

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 06-176

Domestic nonprofit water cooperative merging with or transferring assets to municipality

QUESTIONS

1. Whether a domestic nonprofit water cooperative, incorporated pursuant to the Tennessee Nonprofit Corporation Act, Tenn. Code Ann. §§ 48-51-101, *et seq.*, may merge with an adjacent municipality that operates its own water utility system?

2. Whether a domestic nonprofit water cooperative, incorporated pursuant to the Tennessee Nonprofit Corporation Act, Tenn. Code Ann. §§ 48-51-101, *et seq.*, may transfer all of its assets, including accumulated cash on hand and accounts receivable, to an adjacent municipality that operates its own water utility system?

3. If the answer to the second question is in the affirmative, may the cooperative have its assets contractually dedicated to specific improvements within the cooperative's service area?

OPINIONS

1. No.

2. Yes.

3. Whether the parties may contractually require that the cooperative's assets be dedicated to specific improvements within the cooperative's service area would depend on specific facts and circumstances.

ANALYSIS

1. The first question is whether a domestic nonprofit water cooperative, incorporated pursuant to the Tennessee Nonprofit Corporation Act, Tenn. Code Ann. §§ 48-51-101, *et seq.*, may merge with an adjacent municipality that operates its own water utility system. Tenn. Code Ann. §§ 48-61-101 to -107 govern mergers involving nonprofit corporations; however, Tenn. Code Ann. § 48-51-104 states as follows:

The provisions of chapters 51-68 of this title shall apply to every nonprofit corporation now existing or hereafter formed; provided, that if there are other

specific statutory provisions which govern the formation of, impose restrictions or requirements on, confer special powers, privileges or authorities on, or fix special procedures or methods for, special categories of corporations, then to the extent such provisions are inconsistent with or different from chapters 51-68 of this title, such provisions shall prevail.

Tenn. Code Ann. § 48-51-104.

Thus, any statutes specifically governing mergers of water cooperatives shall prevail to the extent such provisions are inconsistent with Tenn. Code Ann. §§ 48-61-101 to -107. In the absence of any such inconsistent provisions, Tenn. Code Ann. §§ 48-61-101 to -107 govern mergers of water cooperatives. Tenn. Code Ann. §§ 65-26-101 to -109 address water and waterworks companies. Merger of such companies, however, is not addressed in these provisions. Thus, the merger provisions of Tenn. Code Ann. §§ 48-61-101 to -107 apply to domestic nonprofit water cooperatives.

Tenn. Code Ann. § 48-61-101 provides that a nonprofit corporation may merge with a for-profit corporation or a nonprofit corporation, subject to certain limitations. It, however, does not provide that a nonprofit corporation may merge with a municipal corporation. Under statutory construction principles, the mention of one subject in a statute means the exclusion of other subjects that are not mentioned. *Penley v. Honda Motor Co., Ltd.*, 31 S.W.3d 181, 185 (Tenn. 2000); *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). Thus, a domestic nonprofit water cooperative may not merge with an adjacent municipality that operates its own water utility system.

2. & 3. The next question is whether a domestic nonprofit water cooperative, incorporated pursuant to the Tennessee Nonprofit Corporation Act, Tenn. Code Ann. §§ 48-51-101, *et seq.*, may transfer all of its assets, including accumulated cash on hand and accounts receivable, to an adjacent municipality operating its own water utility system. To answer this question, it is necessary to examine the authority of a domestic nonprofit water cooperative to make such a transfer. Similarly, it is necessary to examine the authority of a municipality to acquire the assets of such a domestic water cooperative located outside its boundaries.

The authority of a domestic nonprofit water cooperative to transfer all of its assets will be examined first. While the question posed to this Office does not give exact details as to the type of transfer contemplated, the Tennessee Nonprofit Corporation Act contains several provisions that allow a nonprofit corporation to transfer assets. First, under Tenn. Code Ann. § 48-53-102(a), a corporation's general powers include the following:

(a) Unless its charter provides otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including, without limitation, power to:

* * * *

(5) Sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of, or grant a security interest in, all or any part of its property[.]

Tenn. Code Ann. § 48-53-102(a)(5).

Next, Chapter 62 of Title 48 expressly addresses the sale of assets by a nonprofit corporation. Specifically, Tenn. Code Ann. § 48-62-101 addresses the sale of assets in the regular course of business, and Tenn. Code Ann. § 48-62-102 addresses the sale of assets other than in the regular course of activities. The latter section addresses the situation where a nonprofit corporation desires to sell all or substantially all of its assets. Subsection (a)(1) of this statute provides as follows:

A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property (with or without the good will) other than in the usual and regular course of its activities, on the terms and conditions and for the consideration determined by the corporation's board, if the proposed transaction is authorized by subsection (b).

Tenn. Code Ann. § 48-62-102(a)(1). Subsection (b) provides as follows:

Unless chapters 51-68 of this title, the charter, bylaws, or the board of directors or members (acting pursuant subsection (d)) require a greater vote or voting by class, the proposed transaction to be authorized must be approved:

- (1) By the board;
- (2) By the members by two-thirds (**b**) of the votes cast or a majority of the voting power, whichever is less; and
- (3) In writing by any person or persons whose approval is required by the charter authorized by § 48-60-301 for an amendment to the charter or bylaws.

Tenn. Code Ann. § 48-62-102(b).

Subsection (b) of Tenn. Code Ann. § 48-62-102 is then followed by several other subsections that may apply depending on the facts and circumstances. For instance, subsection (g) provides:

A public benefit corporation¹ must give written notice to the attorney general and reporter at least twenty (20) days before it sells, leases, exchanges or otherwise disposes of all, or substantially all, of its property in a transaction not in the usual and regular course of its activities unless the attorney general and reporter has given the corporation a written waiver of this subsection.

Tenn. Code Ann. § 48-62-102(g).

Finally, Chapter 64 of Title 48 contains several provisions addressing the transfer of assets when a nonprofit corporation dissolves. Thus, various statutory provisions could be invoked by the

¹ Tenn. Code Ann. § 48-68-104 divides nonprofit corporations into two categories: public benefit corporations and mutual benefit corporations.

water cooperative to transfer its assets, depending on the facts and circumstances and the existence of any restrictions in an applicable private act, the water cooperative's charter or by-laws, and the provisions of any legal instruments through which the water cooperative gained its assets.

Assuming that the water cooperative may transfer its assets, the next consideration is whether it may transfer those assets to an adjacent municipality that operates its own utility system. Thus, it is necessary to examine the authority of a municipality to acquire the assets of such a domestic water cooperative located outside its boundaries. Several provisions authorize such.

First, Tenn. Code Ann. § 7-51-401 permits a municipality to conduct utility services outside its boundaries. This statute provides as follows:

- (a) Except as provided in § 7-82-302,² each county, utility district, municipality or other public agency conducting any utility service specifically including waterworks, water plants and water distribution systems and sewage collection and treatment systems is authorized to extend such services beyond the boundaries of such county, utility district, municipality or public agency to customers desiring such service.
- (b) Any such county, utility district, municipality or public utility agency shall establish proper charges for the services so rendered so that any such outside service is self-supporting.
- (c) No such county, utility district, municipality or public utility agency shall extend its services into sections of roads or streets already occupied by other public agencies rendering the same service, so long as such other public agency continues to render such service.

Tenn. Code Ann. § 7-51-401.

Next, Tenn. Code Ann. §§ 7-35-401 to -432 address the powers of municipalities with respect to sewers and waterworks. Tenn. Code Ann. §§ 7-35-401 and -402 provide that an incorporated city may acquire and operate a waterworks system to provide water within or without the corporate limits of such city. Tenn. Code Ann. § 7-35-401, in pertinent part, states as follows:

- (a) Every incorporated city and town in this state is authorized and empowered to own, acquire, construct, extend, equip, operate and maintain within or without the corporate limits of such city or town a waterworks system or a sewerage system, to provide water or sewerage service and to charge for such service.
- (b) As used in this part, unless the context otherwise requires:
* * * *
- (2) "Waterworks system" means all or any part of the following:
 - (A) Source of supply;

² Tenn. Code Ann. § 7-82-302 pertains to utility districts and their power to operate utilities.

- (B) Pumping facilities;
- (C) Purification works;
- (D) Storage facilities;
- (E) Distribution system; and
- (F) All necessary parts and appurtenances for proper orientation[.]

Tenn. Code Ann. § 7-35-401(a) & (b). Then, Tenn. Code Ann. § 7-35-402 provides as follows:

One (1) or more waterworks or sewerage systems, owned by one (1) or more persons or corporations, may be acquired under authority of this part as a single enterprise, and the governing body of a city or town shall be and is empowered to enter into agreement with the owners as to the value of the waterworks or sewerage systems, and to purchase the waterworks or sewerage systems at an agreed price to be fixed by resolution passed by the governing body of the city or town upon three (3) separate readings on three (3) separate days. The city or town shall be understood to have all authority necessary to combine new works acquired under the provisions of this part by purchase, construction or otherwise with any similar existing works owned by the city or town, all to be a part of the same single enterprise under the same supervision and control.

Tenn. Code Ann. § 7-35-402.

Further, Tenn. Code Ann. § 7-35-412, in pertinent part, provides:

The board of waterworks or sewerage commissioners, constituted and appointed as provided in this part and referred to in this part as the “board,” has the power to take all steps and proceedings and to make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this part, subject only to limitations on matters requiring approval by the governing body of the city or town in question. From and after its first meeting, the board shall act in an advisory capacity to the governing body of the city or town in all matters pertaining to the financing of the enterprise and the acquisition of any or all parts of the proposed works or extensions to the works by purchase, condemnation or construction, and it is the board’s duty to collect and furnish all necessary data and information, and to recommend such appropriate action by the governing body as may appear to the board to be necessary from time to time. Subject to and after approval by the governing body of the city or town, the board shall have the power, and it shall be the board’s duty, to proceed with all matters pertaining to construction, extensions, improvements and repairs necessary to proper completion of the works. After completion and acceptance of the works by the board, and approval of such acceptance by the governing body of the city or town, the board shall have the power, and it shall be its duty, to proceed with all matters and perform everything necessary to the proper operation of the works and collection

of charges for services rendered, subject only to the limitation of funds available for operation and maintenance.

Tenn. Code Ann. § 7-35-412.

Finally, the Revenue Bond Law, Tenn. Code Ann. §§ 7-34-101, *et seq.*, and the Local Government Obligations Law, Tenn. Code Ann. §§ 9-21-101, *et seq.*, also give a municipality the power to acquire and operate public works within or without the municipality. Under Tenn. Code Ann. § 7-34-102(3), “public works” is defined to include water supply and distribution systems. Similarly, Tenn. Code Ann. § 9-21-105 (21)(A) defines “public works project” to include water treatment distribution and storage systems.

Specifically, Tenn. Code Ann. § 7-34-104(a) gives municipalities the power to:

(1) Construct, acquire by gift, purchase, or exercise the right of eminent domain, reconstruct, improve, better or extend any public works, within or without the municipality, or partially within or partially without the municipality, and acquire by gift, purchase, or exercise the right of eminent domain, lands, rights in land or water rights in connection with lands, rights in land or water rights;

(2) Operate and maintain any public works for its own use or for the use and benefit of its inhabitants, and also operate and maintain such public works for the use and benefit of persons, firms, and corporations, including municipal corporations and inhabitants of municipal corporations whose residences or places of businesses are located outside the territorial boundaries of the municipality;

* * * *

(7) Contract with any person, municipality, the United States, the president of the United States, the Tennessee valley authority, and any and all other authorities, agencies, and instrumentalities of the United States, and, in connection with any such contract, stipulate and agree to such covenants, terms and conditions as the governing body may deem appropriate, including, but not limited to, covenants, terms and conditions with respect to the resale rates, financial and accounting methods, services, operation and maintenance practices, and the manner of disposition of the revenues of the public works, operated and maintained by the municipality[.]

Tenn. Code Ann. § 7-34-104(a)(1), (2) & (7).

Similarly, Tenn. Code Ann. § 9-21-107 gives all local governments the power and authority to:

(1) Engage in the construction³ of any public works project which may be constructed within or without the local government, or partially within and partially without the local government. However, no local government shall engage in the construction of a public works project wholly or partly within the legal boundaries of another local government except with the consent of the governing body of the other local government; provided, that any county or metropolitan government may construct a public works project within a municipality within the county or metropolitan government without the permission of the governing body of the municipality;

(2) Operate and maintain any public works project for its own purpose or for the benefit and use of its inhabitants and, in the case of municipalities, also to operate and maintain such public work projects for the benefit and use of the municipality and persons, firms and corporations therein and persons, firms and corporations, including municipal corporations, which are situated or whose residences or places of business are situated outside the territorial boundaries of the municipality but within the state and within a radius of twenty (20) miles from the territorial boundaries of the municipality[.]

Tenn. Code Ann. § 9-21-107(1) & (2).

Apart from these statutory provisions, a municipality may be able to derive the authority to acquire and operate utility systems from powers granted in its charter. *Nashville Electric Service v. Luna*, 185 Tenn. 175, 204 S.W.2d 529 (Tenn. 1946); *Kennan & Wade v. City of Trenton*, 130 Tenn. 71, 168 S.W. 1053 (Tenn. 1914); *City of Memphis v. The Memphis Water Co.*, 52 Tenn. 495 (Tenn. 1871). Each of the statutory schemes discussed above provides that each is intended to be supplemental to powers conferred by other laws. Tenn. Code Ann. § 7-34-118; Tenn. Code Ann. § 7-35-432; Tenn. Code Ann. § 9-21-124.

Based on information provided this Office, we were able to determine that the charter of the subject municipality gives it the power “[t]o acquire, construct, own, operate and maintain public utilities . . . or any estate or interest therein, or any other utility or service to the city, its inhabitants or any part thereof; or to inhabitants in areas adjacent to the city.” The charter also creates a Utilities Board to control and manage the purchase, production, and distribution of water both within and without the limits of the municipality. Under the charter, the Utilities Board is granted all the powers and duties possessed by the municipality to “construct, acquire, expand or operate the system.” The charter also bestows upon the Utilities Board the power to “make all contracts and do any and all acts and things that are necessary, convenient or desirable in order to operate, maintain, enlarge, extend, preserve and promote an orderly, economic and businesslike administration of the system.”

³ “Construction” is defined to include acquisition and purchase. Tenn. Code Ann. § 9-21-105(4).

In sum, statutory authority exists for a domestic nonprofit water cooperative to transfer all of its assets to a municipality that operates its own water utility system, and statutory and charter authority exists for the subject municipality to acquire and operate a water distribution system outside of its boundaries. Whether this particular water cooperative and municipality may contractually dedicate the water cooperative's assets to specific improvements within the cooperative's service area, however, would depend on the facts and circumstances. A private act may have bearing on this inquiry. Likewise, the water cooperative's charter and by-laws may have some bearing on this inquiry. The answer also could depend on the terms and conditions of any agreements under which either the cooperative or municipality has financed its system assets. Finally, we note that Tenn. Code Ann. § 7-35-414(a) requires a municipality acquiring and operating a waterworks system to establish and maintain just and equitable rates to be paid by the beneficiary of the service. Any contractual arrangement seeking to dedicate the cooperative's assets to specific improvements within the cooperative's service area should not interfere with the municipality's duty to charge fair rates to all of its customers.

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