STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

January 30, 2017

Opinion No. 17-06

Mandatory Fees for Fire Protection Services

Question 1

Does the city of Lakeland, a municipality organized under a city manager-commission charter, have the authority to impose mandatory fees upon its residents to fund fire protection services?

Opinion 1

No.

Question 2

If not, would a general law of local application survive a constitutional challenge if it authorized the city of Lakeland, but not other municipalities, to impose mandatory fees upon its residents for fire protection services?

Opinion 2

For the reasons explained herein, such a law would be constitutionally suspect under article XI, section 8 of the Tennessee Constitution.

ANALYSIS

The city of Lakeland, an incorporated municipality in Shelby County, receives fire protection services from the Shelby County Fire Department. The city has contracted with Shelby County for the provision of these services for several years.

Counties in Tennessee are authorized to directly provide and fund fire protection services through two statutory schemes. A county may create a "county-wide fire department" that is funded by fire tax districts or by revenue from the county's general fund.[1] Tenn. Code Ann. § 5-17-101. Alternatively, a county may establish an "urban type public facility" to provide fire protection services. Tenn. Code Ann. § 5-16-101. Under this second scheme, a county is authorized to "charge fees, rates and charges" for the facility; the charges are set on "a basis that

[1] If a county funds its county-wide fire department with revenue from its general fund, the revenue must be generated from situs-based taxes collected in the unincorporated areas of the county or originate from other revenue sources that have already been shared with municipalities. Tenn. Code Ann. § 5-17-101(d)(2).

is calculated to ensure the fiscal solvency of the operation at all times." *Id*.; Tenn. Code Ann. § 5-16-109. Both statutory schemes allow a county to contract with incorporated municipalities located within its boundaries for the provision of fire protection services. *See* Tenn. Code Ann. § 5-16-107; Tenn. Code Ann. §§ 5-17-105(c), -108.

Shelby County provides fire protection services under the "urban type public facility" statutory scheme.[2] Based on a recent state study which you enclosed with your request for this opinion,[3] Shelby County is apparently the only county in Tennessee that utilizes this method to provide fire protection services. Under this scheme, the Shelby County Fire Department provides fire protection to all unincorporated areas of Shelby County and to one incorporated city within its boundaries – Lakeland.[4] According to the city's website, Lakeland households and businesses pay monthly fees in their utility bills for these services.[5] Shelby County contracts with Memphis Light, Gas and Water to collect the fees, which are assessed annually and billed monthly.[6]

Based on the foregoing, you conclude that Lakeland residents are the only municipal residents in Tennessee that pay mandatory fees to fund their fire protection services. You further observe that Lakeland is organized under a city manager-commission charter as provided in Chapters 18-22 of Title 6 of the Tennessee Code. Accordingly, Lakeland has express statutory authority to establish a fire department. *See* Tenn. Code Ann. §§ 6-21-701 to -704. You ask whether this authority allows Lakeland to pass an ordinance to impose mandatory fees upon its residents to fund fire protection services.[7] For the reasons explained below, it does not.

It is well established that municipalities may exercise only those express or necessarily implied powers delegated to them by the General Assembly in their charters or under statutes. *Allmand v. Pavletic*, 292 S.W.3d 618, 625-26 (Tenn. 2009); *City of Lebanon v. Baird*, 756 S.W.2d 236, 241 (Tenn. 1998); *Barnes v. City of Dayton*, 216 Tenn. 400, 410, 392 S.W.2d 813, 817 (1965). Thus, in order for Lakeland to impose mandatory fees upon its residents for fire protection services, there must be a positive grant of authority in its charter provisions or other general statutes.

As discussed above, general law expressly authorizes any *county* that desires to provide fire protection services through an "urban type public facility" to "charge fees, rates and charges" to support the facility. Tenn. Code Ann. §§ 5-16-101, -109. *Municipalities*, however, are not given the authority to establish such a facility and charge fees under this statutory scheme. *See*

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[2] *See* https://firedepartment.shelbycountytn.gov/Fire_Fee_Rules_Regulations (last visited January 20, 2017).

[3] *See* https://tn.gov/assets/entities/tacir/attachments/Tab7_Fire.pdf (last visited January 20, 2017).

[4] *See* notes 2 and 3, *supra*.

[5] *See* https://tn-lakeland.civicplus.com/index.aspx?nid=264 (last visited January 20, 2017).

[6] *See* note 3, *supra*.

[7] We assume your use of the phrase "fire protection services" does not encompass fire equipment and facilities, but refers to operations. "[F]ire department equipment and buildings" are considered "public works projects" under the Local Government Public Obligations Act. *See* Tenn. Code Ann. § 9-21-105(21)(A). When a municipality has financed the purchase of fire department equipment and buildings under this Act, the municipality is authorized to charge fees associated with the use of the equipment and buildings. *See* Tenn. Code Ann. § 9-21-107(8).

Tenn. Code Ann. § 5-16-101(a) (authorizing the "various counties of this state"). Under general statutes, the General Assembly has given municipalities the authority to impose fees for fire protection services only on a limited basis pursuant to contracts and "mutual aid agreements" for "firefighting service." *See* Tenn. Code Ann. §§ 6-54-601 to -603; Tenn. Att'y Gen. Op. 93-53 (Aug. 9, 1993).

> Any incorporated city or town may provide fire protection to citizens *outside the territorial limits of the municipality on an individual contractual basis* whenever an agreement has been made for the extension of that service by the legislative body of the municipality and the legislative body of the county in which the fire protection is to be provided. . . .

Tenn. Code Ann. § 6-54-601(c) (emphasis added). Clearly, this statute provides no authority for a municipality to impose fees for fire protection services *within* its territorial limits.

Consequently, Lakeland is not authorized to impose fees upon its residents for fire protection services unless its charter provisions permit it to do so. A review of the "general powers" of a municipality organized under a city manager-commission charter reveals no explicit authority for such a municipality to impose fees upon its residents for the provision of fire protection services. *See* Tenn. Code Ann. § 6-19-101. The "general powers," though, do include a grant of police power. *See* Tenn. Code Ann. § 6-19-101(22). A municipality is generally authorized, as an exercise of its police powers, to provide fire protection services within its boundaries. *See* Tenn. Att'y Gen. Op. 10-03 (Jan. 19, 2010). But "police power belongs to the state, and passes to municipalities only when and as conveyed by legislative enactment." *Holdredge v. City of Cleveland*, 218 Tenn. 239, 247-48, 402 S.W.2d 709, 712 (1966). Consequently, "it is elementary that statutes prescribing how delegated police power may be exercised by municipalities are mandatory and exclusive." *Brooks v. Garner*, 566 S.W.2d 531, 532 (Tenn. 1978). *See Draper v. Haynes*, 567 S.W.2d 462, 465 (Tenn. 1978) (municipalities may only exercise police power within authority expressly or impliedly granted to them by general law or charter provisions).

Here, the General Assembly has authorized a municipality organized under a city manager-commission charter to establish a fire department as set forth in Tennessee Code Annotated §§ 6-21-701 to -704. This grant of the authority provides that the city manager "shall appoint a chief of the fire department and such other members of the department as may be provided by ordinance." Tenn. Code Ann. § 6-21-701. The "duty" of the chief and department members is "to take all proper steps for fire prevention and suppression." Tenn. Code Ann. § 6-21-702. In aid of that duty, the General Assembly has bestowed certain "emergency powers" upon the chief and the department when "responding to, operating at, or returning from" an emergency. Tenn. Code Ann. § 6-21-703(a).[8] Finally, the chief has the authority to appoint a fire marshal "to investigate the

[8] Tennessee Code Annotated § 6-21-703(a) in its entirety provides:

> (a) When any fire department or company recognized as duly constituted by the commissioner of commerce and insurance pursuant to § 68-102-108 is requested to respond to a fire, hazardous materials incident, natural disaster, service call, or other emergency, it may, regardless of where the emergency exists, proceed to the emergency site by the most direct route at the maximum speed consistent with safety. While

cause, origin, and circumstances of fires and the loss occasioned thereby, and assist in the prevention of arson." Tenn. Code Ann. § 6-21-704.

These provisions do not expressly authorize the imposition of fees for any fire protection services that the fire department might provide. Moreover, there is no provision that would implicitly allow the fire department to impose fees upon its residents for these services. While the chief and the department members have a duty "to take all proper steps for fire prevention and suppression," there is no attendant provision that permits a municipality to charge fees to defray the cost of carrying out the duty.[9] Consequently, Lakeland lacks authority to pass an ordinance to impose fees upon its residents for fire protection services. Funding for these services must come

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responding to, operating at, or returning from such emergency, the chief of the responding fire department or company, or any member serving in capacity of fire officer-in-charge, shall also have the authority to:

(1) Control and direct the activities at the scene of the emergency;

(2) Order any person or persons to leave any building or place in the vicinity of such scene for the purpose of protecting such person or persons from injury;

(3) Blockade any public highway, street or private right-of-way temporarily while at such scene;

(4) Trespass at any time of the day or night without liability while at such scene;

(5) Enter any building or premises, including private dwellings, where a fire is in progress, or where there is reasonable cause to believe a fire is in progress, for the purpose of extinguishing the fire;

(6) Enter any building or premises, including private dwellings, near the scene of the fire for the purpose of protecting the building or premises, or for the purpose of extinguishing the fire that is in progress in another building or premises;

(7) Inspect for preplanning all buildings, structures, or other places in the chief's fire district, except the interior of a private dwelling, where any combustible material, including waste paper, rags, shavings, waste, leather, rubber, crates, boxes, barrels, rubbish, or other combustible material that is or may become dangerous as a fire menace to such buildings, structures, or other places has been allowed to accumulate, or where such chief or the chief's designated representative has reason to believe that such combustible material has accumulated or is likely to accumulate;

(8) Direct without liability the removal or destruction of any fence, house, motor vehicle, or other thing, if such person deems such action necessary to prevent the further spread of the fire;

(9) Request and be furnished with additional materials or special equipment at the expense of the owner of the property on which the emergency occurs, if deemed necessary to prevent the further spread of the fire or hazardous condition; and

(10) Order disengagement or discouplement of any convoy, caravan, or train of vehicles, craft, or railway cars, if deemed necessary in the interest of safety of persons or property.

[9] Moreover, the duty herein is not a regulatory one. In some instances, a municipality engaged in a regulatory activity can assess fees, although not legislatively authorized, as long as the fees are reasonably necessary to accomplish the regulatory program. *See* 62 C.J.S. Municipal Corporations § 251 (2016).

from an authorized source – property taxes, for example. *See* Tenn. Code Ann. § 6-19-101(1) (power to levy taxes for municipal purpose).[10]

You next ask whether a general law of local application would survive a constitutional challenge if it authorized the city of Lakeland, but not other municipalities, to impose mandatory fees upon its residents for fire protection services. For the reasons explained below, such a law would be constitutionally suspect.

Article XI, section 8 of the Tennessee Constitution provides in pertinent part:

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immuntie [immunities], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

In short, this constitutional provision states that the legislature has no power to suspend any general law for the benefit of a particular individual that is inconsistent with the general laws of the land. Through judicial interpretation, this provision applies to counties and cities, as well as individuals. *Hart v. City of Johnson City*, 801 S.W.2d 512, 515 (Tenn. 1990) (citations omitted); *Brentwood Liquors Corp. v. Fox*, 496 S.W.2d 454, 456-57 (Tenn. 1973).

In order to trigger application of article XI, section 8, a statute must contravene some general law with mandatory statewide application. *Riggs v. Burson*, 941 S.W.2d 44, 53 (Tenn. 1997) (citations omitted). If a statute contravenes general law for the benefit of an individual, municipality, or county, the statute violates this constitutional provision unless there is a rational basis for the classification.[11] *See id.*; *Hart*, 801 S.W.2d at 515. Under rational basis scrutiny, a statutory classification will be upheld if some reasonable basis can be found for the classification or if any state of facts may reasonably be conceived to justify it. *Riggs*, 941 S.W.2d. at 53.

As explained above, neither general statutory provisions nor the statutes governing municipalities organized under a city manager-commission charter authorize the city of Lakeland to impose mandatory fees upon its residents for fire protection services. Therefore, the proposed law would contravene general law. Accordingly, there must be a rational basis for allowing only Lakeland to impose mandatory fees upon its residents for fire protection services. While you indicate that Lakeland is unique in that it is apparently the only municipality in Tennessee whose residents pay mandatory fees because Shelby County is currently the only county that provides

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[10] A municipality organized under a city manager-commission charter also has the power to "make special assessments for local improvements." Tenn. Code Ann. § 6-19-101(3). While no Tennessee court has addressed whether fire protection services may be funded by special assessment, other courts have found that fire protection is a proper purpose for a special assessment under certain circumstances. *See Lake County v. Water Oak Management Corp*., 695 So.2d 667 (Fla. 1997); Tenn. Att'y Gen. Op. 83-446 (1983) (citing *McCoy v. City of Sisterville*, 120 W.Va. 471, 199 S.E. 260 (1938)).

[11] All classifications that do not affect a fundamental right or discriminate as to a suspect class are generally subject to the rational basis test. *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978).

these fire protection services through the "urban type public facility" scheme, this fact does not provide a justification for the proposed law. Other counties could elect to utilize the "urban type public facility" scheme in the future, which would likely result in the imposition of mandatory fees upon any municipality that chooses to contract with such a county for fire protection services. But more importantly, Lakeland residents incur their current fees because Lakeland has chosen to contract with Shelby County for these services. If Lakeland wishes to provide fire protection services to its residents through its own fire department, it may take the proper steps to terminate its contract with Shelby County. Accordingly, we are unable to conceive a rational basis for granting only the city of Lakeland the authority to impose mandatory fees upon its residents for fire protection services.

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