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June 10, 2009

Opinion No. 09-113

Power of City to Charge for Utilities and Police Protection Provided for County Fairground

QUESTION

Does state law permit a city to charge for the utilities and police protection supplied to a county fairgrounds for events held at the fairgrounds when it is located within the city limits?

OPINION

With respect to charges for utilities, a city may require a county that owns and operates a fairgrounds within the city limits to pay for such services at the same rates that those services are provided to other consumers. With respect to charges for police protection, a city may not require a county to pay for additional police protection unless it enters into a contract with the county to do so.

ANALYSIS

The analysis of this question is dependent, in part, upon the specific powers granted to the city under its charter. Based upon the context in which this question has been posed, this opinion will analyze the question in the context of the powers provided in the Charter of the City of Lebanon (hereinafter, "Charter").

The analysis of both prongs of this question begins with the principle – well settled in Tennessee – that cities and counties have only those powers expressly granted by, or necessarily implied from, statutes. *City of Lebanon v. Baird*, 756 S.W.2d 236 (Tenn. 1988); *Bayless v. Knox County*, 199 Tenn. 268, 286 S.W.2d 579 (1956). Thus, in order to charge a fee for utility service for the fairgrounds as well as a fee for additional police protection, there must a positive grant of authority in the charter or other statutes of this State.

Lebanon has broad powers with respect to public utilities. It may "[a]cquire, construct, own, operate and maintain, or sell, lease, mortgage, pledge or otherwise dispose of public utilities or any estate or interest therein, or any other utility that is of service to the municipality, its inhabitants, or any part of the municipality." Charter at Art. II, § 1(14). Under Lebanon's broad authority to own and operate public utilities, it has the power to assess fees on users of the utility services that it provides. Thus, it is entitled to impose these fees on use of utilities by the county fairgrounds as well as by other inhabitants of the city.

Tenn. Code. Ann. § 67-5-212(i) provides that "[t]here shall be exempt from property taxation the property, or any part thereof, of nonprofit county fair associations." This only applies to property taxes, not to privilege taxes. Even if the fairgrounds were owned by such an entity, this statute would not affect the city's ability to charge for utility services. Such services constitute a fee, rather than a tax. "The nature of an imposition by government" is determined by "the purpose of the monetary imposition." *Saturn Corp. v. Johnson*, 236 S.W.3d 156, 160 (Tenn. Ct. App. 2006). If the imposition is "paid into the public treasury as part of the state's general revenue and disbursed for general public need, it is a tax." *Id*. "If, however, the [imposition] 'is imposed for the purpose of regulating a specific activity or defraying the cost of providing a service or benefit to the party paying the [imposition],' it is a fee." *Id*. A public utility is the quintessential example of a government entity "providing a service or benefit to the party paying" the imposition, and so such charges by a city to a county operating a fairgrounds under the circumstances posited would be fees and would not implicate any prohibition against taxation of the property of county fair associations.

Lebanon does not, however, possess similarly broad authority to charge a fee for police protection. It has the power to "establish, support, and regulate a police system, and to appoint special police when, in the opinion of the Mayor, it is necessary." Charter at Art. II, § 1(36). While it has the power to "[d]efine, 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 City, and exercise general police powers," this power does not include the authority to charge a fee to specific individuals or entities for police protection. Charter at Art. II, § 1(24).

Several statutes impose positive law enforcement duties on municipal police. "It is the duty of the … chiefs of police … and police officers of each municipal corporation, to faithfully maintain and enforce, within the corporate limits of their respective municipalities, the statute laws relating to lewdness, drunkenness, gaming, and the sale and manufacture of intoxicating liquors." Tenn. Code Ann. § 6-54-401. "Any magistrate or officer, having notice of any unlawful act provided against in this chapter, who neglects or refuses to do the magistrate's or officer's duty in the prevention of the public offense commits a Class C misdemeanor." Tenn. Code Ann. § 38-3-107. "It is the duty of all peace officers who know, or have reason to suspect, any person of being armed with the intention of committing a riot or affray, or of assaulting, wounding, or killing another person, or of otherwise breaking the peace, to arrest such person immediately, and take such person before the court of general sessions." Tenn. Code Ann. § 38-3-108. With respect to each of these duties, there is no attendant provision for charging a specific fee to defray the cost of carrying out the duty.

This Office has previously opined that municipalities lack the authority to charge a fee for "police investigations of automobile accidents" because the "fee is not authorized by a general law." Op. Tenn. Att'y Gen. No. 83-94. In the same opinion, this Office stated that

> [t]he imposition of this service fee appears to run counter not only to the state statutory scheme but to the very reason police forces exist. … The officer's presence at the scene of the accident is important to the general welfare. He is not

> there merely for the benefit of the driver, but for the good of the public as a whole. It is presumably for this reason that the law does not provide for service fees.

While the role of the city police in the posited scenario is broader than singular accident investigations, this principle applies more broadly. As with automobile accidents, the presence of police at and around an event held at a county fairgrounds within city limits is not only for the benefit of the promoters of the event, but for the good of the public to ensure, for example, the orderly ingress and egress of foot and vehicle traffic into the grounds and surrounding areas as well as general order and safety on the grounds and the surrounding area.

Because the general law does not provide for the imposition of a "police protection fee" on the owner-operator of a venue hosting an event within the city limits, the city may not impose such a fee. Cities do, however, have the general power to "[c]ontract and be contracted with." Charter, Art. II, § 1(7). Under this authority, a city would be able to contract with the county owning and operating the fairgrounds or with a specific promoter of a fairgrounds event to provide, for consideration, additional police protection beyond the norm. *See, e.g.*, Op. Tenn. Att'y Gen. No. 01-75. It would, of course, be at the discretion of the other party to enter into such a contract.

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