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Opinion No. 06-177

State Tax Relief Program and Exemption from Storm Water User Fees

QUESTION

Do the legislative bodies of counties and/or municipalities have authority to exempt those who qualify for the State tax relief program from the collection of storm water fees?

OPINION

No.

ANALYSIS

Legislative bodies of counties and/or municipalities do not have the authority to exempt those who qualify for the State tax relief program from collection of storm water fees. Tennessee law 1) authorizes municipalities to establish a storm water user fee, 2) requires that a certain methodology be used in determining the storm water fee that is to be paid, and 3) sets forth an exemption from this user fee. Tennessee's tax relief program applies to property taxes but not to user fees. Exempting those who qualify for the State tax relief program does not fall within the bounds of the statutory user fee exemption and is inconsistent with the user fee methodology mandated by state law.

Tennessee's tax relief program affords property tax relief; it does not provide relief from user fees. The tax relief program is constructed upon a foundation laid by Article II, Section 28 of the Tennessee Constitution. The Constitution states that "[t]he Legislature shall provide, in such manner as it deems appropriate, tax relief to elderly low-income taxpayers through payments by the State to reimburse all or part of the taxes paid by such persons on owner-occupied residential property, but such reimbursement shall not be an obligation imposed, directly or indirectly, upon Counties, Cities, or Towns." Tenn. Const. art. II, § 28. Furthermore, "[t]he Legislature may provide tax relief to home owners totally and permanently disabled, irrespective of age, as provided herein for the elderly." *Id*. Through a constitutional amendment approved by Tennessee voters in November of 2006, the available avenues of tax relief were expanded:

(a) The legislative body of any county or municipality may provide

by resolution or ordinance that:

(1) Any taxpayer who is sixty-five (65) years of age or older and who owns residential property as the taxpayer's principal place of residence shall pay taxes on such property in an amount not to exceed the maximum amount of tax on such property imposed at the time the ordinance or resolution is adopted;

(2) Any taxpayer who reaches the age of sixty-five (65) after the time the ordinance or resolution is adopted, who owns residential property as the taxpayer's principal place of residence, shall thereafter pay taxes on such property in an amount not to exceed the maximum amount of tax on such property imposed in the tax year in which such taxpayer reaches age sixty-five (65); and

or (3) Any taxpayer who is sixty-five (65) years of age older, who purchases residential property as the taxpayer's principal place of residence after the taxpayer's sixty-fifth birthday, shall pay taxes in an amount not to exceed the maximum amount of tax imposed on such property in the tax year in which such property is purchased.

(b) Whenever the full market value of such property is increased as a result of improvements to such property after the time the ordinance or resolution is adopted, then the assessed value of such property shall be adjusted to include such increased value and the taxes shall also be increased proportionally with the value.

(c) Any taxpayer or taxpayers who own residential property as their principal place of residence whose total or combined annual income or wealth exceeds an amount to be determined by the General Assembly shall not be eligible to receive the tax relief provided in subsection (a) or (b).

Article II, Section 28 of the Tennessee Constitution, to which the above described constitutional provision has been added, is brought into effect by Tenn. Code Ann. § 67-5-701 through § 67-5-705. These statutes, like the constitutional provision to which they give effect, provide relief from residential property taxes.

Tennessee law authorizes municipalities to establish a storm water user fee. "All municipalities constructing, operating, or maintaining storm water or flood control facilities are authorized to establish a graduated storm water user's fee which may be assessed and collected from each user of the storm water facilities provided by the municipality." Tenn. Code Ann. § 68-221-1107(a). This user fee is not a tax, much less a property tax to which the tax relief program would be applicable. In a previous Attorney General's Opinion, this Office indicated that "the graduated storm water user fee is not a tax on real property." Op. Tenn. Atty. Gen. No. 93-57, *1 (Sept. 3, 1993). In fact, the storm water fee is not a tax at all but is instead a user fee. *Id*. at *1-2; *see also* Op. Tenn. Atty. Gen. No. 94-039, *1-2 (Mar. 21, 1994) (concluding that "the storm water user fee is properly limited to its stated purpose and clearly meets the definition of a 'user fee.'"). A fundamental distinction between a user fee and a tax is that "[t]he fee is not imposed for the purpose of raising general revenue. Rather, the fee is a charge for a particular service that happens to be rendered by the government." Op. Tenn. Atty. Gen. No. 94-039, *1 (Mar. 21, 1994). Simply stated, a municipality acting pursuant to Tenn. Code Ann. § 68-221-1107(a) "imposes a fee, not a tax . . .." *Vandergriff v. City of Chattanooga*, 44 F. Supp. 2d 927, 941 (E.D. Tenn. 1998).

The storm water user fee provision also expressly mandates that a certain methodology be used in determining the fee that is to be charged. Tennessee law requires that

> [s]uch a graduated storm water user's fee ***shall be*** based on actual or estimated use of the storm water and/or flood control facilities of the municipality, and each user or user class shall only be required to pay its proportionate share of the construction, administration, operation and maintenance including replacement costs of such facilities based on the user's actual or estimated proportionate contribution to the total storm water runoff from all users or user classes.

Tenn. Code Ann. § 68-221-1107(a) (emphasis added). In order "[t]o ensure a proportionate distribution of all costs to each user or user class, the user's contribution ***shall be*** based on factors such as the amount of impervious area utilized by the user, the water quality of user's storm water runoff or the volume or rate of storm water runoff." *Id.* (emphasis added). Accordingly, this Office has noted that "the amount of the fee must be based on actual (or estimated) use of the storm water and/or flood control facilities of the municipality and each user (or user class) shall only be required to pay for its share of the facilities used." Op. Tenn. Atty. Gen. No. 94-039, *2 (Mar. 21, 1994). Whatever costs are allocated through the user fees, those who do not qualify for the State tax relief program will necessarily pay a higher percentage than their proportionate use if users of the storm water service who qualify for the State tax relief are not included in the distribution of costs. If the exemption were permitted, there would not be a proportionate distribution of all costs to each user or user class. Providing an exemption to those qualifying for the tax relief program necessarily violates the mandatory proportionality requirement.

The Attorney General's Office has also previously concluded that entities otherwise exempt from taxation are not exempt from a user fee. In considering whether a religious institution would be exempt from the storm water user fee, the Attorney General concluded that "[b]ecause the storm

water user fee is not a tax, and because there is no constitutional exemption for religious or charitable entities from paying fees for the services being rendered to them by the government, an otherwise tax-exempt entity is not exempt from paying a fee." Op. Tenn. Atty. Gen. No. 94-039, *1 (Mar. 21, 1994). Furthermore, "there is no provision in this law which permits a church to be exempt from the payment of this fee. Accordingly, it is the opinion of this Office that the storm water user fee applies to such an entity." *Id.* at * 2. Additionally, "[t]here does not appear to be any authority in the applicable law to permit property which is exempt from taxation to also enjoy an exemption from the user fee. Moreover, the fee for storm water drainage control is for a 'particular service' much like landscaping and other grounds maintenance." Op. Tenn. Atty. Gen. No. 93-57, *4 (Sept. 3, 1993). This Office has concluded that "[t]here does not seem to be any reason why property should be exempt from such a fee merely because it is also exempt from taxation, particularly when the property has received such a direct benefit from storm water drainage control." *Id*. at *4.

The legislature did carve out an exemption from the storm user fee but did not extend this exemption to those who qualify for the tax relief program. "Persons, including, but not limited to, owners and operators of agricultural land, whose storm water runoff is not discharged into or through the storm water or flood control facilities, or both, of the municipality shall be exempted from payment of the graduated storm water user fee authorized by this section." Tenn. Code Ann. § 68-221-1107(a). The Tennessee Supreme Court has indicated that "when interpreting statutes, [it] has routinely followed the Latin maxim of *expressio unius est exclusio alterius*, meaning 'the expression of one thing implies the exclusion of all things not mentioned.'" *State v. Adler*, 92 S.W.3d 397, 400 (Tenn. 2002). Applied to exemptions, it is a long-standing principle of Tennessee law that "[a]n express exception, exemption or saving excludes others. Where a general rule has been established by statute with exceptions, the court will not curtail the former nor add to the latter by implication. Exceptions strengthen the force of a general law, and enumeration weakens it as to things not expressed." *Turner v. Eslick,* 240 S.W. 786, 787 (Tenn. 1922); *see also Penley v. Honda Motor Co., Ltd.*, 31 S.W.3d 181, 185-86 (Tenn. 2000). Tennessee law expressly provides for an exemption for those "whose storm water runoff is not discharged into or through the storm water or flood control facilities, or both . . .." Tenn Code Ann. § 68-221-1107(a). Tennessee law does not provide for an exemption from user fees for those who qualify for the tax relief program.

Tennessee law does not exempt those who qualify for the State tax relief program from storm water user fees. In fact, Tennessee law mandates a certain methodology be used in determining what storm water user fee will be charged, which would include charging a user fee to those who qualify for the tax relief program. "Municipal ordinances in conflict with and repugnant to a State law of a general character and state-wide application are universally held to be invalid." *Southern Ry. Co. v. City of Knoxville*, 442 S.W.2d 619, 621 (Tenn. 1968). "No implied power to pass by-laws, and no express general grant of the power, can authorize a by-law which conflicts either with the national or State constitution, or with the statutes of the State, or with the general principles of the common law adopted or in force in the State." *City of Bartlett v. Hoover*, 571 S.W.2d 291, 292 (Tenn. 1978). Accordingly, if a municipality has utilized the mechanism of charging storm water

user fees,[1] it is obligated to utilize the methodology set forth by the State for determining the amount to be paid. That methodology does not include an exemption for those who qualify for Tennessee's tax relief program.

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[1] *Compare* Tenn. Code Ann. § 68-221-1107(a) *with* Tenn. Code Ann. § 6-2-201 (19) (providing that "[e]very municipality incorporated under this charter may: Collect and dispose of drainage, sewage, ashes, garbage, refuse or other waste, or license and regulate their collection and disposal, and the cost of collection, regulation or disposal may be funded by taxation, special assessment to the property owner, user fees or other charges . . ..").