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Opinion No. 06-030

Authority of City Utility System to Repair Privately Owned Lines

QUESTION

As part of a settlement in lieu of a civil penalty for violations of the Water Quality Act, Tenn. Code Ann. §§ 69-3-101, *et seq.*, the Town of Collierville has proposed replacing damaged privately owned sewer lines in low income housing. These lines run into the city sewer lines. Replacing the lines with new lines in good repair would reduce the amount of storm water flowing into the system that can cause overflows of untreated sewage.

1. Would this proposed use of public funds violate the requirement in Article II, Section 29, of the Tennessee Constitution, or Tenn. Code Ann. § 6-56-112, that city funds be used for a valid municipal purpose?

2. Would the project violate Tenn. Code Ann. § 7-35-401(c)(1) if the Town obtains a construction easement from the line owners?

3. Would the project violate the Town's duty to charge just and equitable rates either under Tenn. Code Ann. § 7-35-414 or the common law?

OPINION

1. No, this use of the funds is a valid city purpose under the Tennessee Constitution and Tenn. Code Ann. § 6-56-112.

2. Tenn. Code Ann. § 7-35-401(c)(1) would prohibit the Town of Collierville from replacing private sewer lines unless the town acquires a permanent utility easement with respect to those lines.

3. We think a court would conclude that, once the city system obtains a permanent utility easement on lines, these lines are part of the city utility system. Their maintenance, therefore, is a legitimate cost of operating the entire system, and that cost may justly be borne by all the ratepayers.

ANALYSIS

This question arises in the course of an enforcement action by the Department of Environment and Conservation against the Town of Collierville for violations of the Water Quality Act, Tenn. Code Ann. §§ 69-3-101, *et seq*. Under Tenn. Code Ann. § 69-3-107(3), the Commissioner of the Department of Environment and Conservation is authorized to bring suit for violation of the statutes prohibiting water pollution. The statute authorizes the Commissioner to seek "any remedy provided in this part, and any other statutory or common law remedy available for the control, prevention, and abatement of pollution." Tenn. Code Ann. § 69-3-107(c). The persons named in the order may request a hearing before the Tennessee Water Quality Control Board. Tenn. Code Ann. § 69-3-109(a)(3). The Commissioner may issue an assessment against any person responsible for the violation. Tenn. Code Ann. § 69-3-115(2)(A). In assessing a civil penalty, the Commissioner may consider the following factors:

> (A) Whether the civil penalty imposed will be a substantial economic deterrent to the illegal activity;
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> (B) Damages to the state, including compensation for loss or destruction of wildlife, fish, and other aquatic life, resulting from the violation, as well as expenses involved in enforcing this section and the costs involved in rectifying any damage;
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> (C) Cause of the discharge or violation;
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> (D) The severity of the discharge and its effect upon the quality and quantity of the receiving waters;
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> (E) Effectiveness of action taken by the violator to cease the violation;
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> (F) The technical and economic reasonableness of reducing or eliminating the discharge;
>
> (G) The social and economic value of the discharge source; and
>
> (H) The economic benefit gained by the violator.

Tenn. Code Ann. §69-3-115(a)(3).

The Commissioner may also assess the polluter or violator for damages to the State resulting from the violation. Tenn. Code Ann. § 69-3-116(a). The Commissioner, therefore, has considerable discretion to assess penalties for violations of the statute. The Commissioner has adopted a policy regarding Supplemental Environmental Projects in lieu of or in addition to a civil penalty. The policy defines a Supplemental Environmental Project ("SEP") as an environmentally beneficial

project that the violators agree to implement as part of settlement of an enforcement action; however, the violator is not otherwise legally obligated to perform the project activity. The civil penalty may be reduced by the cost amount of the SEP, but the reduction for the SEP is not straight cost and is determined on a case-by-case basis.

The request indicates that the Department issued a Commissioner's Order and Civil Penalty Assessment to the Town of Collierville for violations of the state water quality laws. One of the problems the Town experienced is that rain would cause excess water to enter the sewage system, resulting in overflows of untreated sewage. Instead of paying part of the assessment, the Town proposed an SEP to replace damaged private sewer lines that run into the publicly owned municipal sewer-storm water system. Apparently, repair of the lines would be confined to system customers who occupy low-income housing. The Town has informed the Department that, while it does not own these lines, it will acquire "construction utility easements" before starting the project. The Comptroller of the Treasury has expressed concern that the project would violate two statutes governing the city utility system, one concerning the city's power to build private lines and the other concerning its duty to charge just and equitable utility rates.

1. Requirement of Public Purpose

Under Tenn. Code Ann. § 6-56-112, all expenditures of money made by a municipality must be for a lawful municipal purpose. Under Article II, Section 29, the General Assembly may provide for counties and municipalities "to impose taxes for County and Corporation purposes respectively." That provision has been construed to prohibit counties and cities from appropriating funds for anything besides county or public purposes. *See, e.g., Metropolitan Development and Housing Agency v. Leech*, 591 S.W.2d 427, 429 (Tenn. 1979) (appropriation of county funds to a municipal housing agency to improve blighted urban areas serves a legitimate county purpose under Article II, Section 29); *Southern v. Beeler*, 183 Tenn. 272, 300, 195 S.W.2d 857 (1946).

In determining whether the expenditure of public funds is for a public purpose under Article II, Section 29, courts have looked to the end or total purpose of such expenditure, and the mere fact that some individual may derive an incidental benefit from the activity does not deprive the activity of its public function, if its primary function is public. *See City of Chattanooga v. Harris*, 223 Tenn. 51, 442 S.W.2d 602 (1969) (a statute requiring cities to provide defense in suits against city policemen and firemen arising out of performance of their official duties and to indemnify them against any judgment rendered served a valid public purpose under Article II, Section 29, even though it also conferred a personal benefit on the policemen and firemen). Otherwise stated, the test of a public purpose is whether the expenditure confers a direct benefit of reasonably general character to a significant part of the public, as distinguished from a remote or theoretical benefit. McQuillin, *Law of Municipal Corporations* § 39.19 (3rd. ed.1993). In addition, the judgment of the local government of a municipality, as expressed by its governing body, is generally considered by the courts to be prima facie evidence as to whether an object proposed is a legitimate corporate or public purpose. *See McCallie v. Mayor of Chattanooga*, 40 Tenn. 317 (1859) and *Adams v. Memphis & L.R.R.*, 42 Tenn. 645 (1866). *See also* Op. Tenn. Att'y Gen. 96-011 (February 6, 1996) (use of Metro funds to develop a sports stadium expressly authorized by state law serves a

constitutional public purpose as required under Article II, Section 29).

In this case, the Town would repair privately owned pipes that feed into the publicly owned system. Repair of the privately owned pipes would help prevent sewage overflows within the public system. This purpose is clearly a valid municipal purpose under Article II, Section 29.

The question then becomes whether use of city funds for this purpose is a "valid municipal purpose" within the meaning of Tenn. Code Ann. § 6-56-112. An examination of the legislative history of the statute reveals that the Senate Sponsor, Senator Henry, considered the statute to require that, whenever funds are disbursed by a municipality, "the disbursement ought to be able to be matched up with a specific code section or ordinance." Senate Session, March 31, 1993 (Tape S-46). In this case, we think it can be argued that, providing it otherwise falls within the statutory limits discussed below, the Town of Collierville's proposed use of funds for the SEP is authorized under the city utility commission's authority to "perform everything necessary to the proper operation of the works and collection of charges for service rendered, subject only to the limitation of funds available for operation and maintenance." Tenn. Code Ann. § 7-35-412.

2. Authority of City to Repair Private Water Lines

Tenn. Code Ann. § 7-35-401(a) authorizes every incorporated city and town to build and operate a waterworks or sewerage system. Tenn. Code Ann. § 7-35-401(c)(1) provides:

> 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):
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> * * * *
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> (B) "Project for a private purpose" includes, but is not limited to:
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> (i) Any commercial project, commercial subdivision, private residence or residential subdivision that is owned by a nonpublic entity;
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> (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*; and
>
> (iii) Any other projects that are not part of the normal operation of a municipal corporation in providing water or sewerage services and which projects are otherwise constructed by private contractors who are subject to the sales tax, the business tax and other tax laws and licensure laws of this state: and
>
> (C) "Project for a private purpose" does not include the renewal or replacement of any existing water or sewerage lines that are owned

> by the municipal corporation.

(Emphasis added). 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 limitation in Tenn. Code Ann. § 7-35-401(c)(1), therefore, would not apply to a city operating its utility system under a different statutory scheme. The Collierville Town Charter grants the Town the power to:

> Acquire, construct, own, operate, maintain, sell, lease, mortgage, pledge, or otherwise dispose of public utilities or any estate or interest therein, or any other utility or service to the Town, its inhabitants, or any part thereof, whether within or without the corporate limits[.]

Collierville Town Charter, § 2.02(a)(11). This provision gives the town independent authority to own and operate a public utility, including sewage and water systems. At the same time, however, Tenn. Code Ann. §§ 7-35-401, *et seq.*, grants many explicit powers to a town, including the power to condemn property for a waterworks or sewerage system, and the power to create a board of commissioners with specified qualifications and terms of office to operate the system. These powers do not appear in the Collierville Town Charter. Further, the Town apparently acknowledges that the restrictions contained in Tenn. Code Ann. §§ 7-35-401, *et seq.*, apply to its water and sewer system. We will assume, therefore, that the Town of Collierville operates its water and sewer system under that statutory scheme.

Under Tenn. Code Ann. § 7-35-401(c), a city may not bid on or construct a project for a private purpose. The term "project for a private purpose" includes, "[t]he 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 added). We assume that the Town of Collierville proposes to replace individual lines that are beyond the system service meters or on private property. Under this statute, a city may only build these lines if the city owns the lines, or if it has a utility easement for the lines. The statute does not define the term "utility easement." But an easement for the construction and maintenance of a sewer line, and a "temporary construction easement" refer to different property interests. *See, e.g., City of Gallatin v. Jackson*, CA No. 01-A-01-9005CV00160 (W.S. Tenn. Ct. App. 1991), 1991 WL 1051. In that case, the city had condemned an easement "for the construction and maintenance of a sanitary sewer" across a portion of a private lot, and "in addition" acquired a "temporary construction easement" that covered a larger part of the lot. *See also City of Maryville v. Edmondson*, 931 S.W.2d 932 (Tenn. Ct. App. 1996). In that case, a city sought to acquire a permanent easement *and* a construction easement across private property for a sewer line. We think a court would conclude that the term "utility easement" under Tenn. Code Ann. § 7-35-401(c)(1)(B)(ii) refers to a permanent easement for the construction and maintenance of a line, not a temporary construction easement. For this reason, Tenn. Code Ann. § 7-35-401(c)(1) would prohibit the Town of Collierville from replacing private sewer lines unless the town acquires

a permanent utility easement with respect to those lines.

3. "Just and Equitable" Consumer Rates

Tenn. Code Ann. § 7-35-414(a) provides in relevant part:

> The governing body of any city or town acquiring and operating a waterworks or sewerage system under the provisions of this part has the power, and it is the governing body's duty, by ordinance, to establish and maintain *just and equitable rates and charges for the use of and the service rendered by the waterworks or sewerage system, to be paid by the beneficiary of the service.* The rates and charges shall be adjusted so as to provide funds sufficient to pay all reasonable expenses of operation, repair, and maintenance, provide for a sinking fund for payment of principal and interest of bonds when due, and maintain an adequate depreciation account, and the rates and charges may be readjusted as necessary from time to time by amendment to the ordinance establishing the rates then in force.

(Emphasis added). In addition, common law requires that a municipal utility charge rates that are not "unjustly discriminatory." *See City of Parsons v. Perryville Utility District,* 594 S.W.2d 401 (Tenn. Ct. App. 1979), *p.t.a. denied* (1980). It can be argued that the proposed arrangement would make the utility's rate structure unjustly discriminatory in violation of this requirement. The customers willing to transfer a permanent utility easement to the city system would be freed of the expense of maintaining lines on their property. That expense would be borne by all the customers of the district, while some customers would still bear the cost of maintaining the lines on their property. But we think a court would conclude that, once the city system obtains a permanent utility easement on lines, these lines are part of the city utility system. Their maintenance, therefore, is a legitimate cost of operating the entire system, and that cost may justly be borne by all the ratepayers under Tenn. Code Ann. § 7-35-414(a).

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