



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2019-064

March 26, 2020

The Honorable Daniel Shue
Prosecuting Attorney
Twelfth Judicial District
901 South B Street, Suite 209
Fort Smith, AR 72901

Dear Mr. Shue:

This is in response to your request for a follow-up opinion related to Attorney General Opinions 2019-032 and 2018-136. Your request states that Act 1077 of 2019 has made fundamental changes in the procedures to be followed for establishing fire protection districts, presenting challenges for Sebastian County government and the Sebastian County Quorum Court.

In this regard, you have posed the following questions:

Question No. 1: If a petition is filed prior to April 24, 2019, do the procedures of Act 1077 of 2019 apply to that petition?

Question No. 2: Pursuant to Arkansas Constitution Article 7, § 30, and Arkansas Constitution Amendment 55, § 1, does this procedure usurp the power of the quorum court with regard to its responsibility for the levying of taxes?

Question No. 3: With regard to Arkansas Constitution Article 4, § 2, is this procedure an improper delegation of powers from the quorum court to the “governing body of a fire department that seeks to become a fire department district”?

Question No. 4: With regard to Arkansas Constitution Article 2, § 8, does this procedure provide both procedural and substantive due process?

Question No. 5: Did Act 1077 of 2019, repeal A.C.A. §§ 14-284-204 and 14-284-208 by implication?

Question No. 6: If the answer to Question No. 5 is “yes,” please specify the procedures to be followed by the Sebastian County Quorum Court in addressing any petition under Act 1077 of 2019.

Question No. 7: What procedures would be followed if the quorum court, in the exercise of its discretion, refuses to approve the petition?

RESPONSE

It is my opinion that the answer to each of your first, second, and third questions is “no.” It is my opinion in response to your fourth question that a political subdivision of the state cannot invoke the protections of the due process clause. The answer to your fifth question is “no,” rendering your sixth question moot. As for your final question, there are no established procedures in this regard.

DISCUSSION

Question No. 1: If a petition is filed prior to April 24, 2019, do the procedures of Act 1077 of 2019 apply to that petition?

Attorney General Opinions 2019-032 and 2018-136 addressed questions concerning Ark. Code Ann. § 14-284-226, as amended by Act 1077 of 2019, which provides for the conversion of a fire department to a fire protection district. Accordingly, I gather this question pertains to Act 1077’s amendments to section 14-284-226.¹ And I take it the “procedures” you are concerned about are those set forth in section 14-284-226(a) and (b) regarding a fire department’s “request by petition” through its “governing body”:

(a) The governing body of a fire department that seeks to become a fire protection district shall make the request by petition to the quorum court of the county, or counties if the fire department serves more than one (1) county.

(b)(1)(A) Upon the request by petition in subsection (a) of this section, the quorum court shall grant the petition to convert the fire department

¹ See Act 1077 of 2019, § 6.

to a fire protection district within sixty (60) days of receipt of the petition.

(B) The quorum court shall respond in writing to the fire department within the sixty-day period under subdivision (b)(1)(A) of this section if there are issues or questions the quorum court would like addressed in the petition, but in no event shall the quorum court delay the sixty-day period under subdivision (b)(1)(A) of this section.²

The Arkansas Supreme Court has consistently held to the well-established principle of statutory interpretation that all legislation is presumed to apply prospectively unless the legislature expressly declares, or necessarily implies by the language used, an intent to give the legislation retroactive effect.³ The rule against retroactive operation applies especially with reference to amendatory acts.⁴

Act 1077 of 2019 contains no language indicating that it was intended to be applied retroactively. Nor does it imply that the act is to be given retroactive effect. There is an exception to the general rule of prospective application in the case of “procedural or remedial legislation.”⁵ But the general rule applies here because Act 1077 is not merely procedural or remedial. Rather, it creates a new method of converting a fire department to a fire protection district that differs substantively from the previous version of Ark. Code Ann. § 14-284-226.⁶ This dictates against its retroactive effect.⁷

² *Id.*

³ See, e.g., *City of Cave Springs v. City of Rogers*, 343 Ark. 652, 37 S.W.3d 607 (2001); *City of Dover v. Barton*, 337 Ark. 186, 987 S.W.2d 705 (1999).

⁴ *Lucas v. Hancock*, 266 Ark. 162, 583 S.W.2d 491 (1979).

⁵ See *Harrison v. Matthews*, 235 Ark. 915, 362 S.W.2d 704 (1962).

⁶ Section 14-884-226 previously required that the procedures in subchapter 2 of Title 14, Chapter 284 be used in order for a fire department to become a fire protection district. Those procedures are discussed in Op. Att’y Gen. 2018-136.

⁷ See *Gannett River States Pub. Co. v. Ark. Indust. Dev. Com’n*, 303 Ark. 684, 799 S.W.2d 543 (1990) (observing that although the presumption against retroactive application can be overridden with regard to procedural legislation, it will not be overridden with regard to substantive legislation).

Question No. 2: Pursuant to Arkansas Constitution Article 7, § 30, and Arkansas Constitution Amendment 55, § 1, does this procedure usurp the power of the quorum court with regard to its responsibility for the levying of taxes?

No. A fire protection district formed under Subchapter 2 of chapter 284 of Arkansas Code title 4 levies “annual assessments.”⁸ These assessments are distinct from “taxes,”⁹ though they are “payable at the time ad valorem taxes are payable.”¹⁰

Question No. 3: With regard to Arkansas Constitution Article 4, § 2, is this procedure an improper delegation of powers from the quorum court to the “governing body of a fire department that seeks to become a fire department district”?

Section 14-284-226, as amended,¹¹ directs the quorum court to establish a fire protection district upon the petition of a fire department. This procedure does not violate the separation-of-powers doctrine.¹² Although the adoption of Amendment 55 to the Arkansas Constitution granted enlarged authority for self-governance to counties, the counties’ authority in this regard remains subordinate to the state. Amendment 55 provides that counties may “exercise local legislative authority not denied by the Constitution *or by law*.”¹³ Additionally, Amendment 55 provides that “[t]he Quorum Court shall meet and exercise all such powers *as provided by law*.”¹⁴

⁸ Ark. Code Ann. § 14-284-216(a)(1) (Supp. 2017 and Act 1077 of 2019, § 5).

⁹ See *Rainwater v. Haynes*, 244 Ark. 1191, 1193–94, 428 S.W.2d 254, 256 (1968) (“The word ‘taxes’ refers to exactions laid by the government for purposes of general revenue. The word ‘assessments’ refers to exactions laid for making local improvements for the benefit of property owners. The word ‘tax’ does not include ‘assessments.’”) (Internal citations omitted). *Accord* Op. Att’y Gen. 2014-032.

¹⁰ Ark. Code Ann. § 14-284-216(a)(1).

¹¹ See *supra* nn.1, 2 (and accompanying text).

¹² Article 4, section 2 of the Arkansas Constitution embodies the so-called “separation of powers” doctrine, which can be violated by unlawful delegations of legislative authority. See *generally* *Hobbs v. Jones*, 2012 Ark. 293, 9, 412 S.W.3d 844, 851.

¹³ Ark. Const. amend. 55, § 1(a) (Repl. 2019) (emphasis added).

¹⁴ *Id.* at § 4 (emphasis added).

Under Amendment 55’s implementing legislation, quorum courts “shall perform such legislative duties as may be *prescribed by law*.”¹⁵

Thus, there is no unlawful delegation of powers under section 14-284-226, and the General Assembly may require the quorum court to grant a fire department’s petition to convert.

Question No. 4: With regard to Arkansas Constitution Article 2, § 8, does this procedure provide both procedural and substantive due process?

I gather this question is premised on the notion that a county must be afforded the protections of the due process clause under Article 2, section 8, which states: “... nor [shall any person] be deprived of life, liberty, or property, without due process of law.”¹⁶ This is virtually identical to the due process clause of the Fourteenth Amendment to the U.S. Constitution. It is settled that “[a] political subdivision of the state cannot invoke the protection of the Fourteenth Amendment against the state itself.”¹⁷ For the same reason, a county’s attempt to challenge Article 2, section 8 of the Arkansas Constitution would not succeed.¹⁸

Question No. 5: Did Act 1077 of 2019, repeal A.C.A. §§ 14-284-204 and 14-284-208 by implication?

No. Act 1077 did not expressly repeal either of these sections. To the contrary, the Act amended section 14-284-204 by adding a new subdivision. And nothing in the Act suggests any intention to repeal either section. It is well established that repeal

¹⁵ Ark. Code Ann. § 14-14-1301(b)(1)(A) (Supp. 2017) (emphasis added).

¹⁶ Ark. Const. art. 2, § 8 (Repl. 2019).

¹⁷ *City of Cave Springs v. City of Rogers*, 343 Ark. 652, 657, 37 S.W.3d 607, 610 (2001) (citing *Ark. State Hosp. v. Goslee*, 274 Ark. 168, 623 S.W.2d 513 (1981)).

¹⁸ *See Wilson v. City of Pine Bluff*, 278 Ark. 65, 66, 643 S.W.2d 569, 569–70 (1982) (“When the language of the federal and state constitution is identical, as in the instance of the confrontation clause, the due process clause, and several others, and there is no reason for us to construe our constitution other than in the same way as the federal constitution has been construed, we take the view that the case presents a federal question, not a state one.”). *See also Parkman v. Sex Offender Screening & Risk Assessment Comm.*, 2009 Ark. 205, 11, 307 S.W.3d 6, 14 (“Because the language of the [Self-Incrimination Clause of the] federal and state constitutions are virtually identical, and because this court has not been provided any reason why it should interpret the provisions differently, there is no reason for this court to construe our constitution other than in the same way as the federal constitution.”).

by implication is not favored and is “never allowed except where there is such an invincible repugnancy between the former and later provisions that both cannot stand together.”¹⁹

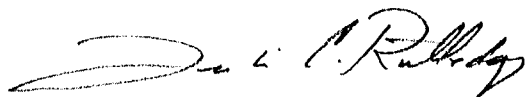
Question No. 6: If the answer to Question No. 5 is “yes,” please specify the procedures to be followed by the Sebastian County Quorum Court in addressing any petition under Act 1077 of 2019.

My response to Question 5 renders this question moot.

Question No. 7: What procedures would be followed if the quorum court, in the exercise of its discretion, refuses to approve the petition?

As stated in response to Question 3 above, Section 14-284-226 directs the quorum court to establish a fire protection district upon the petition of a fire department. This appears to be nondiscretionary. There are no established procedures in the event that a quorum court refuses to grant the petition. Accordingly, I cannot speculate as to the consequences of such a refusal.

Sincerely,

A handwritten signature in black ink, appearing to read "Leslie Rutledge", with a stylized, cursive script.

LESLIE RUTLEDGE
Attorney General

¹⁹ *Donoho v. Donoho*, 318 Ark. 637, 639, 887 S.W.2d 290, 291 (1994).