

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

March 12, 2007

Opinion No. 07-28

County Regulatory Authority

QUESTIONS

1. May a county government regulate an electric utility by prohibiting electricity hookup unless a county building permit is issued?
2. May a county government institute and collect civil penalties up to five hundred dollars per violation for permit or zoning violations?
3. May a county government have one building permit fee for an individual who obtains a permit before beginning construction, and a different permit fee for an individual who obtains a permit after construction has begun?

OPINIONS

1. Yes, where a county has adopted zoning ordinances under Tenn. Code Ann. §§ 13-7-101, *et seq.*, the county is authorized to regulate an electric utility by prohibiting a hookup unless a county building permit is issued. Under Tenn. Code Ann. § 5-1-118(c), a county is also authorized, by a two-thirds vote of the county commission, to adopt regulations that would prohibit providing electric service to a building unless a building permit has been obtained.
2. Yes, under Tenn. Code Ann. § 5-1-121, counties are expressly authorized to impose a fine of up to five hundred dollars for each violation of an authorized rule or regulation.
3. If the county can articulate a rational basis for charging the different fees, then the practice would be defensible.

ANALYSIS

1. County Authority to Require Permit before Electricity Hookup

This opinion addresses the regulatory authority of counties. A county, as a creature of the legislature, has no power except that expressly given by or necessarily implied from state law. *State ex rel. Witcher v. Bilbrey*, 878 S.W.2d 567, 571 (Tenn. Ct. App. 1994), *p.t.a. denied* (1994). Under Tenn. Code Ann. §§ 13-7-101, *et seq.*, counties are authorized to adopt zoning in unincorporated

parts of the county. Tenn. Code Ann. § 13-7-110 expressly authorizes a county commission to provide for enforcement of its zoning regulations by means of withholding building permits. The statute authorizes appointment of a county building commissioner, after whose appointment no building may be used unless a building permit is issued. In our opinion, it is necessarily implicit from this statute that a county may prohibit a building for which no permit has been issued from having an electricity hookup in order to prevent its use. Thus, where a county has adopted zoning ordinances under Tenn. Code Ann. §§ 13-7-101, *et seq.*, the county is authorized to regulate an electric utility by prohibiting an electricity hookup unless a county building permit is issued.

But a county need not adopt zoning to exercise this authority. Counties may generally exercise broad police powers granted to cities by a resolution adopted by a two-thirds vote of the county commission. Tenn. Code Ann. § 5-1-118. Under subsection (c) of that statute, counties may exercise the authority granted to cities under Tenn. Code Ann. § 6-2-201(22) and (23) subject to certain limits. These provisions include the power to:

(22) Define, prohibit, abate, suppress, prevent and regulate all acts, practices, conduct, businesses, occupations, callings, trades, uses of property and all other things whatsoever detrimental, or liable to be detrimental, to the health, morals, comfort, safety, convenience or welfare of the inhabitants of the municipality, and exercise general police powers;

(23) Prescribe limits within which business occupations and practices liable to be nuisances or detrimental to the health, morals, security or general welfare of the people may lawfully be established, conducted, or maintained.

Tenn. Code Ann. § 6-2-201(22) and (23). Tenn. Code Ann. § 5-1-118(c) outlines limits within which counties may exercise this authority. None of the limits in the statute would prevent a county from prohibiting providing electric service to a building unless a building permit has been obtained for it. For this reason, under Tenn. Code Ann. § 5-1-118(c), a county is also authorized, by a two-thirds vote of the county commission, to adopt regulations that would prohibit providing electric service to a building unless a building permit has been obtained.

2. County Authority to Impose Fine

The second question is whether a county is authorized to impose a fine of up to five hundred dollars for permit or zoning violations. Tenn. Code Ann. § 5-1-121 provides:

Counties, by resolution of their respective legislative bodies, may establish a monetary penalty not to exceed five hundred dollars (\$500) for each violation of a rule or regulation that the county legislative body is authorized to adopt.

Thus, under Tenn. Code Ann. § 5-1-121, counties are expressly authorized to impose a fine of up to five hundred dollars for each violation of an authorized rule or regulation. In *Op. Tenn. Att’y Gen. 03-024* (March 3, 2003), however, we recognized that it is unlikely under *City of Chattanooga*

v. Davis, 54 S.W.3d 248 (Tenn. 2001), that a county will be able to impose a fine of more than fifty dollars for a resolution violation without a jury trial.

3. Different Building Permit Fees

The last question is whether a county is authorized to charge a higher fee to an individual who applies for a building permit after beginning construction on the project. The police power does not include the authority to promulgate and enforce regulations that are unreasonable, oppressive, or discriminatory. *Rivergate Wine & Liquors, Inc. v. City of Goodlettsville*, 647 S.W.2d 631, 634 (Tenn.1983). The one challenging a regulation that is facially valid has the burden of showing that the regulation is not reasonably related to a protectable interest or that it is oppressive in its application. *Id.* If the county can articulate a rational basis for charging the different fees, then the practice would be defensible.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable David Hawk
State Representative
219 War Memorial Building
Nashville, TN 37243-0105