STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 18-05

The Copeland Cap and the Rainy Day Fund

Question 1

In determining whether "the rate of growth of appropriations from state tax revenues exceed[s] the estimated rate of growth of the state's economy" under article II, section 24 of the Tennessee Constitution, are funds that are allocated to the "reserve for revenue fluctuation" included in "appropriations from state tax revenues"?

Opinion 1

No.

Question 2

In determining whether "the rate of growth of appropriations from state tax revenues exceed[s] the estimated rate of growth of the state's economy" under article II, section 24 of the Tennessee Constitution, are funds previously allocated to the "reserve for revenue fluctuation" included in "appropriations from state tax revenues" in the year in which the funds are withdrawn?

Opinion 2

No.

ANALYSIS

Article II, section 24 of the Tennessee Constitution contains the following provision, which is known as the "Copeland Cap": [1]

> In no year shall the rate of growth of appropriations from state tax revenues exceed the estimated rate of growth of the state's economy as determined by law. No appropriation in excess of this limitation shall be made unless the General Assembly shall, by law containing no other subject matter, set forth the dollar amount and the rate by which the limit will be exceeded.

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[1] The provision was proposed in the Limited Constitutional Convention of 1977 and approved by the voters of Tennessee in 1978. It is called the "Copeland Cap" because former state Representative David Copeland successfully advocated for the amendment. *See* Journal of the Debates of the Constitutional Convention (1977), vol. II, pp. 1140-1141.

The Copeland Cap, in short, places a limit on “the rate of growth of appropriations from state tax revenues.” This rate is not to exceed “the estimated rate of growth of the state’s economy as determined by law.” The limit may be exceeded only when the legislature passes a law setting forth the amount and rate by which the limit will be exceeded. *See* Tenn. Const. art. II, § 24.

The purpose of the Copeland Cap is to promote accountability. By requiring that the rate of growth of appropriations can exceed the rate of growth of the economy only by deliberate action of the legislature, the process ensures that the legislature is aware of the rate at which appropriations are growing in relation to the economy. *See* Journal of the Debates of the Constitutional Convention (1977), vol. II, pp. 1111-1122.

The Copeland Cap is implemented by three statutory provisions. *See* Tenn. Code Ann. §§ 9-4-5201 to -5203. The first provision supplies the method to determine “the estimated rate of growth of the state’s economy.”[2] *See* Tenn. Code Ann. § 9-4-5201. The second provision requires the State Funding Board to prepare an estimated economic growth report and develop estimates of state revenues. *See* Tenn. Code Ann. § 9-4-5202. The third provision concerns the governor’s budget document and details the steps to be followed when (1) the percentage increase of “recommended appropriations from state tax revenues” in any budget document exceeds the percentage increase of “estimated Tennessee personal income as defined in § 9-4-5201, for the ensuing fiscal year” or when (2) the percentage increase of “appropriations of state tax revenue by the general assembly” exceeds the percentage increase of “estimated Tennessee personal income as defined in § 9-4-5201, for the ensuing fiscal year.” Tenn. Code Ann. §§ 9-4-5203(c), (d).

Accordingly, under article II, section 24 and the implementing statutes, state officials must compare total appropriations from the previous fiscal year with the appropriations in the budget for the upcoming fiscal year. When the appropriations for the upcoming year total more than appropriations for the previous fiscal year, officials must then determine the percentage of increase in appropriations. The result is compared to the estimated rate of growth in the State Funding Board’s report. If the increase is more than the estimated rate of growth, the excess must be explicitly authorized in a separate bill.

The questions at hand concern the interplay between the Copeland Cap and the “reserve for revenue fluctuations,” which is created by statute and which is commonly referred to as the “Rainy Day Fund.” Under Tenn. Code Ann. § 9-4-211(a)(1), “[a]mounts which may from time to time be in this reserve [for revenue fluctuations] shall be available, as hereafter provided, to meet unexpected shortfalls of revenue or to meet expenditure requirements in excess of budgeted appropriation levels.”

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[2] Article II, section 24 states that the estimated rate of growth of the economy is to be “determined by law.” Accordingly, Tennessee Code Annotated § 9-4-5201(a) provides that the estimated rate of growth is to be based on “the projected change in Tennessee personal income,” and Tennessee Code Annotated § 9-4-5201(b) provides that “Tennessee personal income shall consist of those sources of income included in the United States department of commerce’s definition of ‘personal income.’”

The statute requires every budget document and general appropriations bill to include an amount to be allocated to the Rainy Day Fund. This allocated amount is based on the state tax revenues allocated to the general fund and the education trust fund in the budget document and general appropriations bill. The statutory requirements are:

> Each year, beginning with the budget for the 1998-1999 fiscal year, the governor shall include in the budget document and the general appropriations bill prepared pursuant to § 9-4-5106, an amount to be *allocated* to this reserve at least equal to ten percent (10%) of the estimated growth in state tax revenues to be *allocated* to the general fund and the education trust fund. This *allocation* shall be included in the budget presented each year until the amount in the reserve equals eight percent (8%) of the estimated state tax revenues to be *allocated* to the general fund and the education trust fund for that year. In subsequent budgets, the governor shall include an *allocation* to the reserve equal to the lesser of:
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> (A) An amount equal to ten percent (10%) of the estimated growth in state tax revenues to be *allocated* to the general fund and the education trust fund; or
>
> (B) An amount sufficient to maintain the reserve at eight percent (8%) of the estimated state tax revenues to be *allocated* to the general fund and the education trust fund for that year.

Tenn. Code Ann. § 9-4-211(a)(2) (emphasis added).

Amounts available in the reserve for revenue fluctuations may be used by the commissioner of finance and administration "to offset shortfalls in state tax revenues which may occur and for which funds are not otherwise available." Tenn. Code Ann. § 9-4-211(b). The remainder of the statute describes the process for the commissioner to tap into the reserve to offset shortfalls, *see* Tenn. Code Ann. § 9-4-211(c), and to use funds to meet expenditure requirements in excess of budgeted appropriation levels. *See* Tenn. Code Ann. § 9-4-211(d).

Funds Allocated to the Rainy Day Fund

Clearly, the General Assembly has provided that amounts are to be "allocated" to the Rainy Day Fund rather than "appropriated." *See* Tenn. Code Ann. § 9-4-211(a)(2). "Allocate" and "appropriate" are not synonymous. An "allocation" is "[t]he amount or share of something that has been set aside or designated for a particular purpose." *Black's Law Dictionary* 91 (10th ed. 2009). An "appropriation," on the other hand, is "an authority from the legislature, given at the proper time and in legal form, to the proper officers, to apply sums of money, out of that which may be in the treasury in a given year, to specified objects or demands against the state." *State ex rel. Noonan v. King*, 108 Tenn. 271, 276, 67 S.W. 812, 813 (1902). Amounts allocated to the Rainy Day Fund represent a backup source for funding appropriations that the General Assembly has made from estimated tax revenues. Thus, using funds from the Rainy Day Fund for their statutory purposes will not increase total appropriations in the state budget.

Accordingly, state tax revenue allocated to the Rainy Day Fund in the budget document should not be included in "appropriations from state tax revenues" when determining whether the Copeland Cap has been exceeded.

Funds Withdrawn from the Rainy Day Fund

The next consideration is whether funds previously allocated to the Rainy Day Fund are included in the Copeland Cap calculation in the year in which the funds are withdrawn.

An important initial observation is that the Copeland Cap considers only "appropriations from state tax revenues." The State receives revenues from sources other than state tax revenues – license fees and federal funds, for example. Appropriations from these other sources are not included in the Copeland Cap calculation. Thus, the analysis must look only to state tax revenues previously allocated to the Rainy Day Fund and consider whether these revenues retain their character as "state tax revenues" under article II, section 24 once they have been allocated to the Rainy Day Fund.

Well-established constitutional construction principles guide this inquiry. Courts must construe constitutional provisions with respect to the intentions of the persons who adopted them. *Cleveland Surgery Ctr. v. Bradley Cnty. Mem'l Hosp.*, 30 S.W.3d 278, 281-282 (Tenn. 2000); *Gaskin v. Collins*, 661 S.W.2d 865, 867 (Tenn. 1983). These intentions are reflected in the words of the constitution itself. *Cleveland Surgery Ctr.*, 30 S.W.3d at 282. Thus, courts must interpret constitutional provisions in a principled way that gives terms their ordinary and inherent meaning. *Estate of Bell v. Shelby Cnty. Health Care Corp.*, 318 S.W.3d 823, 835 (Tenn. 2010); *State ex rel. Cohen v. Darnell*, 885 S.W.2d 61, 63 (Tenn. 1994). Moreover, courts must construe the state constitution as a whole to harmonize and give effect to each of its provisions. *Estate of Bell*, 318 S.W.3d at 835.

The term "revenues" appears in both the first and second paragraphs of article II, section 24. Both of these paragraphs were part of the same amendment approved by the 1977 Constitutional Convention and ratified by the voters in 1978.

The first paragraph of article II, section 24 uses the term "revenues" as distinct from "reserves":

> No public money shall be expended except pursuant to appropriations made by law. *Expenditures for any fiscal year shall not exceed the state's revenues and reserves*, including the proceeds of any debt obligation, for that year. No debt obligation, except as shall be repaid within the fiscal year of issuance, shall be authorized for the current operation of any state service or program, nor shall the proceeds of any debt obligation be expended for a purpose other than that for which authorized.

Immediately following this provision, the second paragraph establishing the Copeland Cap begins with the sentence: "In no year shall the growth of appropriations from state tax *revenues* exceed the estimated rate of growth of the state's economy as determined by law." This sentence contains only the term "revenues"; it does not contain the term "reserves."

Black's Law Dictionary defines "revenue" in part as follows:

> **revenue**. 1. *Income* from any and all sources; gross income or gross receipts. 2. The *total current income* of a government, however, derived; esp., taxes.
>
> **general revenue**. The *income* stream from which a state or municipality pays its obligations unless a law calls for payment from a special fund.

Black's Law Dictionary 1513 (10th ed. 2009) (emphasis added).

The same dictionary defines "income" in part as follows:

> **income**. The money or other form of payment that one receives, usu. *periodically*, from employment, business, investments, royalties, gifts, and the like. See EARNINGS. Cf. PROFIT.

Id. at 880 (emphasis added).

By contrast, the same dictionary defines the term "reserve" as follows:

> **reserve**, n. 1. Something retained or stored for future use; esp., a fund of money set aside by a bank or an insurance company to cover future liabilities.

Id. at 1501.

The first paragraph of article II, section 24 reflects the distinction between "revenues" and "reserves" by providing that "[e]xpenditures for any fiscal year shall not exceed the state's revenues *and* reserves, including the proceeds of any debt obligation, for that year." This sentence provides a limit for expenditures in any fiscal year: The limit is the sum of revenues received in a fiscal year; funds on hand as reserves, whatever the original source; and the proceeds of long-term debt issued that year. The next sentence of the first paragraph of article II, section 24 then provides that the State may not finance current expenses for any state service or program by issuing debt unless the debt is repaid within the same fiscal year. Thus, the State may not incur long-term obligations to fund current expenses.

The next sentence of article II, section 24, which sets the cap on appropriations, must be read within this context. This sentence limits the rate of growth of state appropriations from state tax revenue within a year. In light of the earlier use of the term "revenues" as distinct from "reserves" in the first paragraph, logically the term "state tax revenues" refers only to revenues received in that fiscal year. Further, the rate of growth may not exceed the "estimated rate of growth of the state's economy as determined by law." Estimated growth is calculated solely on the basis of the preceding year. Tenn. Att'y Gen. Op. 85-153 (May 7, 1985) (documenting view that framers intended a year-by-year approach). Thus, the rate of growth looks to economic activity from year to year, and it is logical to compare this rate with appropriations from tax revenues received from year to year.

Accordingly, when state officials calculate the rate of growth, they may include only appropriations from state tax revenues that are received in the fiscal year. Appropriations from the reserve for revenue fluctuation, to the extent it includes state tax revenue from the earlier year, are not included in the Copeland Cap calculation.

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