

STATE OF TENNESSEE
OFFICE OF THE
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Opinion No. 07-153

County Powers Relief Act

QUESTION

If Tenn. Code Ann. § 13-3-403(b) is amended to include schools as “facilities,” the installation of which may be required as a condition precedent to subdivision plat approval, will Tenn. Code Ann. § 67-4-2913 of the County Powers Relief Act limit the County’s ability to levy a fee for this purpose?

OPINION

The County Powers Relief Act does not preclude the General Assembly from amending Tenn. Code Ann. § 13-3-403(b) to include schools as “facilities,” the installation of which may be required as a condition precedent to subdivision plat approval. Nevertheless, the proposed amendment would appear to conflict with the spirit and express language of the County Powers Relief Act. In the event of such a conflict, it is uncertain which statutory scheme would prevail. Thus, if Tenn. Code Ann. § 13-3-403(b) were amended as suggested above, it would also be advisable to amend the County Powers Relief Act at the same time to harmonize the two provisions.

ANALYSIS

In 2006, the General Assembly enacted the County Powers Relief Act authorizing “counties to levy a privilege tax on persons and entities engaged in the residential development of property.” Tenn. Code Ann. § 67-4-2902 (2006). The purpose of the tax is “to provide a county with an additional source of funding to defray the cost of providing school facilities to meet the needs of the citizens of the county as a result of population growth.” *Id.* In order to levy such a tax, the county must have adopted a capital improvement program as required by Tenn. Code Ann. § 67-4-2909, and must meet at least one of the growth criteria set forth in Tenn. Code Ann. § 67-4-2907. Initially, the county may levy a tax “at a rate not to exceed one dollar (\$1.00) per square foot on residential property.” Tenn. Code Ann. § 67-4-2908 (2006). The county may not increase the tax more often than every four (4) years, and any single increase in the tax rate may not exceed ten percent (10%). *See id.* Tax revenues are to “be used exclusively for the purpose of funding capital expenditures for education, including the retirement of bonded indebtedness, the need for which is reasonably related to population growth.” Tenn. Code Ann. § 67-4-2911 (2006).

The County Powers Relief Act provides that, after its effective date,

no county shall be authorized to enact an impact fee on development or a local real estate transfer tax by private or public act. In addition, this part shall be the exclusive authority for local governments to adopt any new or additional adequate facilities taxes on development. However, the provisions of this part shall not be construed to prevent a municipality or county from exercising any authority to levy or collect similar development taxes or impact fees granted by a private act that was in effect prior to the effective date of this act or from revising the dedicated use and purpose of a tax on new development from public facilities to public school facilities. A county levying a development tax or impact fee by private act on the effective date of this act shall be prohibited from using the authority provided in this part so long as the private act is in effect.

Tenn. Code Ann. § 67-4-2913 (2006).

You have asked whether the County Powers Relief Act would preclude a county from levying an additional fee, as a condition precedent to the county's approval of subdivision plans, for the purpose of funding new schools and school improvements. In this regard, Tenn. Code Ann. § 13-3-403(b) currently authorizes regional planning commissions to require developers to make certain improvements to facilities, including streets, roads, and water, sewer and other utility mains, piping, and connections, as a condition precedent to the commissions' approval of subdivision plats. *See also* Tenn. Code Ann. § 13-4-303(b) (1999) (containing similar authority for municipal planning commissions). Your request suggests amending these provisions to authorize planning commissions to require developers seeking approval of subdivision plats to fund certain school improvements.

In our view, such a provision would conflict with both the spirit and the express language of the County Powers Relief Act. That Act authorizes counties to levy a privilege tax on developers for the purpose of providing counties "with an additional source of funding to defray the cost of providing school facilities to meet the needs of the citizens of the county as a result of population growth." Tenn. Code Ann. § 67-4-2902 (2006). At the same time, the Act specifically prohibits counties from enacting an impact fee on development pursuant to a subsequently-enacted private or public act,¹ and it provides that the Act "shall be the exclusive authority for local governments to adopt any new or additional adequate facilities taxes on development." Tenn. Code Ann. § 67-4-2913 (2006). Although couched in terms of requiring improvements to a community's infrastructure as a condition of subdivision plat approval, your request describes a fee that is virtually identical to that authorized by the County Powers Relief Act, *i.e.*, a fee imposed on

¹As this Office has explained in other recent opinions, however, the Act permits counties to continue levying such a tax or fee if their authority to do so derives from pre-existing private acts. *See* Op. Tenn. Att'y Gen. No. 07-56 (Apr. 23, 2007); Op. Tenn. Att'y Gen. No. 07-40 (Apr. 2, 2007); Op. Tenn. Att'y Gen. No. 07-06 (Jan. 17, 2007).

developers for the purpose of funding new schools and school improvements. Such a provision would create an irreconcilable conflict with the express limitations of the County Powers Relief Act.

Nevertheless, this potential for conflict does not preclude the General Assembly from amending Tenn. Code Ann. § 13-3-403(b) to include schools as “facilities,” the installation of which may be required as a condition precedent to subdivision plat approval. The General Assembly is free to enact new laws or to amend existing laws as it deems appropriate. Thus, the General Assembly has the authority to amend the limiting provisions of the County Powers Relief Act or, alternatively, to enlarge the regional planning commission’s authority under Tenn. Code Ann. § 13-3-403(b). Even if the County Powers Relief Act purported to limit the General Assembly’s power to enact such legislation, such a provision would be ineffective because a public act cannot effectively limit the ability of future General Assemblies to change the laws as they see fit.

The more difficult question presented by your request is which law, in the event of such a conflict, would control. The argument could be made that the later-enacted statute would prevail because it would impliedly repeal any contrary provision of the County Powers Relief Act. *See, e.g., Brewer v. Lincoln Brass Works, Inc.*, 991 S.W.2d 226, 229 (Tenn. 1999). On the other hand, the argument could be made that the County Powers Relief Act should prevail based on the principle that more specific statutory provisions prevail over general ones. *See id.* at 229-30. The County Powers Relief Act specifically addresses the fees that may be imposed on developers for the purpose of funding schools, while Tenn. Code Ann. § 13-3-403(b) more generally deals with the authority of regional planning commissions to require improvements to certain facilities as a condition precedent to subdivision plat approval. Even if the proposed legislation were available for review, however, it would be difficult to predict with any degree of certainty which statutory scheme would prevail. To avoid this problem, if Tenn. Code Ann. § 13-3-403(b) were amended as suggested by this opinion request, then it would also be advisable to amend the County Powers Relief Act at the same time so as to harmonize the two provisions.

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