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

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Opinion No. 13-56

Municipality's Extraterritorial Power to Require Plumbing Permits

QUESTION

Does Tenn. Code Ann. § 68-120-101 preclude the City of Cleveland, a Tennessee municipality, from requiring property owners outside its corporate limits to obtain a plumbing permit from its Building Department in order to connect to Cleveland Utilities, a city-owned public utility?

OPINION

No.

ANALYSIS

The following facts were set forth in the opinion request submitted to this Office. Cleveland Utilities is a public utility owned by the City of Cleveland ("City"), a Tennessee municipality. See http://www.clevelandutilities.com/ (Cleveland Utilities website). Bradley County, in which the City of Cleveland is located, recently informed the City that it intends to require all plumbing permits outside the City's corporate limits, including those where Cleveland Utilities is the service provider, to be purchased from the Bradley County Building Inspection Department. Historically, the City has performed plumbing inspections in Bradley County when Cleveland Utilities is the service provider. This arrangement began at a time when Bradley County did not have certified plumbing inspectors that were qualified to perform plumbing inspections. Bradley County, however, now employs personnel that are certified and qualified to perform plumbing inspections.[1] Bradley County also recently adopted its own building and plumbing codes, as permitted under Tenn. Code Ann. § 68-120-101. Having taken these measures, Bradley County asserts that it now has the "sole" authority to issue plumbing permits to county property owners pursuant to Tennessee statute and Tenn. Att'y Gen. Op. 86-71 (Mar. 20, 1986).[2] The City acknowledges that Bradley County has authority to issue plumbing permits outside the City's corporate limits but maintains that the City also has the authority to require

[1] See Tenn. Code Ann. § 68-120-118 (addressing certification of municipal, county and state plumbing inspectors).

[2] The applicable statutory reference is Tenn. Code Ann. § 68-120-101(b)(2). The statutory precursor to Tenn. Code Ann. § 68-120-101(b)(2) is the statutory provision examined in Tenn. Att'y Gen. Op. 86-71 (Mar. 20, 1986).

property owners outside its corporate limits to obtain a plumbing permit from its Building Department in order to connect to Cleveland Utilities.[3]

The question presented is whether Tenn. Code Ann. § 68-120-101 precludes the City from requiring property owners outside its corporate limits to obtain an additional plumbing permit in order to connect to Cleveland Utilities. Chapter 120 of Title 68 of the Tennessee Code establishes various building regulations in Tennessee. Building construction safety standards are addressed in Tenn. Code Ann. § 68-120-101. This statutory provision gives initial authority to the State fire marshal to promulgate rules establishing the minimum state-wide building construction safety standards. *See* Tenn. Code Ann. § 68-120-101(a).[4] Local governments, though, are authorized to enact their own building construction and fire safety codes, subject to certain constraints. *See* Tenn. Code Ann. § 68-120-101(b); Tenn. Code Ann. § 68-120-106(a).

Local government officials have concurrent jurisdiction with State officials to enforce the provisions of Chapter 120 of Title 68. The statute specifically states:

> The state fire marshal, such fire marshal's deputies and assistants, including all municipal fire prevention or building officials in those municipalities having such officers, and where no such officer exists, the chief of the fire department of every incorporated city or place in which a fire department is established, and the mayor of each incorporated place in which no fire department exists, and all state officials, now having jurisdiction or as directed by the governor, or county officers having jurisdiction in regard to any matter regulated in this chapter, shall have concurrent jurisdiction.

Tenn. Code Ann. § 68-120-106(a); *see* Tenn. Code Ann. § 68-120-107 ("state fire marshal or other official having jurisdiction" is authorized to direct discontinuance of action or remedying of condition in violation of Chapter 120).

Local government officials, however, are restrained from issuing or enforcing regulations that are in conflict with the provisions of Chapter 120. *See* Tenn. Code Ann. § 68-120-106(a) (stating that "[n]o regulation shall be issued or enforced by any . . . official that is in conflict with this chapter" and that this "chapter shall supersede all less stringent provisions of municipal ordinances").

The City of Cleveland's requirement that property owners outside its corporate limits, who reside in Bradley County, obtain a plumbing permit from the City's Building Department in order to connect to the city-owned Cleveland Utilities does not appear to conflict with Chapter 120. Initially, as permitted by Tenn. Code Ann. § 68-120-101(b)(2), Bradley County has adopted the 2006 International Residential Code, the 2006 International Building Code, the 2006

[3] The City relies upon Cleveland Municipal Code § 18-104(2), which is discussed later in this opinion.

[4] The minimum state-wide building construction safety standards are set forth in Tenn. Comp. R. & Regs. 0780-2-2-.01 and Tenn. Comp. R. & Regs. 0780-2-23-.01.

International Fire Code, and the 2006 International Plumbing Code, among others.[5] *See* Bradley County Commission Resolution 2010-041 (Aug. 16, 2010) (copy attached). The relevant provisions of Tenn. Code Ann. § 68-120-101(b)(2) state:

> [Standards established by the state fire marshal] do not apply to any building, other than state buildings, educational occupancies or any other occupancy requiring an inspection by the state fire marshal for initial licensure, located within the jurisdiction of a local government that certifies in writing to the state fire marshal that:
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> (A) The local jurisdiction has chosen to adopt and enforce building construction and fire safety codes for construction of all buildings, for construction of all buildings other than one-family and two-family dwellings, or for construction of one-family and two-family dwellings only; and
>
> (i) For one-family and two-family construction, it has adopted the International Residential Code,[6] published by the International Code Council, Inc.; or
>
> (ii) For construction other than one-family and two-family dwellings, it has adopted a building construction safety code consisting of the International Building Code,[7] published by the International Code Council, Inc., and either:
>
> (a) The international fire code, published by the International Code Council, Inc.; or

[5] According to the State Fire Marshal's Office, Bradley County has submitted only a "Local Government Residential Exemption Authorization" to enforce the International Residential Code; thus, the state fire marshal has concurrent jurisdiction with Bradley County to enforce the other referenced codes with respect to commercial buildings in Bradley County. *See* Tenn. Code Ann. § 68-120-106(a).

[6] The International Residential Code contains a plumbing code that applies to "plumbing systems," which is defined to "[i]nclude[] the water supply and distribution pipes, plumbing fixtures, supports and appurtenances; soil, waste and vent pipes; sanitary drains and building sewers to an approved point of disposal." A "sanitary sewer," in turn, is defined as "[a] sewer that carries sewage and excludes storm, surface and groundwater," and a "building sewer" is defined as "[t]hat part of the drainage system that extends from the end of the building drain and conveys its discharge to a public sewer, individual sewage disposal-system or other point of disposal." 2006 International Residential Code, ch. 2, § R202 Definitions, *available at* http://publiccodes.cyberregs.com/icod/irc/2006f2/.

[7] The International Building Code provides that "plumbing systems" and equipment are to constructed, installed and maintained in accordance with the International Plumbing Code. "Plumbing system" is defined by the International Plumbing Code to "[i]nclude[] the water supply and distribution pipes; plumbing fixtures and traps; water-treating or water-using equipment; soil, waste and vent pipes; and sanitary and storm sewers and building drains; in addition to their respective connections, devices and appurtenances within a structure or premises." 2006 International Building Code, ch. 2, § 202 Definitions, *available at* http://publiccodes.cyberregs.com/icod/irc/2006f2/.

> (b) The uniform fire code, published by the National Fire Protection Association, Inc., if adopted on or after July 1, 2006; and
>
> (B) It is adequately enforcing its code and performing any reviews of construction plans and specifications and inspections required by the state fire marshal under this section.

The decision by Bradley County to exercise the authority granted by Tenn. Code Ann. § 68-120-101(b)(2), thereby excluding certain buildings within Bradley County's jurisdiction from meeting building standards established by the State fire marshal, does not necessarily provide Bradley County with the exclusive authority to issue plumbing permits to county property owners. In Tenn. Att'y Gen. Op. 86-71 (Mar. 20, 1986), this Office considered Tenn. Code Ann. § 68-18-101(b)(2) (1982), the statutory precursor to Tenn. Code Ann. § 68-120-101(b)(2), which provided in relevant part:

> [Standards established by the state fire marshal] shall not apply to any building, other than state buildings or educational occupancies, located within the jurisdiction of a local government which certifies in writing to the state fire marshal that:
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> (A) It has adopted a building construction safety code consisting of the Standard Building Code (published by the Southern Building Code Congress International, Inc.) and either:
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> (i) The Standard Fire Prevention Code (published by the Southern Building Code Congress International, Inc.); or
>
> (ii) The Fire Prevention Code (published by the National Fire Protection Association, Inc.); and
>
> (B) It is adequately enforcing its code and performing any reviews of construction plans and specifications and inspections required by the state fire marshal under subsection (d) of this section.

Tenn. Code Ann. § 68-18-101(b)(2) (1982).

Opinion 86-71 addressed the validity of a Spring Hill, Tennessee municipal ordinance that sought to impose building construction safety standards outside Spring Hill's municipal limits. Tenn. Att'y Gen. Op. 86-71 at 1-2. The ordinance amended Spring Hill's zoning ordinance to require that all new construction, excepting agricultural construction, conform to meet the requirements of the Standard Building Code, the Standard Fire Prevention Code, the Standard Plumbing Code, and the Standard Housing Code as published by Southern Building Code Congress International, Inc. of Birmingham, Alabama. *Id.* at 1. Prior to obtaining a building permit, the ordinance provided that the Building Inspector collect a fee. *Id.*

The opinion observed that when a local government adopts a building construction safety code pursuant to the statute, it is required to enforce the building code by performing reviews of construction plans and specifications. *Id.* at 2. *See* Tenn. Code Ann. § 68-18-101(b)(2)(B) (1982). Further, the opinion noted that Tenn. Code Ann. § 68-18-101(d) (1982) permitted the charging of a fee to cover the costs of a review for compliance but the statute's authority was limited to "buildings 'located within the jurisdiction of a local government.'" Tenn. Att'y Gen. Op. 86-71 at 2. Thus, the opinion concluded that the ordinance was valid within Spring Hill's limits since it adopted building construction standards permitted by statute but it was invalid to the extent it applied to areas outside the municipal limits. *Id.*

In sum, Opinion 86-71 found the Spring Hill ordinance to conflict with Tenn. Code Ann. § 68-18-101(b)(2) (1982). Municipal corporations may not enact ordinances that are in conflict with the general laws of Tennessee. *Southern Railway Co. v. City of Knoxville*, 223 Tenn. 90, 442 S.W.2d 619, 621 (1968); *Manning v. City of Lebanon*, 124 S.W.3d 562, 565 (Tenn. Ct. App. 2003). A conflict exists if the municipal regulation infringes on the general law or if the municipal regulation is repugnant to the general policy of Tennessee law. *Capitol News Co., Inc. v. Metropolitan Gov't of Nashville and Davidson County*, 562 S.W.2d 430, 434 (Tenn. 1978). Because Tenn. Code Ann. § 68-18-101(b)(2) (1982) only granted local governments the ability to establish construction safety standards for buildings located in their jurisdiction, Opinion 86-71 reasoned that allowing Spring Hill to impose construction safety standards on buildings outside its municipal limits would infringe on State law. Tenn. Att'y Gen. Op. 86-71 at 2.

The factual situation discussed in Opinion 86-71 is different from the one posed with this opinion request. Here, the City of Cleveland is not seeking to extend its building standards outside its territory, rather the City is seeking to assure that an owner outside its jurisdiction *wishing to connect to the city-owned Cleveland Utilities* applies for and obtains a plumbing permit as part of the process for obtaining service from Cleveland Utilities. As the Cleveland Municipal Code states:

> (a) Before the owner of any property connects such property into the utility sewer, the owner or the owner's agent shall make application to and be issued permits by both the city and the utility. The work shall be performed only by a plumber approved by the city and utility who has also signed the permits. All connections shall be inspected and approved by both the City of Cleveland Plumbing Inspector and the utility.
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> (b) In order to secure the required connection permits, the owner or owner's agent shall:
>
> (1) Make application for a plumbing permit to the City of Cleveland Plumbing Inspector's Office. The permit application shall be supplemented by any plans, specifications, or other information considered pertinent in the judgment of the Plumbing Inspector. A permit and inspection fee shall be paid to the City of Cleveland at the time the application permit is filed.

> (2) Take the plumbing permit to Cleveland Utilities and make application for service and pay the appropriate connection charge and inspection fee.

Cleveland Municipal Code § 18-104(2), *located at* http://www.clevelandtn.gov/DocumentCenter/View/13.

Thus, the overarching purpose of Cleveland Municipal Code § 18-104(2) is to require property owners to obtain a plumbing permit and pay a fee in order to connect to Cleveland Utilities. Like many municipalities in Tennessee, the City operates a sewer beyond its corporate limits. Tennessee statutes authorize municipalities to operate sewers beyond their corporate boundaries and impose charges upon users of their systems. *See, e.g.*, Tenn. Code Ann. § 9-21-107(2), (8); Tenn. Code Ann. § 7-34-104(a)(2), (5); Tenn. Code Ann. § 7-35-201; Tenn. Code Ann. § 7-35-401(a); Tenn. Code Ann. § 7-51-401. *See also Patterson v. City of Chattanooga*, 192 Tenn. 267, 241 S.W.2d 291, 294 (1951) (city may own and operate a sewer beyond its corporate limits); *Warren v. Bradley*, 39 Tenn. App. 451, 284 S.W.2d 698, 704 (1955) (municipal corporation may fix the charges for using or connecting with its sewers).

Further, Tennessee courts have recognized that the establishment and maintenance of a sewer system by a municipality is regarded as an exercise of its police power. *Patterson*, 241 S.W.2d at 294; *Warren*, 284 S.W.2d. at 701. Included within this police power is a municipality's right to regulate and control the use of its sewers; the right is a necessary incident of its ownership. 64 C.J.S. *Municipal Corporations* § 1965 (2013). Consequently, when a municipal sewer extends beyond the corporate limits, the municipal power to regulate and control the sewer rests largely upon the right of ownership. 11 McQuillin, *The Law of Municipal Corporations* § 31:18 (3d ed. 2013). Accordingly, a municipal corporation has the power to authorize the extraterritorial connection and use of its sewers under permits or licenses and to impose fees and charges for such privileges. *Id*. *See City Transp. Co., Inc. v. Pharr*, 186 Tenn. 217, 209 S.W.2d 15, 18 (1948) (municipality may enforce police powers beyond geographical limits when public necessity so requires).

In short, the City has the power to enact an ordinance that requires property owners outside its corporate boundaries to obtain a plumbing permit before connecting to Cleveland Utilities' sewer. *See Allmand v. Pavletic*, 292 S.W.3d 618, 625 (Tenn. 2009) (municipalities may exercise express or necessarily implied powers delegated to them by the General Assembly in their charters or under statutes). Bradley County, though, has authority, by statute, to require these same property owners to obtain plumbing permits from its Building Inspection Department because Tenn. Code Ann. § 68-120-101(b)(2)(B) requires Bradley County to enforce the building and plumbing codes it has adopted.

In determining whether the City's ordinance and Bradley County's issuance of plumbing permits under Tennessee statute are in conflict, Tennessee courts direct that statutes and ordinances are to be reconciled where possible and effect given to both. *Stuermer v. City of Chattanooga*, 914 S.W.2d 917, 920 (Tenn. Ct. App. 1995); *SPE, Inc. v. Metro Gov't of Nashville and Davidson Cnty.*, 817 S.W.2d 330, 333 (Tenn. Ct. App. 1991). In addressing the question of conflict between municipal ordinances and State statutes, the Tennessee Supreme Court has held:

> The mere fact that the state, in exercise of the police power, has made certain regulations does not . . . prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal by-law are not pernicious, as being unreasonable or discriminatory, both will stand, but municipal authorities, under a general grant of power, cannot adopt ordinances which infringe the spirit of a state law or are repugnant to the general policy of the state.

City of Bartlett v. Hoover, 571 S.W.2d 291, 293 (Tenn. 1978) (citing *Capitol News Co., Inc.*, 562 S.W.2d at 434).

Cleveland Municipal Code § 18-104(2) does not appear to conflict with the authority Bradley County exercises pursuant to Tenn. Code Ann. § 68-120-101(b)(2). Unlike the Spring Hill ordinance at issue in Opinion 86-71, the City of Cleveland's municipal code provision does not establish building and plumbing codes for buildings outside the City's corporate limits. It merely requires property owners to obtain a plumbing permit and pay a fee in order to connect to Cleveland Utilities, a utility district owned and operated by the City. As long as the municipal code provision is enforced against property owners outside its corporate limits in a manner that does not contravene or undermine the building construction safety standards adopted by Bradley County, Bradley County's authority granted under the statute and Cleveland Municipal Code § 18-104(2) can coexist and be effective.

Furthermore, the requirements of Cleveland Municipal Code § 18-104(2) apply to all property owners, within and without the City's corporate boundaries. Additionally, the City, as owner of Cleveland Utilities, has legitimate public health and safety interests in confirming that connections to its sewer system have been properly made since the City is legally responsible for Cleveland Utilities. *See Shaw v. Cleveland Utilities Water Div.*, No. E2009-00627-COA-R3-CV, 2009 WL 4250157 (Tenn. Ct. App. Nov. 30, 2009). Thus, it is reasonable that the City would retain oversight of connections to its sewer system through a city-operated permit process.

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

LAURA KIDWELL
Senior Counsel

Requested by:

The Honorable Eric Watson
State Representative
112 War Memorial Bldg.
Nashville, TN 37243