STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 18-16

Constitutionality of the Affordable Rental Property Act

Question

Is the proposed Affordable Rental Property Act, H.B. 1987, 110th Gen. Assem., 2d Reg. Sess. (Tenn. 2018), constitutional?

Opinion

Yes, H.B. 1987 is constitutional. It articulates a rational basis for creating a property tax classification for affordable rental housing and, thus, satisfies equal protection principles. Moreover, it complies with uniform taxation and valuation principles under the rationale stated in *Marion County v. State Board of Equalization*, 710 S.W.2d 521 (Tenn. Ct. App. 1986).

ANALYSIS

The proposed Affordable Rental Property Act is designed to encourage rental housing owners to provide affordable rental housing for the benefit of low-income persons. H.B. 1987, 110th Gen. Assem., 2d Reg. Sess. (Tenn. 2018). As written, the bill requires the Tennessee Housing Development Agency ("THDA") to "annually research the availability of affordable rental housing in each county of the state and determine which counties have a shortage of affordable rental housing." H.B. 1987, § 5(a). THDA also is required to set the annual income limits for qualifying renters and allowable monthly rental rates to be charged by rental housing owners. H.B. 1987, § 5(b). The State Board of Equalization, in consultation with THDA, is required to create an application process for owners seeking to classify rental housing as "affordable rental property." H.B. 1987, § 6. Applications are filed with the assessor of property in the county in which the rental housing is located. H.B. 1987, § 7(c). If the assessor approves the application, then the assessor considers the property's "current use as affordable rental property to be its immediate most suitable economic use." H.B. 1987, § 8. The assessment is based on the property's "value in its current use, rather than on its value for some other use." *Id.* This assessment method applies for as long as the property owner rents to low income persons at "affordable rental rates" and maintains the property in a habitable condition. H.B. 1987, § 9(b). If the property owner fails to do so, the property is reclassified and assessed at its current market value. H.B. 1987, § 9(c). The bill does not apply to properties operated under subsidized federal or state housing programs. H.B. 1987, § 3(b)(1).

Tax classification statutes generally implicate principles of equal protection, Tenn. Const. art. I, § 8, & art. XI, § 8, and uniform taxation, Tenn. Const. art. II, § 28. In order to withstand an equal protection challenge, a tax classification need only have a rational basis. *Castlewood, Inc.*

v. Anderson County, 969 S.W.2d 908, 909 (Tenn. 1975). On its face, H.B. 1987 provides a rational basis for the Legislature's decision to value affordable rental property differently than other rental property in those counties in which THDA has determined that an affordable housing shortage exists. The preamble to H.B. 1987 observes that "all areas of the state, but especially Davidson County and its greater metropolitan area, are struggling with a shortage of affordable housing." The preamble cites a THDA report stating that "[c]ities in the south where population growth has been high in recent years are facing a particular shortage of affordable options at differing income levels, and the shortage is likely to worsen." The preamble also cites a Housing Nashville report that estimates Nashville's affordable housing shortage will rise from 18,000 units in 2015 to 31,000 by 2025 if no new units are added. Accordingly, H.B. 1987 does not violate equal protection principles.

House Bill 1987 likewise does not appear to violate uniform taxation principles. 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. As the Supreme Court has observed, this provision gives the Legislature "very broad discretion" to determine "the value and definition of property in each of the authorized classifications or subclassifications." *Sherwood Co. v. Clary*, 734 S.W.2d 318, 321 (Tenn. 1987); *accord In re All Assessments*, 58 S.W.3d 95, 99 (Tenn. 2000). Under H.B. 1987, the classification is available in all counties and would be implemented by THDA using uniform standards on a statewide basis.

In *Marion County v. State Board of Equalization*, 710 S.W.2d 521 (Tenn. Ct. App. 1986), the Court of Appeals considered the constitutionality of the Greenbelt Law, which encourages the preservation of open space near urban and suburban areas. Tenn. Code Ann. § 67-5-1002(2) & -1003(2). The law allows landowners to apply to the assessor of property to classify their property as agricultural, forest, or open space land. Tenn. Code Ann. § 67-5-1005. Once so classified, the property is valued for assessment purposes as if "its immediate most suitable economic use" is the approved agricultural, forest, or open space use. Tenn. Code Ann. § 67-5-1008(a). If the land ceases to qualify as agricultural, forest, or open space land, the landowner is liable for rollback taxes for a set period preceding the change in use or ownership. Tenn. Code Ann. § 67-5-1008(d).

The court upheld the Greenbelt Law, which was challenged on equal protection and uniform taxation principles, as well as the Constitutional requirement that all property "be taxed according to its value." *See* Tenn. Const. art. II, § 29. The court reasoned that "in enacting this legislation, the legislature has issued an invitation to property owners to voluntarily restrict the use of their property" and that, "[o]nce assumed, that restriction affects the property's value." *Marion County*, 710 S.W.2d at 523. In that event, the property's value is "free from any artificial value attributed to its possible use for development." *Id.*

A similar rationale applies to H.B. 1987. If enacted, H.B. 1987 issues an invitation to property owners to voluntarily restrict the use of their property to affordable rental property. Once that restricted use is assumed, the restriction affects the property's value. If it can be used only as affordable rental property, then the property does not have the same value as nearby rental properties that are not similarly restricted. Accordingly, H.B. 1987 complies with equal protection

and uniform taxation principles, as well as the requirement that all property be taxed according to its value.

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