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Opinion No. 12-103

Officers under County Charter

QUESTIONS

1. May Knox County under its county charter of government, authorized under Article VII, § 1, ¶ 3, of the Tennessee Constitution and Tenn. Code Ann. §§ 5-1-201 to -215, legally provide for appointment rather than election of the following officers:

a. County clerk;

b. County register of deeds;

c. County trustee;

d. County property assessor;

e. Circuit court clerk

f. Criminal court clerk;

g. Chancery court clerk.

2. May Knox County under its charter provide for the election rather than appointment of the Knox County Director of Schools?

3. May Knox County under its charter provide for the election rather than appointment of the county road commissioner?

OPINIONS

1. A charter county may create the offices of county clerk, register, trustee and property assessor but may not provide that these positions be appointed rather than elected. Article VI, § 13, of the Tennessee Constitution requires that the clerks of inferior courts be elected for a term of four years and that the clerk and master of a chancery court be appointed by the chancellors. The Circuit Court of Knox County and the Criminal Court of Knox County are both inferior courts within the meaning of this provision, and the clerk of each court must, therefore, be elected for a term of four years. Similarly, the Clerk of the Chancery Court of Knox County

must be appointed by the chancellors. A county charter cannot change these methods of selection.

2. Under Tennessee law, every county must have a county school board, and the county school board appoints the county school director. A county charter, therefore, cannot provide for the election of the county school director.

3. Yes, a county charter may provide for an elected county road commissioner.

ANALYSIS

This opinion addresses whether a county in adopting a charter form of government under Tenn. Code Ann. §§ 5-1-201 to -215 may provide for a method of choosing various local officers that differs from the method of selection set forth under various provisions of the Tennessee Constitution and Tennessee statutes of general applicability. Paragraph 3 of Article VII, § 1, of the Tennessee Constitution allows the General Assembly to authorize a county to elect a charter government, stating:

> The General Assembly may provide alternate forms of county government including the right to charter and the manner by which a referendum may be called. The new form of government shall replace the existing form if approved by a majority of the voters in the referendum.

Pursuant to this constitutional provision, the General Assembly has enacted Tenn. Code Ann. §§ 5-1-201 to -215 to give a county the option to adopt a charter form of government.

1. The offices of county clerk, county register of deeds, county trustee and county property assessor are constitutional county offices. Under Paragraph 1 of Article VII, § 1, of the Tennessee Constitution, "[t]he qualified voters of each county shall elect for terms of four years a legislative body, a county executive, a Sheriff, *a Trustee, a Register, a County Clerk and an Assessor of Property."* (Emphasis added). However, Paragraph 3 of Article VII, § 1 authorizes the General Assembly to "provide alternate forms of county government including the right to charter and the manner by which a referendum may be called." Tenn. Const. art. VII, § 1. This paragraph further provides that any new form of government authorized by the General Assembly and adopted by the county "shall replace the existing form [of government]." *Id.* The Tennessee Supreme Court, in extensively reviewing the interrelationship of these constitutional provisions in a case seeking to declare the Knox County Charter null and void, concluded that Paragraph 1 specifying the creation of certain county officers and their terms of office does not apply to a charter county form of government created under Paragraph 3 of the same section. *Jordan v. Knox County*, 213 S.W.3d 751, 773-74 (Tenn. 2007) *See also Bailey v. County of Shelby*, 188 S.W.3d 539, 546 (Tenn. 2006). Thus, a charter county government is not constitutionally required to have these officers. *See Jordan*, 213 S.W.3d at 773-74.

Nonetheless, if a charter county does elect to create these offices, then Tennessee's statutory provisions authorizing a county to adopt a charter county government do not permit a

charter county to appoint rather than elect the county trustee, register, clerk, and property assessor. Tenn. Code Ann. § 5-1-210 lists the provisions that must be included in a county charter adopted under Tenn. Code Ann. §§ 5-1-201 to -215. The statute provides in relevant part:

> The proposed county charter shall provide:
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> . . . .
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> (5) For the assignment of administrative and executive functions to officers of the county government, which officers may be given, subject to such limitations as may be deemed appropriate or necessary, all or any part of the administrative and executive functions possessed by the county being chartered and such additional powers and duties, not inconsistent with general law or the Constitution of Tennessee;
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> (6) For the names or titles of the administrative and executive officers of the county government, their qualifications, compensation, *method of selection*, tenure, removal, replacement and such other provisions with respect to such officers, *not inconsistent with general law, as may be deemed necessary or appropriate for the county government.*
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> (7) For such administrative departments, agencies, boards and commissions as may be necessary and appropriate to perform the functions of county government in an efficient and coordinated manner and for this purpose for the alteration or abolition of existing county offices, departments, boards, commissions, agencies and functions, except where otherwise provided in this part or prohibited by the Constitution of Tennessee;
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> . . . . and
>
> (12) That the duties of the constitutional county officers as prescribed by the general assembly shall not be diminished under a county charter form of government; provided, that such officers may be given additional duties under such charters.

Tenn. Code Ann. §§ 5-1-210(5)-(7), (12) (emphasis added).

The Tennessee Supreme Court has held that, under this statute, a county charter must either create the county offices listed in Paragraph 1 of Article VII, § 1, of the Tennessee Constitution or provide for the performance of the duties of these constitutional officers by other officers created under the charter. *Jordan,* 213 S.W.3d at 773-74. As the Court explained:

> Knox County's claim that its charter is not required to provide for the constitutional county offices and that they somehow exist separate and apart from

> the charter by operation of law does not take into account the requirements of the enabling legislation. Our constitution authorizes the General Assembly to grant counties the right to establish governments under either the traditional or metropolitan forms or to create an alternate charter form of county government. Although the second sentence in the third paragraph of article VII, section 1 provides that the new form of government "shall" replace the existing form if approved by a majority of the voters, *the new form must also comport with the enabling legislation*. In order to meet the latter standard, the "new form of government" must satisfy the requirements found at Tennessee Code Annotated Section 5–1–210, including the provision that "the duties of the constitutional county officers as prescribed by the general assembly shall not be diminished under a county charter form of government; provided that such officers may be given additional duties under such charters." Tenn.Code Ann. § 5–1–210(12). In *Bailey* [*v. County of Shelby*, 188 S.W.3d 539 (Tenn. 2006)] this Court unequivocally concluded that the third paragraph of article VII is not controlled by its first paragraph. Therefore, the subsection requires that the "duties," which are clearly essential for a complete county government, not be neglected in an alternate form of government; but, as this Court ruled over forty years ago in *Winter* [*v. Allen*, 212 Tenn. 84, 367 S.W.2d 785 (1963)] the duties may be transferred to another county official, so long as the duty is performed. 367 S.W.2d at 790. The decision in *Bailey* implied that Tennessee Code Annotated section 5–1–210(12) provides *that it is only when the charter does "retain" the constitutional county offices in the alternate form of government that the duties, as already described by our constitution and statute, may not be diminished. The point, of course, is that the offices must first be "created" under the charter.* A comparison of the constitutional terminology and the statutory language compels this interpretation, as does the holding in *Bailey*. Article VII, paragraph 3 of our constitution grants the power to the counties *not* to have these officers at all.

Jordan, 213 S.W.3d at 773-74 (emphasis added).

Thus, per the Tennessee statutes authorizing a county to adopt a charter form of government and the Supreme Court's *Jordan* decision, a county in adopting a charter government may chose to eliminate the constitutional officers of county clerk, register of deeds, trustee and property assessor *so long as* the duties of these offices are not neglected and are transferred to another county official. However, if one or more of these offices is created by a charter government, then Tenn. Code Ann. § 5-1-210(6) specifically states that the "method of selection" of these officers shall not be "inconsistent with general law." Under the general law of Tennessee, each of these four county officers must be elected to a term of four years. Tenn. Code Ann. § 8-11-101(a) (trustee); Tenn. Code Ann. § 8-13-101(a) (register); Tenn. Code Ann. § 18-6-101(a) and (b) (county clerk); and Tenn. Code Ann. § 67-1-502 (property assessor).[1] Of

[1] In Tenn. Att'y Gen. Op. 11-38 (Apr. 26, 2011), this Office opined the Shelby County Charter could limit the initial term of the Shelby County Assessor to two years. This opinion does not change the conclusion reached in Opinion 11-38, which was limited to the narrow question of whether a charter county has the flexibility to limit the assessor's initial term to two rather than four years. Tenn. Att'y Gen. Op. 11-38, at 3 (Apr. 26, 2011). This Office, while noting this could be a close question, opined the authorizing charter statutes would allow a charter county the

course, these qualifications are all constitutionally required for these officers in counties subject to Paragraph 1 of Article VII, § 1, of the Tennessee Constitution, but the general law governing the creation of these four offices does not exclude charter counties from its operation. Indeed the General Assembly in authorizing a charter form of government requires that the method of selection of county government positions created by a charter government must be consistent with the general law. *Compare* Tenn. Code Ann. § 5-1-210(6) *with* Tenn. Code Ann. §§ 8-11-101(a), 8-13-101(a), 18-6-101(a) & (b) and 67-1-502. *See also Shorts v. Bartholomew*, 278 S.W.3d 268, 277 (Tenn. 2009) (recognizing the general rule of statutory construction that, when the General Assembly enacts a statute, it is presumed to be aware of other statutes relating to the same subject matter, and, unless the newer statute expressly repeals or amends the older statute, the new provision is presumed to be in accord with the same policy embodied in the prior statutes). For these reasons, a county charter may create the offices of county trustee, register, clerk, and property assessor but, pursuant to Tennessee's general law, these positions must be elected.

The next question is whether a county charter may provide for the appointment rather than the election of the court clerks in the county. Knox County has three court clerks: a circuit court clerk, a criminal court clerk, and a chancery court clerk. The Criminal Court of Knox County was originally a branch of the Circuit Court of Knox County and was created under 1907 Tenn. Priv. Act ch. 1, as amended. The Criminal Court Clerk acts as Clerk of the Court of General Sessions of Knox County, Criminal Division and the Circuit Court Clerk acts as Clerk of the Court of General Sessions of Knox County, Civil Division. 2000 Tenn. Priv. Act ch. 126, §§ 1 and 2.

Article VI, § 13, of the Tennessee Constitution provides for the manner in which court clerks are selected:

> Judges of the Supreme Court shall appoint their clerks who shall hold their offices for six years. Chancellors shall appoint their clerks and masters, who shall hold their offices for six years. Clerks of the Inferior Courts holden in the respective Counties or Districts, shall be elected by the qualified voters thereof for the term of four years. Any Clerk may be removed from office for malfeasance, incompetency or neglect of duty, in such manner as may be prescribed by law.

The Circuit Court of Knox County and the Criminal Court of Knox County are both "inferior Courts" within the meaning of this provision. *See* Tenn. Const. Art. VI, § 1 (establishing circuit and other courts). Thus, the Tennessee Constitution requires that the clerks of each of these courts be elected for a term of four years. Further, under this provision, the clerk and master of the Chancery Court of Knox County must be appointed by the chancellors. A county charter may not change these constitutionally mandated methods of selection. *Jordan*, 213 S.W.3d at 782 (Knox County Charter could not impose term limits on circuit and criminal

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flexibility to permit the assessor an initial two year term, with all subsequent terms being four years in accordance with the general law governing the method of selection of assessors. *Id.*

court clerks under Article VI, § 1 and Tenn. Code Ann. § 5-1-204(f), which provides that a county charter may not affect the judicial system).

2. Nor can a county charter provide for the election, rather than the appointment, of the county school director. Tenn. Code Ann. §§ 5-1-201 to -215 do not explicitly authorize a county charter to address the administration of the county school system. Tenn. Code Ann. § 49-2-201(a)(1) does address the creation of county boards of education and provides in relevant part:

> *Notwithstanding any other law to the contrary,* there shall be a board of education elected by the people. *Except in counties with a county charter or metropolitan government charter*, the board shall consist of no more members than the number of members authorized by general law or private act for boards of education in existence on January 1, 1992, or the number of members actually serving on a board on January 1, 1993, except during the transition periods following district reapportionment.

(Emphasis added). Thus, every county operating a county school system, including counties that have adopted a charter form of government, must have an elected board of education. *See also County of Shelby v. McWherter*, 936 S.W.2d 923, 934 (Tenn. Ct. App. 1996) (recognizing that Tennessee's general law requiring the election of school board members preempted a Shelby County Charter provision requiring the county commission to appoint them).

Tenn. Code Ann. § 49-2-203(a)(14)(A) authorizes the county to employ a school director, stating in relevant part:

> (a) It is the duty of the local board of education to:
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> . . . .
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> (14)(A) *Notwithstanding any other public or private act to the contrary*, employ a director of school under a written contract of up to four (4) years' duration, which may be renewed . . . *The school board is the sole authority in appointing a director of schools.*

(Emphasis added). Thus, under the general law, the county school board appoints the county school director. A county charter, therefore, cannot provide for the election of the county school director. *See Jordan*, 213 S.W.3d at 782 (concluding that the general law governing the election and tenure of county school board members preempts the Knox County Charter).

3. Finally, a county charter may provide for an elected county road commissioner. We assume this question refers to the county's chief administrative officer in charge of county highways. No general law of mandatory statewide applicability requires a county to have an appointed road commissioner. The Tennessee County Uniform Highway Law, codified at Tenn. Code Ann. §§ 54-7-101 to -206, only addresses the administration of Tennessee's highway

system in designated Tennessee counties and does not require a county to appoint or elect a chief administrative officer. *See* Tenn. Code Ann. §§ 54-7-102 & -103.[2]

In addition, counties where a county highway organization does not already exist by legislative act are authorized, but not required, to create a county highway commission elected by the county legislative body. Tenn. Code Ann. § 54-8-101. In that case, the highway commission is authorized to hire a road supervisor. Tenn. Code Ann. § 54-8-104. Again, however, these statutes are not general laws of mandatory statewide applicability.

Accordingly, these statutes collectively do not create any Tennessee general law governing the selection of a county road supervisor and thus do not preclude a charter county from providing in its charter or by ordinance, if so permitted by its charter, for an elected county road supervisor. *See* Tenn. Code Ann. §§ 5-1-210(6) and -211(a). A charter county would have this authority even if a private act applicable to the county provided otherwise. Tenn. Code Ann. § 5-1-211(a) (legislative body of charter county may pass ordinance relating to "purely county affairs"); Tenn. Att'y Gen. Op. 10-118, at 4 (Dec. 23, 2010); Tenn. Att'y Gen. Op. 88-04 (Jan. 5, 1988) (both opining that earlier private acts dealing with the form of county government and "purely county affairs" are superseded by the adoption of a charter form of government). Any ordinance adopted under this statute would have to conform to the charter.

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[2] Knox County is currently excluded by population from the Tennessee County Uniform Highway Law. *See* Tenn. Code Ann. § 54-7-102. *See also* 2012 Tenn. Pub. Acts ch. 689, § 1 (effective January 1, 2013 amending Tenn. Code Ann. § 54-7-102 to exclude from the Highway Law any county with a charter form of government).