Office of the Attorney General
*State of Tennessee
Opinion No. U86–79
April 30, 1986

The Honorable Tommy Burks
State Senator
10 Legislative Plaza
Nashville, Tennessee 37219

Dear Senator Burks:

You have requested an opinion of this Office on the following question:

QUESTION

Could supervisors of the Jackson County Soil Conservation District be individually liable in tort to a member of the Jackson County Soil Conservation District Youth Board for a personal injury sustained by the Youth Board member in a Youth Board activity?

OPINION

It is the opinion of this Office that it is possible for circumstances to occur upon which such liability might be found; but, because of Chapter 726 of the Public Acts of 1986, effective July 1, 1986, it should be much more unlikely that such liability would be found as to an injury sustained on or after that date.

ANALYSIS

The "Soil Conservation Districts Law," originally enacted in 1939, is codified as amended as T.C.A. § 43–14–201 et seq. Pursuant to T.C.A. § 43–14–212, the Jackson County Soil Conservation District (SCD) was organized, an application for certificate of organization being filed and recorded with the Secretary of State and that office certifying on September 20, 1944, that "the Jackson County Soil Conservation District has been duly organized as a government subdivision of this State and a public body corporate and politic." That certification was consistent with the T.C.A. § 43–14–213 provision that "When the application and statement have been made, filed, and recorded in the office of the secretary of state, the district shall constitute a subdivision of this state and a public body corporate and politic."

The governing body of the Jackson County Soil Conservation District is composed of five supervisors. T.C.A. § 43–14–217(a) (1985 Cum.Supp.). The District and its supervisors have numerous powers, primarily as enumerated in T.C.A. §§ 43–14–218 and 43–14–219, relative to soil conservation, including the power "To develop comprehensive plans" for soil conservation T.C.A. § 43–14–218(8). Among their other powers is the power "To sue and to be sued in the name of the district ... to make and execute contracts and other instruments necessary or convenient to the exercise of its powers." T.C.A. § 43–14–218(10) No Tennessee statute or federal statute of which we are aware expressly provides for a soil conservation district acting to form or to encourage the formation of a youth board auxiliary to the district's powers and purposes, to sponsor such a youth board, or to delegate to such a youth board activities concerning soil conservation. T.C.A. § 43–14–217(c) (1985 Cum.Supp.) provides in pertinent part, however, that "The supervisors may delegate to their chairman, to one or more supervisors, or to one or more agents or employees, such powers and duties as they may deem proper."

In a telephone conversation of March 18, 1986, Mr. Robert L. Stout, who identified himself as Resource

Conservationist for the U.S. Department of Agriculture in Nashville, said that for the past eleven years he has served as advisor to soil conservation district youth boards in the State of Tennessee. He also said that to his knowledge there is no federal statute or regulation providing for such boards, but they (as well as advisory boards) are sometimes established by soil conservation districts in the State as a matter of discretion to aid in the promotion of soil conservation.

***2** We have received additional information from Mrs. Lindy Turner, District Conservationist in Gainesboro, Tennessee, for the Soil Conservation Service of the U.S. Department of Agriculture. Included in that information were a copy of a Supplemental Memorandum of Understanding of April 1976, between the Soil Conservation Service and the Jackson County Soil Conservation District, and minutes of various meetings of the Jackson County Soil Conservation District supervisors. That Supplemental Memorandum provides for the District to prepare an annual work plan. The minutes of the January 5, 1983, meeting of the supervisors of the Jackson County Soil Conservation District record a motion "to add the Jackson County Youth Board to our Annual Plan of Operations," and that one of the supervisors, Dr. Margaret Roberts, "accepted the sponsorship of the Youth Board." A copy of a clipping from page 7 of The Jackson County Times of March 10, 1983, also supplied by Mrs. Turner, reported the establishment of the Jackson County Soil Conservation District Youth Board in an organizational meeting on March 10, 1983, the meeting having been conducted by Dr. Roberts of the Soil Conservation District and Perry Fuqua, District conservationist of the Soil Conservation Service of the U.S. Department of Agriculture. The news article further reported that "After explaining the functions of conservation district youth boards, Dr. Roberts conducted an election of officers;" that Dr. Roberts and the newly-elected chairman of the Youth Board then signed a memorandum of understanding between the Youth Board and the Soil Conservation District; that Dr. Roberts would be an advisor to the Youth Board; and that there were already 25 other soil conservation district youth boards in a Tennessee Association of Conservation District Youth Boards.

The March 4, 1983, Memorandum of Understanding between the Soil Conservation District and the Youth Board states in part that "cooperation between the District and Youth Board will allow a joint effort in the solution of problems relating to the planning and development of soil, water and other natural resources in Jackson County;" that the District would provide leadership, advice, and guidance to the Youth Board, including advice on planning and development programs; that the chairman of the Youth Board would meet at least three times a year with the District; and that "The District and Youth Board will meet periodically as needed to review and where possible coordinate their individual programs and activities for maximum mutual benefits."

The District Conservationist's report for February and March 1983 stated that "The Jackson County SCD now has a Youth Board" of 31 members, with Dr. Roberts as advisor, and that the Youth Board had, at a meeting on March 9, 1983, to decide upon projects, "voted to help sponsor the Disc Golf Course by planting trees provided by the Corps of Engineers and to participate in the Poke Sallet Festival by operating a dunking machine to raise money for future projects."

***3** The Jackson County Soil Conservation District's Annual Plan of Work for Fiscal Year 1984 included as item IIE "Support and promote activities of the SCD Youth Board. Encourage youth to attend regular SCD meetings, area TACD [Tennessee Association of Conservation Districts] meetings and TACD Annual Convention," and as Item IIIC "Assist SCD Youth Board with continued development of the JCHS [Jackson County High School] Outdoor Classroom. Seek area funding for expanded programs."

The "Jackson County Tennessee Soil Conservation District and Youth Board 1984 Annual Report" was a joint publication of the two groups. The Youth Board's report at page 27 states that "we have worked to become a useful and meaningful extension of the District." A picture on page 29 shows members of the Youth Board and their advisor, Dr. Roberts, at the 1984 meeting of the Tennessee Association of Conservation Districts and Youth Boards. There is a statement on the same page that "The District and

Youth Board combined funds to purchase" conservation education booklets for use by elementary school students. On page 31, Youth Board members are pictured cleaning up trash around highway dumpsters. A picture on page 33 shows a gullied area of road banks, beneath which is a statement that the stabilization of that area would be a major project for the Youth Board in 1985.

A list of Youth Board activities to be published in the 1985 annual report of activities of the District and Youth Board includes: held a car wash to fund activities; cut, loaded, hauled, and placed sod on a gullied roadbank; mulched a field to control erosion problems; sponsored the first annual Hoe-Down consisting of "many games for all ages," (e.g., wheelbarrow race, hay throwing, tobacco spitting, nail driving, root beer chug-a-lug, greased pig chase, wood splitting, tug of war, peanut and cracker eating contest, three legged race, and sack race); stripped and graded tobacco for local farmers (fund raising); cleared landscape and nearby creek channels of unwanted grass and weeds; sponsored an annual dunking machine at county fair; cleaned up around trash dumpsters; planted trees at a local school; and sponsored a live turkey shoot as a fund-raiser.

The minutes of the October 14, 1985, meeting of the Jackson County Soil Conservation District included the following:
A lengthy discussion about the probability of the Youth Board members getting hurt while working on Youth Board projects was brought up. Earl said that we ask Lindy to check into the legal liability of the youth board working—in barns, for example. Are we liable if a child should fall from a tier pole, the roof cave in, or if it should catch on fire? The supervisors (except for Dr. Roberts) stated that the Board does not want the responsibility. They do not want to be individually responsible either. They stated that they might resign their positions if they are individually responsible.

The minutes of the November 4, 1985, meeting of the Jackson County Soil Conservation District record that a motion was adopted "to suspend all Youth Board activities until the liability question can be answered."
***4** From the foregoing, it appears that the Jackson County Soil Conservation District Youth Board is closely associated with the District. The District decided to establish the Youth Board and to include it in the District's annual plan of operations. One of the District supervisors conducted the Youth Board's organizational meeting and election of officers, and became the Youth Board's sponsor or advisor. There is a memorandum of understanding between the District and the Youth Board for cooperation and a joint effort in solving problems, whereby the District provides leadership and guidance on programs to the Youth Board and the District and Youth Board meet together to coordinate their individual programs and activities for their mutual benefit. The Youth Board in fact has been included in the District's annual program of work. Members of the two bodies appear together at associational meetings outside the county. They jointly publish an annual report. The annual report summarizes Youth Board activities, which the District already knows about through one of its supervisors, Dr. Roberts, serving as sponsor or advisor of the Youth Board. The joint 1984 annual report refers to the Youth Board as an "extension of the District."

Concerning the legal basis for liability in tort of a supervisor of the Jackson County Soil Conservation District to a member of the Youth Board for a personal injury sustained by the Youth Board member in a Youth Board activity, we shall examine that (A) first as to presently effective law, and (B) then as to the law on July 1, 1986, and subsequently when Chapter 726 of the Public Acts of 1986 will be in effect.

A. Under Present Law

Many of the Youth Board's programs, known to and sanctioned or acquiesced in by the District supervisors, involve physical activities by individual Youth Board members which the District supervisors know or should know could expose such Youth Board members to a risk of personal injury. If a District supervisor, in a situation where he owed a duty to a Youth Board member to exercise due

care, failed to exercise the care that a reasonably prudent person would exercise under such circumstances, and such failure proximately caused injury to the Youth Board member, who himself was exercising reasonable care in view of his age and inexperience, the supervisor might be held liable for his negligence unless he enjoys immunity because of his position. See generally on the elements of negligence, Roberts v. Robertson County Board of Education, 692 S.W.2d 863, 869–872 (Tenn.App.1985).

Under T.C.A. § 29–20–201(a) (a part of the Tennessee Governmental Tort Liability Act, T.C.A. §§ 29–20–101 et seq.), except as otherwise provided in that Act, a "governmental entity" is immune from suit for an injury resulting from activities of the entity in the exercise of any of its functions. T.C.A. § 29–20–102(3) defines "governmental entity" as "any political subdivision of the state of Tennessee." A soil conservation district organized as was the Jackson County Soil Conservation District is a "subdivision of this state and a public body ... politic." T.C.A. § 43–14–212 We conclude that the Jackson County Soil Conservation District is a "governmental entity" under the Governmental Tort Liability Act and would therefore be immune from suit for injuries from activities in the exercise of its functions unless an exception in the Act applies.

***5** Under T.C.A. § 29–20–202(a) in the Act, immunity is removed for "injuries resulting from the negligent operation by an employee of a motor vehicle or other equipment while in the scope of his employment." T.C.A. § 29–20–102(2) defines "employee" to include "any member of any board ... of a governmental entity." We conclude that a supervisor of a soil conservation district such as the Jackson County Soil Conservation District is an "employee" for purposes of T.C.A. § 29–20–202(a). Thus, the immunity which would otherwise be afforded such a district by T.C.A. § 29–20–201(a) is removed if a district supervisor negligently operates an automobile "or other equipment" while acting within the scope of his responsibilities to the district and thereby causes injury to a district youth board member.

In addition, T.C.A. § 29–20–205 broadly removes T.C.A. § 29–20–201(a) immunity from a governmental entity for an injury proximately caused by "a negligent act or omission of any employee within the scope of his employment," with certain exceptions including an injury which "Arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused." T.C.A. § 29–20–205(1) Again, we believe the supervisor of a soil conservation district is an "employee" for purposes of T.C.A. § 29–20–205 as well, so governmental immunity would be removed here also in the event a supervisor's negligence within the scope of his duties caused an injury, unless it had to do with his exercise of, or failure to exercise, a discretionary function. For opinions discussing discretionary actions, see Baker v. Seal, 694 S.W.2d 948 (Tenn.App.1984), and Charles W. Davis, etc. v. City of Cleveland, etc., (Tenn.App., Feb. 20, 1986)(unreported)(copy attached). This, too, leaves it conceivable that the negligence of a supervisor of a soil conservation district in performing a duty of his position which causes personal injury to a district youth board member might not be immune from liability. See generally as to T.C.A. § 29–20–205 removal of governmental immunity, the Analysis 3 part of the attached copy of an opinion of this Office of October 28, 1982, to Representative Steve D. Bivens. 11 Op.Att.Gen., No. 284 (82–494).

If the soil conservation district as a governmental entity is liable under the Tennessee Governmental Tort Liability Act, a district supervisor as an employee could not be liable for damages except as they may exceed the limits set out in T.C.A. § 29–20–403 or the amount of the insurance actually carried by the district as a governmental entity, whichever is greater. T.C.A. § 29–20–310(b); Cain v. Macklin, 663 S.W.2d 794, 795–796 (Tenn.1984); Johnson v. Smith, 621 S.W.2d 570, 571–572 (Tenn.App.1981) .

B. Under Chapter 726

Chapter 726 of the Public Acts of 1986, approved by the Governor on April 8, 1986, provides as follows:

SECTION 1. The General Assembly finds and declares that the services of governmental entity boards, commissions, authorities and other governing agencies are critical to the efficient conduct and management of the public affairs of the citizens of this state. Complete and absolute immunity is required for the free exercise and discharge of the duties of such boards, commissions, authorities and other governing agencies. Members of boards, commissions, authorities, and other governing agencies must be permitted to operate without concern for the possibility of litigation arising from the faithful discharge of their duties.

***6** SECTION 2. Tennessee Code Annotated, Section 29–20–201, is amended by adding the following subsection as new subsection (b) and by renumbering the existing subsection (b) accordingly:
(b) All members of boards, commissions, agencies, authorities, and other governing bodies of any governmental entity, created by public or private act, whether compensated or not, shall be immune from suit arising from the conduct of the affairs of such board, commission, agency, authority, or other governing body. Provided, however, such immunity from suit shall be removed when such conduct amounts to willful, wanton, or gross negligence.

SECTION 3. This act shall take effect July 1, 1986, the public welfare requiring it.

We have concluded above that the Jackson County Soil Conservation District is a "governmental entity" under the Governmental Tort Liability Act, T.C.A. §§ 29–20–202 et seq., and that the District's five supervisors compose its governing body. Accordingly, the new subsection (b) of T.C.A. § 29–20–201 effective July 1, 1986, will apply to those supervisors as members of a governing body of a governmental entity. Thereunder they "shall be immune from suit arising from the conduct of the affairs of such ... governing body", except "when such conduct amounts to willful, wanton, or gross negligence." Thus, as of July 1, 1986, and afterwards, if a Youth Board member were personally injured in a Youth Board program which qualified as the conduct of the affairs of the supervisors of the Jackson County Soil Conservation District, the supervisors would be immune from suit arising from the same unless the conduct amounted to "willful, wanton, or gross negligence."

"Willful negligence" involves deliberation and malice. Schwartz v. Johnson, 152 Tenn. 586, 593, 280 S.W. 32, 47 A.L.R. 323 (1926); Stofer v. Ramsey, 558 F.Supp. 1, 3 (E.D.Tenn.1982). Though possible, we do not suppose that it is likely that the supervisors of the District would ever conduct their affairs in such a way as to be guilty of that extreme degree of negligence involving those ingredients toward the Youth Board members.

"Wanton negligence" is a heedless and reckless disregard for another's rights, with the consciousness that the act or omission to act may result in injury to another. Burgess v. State, 212 Tenn. 315, 320, 369 S.W.2d 315 (1963); Inter-City Trucking Co. v. Daniels, 181 Tenn. 126, 130, 178 S.W.2d 756 (1944).

"Gross negligence" indicates a conscious neglect of duty or a callous indifference to consequences. Tipton County Board of Education v. Dennis, 561 S.W.2d 148, 151 (Tenn.1978); Thomason v. Wayne County, 611 S.W.2d 585, 587 (Tenn.App.1980). Gross negligence is not characterized by inadvertence; it is a negligent act done with utter unconcern for the safety of others, or one done with such a reckless disregard for the rights of others that a conscious indifference to consequences is implied in law. Odum v. Haynes, 494 S.W.2d 795, 807 (Tenn.App.1972).

***7** While under Tennessee law "[w]hether or not a defendant's conduct arises to the level of willful, wanton or gross negligence turns upon the facts of each case," Byers v. Middle Tennessee Electric Membership Corporation, 467 F.2d 641, 642 (6th Cir.1972), those degrees of negligence are certainly greater than ordinary negligence and would require more proof of different facts.

Therefore, after Chapter 726 of the Public Acts of 1986 becomes effective July 1, 1986, Soil Conservation District supervisors would normally be immune from tort liability as to the conduct of their official affairs, including Youth Board matters, and such immunity would be removed so as to subject them to tort liability only in the unlikely event of their engaging in conduct amounting to willful, wanton, or gross negligence.

Sincerely,

W.J. Michael Cody
Attorney General and Reporter

John Knox Walkup
Chief Deputy Attorney General

Robert E. Kendrick
Associate Attorney General

Tenn. Op. Atty. Gen. No. 87-131 (Tenn.A.G.), 1987 WL 273076

*1 Office of the Attorney General
State of Tennessee
Opinion No. 87-131
August 4, 1987

AGRICULTURE: Federal Food Security Act of 1985: Soil Conservation Districts:
Liability of Soil Conservation Districts and District Supervisors under Title XII of the Federal Food Security Act of 1985. U.S. Const. amend 5; Tenn. Const. art. I, § 21; 16 U.S.C. §§ 3811–3813,–3831, –3832, –3833; T.C.A. §§ 29–20–101–407, –102, –107, –201–206, –202, –205, 43–14–201, et seq., –212, –216, –217, –218, –219, –223; Ch. 405, 1987 Tenn.Pub. Acts.

GOVERNMENT TORT LIABILITY ACT:
Liability of Soil Conservation Districts and District Supervisors under Title XII of the Federal Food Security Act of 1985. U.S. Const. amend 5; Tenn. Const. art. I, § 21; 16 U.S.C. §§ 3811–3813, –3831, –3832, –3833; T.C.A. §§ 29–20–101–407, –102, –107, –201–206, –202, –205, 43–14–201, et seq., –212, –216, –217, –218, –219, –223; Ch. 405, 1987 Tenn.Pub. Acts.

Liability of Soil Conservation Districts and District Supervisors Under Title XII of the Federal Food Security Act of 1985

David Hinton
Chairman
Tennessee State Soil Conservation Committee
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Nashville, Tennessee 37204

QUESTION

What is the liability of Tennessee's soil conservation districts and district supervisors under Title XII of the Food Security Act of 1985, Public Law 99–198?

OPINION

Title XII of the Food Security Act of 1985, Public Law 99–198, contains no provision imposing liability upon state soil conservation districts or their officers or employees. In general, state soil conservation districts in Tennessee are immune from suit for any injury which results from its activities where the districts are engaged in the exercise and discharge of their functions under state law, except as otherwise provided in T.C.A. § 29–20–201–206. District supervisors are immune from any suit arising from the conduct of the affairs of the district, except for conduct which amounts to willful, wanton, or gross negligence.

ANALYSIS

The question of the potential liability of Tennessee's soil conservation districts and district supervisors in implementing Title XII of the Food Security Act of 1985, Pub.Law 99–198, is a very broad one. Although every potential area of liability cannot be addressed in this opinion, the most significant areas of liability will be discussed.

Soil conservation districts in Tennessee are established pursuant to a procedure set forth in T.C.A. §§ 43–14–201 through –223. Section 43–14–212 provides that upon establishment a district "shall constitute

a subdivision of this state and a public body corporate and politic." Each district has five supervisors, two appointed by the Tennessee Soil Conservation Committee and three elected pursuant to T.C.A. § 43–14–216. The five supervisors constitute the governing body of the district. T.C.A. § 43–14–217.

Subtitle B of the Food Security Act of 1985, 16 U.S.C.A. § 3811–3813, provides that agricultural producers are ineligible for the benefits of certain federal programs if they bring highly erodible land into cultivation. The Act further provides that no person shall become ineligible for program benefits as a result of production of a crop of an agricultural commodity on highly erodible land in an area within a conservation district, under a conservation system that has been approved by a conservation district after the district has determined that the conservation system is in conformity with the technical standards set forth in the Soil Conservation Service Technical Guide for such district. 16 U.S.C.A. § 3813(b)(3).

*2 Subtitle D, 16 U.S.C.A. § 3831 requires the U.S. Secretary of Agriculture to formulate and carry out a conservation reserve program through contracts to assist owners and operators of highly erodible crop land in conserving and improving the soil and water resources of their farms or ranches. The Act further provides that the terms of the contract must require the owner or operator of a farm or ranch to agree to implement a plan approved by the local conservation district for converting highly erodible crop land normally devoted to the production of an agricultural commodity on a farm or ranch to a less intensive use. 16 U.S.C.A. § 3832(2). In return the Secretary shares the cost of carrying out the conservation measures for which the Secretary determines that cost sharing is appropriate and in the public interest, pays an annual rental payment in an amount necessary to compensate for the conversion of highly erodible crop land to less intensive use and the permanent retirement of any crop land base or allotment history which the owner or operator agrees to retire, and provide conservation technical assistance to the owner or operator in carrying out the contract. 16 U.S.C.A. § 3833.

The Food Security Act of 1985 contains no provision imposing liability upon state soil conservation districts or their officers or employees based upon their role under the Act. General principles of liability thus apply.

Each soil conservation district in Tennessee is a governmental entity for purposes of the application of the Governmental Tort Liability Act, T.C.A. §§ 29–20–101 through –407. T.C.A. § 29–20–102(3) (1986 Supp.). That Act provides that all governmental entities are immune from suit for any injury which may result from the activities of the governmental entity wherein it is engaged in the exercise and discharge of any of its functions, except as otherwise provided in the Act. T.C.A. § 29–20–201 (1986 Supp.). Sections 29–20–202 through –205 set forth certain exceptions to the immunity of governmental entities under the Act. Section 29–20–202 removes immunity for injuries resulting from the negligent operation by any employee of a motor vehicle or other equipment while in the scope of his employment. The term "employee" includes "any official whether elected or appointed, officer, employee or servant, or any member of any board, agency, or commission (whether compensated or not), or any officer, employee or servant thereof, of a governmental entity,...." T.C.A. § 29–20–102(2) (1986 Supp.). The term "government employee" is further defined in T.C.A. § 29–20–107 (1986 Supp.).

A governmental entity's immunity from suit has also been removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment. T.C.A. § 29–20–205. Section 29–20–205 contains several exceptions to the removal of immunity, however. For example, immunity has been retained with regard to actions against a governmental entity for injuries arising out of the "exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused." Section 29–20–205(1). Actions for injuries arising out of the "issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization." Section 29–20–205(3). Also of some significance to the local districts is subsection (4), which retains immunity for governmental entities for injuries arising out of a failure to make an inspection or by reason of making an inadequate or negligent inspection of any property.

*3 As a governmental entity, each local district would be governed by the immunity principles outlined above.

Individual supervisors, as members of the governing body of the district, are governed by the following provision:
All members of boards, commissions, agencies, authorities, and other governing bodies of any governmental entity, created by public or private act, whether compensated or not, shall be immune from suit arising from the conduct of the affairs of such board, commission, agency, authority, or other governing body, provided, however, such immunity from suit shall be removed when such conduct amounts to willful, wanton, or gross negligence.

T.C.A. § 29–20–201(2) (1986 Supp.). That provision appears to immunize district supervisors from any liability, whether based on a tort, a contract, or some other action, from actions arising from the conduct of the affairs of the district, except to the extent that such actions constitute willful, wanton, or gross negligence. It should be noted, however, that the act was amended by 1987 Tenn.Pub.Acts 405 to provide that nothing in Chapter 20, Title 29 shall be deemed to deprive any person of any cause of action or damages to which he is otherwise entitled arising under the federal civil rights acts of 1871 and 1964 as amended.

An additional potential area of liability should be mentioned. Title XII speaks of approval of conservation systems and plans. T.C.A. § 43–14–218(8) authorizes the district and supervisors to "cooperate, or enter into agreements, with any owner and occupier of lands within the district in the carrying on of erosion control and prevention operations within the district" and "to develop comprehensive plans for the conservation of soil resources and for the control and prevention of soil erosion within the district, ... and to publish such plans and information and bring them to the attention of owners and occupiers of lands within the district." The language of Title XII and T.C.A. § 43–14–218 appears to contemplate voluntary, rather than mandatory, plans. However, T.C.A. § 43–14–219 grants the supervisors of any district the authority to adopt land-use regulations, including the following:
(2) Provisions requiring observance of particular methods of cultivation, including contour cultivating, contour furrowing, lister furrowing, sowing, planting, strip cropping, seeding and planting of lands to water-conserving and erosion-preventing plants, trees and grasses, forestation and reforestation;

(4) Provisions requiring the retirement from cultivation of highly erosive areas or of areas on which erosion may not be adequately controlled if cultivation is carried on;

(5) Provisions for such other means, measures, operations and programs as may assist conservation of soil resources and prevent or control soil erosion in the district.

Such regulations, when adopted pursuant to the procedure outlined in T.C.A. § 43–14–219, "have the force and effect of law in the said district and shall be binding and obligatory upon all owners and occupiers of lands within such district."

*4 It has been held that where a land-use regulation goes so far as to deprive an owner of the beneficial use of his property, it will be recognized as a taking. Bayside Warehouse Company v. City of Memphis, 63 Tenn.App. 268, 470 S.W.2d 375 (1971). The United States Supreme Court has recently held that the "just compensation" clause of the Fifth Amendment of the United States Constitution[1] requires compensation for regulatory takings which deny a landowner all use of his property. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, ––– U.S. ––––, 107 S.Ct. 2378, L.Ed.2d –––– (1987). It appears that under that authority, if a land-use regulation of the district is deemed to constitute a taking of a landowner's property, the district would be liable for the payment of just compensation to the landowner.

The discussion above addresses the most significant areas of potential liability for conservation districts and district supervisors. Other bases for liability might arise in specific fact situations. If you have any further

questions, please feel free to contact this Office.

W.J. Michael Cody
Attorney General and Reporter
John Knox Walkup
Chief Deputy Attorney General
Debra K. Inglis
Assistant Attorney General

Footnotes

[1] The Tennessee Constitution contains a similar provision. See Tenn. Const. Art. I, § 21.

Tenn. Op. Atty. Gen. No. 87-131 (Tenn.A.G.), 1987 WL 273076

STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

Opinion No. 07-143 October 11, 2007

Soil Conservation Committee's and Districts' Status as State Agencies

QUESTIONS

1. Are the State Soil Conservation Committee and Soil Conservation Districts state entities for liability purposes?

2. If so, are they eligible for participation in the insurance programs, insurance pools, special funds, or reserve funds available to state entities for liability purposes?

OPINIONS

1. Yes. It is the opinion of this Office that the State Soil Conservation Committee and Soil Conservation Districts are state entities.

2. Yes. As members of the Committee and District Supervisors are state employees, and to the extent that the State Soil Conservation Committee and Soil Conservation Districts employ other state employees, the State Soil Conservation Committee and Soil Conservation Districts are eligible for liability coverage and participation in the relevant risk management programs.

ANALYSIS

1. Determining whether or not an entity is a state agency for liability purposes can be "a close question." Op. Tenn. Att'y Gen. No. 02-077 (June 28, 2002). For example, in *Hastings v. South Central Human Resource Agency*, 829 S.W.2d 679, 680-81 (Tenn. Ct. App. 1992), the trial court had reviewed and reversed a decision by the South Central Human Resource Agency (SCHRA) to terminate an employee, finding SCHRA had terminated the employee without affording him prior notice and an opportunity to be heard. On appeal, SCHRA argued that its actions were not subject to judicial review because it was not a state agency. *Id.* at 681. SCHRA relied upon Op. Tenn. Att'y Gen. No. 77-198 (June 22, 1978), in which this Office had previously opined that SCHRA's sister agency, the Upper Cumberland Human Resource Agency, was not a state agency. *Id.*

Employing the same test that this Office had used to determine that SCHRA was not a state agency, the Court of Appeals came to the opposite conclusion. The court listed the factors to be weighed:

1. Whether the enabling statute exhibits a legislative intent to regard the agency as a state agency.

2. Whether the State or political subdivision thereof is directly involved in the operation,

supervision and control of the entity.

3. "Whether the entity serves as a conduit through which the State acts ... to carry out ..." a public or governmental function.
4. Whether the state appropriates funds to the entity.

Id. at 682 (quoting Op. Tenn. Att'y Gen. No. 77-198). The court noted at the outset that while the legislation creating human resource agencies, the Human Resource Agency Act of 1973 ("Act"), had not explicitly labeled them as state agencies, the Act evinced a legislative intent that they be regarded as such because the State controlled and monitored the agencies. *Id.* at 683. The Act mandated a governing board; set out the powers of the agencies; and required yearly reports to the Governor, Legislature, and Commissioner of Finance and Administration. *Id.* State funds appropriated to implement the Act were subject to approval of the Governor and the Commissioner of Finance and Administration, and then only after the Governor reviewed the agencies' annual work program. *Id.* Uniform statewide travel regulations applied. *Id.* The State Board of Standards oversaw the agencies' bidding system. *Id.* Personnel procedures had to be filed with the Commissioner of Finance and Administration. *Id.*

The court rejected SCHRA's argument that because it was controlled and supervised by a policy council consisting of providers and consumers of human resource services, it was therefore not a state agency. *Id.* The court noted that the policy council itself merely acted on behalf of the governing board, which was comprised of elected state and local officials.

Examining SCHRA's funding, the court noted that it was funded by a combination of public and private moneys. *Id.* at 683-84. The Legislature clearly intended state financial assistance to the agency, and had prescribed a formula for state to local funding. *Id.* at 684. Examining SCHRA's purpose, the court found that the agency was a nonprofit organization devoted primarily to promoting the public welfare. *Id.* SCHRA's bylaws explicitly stated that the agency's purpose was to act as a conduit for various human resource program funding streams. *Id.*

Finally, the court observed that SCHRA held itself out as a state agency. *Id.* It had vehicles bearing the state seal, its employees carried badges stating that SCHRA was established under state law, and it performed governmental functions through assistance programs. *Id.* at 684-85. For all these reasons, the court concluded that SCHRA was a state agency. *Id.* at 685.

Applying *Hastings'* analysis to your questions, it is clear that the Soil Conservation Committee is a state agency for liability purposes. The enabling legislation for both the statewide Soil Conservation Committee ("Committee") and the localized Soil Conservation Districts ("Districts" or, individually, "District") may be found at Tenn. Code Ann. §§ 43-14-201 through 223, collectively entitled the "Soil Conservation Districts Law" ("Law"). The nomenclature employed within the Law signals an explicit legislative intent that the Committee be considered a state agency: the Law establishes the Committee as the "state soil conservation committee," Tenn. Code Ann. § 43-14-203, and specifically labels the Committee as a "state agency," Tenn. Code Ann. § 43-14-206(6). The Committee's membership includes the Commissioner of the Department of Agriculture, the Commissioner of the Department of Environment and Conservation, and the Dean of the College of Agricultural Sciences and Natural Resources of the University of Tennessee, as well as District Supervisors and private

farmers appointed by the Governor. Tenn. Code Ann. § 43-14-203. Pursuant to Tenn. Code Ann. § 43-14-205, the Committee may request legal services from the Attorney General, who, with limited exceptions not relevant here, represents only "the state of Tennessee or any officer, department, agency, board, commission or instrumentality of the state." Tenn. Code Ann. § 8-6-109(b)(1). The Law sets out the Committee's powers and duties. Tenn. Code Ann. § 43-14-206(1) through (9). The Committee is required to submit yearly to the Commissioner of Agriculture not only an annual report but also a budget request to allow for the implementation of soil conservation programs. Tenn. Code Ann. § 43-14-206(9). Taken together, these statutes evince a clear legislative intent that the Committee be regarded as a state agency for liability purposes.

The Districts' status is a closer question. A District is initiated by petition to the Committee of twenty-five landowners within the proposed District. Upon a hearing, the Committee decides whether there is a need for a District. Tenn. Code Ann. § 43-14-208(a). If the Committee determines there is no need for a District, its decision is unreviewable, although a new petition may be filed within six months. Tenn. Code Ann. § 43-14-208(b). If the Committee decides there is a need for a District, it then must determine whether the operation of the District is administratively feasible and practical. Tenn. Code Ann. § 43-14-209(a). To aid in the latter determination, the Committee must hold a referendum of landholders within the proposed District. Tenn. Code Ann. § 43-14-209(b). The Committee may thereafter reject the proposed District as not administratively practical and feasible, or, if a majority of the votes cast in the referendum are in favor of the District, the Committee may determine that the District is administratively practical and feasible and proceed to organize the District. Tenn. Code Ann. § 43-14-211.

The Committee appoints two of the District's Supervisors, and upon proper application to the Secretary of State, the District is considered "a subdivision of this state and a public body corporate and politic." Tenn. Code Ann. § 43-14-212(d). The Secretary of State must record and issue to the Supervisors a certificate of organization. *Id.* Thereafter, the Committee supervises the election by landowners within the District of three additional Supervisors appointed by the Committee and three elected by the landowners. 43-14-214(a). Supervisors are paid a nominal sum to attend District meetings. Tenn. Code Ann. § 43-14-217(b). Supervisors may call upon the Attorney General for legal services. Tenn. Code Ann. § 43-14-217(c).

Supervisors are required upon request to furnish the Committee copies of various regulations and documents they adopt or deploy. *Id.* The Committee may remove a Supervisor for neglect of duty or malfeasance. Tenn. Code Ann. § 43-14-217(d). The Committee keeps Supervisors of the various Districts informed of activities of other Districts, facilitates interchange of advice and cooperation between Districts, and publishes an annual report. Tenn. Code Ann. § 43-14-2056(2).

Termination of a District is initiated by petition to the Committee of any twenty-five landowners within the District. Tenn. Code Ann. § 43-14-223(a). The Committee thereafter conducts a referendum of the District's landowners. Tenn. Code Ann. § 43-14-223(a). The Committee may determine after the referendum that the District is no longer administratively feasible and practical. Tenn. Code Ann. § 43-14-223(b). In doing so, it must consider the proportion of

votes cast in favor of discontinuance, but it is not bound by the referendum's outcome. *Id.* On the other hand, only if the majority of the voters favor continuance of the District may the Committee determine that the District remains administratively feasible and practical. *Id.* If the Committee determines that the District is no longer administratively feasible and practical, the Supervisors must dispose of all District property at public auction and pay over the proceeds to the State Treasury. Tenn. Code Ann. § 43-14-223(c).

We are informed by the Department of Agriculture that the Districts receive the bulk of their funding in the form of grants from the Department made pursuant to Tenn. Code Ann. § 67-4-409(*l*). That statute erects the Agricultural Resources Conservation fund and allows for grants to preserve and protect soil, among other natural resources. Tenn. Code Ann. § 67-4-409(*l*)(3). No expenditure may be made from that fund without the approval of several state officials: the Commissioner of Agriculture, the Commissioner of Environment and Conservation, and the Director of the Wildlife Resources Agency. Tenn. Code Ann. § 67-4-409(*l*)(2).

Given that the Committee is clearly a state agency for liability purposes, that the Committee and the Districts are created and bound together under an act entitled the "Soil Conservation Districts Law," that the Districts may call upon the Attorney General for legal representation, that the Committee organizes and coordinates the Districts' creation and termination, that the Committee may remove a Supervisor for cause, and that the Districts are largely funded through grants depending upon the approval of state officials, this Office concludes that the Districts are state agencies for purposes of liability.

In two opinions published prior to the 1992 *Hastings* decision, the Office indicated that the Districts were not state agencies, opining that they were subject to the Governmental Tort Liability Act ("GTLA"). *See* Op. Tenn. Att'y Gen. Nos. U86-79 (April 30, 1986) and 87-131 (August 4, 1987). The GTLA applies not to state agencies but only "to municipal, county and local governments." *Spurlock v. Sumner County, Tennessee*, 42 S.W.3d 75, 80 (Tenn. 2001). However, neither opinion addressed the question of whether the Districts are state agencies as opposed to some other form of governmental entity. More importantly, *Hastings* disapproved our 1977 opinion that a Human Resource Agency was not a state agency. 829 S.W.2d 679, 681-85. Soil Conservation Districts are, if anything, more entangled with and directed by the State, its agencies and its purse than was the Human Resource Agency whose status was determined in *Hastings*. Accordingly, we believe that notwithstanding our pre-*Hastings* opinions, a court would likely find the Districts to be state agencies for purposes of liability.

2. In Op. Tenn. Att'y Gen. No. 91-48 (May 13, 1991), we considered a nearly identical question, namely whether the Tennessee Elk River Development Agency ("TERDA") qualified as a state agency for purposes of participating in the State's property and liability insurance programs. First we looked at whether TERDA qualified as a state agency, concluding that it was a hybrid entity, displaying characteristics of both a state and a private entity. *Id.* We then turned to the question of liability coverage, noting that "liability coverage for the State is addressed by Tenn.Code Ann. § 9-8-307."[1] That statute waives the State's immunity for acts or omissions of state officers and employees as defined in Tenn. Code Ann. § 8-42-101(3). Tenn. Code Ann. § 9-8- 307(a)(1). It further provides that state officers and employees are themselves immune from liability for acts or omissions within the scope of their employment.

Tenn. Code Ann. § 9-8-307(a)(1)(h). The statute also fixes the dollar amounts that may be recovered in tort claims against the State and provides that the Board of Claims may purchase insurance for any class of claim. Tenn. Code Ann. § 9-8-307(e).

A separate statutory scheme authorizes the Board of Claims to review and recommend to the Legislature and the Commissioner of Finance and Administration funding of various risk management and insurance funds and to approve insurance policies to protect the State. Tenn. Code Ann. § 9-8-108(3) and (4). It also establishes a risk management fund. Tenn. Code Ann. § 9-8-109. The Board of Claims is authorized to recommend to the Commissioner of Finance and Administration the contribution required of each participating agency. Tenn. Code Ann. § 9-8-109(b).

The TERDA opinion noted that an agency's qualification for the liability coverage under § 9-8-307 depended upon whether its employees are "state employees." Op. Tenn. Att'y Gen. No. 91-48. The term "state employee" includes any "state official." *Id.* (citing Tenn. Code Ann. § 8-42-101(3)(A)). A governmental official is generally defined to include "an individual who has been appointed or elected in a manner defined by law." *Id*. (citing *Sitton v. Fulton*, 566 S.W.2d 887, 889 (Tenn. Ct. App. 1978)). Because TERDA's Board of Directors were duly appointed by the Governor and it appeared that TERDA's other employees were employed by the State, we opined that TERDA was a state agency for purposes of liability coverage. *Id.*

Members of the Committee and District Supervisors are appointed and elected officials of state agencies pursuant to Tennessee's Soil Conservation Districts Law. Therefore, at least as to the acts and omissions of these individuals, the Committee and the Districts are state agencies for purposes of liability coverage and eligibility to participate in related insurance and risk management funds. We do not possess information sufficient to determine whether other Committee and District staff and employees qualify as "state employees."

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Requested by: The Honorable Ken Givens
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[1]Subsequent amendments to the statute are irrelevant to the analysis of this question; therefore all citations will be to the current (2007) version of the statute.

STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL
NASHVILLE, TENNESSEE 37202

August 4, 2009 Opinion No. 09-147

Applicability of City of Smyrna's Storm Water User Fees to Agricultural Land

QUESTION

May the City of Smyrna assess storm water user fees against agricultural land?

OPINION

Yes, if storm water runoff from the agricultural land is discharged into or through the City of Smyrna's storm water and/or flood control facilities. Under Tenn. Code Ann. §§ 68-221-1101 to -1113, municipalities are given authority to regulate storm water discharges, operate storm water and flood control facilities, and set storm water user fees. Owners and operators of agricultural land are subject to a city's storm water user fees unless storm water runoff from that land "is not discharged into or through the storm water or flood control facilities, or both, of the municipality." Tenn. Code Ann. § 68-221-1107(a).

ANALYSIS

In accordance with section 402(p) of the federal Clean Water Act (CWA), 33 U.S.C. § 1342(p), the U.S. Environmental Protection Agency (EPA) regulates discharges from municipal separate storm sewer systems (MS4s). In 1990, EPA issued its Phase I rules, which regulate MS4s that serve populations of 100,000 or more. *See* 40 C.F.R. § 122.26 (2009). EPA's Phase II rules were adopted in 1999 and regulate smaller MS4s located in urbanized areas. *See* 40 C.F.R. § 122.26 and .32 (2009). Municipalities subject to the MS4 regulations must obtain National Pollutant Discharge Elimination System (NPDES) permits. *Id*. *See*, *e.g.*, *Vandergriff v. City of Chattanooga*, 44 F.Supp.2d 927, 929 (E.D. Tenn. 1998), *aff'd*, *review denied*, 182 F.3d 918 (6th Cir. 1999) ("municipalities are required to obtain NPDES permits for discharges from municipal storm sewer systems").

Because Tennessee has an EPA-approved NPDES permit program, MS4 requirements are implemented by the Tennessee Department of Environment and Conservation (TDEC) through the Tennessee Water Quality Control Act (TWQCA), Tenn. Code Ann. §§ 69-3-101 to -133. *See* 33 U.S.C. § 1342(c); 40 C.F.R. Part 123 (2009). *See also Vandergriff*, 44 F.Supp.2d at 929 ("The CWA allows states to develop a program for issuing NPDES permits"). The City of Smyrna is one of 85 cities and counties in Tennessee subject to the Phase II MS4 regulations. *See* TDEC, Storm Water Permitting Phase II MS4s (July 29, 2009), available at http://www.state.tn.us/environment/wpc/stormh2o/MS4II.shtml.

In response to the MS4 requirements, the General Assembly enacted Tenn. Code Ann. §§ 68-221-1101 to -1113. The enactment is designed to facilitate CWA and TWQCA compliance by municipalities affected by EPA's "storm water regulations, particularly those ... regulating storm water discharges." Tenn. Code Ann. § 68-221-1101. The legislature intended for municipalities "to regulate such discharges," "to construct and operate a system of drainage facilities for storm water management and flood control," and "to fix and require payment of fees for the privilege of discharging storm water."[1] *Id*.

As regards fees, municipalities are expressly empowered to create "a system of fees for services and permits." Tenn. Code Ann. § 68-221-1105(a)(2). The General Assembly also specifically authorized municipalities to establish a "graduated storm water user's fee . . . based on actual or estimated use of the storm water and/or flood control facilities of the municipality."[2]

Tenn. Code Ann. § 68-221-1107(a). The only exemption to the storm water user fee is for "[p]ersons, including, but not limited to, owners and operators of agricultural land, whose storm water runoff is not discharged into or through the storm water or flood control facilities, or both, of the municipality." *Id*. Thus, it is the opinion of this Office that the City of Smyrna is authorized to assess storm water user fees against agricultural land unless that land falls within this exemption.

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[1] A "municipality" is defined in this law as "any incorporated city or town, county, metropolitan or consolidated government, or special district empowered to provide storm water facilities." Tenn. Code Ann. § 68-221-1102(3).

[2] The City of Smyrna's storm water user fees arise under the authority of these statutes, and not in the exercise of the city's zoning power. Thus, these fees do not implicate section 22 of the 1998 Tenn. Pub. Acts, ch. 1101, which provides that "[f]or any land that is presently used for agricultural purposes, a municipality may not use its zoning power to interfere in any way with the use of such land for agricultural purposes as long as the land is used for agricultural purposes.

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL

Opinion No. 13-18 March 6, 2013

Elected State or County Official Serving on a County Soil Conservation District

QUESTIONS

1. May a person elected to the General Assembly serve as either an elected or appointed member of a county Soil Conservation District?

2. May a person elected to any county public office serve as either an elected or appointed member of a county Soil Conservation District?

OPINIONS

1. A person elected to the General Assembly may not serve as an elected or appointed member of a county Soil Conservation District.

2. There is no law of general applicability preventing a person elected to a county public office from also serving as an elected or appointed member of a county Soil Conservation District. However, common law incompatibility or local laws may prevent the same individual from occupying these two offices.

ANALYSIS

1. The Tennessee Constitution prohibits a person from holding "more than one lucrative office at the same time." Tenn. Const. art. II, § 26. The term "office" under this provision refers to state offices. *Glasgow v.* Fox, 214 Tenn. 656, 661, 383 S.W.2d 9, 11 (1964); *Boswell v. Powell*, 163 Tenn. 445, 43 S.W.2d 495 (1931). A person elected to the General Assembly holds a State office. *Phillips v. West*, 213 S.W.2d 3, 6 (Tenn. 1948); Tenn. Att'y. Gen. Op. 11-58 (July 18, 2011). This Office has previously opined that a member of a Soil Conservation District also holds a State office. *See* Op. Tenn. Att'y. Gen. No. 07-143 (October 11, 2007). Therefore, article II, section 26 of the Tennessee Constitution prohibits a person from simultaneously holding a position in the General Assembly and a position on a county Soil Conservation District.

2. Article II, section 26 does not address the simultaneous holding of State and county offices. *Boswell*, 43 S.W.2d at 495. Thus, a person can hold both a county office and a State office without violating article II, section 26 of the Tennessee Constitution. *Phillips*, 213 S.W.2d at 6. S*ee also* Tenn. Att'y Gen. Op. 07-159 (Dec. 6, 2007); Tenn. Att'y. Gen. Op. 02-117 (Oct. 22, 2002);Tenn. Att'y Gen. Op. 82-529 (Dec. 14, 1982).

Even though the Tennessee Constitution does not prohibit simultaneously holding

a State office, such as a position on a Soil Conservation District, and a county office, holding such dual offices may be prohibited under common law principles or by local law. Under common law an individual is prohibited from holding incompatible offices. *State ex. rel. Little v. Slagle*, 89 S.W. 326, 327 (Tenn. 1905). As the Tennessee Supreme Court observed in *Slagle*, the "rule at common law is that, where one accepts a second office incompatible with one already held by him, the office first held is thereby ipso facto terminated without judicial proceedings of any kind." *Slagle*, 89 S.W. at 327. *See also* Tenn. Att'y Gen. Op. 07-159 at 2. The question of incompatibility depends on the circumstances of each individual case, and asks whether the occupancy of both offices by the same person is detrimental to the public interest or whether the performance of the duties of one interferes with the performance of those of the other. Tenn. Att'y Gen. Op. 07-159 at 2 (citing 67 C.J.S. *Officers* § 38). For example, an inherent inconsistency exists where one office is subject to the supervision or control of the other. 63C Am. Jur. 2d *Public Officers and Employees* § 59. S*ee also State v. Thompson*, 246 S.W.2d 59, 61 (Tenn. 1952); Tenn. Att'y. Gen. Op. 99-195 (Sept. 28, 1999). The responsibilities of each office must be reviewed to determine whether they are incompatible under the common law.

Local laws or charters may also prevent county officials from holding a county and a State office. *See Hatcher v. Chairman*, 341 S.W.3d 258, 263 (Tenn. Ct. App. 2009) (local law precluded a member of the city council from holding another public office); Tenn. Att'y Gen. Op. 01-152 (Sept. 25, 2001) (noting that a city charter may prohibit an alderman from also serving as constable). Thus local laws must be consulted to determine if such a prohibition applies to the particular county office held by the person seeking a position on a county Soil Conservation District.

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