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Opinion No. 02-020

New Special School District

QUESTIONS

1. Would the draft bill ("Bill")[1] be legally adequate to authorize a new special school district?

2. Would this Bill, if enacted, supercede or amend by implication the prohibition on new special school districts contained in Tenn. Code Ann. § 49-2-501?

3. Would the population description in Section 1 of the Bill be in violation of Article XI, Section 8 of the Constitution of Tennessee on the suspension of general law?

4. Under the terms of Tennessee Code Annotated, Title 6, Chapter 58 or Section 49-2-501, is a special school district required to levy a local tax to supplement county and state funds?

5. Must this tax rate be set by the General Assembly?

6. Must the boundaries of a special school district be set by the General Assembly in the act creating the district?

7. Is creation of a district dependent upon the favorable outcome of a referendum, as proposed in Sections 1 through 4 of the Bill, permissible under the Tennessee Supreme Court's ruling in *Perritt v. Carter*, 204 Tenn. 611 (1959)?

8. Is it permissible to transfer county-owned property to a special school district by public or private act without local approval pursuant to Article XI, Section 9 of the Tennessee Constitution?

9. If county-owned property is transferred to a special school district by operation of state law without approval of the county, would the State be liable to reimbursement to the county for the value of the transferred property?

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[1] Copy attached.

10. In an act such as the proposed one, would the courts be likely to apply the doctrine of elision pursuant to Section 13?

OPINIONS

Because the proposed legislation would suspend the general education law prohibiting the formation of special school districts in favor of a very limited group, defined by a specific population, and does so without any rational basis, it would violate Tenn. Const. Art. I, § 8 and Art. XI, § 8. In addition, because the Bill would condition the district's creation on a referendum and would allow the persons affected to set the district's boundaries, the Bill would be an unconstitutional delegation of legislative functions. Finally, even though the Bill includes the possibility of a referendum, the Bill would violate Tenn. Const. Art. XI, § 9, because the right to participate in the referendum would be limited to voters within the area of the new special school district and would not extend to all voters in the affected counties.

Because we conclude that the Bill is constitutionally unsound, we do not address each question separately.

ANALYSIS

Your questions relate to legislation drafted to create a special school district for the White House - Millersville area. White House is a town in Robertson and Sumner Counties with a population of 7,220, and Millersville is in Sumner County and has a population of 5,308.[2] Both counties have active school systems. The Bill, drafted as a public act, does not contain a description of the boundaries of the proposed new special school district. Section 1 of the Bill creates the classification for the special school district but not the boundaries.

> Section 1: Notwithstanding any other provision of law to the contrary, if any territory located and lying in two counties where included in said territory is the largest municipality having a population of 7,220 residents according to the 2000 census, a petition may be filed by a resident or residents, or a group of residents, with the election commission located in the largest county in which such territory is located. Such petition shall request that a proposition be submitted to the qualified voters of said territory to allow the creation of a special school district encompassing said territory described in the petition and to allow the levy and collection of a school tax to support said school district.

[2] Population figures are from the 2000 Census.

Before we answer specific questions, we note relevant general law of statewide application that could affect or be affected by the passage of the Bill.

Current law prohibits the creation of special school districts. Tenn. Code Ann. § 49-2-501(b)(3). If a new special school district could be created, it would have to meet the criteria set out in Tenn. Code Ann. § 49-2-106; *see also* Tenn. Admin. Rules, *State Board of Education,* 0520-1-3-.01, *et seq.* (Minimum Requirements for the Approval of Public Schools); 0520-1-8-.01, *et seq.* (Requirements for Creation or Activation of City School Systems).[3] In addition, the general education statutes set a maximum number of school systems per county. Tenn. Code Ann. § 49-2-501(b). BEP funding for the new school district would be based on average daily membership (ADM) figures. Tenn. Code Ann. § 49-3-351.[4] By contrast, the Bill, Section 9, allocates funding as follows: "[A]ll state funding formerly paid to the counties of [sic] county Board of Education where the school district is located shall thereafter be paid to the newly created special school district."

General education statutes also spell out what qualifications a candidate for director of schools must have, including a license of qualification and experience in the art of teaching and school administration. Tenn. Code Ann. § 49-2-301. By contrast, the Bill requires a minimum of a baccalaureate degree but does not require a license or experience.

Constitutionality of Proposed Bill

Because we think the draft legislation is constitutionally unsound, we address these issues only. Four basic constitutional principles are involved.

1. When fundamental rights or suspect classes are not involved, the General Assembly may create classifications that yield different treatment for different individuals, groups or entities, if the General Assembly has a rational basis for the classification. Tenn. Const. Art. I § 8.

2. The General Assembly cannot suspend the general law in favor of an individual or group of individuals, absent a rational basis. Tenn. Const. Art. XI § 8.

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[3] Rule 0520-1-8-.01 was based on Tenn. Code Ann. § 49-2-106, but now the rule does not, of course, refer to special school districts because current law prohibits them. In addition, an existing municipality which does not operate a school system or a municipality incorporated after May 19, 1998, may not establish a school system. Tenn. Code Ann. § 6-58-112(b).

[4] "[T]he basic education program [funding] of every local education agency will be calculated on the basis of prior year average daily membership (ADM) or full-time equivalent average daily membership (FTEADM) . . . ." Tenn. Code Ann. § 49-3-351(d).

3. The Constitution confers the power to make laws upon the legislative branch of government. The General Assembly may not delegate its legislative functions. Tenn. Const. Art. II §§ 1 and 2.

4. The General Assembly may not pass a law local in form and effect unless provision is made for a referendum and the people affected vote affirmatively. Tenn. Const. Art. XI § 9.

We start our review with Article XI, Section 8 and Article I, Section 8 of the Tennessee Constitution. The former provision restricts the legislature from suspending the general law of the land in an arbitrary or capricious manner for the benefit of specific individuals. Tenn. Const. Art. XI, § 8. Legislation creating an exception to the general law and making it applicable in only one area would trigger scrutiny under Article XI, Section 8 of the Tennessee Constitution. *See Civil Service Merit Board v. Burson,* 816 S.W.2d 725, 731 (Tenn. 1991).

Article I, Section 8 of the Tennessee Constitution, guarantees equal protection of the laws. In this context, it addresses the concern that legislation applying different provisions to different counties, depending upon their populations, be reasonable or fair. Tenn. Const. Art. 1, § 8; *Civil Service Board v. Burson*, 816 S.W.2d at 730. As a general rule, legislation based on classifications will not be struck down as unconstitutional "if any possible reason can be conceived to justify the classification, or if the reasonableness is fairly debatable." *Estrin v. Moss*, 221 Tenn. 657, 430 S.W.2d 345, 349 (Tenn. 1968).

In determining the reasonableness of a statute under either Article XI, Section 8 or Article I, Section 8, the analysis is essentially the same. *Tenn. Op. Atty. Gen.* 99-226 (December 3, 1999). Generally, the "legislation need not, on its face, contain the reasons for a certain classification." *Civil Service Board*, 816 S.W.2d at 731, citing *Stalcup v. City of Gatlinburg*, 577 S.W.2d 439, 442 (Tenn. 1978). Rather, "if any possible reason can be conceived to justify the classification it will be upheld and deemed reasonable." *Civil Service Board*, 816 S.W.2d at 731. Reasonableness, however, depends upon the facts of the case, and no general rule can be formulated for its determination. *See Harrison v. Schrader,* 569 S.W.2d 822, 825-26 (Tenn. 1978).

In the case of legislation which classifies by population, the justification for the classification must itself relate to population. *Nolichuckey Sand Co. v. Huddleston*, 896 S.W.2d 782, 789 (Tenn. App. 1994), citing *Leech v. Wayne County*, 588 S.W.2d 270, 280 (Tenn. 1979). In other words, there must be some reason relating specifically to differences in population that would justify varying from the general prohibition contained in Tenn. Code Ann. § 49-2-501 based upon population size. *See Woodard v. Brien,* 82 Tenn. 520, 524 (1884), in which the Tennessee Supreme Court found that an act that conferred a benefit on the individuals affected by creating a very limited class into which others could not be expected to enter was unconstitutional under Tenn. Const. Art. XI, § 8, that is, the population classification had no rational basis. In the absence of such a basis supporting classification by population, the legislation would be unconstitutional.

The Bill draws the class using the following criteria:

1. Any territory located and lying in two counties where
2. The largest municipality in that territory has a population of 7,220 residents according to the 2000 census and
3. A smaller municipality is located within the same area.

See Bill, Sections 1 and 9.

Using a town of 7,220 as reference point, this description fits an undefined area in Robertson and Sumner Counties and includes White House and Millersville. We have examined the 2000 Census and have not found another municipality with a population of 7,220. By specifying a population tied to the 2000 Census, the Bill creates a closed class. No other area in the State can fit the class criteria now and no other area could do so in the future under a subsequent census. The Bill, in effect, creates a special school district by population. Nothing in the Bill or the information available to us indicates how this need for a new special school district relates to the population criteria used.

In addition, the Bill conditions the creation of the special school district, its boundaries, and the district's authority to levy taxes on a referendum of the people affected. Referenda have different functions. First, leaving the efficacy of the Bill to a local referendum would mean that voters in the undefined "territory" would exercise the legislative function of passing legislation, for without the referendum, the Bill would not take effect. And, with a positive referendum, the voters would create the special school district and set its boundaries — functions of the Legislature. Furthermore, the Bill does not set a tax rate. Only the Legislature has the power to set the tax rate, and thus the special school district would have authority to tax but would not be able to do so because it would have no tax rate.[5]

Normally, a public act does not require a referendum. In addition, a special school district does not come within the definition of a municipality under Tenn. Const. Art. XI, § 9 and thus does not prompt the need for a referendum. *See Perritt v. Carter*, 204 Tenn. 611, 614, 325 S.W.2d 233 (Tenn. 1959). A referendum is required, however, when the Legislature passes an act that is local in form and effect. *County of Shelby v. McWherter*, 936 S.W.2d 923, 935 (Tenn. App. 1996). Clearly, either or both Robertson and Sumner Counties would be affected, and no others, if county-owned property were

[5] The Legislature has the sole authority to set a tax rate for a special school district. *Op. Tenn. Atty. Gen.* 83-141 (March 21, 1983). Before special school districts were abolished, the Legislature set the tax rate in the private act creating the special school district. *Op. Tenn. Atty. Gen.* 83-141. As a general rule, however, a private act cannot suspend or supersede the general law. *Baugh v. Williamson County Hospital*, 679 S.W.2d 934, 937 (Tenn. 1984); *Op. Tenn. Atty. Gen.* 94-046 (April 4, 1994). Now, because of Tenn. Code Ann. § 49-2-501(b)(3), the Legislature cannot pass a private act to create a special school district, without suspending the general law.

"transferred" by the State to the new special school district. The referendum called for in the Bill would not meet the requirements of Tenn. Const. Art. XI, § 9. Even though the referendum would affect property in two counties, it is for the creation of the school district, not the "transfer" of county property, and it does not include all voters of Robertson and Sumner Counties but is limited to the voters of the undefined school district area.

Because the efficacy of the Bill, the creation of a special school district and its boundaries depend on the referendum, the Bill would be an unconstitutional delegation of legislative power. Thus, the Bill would violate Tenn. Const. Art. II, §§ 1 and 2, as well as Tenn. Const. Art. XI, § 9. *See Nolichuckey*, 896 S.W.2d at 785; *Perritt*, 204 Tenn. at 614.

For these reasons, it is the opinion of this Office that the Bill is unconstitutional.

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