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Opinion No. 04-158

Constitutionality of Proposed Adequate Facilities Tax

QUESTION

Do private acts authorizing local governments to impose an "adequate facilities tax" present any constitutional problems?

OPINION

"Adequate facilities taxes," as they have been authorized and implemented in a number of Tennessee counties, are constitutional.

ANALYSIS

The General Assembly, through various private acts, has authorized a number of Tennessee counties to levy an "adequate facilities tax." Generally speaking, these are privilege taxes on persons engaged in residential and commercial land development. The rate of such taxes is usually set at a certain amount per square foot of new residential and commercial buildings, and the tax is collected by a designated local official when a building permit is issued.

Such taxes, if properly authorized by the General Assembly and ratified and implemented locally, comport with all constitutional requirements. This Office is not aware of any serious issues that such taxes present under either the Tennessee or United States constitutions, if they are properly structured and levied. This sort of levy is authorized under Article II, § 28, of the Tennessee Constitution, since the Legislature is thereby vested with plenary power to decide what activities constitute taxable privileges. *See Hooten v. Carson*, 186 Tenn. 202, 209 S.W.2d 273 (1948); *Trenthan v. Moore*, 111 Tenn. 346, 352, 76 S.W. 904 (1903).

This Office has previously opined that private acts authorizing such taxes in Rutherford and Montgomery counties are constitutional. Op. Tenn. Att'y Gen. No. 96-088 (July 16, 1996) (Rutherford County)(Attachment A); Op. Tenn. Att'y Gen. No. 99-168 (Aug. 26, 1999) (Montgomery County)(Attachment B). The courts have confirmed this view. In *Throneberry Properties v. Allen*, 987 S.W.2d 37 (Tenn. Ct. App. 1998), *perm. app. denied* (Tenn. 1999)(Attachment C), the Middle Section Court of Appeals readily disposed of a number of

constitutional challenges to a similar "development tax" levied by Rutherford County, rejecting claims under Article I, § 8; Article I, § 21; Article II, § 28; and Article XI, § 8, of the Tennessee Constitution, as well as under the fourteenth amendment of the federal Constitution. Subsequently, in *Home Builders Association v. Maury County, Tennessee*, 2000 WL 1231374 (Tenn. Ct. App., Aug. 31, 2000)(Attachment D), *perm. app. denied — not for citation* (Tenn. Mar. 5, 2001), the Middle Section Court of Appeals upheld the Maury County Adequate Facilities Tax against challenges to the fundamental nature, structure, and incidence of the tax. The Supreme Court later denied permission to appeal in that case and designated it "not for citation," apparently because of concerns about standing and jurisdiction. But the Court expressly stated in its Order, "we affirm that portion of the opinion of the Court of Appeals which addressed the constitutional claims . . . ." *Id*., No. M1999-02383-SC-R11-CV, Order of Mar. 5, 2001 (Attachment E). As a result, the designation of the Court of Appeals opinion as not for citation does not impugn the reasoning of that Court in rejecting the constitutional claims in the case.

Accordingly, this Office is not aware of any substantial constitutional arguments that could be interposed against adequate facilities taxes, at least in the form in which they have generally been authorized for Tennessee counties. Of course, discriminatory or other features might be part of the design of a particular act, and those features might cause it to fail constitutional muster. The proposed Wilson County tax that was addressed in Op. Tenn. Att'y Gen. No. 96-067 (Apr. 9, 1996) (Attachment F) demonstrates this possibility. But an "adequate facilities tax" can certainly be drafted that avoids these problems, as illustrated by those taxes in several Tennessee counties that have been upheld.

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