S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
P. O. BOX 20207
NASHVILLE, TENNESSEE 37202-0207

June 21, 2006

Opinion No. 06-103

Rental License Ordinance

QUESTION

May a home rule municipality adopt an ordinance that requires all persons who lease residential real property within the municipality to obtain an annual license and pay a $20 charge for each unit leased?

OPINION

Yes, a municipality, acting within its charter powers to protect the health and safety of its citizens, may adopt an ordinance regulating the rental of residential property within its borders, provided that the money collected is reasonably related to the administration and enforcement of the ordinance, since the $20 charge would then be considered a licensing fee and not an unauthorized privilege tax.

ANALYSIS

The determinative question is whether the proposed rental ordinance imposes a licensing fee or a tax. As discussed below, if such a charge is a tax, then it would violate the Tennessee Constitution, because it would be a privilege tax enacted by a municipality without proper authorization by the General Assembly. If, however, the charge is a fee imposed for services provided by the municipality under its charter powers, then it does not violate the Constitution.

Within the meaning of the Tennessee Constitution, the exercise of an occupation or business which requires a license from a governmental authority, designated by a general law, and not open to anyone without such license, is a privilege. *State v. Schlier*, 55 Tenn. 455 (1871). A privilege tax is a tax on the privilege of carrying on a business or occupation for which a license or franchise is required. *See* Blacks Law Dictionary (8th ed.) (definition of "privilege tax"). According to the Tennessee Constitution, the power to tax privileges is reserved to the Tennessee General Assembly. *See Tenn. Const.* Art. II, § 28. Municipalities may only impose privilege taxes that are authorized by the General Assembly. *See id.*; *Kivett v. Runions*, 191 Tenn. 62 (1950). The General Assembly has not, by a general law, declared the rental of residential real property specifically to be a taxable privilege. Thus, if the proposed ordinance levies a privilege tax, then it is unconstitutional because it lacks legislative authorization.

But not every charge for the regulation of an endeavor that theoretically might be declared a privilege is a tax, since some such endeavors may be regulated by governmental authorities, and a fee may be imposed for the services provided. If such an endeavor has not been identified by the General Assembly as a taxable privilege, and if it is subject to a comprehensive regulatory scheme, then one must examine whether a charge imposed upon its exercise might qualify as a regulatory fee.

"An occupation or a privilege tax embodies as its primary purpose the creation and collection of revenue while a true license fee as distinguished from such a tax should be fixed to cover the expense of issuing it, the service of officers and other expenses directly or indirectly incident to the supervision of the particular business or vocation." *S & P Enterprises, Inc. v. City of Memphis*, 672 S.W.2d 213, 215 (1984). "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 its purpose is for the regulation of some activity under the police power of the governing authority it is a fee." *Id.* Whether the fee exceeds the cost of enforcement and administration is irrelevant; it must only be reasonably related to the administration and enforcement of the licensing statute. *Id.* at 216.

While the question as posed does not direct us to the charter powers of any particular municipality, it is safe to assume that most, if not all, Tennessee municipalities are granted general police powers under which they may regulate activities within their boundaries in order to foster public health and safety. *See generally* Tenn. Code Ann. §§ 6-2-201(22) & (23) (for cities operating under the general mayor-aldermanic charter); §§ 6-19-101(22) & (23) (for cities operating under the general city manager-commission charter); §§ 6-33-101(a) (for cities operating under the general modified city manager-council charter).[1] The regulation of residential property rental would clearly fall within such powers, since presumably such regulation would be designed to ensure that rental properties are maintained so as to meet city building codes and to guarantee conditions that foster the safety and health of the residents of such properties and their neighbors.

The question thus becomes whether the charge imposed is reasonably related to administering and enforcing the city's regulation of residential landlords and properties. While that is, to some extent, a factual question which this Office currently lacks the information to answer, imposition of a $20 fee does not seem unreasonable for all of the services the city might provide in regulating rental properties and ensuring the health and safety of residents there. While the total amount that such a charge would produce and its actual use by the city should be examined, it seems likely that such a charge would be characterized as a regulatory fee. If that is the conclusion, then such a fee would be a permissible exaction under the city's police powers to support the enforcement and administration of the ordinance. If, however, the $20 fee were primarily a revenue generator,

---

[1] This analysis does not depend on whether the municipality has adopted home rule. While a city that has adopted home rule under Article XI, § 9, of the Tennessee Constitution may alter its charter by local action independent of the General Assembly, the power to do so has no impact on whether a particular charge is a fee or a tax. Of course, even a home rule city may not increase its power of taxation through amending its charter; Article XI, § 9, expressly provides that a city's power of taxation may be enlarged only by general act of the General Assembly.

and the monies collected were customarily used to pay for other programs, then the ordinance would be an unauthorized privilege tax.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

CHARLES L. LEWIS
Deputy Attorney General

WILLIAM N. HELOU
Assistant Attorney General

Requested by:

The Honorable Randy McNally
State Senator
307 War Memorial Building
Nashville, TN 37243-0205