



STATE OF ARKANSAS  
ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2015-116

February 8, 2016

The Honorable Bruce Maloch  
State Senator  
650 Columbia Road 258  
Magnolia, AR 71753

Dear Senator Maloch:

I am writing in response to your request for an opinion concerning tort immunity for a planning and development district. Specifically, your request states that the Southwest Arkansas Planning and Development District (“the District”), a non-profit representing 12 counties and 65 cities in Southwest Arkansas, is applying for a U.S. Environmental Protection Agency Cleanup Grant for Howard County’s former hospital. One of the EPA’s requirements for the grant is that ownership must transfer from Howard County to another party while the grant is in effect. You further state that the cleanup could take from one to five years. The District would like to take ownership of the property during the cleanup process, and then return the property to Howard County once the EPA has approved the cleanup.

With the foregoing background in mind, you ask:

Would [the District] need to have liability insurance coverage for this endeavor or will they have tort immunity?

**RESPONSE**

The wording of this question suggests that the District’s “need” for liability insurance for this project will necessarily be determined by the answer to the question whether the District has tort immunity. While tort immunity may certainly have some bearing on the District’s decision to carry liability coverage, I do not see a necessary connection between the two issues. There may be other

factors besides tort immunity for the District to consider when assessing its need for liability insurance coverage.

I cannot opine regarding the District's need for insurance as that is a matter to be addressed by the District in consultation with its own legal counsel. But I can address the question whether the District qualifies in this instance for tort immunity that is afforded political subdivisions pursuant to Ark. Code Ann. § 21-9-301. In my opinion, the District in all likelihood qualifies for this statutory immunity.

## DISCUSSION

The General Assembly has clearly stated the express public policy of immunizing the State's political subdivisions from tort liability and damages:

(a) It is declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, public charter schools, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance.

(b) No tort action shall lie against any such political subdivision because of the acts of its agents and employees.<sup>1</sup>

The legislature has defined the term "political subdivision" in various ways, depending on the context of particular legislation ranging from such topics as law enforcement officer training and standards to matters of public finance.<sup>2</sup> In two

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<sup>1</sup> Ark. Code Ann. § 21-9-301 (Supp. 2015). The immunity granted by this statute does not include immunity from liability for intentional torts. *See, e.g., Battle v. Harris*, 298 Ark. 241, 766 S.W.2d 431 (1989) (internal citation omitted).

<sup>2</sup> *See, e.g.,* Ark. Code Ann. §§ 12-9-102(3) and 12-9-401(7) (Repl. 2009) ("Political subdivision" means any county, municipality, township, or other specific local unit of general government."); Ark. Code Ann. § 12-50-103(8) (Repl. 2009) ("Political subdivision" means a city of any class, a town, or a county."); Ark. Code Ann. § 14-77-102 (4) (Supp. 2015) ("Political subdivision" means any county, municipality, or school district of the State of Arkansas."); Ark. Code Ann. § 15-6-103(8) (Supp. 2015) ("Political subdivision" means a county, municipality, and any other

instances, the term has even been defined to include public corporations.<sup>3</sup>

In addition, the Arkansas Supreme Court has indicated that territorial boundaries should be considered when adopting a general definition of the term “political subdivision”:

[P]olitical subdivisions have been defined as [embracing] a certain territory and its inhabitants, organized for the public advantage, and not in the interest of particular individuals or classes; that their chief design is the exercise of governmental functions; and that to the electors residing within each is, to some extent, committed the power of local government....<sup>4</sup>

Neither Arkansas appellate court has specifically addressed whether the eight regional multi-county planning and development districts established under Ark. Code Ann. § 14-166-201 *et seq.* are “political subdivisions of the State.” But a federal district court, interpreting Arkansas law, stated that one such district had “become so entwined with governmental policies” as to infuse it with “a governmental character.”

Where ... a nonprofit corporation has been created by virtue of state law, the state government has provided significant financial support for the activities of the corporation, the state has delegated functions relating to the planning and delivery of public services to the corporation, the corporation has engaged in activities normally

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unit of local government, including a school district and an improvement district, authorized by law to perform governmental functions.”); Ark. Code Ann. § 19-7-901(2) (Repl. 2007) (“‘Political subdivision’ means any agency or unit of this state which is authorized to levy taxes or empowered to cause taxes to be levied.”).

<sup>3</sup> See Ark. Code Ann. § 21-1-303(4) (Repl. 2004) (“‘Political subdivision’ includes counties, cities, towns, villages, townships, districts, authorities, and other public corporations and entities whether organized and existing under charter or general law.”); and Ark. Code Ann. § 15-5-103(18) (Supp. 2015) (“‘Political subdivision’ means a city of the first class, a city of the second class, an incorporated town, a county, or an improvement district, or any agency, board, commission, public corporation, or instrumentality of the above.”).

<sup>4</sup> *Dermott Spec. Sch. Dist. v. Johnson*, 343 Ark. 90, 95, 32 S.W.3d 477, 480 (2000) (citation omitted).

performed by governmental agencies, the corporation has worked in cooperation with various agencies or instrumentalities of state government and the supervision of the affairs of the corporation has been vested in a board of directors, the majority of which are local elected officials, the conduct of the “private” nonprofit corporation has become so entwined with governmental policies and so impregnated with a governmental character as to subject the conduct of the corporation to the institutional limitations placed upon state action.<sup>5</sup>

It is my understanding that the District is one of the eight geographic districts in the State recognized in section 14-166-202. I further understand that the District provides a range of services to several municipalities and counties in Southwest Arkansas, among which are securing and administering federal, state, and private grants for feasible activities for the counties and cities it serves. The District is governed by an Executive Board of Directors composed of elected officials from the counties and cities within the District.

Furthermore, in this case and based on the representations in your opinion request, the EPA regulations require that the former hospital change ownership before the cleanup grant can be given. Without such ownership change, the property would continue to be the responsibility of Howard County, which does enjoy statutory tort immunity. Thus, in my opinion, a reviewing court likely would find that the District, which encompasses specific territory and is organized and authorized by the legislature for the public advantage, “has become so entwined with governmental policies and so impregnated with a governmental character” that it meets the definition of a “political subdivision” in this instance, and would be immune from tort liability pursuant to Ark. Code Ann. § 21-9-301.

It is important to note that this would be a somewhat novel issue for the Court, and that the test is fact-specific. Accordingly, I cannot say with total confidence that the Court would adopt my opinion. Moreover, the determination that the District likely is a “political subdivision” in this situation for the purposes of the tort

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<sup>5</sup> *Gilbreath v. E. Arkansas Planning & Dev. Dist., Inc.*, 471 F. Supp. 912, 922 (E.D. Ark. 1979). *Gilbreath* was concerned with whether certain actions of the East Arkansas Planning and Development District, Inc. were under color of state law for a federal discrimination claim under 42 U.S.C. § 1983. The court found a sufficient nexus between the activities of the district and state and local governments to bring the alleged discriminatory practices within § 1983 scrutiny.

immunity statute does not definitively address whether the District “needs”—that is, whether it is desirable or prudent for the District to have—such liability insurance. There may be other factors besides tort immunity that the District will wish to consider when assessing its “need” for liability insurance coverage.<sup>6</sup> This is an issue upon which I cannot opine as it is beyond the scope of an Attorney General’s opinion. The District’s need for insurance in this instance is a matter to be addressed by the District in consultation with its own legal advisor.

Sincerely,



LESLIE RUTLEDGE  
Attorney General

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<sup>6</sup> For instance, the District could conceivably face liability for a violation of federal law pursuant to 42 U.S.C. § 1983. For purposes of federal law and federal causes of action, a different “qualified immunity” will apply. *See e.g.*, brief discussion of *Gilbreath*, *supra* note 5; *see also generally Anderson v. Creighton*, 483 U.S. 635 (1985); *Robinson v. Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987); *Matthews v. Martin*, 280 Ark. 345, 658 S.W.2d 374 (1983). Under the doctrine of qualified immunity, an individual is immune if the actions complained of were taken in good faith in the performance of one’s duties, and the acts do not violate any clearly established constitutional right. *Saucier v. Katz*, 533 U.S. 194 (2001).

It should also be noted that under Ark. Code Ann. § 21-9-303, all political subdivisions must carry liability insurance on their motor vehicles and/or be self-insured in the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act, codified at Ark. Code Ann. § 27-19-101 *et seq.* (Repl. 2014 and Supp. 2015).