



Department of Law  
State of Georgia

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OFFICIAL OPINION

Vance Smith, Jr.  
Commissioner  
Georgia Department of Transportation  
One Georgia Center  
600 West Peachtree Street, N.W.  
Atlanta, Georgia 30308

Re: The state and its departments, agencies, and authorities, including the Georgia Department of Transportation and its construction projects, are not subject to the “post-development stormwater runoff” regulations or other ordinances adopted by a local government, local authority, or regional authority, including the model ordinance promulgated by the Metropolitan North Georgia Water Planning District.

Dear Commissioner Smith:

Your predecessor requested my opinion whether the state and the Georgia Department of Transportation (“DOT”) are subject to regulation by local ordinances or permit requirements of a local government, local authority, or regional authority, including the “post-development stormwater runoff” regulations adopted by the Douglasville-Douglas County Water and Sewer Authority under the model ordinance authority of the Metropolitan North Georgia Water Planning District.<sup>1</sup> It is my conclusion that DOT, as well as any other state agency or state authority, is not subject to such regulation by local government or local or regional authority.

It has been well-settled that local governments exercise only the powers delegated to them by the state and that an attempt by a local governing authority, county, or municipality to exercise an undelegated power against the state is *ultra vires*. *City of Atlanta v. State*, 181 Ga. 346 (1935) (city cannot require a construction permit for a state project). *See City of Marietta v. CSX Transp., Inc.*, 272 Ga. 612 (2000) (city cannot obtain state land by adverse possession); *Mayor of Atlanta v. Central R.R. & Banking Co.*, 53 Ga. 120 (1874) (city cannot condemn state land); 1958-59 Op. Att’y Gen. 219; 1996 Op. Att’y Gen. 96-4, 1971 Op. Att’y Gen. 71-113, 1973 Op. Att’y Gen. 73-164, 1976 Op. Att’y Gen. U76-59. This rule also prohibits local regulation of state authorities. *See* 1958-59 Op. Att’y Gen. 5; 1976 Op. Att’y Gen. U76-36; 1996 Op. Att’y Gen. 96-4.

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<sup>1</sup> *See* O.C.G.A. §§ 12-5-570 through -586, the Metropolitan North Georgia Water Planning District Act (the “Act”).

A general power granted to a local government does not apply to the state or its departments, agencies, and instrumentalities in the absence of express language in the statutory grant.<sup>2</sup> This immunity from local regulation of state property is based upon fundamental principles of government, necessary so that functions of government are not unduly impeded. *Penick v. Foster*, 129 Ga. 217 (1907); *Bd. of Tr's of the Gate City Guard v. City of Atlanta*, 113 Ga. 883 (1901); *State v. Western & Atl. R.R.*, 136 Ga. 619, 625 (1911).

It follows that the projects and public property of state entities are not subject to local regulation, nor to local permit requirements, absent express statutory language to the contrary.<sup>3</sup> *Bd. of Tr's of the Gate City Guard v. City of Atlanta*, *supra*; *Atlanta v. Cent. R.R. & Banking Co.*, 53 Ga. 120, 123 [4] (1874); 1958-59 Op. Att'y Gen. 219. Moreover, public property, including state property, is not subject to lien, nor to levy or sale. *Neal-Millard Co. v. Tr's of Chatham Acad.*, 121 Ga. 208, 213-15 (1904); *B&B Elec. Supply Co. v. H.J. Russell Constr. Co.*, 166 Ga. App. 499, 503 (1983); 1982 Op. Att'y Gen. 82-91. Similarly, other forms of local government regulation are also *ultra vires*.<sup>4</sup>

DOT and its contractors, however, remain subject to regulation by the Environmental Protection Division, Georgia Department of Natural Resources ("EPD"), with two general permits issued by EPD currently in effect. Local officials who have concerns relating to a DOT project may raise those concerns with EPD. The state and its other departments, agencies, and authorities are subject to EPD regulations through a limited delegation to qualified local governments.<sup>5</sup>

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<sup>2</sup> See O.C.G.A. § 1-3-8 ("The state is not bound by the passage of a law unless it is named therein or unless the words of the law are so plain, clear, and unmistakable as to leave no doubt as to the intention of the General Assembly."); see also 1996 Op. Att'y Gen. 96-4.

<sup>3</sup> For a statutory exception in the Code, see the limited delegation of the state Environmental Protection Division's enforcement powers to qualified counties and municipalities contained in the latter part of O.C.G.A. § 12-7-17(9). It should be noted, however, that DOT projects are subject to oversight by DOT and regulation by the state Environmental Protection Division ("EPD"). See O.C.G.A. §§ 12-7-7.1, 12-7-17(9), and 12-5-30.

<sup>4</sup> The state and its departments, agencies, and authorities, including DOT, are likewise not subject to:

- a. Local zoning laws, see 1985 Op. Att'y Gen. U85-11; 1981 Op. Att'y Gen. U81-1; *City of Decatur v. DeKalb County*, 256 Ga. App. 46, (2002);
- b. Local permits or licenses, see 1996 Op. Att'y Gen. 96-4;
- c. Local planning commission regulation, including, in particular, local regulations concerning the recording of plats, see 2005 Op. Att'y Gen. U2005-5;
- d. Local historic preservation regulation (there are however, separate state historic laws, rules, and regulations), see O.C.G.A. §§ 12-3-52(a), -55, -56;a
- e. Local taxes and special assessments, see GA. CONST. art. VII, sec. I, par. I; *Penick v. Foster*, 129 Ga. 217, 225 (1907); *City of Atlanta v. Stokes*, 175 Ga. 201 (1932); *Camden Tel. & Tel. Co. v. City of St. Marys*, 247 Ga. 687 (1981).
- f. Local environmental regulations, see 1996 Op. Att'y Gen. 96-4; (*but see note 3 supra*); and
- g. Fire safety standard enforcement, see O.C.G.A. §§ 25-2-12(a)(2) (*but see O.C.G.A. § 25-2-12(a)(3) authorizing inspection and reporting to Safety Fire Commissioner*).

<sup>5</sup> See note 3 *supra*.

The local ordinance and regulations specifically referenced in your request are the stormwater management regulations of the Douglasville-Douglas County Water and Sewer Authority (“Water Authority”), which were adopted by the Water Authority in part to implement requirements of a model ordinance promulgated by the Metropolitan North Georgia Water Planning District (“District”).<sup>6</sup> These regulations also include the Water Authority’s ordinance implementing Erosion and Sedimentation Act requirements that enable the Water Authority to be designated by EPD as a local issuing authority under that Act. The Water Authority’s ordinance, consolidating both sets of requirements, specifies in Chapter Eight those “persons” who are subject to the regulations and against whom civil remedies, such as stop work orders, can be issued for non-compliance. Section 8-2, Definitions, specifies that the following persons and entities are to be regulated:

Person means . . . the State of Georgia, the United States of America,<sup>7</sup> or any other legal entity.<sup>8</sup>

Owner means the legal or beneficial owner of a site, including, but not limited to, . . . [any] other person, firm, or corporation in control of a site.<sup>9</sup>

The District is authorized by law to promulgate model regulations and stormwater and other plans for local governments within its geographical area of authority, and the Act requires local governments to adopt and enforce such model ordinances on penalty of potential loss of, *inter alia*, state grants and loans for water, wastewater, and conservation projects.<sup>10</sup> The District required adoption of the above-referenced regulations and the included definitions. The Water Authority adopted the model ordinance through local regulations and is now attempting to enforce those regulations to avoid the penalty powers of the Director of the Environmental Protection Division of the Georgia Department of Natural Resources.<sup>11</sup>

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<sup>6</sup> See O.C.G.A. §§ 12-5-570 through -586.

<sup>7</sup> The power of a state, and in particular a political subdivision of a state, to regulate the United States is generally prohibited by the Supremacy Clause of the U.S. Constitution. U.S. CONST. art. VI.

<sup>8</sup> This form of the model ordinance was adopted by the Water Authority prior to 2006. Rockdale County adopted a definition of “person” to include “state agency,” “public or private corporation,” “public or private institution,” and “any interstate body or any other legal entity” in Section 106-1 in November 2006. In December 2006, the District modified its definitions in the model ordinance, similar to the Rockdale County ordinances, but excluding “state agency” and adding “except to the extent exempted from this ordinance.” However, here are no exemptions contained in the District’s 2006 model ordinance for the state or the United States. Accordingly, the District’s 2006 model ordinance continues to overreach the statutory authorization provided to the District and to those local governments that adopt the model ordinances.

<sup>9</sup> The Water Authority is using this provision to attempt to impose a stop work order against a DOT contractor who is performing work on a site, or who is otherwise in control of a site, and would attempt to enforce such a stop work order against the contractor as well as DOT, as the owner of the site.

<sup>10</sup> See O.C.G.A. § 12-5-582(e)(1) and (4), O.C.G.A. § 12-5-583(e)(4), and O.C.G.A. § 12-5-584(d)(4).

<sup>11</sup> See O.C.G.A. § 12-5-573(2), O.C.G.A. § 12-5-582(e)(3) and (4), O.C.G.A. § 12-5-583(e)(3) and (4), and O.C.G.A. § 12-5-584(d)(3) and (4).

A local government, authority, district, or commission cannot exceed the powers delegated to it in its enabling legislation. In order to determine whether a local government or authority has the statutory authorization to regulate the state, DOT, and other instrumentalities of the state, the particular statute, such as the Act under which authority the District's model ordinance was promulgated for adoption by the Water Authority, must be examined. Under the Act, the primary purpose of the District, as it relates to the Water Authority, is specified in O.C.G.A. § 12-5-572(c):

It is the primary purpose of the district to develop regional and watershed-specific plans for storm-water management, waste-water treatment, water supply, water conservation, and the general protection of water quality, which plans will be implemented by *local governments* in the district.

(Emphasis added.) Further, in O.C.G.A. § 12-5-573(5), the applicable governments to be affected by the Act are defined as:

“Local government” means any *county or municipality* of this state lying in whole or in part within the district area.

(Emphasis added.) Thus the Act does not expressly, or by implication, name or make the state, or any state department, agency, or authority, subject to the powers conferred by the Act upon the District.<sup>12</sup> It then follows that the District cannot confer a power upon a local government to regulate the state when neither the District nor local governments are vested with such authority. Therefore, local governments, having no inherent power<sup>13</sup> to regulate the state, and further having no power provided to them through the District, would be acting *ultra vires* in attempting to regulate and enforce such regulation against the state.

Therefore, it is my official opinion that the state and its departments, agencies, and authorities, including the Georgia Department of Transportation and its construction projects, are not subject to the “post-development stormwater runoff” regulations or other ordinances adopted by a local government, local authority, or regional authority, including the model ordinance promulgated by the Metropolitan North Georgia Water Planning District.

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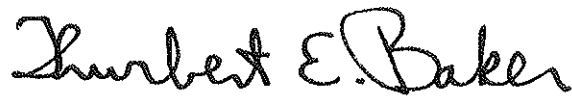
<sup>12</sup> See O.C.G.A. § 1-3-8; 1996 Op. Att’y Gen 96-4.

<sup>13</sup> See notes 2-4 and accompanying text *supra*.

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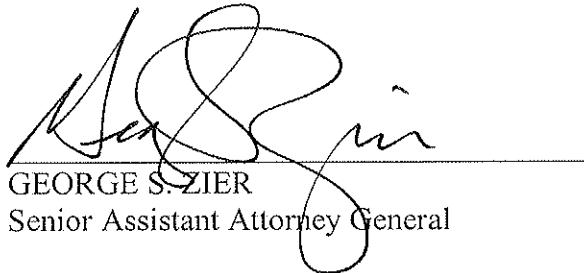
Issued this 9<sup>th</sup> day of July, 2009.

Sincerely,



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Prepared by:



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