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Opinion No. 08-50

Annexation under Tenn. Code Ann. § 6-58-111(d)(2) (2005) after agreement not to annex

QUESTIONS

1. A municipality and a county mediated a settlement of the boundaries of a comprehensive growth plan, pursuant to Tenn. Code Ann. § 6-58-104, and they entered into a separate agreement wherein the municipality agreed to extend its boundaries only as provided in the agreement. Four years after the agreement was entered, Tenn. Code Ann. § 6-58-111(d)(2) was amended in 2005. May the municipality utilize Tenn. Code Ann. § 6-58-111(d)(2) (2005) to extend its boundaries by annexation referendum without violating its previous agreement with the county?

2. Whether Tenn. Code Ann. § 6-58-111(d)(2) (2005) is unconstitutional under Article I, Section 20, of the Tennessee Constitution, as applied to existing comprehensive growth plan agreements?

OPINIONS

1. Even assuming that the specific terms of the agreement between the municipality and the county show that the municipality did agree to refrain from exercising its authority to annex, Tenn. Code Ann. § 6-58-104(a)(6)(C) permits such an agreement to be terminated after it has been in effect for five years. Based on the question posed, it appears that the agreement has been in effect for five years. Accordingly, it is the opinion of this Office that the municipality could utilize Tenn. Code Ann. § 6-58-111(d)(2) (2005) to extend its boundaries by annexation referendum once it terminated its agreement with the county in the manner provided in Tenn. Code Ann. § 6-58-104(a)(6)(C).

2. No.

ANALYSIS

In 1998, the General Assembly enacted the "Comprehensive Growth Plan," codified at Tenn. Code Ann. §§ 6-58-101, *et seq*. The intent was to establish a comprehensive growth policy for the state that:

(1) Eliminates annexation or incorporation out of fear;

(2) Establishes incentives to annex or incorporate where appropriate;

(3) More closely matches the timing of development and the provision of public services;

(4) Stabilizes each county's education funding base and establishes an incentive for each county legislative body to be more interested in education matters; and

(5) Minimizes urban sprawl.

Tenn. Code Ann. § 6-58-102.

To implement this policy, Tenn. Code Ann. § 6-58-104 required local governments in each county to develop a county growth plan through a coordinating committee no later than January 1, 2000. Each county's growth plan had to allocate the county's unincorporated land to urban growth areas,[1] planned growth areas,[2] and rural areas.[3] *See* Tenn. Code Ann. §§ 6-58-104, -106. After a county and its municipalities adopted a growth plan,[4] Tenn. Code Ann. § 6-58-107 required the plan to be submitted and approved by the local government planning advisory committee no later than January 1, 2001. After approval by the local government planning advisory committee, all land use decisions in the county must conform to the growth plan. Tenn. Code Ann. § 6-58-107.

Annexation following the adoption of a growth plan is addressed in Tenn. Code Ann. § 6-58-111, which originally provided in relevant part:

(a) Within a municipality's approved urban growth boundaries, a municipality may use any of the methods in chapter 51 of this title to annex territory; . . .

(c) A municipality may not annex territory by ordinance beyond its urban growth boundary without following the procedure in subsection (d).

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[1] An urban growth area includes territory contiguous to the existing boundaries of a municipality into which the municipality is expected to grow during the next twenty years and to which the municipality is better able to provide services than are other municipalities. Tenn. Code Ann. § 6-58-106(a)(1).

[2] A county's planned growth area consists of territory in which residential and nonresidential growth is expected to occur over the next twenty years and which is not part of any municipality or urban growth area. Tenn. Code Ann. § 6-58-106(b)(1).

[3] A county's rural area consists of territory which is not in any urban growth or planned growth area and which is to be preserved for uses such as agriculture, forestry, recreation, or wildlife management. Tenn. Code Ann. § 6-58-106(c)(1).

[4] If a county and a municipality could not come to an agreement with respect to the recommended growth plan, the statutory scheme provided for the resolution of disputes by mediation or other methods of alternative dispute resolution. *See* Tenn. Code Ann. § 6-58-104(b).

> (d)(1) If a municipality desires to annex territory beyond its urban growth boundary, the municipality shall first propose an amendment to its urban growth boundary with the coordinating committee under the procedure in § 6-58-104.
>
> (2) As an alternative to proposing a change in the urban growth boundary to the coordinating committee, the municipality may annex the territory by referendum as provided in §§ 6-51-104 and 6-51-105.

In 2005, subsections (a) and (d)(2) of Tenn. Code Ann. § 6-58-111 were amended. Subsection (a) was amended by inserting the following sentence at the beginning of the subsection:

> Notwithstanding any provision of this title or any other law to the contrary, a municipality possesses exclusive authority to annex territory located within its approved urban growth boundaries; therefore, no municipality may annex by ordinance or by referendum any territory located within another municipality's approved urban growth boundaries.

2005 Tenn. Pub. Acts, ch. 246, § 1. Subsection (d)(2) was amended by deleting the words "the territory" and substituting instead the following: "a territory located in the county's planned growth area or rural area." 2005 Tenn. Pub. Acts, ch. 246, § 2. Both of these amendments took effect January 1, 2006. 2005 Tenn. Pub. Acts, ch. 246, § 3.

Remarks by legislators during the legislative process reveal that Tenn. Code Ann. § 6-58-111(d)(2) was amended in order to close a perceived loophole. Under the Act, as originally written, it was arguable that a municipality could annex territory within a bordering city's urban growth boundaries. Thus, subsection (a) of Tenn. Code Ann. § 6-58-111 was amended to make it clear that a municipality may only annex territory within its own urban growth boundaries and that it may not annex territory in another municipality's urban growth boundaries. Subsection (d)(2) of Tenn. Code Ann. § 6-58-111, which addresses annexation by referendum beyond a city's urban growth boundary, was similarly clarified. Instead of simply stating that a municipality may annex such "territory" by referendum, "territory" was modified in subsection (d)(2) of Tenn. Code Ann. § 6-58-111 to read "a territory located in the county's planned growth area or rural area." *See generally* HB 408, State and Local Government Committee, April 26, 2005; HB 408, House Session, May 5, 2005; SB 1587, State and Local Government Committee, March 8, 2005.

The last statutory provision germane to your opinion request is Tenn. Code Ann. § 6-58-104(a)(6), which provides that a municipality is allowed to make binding agreements with other municipalities and with counties to refrain from exercising, among other powers, the authority to annex. Specifically, Tenn. Code Ann. § 6-58-104(a)(6) provides:

> (6)(A) A municipality may make binding agreements with other municipalities and with counties to refrain from exercising any power or privilege granted to the municipality by this title, to any degree contained in the agreement including, but not limited to, the authority to annex.

> (B) A county may make binding agreements with municipalities to refrain from exercising any power or privilege granted to the county by title 5, to any degree contained in the agreement including, but not limited to, the authority to receive annexation date revenue.
>
> (C) Any agreement made pursuant to this subdivision (a)(6) need not have a set term, but after the agreement has been in effect for five (5) years, any party upon giving ninety (90) days written notice to the other parties is entitled to a renegotiation or termination of the agreement.

Against this statutory framework, we turn to your queries. You inform us that a municipality and a county mediated a settlement of the boundaries of a comprehensive growth plan, pursuant to Tenn. Code Ann. § 6-58-104, and entered into a separate agreement wherein the municipality agreed to extend its boundaries only as provided in the agreement. You also inform us that the agreement was entered four years before the passage of Tenn. Code Ann. § 6-58-111(d)(2).[5] You first ask whether the municipality may extend its boundaries by annexation referendum, pursuant to Tenn. Code Ann. § 6-58-111(d)(2), without violating its previous agreement with the county. Second, you inquire whether Tenn. Code Ann. § 6-58-111(d)(2) is unconstitutional under Article I, Section 20, of the Tennessee Constitution, as applied to existing comprehensive growth plan agreements.

We begin with your query concerning constitutionality. Article I, Section 20, of the Tennessee Constitution states "[t]hat no retrospective law, or law impairing the obligations of contracts, shall be made." Tenn. Const., Art. I, § 20. Similarly, Article I, Section 10, of the United States Constitution provides that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts." U.S. Const., Art. I, § 10. The Tennessee Supreme Court has stated that the meaning of the federal and state constitutional provisions is identical. *First Utility District of Carter County v. Clark*, 834 S.W.2d 283, 287 (Tenn. 1992); *see Paine v. Fox*, 172 Tenn. 290, 112 S.W.2d 1 (1938); *Lake County v. Morris*, 160 Tenn. 619, 28 S.W.2d 351 (1930).

The United States Supreme Court has long held that Article I, Section 10, of the United States Constitution does not, in general, apply to relations between a municipal corporation and its creating state. *Hunter v. Pittsburgh*, 207 U.S. 161, 178, 28 S.Ct. 40, 52 L.Ed. 151 (1907). In *Hunter*, the Court dismissed a challenge brought by citizens of a smaller municipality annexed to an adjacent and larger municipality. The Court noted that, since municipal corporations are created by statute, "[n]either their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution." *Id.* Moreover, the United States Supreme Court has held that a city may not challenge a state statute on the grounds that it impairs an agreement between a city

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[5] We assume that you mean that the agreement was entered four years before the passage *of the 2005 amendment* of Tenn. Code Ann. § 6-58-111(d)(2), not four years before the passage of subsection (d)(2) as originally enacted in 1998, since you state that the city and county's growth plan and agreement were formed pursuant to Tenn. Code Ann. § 6-58-104, which is a statutory provision that did not exist in 1994.

and a third party. *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394, 39 S.Ct. 526, 63 L.Ed. 1054 (1919); *Worchester v. Worchester Consolidated Street Rwy. Co*., 196 U.S. 539, 25 S.Ct. 327, 49 L.Ed. 591 (1905).

Similarly, the Tennessee Supreme Court has held that a municipal corporation is not entitled to challenge a state statute on the ground that it impairs a contractual right of the municipal corporation. *Clark*, 834 S.W.2d at 287. In fact, Tennessee courts have squarely stated that the authority enjoyed by municipalities to annex derives from the grace of the General Assembly, which may enlarge it, restrict it, or eliminate it altogether at any time. *State ex rel. Hornkohl v. City of Tullahoma*, 746 S.W.2d 199, 201 (Tenn. Ct. App. 1987); *see City of Gallatin v. City of Hendersonville*, 510 S.W.2d 507, 509 (Tenn. 1974).

The cases cited above address the rights of a municipality to challenge a state statute. In each, the courts found that municipalities are creatures of state law and that the legislature may amend the laws under which they operate, even if those laws impair a contract between a municipality and a third party. For similar reasons, a county may not challenge a statute on grounds that it impairs a contract. *Cunningham v. Broadbent*, 177 Tenn. 202, 147 S.W.2d 408 (Tenn. 1941); Op. Tenn. Att'y Gen. 07-51 (Apr. 16, 2007). Accordingly, we do not believe that Tennessee municipalities or counties may challenge Tenn. Code Ann. § 6-58-111(d)(2) (2005) on the ground that it impairs their contract rights with respect to agreements they may enter pursuant to Tenn. Code Ann.§ 6-58-104(a)(6).

Moreover, even if Tennessee municipalities and counties could lodge such a challenge, we do not believe that Tenn. Code Ann. § 6-58-111(d)(2) (2005) impairs a prior agreement between a municipality and a county, made pursuant to Tenn. Code Ann. § 6-58-104, wherein a municipality agrees to alter its boundaries as provided in the agreement. A "retrospective law" that violates Article I, Section 20, of the Tennessee Constitution is one that takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed. *Morris v. Gross*, 572 S.W.2d 902, 907 (Tenn. 1978). As explained above, the amendment to Tenn. Code Ann. § 6-58-111(d)(2) simply clarified that a municipality could not annex territory in another municipality's urban growth boundary. Thus, a municipality's authority to annex, following the passage of the amendment of Tenn. Code Ann. § 6-58-111(d)(2), became no greater than it was in 1998 when the comprehensive growth plan statutory scheme was enacted. Accordingly, it is the opinion of this Office that Tenn. Code Ann. § 6-58-111(d)(2) (2005) does not impair any prior agreement between a municipality and a county, made pursuant to Tenn. Code Ann. § 6-58-104, wherein a municipality agreed to alter its boundaries as provided in the agreement, because municipalities gained no right to annex that they did not already possess when Tenn. Code Ann. § 6-58-111(d)(2) was originally enacted.

Finally, even if Tenn. Code Ann. § 6-58-111(d)(2) (2005) did impair agreements between municipalities and counties made pursuant to Tenn. Code Ann. § 6-58-104, we note that Tennessee courts have recognized that contracts may be subject to interference, or otherwise be affected by, subsequent statutes and ordinances enacted in the bona fide exercise of an appropriate and valid police power. *Profill Development, Inc., v. Dills*, 960 S.W.2d 17, 32 (Tenn. Ct. App. 1997);

Sherwin Williams Co. v. Morris, 25 Tenn. App. 272, 156 S.W.2d 350, 352 (Tenn. Ct. App. 1941). "Police power" has been defined as "an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." *Ford Motor Co. v. Pace*, 206 Tenn. 559, 583, 335 S.W.2d 360, 370 (1960). Tenn. Code Ann. § 6-58-111(d)(2) (2005) addresses the territory that a municipality may annex outside its urban growth boundary. We think legislation regulating such matter, even if it did impair contract rights, represents a valid exercise of the police power and thus does not violate Article I, Section 20, of the Tennessee Constitution.

Next, we turn to your question as to whether a municipality that has made an agreement with a county, pursuant to Tenn Code Ann. § 6-58-104, to alter its boundaries only as provided in the agreement, may extend its boundaries by annexation referendum pursuant to Tenn. Code Ann. § 6-58-111(d)(2) (2005) without violating its agreement with the county. As set forth above, Tenn. Code Ann. § 6-58-104(a)(6)(A) provides that a "municipality may make binding agreements . . . with counties to refrain from exercising any power or privilege granted to the municipality by this title, to any degree contained in the agreement including, but not limited to, the authority to annex." By its express terms, this provision clearly permits a municipality to make a binding agreement with a county to refrain from exercising its authority to annex. Thus, the initial consideration is whether the specific terms of the agreement between the municipality and the county about which you inquire show that the municipality agreed to refrain from exercising its authority to annex.

Assuming the municipality did agree to refrain from exercising its authority to annex, the next consideration is Tenn. Code Ann. § 6-58-104(a)(6)(C), which provides that any agreement made pursuant to "subdivision (a)(6) need not have a set term, but after the agreement has been in effect for five (5) years, any party upon giving ninety (90) days written notice to the other parties is entitled to a renegotiation or termination of the agreement." If the agreement does not have a term, subsection (C) states that any party may renegotiate or terminate the agreement, upon giving ninety (90) days written notice, after the agreement has been in effect for five years. Similarly, subsection (C) appears to contemplate that an agreement with a term greater than five years may be renegotiated or terminated upon giving ninety (90) days written notice once the agreement has been in effect for five years. You indicate that the agreement between the municipality and the county was entered four years before the passage of Tenn. Code Ann. § 6-58-111(d)(2) (2005); thus, we assume that the agreement has been in effect for five years. Accordingly, we are of the opinion that the municipality could utilize Tenn. Code Ann. § 6-58-111(d)(2) (2005) to extend its boundaries by annexation referendum once it terminated its agreement with the county in the manner provided in Tenn. Code Ann. § 6-58-104(a)(6)(C).

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