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Opinion No. 01-125

Requiring Connection to New Sewer System

QUESTION

May Town A, upon building and operating its own sewage treatment plant, via ordinance and/or other means, require all home owners, businesses, schools and other customers to use Town A's sewer service and require those presently using Town B's sewage treatment system to switch to Town A's system?

OPINION

Only a court of competent jurisdiction, after reviewing all the relevant facts and circumstance, including the location of the two sewage treatment systems, and the circumstances under which the older system was built, could provide a definitive answer to this question. No Tennessee statute expressly authorizes a city to require customers of an older system operated by a different city to connect with a newer system. We think a court would conclude that, under Tenn. Code Ann. § 7-51-401(c), Town A is not authorized to extend sewer service into areas outside its boundaries that are already being served by Town B's system. In addition, while cities generally have exclusive authority to provide utility service within their corporate boundaries, a court could conclude that Town A is estopped from forcing residents within its limits to switch service if Town B initially provided service within the limits with the consent, express or implied, of Town A. A court could also conclude that, in view of various statutes authorizing cities to cooperate in the provision of utilities, cities are not authorized to compete with one another by such a method.

ANALYSIS

This request concerns the respective authority of two different cities, Town A and Town B. Town A wishes to build a new sewer system. Town B has been operating a sewer system in the area for some time. The question is whether, once Town A has built its system, it may, by ordinance or any other means, require customers connected to Town B's system to switch to service by Town A. This Office recently concluded that a city may, in some circumstances, build a sewer line across the territory of another city in order to connect with a third city's sewer plant, without obtaining the permission of the city whose territory it is crossing. Op. Tenn. Atty. Gen. 01-098 (June 13, 2001). But that opinion does not address a city's

right to extend service to customers in an area that is already being served by another city system.

A. Authority to Extend Service Beyond City Limits

The request does not indicate where Town B is now providing service. Tenn. Code Ann. § 7-51-401 provides as follows:

> (a) Except as provided in § 7-82-302, each county, utility district, municipality or other public agency conducting any utility service specifically including waterworks, water plants and water distribution systems and sewage collection and treatment systems is authorized to extend such services beyond the boundaries of such county, utility district, municipality or public agency to customers desiring such service.
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> (b) Any such county, utility district, municipality or public utility agency shall establish proper charges for the services so rendered so that any such outside service is self-supporting.
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> (c) *No such county, utility district, municipality or public utility agency shall extend its services into sections of roads or streets already occupied by other public agencies rendering the same service, so long as such other public agency continues to render such service.*

Tenn. Code Ann. § 7-51-401 (emphasis added). We think a court would conclude that, under subsection (c), Town A is not authorized to extend sewer service into areas outside its boundaries that are already being served by Town B's system.

B. Authority to Require Customers within City Limits Receiving Sewer Service from Another City to Switch Service

No statute clearly addresses the power of City A to require customers located within its boundaries who are already being served by City B's system to connect to City A's new system. Of course, as cited above, Tenn. Code Ann. § 7-51-401(c) prohibits a city from extending its service into an area already served by another public utility. It could therefore be argued that, once City B begins serving an area within the corporate limits of City A, this statute would prohibit City A from providing services to the same area. We think, however, that this statute limits the right of a public utility to extend services *beyond* its corporate boundaries, not the right of a city to provide service within its boundaries. This conclusion is based on the language of the statute, which refers to "any *such* county, utility district, municipality or public utility agency..." that is, any governmental entity extending its services beyond its boundaries. We think this

interpretation is also consistent with other statutes providing that a city has the right to grant exclusive franchises for the provision of public utilities to be furnished within the city. *See, e.g.,* Tenn. Code Ann. § 6-2-201(12).

State statutes expressly authorize a city financing a new system under Tenn. Code Ann. § 7-35-101, *et seq.*, to require residents to hook on to the system. Tenn. Code Ann. § 7-35-201 provides in relevant part:

> *In order to protect the public health of persons residing within congested areas, and in order to assure the payment of bonds issued for sewer purposes,* the governing body of every city, town and utility district, which has heretofore issued or shall hereafter issue bonds payable in whole or in part from revenues from sewer services provided within or without its borders, is authorized by appropriate resolution:
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> (1) To require the owner, tenant or occupant of each lot or parcel of land which abuts upon a street or other public way containing a sanitary sewer and upon which lot or parcel a building exists for residential, commercial or industrial use, to connect such building with such sanitary *sewer and to cease to use any other means for the disposal of sewage,* sewage waste or other polluting matter; in addition to any other method of enforcing such requirement, a city, town or utility district also providing water services to such property may, within or without its borders, refuse water service to such owner, tenant or occupant until there has been compliance and may discontinue water service to an owner, tenant or occupant failing to comply within thirty (30) days after notice to comply.

Tenn. Code Ann. § 7-35-201(1) (emphasis added). Tenn. Code Ann. § 68-221-209 contains similar authority with regard to a city financing its system by a loan from Local Development Authority Bonds under Tenn. Code Ann. §§ 68-221-201, *et seq.* It could be argued that either of these provisions would authorize a city financing a system under these statutes to require customers located within the city boundaries and outside the city boundaries to connect to the new system. Earlier opinions of this Office imply that these statutes provide the sole authority for a city to require residents to connect to a new system. Op. Tenn. Atty. Gen. 92-8 (February 7, 1992); Op. Tenn. Atty. Gen. 91-17 (February 20, 1991). But we think that, depending on facts and circumstances, an argument could be made that a city, regardless of how a new sewer system is financed, may require residents to connect to a new sewer system in areas where sewer service was not formerly available in order to protect the public health and safety. This requirement, while not expressly contained in any statute, could be inferred from the police powers generally accorded under a city charter. Under Tenn. Code Ann. § 6-2-201(22), for example, cities incorporated under the mayor-aldermanic charter may regulate "all . . . 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 municipality, and exercise general police powers[.]"

But it is not clear that a city could, under Tenn. Code Ann. § 7-35-201, Tenn. Code Ann. § 68-221-209, or in the exercise of its police power, require customers who are already served by a sewer system within its boundaries by another city to switch to a system built by the city. That authority does not further the same health concerns as requiring a connection in an area not currently served by a sewer system. Cities are generally authorized to grant exclusive franchises for the provision of public utilities to be furnished within the city. *See, e.g.*, Tenn. Code Ann. § 6-2-201(12). Further, a city has the sole right to furnish utilities within any area it annexes. Tenn. Code Ann. § 6-51-111. However, City A's right to replace a system already operated by City B within City A's boundaries could depend on the circumstances under which City B extended service into the city boundaries. For example, if such extension was with the consent, either express or implied, of City A, City A could be estopped from attempting to replace City B's system by requiring customers to hook on to City A's new system. *Whitehaven Utility District v. Ramsay*, 215 Tenn. 435, 387 S.W.2d 351 (1964). It should also be noted that a city is expressly authorized to contract with another city for the use of utility pipes belonging to that city. Tenn. Code Ann. §§ 7-35-301, *et seq.* It could therefore be argued that the applicable statutes require cities to cooperate, rather than compete, in providing utility service in an area, and that City A is therefore not authorized to require customers of City B's system to switch to City A's new system.

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