STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 18-10

Constitutionality of the Short-Term Rental Unit Act

Question 1

Proposed legislation would establish a continued-use provision for short-term rental units, which would prohibit local governments from applying regulations and restrictions to short-term rental units that were in operation before the enactment of those regulations and restrictions. The legislation would not apply, however, to regulations and restrictions enacted by a local government before January 1, 2014. By allowing some local governments to enforce their rules governing short-term rental units uniformly but preventing other local governments—namely those that enacted rules after January 1, 2014—from doing so, would the proposed legislation constitute impermissible class legislation in violation of article I, section 8 and article XI, section 8 of the Tennessee Constitution?

Opinion 1

No. The distinction in the proposed legislation has a rational basis and is reasonably related to legitimate state interests.

Question 2

The proposed legislation would also preclude a local government from prohibiting or effectively prohibiting the use of property as a short-term rental unit after August 1, 2017. This provision would allow some local governments to continue to prohibit short-term rentals but would prevent local governments that did not enact such laws prior to August 1, 2017, from doing so. Would this provision constitute impermissible class legislation in violation of article I, section 8 and article XI, section 8 of the Tennessee Constitution?

Opinion 2

Yes, most likely. The distinction on which this provision relies—the date a local government enacted a prohibition on short-term rental units—does not appear to have a reasonable relationship to legitimate state interests.

Question 3

The proposed legislation would also prevent a local government from considering the leasing of a residential dwelling as a short-term rental for purposes of determining land use or utility rates. Does this provision violate article II, section 28 of the Tennessee Constitution?

Opinion 3

No.

Question 4

Would the proposed legislation otherwise violate the U.S. Constitution or Tennessee Constitution, including by effectively limiting the ability of a single county to restrict short-term rentals or by employing terms such as "effectively prohibit" and "reasonable compliance" that might be deemed too vague to provide meaningful guidance to local governments?

Opinion 4

No.

ANALYSIS

A proposed amendment to pending legislation known as the "Short-Term Rental Unit Act," Senate Bill 1086/House Bill 1020, 110th Tenn. Gen. Assem. (2017), would add several new provisions that restrict local governments' authority to regulate or prohibit short-term rentals. Most prominently, the amendment would add a "continued-use" provision for short-term rental units that would prevent local governments from applying new regulations and restrictions to existing short-term rental units. Under proposed § 13-7-603(a)(1), a local rule or regulation would "not apply to property if the property was being lawfully used as a short-term rental unit by the owner of the property prior to the enactment" of the rule or regulation. Instead, the rules and regulations "in effect at the time the property began being lawfully used as a short-term rental unit [would be] the law that governs the use of the property as a short-term rental unit" until the property was sold or was not used as a short-term rental unit for 30 consecutive months.

The continued-use provision would not apply uniformly, however. Proposed § 13-7-603(a)(2) would allow local governments to enforce rules and regulations "enacted prior to January 1, 2014" that "expressly limit the period of time a residential dwelling may be rented." It would not, however, permit a local government to enforce rules and regulations enacted prior to January 1, 2014, "that generally prohibit commercial activity or the renting of residential dwellings to transients." The proposed legislation clarifies that the intent of the two provisions is to "provide an owner of property with continued lawful use of the property without impairment from a local governing body" but also to "grandfather" local rules and regulations enacted prior to January 1, 2014, that "provided notice to property owners that renting a residential dwelling unit under a specified period of time was unlawful prior to a substantial number of property owners using their property as short-term rental units."

The proposed amendment would also add, as § 13-7-603(b), a provision forbidding local governments from "prohibit[ing] or effectively prohibit[ing] the use of property as a short-term rental unit on or after August 1, 2017." It explains, however, that this prohibition does not prevent a local government from either "[r]egulating short-term rental units," as long as "the regulation allows for reasonable compliance," or "[p]lacing a limit on the number of non-owner occupied short-term rental units." This provision would supersede any conflicting rule or regulation

"enacted, maintained, or enforced by a local governing body," and indicates it is intended "to prevent recent and future over-regulation of short-term rental units by a local governing body."

Finally, among various other provisions related to short-term rental units, the proposed legislation would prohibit a local government from "consider[ing] the leasing of a residential dwelling as a short-term rental unit as commercial activity, regardless of the term of the lease agreement," for the purposes of "determining land use or utility rates, when determining whether a property conforms to the requirements of a residential zone or residential use."

1. Proposed § 13-7-603(a) would result in differential treatment of local jurisdictions. Some local governments—those that enacted rules and regulations governing short-term rental units before 2014—would be allowed to enforce their rules and regulations uniformly against all short-term rental units. But other local governments—those that did not enact rules and regulations before 2014—would not be permitted to enforce their rules and regulations against short-term rental units that were already in operation at the time of their enactment.

Legislation that treats local governments differently potentially implicates 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. The latter guarantees equal protection of the laws. *See Civil Serv. Merit Bd. v. Burson*, 816 S.W.2d 725, 730-02 (Tenn. 1991).

Legislative classifications enjoy a presumption of validity, and do not violate the Constitution if they have "a reasonable relationship to a legitimate state interest." *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988). Thus, a classification will generally pass constitutional muster if there is any conceivable reason—i.e., any "rational basis"—to justify the classification.

> 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." [*Civil Serv. Merit Bd.*, 816 S.W.2d] at 731, *citing Stalcup v. City of Gatlinburg*, 577 S.W.2d 439, 442 (Tenn. 1978). Rather, "[i]f any possible reason can be conceived to justify the classification it will be upheld and deemed reasonable." *Id.* Reasonableness, however, depends upon the facts of the case, and no general rule can be formulated for its determination. *See Harrison v. Schrader*, 569 S.W.2d 822, 825-26 (Tenn. 1978); Tenn. Op. Att'y Gen. 99-112 (May 13, 1999).

Op. Tenn. Att'y Gen. 99-226 (Dec. 3, 1999) (second alteration in original).

Under these principles, the proposed continued-use provision is constitutional. The State has a legitimate interest in ensuring property owners who purchase property for an intended use are not deprived of that opportunity later by local regulation. Indeed, Tenn. Code Ann. § 13-7-208(b)(1), "often referred to as a 'grandfather clause,'" already protects that interest with respect to industrial, commercial, and business establishments. *Ready Mix, USA LLC v. Jefferson County*, 380 S.W.3d 52, 67 (Tenn. 2012) (quoting *SNPCO, Inc. v. City of Jefferson County*, 363 S.W.3d 467, 474 (Tenn. 2012)). "The grandfather clause ensures that despite a primary objective of zoning to eliminate non-conforming uses, the use to which the property has been devoted at the time of

the enactment of the ordinance may continue without interruption." *Id.* The continued-use provision of the proposed legislation extends this grandfather clause to residential property used for short-term rentals.

The continued-use provision in the proposed legislation is qualified, however. The proposed legislation restricts the operation of the continued-use provision to local rules and regulations enacted beginning in 2014. Even though the result of this limitation is that the rules and regulations of some local jurisdictions apply uniformly to short-term rental units and the rules and regulations of other local jurisdictions must make exceptions for short-term rental units covered by the continued-use provision, that distinction has a reasonable basis.

The prevalent use of residential property as a short-term rental unit is a relatively recent phenomenon. The proposed legislation relies on this fact as the rationale for its distinction among local jurisdictions. It recognizes expressly that local governments that enacted rules and regulations before 2014 "provided notice to property owners that renting a residential dwelling unit under a specified period of time was unlawful prior to a substantial number of property owners using their property as short-term rental units." Because those rules and regulations predated the widespread use of residential property for short-term rentals, the majority of property owners in those jurisdictions would never have reasonably expected to use residential property solely for short-term rentals.

The distinction included in the continued-use provision is thus rationally related to the State's legitimate interest in protecting the expectations of property owners. Local rules and regulations enacted before the use of residential property for short-term rentals became widespread do not undermine the State's interest to the same degree as more recent local rules and regulations. The General Assembly's decision to distinguish between the rules and regulations of local jurisdictions based on their date of enactment is reasonable in light of that interest and does not violate the Tennessee Constitution.

2. The proposed legislation would result in an additional distinction among local jurisdictions based on a date chosen by the General Assembly. Proposed § 13-7-603(b) proscribes any local government attempt to "prohibit or effectively prohibit" short-term rental units after August 1, 2017. Subject to the requirements of the continued-use provision, proposed § 13-7-603(b) would allow jurisdictions that prohibited short-term rental units before August 1, 2017, to continue to prohibit them and would allow local rules and regulations enacted before that date that effectively prohibit the use of residential property for short-term rentals to remain enforceable. But any local jurisdiction that imposed such restrictions or regulations on or after August 1, 2017, or that seeks to do so in the future, would be precluded from enforcing them. Any rules or regulations that prohibit or effectively prohibit short-term rentals within a local jurisdiction enacted on or after August 1, 2017, would be superseded by proposed § 13-7-603(b).

Unlike the distinction in the continued-use provision, the distinction in proposed § 13-7-603(b) is likely unconstitutional. It is true that the rational basis test accords the General Assembly "the initial discretion to determine what is 'different' and what is 'the same"' and allows it "considerable latitude in making those determinations." *Gallaher v. Elam*, 104 S.W.3d 455, 461 (Tenn. 2003). And courts uphold classifications "if [it] can conceive of some rational basis for the distinction." *Id.*; *see also Riggs v. Burson*, 941 S.W.2d 44, 53 (Tenn. 1997) (a statutory

classification is rational "if any state of facts may reasonably be conceived to justify it" (internal quotation marks omitted)). Even under that deferential standard, however, the choice of August 1, 2017, as the date separating jurisdictions that may prohibit short-term rental units from those that may not does not appear to be reasonably related to any conceivable state interest.

Proposed § 13-7-603(b) states that its purpose is "to prevent recent and future overregulation of short-term rental units by a local governing body." On its face, this purpose appears legitimate. If the General Assembly determines that a prohibition or effective prohibition on short-term rental units is "overregulation," it can act to address that problem. But if a prohibition or effective prohibition enacted on August 2, 2017, is an "overregulation" that warrants legislative action, then it is unclear why the same prohibition or effective prohibition passed on July 31, 2017, would not warrant the same action.

As a practical matter, the date appears to have been chosen to nullify the Metropolitan Government of Nashville and Davidson County's act in November 2017 to ban short-term rentals. The proposed legislation would apply more broadly, of course, to prevent any local government from taking similar action in the future. The prohibition does not, however, distinguish among local jurisdictions based on facts that are conceivably relevant to the regulation of short-term rental units, such as population size, tourism, or urban density. *Cf. Throneberry Props. v. Allen*, 987 S.W.2d 37, 40-41 (Tenn. Ct. App. 1998) (upholding a tax applying only to Rutherford County as a reasonable distinction because it was "the fastest growing county in the state" and existing revenue could not keep up with the "increased demand on services").

The proposed legislation instead distinguishes among local jurisdiction based solely on the date on which the jurisdiction enacted a prohibition on short-term rental units. Because that date does not appear to be reasonably related to any conceivable state interest in the regulation of short-term rentals, this provision would likely violate the Tennessee Constitution. In contrast to the date in the continued-use provision—which corresponds roughly to the point at which the use of residential property for short-term rentals became widespread and relates to the legislature's concern about preserving property owners' reasonable expectations for the use of their property—the date chosen after which no local government may prohibit short-term rental units is arbitrary and unrelated to the interests underlying the legislation.

3. Article II, section 28 of the Tennessee Constitution "classifies real property into four categories: public utility, industrial and commercial, residential, and farm" for purposes of taxation. *Castlewood, Inc. v. Anderson County*, 969 S.W.2d 908, 909 (Tenn. 1998). Section 28 also defines "residential property containing two (2) or more rental units" as "industrial and commercial property." Tenn. Const. art. II, § 28. Accordingly, section 28 "requires that residential property containing two or more rental units be treated as industrial and commercial property for tax purposes." Op. Tenn. Att'y Gen. 17-32 (Apr. 21, 2017). "The purpose and objective of [the classification] is to tax income-producing property at a higher rate than owner-occupied residences and farms." *Snow v. Memphis*, 527 S.W.2d 55, 66 (Tenn. 1975).

The proposed legislation would not, on its face, implicate section 28 because it does not relate to taxation. The proposed legislation would prohibit a local government from "consider[ing] the leasing of a residential dwelling as a short-term rental unit as commercial activity," only "[f]or purposes of determining land use or utility rates." Residential property that includes two or more

rental units must be "treated as industrial and commercial property *for tax purposes*" under section 28, Op. Tenn. Att'y Gen. 17-32 (Apr. 21, 2017) (emphasis added), but nothing in section 28 requires such property to be treated as commercial property for all other purposes such as zoning or setting utility rates. As the Tennessee Supreme Court has recognized:

> The word "residential" and thus the phrase "residential property" is elastic and flexible. The phrase may have different connotations in different statutes and situations. When used in connection with zoning, it has meaning in the light and purpose of zoning laws. When used in connection with taxation, it has, or may have, a different meaning, because the object or purpose of said law is entirely different.

Snow, 527 S.W.2d at 59. Of course, if the application of this provision under the governing laws of a particular jurisdiction would otherwise have the effect of classifying a particular piece of residential property containing two or more rental units as residential for purposes of *taxation*, it would then implicate—indeed violate—section 28. In such cases, the local law would be preempted by the constitutional provision, which requires that the property be classified as commercial for purposes of taxation. Whether a particular short-term rental unit contained two or more "rental units" within the meaning of section 28 would depend on the facts of the individual case.

4. The proposed legislation does not appear to raise other constitutional concerns. Two concerns in particular have been raised: (1) whether the legislation is unconstitutional because at the time of passage it would apply, in effect, only to a single county and (2) whether the legislation is unconstitutional because it employs arguably vague terms such as "reasonable compliance" and "effectively prohibit."

a. The proposed legislation is not impermissible local regulation in violation of the Tennessee Constitution. Article XI, section 9 of the Tennessee Constitution prohibits legislation that is "private or local in form or effect" and "applicable to a particular county or municipality" unless the legislation requires local approval. *See Civil Serv. Merit Bd.*, 816 S.W.2d at 729. Under this provision, the "sole constitutional test must be whether the legislative enactment, irrespective of its form, is local in effect and application" or "whether th[e] legislation was designed to apply to any other county in Tennessee." *Farris v. Blanton*, 528 S.W.2d 549, 551-52 (Tenn. 1975). If the legislation "is *potentially* applicable throughout the state, it is not local in effect even though at the time of its passage it might have applied to [only one county]." *Civil Serv. Merit Bd.*, 816 S.W.2d at 729 (emphasis and alteration in original) (quoting *Farris*, 528 S.W.2d at 552).

The proposed legislation is potentially applicable throughout the state, and it thus does not violate article XI, section 9 of the Tennessee Constitution. Even assuming that some portions of the legislation—such as the ban on prohibiting or effectively prohibiting short-term rental units after August 1, 2017—currently apply only to a single county or local government, the ban applies throughout the state and prohibits all local governments from adopting such a prohibition in the future. The proposed legislation thus does not impose regulations on short-term rental units that apply only to a specific county or jurisdiction, either expressly or in effect, but potentially applies to many other counties. The proposed legislation thus does not require local approval under article XI, section 9.

b. The proposed legislation also does not violate the Tennessee Constitution or U.S. Constitution by using terms such as "effectively prohibit" and 'reasonable compliance." A statute may be unconstitutionally vague if it includes "prohibitions [that] are not clearly defined." *State v. Pickett*, 211 S.W.3d 696, 704 (Tenn. 2007) (quoting *Grayned v. Rockford*, 408 U.S. 104, 108 (1972)). "[T]he root of the vagueness doctrine is a rough idea of fairness." *Moncier v. Bd. of Prof'l Responsibility*, 406 S.W.3d 139, 152 (Tenn. 2013) (alteration in original) (quoting *Colten v. Kentucky*, 407 U.S. 104, 110 (1972)); *see also Pickett*, 211 S.W.3d at 704 ("Due Process requires that the law give sufficient warning so that people may avoid conduct which is forbidden."). The doctrine mandates that a statute define the conduct prohibited "in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402-03 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

Accordingly, the vagueness doctrine typically arises in the criminal context, when a defendant alleges that a criminal prohibition is too vague to provide fair notice of the precise conduct it prohibits or permits discriminatory enforcement. *See, e.g.*, *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Skilling*, 561 U.S. at 402-13; *State v. Burkhart*, 58 S.W.3d 694 (Tenn. 2001). An ambiguous civil statute may also be void for vagueness if it "provides the State with a procedure for depriving [an individual] of his liberty [or] property," or infringes other fundamental rights protected by the Due Process Clause. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966).[1]

The proposed legislation, however, does not impose any criminal or civil penalties or provide any mechanism by which the State may deprive an individual of property or liberty or infringe other fundamental rights. Nor does the statute grant any authority to law enforcement or other state officials that potentially could be enforced against individuals in an arbitrary or discriminatory manner. Instead, the prohibitions in the proposed legislation apply only to local governments, which have no due process protections against state legislation. *See Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923); *Carlyn v. City of Akron*, 726 F.2d 287, 290 (6th Cir. 1984). Accordingly, the statute does not raise concerns under the vagueness doctrine.

Moreover, the proposed legislation does not use terms that an ordinary person would not understand. "The vagueness doctrine does not invalidate every statute which a reviewing court believes could have been drafted with greater precision, especially in light of the inherent vagueness of many English words." *State v. Lyons*, 802 S.W.2d 590, 592 (Tenn. 1990). Instead, a statute is void for vagueness only "if an '"ordinary person exercising ordinary common sense" [cannot] sufficiently understand the law and comply with [it].'" *Moncier*, 406 S.W.3d at 152 (second alteration in original) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 159 (1974)). The terms and qualifiers used in the proposed legislation—"reasonable," "effectively," "compliance," "prohibit"—are common terms that an ordinary person understands. And the fact that the legislation uses "general standards" such as "reasonable compliance" and "effectively prohibit" rather than attempting to formulate an exhaustive list of prohibited actions represents a common legislative choice to ensure local governments cannot find ways to work around the statutory prohibitions. *Phillips v. State Bd. of Regents of State Univ. & Cmty. Coll. Sys.*, 863 S.W.2d 45,

[1] Individuals may also mount a First Amendment challenge to a statute based on vagueness when ambiguous language threatens to proscribe speech or conduct protected by the First Amendment or otherwise inhibits the exercise of First Amendment rights. *See, e.g.*, *United States v. Williams*, 553 U.S. 285, 304 (2008); *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). The proposed legislation does not implicate any First Amendment rights.

49-50 (Tenn. 1993); *see also Arnett*, 416 U.S. at 159-62. Employing such standards as a "catch-all" to ensure the statute covers all relevant actions does not render a statute unconstitutionally vague. *See Phillips*, 863 S.W.2d at 49-50; *Fowler v. Bd. of Educ. of Lincoln County*, 819 F.2d 657, 664-65 (6th Cir. 1987).

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

JONATHAN DAVID SHAUB
Assistant Solicitor General

Requested by:

The Honorable Steven Dickerson
State Senator
Suite 734 Cordell Hull Building
Nashville, Tennessee 37243

The Honorable John Stevens
State Senator
Suite 710 Cordell Hull Building
Nashville, Tennessee 37243