

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

April 15, 2003

Opinion No. 03-044

Not-For-Profit Foundations Benefitting Public Higher Education Institutions

QUESTION

Does the State have the authority to limit the activities of not-for-profit corporations?

OPINION

Yes.

ANALYSIS

Your question arises from Senate Bill 1270/House Bill 1411, which would require foundations associated with, but separate from, public universities and colleges to comply with the same laws on expenditures as the college or university must. The bill would amend Tenn. Code Ann. § 49-7-107 and reads as follows:

Expenditures by a foundation for the benefit of a state college or university shall be made in compliance with applicable laws, policies and procedures pertaining to expenditures of the respective state college or university as though the expenditures had been made by the state college or university.

In your letter, you stated that the foundations referenced in the bill are separate, not-for-profit corporations. In addition to raising money for a public university or college, a foundation may also serve to foster public/private partnerships and to further the mission of the public higher education institution. All funds currently transferred by a foundation to a university or college are subject to the laws and policies referenced above, and the State Building Commission must approve all building acquisitions assisted by a foundation.

The General Assembly has the authority to create, alter or end corporate existence. The General Assembly's authority is found in the Tennessee Constitution, Art. XI § 8, which reads in pertinent part as follows:

No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed and no such alteration or repeal shall interfere with or divest rights which have become vested.

The creation and existence of a corporation is wholly dependent on its statutory authority. *North British & Mercantile Co. v. Craig*, 106 Tenn. 621 (1901); 18A Am.Jur.2d *Corporations* § 150. That statutory authority will define the scope of the corporations and the nature and extent of the corporations' privileges. 18A Am.Jur.2d *Corporations* § 150. Extensive rules governing not-for-profit corporations are found in Tenn. Code Ann. §§ 48-51-101 through 48-68-101, *et. seq.*, The Tennessee Nonprofit Corporation Act. Just as the General Assembly may create and regulate not-for-profit corporations, it may also limit their scope, authority and practices. 18A Am. Jur.2d *Corporations* § 150.

Senate Bill 1270/House Bill 1411 would create a new classification by placing certain restrictions and duties on not-for-profit foundations whose mission is to raise funds to benefit public universities and colleges. Some might question whether the General Assembly may impose new requirements on this class of not-for-profits but not on other not-for-profits.

Article XI, Section 8 of the Tennessee Constitution, and the Fourteenth Amendment, Section 1 to the United States Constitution guarantee to citizens equal protection of the laws, and the same rules are applied under them as to the validity of classifications made in legislative enactments. *Brown v. Campbell County Board of Education*, 915 S.W.2d 407, 412 (Tenn. 1995). Ordinarily, unless a classification involves a suspect class or interferes with a fundamental right, it will be upheld under an equal protection analysis if there is a rational basis for the classification. Under rational basis scrutiny, a statutory classification will be upheld if "some reasonable basis can be found for the classification . . . or if any state of facts may reasonably be conceived to justify it." *Riggs v. Burson*, 941 S.W.2d at 53, quoting *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993).

Thus, if a court could find a rational basis for the change made by Senate Bill 1270/House Bill 1411, a court could conclude that the change presents no constitutional problem. In this instance, the General Assembly could decide that it is appropriate to place additional requirements on not-for-profit foundations that fund projects to further the missions of public colleges and universities. The additional requirements, for example, could be necessary to impose uniformity and accountability on these foundations as they deal with public institutions.

Based upon the information you provided and our research, we find no legal barrier to the General Assembly enacting the proposed bill.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

KATE EYLER
Deputy Attorney General

Requested by:

The Honorable Curtis Person, Jr.
State Senator
Suite 308, War Memorial Bldg.
Nashville, TN 37243-0031