S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

June 1, 2000

Opinion No. 00-103

Effect of SB3147 / HB3259 on Building Fees and Permits Enacted in Bartlett, Tennessee

QUESTION

Will SB3147 / HB3259, which permit counties to levy a privilege tax on transfers of real property, affect, limit or abolish certain fees and permits relating to development and building previously, or hereinafter, enacted by the City of Bartlett, Tennessee?

OPINION

It is the opinion of this Office that the provisions of SB3147 / HB3259, will not affect, limit or abolish any of the fees and permits relating to development and building that have been sent to our office for review by the Office of Mayor Ken Fulmer, City of Bartlett. It is also the opinion of this Office that the provisions of the proposed legislation will not affect, limit or abolish any fees or permits relating to development or building enacted by the City of Bartlett if the purpose of such fees is to regulate some activity under the police power of the city instead of to raise revenue.

ANALYSIS

You have requested that we analyze the provisions of SB3147 / HB3259 to determine whether these provisions would affect, limit or abolish certain fees and permits relating to development and building that have been established by the City of Bartlett[1] (the "City Fees") and to provide certain guidance regarding the potential effect of this proposed legislation upon future enactments of any such fees and permits by the city. The City Fees reviewed by our office fall into one of the following three categories: (i) inspection fees, (iii) permit fees, and (iv) impact fees.

While Subsection (e) of SB3147 / HB3259 provides that "No county ***that levies a realty transfer tax under subsection (b)*** shall levy an adequate facilities tax" (emphasis added), Section (f) of the proposed legislation provides as follows:

[1] A list of the City Fees, together with the ordinances and other materials reviewed by our office is set forth on Exhibit A hereto.

> (f) During the period beginning on July 1, 2000 and ending on June 30, 2001, no municipality shall levy a new adequate facilities tax[2] or increase the rate of any adequate facilities tax that was not in effect on June 30, 2000.

The clear implication of Section (e) is that all municipalities, whether or not the county decides to levy a real estate transfer tax under the act, may not levy a new adequate facilities tax or increase the rate of existing taxes during the prescribed period.

An adequate facilities tax is a privilege tax, usually authorized by a private act of the Legislature, that is levied upon new development to ensure and require that the persons responsible for new development share in the burdens of growth by paying their fair share for the costs of new and expanded public facilities made necessary by such development. The revenues collected from an adequate facilities tax ordinarily are used for the general welfare and are not segregated for any particular purpose. Because such a levy is a tax rather than a fee, however, its proceeds could be used for any public purpose, if so authorized by statute.

A impact fee is a monetary charge imposed on new development in order to control, regulate or otherwise affect the plans of developers. The revenues collected from impact fees must be segregated from the general funds of the government and are dedicated to a specific purpose. Among the City Fees examined by our Office, examples of an impact fee would include the Parkland Development Fee (Ordinance no. 92-5), that imposes a fee of $200.00 per lot or dwelling unit to be used exclusively to acquire or improve lands for parks, and Ordinance 93-4, that requires developers to pay 100% of the costs for street lights and street light installation.

Inspection fees and building permit fees are fees imposed by government acting under the police power to ensure that certain public safety regulations are enforced for the general welfare. These fees tend to be used to fund the offices of government that apply and enforce the public safety regulations and, therefore, are dedicated funding mechanisms instead of general taxes to increase

---

[2] Section (a)(1) of HB3259 / SB3147 defines adequate facilities tax as follows:

> (1) "Adequate facilities tax" means any privilege tax that is levied by a county or a municipality on engaging in the act of development; provided, however, that the meaning of adequate facilities tax shall not include:
>
> (A) any impact fee that is imposed by a county or municipality; or
> (B) any special assessment imposed by a county under section 5-1-118 or a municipality under section 6-2-201(3).

Section (a)(4) of HB3259 / SB3147 defines impact fee as follows:

> (4) "Impact fee" means a monetary charge imposed by a county or municipal government by private act to regulate new development on real property. The amount of impact fees is related to the costs resulting from the new development, and the revenues from this fee are earmarked for investment in the area of the new development. "Impact fee" does not include any inspection fee or building permit fee.

revenue. While the distinction between a building permit fee and an adequate facilities tax charged upon issuance of a permit may be vague, the analysis of whether the charge is a fee or a tax must focus upon the purpose of the government enactment. The Tennessee rule on whether a particular exaction imposed by the legislature is a fee or a tax is determined by an examination of the intent and objective of the governing body when enacting the provision:

> In Tennessee, taxes are distinguished from fees by the objectives for which they are imposed. If the imposition is primarily for the purpose of raising revenue it is a tax; if it's [*sic*] purpose is for the regulation of some activity under the police power of the governing authority it is a fee.

Memphis Retail Liquor Dealers' Ass'n, Inc. v. City of Memphis, 547 S.W.2d 244, 245 (Tenn. 1977).

An examination of several of the ordinances submitted for our review is instructive. The precatory language in Ordinance 99-17[3], that establishes a fee for review of water sewage plans, is an example of the City charging a fee when acting under its police power. The language of Ordinance 85-16[4], that establishes a road cut and boring permit fee, also supports the City's claim that it is charging a fee to defer costs incurred when acting under the police power to protect public safety. These ordinances could not reasonably be construed as "adequate facilities taxes" because the language of the ordinances makes clear the purpose of the City when enacting the fees.

The language of Section (f) of the proposed legislation negates the necessity of opining whether or not any of the City Fees might possibly be construed as an "adequate facilities tax" instead of a regulatory fee. Because the act merely prohibits, during the one-year period commencing July 1, 2000, any municipality from levying any new adequate facilities tax or increasing the rate of any adequate facilities tax, the existing City Fees will not be in any way affected by the legislative proposal.

---

[3] Ordinance 99-17 states in part:

> Whereas, the Tennessee Department of Health and Environment Sewer Division has asked the City of Bartlett to consider providing plans review for sewers.
>
> Whereas, the Tennessee Department of Health and Environment wishes to delegate this plan review authority to the City of Bartlett.
>
> Whereas, a fee of the greater of either $10 per lot or $25 per 250 feet of sewer line extension will be charged by the City to defer the costs of this plans review with a minimum charge of $24 per contract being required.

[4] Ordinance 85-17(a) states:

> That a fee of ten ($10.00) Dollars per linear 25 feet is hereby established to defray the costs of review and inspection on the issuance of road cut and boring permits in the City of Bartlett roads and right-of-ways.

During the period beginning July 1, 2000 and ending June 30, 2001, the City should take care to document both the intention of the City and the purpose of the fee when enacting any new fees, or increasing the rate of any existing fees, to ensure that any such fees would not be construed by the courts as an adequate facilities tax as opposed to a fee.

Based on the foregoing, it is the opinion of this Office that the provisions of SB3147 / HB3259, will not affect, limit or abolish any of the City Fees and that, if the purpose of the enactment of any new fees or increases in existing fees is to regulate some activity under the police power of the governing authority, then any such fees would not be construed as "adequate facilities taxes" under the proposed legislation.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

WINSTON B. SITTON
Assistant Attorney General

Requested by:
The Honorable W.C. "Bubba" Pleasant
State Representative
106 War Memorial Building
Nashville, Tennessee 37243