S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

April 20, 2005

Opinion No. 05-055

Constitutionality of Proposed Adequate Facilities Tax in Rutherford County

QUESTIONS

1. House Bill 324 is a proposed private act to provide for an adequate facilities tax on new development in Rutherford County. Is the bill's attempt to single out a class of residents for taxation and to impose taxes for the costs of new growth on "new residents and businesses who create the demand for the additional expenditures," rather than on existing residents, constitutional?

2. Is Section 3 of the bill, which seeks to impose a tax on new development in Rutherford County "so as to ensure and require that the persons responsible for new development share in the burdens of growth by paying their fair share for the cost of new and expanded public facilities made necessary by such development," impermissibly vague in identifying what is meant by a "fair share"?

3. Section 5 of the bill establishes that the tax will not be imposed until a capital improvements program is adopted that will find "that the need for . . . public facilities is reasonably related to new development in the county." Is there or should there be a rational nexus to establish what facilities are eligible to be funded by this tax?

4. Because the tax cannot be implemented until after the capital improvements program is adopted, does this mean that the funds from this tax cannot be spent for debt service or for facilities already in the pipeline prior to the passage of this act?

5. Section 9 of the bill states that "all tax funds collected shall be used for the purpose of providing public facilities." Does this provision exclude application of these funds for expenses related to the collection of this tax?

6. Section 10 of the bill claims that the authority to levy the tax under this bill "is in addition to all other authority to impose taxes, fees, assessments, or other revenue-raising or land-development regulatory measures . . . and the imposition of such tax, in addition to any other authorized taxes, fees[,] assessments, or charges, shall not be deemed to constitute double taxation." However, Rutherford County already has a Development Tax in place which is not repealed by this bill. Are that tax and the tax proposed by this bill levied on the same resources and for the same

purpose and, if so, is this double taxation, despite the disclaimer appearing in Section 10? If this is double taxation, is it constitutional?

OPINIONS

1. According to Tennessee case law, an adequate facilities tax passes constitutional muster under all formulations of equal protection, including Article I, Section 8 and Article XI, Section 8 of the state constitution and the fourteenth amendment of the federal constitution.

2. The definition of "fair share" in the act is adequately defined by the structure of the tax itself and by the requirement that the capital improvements program adopted pursuant to Section 8 of the act must make a finding that the need for public facilities is reasonably related to new development in the county.

3. The term "reasonably related" itself creates a requirement for a "rational nexus" between the facilities to be funded by this tax and new development in the county.

4. No. In the absence of an express requirement in the statute that these tax funds be used only for projects that are initiated after the passage of the act, use of the revenues from the tax is not limited to projects begun after its adoption.

5. By its stated language, yes. Section 9 authorizes use of the proceeds of this tax only for the purpose of providing public facilities.

6. If this bill is enacted, the General Assembly will have plainly stated its intent to allow both the adequate facilities tax and the development tax to be imposed and will have declared that this arrangement shall not be considered double taxation. Regardless of whether the arrangement is considered to be double taxation, it is constitutional because the legislature has stated plainly its intent to authorize both taxes simultaneously.

ANALYSIS

1. Adequate facilities taxes similar to the one under consideration have been passed by the General Assembly with respect to many Tennessee counties in recent years, including Rutherford County itself in 1996. *See* 1996 Tenn. Priv. Act Ch. 212, 216. This Office has consistently opined that these private acts are constitutional. *See* Op. Tenn. Att'y Gen. No. 04-158 (November 1, 2004); Op. Tenn. Att'y Gen. No. 99-168 (Aug. 26, 1999) (Montgomery County), Op. Tenn. Att'y Gen. No. 96-088 (July 16, 1996) (Rutherford County). The exception to this trend involved a provision in a proposed Wilson County adequate facilities tax that would have created a one-time exemption available only to individuals who had been residents of Wilson County for at least ten years as of January 1, 1996. Op. Tenn. Att'y Gen. No. 96-066 (April 9, 1996). The Office determined this to be unconstitutional under the Privileges and Immunities Clause of the Fourteenth Amendment of the federal constitution. *Id.* No such exemption was included in the other

statutes under review by this Office in the above cited opinions, including Rutherford County's 1996 adequate facilities tax.

The 1996 Rutherford County adequate facilities tax was passed in conjunction with a "development tax" for the same county that was similar in many respects. 1996 Tenn. Priv. Act Ch. 215; *Throneberry Properties v. Allen*, 987 S.W.2d 37 (Tenn. App. 1998). That act levied a tax on the privilege of "[e]ngaging in the act of land development for residential purposes" (whereas the adequate facilities tax identified the privilege there as "[e]ngaging in the act of development"). 1996 Tenn. Priv. Act Ch. 215; 1996 Tenn. Priv. Act Ch. 212. Because both taxes fell only on new development, their burden was shared by the same persons; thus, the analysis under the various equal protection provisions of the state and federal constitutions would be the same. The development tax was challenged on these grounds in *Throneberry* unsuccessfully. Article XI, Section 8 of the state constitution prohibits the legislature from suspending the general law for the benefit of particular individuals as well as from granting any "rights, privileges, immunity, or exemptions" to particular individuals that may not be extended to any member of the community. *Throneberry* at 40. As in the instant proposal, "residential developers in Rutherford County [were being] treated differently from developers in other parts of the state" by the development tax. *Id.* However, the court held that "[l]egislative classifications are not arbitrary and capricious if the classification has a reasonable basis and the legislature has the power to make the classification if it is fairly debatable." Employing this rationale, which applies with equal force to the adequate facilities tax, the court in *Throneberry* found no violation of equal protection at either the state or federal level. *Id.*

2. While the term "fair share" in Section 3 of the proposed bill may seem at first blush to be imprecise, the share of a taxpayer under such a system of taxation will be defined by the terms of the tax. New development in Rutherford County, as defined in Section 1 of the act and subject to the exceptions contained in Section 6, will be subject to taxation as described in Section 7. The terms in that section are precise and easily computed and should fully determine the answer to what the act considers to be a fair share. In determining the "fairness" of this amount, it is important to remember that the taxation scheme itself does not violate any constitutional equal protection requirement, as discussed above, and that the capital improvements program, which must include a finding of reasonable relation between new development and the public facilities to be constructed, must be adopted under Section 5 before the imposition of the tax. This finding should ensure that the tax is being imposed in connection with the construction of new facilities necessitated by the new development.

3. Section 5 requires the county commission to adopt a "capital improvements program" before it may impose this tax, finding "that the need for . . . public facilities is reasonably related to new development in the county." The term "related" requires that there be some connection between the facilities and new development, while "reasonably" represents the minimum level of connectivity between those things required to be found before the program may be adopted and the tax imposed. Taken together, the term does require some rational connection between new development and the need for facilities to be funded by the tax and requires that proceeds from the tax not be used for any facilities unrelated to new development. In this case, if the program presents

a finding that the public facilities would not be constructed without the new development, then the two may be said to be reasonably related. If those facilities would be built without any new development, then there is no reasonable relationship. This inquiry is to be made initially by the county commission.

4. According to the language of Section 5, the governing body of Rutherford County must first adopt a "capital improvements program" before the adequate facilities tax may be imposed. This threshold requirement expressly applies only to the imposition of the tax, not to the permissible uses of the proceeds of the tax, which are governed by Section 9. This program is charged with two duties: "indicating the need for the cost of public facilities anticipated to be funded" and "finding that the need for such public facilities is reasonably related to new development in the county." None of this language limits the program's findings to projects that have not yet begun. The only limitation set out in Section 9 is that the funds be used for public facilities "reasonably related to new development." "Development" is defined in the bill, but not "new development" as a term, leaving unspecified the earliest date at which development could be considered "new" for purposes of defining which facilities are tied to new development.

The act is concerned with the provision of new facilities owing to new development in the county. Facilities in various stages of construction at the time of the act's passage that were required because of new development are as reasonably related to new development as projects that will be initiated after the act is passed and ratified. In the absence of express language limiting the use of the funds to projects begun after the act becomes law, this bill makes no distinction between projects begun before adoption of the act and those begun after, so long as all such projects are reasonably related to new development.

5. The plain language of the act reads: "[A]ll tax funds collected shall be used for the purpose of providing public facilities, the need for which is reasonably related to new development." This language expressly excludes any other use for any of these proceeds, and therefore any such use would be in violation of the act. Limiting the revenues raised by a tax to certain purposes is within the legislature's power and disregarding such limitations is impermissible. Examining cases involving "the unauthorized diversion of conventional tax revenues raised for specific and itemized purposes," the Supreme Court concluded that "our courts consistently and correctly have held that tax revenues raised for state public purposes may not be diverted." *State ex rel. Conger v. Madison County*, 581 S.W.2d 632, 638 (Tenn. 1979). A plain reading of Section 9 reveals that the adequate facilities tax proposed in this bill has a specific purpose. Although one would ordinarily assume that some of the proceeds from a tax would be used for its administration, where a bill clearly specifies the use of the funds, it operates to prohibit any other use. Therefore, without specific authorization in the bill for application of these funds to expenses related to the collection of the tax, such a use of the funds would be impermissible.

6. The *Throneberry* case discussed above also examined the possibility that the Rutherford County adequate facilities tax and the development tax that were both passed in 1996 constituted double taxation. The Court of Appeals there held that "[e]ven assuming that both private acts [were] privilege taxes on the same privilege, our constitution does not prohibit the legislature

from imposing double taxation on the same privilege if it is clear that such was the legislative intent." *Throneberry* at 41, *citing Oliver v. King*, 612 S.W.2d 152 (Tenn. 1981). The court reasoned that because both taxes were passed at the same legislative session and both contained identical language indicating that each "tax was in addition to all other taxes," the legislative intent was clearly to tax the privileges twice. *Throneberry* at 41. The language relied on by the court was found in Section 10 of both 1996 acts:

> [T]he authority to impose this privilege tax on new development in Rutherford County is in addition to all other authority to impose taxes, fees, assessments, or other revenue raising or land development regulatory measures granted either by the private or public acts of Tennessee, and the imposition of such tax, in addition to any other authorized tax, fee, assessment, or charge, shall not be deemed to constitute double taxation.

Op. Tenn. Att'y Gen. No. 96-088 (July 16, 1996). Both acts also contained language in each Section 12 disclaiming any intent to alter the authority granted by any other act. 1996 Tenn. Priv. Act Ch. 212; 1996 Tenn. Priv. Act Ch. 215. While the proposed adequate facilities tax is not being passed during the same session as the development tax, the language in the current bill's Section 10 is identical, with the exception of small grammatical changes and the addition of a new sentence at the end of the section excepting from the tax anyone who had paid some or all of the development tax *prior to* the new adequate facilities tax becoming law. Section 12 of the current bill is also identical to both 1996 predecessors, although it adds a new clause at the end to specify that the public facilities in question are "made necessary by new development in the county and/or any of its cities." The legislative intent of this bill thus is very similar to the 1996 bills, and the use of the same language makes it clear that the legislature intends to impose the new adequate facilities tax in addition to all other taxes currently authorized, an intent that is even more forceful when the addition to Section 10 acknowledging the development tax is considered. Despite the negative connotations evoked by the term "double taxation," neither the Tennessee nor the federal constitution prohibits double taxation, so long as the legislature evinces an intention in each act to tax those things that are covered by both. Accordingly, the proposed bill does not present any constitutional problems in this regard.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

BRAD H. BUCHANAN
Assistant Attorney General

Requested by:

The Honorable Donna Rowland
State Representative, 34th Legislative District
209 War Memorial Building
Nashville, Tennessee 37243-0134