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STATE OF ALABAMA
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Honorable Roderick V. Royal
President, Office of the City Council
City of Birmingham
710 North Twentieth Street
Birmingham, Alabama 35203

Air Pollution Control Act of 1971 -
Pollution Control – Municipalities –
Air Pollution – Environmental
Management Department – Jefferson
County

The City of Birmingham is prohibited from establishing its own local air pollution control program pursuant to the Alabama Air Pollution Control Act of 1971, codified in section 22-28-1, *et seq.*, as amended, of the Code of Alabama.

Dear President Royal:

This opinion of the Attorney General is issued in response to your request on behalf of the Birmingham City Council.

QUESTION

May the City of Birmingham establish its own local air pollution control program under the Alabama Air Pollution Control Act of 1971 (section 22-28-1, *et seq.*, as amended, of the Code)?

FACTS AND ANALYSIS

The City of Birmingham is considering establishing its own local air pollution control program.

Section 22-28-23(a) of the Alabama Air Pollution Control Act of 1971 expresses the Legislature's intent to preempt the field of air pollution control within the state. At subsection (b), however, the act recognizes the authorization of a limited class of preexisting local air pollution control programs. In pertinent part, section 22-28-23(a) and (b) reads as follows:

(a) Except as provided in this section, *it is the intention of this chapter to occupy by preemption the field of air pollution control within all areas of the State of Alabama.* However, nothing in this section shall be construed to limit or abrogate any private remedies now available to any person for the alleviation, abatement, control, correction, or prevention of air pollution or restitution for damage resulting therefrom.

(b) Subject to the provisions of this section, *each municipal governing body which had municipal ordinances in effect on, or before, July 1, 1969,* which pertain to air pollution control and which provide for the creation and establishment of an air pollution control board and each county board of health *shall have the authority to establish, and thereafter administer, within their jurisdictions, a local air pollution control program* which:

(1) Provides, subject to subsection (d) of this section, by ordinance, regulation, or resolution, for requirements for the control or prevention of air pollution consistent with, or more strict than, those imposed by this chapter or the rules, regulations, and standards promulgated by the commission under this chapter; . . .

ALA. CODE § 22-28-23 (2006) (emphasis added).

As the City of Birmingham acknowledges, it had no air pollution control program on or before July 1, 1969. The City also acknowledges

that the air pollution control program administered by the Jefferson County Department of Health existed at that time and continues to operate. Accordingly, the City of Birmingham does not satisfy the statutory prerequisite for authorization to establish and administer its own local air pollution control program.

In its request, the City cites section 22-28-23(d) of the Code and asks if that section can be interpreted to authorize the City of Birmingham to establish and administer a local program. The City also refers to section 22-28-23(c) of the Code

Section 22-28-23(c), (d), and (d)(1) reads as follows:

(c) No county board of health shall have the authority to exercise air pollution control jurisdiction within the bounds of any incorporated municipality or the police jurisdiction thereof having an air pollution control program as authorized

(d) Any municipal governing body and each county board of health may adopt and enforce any ordinance, regulation, or resolution requiring the control or prevention of air pollution as follows:

(1) Where any ordinance, regulation or resolution is identical in substance to requirements for the control or prevention of air pollution imposed by this chapter, or the rules, regulations, and standards promulgated by the commission under this chapter, then the ordinance, regulation or resolution may be adopted and enforced without further approval of the commission.

Id.

Subsections (c) and (d) can only be read to define the rule-making authority of those preexisting air pollution control programs authorized under statute, not expand the class of local programs that can be

Honorable Roderick V. Royal
Page 4

authorized. To read otherwise would render the date specifications in subsection (b) meaningless and defeat the general intent to preempt the field of air pollution in the state.

Because the City of Birmingham had no air pollution control program in effect on or before July 1, 1969, it is prohibited from establishing and administering one. The air pollution control program administered by the Jefferson County Department of Health, however, existed on or before July 1, 1969, and thus is fully authorized. Section 22-28-23(c) does not apply to Jefferson County because no municipal air pollution control program existed within the county at that time.

CONCLUSION

The City of Birmingham is prohibited by the Alabama Air Pollution Control Act of 1971 from establishing a municipal air pollution control program.

I hope this opinion answers your question. If this Office can be of further assistance, please contact me.

Sincerely,

LUTHER STRANGE
Attorney General
By:



BRENDA F. SMITH
Chief, Opinions Division

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