S T A T E O F T E N N E S S E E
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Opinion No. 00-119

Authority of Tennessee Board of Architectural and Engineering Examiners to adopt policies

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QUESTIONS

1. Does the Tennessee Board of Architectural and Engineering Examiners (the "Board") have authority to adopt policies such as those set forth on the Board's internet web site (www.state.tn.us/commerce/aepolicy.htm) (hereinafter, the "Internet Policies'") and in the publication entitled "Tennessee Board of Architectural And Engineering Examiners Reference Manual for Building Officials and Design Professionals" (hereinafter, the "Manual")?

2. More specifically, does the Board have authority to adopt the policy entitled "Seal Exemptions Clarification (T.C.A. Section 62-2-102(b))," which appears on Page 11 of 15 of the Internet Policies?

3. Similarly, may the Board include the "Seal Exemptions Clarification" policy in *Appendix D* of the Manual?

OPINIONS

1. Yes, the Board has authority to adopt the policies at issue.

2 -3. Yes, the Board has authority to adopt the "Seal Exemptions Clarification" policy relating to Tenn. Code Ann. § 62-2-102(b).

ANALYSIS

1. Tennessee Code Ann. §§ 62-2-101 through -602 govern the registration of architects and engineers (the "registration statutes"). The Board is the regulatory board responsible for administering this program. The Board has the responsibilities of examining the qualifications of applicants for registration and, in proper cases, issuing certificates of registration. *See* Tenn. Code Ann. §§ 62-2-301 and -304. The Board also may suspend or revoke certificates of registration in cases of misconduct. Tenn. Code Ann. § 62-2-308. Additionally, the Board has the duty to inquire into the identity of any person (or firm) claiming to be an architect or engineer and to prosecute persons violating provisions of the registration law. Tenn. Code Ann. §§ 62-2-105 and -106.

You first inquire whether the Board has authority to adopt policies such as the Internet policies and the policies contained in the Manual. The Internet Policies, for the most part, are comprised of policies that clarify the meaning of statutory provisions or explain various practices of the Board.[1] Most of them express a systematic response to or provide guidance for recurring situations that arise before the Board with respect to aspects of the registration statutes. The Manual contains a summary of the registration statutes as well as some of the Internet Policies. It also includes a section that addresses questions often asked by building officials. The Manual provides that it "has been published . . . to aid building officials, design and construction professionals, and the general public in understanding the laws of this state governing the practice of architecture, engineering. . . ." In the foreword of the Manual, the Board stipulates: "Information contained herein is basic and not intended to be a complete discussion of the Tennessee law."

Turning to the issue of whether the Board may adopt policies, it is well established that the Board may not take any action so as to exceed its statutory authority. *General Portland v. Chattanooga Air Pollution Control Bd.*, 560 S.W.2d 910 (Tenn. Ct. App. 1976). The legislature has delegated broad authority to the Board to administer the registration statutes, and the Board's policies clarify some of these registration statutes. In general, administrative interpretation of statutes by agencies charged with enforcement or administration are customarily given respect and accorded deference by courts, especially where the interpretations are unchallenged over a long period of time. *Riggs v. Burson*, 941 S.W.2d 44, 50-51 (Tenn. 1997); *Covington Pike Toyota, Inc. v. Cardwell,* 829 S.W.2d 132, 134 (Tenn. 1992); *Nashville Mobilphone Co. v. Atkins*, 536 S.W.2d 335, 340 (Tenn. 1976); *Wayne Cty. v. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279-280 (Tenn. Ct. App.1988). As discussed later in this opinion, in analyzing policies, such as those adopted by the Board, one must consider whether the policies conflict with any of the registration statutes and whether the policies further the legislature's intent for requiring registration in the first place. The introductory provision of the registration statutes, Tenn. Code Ann. § 62-2-101, sets forth the broad purpose for Tennessee's registration requirement. This section provides in relevant part: "In order to safeguard life, health and property, and to promote public welfare," only registered architects and engineers shall practice architecture and engineering.

In this instance, the Board has adopted policies, many of which clarify or explain statutes. It is the opinion of this Office that the Board has authority to adopt such policies, because the policies appear to fall within the Board's area of technical expertise.[2] The legislature has delegated broad discretionary authority to the Board to administer the registration statutes. The Board appears to have adopted the policies at its regular meetings, and in many instances, after discussion with

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[1]Tennessee Code Ann. § 4-5-102 (10) lists the circumstances under which an agency may adopt policies instead of promulgate rules pursuant to Tenn. Code Ann. §§ 4-5-201 through -227. The Board's policies fall within the category of "general policy statements which are substantially repetitious of existing law." *See* Tenn. Code Ann. § 4-5-102 (10)(D).

[2]This opinion does not address individual policies except for the ones specifically referenced in the opinion request.

representatives of the industry. Most of the policies provide guidance to the industry for recurring situations that arise before the Board. Therefore, in light of the broad responsibilities delegated to the Board and the nature of the policies, it is the opinion of this Office that the Board has authority to adopt policies of this type.

2. and 3. You next ask whether the Board may adopt the policy named "Seal Exemptions Clarification (Section 62-2-102(b))," which appears on page 11 of the Internet Policies and Appendix D of the Manual. You also state your opinion that the policy conflicts with Tenn. Code Ann. § 62-2-102(b).

Your request for an opinion regarding this policy involves analysis of Tenn. Code Ann. § 62-2-102(b). This provision requires that all plans and specifications for buildings and structures must be prepared by a registered architect or engineer except as follows:

> (b)(1) Structures classified as "business," "factory-industrial," "hazardous," "mercantile," "residential" and "storage" occupancies, as such occupancies are defined in the 1985 edition of the Standard Building Code, which are:
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> (A) Less than three (3) stories in height; and
>
> (B) Less than five thousand square feet (5,000 sq. ft.) in total gross area;
>
> (2) One-family and two-family dwellings and domestic outbuildings appurtenant thereto; or
>
> (3) Farm buildings not designed or intended for human occupancy.

With the Seals Exemption Clarification policy, the Board addresses the first exemption set forth in Tenn. Code Ann. § 62-2-102(b). The policy reads:

> **Seal Exemptions Clarification (T.C.A. Section 62-2-102(b))**
> The following are situations where a registrant is not required:
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> 1. Tenant finishes and tenant improvements to a building of either B, F, M, or S occupancy may be designed by a nonregistrant with the following provisions:
>
> A. Each separate tenant space is less than 5,000 square feet in a structure that is less than three stories in height, and

> the tenant spaces are separated from other tenant spaces by a two-hour rated wall; and
>
> B. Remodeling, maintenance or renovation of any building or structure which does not alter the structural system or alter fire protection or egress requirements.
>
> 2. Normal maintenance or replacement of defective mechanical equipment with like equipment may be accomplished by contractors licensed in their respective trades.
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> 3. Mechanical design. The design of a mechanical system for a building or structure of group B occupancy, Group F occupancy, Group M occupancy, Group S occupancy and a temporary structure, wherein the HVAC system developed is not more than a total of 12.5 ton capacity and not more than a total of 500,000 BTU of heating per hour output.

The policy adds a "historical footnote," which provides that the policy "was adopted by the Board as a result of negotiations with construction-related industry representatives to get T.C.A. Section 62-2-102(b) enacted into law." It also indicates that the policy was adopted in 1989 and most recently was revised and adopted again in 1997.

It is the opinion of this Office that the Board has acted within its statutory authority. This policy simply clarifies situations in which the Board has determined that a registered architect or engineer is not necessary to further the underlying public safety purpose of the registration requirement. *See* Tenn. Code Ann. § 62-2-101. Further, as discussed below, the policy comports with the limitations set in Tenn. Code Ann. § 62-2-102(b) relating to height and area.

You have indicated that the policy conflicts with Tenn. Code Ann. § 62-2-102(b). At first impression, the first situation described in the policy may appear to conflict with subpart (b)(1) of the statute. The statute prescribes registration for all structures classified as B, F, H, M, R, and S[3] occupancies, which are three or more stories in height and 5,000 square feet or more in gross area. The policy, on the other hand, states that plans may be prepared by a nonregistrant for "tenant finishes and tenant improvements to a building of either B, F, M, or S occupancy" as long as "each separate tenant space is less than 5,000 square feet in a structure that is less than three stories in height, and the tenant spaces are separated from other tenant spaces by a two-hour rated wall."

[3]Under the 1985 Standard Building Code, the types of occupancies are shortened to letters as follows: "B" is "business;" "F" is "factory-industrial;" "H" is "hazardous;" "M" is "mercantile;" "R" is "residential;" and "S" is "storage."

We find no conflict between the statute and the policy. The statute specifically incorporates by reference the 1985 edition of the Standard Building Code (the "Code"). *See* Tenn. Code Ann. § 62-2-102(b). Section 402.1.2 of the Code addresses the situation covered by the policy. The Code states in relevant part: "For the purpose of this Code, each part of a building or structure included within fire walls shall be considered a separate building." Therefore, the Code treats individual areas of a building, such as tall office building, as a separate building. It is evident that the Board, in adopting the policy, merely incorporated the Code's treatment of tenant build-out situations. This policy conforms to the underlying safety purpose of Tennessee's registration requirement.

Additionally, the Manual addresses this policy and demonstrates the Board's commitment to furthering the public safety purpose of the registration requirement. First, on page 11, an explanatory note to Tenn. Code Ann. § 62-2-102(b) provides in relevant part:

> The Board has interpreted the above exceptions (See **Appendix D** entitled "Seal exemptions --Clarification") only for those structures classified . . . which are also separated from other buildings and/or spaces/tenants by at least two-hour construction. Only one-hour separation is required for commercial, retail, mercantile, and business occupancies in single story structures where two exterior exits are provided per single tenant space, such as strip shopping centers and strip office buildings.

Second, in the questions and answers section of the Manual, the Board clarifies that a registered engineer or architect must prepare the plans for the structure as a whole. The Seal Exemption Clarification applies solely to the individual tenant areas in the structure. Question 31 of the Manual reads:

> 31. Is a registered architect or engineer required to prepare and seal drawings for an existing building space over 5,000 square feet if the space is going to be divided into several spaces less than 5,000 square feet?
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> Yes. While the particular use of a facility may ultimately have individual spaces less than 5,000 square feet and separated by fire-rated construction from other tenants, the overall space requires a registered architect or engineer to be sure construction, egress, system, etc., are properly designed and integrated collectively.

In sum, it is the opinion of this Office that the Board has authority to adopt the Seal Exemption Clarification policy. The policy simply addresses a common situation in the construction industry, which the statute does not explicitly address. The statute, however, incorporates the 1985 Standard Building Code, which expressly treats portions of a building as separate structures. Using the

discretion granted to it by the legislature, the Board adopted the policy. The policy does not go against the registration statutes' underlying public safety purpose. Moreover, it should be noted that this policy has been in existence since 1989, and the legislature has never amended Tenn. Code Ann. § 62-2-102(b).

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