S T A T E O F T E N N E S S E E
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Opinion No. 03-068

Valuation of Property that Generates Electricity Using Wind

QUESTION

Is SB675, with the proposed amendment describing the manner in which property assessors must value property that generates electricity using wind as its energy source, constitutional?

OPINION

It is the opinion of this Office that SB675, with the proposed amendment, is constitutionally defensible and could be upheld in light of the legislature's broad authority under Article II, Section 28 of the Tennessee Constitution to determine the manner in which property is valued for ad valorem tax purposes.

ANALYSIS

Senate Bill 675, if amended as proposed, would alter Tenn. Code Ann. § 67-5-601 by adding the following language as a new subsection:

> (e) The general assembly finds that any public utility property or commercial and industrial property that generates electricity using wind as its energy source is generally capable of only generating approximately one third (1/3) of the electricity that competing generation properties are capable of producing using coal or other conventional energy sources and that the commercially competitive disadvantage of such generation property due to its dependence on the intermittent nature of wind as an energy source similarly evidences that its sound, intrinsic, and immediate economic value for all purposes under this chapter should not initially exceed one third (1/3) of its total installed costs. The general assembly further finds that, unless the aforementioned findings are considered in the determination of the sound, intrinsic, and immediate economic value of such property for all purposes under this chapter, investment in

> property to generate electricity using wind as its energy source will be unreasonably discouraged, denying the citizens of this state the environmental benefits associated with the greater use of wind, as a renewable energy source, for electric power generation. The assessor of property in assessing any such commercial and industrial property or the comptroller in assessing any such public utility property, which generates electricity using wind as its energy source, shall take these findings by the general assembly into account in determining the sound, intrinsic, and immediate economic value of such property, when the property is initially appraised and each time the property is reappraised.

On its face, the proposed legislation does not violate equal protection principles. *See* Tenn. Const. art. I, § 8, art. XI, § 8; *see also* U.S. Const. amend. XIV. Our Supreme Court has explained that "[s]tates have the right to adjust their systems of taxation in all proper and reasonable ways and the courts will not invalidate a tax statute on the basis of equal protection so long as the classification and selection are reasonable." *Genesco, Inc. v. Woods*, 578 S.W.2d 639, 641 (Tenn. 1979). The test is "whether the statute rests on a reasonable basis." *Id*. Because constitutional equal protection provisions require only "that there be 'some relevance to the purpose for which the classification is made,'" the Legislature "may impose special burdens upon defined classes in order to achieve permissible ends." *Id*. (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 309, 86 S. Ct. 1497, 1499 (1966)). A classification, even a discriminatory one, will not be invalidated on equal protection grounds "if any state of facts reasonably can be conceived that would sustain it," *Snow v. City of Memphis*, 527 S.W.2d 55, 65 (Tenn. 1975) (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528, 79 S. Ct. 437, 441 1950)), or if there exists "any possible reason or justification for its passage." *Genesco*, 578 S.W.2d at 641. No equal protection violation occurs "[i]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy." *Snow*, 527 S.W.2d at 65 (quoting *Allied Stores*, 358 U.S. at 527, 79 S. Ct. at 441).

Senate Bill 675, if amended as proposed, would provide that property which generates electricity using wind as its energy source should be valued differently than other electricity-generating property. The bill also provides a rationale for treating such property differently, *i.e.* that "due to [such property's] dependence on the intermittent nature of wind as an energy source," the property has an intrinsically lower value than other electricity-generating property. On its face, SB675 provides a rational basis for the Legislature's decision to value such property differently than other electricity-generating property. Accordingly, SB675, with the amendment, does not violate equal protection principles.

The more serious issue is whether Senate Bill 675 would violate principles of uniform taxation. The Tennessee Constitution provides that "[t]he ratio of assessment to value of property in each class or subclass shall be equal and uniform throughout the State, the value and definition

of property in each class or subclass to be ascertained in such manner as the Legislature shall direct." Tenn. Const. art. II, § 28. The appellate courts of this state have repeatedly observed that this provision gives the Legislature "very broad discretion" to determine the value and definition of property in each of the classifications or subclassifications contained in Article II, Section 28. *In re All Assessments*, 58 S.W.3d 95, 99 (Tenn. 2000); *Sherwood Co. v. Clary*, 734 S.W.2d 318, 321 (Tenn. 1987); *In re All Assessments*, 67 S.W.3d 805, 819-20 (Tenn. Ct. App. 2001); *Kellogg Co. v. Assessment Appeals Comm'n*, 978 S.W.2d 946, 951 (Tenn. Ct. App. 1998). As the Supreme Court explained in discussing this provision, "the General Assembly was not constitutionally required to attempt to administer and maintain an impractical system of taxation, and it was given very broad discretion with respect to determining the value and definition of property in each of the authorized classifications or subclassifications." *Sherwood Co.*, 734 S.W.2d at 321.

In accordance with these authorities, the Legislature has broad discretion to determine the methods for valuing property in this state. Of course, that power is not without limit, and cannot be exercised in such a way as to render meaningless the other constitutional provisions relating to classification and assessment of property. Certainly the legislature could mandate any reasonable, recognized manner of determining the value of property that uses the wind to generate electricity. The instant question, however, is whether the method set forth would constitute a good faith effort to determine the true value of such property, as Article II, Section 28, contemplates.

One might argue that a business or utility would not install a windmill if, immediately upon completion, it is worth only one third of its cost. Thus, one could contend that the effect of the proposed bill is merely to allow a reduced, and improper, tax rate for such property. That a reasonable basis exists for treating windmills differently from other property is not sufficient to satisfy the uniform taxation clause, because under that clause any authorized methodology must seek to reach the true value of the property, regardless of its social usefulness. In this context, the answer may, to some extent, require a factual inquiry to determine whether the methodology set forth in the bill is so divorced from reality that it becomes unconstitutional. Upon the very limited facts presented, it would appear that the bill's justification for its methodology contains at least a credible rationale. The legislature's power to determine the value of property, as recognized in the *Sherwood* decision, is so broad that this Office, upon the limited facts known to us, cannot say that the bill goes beyond the legislature's prerogative. Thus, while we cannot be certain of a court's conclusions about the bill, it is the opinion of this Office that the bill is constitutionally defensible.

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