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Opinion No. 09-116

HB2189: Constitutionality of Population Bracket Exemptions

QUESTION

If HB2318 is amended with one or more of the proposed amendments whereby one or more counties are removed from the application of such an amended version of HB2318, will the aforementioned amended version of HB2318 be constitutionally defensible?

OPINION

This bill, if amended by one or more of the proposed amendments that seek to exclude specific counties based upon population brackets, would be constitutional only if there is a rational basis justifying the exemption of the counties identified by population brackets within those amendments and the rational basis itself related to population. In the event one or more of these exemptions were found to be unconstitutional, the bill as currently drafted contains a severability clause. Consequently, a court ruling that some or all population bracket exemptions were invalid would probably not affect the validity of the remaining portions of the legislation, but would result in the legislation being made applicable to those counties that were previously exempted.

ANALYSIS

This Office has previously addressed the constitutionality of local exemptions from otherwise statewide bills based upon population brackets in a number of recent opinions.[1] Without unnecessarily repeating the analysis that appears in our previous opinions, exemptions based upon population brackets implicate two provisions of the Tennessee Constitution: Article XI, Section 8 and Article I, Section 8. The former restricts the legislature from enacting "special legislation" for the benefit of specific individuals or localities in an arbitrary or capricious manner, and the latter guarantees equal protection of the laws.

The same analysis would be employed under both Article XI, Section 8 and Article I, Section 8. As we have previously stated:

[1] *See, e.g.*, Op. Tenn. Att'y Gen. 09-102 (May 28, 2009); Op. Tenn. Att'y Gen. 09-53 (April 9, 2009); Op. Tenn. Att'y Gen. 08-143(September 4, 2008); Op. Tenn. Att'y Gen. 08-80 (April 3, 2008) (copies attached).

> In determining the reasonableness of a statute under either Article XI, Section 8 or Article I, Section 8, the analysis is essentially the same. Generally, the legislation "need not, on its face, contain the reasons for a certain classification." . . . Rather, "[i]f any possible reason can be conceived to justify the classification it will be upheld and deemed reasonable." . . . Reasonableness, however, depends upon the facts of the case, and no general rule can be formulated for its determination. . . . In the case of legislation which classifies by population bracket, the justification for the classification must itself relate to population. . . . In other words, there must be some reason relating specifically to differences in population that would justify varying the general prohibition contained in Tenn. Code Ann. § 62-2-102 based upon population size. In the absence of such a basis supporting population brackets, the legislation would be deemed unconstitutional.[2]

(Citations omitted).

We now turn to the application of these principles to the proposed legislation that is the subject of your opinion request. HB2318 is a lengthy bill that establishes a comprehensive energy conservation program for both public and private buildings and facilities in Tennessee. The bill also contains provisions regarding energy-efficient vehicles owned by the State, and State purchases of energy-efficient equipment and appliances, as well as provisions affecting local building inspections standards and other provisions dealing with energy conservation.

As you point out in your opinion request, there are at least twenty five (25) proposed amendments to this bill, each of which seeks to exempt one or more counties based upon population brackets. If all of these amendments were adopted, at least fifty seven (57) of the ninety five (95) counties in the State of Tennessee would be exempted from the provisions of HB2318. It is impossible to determine the legislative intent behind all fifty seven (57) county exemptions proposed within the twenty five (25) amendments that contain population bracket exemptions. In accordance with our previous opinions, these population bracket exemptions would be constitutional only if there is a rational basis justifying the exemption of the counties identified by population brackets within those amendments. The rational basis must itself relate to population.

In the event one or more of these population bracket exemptions were declared invalid by a reviewing court, HB2318 contains the following severability clause:

> SECTION 27. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or

[2] Op. Tenn. Att'y Gen. 09-53(April 9, 2009) (quoting Op. Tenn. Att'y Gen. 99-226 (December 3, 1999)).

> application, and to that end the provisions of this act are declared severable.

The Tennessee Supreme Court has stated that such severability clauses are to be given effect where doing so will not do violence to the primary intent of the legislation:

> The doctrine of elision is not favored. The rule of elision applies if it is made to appear from the face of the statute that the legislature would have enacted it with the objectionable features omitted, and those portions of the statute which are not objectionable will be held valid and enforceable . . . provided, of course, there is left enough of the act for a complete law capable of enforcement and fairly answering the object of its passage. However, a conclusion by the court that the legislature would have enacted the act in question with the objectionable features omitted ought not to be reached unless such conclusion is made fairly clear of doubt from the face of the statute. Otherwise, its decree may be judicial legislation. **The inclusion of a severability clause in the statute has been held by this Court to evidence an intent on the part of the legislature to have the valid parts of the statute enforced if some other portion of the statute has been declared unconstitutional.**[3]

(Emphasis added). With regard to the validity of the legislation in the event one or more of the population bracket exemptions were ruled invalid by a court, it appears highly probable that a court would find the remaining portions of HB2318 to be severable, and thus valid and enforceable, even if the exemptions were found unconstitutional. The presence or absence of the population bracket exemptions does not go to the primary object of the bill. Consequently those exemptions that were found invalid would almost certainly result only in the legislation being made applicable to those counties that were previously exempted.

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[3] *State v. Harmon*, 882 S.W.2d 352, 355 (Tenn. 1994), quoting *Gibson County Special School Dist. v. Palmer*, 691 S.W.2d 544 (Tenn. 1985).

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