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December 11, 2007

Opinion No. 07-161

Effect of County Powers Relief Act on City's Authority to Require Developers of Certain Real Property to Construct Sidewalks or Pay a Fee in Lieu of Construction

QUESTIONS

Do the restrictions on impact fees and adequate facilities taxes provided in Tenn. Code Ann. § 67-4-2913 (2007) of the County Powers Relief Act prohibit the City of Knoxville from enacting a proposed ordinance (the "Proposed Ordinance") that would require developers of certain real property either to construct sidewalks on the real property or, upon the request of the developer and the approval of the City's Director of Engineering, to pay a fee in lieu of constructing the sidewalks?

OPINIONS

No. The Act does not prohibit the City from enacting the Proposed Ordinance because (1) the fee in lieu of construction of the sidewalks is not an adequate facilities tax and (2) the Act does not prohibit cities from enacting impact fees. Because the Act does not prohibit cities from enacting impact fees, it is unnecessary to opine as to whether the Proposed Ordinance's fee in lieu of construction is an impact fee.

ANALYSIS

I. The County Powers Relief Act.

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 (2007). 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 (2007). 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 (2007).

The Act restricts the enactment of impact fees and adequate facilities taxes after its June 20, 2006, effective date by providing that

> 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 June 20, 2006, 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 June 20, 2006, 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 (2007).

II. The Proposed Ordinance.

A local group in the City of Knoxville has drafted a proposed ordinance that would require developers to construct sidewalks when they develop real property located within the City. Proposed Ordinance, Unnumbered Paragraph 6. The purpose of the Proposed Ordinance is "to promote the health, safety and welfare of [City] inhabitants" by establishing a network of sidewalks that "enable safe access for all users" of city streets. Proposed Ordinance, Unnumbered Paragraphs 1-3. The Proposed Ordinance is limited to certain types of development and certain real property located in the city.

> Sidewalks or approved pedestrian pathways shall be required by the City within school parental responsibility zones (PRZs) for all new construction, and for renovations or expansions, pursuant to the following provisions:
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> 1) Renovations with a total cost exceeding 50 percent of the tax record assessed value of the building, according to the City of Knoxville tax records;
>
> 2) Expansions exceeding 50 percent of the pre-expansion gross floor area.
>
> All new subdivisions are required to provide sidewalks along all new streets constructed.

> Sidewalks or approved pedestrian pathways shall be required to be constructed outside of the PRZs in areas designated by the City to be critical to pedestrian connectivity across the City.
>
> Any roadway and bridge construction or reconstruction that changes the road curb-to-curb cross-section shall include sidewalks or approved pedestrian pathways. New City parks shall also adhere to these requirements for adjacent roadways.

Proposed Ordinance, Unnumbered Paragraphs 6-9. The Proposed Ordinance also provides for the payment of a fee in lieu of building sidewalks.

> Where a sidewalk is required to be constructed, the Director of Engineering may waive said requirement with the advice of the Pedestrian Safety Board. Applicants must make a written request to the Director for a waiver. Waivers can be granted with consideration of pedestrian safety, school locations, connection to existing sidewalks, and other engineering and community concerns. If such a waiver is granted, a fee will be assessed in lieu of constructing the sidewalk. The fee will be based on the market price of construction of sidewalks plus 5 (five) percent as determined by the Director of Engineering.
>
> In the event that a fee in lieu of constructing a sidewalk is approved, a recorded easement shall be provided for future development of the sidewalk. Grading shall be done in preparation for future sidewalks or pedestrian pathways.
>
> Fees collected will go into a city fund dedicated to sidewalk and pedestrian pathway construction. Disbursal of funding should not be geographically constrained, but should be based on a project prioritization system developed in conjunction with the Pedestrian Plan.

Proposed Ordinance, Unnumbered Paragraphs 21-23.

III. The Proposed Ordinance's Fee in Lieu of Construction Is Not an Adequate Facilities Tax.

Tenn. Code Ann. § 66-5-211(b)(1) (2007) defines "adequate facilities tax" as follows:

> "Adequate facilities tax" means any privilege tax that is a development tax, by whatever name, imposed by a county or city, pursuant to any act of general or local application, on engaging in the act of development.

In the years prior to the Act, the General Assembly authorized several local governments to levy adequate facilities taxes. *See, e.g.*, Private Acts, 1996, Chapter 216 (Rutherford County); Private Acts, 1991, Chapter 118 (Maury County); Private Acts, 2000, Chapter 158 (Dickson County). These taxes explicitly state that they are privilege taxes on engaging in the act of development. Private Acts, 1996, Chapter 216, § 4; Private Acts, 1991, Chapter 118, § 4; Private Acts, 2000, Chapter 158, § 4. The purpose of these taxes is to help counties cope with the increased demand for public facilities and services created by development booms by requiring the developers to pay their fair share of the costs of these new or expanded facilities and services. Private Acts, 1996, Chapter 216, § 3; Private Acts, 1991, Chapter 118, § 3; Private Acts, 2000, Chapter 158, § 3. The rate of the taxes is usually set at a certain amount per gross square foot or lot or unit of the new development. Private Acts, 1996, Chapter 216, § 7; Private Acts, 1991, Chapter 118, § 7; Private Acts, 2000, Chapter 158, § 7. The acts authorizing these taxes often require the governing bodies levying the taxes to adopt capital improvement programs and to find that the costs of the facilities that may be funded by the taxes are "reasonably related to new development." Private Acts, 1991, Chapter 118, §§ 5 and 9; Private Acts, 2000, Chapter 158, §§ 5 and 9.

The Proposed Ordinance is not an adequate facilities tax. First, and most importantly, it is not a privilege tax on development. The Proposed Ordinance does not declare the development of property to be a taxable privilege. Also, unlike the taxes described above, it is not the intent of the Proposed Ordinance to ensure that developers pay their fair share of new or expanded public facilities caused by a substantial increase in property development. The City wants to create a network of sidewalks as part of its desire to promote the health, safety and welfare of the public. This desire exists outside of any residential development boom that might create the need for new or expanded sanitary sewers, roads, waterworks, and other facilities. Furthermore, the fee in lieu of construction is based on the actual cost of constructing the required sidewalk, not a calculation of the gross square footage or number of lots or units being developed. Finally, it must be noted that the default position of the Proposed Ordinance is for the developer to build the sidewalk, not for the City to impose a tax and collect revenue. Under the Proposed Ordinance, the City collects funds from the developer only when the developer requests a waiver of the construction requirement and the waiver is approved by the City's Director of Engineering.

IV. The Act Does Not Prohibit Cities from Enacting Impact Fees.

The County Powers Relief Act restricts counties and metropolitan governments, not cities, from enacting impact fees on development after June 20, 2006. The Act provides as follows:

> After June 20, 2006, 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 June 20, 2006, 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 June 20, 2006, 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 (2007) (emphasis added). In the first sentence, the General Assembly specifically applies the restriction on impact fees to "counties." *Id.* The Act defines "county" as "a county or metropolitan government." Tenn. Code Ann. § 67-4-2903(4) (2007). In the second sentence, with regard to the restriction on adequate facilities taxes, the General Assembly applies the restriction to "local governments." Tenn. Code Ann. § 67-4-2913 (2007). The third sentence uses the terms "municipality" and "county" when providing that the restrictions do not apply to impact fees in effect prior to June 20, 2006. *Id*. The Act itself does not define the terms "local governments" or "municipality."

The General Assembly's use of these particular terms demonstrates its desire to limit counties from enacting impact fees while allowing cities to do so. If the General Assembly had intended to limit cities, it could have used the term "local governments" as it did in the second sentence with regard to the restriction on adequate facilities taxes or the term "municipality" as it did in the third sentence. The May 2, 2006, transcript of the State and Local Government Committee of the State House of Representatives further evidences the intent of the General Assembly to apply the impact fee restriction to counties but not cities. In the transcript, Representative Dewayne Bunch told Representative Randy Rinks, a sponsor of the Act, of his understanding "that municipalities would not be prohibited from bringing an impact fee [and] that they can still create that impact fee in the future even if they don't currently have or levy that fee." Representative Bunch continued with some additional comments on the Act. When Representative Rinks subsequently responded, he did not attempt to correct or modify Representative Bunch's statement as to the applicability of the impact fees restriction.

Because the Act does not prohibit cities from enacting impact fees, it is not necessary to

determine whether the Proposed Ordinance's fee in lieu of construction is an impact fee. Even if the fee in lieu of construction constitutes an impact fee, the Act would not prohibit the City from enacting it.

Therefore, it is the opinion of this Office that the Act does not prohibit the City from enacting the Proposed Ordinance.

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