STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

February 14, 2014

Opinion No. 14-19

Municipality's Right to Provide Water Services in Annexed Territory

QUESTIONS

1. If a municipality desires to provide water and/or wastewater services in territory annexed by the municipality where such territory is claimed to be within a "service area" of a Water and Wastewater Treatment Authority, must the municipality attempt to obtain the right to provide service pursuant to Tenn. Code Ann. § 5-6-120?

2. If a municipality desires to provide water and/or wastewater services in territory annexed by the municipality where such territory is claimed to be within a "service area" of a Water and Wastewater Treatment Authority, can the municipality require the Water and Wastewater Treatment Authority to proceed under Tenn. Code Ann. § 6-51-111?

OPINIONS

1. No. There is an irreconcilable conflict between the provisions of Tenn. Code Ann. § 5-6-120 and § 6-51-111. The later-enacted substantive provisions of Tenn. Code Ann. § 6-51-111(e) impliedly repeal Tenn. Code Ann. § 5-6-120 to the extent of the inconsistency between the two statutes. Therefore the situation is governed by Tenn. Code Ann. § 6-51-111(e).

2. Yes. The Water and Wastewater Treatment Authority is required to proceed under Tenn. Code Ann. § 6-51-111(e).

ANALYSIS

1. & 2. Both Tenn. Code Ann. § 5-6-120 and § 6-51-111 speak to the situation in which a municipality has annexed territory that is claimed to be within the existing "service area" of a Water and Wastewater Treatment Authority (WWTA) and the municipality wants to provide water and/or wastewater services in the annexed territory. Tenn. Code Ann. § 5-6-120(a) provides:

> The general assembly enacts this section as a statement of its intent that this section is a clarification of title 68, chapter 221, part 6.[1] From and after the creation of a water and wastewater treatment authority and the establishment of its service area, the authority shall be the sole and *exclusive provider* of its authorized services in its service area. . . . The authority may cede all or any portion of its functions or service area to another governmental entity upon the [authority's] board determining in its sole discretion that the public convenience and necessity require the same.

(Emphasis added). Tenn. Code Ann. § 5-6-120(b) provides:

> The authority granted in this section shall prevail over any other provision of law to the contrary for all water and wastewater service providers proposing to provide such services in the service area of the authority. Any city proposing to provide such services in the service area of the authority shall have authorization to do so only by filing a petition in the manner established by this section and receiving a cession by the authority.

Tenn. Code Ann. § 6-51-111(a), which addresses the power of annexing municipalities to provide utility services in annexed territory, provides:

> The annexing municipality, if and to the extent that it may choose, shall have the *exclusive right* to perform or provide municipal and utility functions and services in any territory that it annexes, notwithstanding § 7-82-301[2] or any other statute, subject however, to the provisions of this section with respect to electric cooperatives.

(Emphasis added). Tenn. Code Ann. § 6-51-111(e) establishes the procedure to be followed "[i]f at the time of annexation, the annexed territory is being provided with utility services by a municipal utility system or other state instrumentality, including but not limited to, a utility district."[3] In that situation, Tenn. Code Ann. § 6-51-111(e) provides:

---

[1] This is a reference to the Water and Wastewater Treatment Authority Act. *See* Tenn. Code Ann. §§ 68-221-601 to -618. In accordance with this act, a WWTA may operate a water treatment facility, a wastewater treatment facility, or both. *See* Tenn. Code Ann. § 68-221-603(9).

[2] This statute is part of the Utility District Law of 1937. *See* Tenn. Code Ann. §§ 7-82-101 to -804.

[3] A "utility district" is defined in Tenn. Code Ann. § 7-82-701(a) to include "authorities or instrumentalities of government created by public or private act having the authority to administer a water or wastewater facility."

> [T]he annexing municipality shall, by delivering written notice of its election to the municipal utility system or other state instrumentality, have the right to purchase all or any part of the utility system of the municipal utility system or other state instrumentality then providing utility service to the area being annexed that the annexing municipality has elected to serve under this section.

If the annexing municipality and the current utility service provider cannot agree on a purchase price, the statute provides for that price to be determined through arbitration. The procedure specified in Tenn. Code Ann. § 6-51-111(e) is declared to be "the sole means by which the annexing municipality may acquire the facilities of a municipal utility system or other state instrumentality located in the annexed territory."

Thus, both Tenn. Code Ann. § 5-6-120 and § 6-51-111 address the situation posited. Tenn. Code Ann. § 5-6-120(a) designates a WWTA as the "exclusive provider of its authorized services in its service area." Yet, Tenn. Code Ann. § 6-51-111(a) gives an annexing municipality the "exclusive right to perform or provide municipal and utility functions and services in any territory that it annexes." Under Tenn. Code Ann. § 5-6-120(a), the WWTA has sole discretion to decide whether it wants to cede its authority to provides services to another provider. But under Tenn. Code Ann. § 6-51-111(e), once an annexing municipality provides notice of its election to provide service in the annexed territory, this statute authorizes the municipality to purchase any or all of the existing service provider's facilities.

"[T]he Legislature is presumed to have knowledge of its prior enactments and to know the state of the law at the time it passes legislation." *Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn. 1995) (citing *Wilson v. Johnson County*, 879 S.W.2d 807, 809 (Tenn. 1994)). Accordingly, it is an established rule of statutory construction that when "two acts conflict and cannot be reconciled, the prior act will be repealed or amended by implication to the extent of the inconsistency between the two." *Hayes v. Gibson County*, 288 S.W.3d 334, 337 (Tenn. 2009) (quoting *Cronin*, 906 S.W.2d at 912, and citing *State ex rel. Strader v. Word*, 508 S.W.2d 539, 547 (Tenn. 1974), and *Southern Constr. Co. v. Halliburton*, 149 Tenn. 319, 258 S.W. 409, 412 (1924)). While repeals by implication are not favored, they are recognized by Tennessee courts "when the conflict between the statutes is irreconcilable." *Hayes*, 288 S.W.3d at 338 (citing *Cronin*, 906 S.W.2d at 912, *English v. Farrar*, 206 Tenn. 188, 332 S.W.2d 215, 220 (1960), and *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 60 S.W.3d 65, 74 (Tenn. Ct. App. 2001)).

Clearly, both Tenn. Code Ann. § 5-6-120 and § 6-51-111 cannot be applied in a situation where an annexing municipality wants to provide water and/or wastewater services in annexed territory that is claimed to be within a WWTA's existing "service area." A WWTA and an annexing municipality cannot both have

the "exclusive" right to provide service in the same territory. And both statutes cannot provide the "sole" or "only" procedure to be followed in this situation. Thus, there is an irreconcilable conflict between the provisions of Tenn. Code Ann. § 5-6-120 and § 6-51-111.

The last substantive amendment to Tenn. Code Ann. § 6-51-111 was in 2003. *See* 2003 Tenn. Pub. Acts 93. As relevant to the questions presented by this request, the 2003 amendment changed the scope of subsection (e) of the statute by having it apply not just to "electric service" and an "electric distribution system," as when originally enacted in 1998, but more broadly to "utility service" and a "utility system." *Compare* 2003 Tenn. Pub. Acts ch. 93, § 1, *with* 1998 Tenn. Pub. Acts ch. 586, § 1. The 2003 amendment also added the specific reference to a "utility district" in subsection (e), which, as noted, is statutorily defined to encompass "authorities or instrumentalities of government created by public or private act having the authority to administer a water or wastewater facility." Tenn. Code Ann. § 7-82-701(a).[4]

The last substantive amendment to Tenn. Code Ann. § 5-6-120 was in 1995. *See* 1995 Tenn. Pub. Acts 77, § 1. Although this statute was also amended in 2003, that change was one of form rather than substance. In 2003, the General Assembly decided that the title given the chief executive officer of a county would be "county mayor" instead of "county executive" and amended Tenn. Code Ann. § 5-6-101. *See* 2003 Tenn. Pub. Acts 90, § 1. Tenn. Code Ann. § 5-6-120 was implicated only because the act also directed the Tennessee Code Commission to make that change where "county executive" appeared elsewhere in the Code. *Id*. at § 2. This non-substantive change to Tenn. Code Ann. § 5-6-120 is not relevant in determining which statute has the later-enacted provisions applicable to the factual situation here. *See* 1A *Sutherland Statutory Construction* § 23.10 (7th ed. 2007) (the question is whether "the legislature intended in its later legislative action the unequivocal purpose to effect a repeal").

Because there is an irreconcilable conflict between these two statutes, the later-enacted provisions of Tenn. Code Ann. § 6-51-111(e) impliedly repeal the provisions of Tenn. Code Ann. § 5-6-120 to the extent of the inconsistency between the two. As a result, when an annexing municipality wants to provide water and/or wastewater services in annexed territory that is claimed to be within a WWTA's

[4] Prior to the 2003 amendment to Tenn. Code Ann. § 6-51-111(e), an issue about an alleged conflict between Tenn. Code Ann. § 5-6-120 and § 6-51-111 was raised by a WWTA and an annexing municipality in a case before the Court of Appeals. *See City of Collegedale v. Hamilton Cnty. Water and Wastewater Treatment Auth.*, No. E2001-02041-COA-R3-CV, 2002 WL 1765776 (Tenn. Ct. App. July 31, 2002). The trial court had ruled in favor of the municipality, but the appellate court did not reach the issue, determining that Tenn. Code Ann. § 5-6-120(a) did not apply because the WWTA had not appropriately designated its "service area" before the municipality annexed the territory in question. *Id*. at *4.

existing "service area," the applicable statutory provisions are those in Tenn. Code Ann. § 6-51-111(e).[5]

ROBERT E. COOPER, JR.
Attorney General and Reporter

JOSEPH F. WHALEN
Acting Solicitor General

BARRY TURNER
Deputy Attorney General

Requested by:

The Honorable Susan Lynn
State Representative
104 War Memorial Building
Nashville, Tennessee 37243

[5] Federal law, however, may bear upon the rights of certain rural utilities in this situation. *See* Tenn. Att'y Gen. Op. 07-124 (Aug. 16, 2007).