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Opinion No. 08-44

Utility Construction within Corporate Limits of Another City

QUESTIONS

1. a. Under Tenn. Code Ann. § 13-4-104, is Memphis Light, Gas and Water ("MLGW") required to submit plans for utility construction within the corporate limits of the City of Lakeland to the Municipal Planning Commission of the City of Lakeland for approval?

b. If the answer to a. is yes, and the plans are disapproved, who may overrule the decision to disapprove?

c. What activities constitute utility construction subject to Tenn. Code Ann. § 13-4-104?

2. a. Under Tenn. Code Ann. § 7-34-105, is MLGW required to submit plans for public works construction within the corporate limits of the City of Lakeland to the Municipal Planning Commission of the City of Lakeland for approval?

b. If the answer to a. is yes, if the plans are disapproved, who may overrule the decision to disapprove?

c. What activities constitute public works construction under Tenn. Code Ann. § 7-34-105?

3. Does MLGW have to comply with Lakeland zoning ordinances and subdivision regulations?

OPINIONS

1. a. Yes. The submission to the planning commission could be made by MLGW itself, or by the Board of Commissioners of the City of Lakeland under whose authority MLGW operates within the city, or by both entities jointly.

b. We think a court would conclude that provision of utilities within the city boundaries by MLGW is by the authorization of the Lakeland Board of Commissioners within the meaning of Tenn. Code Ann. § 13-4-104. Under the statute, therefore, the Lakeland Board of

Commissioners may overrule the planning commission's disapproval of utility construction by MLGW within the city boundaries. Agreements between Lakeland and the Shelby County Board of Public Utilities, Memphis, or MLGW should be consulted to determine whether they impact this authority.

c. Clearly, the term "utility construction" under Tenn. Code Ann. § 13-4-104 includes building a new utility. The statute, by its terms, also requires approval of "[t]he widening, narrowing, relocation, vacation, change in the use, acceptance, acquisition, sale or lease of any street or public way, ground, place, property or structure . . . ." Although this portion of the statute does not directly refer to utilities, the terms "place, property or structure" could be interpreted to include an existing utility. Whether any particular activity would be subject to municipal planning commission approval under this statute would depend on specific facts and circumstances, including commission practice and the changes the activity would make to the system.

2. a. Where MLGW wishes to build a utility in Lakeland, it must submit plans to the municipal planning commission under Tenn. Code Ann. § 13-4-104. If the project will be financed under Tenn. Code Ann. §§ 7-34-101, *et seq.*, MLGW must also obtain the affirmative approval of the Lakeland Board of Commissioners.

b. As discussed in the answer to 1.b. above, under Tenn. Code Ann. § 13- 4-104, the Lakeland Board of Commissioners may overrule the planning commission's disapproval of utility construction by MLGW within the city boundaries. If the project is also financed under Tenn. Code Ann. § 7-34-101, *et seq.*, the Lakeland Board of Commissioners must also affirmatively approve the project as required under Tenn. Code Ann. § 7-34-105.

c. Clearly, the statute includes building an entirely new system as well as major extensions to an existing system. Since the term "public works" includes "all parts thereof and appurtenances thereto" it could also cover minor improvements or extensions. Where, as here, a local government already operates a utility system in another city with that city's consent, it is not clear what activities might require further approval from the city.

3. We think a court would conclude that, when operating within the Lakeland city limits, MLGW must comply with Lakeland zoning ordinances and subdivision regulations. A court would reach the same result whether MLGW directly owns the utility or operates it on behalf of the Shelby County Utilities Board.

ANALYSIS

1. Requirement of Municipal Planning Commission Approval under Tenn. Code Ann. § 13-4-104

This opinion addresses the respective rights and duties of Memphis Light, Gas and Water ("MLGW") and the City of Lakeland. MLGW is a department of the City of Memphis. Op. Tenn. Att'y Gen. 05-006 (January 20, 2005). Research indicates that the Lakeland Board of

Commissioners, by ordinance, has authorized the City of Memphis or any of its agencies to operate an electric or gas system within the corporate limits of Lakeland. Lakeland Municipal Code, § 19-101. The Lakeland Board of Commissioners has authorized the Shelby County Board of Public Utilities to furnish water to city residents. Lakeland Municipal Code, § 18-301. MLGW is authorized to maintain and operate this water system within Lakeland. Lakeland Municipal Code, § 18-302. Lakeland city sewer users must comply with provisions of the City of Memphis ordinances pertaining to sewer use, charges, billing, and practices "in accordance with Agreement dated July 7, 1969, and any other amendments thereto, by and between the City of Lakeland and the City of Memphis." Lakeland Municipal Code, § 18-211. This Office has not reviewed the agreement referred to in this ordinance, or any other agreements between Lakeland and the Shelby County Board of Public Utilities, Memphis, or MLGW. These agreements may further define the rights of MLGW with respect to utility systems that it operates and maintains within Lakeland municipal boundaries.

The first question concerns MLGW's obligations under municipal planning statutes. Under Tenn. Code Ann. § 13-4-101, the legislative body of a city may establish a municipal planning commission. It is the function and duty of a municipal planning commission to adopt an official general plan for the physical development of the community. The plan may include, among other things, "the general location and extent of public utilities and terminals, whether publicly or privately owned, for water, light, power, sanitation, transportation, communication and other purposes," as well as the "removal, relocation, widening, extension, narrowing, vacating, abandonment, change of use or extension" of such utilities. Tenn. Code Ann. § 13-4-201.

Tenn. Code Ann. § 13-4-104 provides in relevant part:

> Whenever the commission shall have adopted the plan of the municipality or any part thereof, then and thenceforth . . . *no public utility, whether publicly or privately owned, shall be constructed or authorized in the municipality until and unless the location and extent thereof shall have been submitted to and approved by the planning commission;* provided, that in case of disapproval, the commission shall communicate its reasons to the chief legislative body of the municipality, and such legislative body, by a vote of a majority of its membership, shall have the power to overrule such disapproval and, upon such overruling, such legislative body shall have the power to proceed; provided, that if the public . . . utility be one the authorization or financing of which does not, under the law governing the same, fall within the province of such legislative body, *then the submission to the planning commission shall be by the state, county, district, municipal or other board or official having such jurisdiction,* and the planning commission's disapproval may be overruled by such board by a majority vote of its membership, or by such official. The widening, narrowing, relocation, vacation, change in the use, acceptance, acquisition, sale or lease of any street or public way, ground, place, property or structure shall be subject to similar submission and approval, and the failure to approve may be similarly overruled. The failure of the commission to act within thirty (30) days from and after the date of official submission to it shall be deemed

> approval, unless a longer period be granted by such chief legislative body or other submitting board or official.

(Emphasis added).

The plain wording of the statute requires municipal planning commission approval of all public utility construction within the corporate limits of the city. The submission to the planning commission could be made by MLGW itself, or by the Board of Commissioners of the City of Lakeland under whose authority MLGW operates within the city, or by both entities jointly.

b. The next question concerns the power to overrule a decision by the municipal planning commission under Tenn. Code Ann. § 13-4-104. The statute states in relevant part:

> provided, that if the public . . . utility be one *the authorization or financing of which does not, under the law governing the same, fall within the province of such legislative body*, then the submission to the planning commission shall be by the state, county, district, municipal or other board or official having such jurisdiction, and the planning commission's disapproval may be overruled by *such board* by a majority vote of its membership, or by such official.

(Emphasis added). The question is which governing body, in this case, has the power to overrule the municipal planning commission's disapproval of MLGW utility construction. Of course, MLGW would operate and control the planned project. But, as noted above, MLGW operates within the City of Lakeland under city ordinances and contracts with the City. Lakeland operates under the city manager-commission charter form of government, Tenn. Code Ann. §§ 6-18-101, *et seq*. A city incorporated under this statutory charter is authorized to grant utility franchises and make contracts for utilities to be furnished within the city limits. Tenn. Code Ann. § 6-19-101(12) and (13). For this reason, we think a court would conclude that provision of utilities within the city boundaries falls within the authorization of the Lakeland Board of Commissioners within the meaning of Tenn. Code Ann. § 13-4-104. Under Tenn. Code Ann. § 13-4-104, therefore, the Lakeland Board of Commissioners may overrule the planning commission's disapproval of utility construction by MLGW within the city boundaries. Agreements between Lakeland and the Shelby County Board of Public Utilities, Memphis, or MLGW should be consulted to determine whether they impact this authority.

c. The next question is what activities constitute utility construction subject to the approval of a municipal planning commission under Tenn. Code Ann. § 13-4-104. The statute does not define this term, nor do any cases in Tennessee appear to address the issue. When a statute is unambiguous, legislative intent is determined from the plain and ordinary meaning of the language used in the statute. *Freeman v. Marco Transp. Co.*, 27 S.W.3d 909, 911 (Tenn. 2000). The statutory language must be read "without any forced or subtle construction which would extend or limit its meaning." *Bryant v. Baptist Health System Home Care of East Tennessee,* 213 S.W.3d 743 (Tenn. 2006) (quoting *National Gas Distributors v. State*, 804 S.W.2d 66, 67 (Tenn. 1991)). The American Heritage Dictionary defines "construct" in relevant part as "[t]o form by assembling parts; build."

The American Heritage Dictionary 315 (2d Coll. Ed. 1985). Clearly, therefore, the term includes building a new utility. The statute, by its terms, also requires approval of "[t]he widening, narrowing, relocation, vacation, change in the use, acceptance, acquisition, sale or lease of any street or public way, ground, place, property or structure . . . ." Although this portion of the statute does not directly refer to utilities, the terms "place, property, or structure" could be interpreted to include an existing utility. Whether any particular activity would be subject to municipal planning commission approval under this statute would depend on specific facts and circumstances, including commission practice and the changes the activity would make to the system.

2. Approval under Tenn. Code Ann. § 7-34-105

The next question concerns approval under Tenn. Code Ann. § 7-34-105. This statute provides:

> No municipality shall construct public works wholly or partly within the corporate limits of another municipality, except with the consent of the governing body of such other municipality.

This provision is part of Tenn. Code Ann. §§ 7-34-101, *et seq.* Under this statutory scheme, local governments are authorized to finance and build public works, including utility systems. The powers conferred under the chapter are in addition and supplemental to, and the limitations in the act do not affect, powers conferred by any other law. Tenn. Code Ann. § 7-34-118.

a. The first question is whether, under this statute, MLGW must submit plans for public works construction within the corporate limits of the City of Lakeland, to the Lakeland Municipal Planning Commission for approval. As discussed above, the municipal planning statutes would apply to any utility to be built within a city, regardless of how it is financed. Thus, where MLGW wishes to build a utility in Lakeland, it must submit plans to the municipal planning commission under Tenn. Code Ann. § 13-4-104. If the project will be financed under Tenn. Code Ann. §§ 7-34-101, *et seq.*, MLGW must also obtain the affirmative approval of the Lakeland Board of Commissioners. Op. Tenn. Att'y Gen. 01-098 (June 13, 2001).

b. The next question is, assuming such plans must be submitted and the planning commission disapproves them, who may overrule the decision to disapprove. As discussed in the answer to 1.b. above, under Tenn. Code Ann. § 13- 4-104, the Lakeland Board of Commissioners may overrule the planning commission's disapproval of utility construction by MLGW within the city boundaries. If the project is financed under Tenn. Code Ann. § 7-34-105, the Lakeland Board of Commissioners must also affirmatively approve the project.

c. The next question is what activities constitute public works construction within the meaning of Tenn. Code Ann. § 7-34-105. The statute does not define the term "construct." The statute defines the term "public works" as follows:

> "Public works" means any one (1) or combination of two (2) or more of the

> following: water, sewerage, gas or electric heat, light or power works, plants and systems or parking facilities, together with all parts thereof and appurtenances thereto, including, but not limited to, supply and distribution systems, electrical power purchased from the Tennessee valley authority or similar governmental agencies, on a current or long-term purchase basis, reservoirs, dams, sewage treatment and disposal works and generating plants.

As discussed above in the answer to Question 1, the term "construct" is defined as "[t]o form by assembling parts; build." Clearly, then, the statute includes building an entirely new system as well as major extensions to an existing system. Since the term "public works" includes "all parts thereof and appurtenances thereto," it could also cover minor improvements or extensions. Where, as here, a local government already operates a utility system in another city with that city's consent, it is not clear what activities might require further approval from the city.

3. Duty of MLGW to Follow Lakeland Zoning Ordinances and Subdivision Regulations

The last question is whether MLGW, when operating within the Lakeland city limits, must comply with Lakeland zoning ordinances and subdivision regulations. MLGW is a department of the City of Memphis. We have found no general or private act that addresses whether MLGW is subject to Lakeland zoning ordinances and subdivision regulations when operating within the Lakeland city limits. It is a well-settled principle that the State is not subject to zoning regulations in its use of property for governmental purposes unless there is legislative enactment to the contrary. *Davidson County v. Harmon*, 200 Tenn. 575, 292 S.W.2d 777 (1956). Courts in other states have extended this principle to a local government operating within the boundaries of another local government. *See, e.g.*, *City of Washington v. Warren County*, 899 S.W.2d 863 (Mo. 1995). But a governmental body may be subject to zoning regulations when its use of property is in a proprietary capacity. *See, e.g.*, *City of Selma v. Dallas County*, 964 So.2d 12 (Ala. 2007); Op. Tenn. Att'y Gen. 89-143 (December 12, 1989). The Tennessee Court of Appeals, in a different context, has stated that a city operates its utilities in a proprietary or individual capacity and not in its governmental capacity. *Maury County Board of Public Utilities v. City of Columbia*, 854 S.W.2d 890, 892 (Tenn. Ct. App. 1993), *p.t.a. denied* (1993) (citing *Baton v. Pleasant View Utility District*, 592 S.W.2d 578 (Tenn. Ct. App. 1979), *p.t.a. denied* (1980)). Thus, rules controlling a private individual or corporate business generally apply to a municipality operating its utility. *Id.* We think this principle would apply whether MLGW directly owns the utility, or operates it on behalf of the Shelby County Board of Public Utilities. For this reason, a court would probably conclude that, when operating within the

Lakeland city limits, MLGW must comply with Lakeland zoning ordinances and subdivision regulations.

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