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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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Honorable Melvyn W. Salter
Judge of Probate
Cherokee County Administrative Center
260 Cedar Bluff Road, Suite 101
Centre, Alabama 35960

County Commissions – County Boards of Health – Water and Sewage – Sewers – Public Health, Department of

Section 45-10-170.40 of the Code of Alabama is a local law applicable to Cherokee County and is the only administrative mechanism available to compel a property owner in a resort area to connect to a public or private sewerage system. The Cherokee County Health Department acts as an agent of the county commission to identify properties that are required to connect to a sewer system and to issue notices pursuant to section 45-10-170.43 of the Code. The Cherokee County Commission has authority to assess civil fines for violations for failure to connect, and the fines are payable to the county commission. Due process hearings must also be made available by the county commission.

The local law is presumed to be valid and enforceable.

This Office does not issue opinions regarding the rights and responsibility between private parties.

If there is no ordinance or resolution to indicate the county commission elected to levy and collect fees in accordance with section 45-10-170.20(e) of the Code of Alabama, and no evidence that such fees were ever imposed, the Cherokee County Commission should not

assume that it has levied the fees. The county commission may begin levying a fee of up to four percent of the gross receipts of a system provider after the county commission, by ordinance or resolution, elects to levy and collect such a fee.

Section 45-10-170.20(e) of the Code requires the Cherokee County Commission to expend any fees properly levied and collected from wastewater system providers for the needs and purposes of the Cherokee County Decentralized Wastewater Systems Authority and the county health department.

Dear Judge Salter:

This opinion of the Attorney General is issued in response to your request.

QUESTION 1

Based upon sections 45-10-170.40 through 45-10-170.45 of the Code of Alabama and State Health Department Codes, who has the responsibility for enforcement of connection to a decentralized waste system in a resort area: the state and local health departments, the Cherokee County Commission, or both?

FACTS AND ANALYSIS

The state and county health departments have statutory authority to require a person who owns or occupies property to install and connect to an onsite sewage disposal system conforming to the rules of the State Board of Health; to require connection to an available sanitary sewer system¹ that complies with the regulations of the state and county boards of health²; or, to

¹ A sanitary sewer system is defined in rule 420-3-1-.04(aaaa) of the Alabama Administrative Code as a public or private sewer system, including Decentralized Wastewater Cluster Systems.

² The Alabama Department of Public Health regulates the design, permitting, and installation of a subsurface onsite sewage disposal system

require a person to otherwise dispose of sewage in a manner approved by the State Board of Health. Section 22-26-2 of the Code states, in pertinent part, as follows:

The State Board of Health and/or county boards of health, acting through its duly authorized agents or employees, shall require every person, firm or corporation, or agent thereof, owning or occupying property within the state to install the required plumbing facilities, type and number of sewage collection, treatment and disposal facilities conforming to rules and regulations of the State Board of Health and/or county boards of health and require connection to a sanitary sewer conforming to rules and regulations of the State Board of Health and/or county boards of health where sanitary sewers are available and are not regulated by the municipal corporation, or to dispose of sewage in such sanitary manner as shall be approved by the State Board of Health.

ALA. CODE § 22-26-2 (2006).

The rules of the State Board of Health (chapter 420-3-1 of the Alabama Administrative Code) contain no administrative mechanism to compel persons to connect to a sanitary sewer system, and the Department of Public Health is without statewide statutory authority to impose an administrative fine against a person who refuses or fails to connect to an available sanitary sewer system when connection is deemed necessary. Misdemeanor criminal fines may be pursued for violations of the rules of the State Board of Health. See ALA. CODE §§ 22-26-6 & 22-2-14 (2006).

In 2001, local legislation was enacted establishing a mechanism to compel persons in resort areas in Cherokee County to connect to available publicly or privately owned sewer systems. The local law states, in pertinent part, as follows:

(a)(1) The Cherokee County Commission, through the county health department, shall compel

serving an individual household pursuant to the authority of section 22-26-3 of the Code. The Department of Public Health also regulates the permitting, design, and installation of cluster wastewater systems as defined in section 22-25B-1. The Alabama Department of Environmental Management regulates community wastewater systems as defined in section 22-25B-1 and regulates discharges of wastes into waters of the state pursuant to section 22-22-9.

connection of any new construction in resort areas³ to any available public sewerage system, whether publicly or privately owned.

(2) The county commission, through the county health department, shall compel the connection of existing privies, water closets, and septic tanks in resort areas which are not designed or operated in full compliance with all applicable state and county regulations with any available public sewerage system, whether publicly or privately owned.

(b) When connections are made by the county under this section, the county health department shall prepare a statement in writing setting forth the name of the owner and a description of the property upon which the improvements have been made, together with the cost of the sanitary sewer connections, and the statement shall be signed by the presiding officer of the county commission in his or her official capacity and filed with the judge of probate in the county for record in the mortgage records of the county. The filing of the statement shall operate as notice of the lien from the date of its filing.

ALA. CODE § 45-10-170.42 (2005).

The process of compelling connection to an available sewerage system begins with a notice, as required by section 45-10-170.43 of the Code, which states as follows:

(a) When the county health department determines that the connection of property to an available public sewerage system, whether publicly or privately owned, shall be required, the property owner shall be given written notice at least 90 days prior to the date upon which the connections shall be made by the county. The notice, which shall be sent by certified

³ "Resort area" is defined in section 45-10-170.41 as any area located outside the corporate limits of any municipality in Cherokee County in which the primary use of the majority of the real property is for recreational pursuits or those associated with relaxation, avocation, or pleasure, including vacation homes and facilities and commercial, amusement, or recreational establishments providing facilities, goods, or services with respect thereto.

mail, return receipt requested, addressed to the person or entity last assessed for taxation of the property in the county, shall describe the property as shown on the rolls of the tax assessor or revenue commissioner of the county, and shall advise that the county is requiring the connection of the described property to the sewerage system, that if the property owner does not obtain sewerage service within 90 days from the date of the notice, the connection shall be made by the county; and that if the connection is made by the county, all costs of the connection shall operate as a lien on the property. The notice shall cite this subpart as authority for the actions to be taken, shall provide the name and telephone number of a person employed by the county who may be contacted regarding the notice and shall be signed by an officer or employee of the county as designated by the county commission.

(b) If, after the expiration of time provided in the notice, the property owner has not connected with an available sewerage system and the county proceeds to connect the property to a sewerage system pursuant to Section 45-10-170.42, the property owner shall be given written notice of the actions taken by the county. The notice shall be sent by certified mail, return receipt requested, addressed to the person or entity last assessed for taxation of the property in the county; shall provide the name, address, and telephone number of the sewerage system to which service has been connected; shall include a copy of the statement filed with the judge of probate; and shall advise the property owner of the costs of the sanitary sewer connection.

ALA. CODE § 45-10-170.43 (2005).

The local law also provides for a mechanism to assess civil fines for violations. Section 45-10-170.44 states as follows:

(a) Any violation of this subpart shall constitute a public nuisance subject to a civil fine of fifty dollars (\$50) per day not to exceed three thousand dollars (\$3,000) to be assessed by the county commission. Any person assessed a fine pursuant to this section may pay the fine to the county commission or request, within 30 days of receipt of the citation, a

due process hearing before the county commission or a hearing officer appointed by the county commission on the validity of the citation. An order of the county commission or its hearing officer finding a violation and an assessment of a civil fine shall be final within 30 days thereof unless appealed to the Circuit Court of Cherokee County based upon the record of the due process hearing. Any fine due and owing shall be considered a debt owed to the county commission and shall be enforceable by civil action in the same manner as any other debt. The person or entity owing the fine shall be liable for all costs, including court costs and attorney fees, and all other expenses of litigation if action is taken to collect any fine owed.

(b) In addition to the civil fines provided for in subsection (a), the provisions of this subpart may be enforced by the Circuit Court of Cherokee County by an action brought by the county health department or the county commission seeking a mandatory injunction or other proper remedy. Any person or entity ordered to comply with this subpart pursuant to an action brought by the county health department or the county commission shall be liable for all costs, including court costs and attorney fees, and all other expenses of litigation.

ALA. CODE § 45-10-170.44 (2005).

The local law describes a working relationship between the Cherokee County Commission and the Cherokee County Health Department. The Cherokee County Health Department is tasked to act as an agent of the county commission to identify properties that are required to connect to a sewer system and to issue notices pursuant to section 45-10-170.43. The responsibility of enforcement ultimately lies with the Cherokee County Commission. It is the county commission under the local law that has authority to assess civil fines for violations for failure to connect. Such fines are payable to the county commission. Due process hearings must also be made available by the county commission. ALA. CODE § 45-10-170.44 (2005).

CONCLUSION

Section 45-10-170.40 of the Code is a local law applicable to Cherokee County and is the only administrative mechanism available to compel a property

owner in a resort area to connect to a public or private sewerage system. The county health department acts as an agent of the county commission in carrying out enforcement responsibilities. It is, however, the county commission that is ultimately responsible to assess and retain civil penalties that, if not paid, are deemed to be debts owed to the county; to assure that due process is afforded to those who are fined; and to be responsible for any costs associated with connections that may be made to a sewerage system when a property owner fails to connect within the time allotted in a notice issued to the property owner.

QUESTION 2

Does a local bill in any way supersede state law and rules and regulations of the Alabama Department of Public Health?

FACTS AND ANALYSIS

Local legislation is not prohibited where the object of the local law is to accomplish an end not substantially provided for and effected by general law, notwithstanding that there is a general law dealing with the subject affected by the local law. *In re Opinion of the Justices* No. 159, 266 Ala. 363, 368, 96 So. 2d 634, 638 (1957). Additional or supplemental local laws are not prohibited by section 105 of the Constitution of Alabama if the local laws are substantially different to meet local needs. *Mathis v. State*, 280 Ala. 16, 19, 189 So. 2d 564, 569 (1966).

The local law applicable to Cherokee County established a mechanism to compel property owners in resort areas to connect to available public or private sewerage systems and to impose civil penalties for failure to do so. ALA. CODE §§ 45-10-170.40 to 45-10-170.45 (2005). There is no such mechanism in the general statutes or rules promulgated by the State Board of Health that authorizes the state and county health departments to require connection to a sanitary sewer system or a cluster wastewater system. Thus, the local law does not supersede the state law, but supplements the general law. Furthermore, local laws are presumed to be valid and enforceable. *State Bd. of Health v. Greater Birmingham Ass'n of Homebuilders*, 384 So. 2d 1058, 1060 (Ala. 1980).

CONCLUSION

The local law supplements the general law and is presumed to be valid and enforceable.

QUESTION 3

Does Alabama Power have the authority to expect the county commission to force connection to a decentralized system in a resort area that is in their flood zone area, or should Alabama Power, instead of the county and the Health Department (if Alabama Power is going against its own policy by allowing these recreational lots to have RVs and "semi-permanent" dwellings) make sure there is a proper functioning decentralized system to accommodate these RV areas with the Health Department enforcing the tie-ons?

FACTS, ANALYSIS, AND CONCLUSION

Your request presented the following background information:

Weiss Lake has over 12,000 mobile homes and RVs around our 33,000-acre, 500-mile-shoreline lake. Most of these are recreational lots, which are in the Alabama Power flood area. Over the years, these facilities have become more permanent-like residences. The policy of Alabama Power essentially is that no one can build in a flood area nor have any kind of structure that cannot be easily moved in event of a flood.

To the extent the question and information provided in your request suggests that Alabama Power maintains flood easements on properties surrounding Weiss Lake, your question pertains to the legal responsibilities of Alabama Power to enforce the provisions of its flood easements. The policies and agreements of Alabama Power with property owners are not subject matters appropriate for an Attorney General's opinion. Because the determination of this issue could affect the rights and duties of many private parties, it is the conclusion of this Office that, unless this issue can be resolved by the parties involved, it may be more appropriately addressed to a judicial forum where all parties can present their respective views. Accordingly, this Office must decline to address questions relating to the rights and responsibilities between private parties.

Furthermore, to the extent that your question asserts or implies that certain properties adjoining Weiss Lake are flood-prone areas, county commissions have statutory authority to adopt zoning ordinances, building codes, and health regulations to address construction and development in flood-

prone areas outside of a municipality, including the placement of septic tanks to avoid contamination during flooding and the placement of sewage systems that may be adversely affected by flooding. See ALA. CODE §§ 11-19-1 to 11-19-24 (2008).

QUESTION 4

Can the county commission collect four percent of gross receipts that the wastewater system providers have placed in an escrow account, even though there is no evidence that the county commission ever levied the fees?

FACTS AND ANALYSIS

The Cherokee County Decentralized Wastewater Systems Authority (“Authority”) was created by local law to oversee construction, maintenance, and operation of decentralized wastewater systems in unincorporated areas of Cherokee County, including the establishment of rates of publicly or privately owned decentralized wastewater systems. The Authority was also empowered to issue permits for the construction and operation of decentralized wastewater systems and charge fees for such permits.⁴ No information was provided as to the extent to which the Authority is currently functioning and exercising its jurisdiction pursuant to sections 45-10-170.20(a) through (d) of the local law.

Section 45-10-170.20(e) of the local law provides, as follows, for the levy of the fee:

(e) The Cherokee County Commission is authorized to levy a fee upon decentralized wastewater system providers of up to four percent of the gross receipts of the system provider. The fees collected

⁴ As there was no such inquiry, this opinion does not address whether any provisions of section 45-10-170.20 (a) through (d) of the Code of Alabama contravene the provisions of general law found in section 22-25B-1, *et seq.*, of the Code, which authorizes the Alabama Department of Public Health and the Alabama Department of Environmental Management to regulate the permitting, design, and installation of cluster and community wastewater systems and authorizes the Public Service Commission to approve rates for entities managing wastewater systems. Again, local laws are presumed to be constitutional unless or until a court holds otherwise.

shall be deposited into the county general fund and shall be used for the county health department and the Cherokee County Decentralized Wastewater Systems Authority.

ALA. CODE § 45-10-170.20(e) (2005) (emphasis added).

Your request also states that two decentralized companies have operated several systems in the county. During their operation in the county, they have collected the four percent fee and held the tax in an escrow account because the county never, to the knowledge of the commission, requested payment. In search of the county records, the current county commissioners can only assume the county levied the four percent fee, even though there is no record of the county commission ever having levied the tax. If the county commission cannot find a record of the levy, you ask whether the commission can assume such levy occurred, since both companies have the tax in escrow and now receive the tax for the purpose for which it was designated.

“The first rule of statutory construction is that the intent of the legislature should be given effect.” *Beavers v. County of Walker*, 645 So. 2d 1365, 1376 (Ala. 1994). When possible, the intent of the Legislature should be inferred from the words of the statute. *Volkswagen of Am. v. Dillard*, 579 So. 2d 1301, 1305 (Ala. 1991). Where the statutory language is plain, the court must give effect to the clear meaning of that language. *Beavers* at 1376-77. Words in a statute must be given their plain, ordinary, and commonly understood meaning, and where plain language is used, this Office must interpret it to mean exactly what it says. *Ex parte Shelby County Health Care Auth.*, 850 So. 2d 332 (Ala. 2002).

Because there is no ordinance or resolution presented to indicate that the county commission elected to exercise its right to impose and collect fees in accordance with section 45-10-170.20(e), and no evidence that such fees were ever imposed, the Cherokee County Commission should not assume that it has levied the fees based only upon the fact that the wastewater providers have held four percent of its gross sales in an escrow account beginning at some point since the local law became effective. The Cherokee County Commission may begin levying a fee of up to four percent of the gross receipts of a system provider after the county commission, by ordinance or resolution, elects to levy and collect such a fee. To the extent that the Cherokee County Commission may attempt to impose fees retroactively after adoption of an ordinance or resolution, it is a general rule that legislation will not be given retroactive effect unless the legislating body makes its intent to do so very clear. *Kittrell v. Benjamin*, 396 So. 2d 93, 94 (Ala. 1981).

CONCLUSION

Because there is no ordinance or resolution presented to indicate that the county commission elected to exercise its right to impose and collect fees in accordance with section 45-10-170.20(e), and no evidence that such fees were ever imposed, the Cherokee County Commission should not assume that it has levied the fees based only upon the fact that the wastewater providers have held four percent of its gross sales in an escrow account beginning at some point since the local law became effective. The Cherokee County Commission may begin levying a fee of up to four percent of the gross receipts of a system provider after the county commission, by ordinance or resolution, elects to levy and collect such a fee.

QUESTION 5

If the county can receive the four percent in escrow, or other funds from the levy of a fee, can the county provide those funds to the Decentralized Wastewater Authority so they can have the resources to begin enforcement of the tie-ons as outlined in the bill?

FACTS AND ANALYSIS

As stated under Question 4, the county is not entitled to collect the funds held in escrow if the county has not, by ordinance or resolution, levied the fee. If the county commission levies the fee at some point in the future, the question you ask is whether the funds can then be provided to the Decentralized Wastewater Authority.

Section 45-10-170.20(e) of the Code clearly states that the funds collected "shall be deposited into the county general fund and shall be used for the county health department *and* the Cherokee County Decentralized Wastewater Systems Authority." ALA. CODE § 45-10-170.20(e) (2005) (emphasis added). Based upon this language, the county commission is required to expend the proceeds of the fee for expenditures for the needs and purposes of both the Cherokee County Decentralized Wastewater Systems Authority and the county health department.

CONCLUSION

Section 45-10-170.20(e) of the Code requires the Cherokee County Commission to expend any fees properly levied and collected from wastewater

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system providers for the needs and purposes of the Cherokee County
Decentralized Wastewater Systems Authority and the county health department.

I hope this sufficiently answers your questions. If this Office can be of
further assistance, please contact me.

Sincerely,

TROY KING
Attorney General
By:

A handwritten signature in cursive script that reads "Brenda F. Smith".

BRENDA F. SMITH
Chief, Opinions Division

TK/BFS
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