STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 20-12

Constitutionality of Legislation Exempting the City of Athens from Tax Law

Question

Would HB 2919/SB 2925, 111th Tenn. Gen. Assem. (2020), which is intended to exempt the city of Athens from the operation of Tenn. Code Ann. § 67-4-1425(a) by means of a narrow population bracket, raise constitutional concerns?

Opinion

Yes. Both article I, section 8 and article XI, section 8 of the Tennessee Constitution require that a population bracket designed to exempt a particular county or municipality from a tax law be supported by some rational basis related directly to the size of the bracketed population. Because there does not appear to be such a rational basis for creating a narrow population-bracket exception from Tenn. Code Ann. § 67-4-1425 for the city of Athens, the proposed legislation raises significant constitutional concerns.

ANALYSIS

Tennessee Code Annotated § 67-4-1425 prohibits a county and a municipality from both levying occupancy taxes on hotels and motels located in the municipality. The county or municipality that "first imposes such a tax" has "priority" under the statute, and its imposition of the tax "prohibits the other local entity" from enacting such a tax. Tenn. Att'y Gen. Op. 03-134 (Oct. 8, 2003). As the Tennessee Court of Appeals has explained, "only the entity that first levies an occupancy tax may maintain that tax" under § 67-4-1425(a). Admiralty Suites & Inns, LLC v. Shelby Cty., 138 S.W.3d 233, 236 (Tenn. Ct. App. 2003), overruled on other grounds by Chuck's Package Store v. City of Morristown, 545 S.W.3d 398 (Tenn. 2018).

The proposed legislation would exempt the city of Athens, Tennessee, from this priority rule by providing that § 67-4-1425 "shall not apply in any city having a population" between 13,400 and 13,500 that is located in a county having a population between 52,200 and 52,300. HB 2919/SB 2925, 111th Tenn. Gen. Assem. (2020). According to the legislative description of the bill, its purpose to "authorize the city of Athens to levy a privilege tax of up to 3 percent upon the privilege of occupancy by a two-thirds vote of its governing body."

As this Office has previously opined,[1] the use of narrow population brackets to exempt a particular city or county from the operation of a general law raises significant concerns under two separate provisions of the Tennessee Constitution: (1) article I, section 8, which guarantees equal protection of the laws;[2] and (2) article XI, section 8, which prohibits special legislation for the benefit of specific individuals or localities absent a rational basis for the disparate treatment.[3] The question posed requires analysis under each provision.

The analysis and the conclusion in the 2018 Attorney General opinion concerning very similar legislation designed to exempt Obion County from the operation of § 67-4-1425 apply equally to the proposed legislation designed to exempt the city of Athens from that provision:

> Article I, section 8 and article XI, section 8 [of the Tennessee Constitution] prohibit legislation that treats some counties differently than others without a rational basis for the classification. *Civil Serv. Merit Bd. v. Burson,* 816 S.W.2d 725, 730-02 (Tenn. 1991). . . . [A]rticle I, section 8 "guarantees equal protection of the laws," and article XI, section 8 "restricts the legislature from enacting 'special legislation' for the benefit of specific individuals or localities in an arbitrary or capricious manner." Tenn. Att'y Gen. Op. 18-10 (Mar. 14, 2018).
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> . . . [W]ith respect to a narrow population bracket . . . , the test would be "whether a rational basis exists for the narrow population classification that suspends the general law" prohibiting double taxation only as to Obion County. Tenn. Att'y Gen. Op. 13-37 (May 2, 2013).
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> The proposed legislation, through a narrow population bracket, would have the effect of exempting Obion County from the prohibition against double taxation without providing any rationale. And no rationale unique to a county with a population in that particular range is otherwise apparent. Accordingly, a court would likely conclude that the proposed legislation is unconstitutional because there appears to be no rational basis on which to justify the narrow population-bracket classification. *See Knoxville Cmty. Dev. Corp. v. Knox County*, 665 S.W.2d

[1] *See, e.g.*, Tenn. Att'y Gen. Op. 18-18 (Apr. 4, 2018) (concluding that a narrow population bracket exempting Obion County from § 67-4-1425 would raise significant constitutional concerns); Tenn. Att'y Gen. Op. 13-37 (May 2, 2013) (concluding that the exemption of Williamson County by means of a narrow population bracket was likely unconstitutional because the Office could not "identify any rational basis why Williamson County should be treated differently than any other county in the State"); Tenn. Att'y Gen. Op. 08-80 (Apr. 3, 2008) (concluding an exemption of four counties based on narrow population brackets at the request of local officials was likely unconstitutional); Tenn. Att'y Gen. 99-104 (May 10, 1999) ("It is difficult to argue that there is a rational basis for the application of a statute to a single county based on a two-hundred-person population bracket[.]").

[2] "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the law."

[3] "The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of the law."

> 704, 705 (Tenn. 1984) (finding "no reason to justify the discriminatory classification" of a narrow population bracket); *Nolichuckey Sand Co. v. Huddleston*, 896 S.W.2d 782, 789 (Tenn. Ct. App. 1994) (finding "no underlying rationale" to support "myriad population exclusion brackets" in a tax law). As the Court of Appeals has recognized in analyzing a similar statute that exempted Hamilton County from a generally applicable provision, "even the generous rational basis standard requires that an exclusion based on a population bracket have some relation to a distinctive characteristic of that size population." *Chattanooga Metro. Airport Auth. v. Thompson*, No. 03A01-9610-CH-00319, 1997 WL 129366, at *3 (Tenn. Ct. App. Mar. 24, 1997) (no perm. app. filed).

Just as did the Obion County exemption, the proposed legislation would raise significant constitutional concerns, and a court would likely find the exemption to be in violation of article I, section 8 or article XI, section 8, or both. The proposed legislation does not single out the city of Athens by name or base the exemption on unique characteristics of the city. The exemption is based solely on the very narrow, 100-person population bracket. But there is no apparent rationale for exempting from the law only a city in the specified, narrow population range located in a county within the specified, narrow population range but not exempting cities of comparable size in other counties or cities with somewhat smaller populations within the same county.[4]

It appears that there are currently at least 30 exemptions to § 67-4-1425, and it has been suggested that the numerosity of exemptions renders § 67-4-1425 no longer "a general law" and therefore not subject to article XI, section 8 of the Tennessee Constitution. *See Rector v. Griffith*, 563 S.W.2d 899, 904 (Tenn. 1978) (rejecting an art. XI, § 8 challenge to a law altering the method of selection of a local utility board because the legislation did not "offend[] any general law which is obligatory or . . . violate[] any uniform state policy"); *Long v. Blount Cty. Elec. Comm'n*, 854 S.W.2d 894, 895 (Tenn. Ct. App. 1993) (upholding a narrow population bracket exemption under art. XI, § 8 because there was "no general 'rule,' only exceptions applying to various counties").

But the *Rector/Long* precedent underlying that suggestion is distinguishable since it applies only to "legislation affecting the structure and organization of local governmental units," i.e. legislation that is not "designed or intended to confer a special benefit or privilege." *Rector*, 563 S.W.2d at 904; *see also Nolichuckey Sand Co., Inc. v. Huddleston*, 896 S.W.2d 782, 789 (Tenn. Ct. App. 1994) (rejecting application of *Rector* and *Long* to a revenue statute containing numerous population-bracket exceptions—the very same kind of statute as the proposed legislation). Moreover, even if the courts were to conclude that article XI, section 8 did not apply to the proposed legislation, the exemption for the city of Athens would still have to pass muster under Tennessee's equal protection clause, i.e., article I, section 8 of the Tennessee Constitution, which prohibits classifications among cities and counties absent a rational basis for the classification. *See* Tenn. Att'y Gen. Op. 97-34 (Mar. 31, 1997) (concluding that even though proposed legislation would not violate art. XI, § 8 because no "general law" existed, it would,

[4] By contrast, in the *Admiralty Suites* decision, the Court of Appeals upheld the constitutionality of legislation—which exempted Shelby, Williamson, and Rutherford County from the double-taxation prohibition in § 67-4-142—based on evidence from experts supporting a rationale for the differential treatment of those three fast-growing, large counties. *Id.* If similar evidence relevant to the population of the city of Athens could be marshalled in favor of the proposed legislation, it could potentially withstand constitutional scrutiny under the reasoning of *Admiralty Suites*.

nevertheless, violate art. I, § 8 because it lacked a rational basis). And because no such rational basis is apparent, the proposed legislation designed to exempt only the city of Athens from § 67-4-1425 would likely be held unconstitutional under article I, section 8 (the equal protection clause) of the Tennessee Constitution even if it escaped scrutiny under article XI, section 8 (the special legislation clause) of the Tennessee Constitution.

In sum, both article I, section 8 and article XI, section 8 of the Tennessee Constitution require that a population bracket designed to exempt a particular county or municipality from a tax law be supported by some rational basis related directly to the size of the bracketed population. Because there does not appear to be such a rational basis for creating a narrow population-bracket exception from Tenn. Code Ann. § 67-4-1425 for the city of Athens, the proposed legislation raises significant constitutional concerns.

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