STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

August 31, 2017

Opinion No. 17-37

Annexation, Comprehensive Growth Plan and Coordinating Committees

Question 1

What procedures are available to a county and a municipality to amend an adopted comprehensive growth plan if its coordinating committee is unavailable or undesired?

Opinion 1

In accordance with Tennessee Code Annotated § 6-58-104(a)(9)(B), the county legislative body and the governing body of each municipality located therein must all agree that another entity shall perform the duties assigned to the coordinating committee by Chapter 58 of Title 6 of the Tennessee Code.

Question 2

If a county legislative body and the governing body of each municipality located therein enter an agreement to appoint another entity to perform the duties assigned to the coordinating committee, as permitted by Tennessee Code Annotated § 6-58-104(a)(9)(B), must the appointed entity meet any qualifications?

Opinion 2

Tennessee Code Annotated § 6-58-104(a)(9)(B) contains no requirements for the members of the alternative entity that is permitted to perform the duties of the coordinating committee; thus, the membership of the entity would be governed by the charter or agreement that creates it. The entity itself, though, would still be a creature of statute. Therefore, the entity could exercise only those powers that are expressly conferred or necessarily implied by statute.

Question 3

Does the requirement of Tennessee Code Annotated § 6-58-107 that "all land use decisions made by the legislative body and the municipality's or county's planning commission shall be consistent with the growth plan" apply if the county's coordinating committee has failed to review the plan every three years as required by the plan adopted by the coordinating committee?

Opinion 3

Yes.

Question 4

Do the recent amendments to Tennessee's annexation statutes abrogate any of the statutory provisions that govern comprehensive growth plans?

Opinion 4

For the reasons explained below, the recent amendments to Tennessee's annexation statutes impliedly repeal Tennessee Code Annotated § 6-58-111(c)(1), which provides that a municipality may annex territory outside its urban growth boundary by ordinance following an amendment to its growth plan.

ANALYSIS

In 1998, the General Assembly enacted the "Comprehensive Growth Plan," currently codified at Tennessee Code Annotated §§ 6-58-101 to -118. The stated purpose of this statutory scheme is to establish a comprehensive growth policy for Tennessee that:

(1) Eliminates annexation or incorporation out of fear;
(2) Establishes incentives to annex or incorporate where appropriate;
(3) More closely matches the timing of development and the provision of public services;
(4) Stabilizes each county's education funding base to be more interested in education matters; and
(5) Minimizes urban sprawl.

Tenn. Code Ann. § 6-58-102.

To implement this policy, the General Assembly required nearly every county in Tennessee[1] to develop a "growth plan." *See* Tenn. Code Ann. §§ 6-58-104 to-107. The general purpose of a growth plan is to direct the rate, location, and character of new development. *See* Tenn. Code Ann. § 6-58-107(c).

The General Assembly decided that the key aspect of each county's growth plan would be the establishment of "urban growth boundaries" for the municipalities within each county. *See* Tenn. Code Ann. §§ 6-58-104(a)(2), -106(a)(1), -107(b). Following the adoption of a county's growth plan, a municipality's urban growth boundary would dictate the method by which the municipality could annex territory. If a municipality desired to annex property within its urban growth boundary, it could use any method in Chapter 51 of Title 6 to annex territory. *See* Tenn. Code Ann. § 6-58-111(a). If the area which the municipality wished to annex was outside its urban

[1] Chapter 58 of Title 6 does not apply to counties that have a metropolitan form of government. *See* Tenn. Code Ann. § 6-58-103. Also, counties with a charter form of government that had annexation reserve agreements in effect on January 1, 1998, were allowed to have those agreements satisfy the requirement of a growth plan. *See* Tenn. Code Ann. § 6-58-104(a)(7)(B).

growth boundary, the municipality could annex by referendum or by ordinance following an amendment to its urban growth boundary. *See* Tenn. Code Ann. § 6-58-111(c).

The General Assembly placed the duty to develop the growth plans upon "coordinating committees." *See* Tenn. Code Ann. §§ 6-58-104(a), -106(a). For most counties, the General Assembly provided that the coordinating committee would comprise the following members: county mayor or designee; the mayor of each municipality or designee; one member appointed by the governing board of the county's largest municipally-owned utility system; one member appointed by the governing board of the county's largest utility system that is not municipally-owned; one member appointed by the board of directors of the county's soil conservation district; one member appointed by the board of the county's largest local education agency; one member appointed by the county's largest chamber of commerce; two members appointed by the county mayor; and two members appointed by the mayor of the county's largest municipality. Tenn. Code Ann. §§ 6-58-104(a)(1)(A) through (H).[2]

The General Assembly also provided that an entity other than the coordinating committee could perform the duties of the committee under specified circumstances:

> Instead of the coordinating committee created pursuant to subdivision (a)(1), if the county legislative body and the governing body of each municipality located therein all agree that another entity shall perform the duties assigned by this chapter to the coordinating committee, then such other entity shall perform such duties of the coordinating committee, and such coordinating committee shall not be created or continued, as the case may be.

Tenn. Code Ann. § 6-58-104(a)(9)(B).

Once formed, the coordinating committee of each county was required to develop a recommended growth plan no later than January 1, 2000. *See* Tenn. Code Ann. §§ 6-58-104(a)(2), (4). A county's growth plan had to depict each municipality's corporate limits and their "urban growth boundaries."[3] *See* Tenn. Code Ann. §§ 6-58-104(a)(2), -107(b). The coordinating

[2] The General Assembly provided a different membership composition for counties "in which the largest municipality comprises at least sixty percent (60%) of the population of the entire county and on May 19, 1998, there is no other municipality in the county with a population in excess of one thousand (1000), according to the 1990 federal census or any subsequent federal census." Tenn. Code Ann. § 6-58-104(a)(9)(A). For those counties, the municipal planning commission and the county planning commission (if the county had a planning commission) would be the coordinating committee. *Id.*

[3] An urban growth boundary identifies territory contiguous to the existing boundaries of a municipality into which the municipality is expected to grow during the next twenty years and to which the municipality is better able and prepared than other municipalities to provide urban services. *See* Tenn. Code Ann. § 6-58-106(a)(1).

committee's plan also had to describe and depict any "planned growth areas"[4] or "rural areas"[5] beyond the municipalities' urban growth boundaries. *See id.* In making these determinations for their respective counties, the coordinating committees were permitted to address land use, transportation, public infrastructure, housing and economic development. *See* Tenn. Code Ann. §§ 6-58-104(a)(2), -107(b).

Next, the coordinating committee was required to submit its recommended growth plan for ratification to its county legislative body and the governing body of each municipality within the county. *See* Tenn. Code Ann. §§ 6-58-104(a)(2), (4). Once a county and its municipalities adopted a growth plan,[6] the local government planning advisory committee had to approve (or revise) the plan, by no later than July 1, 2001. *See* Tenn. Code Ann. § 6-58-104(c). Following approval of the plan, "all land use decisions made by the legislative body and the municipality's or county's planning commission shall be consistent with the growth plan." Tenn. Code Ann. § 6-58-107(a).

The initially approved growth plans were required to stay in effect for not less than three years, absent extraordinary circumstances. *See* Tenn. Code Ann. § 6-58-104(d)(1). Thereafter, a municipality or county could propose an amendment to the growth plan, at any time, by filing notice with the county mayor or county executive and with the mayor of each municipality in the county. *Id.* Upon receiving the notice, the county mayor or county executive is required to "reconvene or reestablish" the coordinating committee to consider the proposed amendment. *Id.* The process for amending a growth plan is the same as the process for establishing the original plan.[7] *Id.* Thus, coordinating committees play a continuing role when the growth plans of local governments need to be adjusted.

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[4] A county's planned growth area consists of territory in which residential and nonresidential growth is expected to occur over the next twenty years and which is not part of any municipality or urban growth area. *See* Tenn. Code Ann. § 6-58-106(b)(1).

[5] A county's rural area consists of territory which is not in any urban growth or planned growth area and which is to be preserved for uses such as agriculture, forestry, recreation, or wildlife management or for uses other than high density commercial, industrial or residential development. *See* Tenn. Code Ann. § 6-58-106(c)(1).

[6] If the plan was rejected by the county or any municipality, the coordinating committee was required to reconsider its action and submit a revised growth plan. If a consensus could not be obtained between all involved parties on a revised growth plan, the county or any municipality could declare an impasse, thereby triggering a dispute resolution process through the Tennessee Secretary of State. *See* Tenn. Code Ann. § 6-58-104(b).

[7] The General Assembly, though, recently enacted a narrow exception to the amendment process outlined in Tenn. Code Ann. § 6-58-104(d)(1):

> A municipality may expand its urban growth boundaries to annex a tract of land without convening the coordinating committee or approval from the county or any other municipality if:
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> (1) The tract is contiguous to a tract of land that has the same owner and has already been annexed by the municipality;
> (2) The tract is being provided water and sewer services; and
> (3) The owner of the tract, by notarized petition, consents to being included within the urban growth boundaries of the municipality.

2014 Tenn. Pub. Acts ch. 707 § 6 (codified at Tenn. Code Ann. § 6-58-118).

1. Procedures Available to a County and a Municipality to Amend an Adopted Comprehensive Growth Plan if its Coordinating Committee is Unavailable or Undesired.

The General Assembly permits a county to create an alternative entity to perform the functions of the coordinating committee. *See* Tenn. Code Ann. § 6-58-104(a)(9)(B). There is no other procedure available. A growth plan cannot be amended unless the coordinating committee is "reconvene[d] or restablish[ed]." *See* Tenn. Code Ann. § 6-58-104(d)(1). Thus, in accordance with Tennessee Code Annotated § 6-58-104(a)(9)(B), the county legislative body and the governing body of each municipality located therein must all agree that another entity shall perform the duties assigned to the coordinating committee by Chapter 58 of Title 6 of the Tennessee Code.

2. Qualification Requirements for an Alternative Entity

Tennessee Code Annotated § 6-58-104(a)(9)(B) contains no requirements for the members of the alternative entity that is permitted to perform the duties of the coordinating committee; thus, the membership of the entity would be governed by the charter or agreement that creates it. *See* Tenn. Att'y Gen. Op. 11-77 (Nov. 14, 2011).

The entity itself, though, would still be a creature of statute. Therefore, the entity could exercise only those powers that are expressly conferred or necessarily implied by statute. *See Tennessee Pub. Serv. Comm'n v. Southern Ry. Co.*, 554 S.W.2d 612, 613 (Tenn. 1977); *State ex rel. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 769 (Tenn. Ct. App. 2001).

3. Requirement that Land Use Decisions Made by the County Legislative Body and the Municipality's or County's Planning Commission Be Consistent with the Growth Plan if the County's Coordinating Committee has Not Reviewed the Plan as Required by the Plan Adopted by the Coordinating Committee.

Tennessee Code Annotated § 6-58-107(a), in pertinent part, provides: "After a growth plan is [] approved, all land use decisions made by the legislative body and the municipality's or county's planning commission shall be consistent with the growth plan." The operative word in this statutory provision is "shall." As a general rule, "when the word 'shall' is used in a statute it is construed to be mandatory, not discretionary." *Home Builders Ass'n of Middle Tennessee v. Williamson Cnty.*, 304 S.W.3d 812, 819 (Tenn. 2010). In short, the word "shall" means "must." *Bateman v. Smith*, 183 Tenn. 541, 543, 194 S.W.2d 336, 336 (1946).

The essence of Chapter 58 of Title 6 is that counties are required to develop growth plans and then adhere to them. There is thus no reason to depart from the general rule that "shall" means "must" in construing this statute. Consequently, the land use decisions of a county legislative body and the municipality's or county's planning commission must be consistent with the growth plan even if the county's coordinating committee has failed to review the plan every three years as required by the plan adopted by the coordinating committee. For these county and municipal

bodies to deviate from the growth plan, the growth plan would have to be amended. *See* Tenn. Code Ann. § 6-58-104(d)(1).

4. Recent Amendments to Tennessee's Annexation Statutes as Abrogating Any of the Statutory Provisions that Govern Comprehensive Growth Plans.

In 2013, the General Assembly enacted a moratorium that prevented municipalities from extending their corporate limits by means of an annexation ordinance from April 15, 2013 to May 15, 2014. 2013 Tenn. Pub. Acts ch. 441 (codified at Tenn. Code Ann. § 6-51-122). In 2014, the General Assembly amended Tennessee Code Annotated § 6-51-102, along with several other provisions of Chapter 51, to prohibit all annexations by ordinance that were not both operative and effective prior to May 16, 2015. 2014 Tenn. Pub. Acts ch. 707 § 2(b). Then, the General Assembly passed another Act "relative to assisting the implementation of Chapter 707 of the Public Acts of 2014 to abolish annexation by ordinance." 2015 Tenn. Pub. Acts ch. 512. Consistent with the Act's stated intent to "abolish annexation by ordinance," Chapter 512 deleted Tennessee Code Annotated § 6-58-108, a Comprehensive Growth Plan provision that addressed a municipality's authority to annex by ordinance.[8] *Id*. § 10.

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[8] Tennessee Code Annotated § 6-58-108 (2008) provided:

> (a) Deleted by 2008 Pub. Acts, c. 818, § 2, eff. April 29, 2008.
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> (b) Deleted by 2008 Pub. Acts, c. 818, § 2, eff. April 29, 2008.
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> (c) Deleted by 2008 Pub. Acts, c. 818, § 2, eff. April 29, 2008.
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> (d) Deleted by 2008 Pub. Acts, c. 818, § 2, eff. April 29, 2008.
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> (e)(1) After May 19, 1998, a municipality may not annex by ordinance upon its own initiative territory in any county other than the county in which the city hall of the annexing municipality is located, unless one (1) of the following applies:
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> (A) A municipality that is located in two (2) or more counties as of November 25, 1997, may annex by ordinance in all such counties, unless the percentage of the municipal population residing in the county or counties other than that in which the city hall is located is less than seven percent (7%) of the total population of the municipality;
> (B) A municipality may annex by ordinance with the approval by resolution of the county legislative body of the county in which the territory proposed to be annexed is located; or
> (C) A municipality may annex by ordinance in any county in which, on January 1, 1998, the municipality provided sanitary sewer service to a total of one hundred (100) or more residential customers, commercial customers, or a combination thereof.
>
> (2) Subdivision (e)(1) shall not affect any annexation ordinance adopted on final reading by a municipality prior to May 19, 1998, if such ordinance annexed property within the same county where the municipality is located or annexed property in a county other than the county in which the city hall is located if the property is used or is to be used only for industrial purposes.
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> (f)(1) Deleted by 2008 Pub. Acts, c. 818, § 2, eff. April 29, 2008.
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> (2) After January 1, 1999, a new municipality may only be incorporated in accordance with this section and with an adopted growth plan.

A review of the remaining Comprehensive Growth Plan provisions reveals that Tennessee Code Annotated § 6-58-111 is the only other provision that authorizes annexation by ordinance. This provision supplies the methods that a municipality may use to annex territory relative to its urban growth boundary. If a municipality desires to annex property within its urban growth boundary, Tennessee Code Annotated § 6-58-111(a) provides that the municipality may use any method in Chapter 51 of Title 6. When the Comprehensive Growth Plan was enacted, annexation by ordinance was a permitted method under Chapter 51. As a result of the recent amendments to Chapter 51, though, annexation by ordinance is no longer allowed. Thus, a municipality may no longer annex territory within its urban growth boundary by ordinance because that method is no longer a permitted method under Chapter 51.

With respect to a municipality's annexation of territory outside its urban growth boundary, Tennessee Code Annotated § 6-58-111(c)(1) states that a municipality may annex by ordinance following an amendment to its urban growth boundary. Alternatively, Tennessee Code Annotated § 6-58-111(c)(2) provides that a municipality may annex territory outside its urban growth boundary by referendum. The General Assembly's amendments to Chapter 51, as well as its deletion of Tennessee Code Annotated § 6-58-108, evidence an unequivocal intent to prohibit all annexations by ordinance that are not operative and effective prior to May 16, 2015. Therefore, a municipality may no longer annex territory outside its urban growth boundary, and Tennessee Code Annotated § 6-58-111(c)(1) has been impliedly repealed. *See Metropolitan Gov't of Nashville v. Hillsboro Land Co.*, 222 Tenn. 431, 440, 436 S.W.2d 850, 854 (1968) (while repeals by implication are not favored, a later Act does impliedly repeal an earlier Act if the two Acts are manifestly repugnant or in irreconcilable conflict of substance). Accordingly, referendum is now the only method that a municipality may use to annex territory outside its urban growth boundary. *See* Tenn. Code Ann. § 6-58-111(c)(2).

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