S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

February 9, 2012

Opinion No. 12-12

Annexation in Shelby County

QUESTIONS

1. Senate Bill 3703/House Bill 3473 of the 107th General Assembly of Tennessee (hereinafter "SB3703") removes territory from the reserve annexation area of the City of Memphis and places the territory in the planned growth area of Shelby County. Is SB3703 constitutionally suspect?

2. Senate Bill 3702/House Bill 3392 of the 107th General Assembly of Tennessee (hereinafter "SB3702") changes the process by which territory may be annexed to a municipality "in any county having a population of greater than nine hundred thousand (900,000) according to the 2010 federal census or any subsequent federal census." SB3702 also changes the process by which a territory may be deannexed from a municipality in "any municipality in a county having a population in excess of nine hundred thousand (900,000) according to the 2010 federal census or any subsequent federal census." Is SB 3702 constitutionally suspect?

OPINIONS

1. Yes. Because SB3703 alters a specific tract of land's classification under Tennessee's annexation laws, SB3703 is constitutionally suspect under Article XI, § 9, of the Tennessee Constitution, which provides in relevant part that, "[t]he General Assembly shall by general law provide the exclusive methods by which municipalities may be created, merged, consolidated and dissolved *and by which municipal boundaries may be altered.*" (emphasis added) (hereinafter referred to as the "Municipal Boundaries Clause").

2. Yes. SB3702 establishes a population classification that deviates from the general law defining how municipal boundaries may be altered. Tennessee courts have never found such a statute valid under the Municipal Boundaries Clause. While it conceivably can be argued that a statute with a classification supported by a rational basis is valid under the Municipal Boundaries Clause, this Office is not aware of any facts that would justify the provisions of SB3702 applying different rules of annexation to all municipalities located in a densely populated county. SB3702, therefore, is constitutionally suspect under the Municipal Boundaries Clause.

ANALYSIS

1. SB3703

SB3703 amends Tennessee's comprehensive growth plan law, codified at Tenn. Code Ann. §§ 6-58-101 to -117. Under Tenn. Code Ann. § 6-58-104, the county and municipal governments within a county must develop a "growth plan." The growth plan must delineate municipal corporate limits as well as urban growth boundaries, planned growth areas, if any, and rural areas, if any. Tenn. Code Ann. § 6-58-107.

Generally speaking, a municipality may more readily annex territory within its urban growth boundaries than territory within planned growth and rural areas. Under Tenn. Code Ann. § 6-58-111, a municipality may annex territory within its urban growth boundaries by ordinance or by referendum of voters within the territory. If a quo warranto action is filed to challenge the annexation, the party filing the action has the burden of proving that:

> (1) An annexation ordinance is unreasonable for the overall well-being of the communities involved; or
>
> (2) The health, safety, and welfare of the citizens and property owners of the municipality and territory will not be materially retarded in the absence of such annexation.

Tenn. Code Ann. § 6-58-111(a)(1) and (2). The action is tried without a jury. Tenn. Code Ann. § 6-58-111(b).

By contrast, before a municipality may annex by ordinance territory within another municipality's urban growth boundary, county's planned growth area, or a rural area, the annexing municipality must successfully seek to amend the growth plan by the same process initially used to approve the original growth plan. *See* Tenn. Code Ann. § 6-58-111(c)(1). In the alternative, a municipality may annex territory in a county's planned growth area or rural area by a referendum among voters in the territory to be annexed. Tenn. Code Ann. § 6-58-111(c)(2).

Tenn. Code Ann. § 6-58-104(a)(7) permits certain local governments to use annexation reserve agreements already in effect as the basis for their growth plan. That statute provides in relevant part:

> (A) Notwithstanding any provisions of this chapter or any other provision of law to the contrary, any annexation reserve agreement or any agreement of any kind either between municipalities or between municipalities and counties setting out areas reserved for future municipal annexation and in effect on May 19, 1998, are ratified and remain binding and in full force and effect. Any such agreement may be amended from time to time by mutual agreement of the parties. Any such

> agreement or amendment may not be construed to abrogate the application of any provision of this chapter to the area annexed pursuant to the agreement or amendment.
>
> (B) In any county with a charter form of government, the annexation reserve agreements in effect on January 1, 1998, are deemed to satisfy the requirement of a growth plan. The county shall file a plan based on such agreements with the committee.

Tenn. Code Ann. § 6-58-104(a)(7).

Shelby County had a series of annexation reserve agreements in effect on January 1, 1998; thus, these agreements were continued under Tenn. Code Ann. § 6-58-104(a)(7). The Shelby County Growth Plan states that new agreements involving all the local governments within the county were completed in 1999. *See* http://shelbycountytn.gov. The annexation reserve area boundaries under these agreements are the urban growth boundaries of each city under the county growth plan. *Id.*

Section 1 of SB3703 would amend Tenn. Code Ann. § 6-58-104(a)(7)(A) by deleting the word "Notwithstanding" and substituting the phrase, "Except as provided in subdivision (a)(7)(C), notwithstanding." Section 2 would then add the following new subdivision (C):

> (C) Notwithstanding any provision of this part to the contrary or the annexation reserve agreement for areas reserved for future municipal annexation in effect on May 19, 1998, pursuant to subdivision(a)(7)(A) for the largest municipality located in any county to which such reserve agreements apply, all the area located within the following description shall be moved from the reserve agreement for the largest municipality to the planned growth area of the county:
>
> > Beginning at Grays Creek at the northern most portion of the area at the county line to the point at where Grays Creek intersects with Pisgah on the west side of the area; then following Pisgah south to a point where it intersects with Macon and west on Macon to a point where Houston Levee intersects with Macon; then south on Houston Levee to a point where Houston Levee intersects with Raleigh LaGrange; then east on Raleigh LaGrange to a point where Monterey intersects with Raleigh LaGrange; then east on Monterey to the county line.

2. SB3702

SB3702 directly amends Tennessee's general annexation law. Under Tenn. Code Ann. § 6-51-102(a)(1), a city may, by ordinance, annex territory adjoining its existing boundaries "as may be deemed necessary for the welfare of the residents and property owners of the affected territory as well as the municipality as a whole." The statute requires no referendum by the residents of the territory to be annexed before the ordinance becomes effective.[1]

Under the proposed (a)(4) to be added by Section 1 of SB3702, a different provision would apply in "any county having a population of greater than nine hundred thousand (900,000) according to the 2010 federal census or any subsequent federal census." In counties within this bracket, an annexation ordinance would not become operative until approved in an election among the voters residing in the territory to be annexed.

Section 3 of SB3702 amends Tennessee general law on deannexation. Under current deannexation law, an incorporated city or town may contract its limits upon the approval of three fourths of the qualified voters. Tenn. Code Ann. § 6-51-201(a). The city or town must provide for the election by ordinance. Tenn. Code Ann. § 6-51-202. An incorporated city or town may in the alternative, by ordinance, contract its territorial limits. Tenn. Code Ann. § 6-51-201(b)(1). That contraction may not occur if opposed by a majority of the voters residing within the area to be annexed. Tenn. Code Ann. § 6-51-201(b)(3). Thus, in either case, the city or town legislative body must pass an ordinance before deannexing territory within its limits.

Section 3 of SB3702 adds a new section, styled 6-51-203. The new section would apply in "[a]ny municipality in a county having a population in excess of nine hundred thousand (900,000) according to the 2010 federal census or any subsequent federal census." Under this provision, voters in a territory may trigger a referendum to remove the territory from the municipality's limits. The referendum must be held if the voters file a petition signed by at least fifteen percent of the number of registered voters who voted in the last municipal election in the territory that wishes to be contracted. On approval by three-fourths of the qualified voters in the territory to be deannexed, the territory is deannexed effective six months after the county election commission certifies the returns.

Section 2 of SB3702 also amends Tenn. Code Ann. § 6-58-111, part of the Tennessee law on annexation, to provide that any territory deannexed under SB3702 becomes part of the planned growth area of the county.

[1] Tenn. Code Ann. § 6-51-102(a) (2) and (3) exempt particular territories in narrow population brackets from (a)(1). This opinion does not address the constitutionality of these exemptions.

3. Constitutional Review

Turning to the questions presented, any analysis of the constitutional viability of an annexation bill or statute must begin with a review of the parameters established by the Tennessee Constitution for the creation and alteration of municipalities and their boundaries. The "Municipal Boundaries Clause" of the Tennessee Constitution provides in relevant part:

> The General Assembly shall by *general law* provide the *exclusive methods* by which municipalities may be created, merged, consolidated and dissolved *and by which municipal boundaries may be altered.*

Tenn. Const. Art. XI, § 9 (emphasis added). *See also Highwoods Properties, Inc. v. City of Memphis*, 297 S.W.3d 695, 703-04 (Tenn. 2009) (discussing legislative history of the Municipal Boundaries Clause at the Limited Constitutional Convention of 1953). As the Tennessee Supreme Court observed in the *Highwoods* opinion, the Municipal Boundaries Clause was added to the Tennessee Constitution in 1953 to eliminate the problems "'that had arisen in regard to the Legislature enacting legislation affecting only one county or municipality.'" *Id.* at 705 (quoting *Frost v. City of Chattanooga*, 488 S.W.2d 370, 373 (Tenn. 1972)).

Tennessee courts and this Office have read the Municipal Boundaries Clause to prohibit "the Legislature from prescribing any method of altering municipal boundaries except by general law." *Frost v. City of Chattanooga*, 488 S.W.2d 370, 372 (Tenn. 1972) (holding unconstitutional a statute creating a population classification that would allow municipalities within the classification to annex any territory without levying any municipal ad valorem taxes except for actual municipal services rendered). *See also* Op. Tenn. Att'y Gen. U86-67 (April 7, 1986) (characterizing as constitutionally suspect a bill exempting certain counties by population from the general Tennessee annexation statutes). *But see State ex rel. Tipton v. Knoxville*, 205 S.W.3d 456, 466 (Tenn. Ct. App. 2006.) (Court upheld as constitutional a statute removing a jury in only quo warranto cases that arose from annexations of territory within a municipality's approved urban growth plan, stating the statute is not an attempt to create a rule that applies only to one or a few chosen local governments and thus does not rise to the evil Article XI, Section 9 was intended to remedy).

In short, no Tennessee case has upheld an annexation statute with population classifications against a challenge under the Municipal Boundaries Clause. However the Tennessee Supreme Court has implicitly suggested that the Municipal Boundaries Clause might not prohibit a statute with classifications supported by a rational basis. For example, in *Pirtle v. Jackson*, 560 S.W.2d 400 (Tenn. 1977), the Tennessee Supreme Court invalidated a statute that excluded some cities from the burden of proving that an annexation ordinance is reasonable for the overall well-being of the communities involved. The statue applied only to municipalities located in counties with a population of not less than 65,000 nor more than 66,000, and counties

with a population of 400,000 or more, according to the federal census of 1970 or any subsequent federal census, and in counties having a metropolitan form of government. The Court found the statute violated the Municipal Boundaries Clause but also observed that no rational basis could be found for the classification. *Id* at 402. In *Vollmer v. Memphis,* 730 S.W.2d 619 (Tenn. 1987), the Court found an annexation act with apparently random classifications invalid under the Municipal Boundaries Clause and noted, "[s]uffice it to say the classifications as herein summarized are not reasonable and render the statute void." 730 S.W.2d at 621. Similarly, in *Hart v. City of Johnson City,* 801 S.W.2d 512 (Tenn. 1990), the Tennessee Supreme Court found an act violated the Municipal Boundaries Clause because the act, by population bracket, effectively limited the rights of property owners to contest annexation in eighty-one counties. The Court went on to observe that no rational basis existed for the classification. *Id.* at 517. Thus, in all three of these cases, the Supreme Court invalidated population classifications under the Municipal Boundaries Clause but also buttressed its holding by finding the classifications lacked any rational basis.

The Tennessee Court of Appeals recently discussed these findings in holding that an act was invalid under the Municipal Boundaries Clause because the act allowed a specific class of territories to incorporate despite the territories' failure to comply with the general law that newly incorporated territories must be three miles from existing municipalities. *City of Oakland v. McCraw,* 126 S.W.3d 29 (Tenn. Ct. App. 2003). The Court found that the classification at issue was not supported by a rational basis, even though it observed:

> there is no Tennessee case law directly stating that a special law violating Section 9 is valid if supported by a rational basis. Moreover, we do not hold that a court is required to conduct a rational basis analysis when considering the constitutionality of a statute under Article XI, Section 9. . . .

Id. at 41. The Court noted the Supreme Court in *Hart* had applied a rational basis analysis in a similar challenge and accordingly proceeded to review the act in question under the rational basis standard.

If applicable to a challenge of a law under the Municipal Boundaries Clause, the rational basis test will uphold a classification that has "'some basis which bears a natural and reasonable relation to the object sought to be accomplished.'" *Id.* at 42 (quoting *Huntsville v. Duncan,* 15 S.W.3d 468, 472 (Tenn. Ct. App. 1999)). *See also Gallaher v. Elam,* 104 S.W.3d 455, 462 (Tenn. 2003) (citing *Riggs v. Burson,* 941 S.W.2d 44, 53 (Tenn. 1997), *cert. denied,* 522 U.S. 982 (1997)). The question is "whether the challenged classifications have a reasonable relationship to a legitimate state interest." *Gallaher v. Elam,* 104 S.W.3d at 462. State legislatures have the initial discretion to determine what is "different" and what is "the same," and are given considerable latitude in making those determinations. *Id.*

Application of these principles to the bills in question leads to a conclusion that these bills are constitutionally suspect. SB3703 amends one county's growth plan by moving certain delineated territory from the reserve area/urban growth boundary of the City of Memphis to the planned growth area for Shelby County. As discussed above, a municipality cannot annex territory outside its urban growth boundaries by ordinance unless it first has the growth plan amended to include the territory in its urban growth boundaries. Absent such an amendment, the city may only annex such territory by referendum. Thus, SB3703 changes the method by which the municipal boundaries of Memphis may be altered; in so doing SB3703 is not a general law but instead addresses the annexation of one particular tract of land in a particular county. For this reason, SB3703 is constitutionally suspect under the Municipal Boundaries Clause, and, if relevant, this Office can conceive of no rational basis for this different treatment.

Turning to SB3702, this bill changes the ability of county residents to avoid annexation by a municipality in any county having a population of greater than 900,000 according to the 2010 federal census or any subsequent federal census. Similarly, the bill gives city residents the right to deannex territory without the consent of the city where the territory is located in any municipality in a county having a population in excess of 900,000, according to the 2010 federal census or any subsequent federal census. Thus, the bill creates a separate class of cities and citizens subject to different annexation and deannexation rules.[2] SB3702 in practice and effect applies different annexation rules from the general Tennessee law in a county with a population of 900,000 or more under the 2010 census or any subsequent census. This classification is therefore constitutionally suspect under the Municipal Boundaries Clause since it is not a general law and currently applies to only one county. Assuming that the rational basis test applies to a review of SB3702 under the Municipal Boundaries Clause, in many cases a rational basis does exist for different treatment of more populous counties. Here, however, this Office is unaware of any facts to justify applying different rules of annexation to variously different municipalities in a more densely populated county. By its terms, the rules apply to any municipality within the county, regardless of its population. Thus, the rules would apply to municipalities with a relatively small population or municipalities with a relatively large population, so long as they are located in a densely populated county. Again, this Office can perceive of no rational basis for treating municipalities of any size in a densely populated county differently from the treatment accorded municipalities of similar size in a less densely populated county under

[2] The Tennessee Court of Appeals has found that an act that applied only in counties with populations of 700,000 or more, according to the 1990 federal census or any subsequent federal census, was not an act private or local in form or effect applicable to a particular county or municipality under a different provision of Article XI, § 9. *County of Shelby v. McWherter*, 936 S.W.2d 923, 935 (Tenn. Ct. App. 1996). The Court reasoned that the statute was "general in form and effect" and, therefore, did not require local approval. *Id. at* 936. Because this case does not interpret the Municipal Boundaries Clause, it is not applicable to this analysis.

Tennessee's annexation law. For these reasons, SB3702 is constitutionally suspect under the Municipal Boundaries Clause.

Given these conclusions, this Office finds it unnecessary to review any other possible constitutional deficiencies with either SB3702 or SB3703.

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

The Honorable Mark Norris
State Senator
9A Legislative Plaza
Nashville, Tennessee 37243