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OFFICIAL OPINION 2020-2

Representative Woody Burton
House of Representatives
200 W. Washington St.
Indianapolis, IN 46204

RE: Municipal utilities and rental properties under Ind. Code § 8-1.5-3-8

Dear Representative Burton:

You asked for an official opinion on issues related to Ind. Code § 8-1.5-3-8, as amended in the 2019 legislative session by H.B. 1347 and P.L. 105-2019[1]. The legislation attempted to clarify the responsibility for payment for services provided by municipally owned utilities to rental properties. You presented several questions, with the key issues summarized as follows:

- Can municipal utilities require property owners to sign for a utility account with their tenant or otherwise become a party to the service agreement?
- Can municipal utilities hold property owners responsible for a tenant's unpaid bills?
- Can municipal utilities require property owners to pay a deposit for service to a non-owner-occupied residence?
- Can the utility charge a larger deposit based on the creditworthiness of the tenant customer?
- Can the utility deny service to a new tenant based on a previous tenant's unpaid bills?
- Do unpaid utility bills attach to the property in any way?
- Would it be advisable to seek an amendment to the statute to provide for an enforcement mechanism against municipalities that do not comply with the statute?

BRIEF ANSWER

If a tenant is responsible for payment of utilities under a lease, the municipal utility cannot hold the landlord responsible for payment unless the landlord is a party to the service agreement. The utility cannot deny service to subsequent occupants of the property, and unpaid

[1] H.B. 1347 is attached as an Appendix.

utility bills do not constitute a lien on the property. Although the statute does not explicitly prohibit a municipal utility from requiring a property owner to sign for the account with a tenant so that the landlord is responsible for the tenant's delinquent bills, such a requirement would be contrary to the purpose of the statute as a whole and may not be permissible under Indiana's Home Rule Act.

ANALYSIS

Ind. Code § 8-1.5-3-8 applies to municipally-owned utilities. The statute does not apply to certain sewage works, or to utilities provided by a consolidated city. P.L. 105-2019 added subsections (j) and (k), which apply to property occupied by someone other than the property owner, such as rental property. The amended statute provides that utility charges are payable by the occupant if the occupant is responsible for payment of the utility charges. It also provides that utility charges for a non-owner-occupied property do not constitute a lien against the property. Subsection (k) allows a utility to require a deposit or impose other requirements "to ensure the creditworthiness of the person occupying the property as account holder or customer with respect to the property." The statute does not describe how a tenant might become responsible for a utility bill. Presumably, the lease would specify which party is responsible for utility payment. Therefore, the legislation does not affect situations in which utilities are included in the rent and paid by the owner.

Ind. Code § 8-1.5-3-8(j) provides in part:

> Subject to subsection (k), all rates, charges, and other fees for all rates, charges, and other fees for services rendered by a municipally owned utility to a property that is subject to this subsection are payable by the person occupying the property if the account or other customer or billing records maintained by the municipally owned utility for the property indicate that:
>
> (1) the property is occupied by someone other than the owner; and
>
> (2) the person occupying the property is responsible for paying the rates, charges, and fees assessed for the services rendered by the municipally owned utility with respect to the property.

Under this section, utility charges are payable by a tenant if the lease provides that the tenant is responsible for payment of utilities. The utility would bill the tenant for the service, and the owner would not be responsible for the bill.

Landlord's responsibility to pay a deposit

Ind. Code § 8-1.5-3-8(k) does not allow a municipality to require a deposit from the owner if the tenant is responsible for a utility bill. The statute allows the municipality to require a deposit "to ensure payment by the person occupying the property." It does not expressly state that the deposit must be paid by the tenant rather than the landlord, but this does appear to be the

intent, since the purpose is to ensure payment by the person occupying the property. The statute is silent on the amount of the deposit, or whether it can vary depending on the tenant's creditworthiness. In the absence of any guidance, the municipality has the discretion to set the deposit in any amount necessary to ensure payment.

Utility's ability to require owners to agree to be responsible for the tenant's bills

The amendments made to Ind. Code § 8-1.5-3-8(j) by P.L. 105-2019 clearly make the tenant, not the landlord, responsible for payment of municipal utility bills if the lease so provides. It is not as clear what requirements, if any, municipalities may impose on landlords when a tenant is responsible for the utility bill. Ind. Code § 8-1.5-3-8(k), which allows a municipal utility to collect a deposit, also allows it to impose any "other requirement to ensure the creditworthiness of the person occupying the property as the account holder or customer with respect to the property." The statute does not specify what "other requirements" are permitted, but it certainly could be interpreted to include a cosigner requirement. Some municipalities have interpreted this provision as allowing them to require that the owner cosign for the tenant.

The Indiana legislature has granted municipalities broad powers to furnish and regulate utility services. Ind. Code § 36-9-2-15 provides that "a unit[2] may furnish, or regulate the furnishing of, utility service to the public," and Ind. Code § 36-9-2-14 authorizes a unit to "regulate the furnishing of water to the public. A unit also may establish, maintain, and operate waterworks." Neither Ind. Code § 8-1.5-3-8 nor Ind. Code chapter 36-9-2 address whether a municipality may require a property owner to cosign a tenant's utility agreement. In the absence of any specific prohibition, Indiana's Home Rule Act gives municipalities broad powers to establish the terms of utility service agreements. The Home Rule Act, Ind. Code § 36-1-3-2, provides that "the policy of the state is to grant units all the powers that they need for the effective operation of government as to local affairs." Additionally, Ind. Code § 36-1-3-3 provides that "[a]ny doubt as to the existence of a power shall be resolved in favor of its existence." However, this power is not without limits. Ind. Code § 36-1-3-8 specifically withholds the power of a unit to "prescribe the law governing civil actions between private persons."

Although Ind. Code § 8-1.5-3-8 does not expressly prohibit a municipality from requiring that the property owner be a party to the agreement if there are concerns about the creditworthiness of a tenant customer, a complete reading of the statute supports the interpretation that the legislative intent was to ensure that responsibility for payment did not fall to the landowner. A statute should be construed so as to ascertain and give effect to the intention of the legislature as expressed in the statute. In so doing, the objects and purposes of the statute in question must be considered as well as the effect and consequences of such interpretation. *State v. Eichorst,* 957 N.E.2d 1010, 1012 (Ind. Ct. App. 2011). When interpreting the words of a single section of a statute, the words must be construed with due regard for all other sections of

[2] "Unit" is defined by Ind. Code §36-1-2-23 as a county, municipality, or township.

the act and with regard for the legislative intent to carry out the spirit and purpose of the act itself. *Id.* It is presumed that the legislature intended its language to be applied in a logical manner consistent with the statute's underlying policy and goals. *Id.* Therefore, because the purpose of the statute is to ensure that landowners are not responsible for utility charges that a tenant does not pay, a requirement by a municipal legislative body that a landowner cosign for a tenant to increase the tenant's creditworthiness would not fulfill the intent of the legislature. Moreover, even if such a requirement were to pass muster there is no indication that a future tenant would also need a cosigner absent a blanket requirement that all tenants require the landlord to cosign. However, a blanket requirement that all landlords cosign for all tenants does not "ensure the creditworthiness of the person occupying the property." Contrary to the intent of the statute, a blanket requirement merely ensures that the property owner is ultimately responsible for the payment of a tenant's utilities. While the purpose of the statute was to prevent landowners from having responsibility for their tenants' utility bills, the statute does not prohibit a landowner from voluntarily cosigning for a tenant. In that case, the landowner would be responsible for paying if the tenant does not.

A municipal ordinance mandating that landlords cosign for tenants may also go beyond the powers granted by Indiana's Home Rule Act. The Home Rule Act does not allow a municipality to "prescribe the law governing civil actions between private persons." Ind. Code §36-1-3-8(a)(2). Indiana withholds this power from municipalities, recognizing "that laws governing relationships between private individuals are more properly the subject of statewide legislation. Such legislation produces the desired uniformity and treatment of such interests better than municipal legislation which could result in an endless variety of private law." *Burgin By and Through Akers v. Tolle,* 500 N.E.2d 763, 767 (1986). Arguably, a municipality that requires a landlord to cosign a tenant's utility service agreement is prescribing the law governing civil actions between the landlord and the tenant. Residents moving from one municipality or another throughout the state of Indiana may be subjected to differing and confusing processes for demonstrating sufficient creditworthiness or establishing credit for utility services. Certainly, property owners with property in multiple jurisdictions would have more time and administrative cost involved with being a party to various utility agreements with different terms and requirements. An ordinance that mandates property owners to cosign for tenants would require the property owner to assume responsibility for the tenant's bills. Such an ordinance alters the principles of contract between the landlord and tenant. Moreover, as the cosigner, the landlord would be limited in what actions it could take against the tenant absent an additional clause that the tenant is responsible for any unpaid utility bill.

A municipal ordinance that affects private arrangements does not necessarily run afoul of Ind. Code §36-1-3-8(a)(2). The ordinance is valid if the effect on private arrangements is incident to the exercise of another independent municipal power, such as its police powers to protect or promote some public interest or welfare. *Chandley Enterprises, Inc. v. City of Evansville,* 563 N.E.2d 672, 675 (1990). Requiring a landlord to cosign a tenant's utility agreement is not a valid exercise of a municipality's police power. While avoiding unpaid municipal utility bills may further the public interest, this goal could be accomplished by allowing any creditworthy person to cosign for a tenant. The cosigner need not be the landlord.

Additionally, a landlord who was required to cosign for a tenant and ultimately responsible for utility bills not incurred by the landlord could argue that the requirement is a tax on the landlord. This would be in direct contravention of the Home Rule Act that prohibits a local unit from imposing a tax that it is not specifically granted by statute the power to impose. Ind. Code § 36-1-3-8(a)(4).

Consequences of delinquent bills

You asked whether a utility can deny service to a new tenant based on a previous tenant's unpaid utility bills, or whether the unpaid bills attach to the property. If the property owner is a party to the service agreement, the agreement could require the owner to pay any delinquent balance in order to maintain or restore utility service to the property. The utility could deny service to a new tenant until the past due balance is paid as long as the landlord continues to be a cosigner for the subsequent tenant. If the property owner has not cosigned the tenant's service agreement, the utility would have no basis for denying service to a subsequent tenant.

Ind. Code § 8-1.5-3-8(j) provides that delinquent charges for non-owner-occupied property do not constitute a lien against the property. If the utility's service agreement is only applicable to the tenant and not the owner, there would be no basis to deny utility service to the property based on the tenant's unpaid bill. Without a lien, the outstanding balance would not attach to the property after the delinquent tenant is no longer residing and receiving service there. However, if the owner is a cosigner or otherwise agrees to be a party to the service agreement, the lack of a lien would not prevent the utility from refusing service until the owner pays the past due balance unless a subsequent tenant does not require a cosigner. In that case, the new tenant would be the customer and could receive water.

The Indiana Utility Regulatory Commission rules governing water service disconnection would not authorize a utility to discontinue service to a current tenant based on a previous tenant's unpaid bill.[3] 170 IAC 6-1-16 specifies notice and other requirements that must be met before service is shut off to a "customer." "Customer" is defined in 170 IAC 6-1-1(d) as someone "that has agreed, orally, or otherwise, to pay for water service received from a water utility." The rule does not differentiate between owners and renters, but if the tenant is responsible for the water bill, the tenant is the customer. The rule does not authorize disconnection of service based on a different customer's nonpayment.

[3] Ind. Code §8-1.5-3-9 allows municipally owned utilities to opt out of Indiana Utility Regulatory Commission (IURC) rate-setting jurisdiction, and many have done so. Those utilities would nevertheless be subject to the disconnection rule.

Enforcement mechanisms to ensure compliance with the statute.

The Indiana State Real Estate Investor's Association, Inc. has expressed concern that, because most municipal utilities are not under the rate-setting jurisdiction of the IURC, there is no mechanism or penalty to ensure that they comply with the statute. It has been suggested that an enforcement provision similar to Ind. Code § 36-7-9-7.5 would be a possible solution. That statute imposes civil penalties on owners for noncompliance with orders to repair or rehabilitate unsafe buildings. It does not seem to provide an appropriate enforcement mechanism against municipalities. Civil penalties against municipalities would ultimately be paid by taxpayers or other utility customers. If a municipality fails to comply with a statute, or a landlord is in some other way aggrieved, the political process and the court system can provide redress.

CONCLUSION

A municipal utility cannot hold a property owner responsible for its tenant's utility bills if the tenant is responsible for prompt payment of outstanding balances under the lease, and if the landlord is not a party to the agreement for utility service. However, the property owner may voluntarily sign the agreement for utility service to the property. In that situation, the landlord could be responsible for the tenant's unpaid bills, and the utility could deny service if bills remain delinquent. Although Ind. Code 8-1.5-3-8 does not expressly prohibit the utility from requiring the landlord's participation in the agreement, such a requirement may be considered an impermissible attempt to prescribe civil actions between private persons in violation of the Home Rule Act. Any doubts about whether such a requirement is permissible could be resolved by amending Ind. Code § 8-1.5-3-8 to clarify that a municipality may not require a landlord to agree to be responsible for a tenant's utility bills.

Sincerely,

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