bond); Tenn. Comp. R. & Regs. 1320-08-09-.02 and 1340-01-04-.05 (the Tennessee Department of Safety requires surety bonds from certain applicants for a certificate of title and from those providing defensive driving courses); Tenn. Comp. R. & Regs. 1680-01-01-.04 (1)(a), 1680-02-01-.16 (1), 1680-02-02-.08(e), 1680-06-01-.07(12), and 1680-06-01-.09(4)(c)(5) (the Tennessee Department of Transportation requires surety bonds of common carriers, holders of permits to construct driveways on state highway right-of-ways, holders of permits to control vegetation, holders of use and occupancy agreements to install utilities within highway rights-of-way, and holders of use and occupancy agreements to install fiber optic facilities on freeway rights-of-way).

WILLIAM E. YOUNG
Solicitor General

GREGORY O. NIES
Assistant Attorney General

Requested by:

Mr. Isaac Northern
Chairman, Tennessee Real Estate Commission
500 James Robertson Parkway
Nashville, Tennessee 37243-1151