S T A T E O F T E N N E S S E E
OFFICE OF THE
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Opinion No. 08-143

Authority of Governmental Entity to Replace/Repair Sewer Lines on Private Property

QUESTIONS

1. Would the Hamilton County Water and Wastewater Treatment Authority's replacement and/or repair of damaged sewer lines on private property, financed through a monthly fee charged to each of the Authority's customers in its service area, violate Article II, Section 29, of the Tennessee Constitution?

2. Would the Hamilton County Water and Wastewater Treatment Authority be required to obtain utility easements under Tenn. Code Ann. § 7-35-401(c)(1)(B)(ii) in order to effectuate this plan?

3. If the answer to question 2 is yes, would a utility easement be required to be in place before any monthly fee could be charged?

4. If the answer to question 2 is yes, would the affected private property owners be financially responsible for future upkeep and maintenance of the sewer lines?

5. Do the provisions of Tenn. Code Ann. § 7-35-401(c)(2) apply to the Hamilton County Water and Wastewater Treatment Authority?

OPINIONS

1. No. The water and wastewater treatment authority's plan to charge its customers a fee to finance repairs of private sewer lines is not subject to the limitations expressed in Article II, Section 29, of the Tennessee Constitution.

2. No. The need for a utility easement is obviated by the provisions of Tenn. Code Ann. § 7-35-401(c)(1)(D), which do, however, require the property owner's consent and agreement to hold the municipality harmless.

3. Since the answer to question 2 is no, it is not necessary to answer this question.

4. Affected property owners would be financially responsible in the future for maintaining that portion of the sanitary sewer connection that is located on the property of the owner in accordance with Tenn. Code Ann. § 7-35-201(2) and § 68-221-209(a)(2).

5. No. The population bracket exemption in Tenn. Code Ann. § 7-35-401(c)(2) does not apply to the Hamilton County Water and Wastewater Treatment Authority.

ANALYSIS

1. Requirement of a Public Purpose

Article II, Section 29, of the Tennessee Constitution provides that the General Assembly may authorize counties and municipalities "to impose *taxes* for County and Corporation purposes respectively." (Emphasis supplied). That provision has been construed to prohibit counties and cities from appropriating funds for anything besides county or public purposes. *See Metropolitan Development and Housing Agency v. Leech,* 591 S.W.2d 427, 429 (Tenn. 1979).

Under the facts presented in this request, the Hamilton County Water and Wastewater Treatment Authority desires to repair and/or replace the lateral sewer lines of its residential and commercial customers that lie on private property and connect to the public wastewater system. According to the request, this project, which is designed to reduce excessive infiltration of storm water into the system that often results in sewer overflows, would be financed through the imposition of a monthly fee on all customers in the service area. Since the charge it seeks to impose on its customers is designed to regulate a specific activity, the repair and/or replacement of sewer lines, we believe it can be properly characterized as a fee, rather than a tax. *Memphis Retail Liquor Dealers' Association v. City of Memphis,* 547 S.W.2d 244, 245-46 (Tenn. 1977). Thus, the provisions of Article II, Section 29, have no application to the facts stated in this request.

2. – 4. Application of Tenn. Code Ann. § 7-35-401(c)(1)

You have also inquired as to whether the Hamilton County Water and Wastewater Treatment Authority's plan is subject to the provisions in Tenn. Code Ann. § 7-35-401(c)(1)(B)(ii) concerning utility easements. Tenn. Code Ann. § 7-35-401(a) authorizes every incorporated city and town to construct, operate, and maintain a waterworks or sewerage system and to charge for such service. Tenn. Code Ann. § 7-35-401(c)(1)(B) provides in pertinent part:

> The power to own, acquire, construct, extend, equip, operate and maintain water or sewerage service shall not include the power to bid on or construct any project for a private purpose. As used in this subsection (c):
>
> (B) "Project for a private purpose" includes, but is not limited to:

> (i) Any commercial project, commercial subdivision, private residence or residential subdivision that is owned by a nonpublic entity;
>
> (ii) The construction of individual water or sewerage lines beyond a meter that measures service or consumption, or onto private property, *unless such water or sewerage line is owned by, or a utility easement has been obtained by, the municipal corporation*;

(Emphasis supplied).

The provisions of Tenn. Code Ann. § 7-35-401, *et seq*. are an "additional and alternate method for the acquisition of waterworks or sewerage system by any incorporated city or town, and shall not be deemed to include, amend, alter or repeal any other statute." Tenn. Code Ann. § 7-35-432. The provisions in Tenn. Code Ann. § 7-35-401, *et seq*., then, are supplementary. We note this because the Hamilton County Water and Wastewater Treatment Authority was formed in accordance with the provisions of Tenn. Code Ann. §§ 68-221-601 to 68-221-618, known as the Water and Wastewater Treatment Authority Act. Its web site reflects that it is responsible for the public sewer system throughout the unincorporated areas of Hamilton County, as well as the surrounding incorporated municipalities of East Ridge, Lakesite, Lookout Mountain, Red Bank, Ridgeside, Signal Mountain, and Soddy Daisy. It is governed by a Board of Commissioners composed of five members appointed by the county mayor and a representative from each of the seven incorporated cities that joined in its formation. Tenn. Code Ann. § 68-221-605(a) and (b). Water and waste water treatment authorities are considered "agencies and instrumentalities of the creating and participating governmental entities" involved in their formation and operation. Tenn. Code Ann. § 68-221-602(a).

We further note that Tenn. Code Ann. § 7-35-401 was amended in 2007 to include the following provision in subsection(c)(1)(D):

> (D) "Project for a private purpose" does not include the renewal or replacement of individual water or sewage lines behind a meter or onto private property when such rehabilitative maintenance or construction is deemed necessary by the municipal corporation because excessive infiltration and inflow from groundwater or rainwater is resulting in sanitary sewer overflows or other serious health or system capacity issues. Municipal corporations are authorized, but not required, to maintain or construct individual lines for this purpose *if the property owner consents and agrees to hold the municipal corporation harmless for the work.*

2007 Tenn. Public Acts, Ch. 123 (Emphasis supplied). The provisions of Tenn. Code Ann. § 7-35-401(c)(1)(D), therefore, effectively eliminate the need for a utility easement when the objective is to reduce sanitary sewer overflows, as long as the private property owner provides consent and agrees to hold the municipality harmless for the work. Once the rehabilitative construction is completed, each affected private property owner would be responsible in the future for maintaining that portion of the sanitary sewer connection that is located on the property of the owner. Tenn. Code Ann. § 7-35-201(2) and § 68-221-209(a)(2).

5. Population Bracket Exemption

Lastly, you have inquired whether Tenn. Code Ann. § 7-35-401(c)(2) has any application to the Hamilton County Water and Wastewater Treatment Authority. Subsection (c)(2) contains a population bracket exemption that states that the provisions of subsection (c) shall not apply to any county having a population between 287,700 and 287,800, according to the 1980 federal census or any subsequent federal census. This exemption was added by Chapter 738 of the Public Acts of 1988. According to the 1980 federal census found in the 1995 replacement part of Volume 13 of the Tennessee Code Annotated, Hamilton County had a population of 287,740 and was the only county in Tennessee corresponding to this population bracket in 1980. But the 2007 Supplement to the Tables in Volume 13 contains a corrected 1980 federal census that reflects the actual population of Hamilton County in 1980 as being 287,643, which would remove Hamilton County from the population bracket found in Tenn. Code Ann. § 7-35-401(c)(2).

Because the corrected census table found in the 2007 Supplement accurately reflects the population of Hamilton County in 1980, we believe the population bracket found in Tenn. Code Ann. § 7-35-401(c)(2), therefore, does not have any application to Hamilton County. The Hamilton County Water and Wastewater Treatment Authority consequently may avail itself of the provisions in Tenn. Code Ann. § 7-35-401(c)(1)(D) for repairing and replacing private sewer lines. But even if the population number for Hamilton County found in the census table of the 1995 edition of the Code were correct, we believe the population bracket constitutes impermissible class legislation under both Article XI, Section 8, and Article I, Section 8, of the Tennessee Constitution.

Article XI, Section 8, requires that "[g]eneral laws only [are] to be passed" by the Legislature and it prohibits the passage of laws conferring benefits or imposing burdens on individuals without affecting others similarly situated. Article I, Section 8, has been interpreted broadly by the courts to guarantee not only due process but equal protection of the law. *Tennessee Small Schools System v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993). Moreover, the provision protects cities and counties, as well as individuals. *Civil Service Merit Board of Knoxville v. Burson*, 816 S.W.2d 725, 731 (Tenn. 1991).

It is the opinion of this Office that the provisions of Tenn. Code Ann. § 7-35-401 authorizing cities and towns to operate and maintain a sewage system, including the right, in limited circumstances, to repair privately owned sewer lines, constitute a general law of statewide application on the construction and operation of public sewage systems. The population bracket exemption in Tenn. Code Ann. § 7-35-401(c)(2) appears to us to contravene this general law. Moreover, there have been no subsequent amendments to the law exempting counties in other population brackets from the "general" requirements of Tenn. Code Ann. § 7-35-401(c) to suggest that it has ceased to be a law of general application. *See* Op. Tenn. Att'y. Gen. 97-034 (March 31, 1997).

Class legislation affecting a particular county or municipality will not offend Article XI, Section 8, or the equal protection provision inherent in Article I, Section 8, as long as there is a reasonable basis for the classification. *Civil Service Merit Board of Knoxville v. Burson*, 816

S.W.2d at 731. In *State ex rel. Bales v. Hamilton County*, 170 Tenn. 371, 375, 95 S.W.2d 618, 169 (1936), the Tennessee Supreme Court stated that "unless the act relates to a matter in respect of which a difference in population would furnish a rational basis for diversity of laws, classification on such basis will not be upheld." This Office cannot conceive of any reason justifying this population bracket exemption in Tenn. Code Ann. § 7-35-401(c)(2), and no rationale is cited in the 1988 Public Act that introduced the population bracket. Lacking a rational basis, the exemption would therefore be unconstitutional.

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