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STATE OF ARKANSAS
OFFICE OF THE ATTORNEY GENERAL
JUSTICE BUILDING, LITTLE ROCK 72201

(501) 371-2007

OPINION NO. 85-161

July 17, 1985

The Honorable Mike Wilson
State Representative
1202 Main Street
Jacksonville, AR 72075

Dear Representative Wilson:

This Office acknowledges receipt of your request for an official opinion. You inquire concerning a proposed ordinance which would prohibit the burning of solid wastes within the Jacksonville city limits. Section 2 of the proposed ordinance provides, in pertinent part:

The Chief of the Jacksonville Fire Department shall not permit the incineration of hazardous wastes, notwithstanding any permission by any agency of the United States or the State of Arkansas. "Hazardous wastes" shall be defined as that defined in the United States Resource Conservation and Recovery Act (RCRA).

In regard to the proposed ordinance you raise the following questions, which we shall address in the order raised.

- (1) Would the proposed ordinance violate the provisions of the Arkansas Water and Air Pollution Control Act which prohibit local regulation of air pollution, Ark. Stat. Ann. §82-1941 (1976 Repl.)?
- (2) Would enactment of the ordinance contrary to state or federal law permit a successful Plaintiff to seek attorney's fees and costs in an action against the city challenging the ordinance?
- (3) Assuming that the ordinance does not violate Ark. Stat. Ann. §82-1941, would the prohibition against incinerating hazardous wastes be preempted by the state or federal hazardous waste regulatory programs?

In answer to your first question whether local regulation of air pollution would violate the Arkansas Water and Air

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Pollution Control Act, the answer is yes. The treatment of hazardous wastes by incineration is subject to the requirements of the Arkansas Water and Air Pollution Control Act, Ark. Stat. Ann. §§82-1901 to 82-1909 and 82-1931 to 82-1943. The responsibility for regulation in this area has been delegated to the Commission on Pollution Control and Ecology. Ark. Stat. Ann. §82-1935. The legislature has preempted the regulation of air pollution by municipal bodies. Ark. Stat. Ann. §82-1941 provides

Political subdivisions forbidden to legislate on air pollution. - In order to avoid conflicting and overlapping jurisdiction, it is the intention of this Act [§§ 82-1901 - 82-1909, 82-1931 - 82-1943] to occupy by preemption the field of control and abatement of air pollution and contamination and no political subdivision of the State shall henceforth enact or enforce laws, ordinances, resolutions, rules or regulations in such field. Nothing herein shall be construed to prevent private actions under existing laws. [Acts 1949, No. 472, Part 2, § 12, as added by Acts 1965, No. 183, § 7, p. 546.]

We cannot give a simple "yes" or "no" answer to your second question. The general rule in both state and federal courts is that each party to a lawsuit is responsible for his own expenses of litigation which include attorneys' fees. U.S. v. 234.55 Acres of Land, More or Less, Situate in Union County, State of Ark., 751 F2d 924; Selle v. City of Fayetteville, 207 Ark. 966, 184 S.W.2d 58 (1945); Hough v. Continental Leasing Corp., 275 Ark. 340, 630 S.W.2d 19 (1982).

In certain situations statutes specifically provide that the prevailing party can recover the expenses of his attorney. This is the case in Civil Rights Litigation, 42 U.S.C. §1988.

We cannot at this point predict the nature of the claims which may be brought against the city and the members of the city council if the proposed ordinance is adopted. There is certainly a possibility that enacting the ordinance will involve the municipality in litigation. There is a likelihood that plaintiff's counsel will frame their suit in a manner to make them eligible to receive an award of attorneys' fees.

Your third question does not require an answer because the proposed ordinance does violate Ark. Stat. Ann. §82-1941.

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As you are aware, I am in the process of appointing a Task Force to examine and find solutions to the pressing hazardous waste problems facing the citizens of Arkansas. Although I have philosophical concerns with legislation which bars local governments from addressing pollution problems within their geographical limits, it is my duty as the Attorney General to report the law as it currently stands.

The foregoing opinion which I hereby approve was prepared by Assistant Attorney General Arnold M. Jochums.

Sincerely,

A handwritten signature in cursive script that reads "Steve Clark".

STEVE CLARK
Attorney General

JSC:AMJ:jk