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Opinion No. 05-145

Constitutionality of Population Bracket Exemptions of Chapter 495 of the Public Acts of 2005

QUESTIONS

1. Are the exemptions for the counties designated by population brackets in section two of Chapter 495 of the Public Acts of 2005 constitutional?

2. If not, would a court determine that Chapter 495 is wholly unconstitutional or that the requirements of section one apply state-wide?

3. If your opinion is that section two is unconstitutional but severable, may the Department of Environment and Conservation administer only the constitutional portions of Chapter 495, or is the Department required to administer Chapter 495 in its entirety until a court rules on the issue of constitutionality?

OPINIONS

1. The exemptions for the counties designated by population brackets in section two of Chapter 495 lack a rational basis and are therefore unconstitutional.

2. A court would likely determine that section two is severable from the remainder of Chapter 495. The requirements of section one would therefore apply state-wide.

3. In light of this opinion, the Department may elect to administer only the constitutional portions of Chapter 495.

ANALYSIS

Chapter 495 of the Public Acts of 2005 amends Tennessee Code Annotated section 68-221-409. Section 68-221-409 is one of several statutory provisions governing the regulation of subsurface sewage disposal systems. Before its amendment by Chapter 495, section 68-221-409 read as follows:

> Any person proposing to construct, alter, extend or repair subsurface sewage disposal systems and/or engage in the business of removing accumulated wastes from such systems shall secure a permit from the commissioner in accordance with the provisions of this part and rules and regulations promulgated pursuant to the

provisions of this part.

Tenn. Code Ann. § 68-221-409 (2001). Section one of Chapter 495 amends section 68-221-409 by deleting the existing statutory language and substituting new language. Section one of Chapter 495 maintains the exact language of former section 68-221-409 as part of a new subsection 68-221-409(a), but also includes additional language in new subsection 68-221-409(a) and adds new subsections 68-221-409(b), (c) and (d). 2005 Tenn. Pub. Acts, ch. 495, § 1 (to be codified at Tenn. Code Ann. § 68-221-409). At the risk of oversimplification, suffice it to say that the new language contemplated by Chapter 495 is intended to impose a requirement that soil consultants, soil scientists, percolation testers and installers of septic systems secure a bond or letter of credit for the benefit of any person who, having hired the consultant, scientist, tester or installer, is damaged through negligence or fraud.[1] The House and Senate sponsors made clear that the principal purpose behind Chapter 495 was a desire to protect homeowners across the state in the event they faced expenses resulting from failing septic systems. *An Act to amend Tennessee Code Annotated, Title 68, Chapter 221, Part 4, relative to subsurface sewage disposal systems: Hearing on S.B. 1879 Before the Comm. on Env't, Conservation and Tourism*, 104th General Assembly, 1st Reg. Sess. (April 6, 2005) (Statement of Sen. Herron); *Hearing on H.B. 105 Before the Comm. on Conservation and Env't* (April 20, 2005) (Statement of Rep. McDonald); *Hearing on H.B. 105 Before the Comm. on Finance, Ways and Means* (May 3, 2005) (Statement of Rep. McDonald).

Section two of Chapter 495 contains the language that gives rise to the questions presented in this opinion request. Section two states that the provisions of Chapter 495 shall not apply in counties falling within seventeen population brackets according to the 2000 federal census or any subsequent federal census.[2] The population brackets range in size from between 4900 and 5000 to between 105,800 and 105,900. 2005 Tenn. Pub. Acts, ch. 495, § 2. According to the 2000 federal census, the listed population brackets correspond to the following counties: Pickett, Clay, Jackson, Fentress, Morgan, Overton, Grainger, Scott, Fayette, Claiborne, Monroe, Loudon, Jefferson, Gibson, Roane, Sevier and Blount. The exemptions contained in section two were not part of the legislation as originally proposed. Rather, the exemptions arose as amendments to the legislation during debate on the floor of the House. *An Act to amend Tennessee Code Annotated, Title 68, Chapter 221, Part 4, relative to subsurface sewage disposal systems: Hearing on H.B. 105 Before the House*, 104th General Assembly, 1st Reg. Sess. (May 25, 2005) (Statements of Reps. Nicely, Gresham and Ferguson).

The first and most fundamental question presented in this opinion request concerns whether the exemptions set forth in section two of Chapter 495 are constitutional. We believe that an examination of the exemptions under Article I, Section 8 of the Tennessee Constitution is determinative on this issue. Article I, Section 8 reads as follows:

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[1] Chapter 495 does set forth some qualifications upon the bond requirement, but they are not pertinent to the questions presented.

[2] Section two actually lists eighteen population brackets. Two of the population brackets, however, overlap. The overlapping population brackets are: from 39,050 to 39,105; and from 39,050 to 39, 150.

> That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land.

Tenn. Const. art. I, § 8. In general, Tennessee courts have interpreted this provision to guarantee due process of law and equal protection of the law. *Civil Serv. Merit Bd. of Knoxville v. Burson*, 816 S.W.2d 725, 728 (Tenn. 1991). Moreover, the provision protects cities and counties as well as individuals. *Civil Serv. Merit Bd.*, 816 S.W.2d at 731. The core concern expressed in the provision with respect to legislative classification is that, to the extent such classification exists, it must not be unreasonable or unfair. In other words, legislative classification affecting particular counties and conferring benefits or imposing burdens on their residents, without affecting others similarly situated in the state, does not violate Article I, Section 8 as long as there is a reasonable basis for the classification. *Civil Serv. Merit Bd.*, 816 S.W.2d at 731.

With regard to analyzing the basis for classification, it is well-established that legislation need not on its face contain the reasons for a classification. This conclusion flows from the strong presumption in favor of the constitutionality of acts passed by the legislature. Instead, a classification must be deemed reasonable if any possible reason can be conceived to justify it. *Civil Serv. Merit Bd.*, 816 S.W.2d at 731.

Applying these principles to Chapter 495, it becomes clear that the exemptions lack a rational basis and are therefore unconstitutional. The language of Chapter 495 itself does not specify a reason for the exemptions. The legislative history of Chapter 495 does, however, provide some information about the reasoning supporting the exemptions. As mentioned above, the exemptions were added to the original text of House Bill 105 ("HB105") through three amendments proposed during debate on the floor of the House. The three amendments were Amendment Seven by Rep. Nicely, Amendment Eight by Rep. Gresham and Amendment Ten by Rep. Ferguson.

The most thorough comments concerning the exemptions came from Rep. Nicely during debate on Amendment Seven.[3] Rep. Nicely stated that, while the intentions behind HB105 might be good, he saw no need for soil consultants, soil scientists, percolation testers and installers to be bonded when they could be sued for damages in the event their actions harmed a homeowner. *An Act to amend Tennessee Code Annotated, Title 68, Chapter 221, Part 4, relative to subsurface sewage disposal systems: Hearing on H.B. 105 Before the House*, 104th General Assembly, 1st Reg. Sess. (May 24, 2005, and May 25, 2005) (Statements of Rep. Nicely). Rep. Nicely buttressed his reasoning by pointing out that a myriad of other persons could potentially damage subsurface sewage disposal systems through their business activities (Rep. Nicely used the example of a person delivering sheetrock to a new home driving a heavy truck over the field lines of a septic system and crushing them), and under the reasoning behind HB105 these persons should be required to be

[3] With regard to Amendment Eight, Rep. Gresham commented simply that county officials had requested to exempt Fayette County. *An Act to amend Tennessee Code Annotated, Title 68, Chapter 221, Part 4, relative to subsurface sewage disposal systems: Hearing on H.B. 105 Before the House*, 104th General Assembly, 1st Reg. Sess. (May 25, 2005) (Statement of Rep. Gresham). With regard to Amendment Ten, Rep. Ferguson offered no explanation.

bonded as well. *An Act to amend Tennessee Code Annotated, Title 68, Chapter 221, Part 4, relative to subsurface sewage disposal systems: Hearing on H.B. 105 Before the Comm. on Conservation and Env't*, 104th General Assembly, 1st Reg. Sess. (April 20, 2005) (Statement of Rep. Nicely). Rep. Nicely therefore indicated that HB105 added more paperwork for persons engaging in the specified businesses when the individuals sought to be protected already had a remedy in the event they were harmed, namely a court action. Thus, Rep. Nicely wished to exempt the counties he represented. *An Act to amend Tennessee Code Annotated, Title 68, Chapter 221, Part 4, relative to subsurface sewage disposal systems: Hearing on H.B. 105 Before the House*, 104th General Assembly, 1st Reg. Sess. (May 24, 2005, and May 25, 2005) (Statements of Rep. Nicely).

In our view, the added paperwork associated with the new bond requirement and the availability of alternative legal remedies do not provide a rational basis for treating any Tennessee county differently from another in the context of Chapter 495.[4] We can discern no relevant difference among the counties throughout the state with respect to paperwork or available legal remedies. Furthermore, we can conceive of no legitimate population-based reason behind the exemptions. We note that the exemptions encompass a wide range of populations, from the least populous county in the state to a county of more than 100,000 people. Additionally, the exemptions apply to counties of certain population but do not apply to other counties of very similar population.[5] Likewise, we can conceive of no legitimate geographical reason behind the exemptions. We note that the exemptions include ten counties of east Tennessee, five counties of upper-middle Tennessee and two counties of west Tennessee, with no apparent relevant link among them not shared by the remaining counties throughout the state. Nor can we conceive of any other reason related to subsurface sewage disposal systems behind the exemptions of Chapter 495.

In short, it appears to this Office that the exemptions of Chapter 495 lack a "unifying or discernible basis" and, in fact, comprise a "hodge-podge of statutory exclusions." *Cf.* Op. Tenn. Att'y Gen. 99-112 (May 13, 1999) (opining that certain contractor licensing classifications were unconstitutional). The legislative history suggests that there was simply a desire by the exempted counties not to be covered by Chapter 495, and the population classification was the method chosen to exclude such counties. *Cf. Hart v. Johnson City*, 801 S.W.2d 512, 517 (Tenn. 1990) (holding unconstitutional certain municipal annexation classifications). Accordingly, it is the opinion of this Office that the exemptions set forth in section two of Chapter 495 violate Article I, Section 8 and are therefore unconstitutional.

The second question posed in this opinion request is a logical extension of the first question, namely whether Chapter 495 is unconstitutional in whole or merely in part. The answer to this

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[4] We do not mean to comment upon the validity of the concerns voiced by Rep. Nicely, but rather to state that although those concerns may have provided Rep. Nicely a reason to vote against HB105, they do not provide a valid reason for exempting certain counties from HB105.

[5] For instance, the exemptions include Clay County with a population of 7976, but do not include Lake County with a population of 7954. Similarly, the exemptions include Blount County with a population of 105,823, but do not include Washington County with a population of 107,198.

question depends upon whether a court would likely elide the unconstitutional exemptions of section two of Chapter 495 and uphold the remaining sections of Chapter 495, including its principal substance contained in section one. The doctrine of elision allows a court to do just that, to elide an unconstitutional portion of a statute and to enforce the remaining provisions as constitutional and effective under appropriate circumstances when consistent with the expressed legislative intent. *Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 22 (Tenn. 2000); *State ex rel. Barker v. Harmon*, 882 S.W.2d 352, 355 (Tenn. 1994). Elision is appropriate when doing so would not undermine the legislative intent of the statute, that is to say when the legislature would have enacted the statute with the unconstitutional portion omitted. *American Chariot v. City of Memphis*, 164 S.W.3d 600, 605 (Tenn. Ct. App. 2004).

Turning again to the legislative history of Chapter 495, elision appears appropriate in the context of Chapter 495. After adoption of the exempting amendments, the House considered and adopted another amendment, Amendment Fourteen. Amendment Fourteen inserted a severability clause as section four of Chapter 495. Tennessee courts have repeatedly held that the inclusion by the legislature of a severability clause is evidence of the legislature's intent that valid portions of the statute be enforced when a court determines that other portions are unconstitutional. *Harmon*, 882 S.W.2d at 355; *State v. Tester*, 879 S.W.2d 823, 830 (Tenn. 1994); *Franks v. State*, 772 S.W.2d 428, 430 (Tenn. 1989). In light of the adoption of the severability clause after the adoption of the exemptions, it is the opinion of this Office that a court would likely elide the unconstitutional exemptions of section two of Chapter 495 and enforce the remaining constitutional provisions.[6]

The third question posed in this opinion request is a logical extension of the second question, namely an inquiry into the responsibilities of the agency charged with administering Chapter 495 in the event that this Office opines the Act to be unconstitutional in part. The question is whether, in light of the opinion of this Office that the exemptions of section two are unconstitutional but severable, the Department of Environment and Conservation ("TDEC") may administer just the constitutional portions of Chapter 495. The alternative would be for TDEC to administer Chapter 495 in full, in spite of the opinion of this Office, until a Tennessee court determines the issues of constitutionality and severability of section two.

Statutes enacted by the legislature are presumed to be constitutional. *Vogel v. Wells Fargo Guard Servs.*, 937 S.W.2d 856, 858 (Tenn. 1996). As a result, Tennessee courts have observed that an unconstitutional act is not void but rather voidable. *Cumberland Capital Corp. v. Patty*, 556 S.W.2d 516, 540 (Tenn. 1977); *Huntsville Util. Dist. v. General Trust Co.*, 839 S.W.2d 397, 404 (Tenn. Ct. App. 1992). Thus, as the Tennessee Supreme Court stated,

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[6] We note that the House voted convincingly to adopt the exemptions in spite of arguments by Rep. McDonald that HB105 should apply state-wide. *An Act to amend Tennessee Code Annotated, Title 68, Chapter 221, Part 4, relative to subsurface sewage disposal systems: Hearing on H.B. 105 Before the House*, 104th General Assembly, 1st Reg. Sess. (May 25, 2005) (Statements of Rep. McDonald). This circumstance, standing alone, might suggest that the legislature would not have passed Chapter 495 without the exemptions. The severability clause, however, was added to HB105 after adoption of the exemptions, and we view the clause and the timing of its adoption as determinative on this issue.

> No rule of law is better settled than that which declares every act of the Legislature, which is not palpably unconstitutional on its face, is binding as a law until its constitutionality is judicially determined in a proceeding instituted for that purpose, or until some proceeding is instituted to enforce the act, or to declare some right under the act affecting life, liberty or property.

State v. Hoffman, 210 Tenn. 686, 695, 362 S.W.2d 231, 235 (1962) (citation omitted).

This reasoning has led to the conclusion that, by force of the presumption in favor of the constitutionality of statutes, the public and individuals are bound to observe a statute, though unconstitutional, until it is declared void by an authoritative tribunal. *O'Brien v. Rutherford County*, 199 Tenn. 642, 647, 288 S.W.2d 708, 710 (1956); *Rust v. Newby*, 171 Tenn. 127, 100 S.W.2d 989, 990 (1937). Similarly, ministerial officials are not as a general rule permitted to question the validity of a statute. *Bricker v. Sims*, 195 Tenn. 361, 368, 259 S.W.2d 661, 664-65 (1953) (holding sheriff and deputy not liable for enforcing unconstitutional ordinance by virtue of duty as ministerial official to enforce the law). The *Bricker* Court, however, recognized that there could be exceptions to the general rule. *Bricker*, 195 Tenn. at 368, 259 S.W.2d at 664.

In light of the potential exceptions mentioned in *Bricker*, this Office has previously opined that public officials must consider all state laws constitutional until declared otherwise by a Tennessee court except in rare situations where the official has discretionary functions under the statute at issue, the statute is palpably unconstitutional and the official has been advised by the opinion of the Attorney General, with supporting legal authorities, that the statute is unconstitutional. Op. Tenn. Att'y Gen. 84-157 (May 8, 1984). Accordingly, a public official with discretionary functions under a state statute that has been declared to be unconstitutional by an opinion of the Attorney General may take appropriate action based upon that legal advice to conform his or her conduct to the particular constitutional mandate, particularly if the statute appears to be palpably unconstitutional, or may initiate a judicial action for a declaratory judgment as to his or her legal responsibilities. Op. Tenn. Att'y Gen. 02-090 (August 27, 2002) (citing Op. Tenn. Att'y Gen. 84-157 (May 8, 1984)).

The critical inquiry as to TDEC's responsibilities with respect to Chapter 495, then, is whether TDEC has discretionary functions under the statute. As mentioned above, the principal purpose of Chapter 495 is to impose a bond requirement upon soil consultants, soil scientists, percolation testers and installers of subsurface sewage disposal systems. 2005 Tenn. Pub. Acts, ch. 495, § 1. It appears, however, that implementation of this statutory directive is to be accomplished through rulemaking. To that end, Chapter 495 specifically vests rulemaking authority in TDEC. 2005 Tenn. Pub. Acts, ch. 495, §§ 1 and 3. Equally important, Chapter 495 references the rulemaking authority afforded TDEC under other statutory provisions governing the regulation of subsurface sewage disposal systems. 2005 Tenn. Pub. Acts, ch. 495, § 1.

In this vein, we must remember that the bond requirement of Chapter 495 is but one part of an over-arching statutory scheme governing the regulation of subsurface sewage disposal systems. The statutory scheme provides TDEC with the authority to "promulgate rules and regulations *as the*

[TDEC] commissioner deems necessary" to accomplish the purposes of the scheme. Tenn. Code Ann. § 68-221-403(a)(2) (emphasis added).

In our view, then, TDEC is vested with a certain degree of discretion in administering the statutory scheme governing subsurface sewage disposal systems, including the provisions of Chapter 495. It would seem to make little sense to require TDEC to exercise its rulemaking discretion to implement the exemptions of Chapter 495 when TDEC knows that its official legal adviser has held that the exemptions are unconstitutional. *Cf. Cummings v. Beeler*, 189 Tenn. 151, 159-60, 223 S.W.2d 913, 916 (1949) (suggesting that the Comptroller may refuse to approve warrants when the Attorney General has held that the act under which the warrants were to be issued is unconstitutional). Accordingly, because TDEC is afforded a certain degree of discretion, it is the opinion of this Office that TDEC may take appropriate action to conform its conduct under Chapter 495 to the constitutional mandate.

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