

**STATE OF TENNESSEE**  
**OFFICE OF THE**  
**ATTORNEY GENERAL**  
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**NASHVILLE, TENNESSEE 37202**

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Opinion No. 05-089

Constitutionality of House Bill 969/Senate Bill 387 Establishing Valuation Method for  
Low-Income Housing

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**QUESTION**

Does House Bill 969/Senate Bill 387, which establishes a valuation method for certain low-income housing properties, violate any provisions of the United States or Tennessee constitutions?

**OPINION**

No, House Bill 969/Senate Bill 387 does not violate any provisions of the United States or Tennessee constitutions. Pursuant to Article II, Section 28, of the Tennessee Constitution, the Legislature has the authority to enact such legislation directing the method to be used in ascertaining the value of real property, including low-income housing property.

**ANALYSIS**

If enacted, House Bill 969/Senate Bill 387 would dictate the manner in which certain low-income housing property is valued by local assessors. The bill applies to housing that has received a low-income housing tax credit authorized by section 42 of the Internal Revenue Code of 1986. The bill provides that the federal tax credits associated with the property should not be considered as income or value related to the property, that the assessed value as determined by the income capitalization method should be based upon the rent paid without consideration of any project-based federal grant or subsidy, and that any properly-recorded land-use restriction associated with the project should be considered as a limitation on the property's highest and best use.

The provisions of House Bill 969/Senate Bill 387 do not appear to violate any provisions of the United States or Tennessee constitutions. In a 2000 opinion, this Office addressed the constitutionality of legislation that would have established a similar valuation method for low-income housing. *See* Tenn. Att'y Gen. Op. No. 00-066 (Apr. 5, 2000). The 2000 bill would have required assessors, in valuing such low-income housing, to take into account the effect of use restrictions on the property and, conversely, not to take into account the associated tax credits.

In opining that the proposed legislation was constitutional, this Office explained:

Senate Bill 2481/House Bill 2584 provides a method for appraising the value of real property that qualifies for certain federal income tax credits authorized by § 42 of the Internal Revenue Code of 1986, as amended under the Federal Low Income Housing Tax Credit Program (“LIHTC Program”). At issue is the assignment of value in the appraisal of the real property to the tax credits authorized or awarded under the LIHTC Program and whether the restrictions on use of the property under the LIHTC Program require a reduction in the valuation of the property for tax assessment purposes.

The specific issue addressed by Senate Bill 2481/House Bill 2584 has not been resolved by the courts in Tennessee and is currently the subject of litigation to which the State Board of Equalization is a party. The issue has been dealt with by courts in several sister states, which are divided as to whether or not value should be assigned to the tax credits authorized or awarded under, and whether or not the assessed value of real property should reflect the restrictions imposed by, the LIHTC Program.

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For the purposes of the question presented, it is sufficient that the courts are divided as to the appropriate method for the valuation of real property qualifying for tax credits under the LIHTC Program. Article II, § 28 expressly grants the Legislature the authority to direct the method to be used in ascertaining the value of real property and constitutes a clear and unambiguous declaration that the Legislature possesses the institutional competency to make such determinations. When courts are unable to agree as to the appropriate method to ascertain value, the Legislature clearly has the power to exercise its competency and direct which method shall be used.

A clear precedent for the Legislature's exercise of its power to direct valuation methodology is the enactment of the “Greenbelt Law,” Tenn. Code Ann. §§ 65-5-1002, *et seq.* The Greenbelt Law permits property owners voluntarily to restrict the use of their property and directs that the assessment of value of such property reflect such restriction. The constitutionality of the Greenbelt Law was upheld by the Court of Appeals in *Marion County vs. State Board of Equalization*, 710 S.W.2d 521 (Tenn. Ct. App. 1986). In *Marion County*, the Court of Appeals stated that “there are many different definitions of value. The constitution does not give any clue as to how value is to be determined; instead it leaves the method of

determining value to the Legislature.” *Id.* at 523. The Court expressly found that the Legislature has the power to require that the “fair market value” of property be assessed according to actual use as opposed to a hypothetical best use, and reasoned:

It seems to us that in enacting this legislation, the Legislature has issued an invitation to property owners to voluntarily restrict the use of their property for agricultural, forest or open space purposes. Once assumed, that restriction affects the property's value. ***If it can only be used for farm purposes for instance, then it would be free from any artificial value attributed to its possible use for development. It should have only the same value as any similar property that is as productive and accessible as it is.*** [emphasis added]

*Id.* Because, like the owners of real property that elect to qualify under the Greenbelt Law, owners of property that qualify for the LIHTC Program voluntarily restrict the use of their property at the Legislature’s invitation, the logic expressed in *Marion County* is directly applicable to a legislative determination that the voluntary restriction under the LIHTC Program affects the restricted property’s value and that such property should be assessed by the value determined by actual use as opposed to an artificial value attributed to its highest and best use.

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Consistent with the decision in *Marion County*, the Court of Appeals held in *Fayette County Taxpayers vs. State Board of Equalization*, 1985 Tenn. App. LEXIS 2926 (June 4, 1985), that the Legislature has the constitutional authority under the Greenbelt Law to direct that the method of determining fair market value of the qualifying property reflect the actual restricted use of such property. The Court stated:

Tennessee Code Annotated § 67-5-1008 requires property owners qualifying under “The Agricultural, Forest, and Open Space Land Act of 1976” ***to be valued at fair market value but restricts the use of the property to agricultural, forest, or open space land as the highest and best use. Consideration may***

***not be given to any use other than the current use in determining the qualifying land's value.*** Tenn. Code Ann. § 67-5-1008 does not violate either Article 2, Section 28 of the Tennessee Constitution or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because the property is being valued at its fair market value with the only restriction being that the property can be used only for agricultural, forest, or open space land purposes. [emphasis added]

*Id.* at 5. The Court, however, held that a formula developed by the State Board to assess the value of such property was unconstitutional under Article II, § 28 because that formula applied a market capitalization rate that was not market based but instead was based upon the Federal Land Bank interest rate (“FLB Rate”). *Id.* Because the use of this FLB Rate would clearly produce a property value that was not the market value, the formula was ruled unconstitutional. In addition, the Court disagreed with the plaintiff’s assertion that “present use value” should be derived solely from the actual income derived from the property and not from a determination of fair market value, albeit a fair market value of the property under restricted use, pursuant to Tenn. Code Ann. § 67-5-602. *Id.*

The provisions of the proposed legislation merely direct that (i) the intangible property rights created by the tax credits under the LIHTC Program are not to be considered in calculating the fair market value, and (ii) the voluntary restrictions that have an effect on the fair market value should be recognized. In neither case does the Legislature require that the formula to be used to assess the qualifying property be separate or distinct from the formula to be used to assess non-qualifying property or that such formula determine a value other than fair market value. The Legislature merely exercises its inherent power, as under the Greenbelt Law, to invite property owners to voluntarily restrict the use of the property and to recognize that such restrictions have an effect on the value of the property. Consistent with the Tennessee Constitution and the case law interpreting it, the Bill requires the assessor to consider the effect of use restrictions in valuing these properties, and it forbids the assessor from considering the federal income tax credits as a separate component of the property value. The Bill should not be construed, however, as preventing the assessor from considering market influences or as limiting the assessor to considering only the

contracted rents in valuing the property, either of which would place the Bill at odds with the holding in the *Fayette County Taxpayers* case.

The last sentence of the Bill directs that other “affordable housing” “shall be assessed based on the income appraisal approach if rental rates are restricted due to governmental regulations.” We construe this provision to require that the income approach, as it is generally recognized by property appraisers, be used to determine the fair market value of the property, albeit subject to the governmental regulations. A contrary construction under which the valuations would be derived from contracted rents only would bring that provision into direct conflict with the Court of Appeal’s decision in *Fayette County*. In specifying use of the generally recognized income approach, rather than other legitimate methods of valuation, this provision would appear to be a valid exercise of the Legislature’s authority to specify how the restrictions voluntarily imposed upon the property because of its participation in the federal program are to be recognized in determining fair market value.

For the reasons expressed above, it is the opinion of this Office that the proposed taxation method provided in Senate Bill 2481/House Bill 2584 for low-income residential property as interpreted herein is a proper exercise of the Legislature’s authority under, and does not violate the requirements of, Article II, §§ 28 and 29 of the Tennessee Constitution.

Tenn. Att’y Gen. Op. No. 00-066 (Apr. 5, 2000).

This Office continues to adhere to the foregoing opinion and analysis. Although the language of House Bill 969/Senate Bill 387 is not identical to the legislation proposed in 2000, their impacts would be essentially the same. Under both the 2000 and 2005 bills, assessors valuing qualified low-income housing property would be required to consider the effect of land-use restrictions on the property’s value and, at the same time, not to consider the effect of the associated tax credits. In accordance with Tenn. Att’y Gen. Op. No. 00-066 (Apr. 5, 2000), House Bill 969/Senate Bill 387 appears to be a proper exercise of the Legislature’s authority to direct the method to be used in ascertaining the value of property in this state.

The litigation against the State Board of Equalization referenced in Tenn. Att’y Gen. Op. No. 00-066 (Apr. 5, 2000), was resolved by the Court of Appeals’ decision in *Spring Hill, L.P. v. State Board of Equalization*, No. M2001-02683-COA-R3-CV, 2003 WL 23099679 (Tenn. Ct. App. Dec. 31, 2003) (*no perm. app. filed*). After reviewing the split of authority on this issue among courts of other jurisdictions, the Court of Appeals concluded that, absent legislation to the contrary,

the local assessors properly considered the associated tax credits in their valuations of low-income housing properties. In reaching this conclusion, however, the court recognized that the Legislature could enact legislation prohibiting assessors from considering such tax credits. *Id.*, at \*17 n.25. House Bill 969/Senate Bill 387 appears to represent an attempt by legislators to change the result of the *Spring Hill* case. If so, the constitution does not preclude them from doing so.

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