

Opinion No. 2012-093

August 13, 2012

The Honorable Andy Mayberry
State Representative
3022 East Woodson Lateral Road
Hensley, Arkansas 72065-9169

Dear Representative Mayberry:

You have requested my opinion concerning a water issue in a local water district. By way of background information, you state:

This request has been prompted by an issue involving the local water district, East End Water, and one of its customers regarding whether the local water commission can require a customer to install a separate water meter for a building located on the owner's property but not connected to the owner's primary residence. There is a water shut-off valve but no separate meter for the second building. It is my understanding that in this particular circumstance, the second building periodically serves as a "guest house" for visitors but is vacant most of the time. This was the situation when this water customer bought the property several years ago and has remained unchanged by the owner since. Recently, employees of East End Water, who had been unaware of the second building with water connectivity until a few months ago, asked this customer to add the second meter at his expense. To date, the customer has refused to do so.

You further report that according to the water commission, this procedure is a requirement of their local by-laws, and that they have enforced it with other users in the water district for many years.

On behalf of the customer, you have asked for my opinion on the following two issues:

1. interpretation of what constitutes a “residence” in this instance, as I understand that is the language used in the East End Water District by-laws and
2. when separate water meters are needed for safety and health concerns.

RESPONSE

I am unable to address your first question because it appears to turn solely on the interpretation of the water district’s bylaws. Official opinions of this office are limited in scope and must be focused upon questions involving the interpretation of state law.¹

With regard to your second question, the Arkansas State Plumbing Code, as adopted by the State Board of Health, prescribes minimum uniform standards in order to safeguard the public health.² A local water district’s plumbing program must prescribe standards that are “at least equal to the [Plumbing Code’s] minimum requirements....”³ Given that a water district can prescribe

¹ See A.C.A. § 25-16-706 (Repl. 2002). By statute, my advisory function is limited to counseling various public servants and entities on constitutional and legal matters of official significance. *Id.* Under A.C.A. § 25-16-701, I am precluded from engaging in or assisting the private practice of law. Accordingly, to the extent the questions at hand involve the interests of a private party or parties, I must further note that this opinion is not provided for the benefit of such parties and should not be relied upon for that purpose. *E.g.*, Op. Att’y Gen. Nos. 2010-113; 2009-007; 2007-228.

² A.C.A. §§ 17-38-103 (Repl. 2010). See also A.C.A. § 17-38-201 (Repl. 2010) (regarding the State Board of Health’s powers and duties generally, which include “general supervision of all plumbing,” *id.* at (a)(2)(A)); Arkansas Plumbing Code (2006) at § 101.3 (stating that the purpose of the plumbing code is to “provide minimum standards to safeguard life or limb, health, property and public welfare by regulating and controlling the design, construction, installation, quality of materials, location, operation and maintenance or use of plumbing equipment and systems.)

³ A.C.A. § 17-38-204(h) (Repl. 2010). This subsection states in full:

When the plumbing control program of any county, city, town, water district, water association, sewerage district, sewer association, or water, sewer, or gas utility fails to provide a program at least equal to the minimum requirements of the department, the department shall take measures to assure that the minimum state requirements are met to protect the public health and safety of the county, city, town, water district, water association, sewerage district, or water, sewer, or gas utility.

requirements exceeding the state Plumbing Code's minimum standards, the answer to your second question may turn on the district's particular requirements with respect to service connections. What those requirements entail and whether they exceed the Plumbing Code standards are matters falling outside the scope of an opinion from this office.

While I therefore cannot definitively opine on your second question, I can and will address what appear to be the relevant state minimum standards. Your question regarding separate water meters is asked against a set of facts that involves two buildings located on the same property, one being the owner's primary residence and the other periodically serving as a guest house, but with no separate meter. This factual scenario suggests that some consideration be given to the following Plumbing Code subsection governing individual water service connections:

Except as approved by the State Administrative Authority, in no case shall a residential building be allowed to connect to the same water, building drain or building sewer service of another private residential building. Each building structure shall have separate water, and/or water line service from the point of the utility source and in no case be interconnected with the plumbing system of another privately owned property.⁴

The first sentence of this provision might, standing alone, suggest that separate water service is required for separate residential buildings under the same ownership. But the first sentence cannot be read in isolation. The second sentence elaborates on the minimum standard applicable to "[e]ach building structure," and in doing so refers to "another privately owned property." This seems to suggest separate ownership of the other "private residential building," as referenced in the first sentence. Indeed, this is the Department of Health's interpretation, as expressed by the Director of the Plumbing and Natural Gas Section:

The key language in this section is "owned." Ownership drives this section of the code. It always has since its adoption. This section is not intended to require separate plumbing systems to the point of the water utility, sewer utility, or sewage disposal system if the buildings fall under the ownership of one entity as long as the

⁴ Arkansas Plumbing Code, § 603.2.3. The provisions of the Plumbing Code "*have the effect and force of law* in the form of minimum standards statewide in application." A.C.A. § 17-38-103(a) (emphasis added). *See also generally Rowell v. Austin*, 276 Ark. 445, 449, 637 S.W.2d 531 (1982) ("A proper administrative regulation has the same force and effect as a statute enacted by the legislature and is considered valid.").

plumbing systems are installed to minimum plumbing code standards.⁵

The Department of Health's view of this provision will prevail unless it can be shown that the Department is "clearly wrong."⁶ I find such a showing highly unlikely. Indeed, in my opinion, the Department's interpretation is reasonable based on the regulation's plain language.

In response to your second question, therefore, it appears that separate meters are not required to ensure compliance with the Plumbing Code under the circumstances you have outlined, involving two separate buildings that are under the same ownership. It must be recognized, however, that this may not end the inquiry, given that a local water district can prescribe requirements that exceed the state Plumbing Code's minimum standards. I lack both the resources and the authority to undertake that analysis, which involves the interpretation of the water district's bylaws rather than any relevant Arkansas statute. Whether or not the district has in fact prescribed more stringent standards is a matter to be addressed by the water district's governing board, ideally with the assistance of local counsel.

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/EAW:cyh

⁵ Letter from Bob Higginbottom, Director to Nathaniel McGee (Re. Official Interpretation of the State Plumbing Code Section 603-2-3 – Individual Water) (June 14, 2012). This letter was presumably issued under the authority of A.C.A. § 17-38-201(a)(2)(B), which provides that the Director of the Department of Health, or any employee of the Department designated by the State Board of Health, may act for the Board.

⁶ See, e.g., *Arkansas Dept. Human Serv. v. Hillsboro Manor Nursing Home, Inc.*, 304 Ark. 476, 480, 803 S.W.2d 891 (1991) (“[A]n administrative agency’s interpretation of a statute or its own rules will not be overturned unless it is clearly wrong.”).