S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 00-134

Application of the Building Height Restriction in the Scenic Highway System Act

QUESTION

Does the building height restriction in the Scenic Highway System Act of 1971 apply to that portion of West End Avenue in Nashville that is a designated urban scenic highway?

OPINION

No. It is the opinion of this Office that the building height restriction in Tenn. Code Ann. § 54-17-115, as amended, currently has no application to that portion of West End Avenue that is a designated scenic highway. But because we also believe that the 1987 law amending the height restriction is constitutionally suspect, a judicial decision declaring the amendment unconstitutional would leave the previously enacted provisions of § 54-17-115(a)(1) in effect, so that a uniform building height limitation would apply to *all* designated scenic highways, urban and rural.

ANALYSIS

The Scenic Highway System Act limits the size of buildings to be constructed along a designated scenic highway to thirty-five feet. Tenn. Code Ann. § 54-17-115(a). In 1987, the legislature amended this provision so that the height restriction applied "only to counties containing Class II rural roads as specified in Section 54-17-114." 1987 Tenn. Pub. Acts, ch. 30, § 2. As noted in earlier opinions issued by this Office, this amendment, which was never codified, had the effect of applying the height restriction to all designated scenic highways in counties containing Class II scenic rural roads, and not just to development on scenic rural roads. Op. Tenn. Atty. Gen. 98-231 (Dec. 10, 1998); Informal Op. Tenn. Atty. Gen. (June 19, 2000). In other words, as long as the legislature has designated even a portion of a scenic rural road within a county, the building height limitation would apply to construction along all scenic highways in that county, whether they were designated urban or rural. But the restriction does not apply to development along scenic highways in counties that do not contain Class II rural roads.

You have inquired whether this height restriction presently applies to the portion of West End

Avenue in Nashville that is designated a Class I urban road at Tenn. Code Ann. § 54-17-114(1)(C). Under the current provisions of the Act, none of the Class II rural roads specified in Tenn. Code Ann. § 54-17-114(a)(2) lie within Davidson County. The statute does list the Natchez Trace Parkway, "except for those portions within the boundaries of incorporated municipalities." Tenn. Code Ann. § 54-17-114(a)(2)(R). While we understand that a small segment of the Natchez Trace Parkway does lie within the physical boundaries of Davidson County, we read the exception clause in subdivision (a)(2)(R) to exempt this portion. This provision referencing the Natchez Trace Parkway was enacted in 1988, well after the formation of the Metropolitan Government of Nashville and Davidson County in 1961. *See* 1988 Tenn. Pub. Acts ch. 694, § 1. The Tennessee Supreme Court has held that, once it is created, a metropolitan government assumes the characteristics and liabilities of a municipal corporation. *Metropolitan Government v. Allen*, 220 Tenn. 222, 231-232, 415 S.W.2d 632 (1967). Thus, there are no designated scenic rural roads in Davidson County, and the building height restriction in Tenn. Code Ann. § 54-17-115(a)(1), as amended in 1987, currently has no application to any development along the referenced portion of West End Avenue in Nashville.

But we have also stated that this type of disparate treatment affecting particular counties in this way is not constitutionally defensible, inasmuch as the law on its face does not offer any rational basis for such class legislation, and we are not aware of any. Informal Op. Tenn. Atty. Gen. (June 19, 2000). Although we were addressing a proposed bill that would have amended the Scenic Highway System Act by specifically imposing the height restriction on urban roads in Davidson County, the same analysis applies to the existing law regarding the thirty-five foot height limitation based on the 1987 amendment to that provision. We can think of no reason justifying application of the building height restriction to scenic urban roads simply because a designated Class II rural road exists somewhere in the same county.

Should a court conclude, as we have suggested, that the 1987 amendment is unconstitutional, the result of such a ruling would be to leave unaffected the prior provisions in Tenn. Code Ann. § 54-17-115(a)(1) containing the thirty-five foot height limitation as a blanket restriction for development on all designated scenic highways, both urban and rural. *See, e.g., State v. Driver*, 598 S.W.2d 774, 776 (Tenn. 1980) (an unconstitutional act designed to amend existing law does not repeal or change former valid act but leaves it in full force and effect).

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