

**STATE OF TENNESSEE  
OFFICE OF THE ATTORNEY GENERAL**

**February 24, 2016**

**Opinion No. 16-07**

**Constitutionality of Legislation Adding “Affordable Housing” and “Workforce Housing” to  
Definition of “Public Works Project” under the Local Government Public Obligations Act**

**Question**

Whether legislation providing that a metropolitan government may issue bonds and notes under the Local Government Public Obligations Act must provide for a referendum under article II, section 29 of the Tennessee Constitution?

**Opinion**

Yes.

**ANALYSIS**

The Local Government Public Obligations Act of 1986 authorizes local governments to fund “public works projects” through several types of financing methods, assuming the local government meets applicable statutory requirements. *See generally* Tenn. Code Ann. §§ 9-21-101 to -1104. The financing methods specifically authorized by the Act include general obligation bonds, revenue bonds, bond anticipation notes, capital outlay notes, grant anticipation notes, and tax anticipation notes. *See id.*

The Act’s definition of “public work project” covers a wide range of projects. *See* Tenn. Code Ann. § 9-21-105(21). Tennessee House Bill 1426/Senate Bill 1446, 109th Gen. Assem. (2016), would amend this definition to add the following:

Facilities or expenditures paid or incurred with respect to development of affordable housing or workforce housing in a county having a metropolitan form of government with a population of not less than six hundred thousand (600,000), according to the 2010 federal census or any subsequent federal census, including expenditures related to a housing trust fund established in accordance with title 7, chapter 8 or title 13, chapter 23, part 5.

The proposed law does not define “affordable housing” or “workforce housing,” but the General Assembly defined these terms last year when it passed legislation to authorize county legislative bodies to appropriate funds for these types of housing. *See* 2015 Pub. Acts, ch. 377 (codified at Tenn. Code Ann. § 5-9-113). The Act provides:

(1) “Affordable housing” means housing that, on an annual basis, costs thirty percent (30%) or less than the estimated median household income for households

earning sixty percent (60%) or less than the median household income for the applicable county based on the number of persons in the household, as established by the “Median Household Income in the Past 12 Months by Household Size” (B19019) from the most recently available United States Census Bureau American Community Survey; and

(2) “Workforce housing” means housing that, on an annual basis, costs thirty percent (30%) or less than the estimated median household income for households earning more than sixty percent (60%) and not to exceed one hundred twenty percent (120%) of the median household income for the applicable county based on the number of persons in the household, as established by the “Median Household Income in the Past 12 Months by Household Size” (B19019) from the most recently available United States Census Bureau American Community Survey.

*Id.* at § 1 (codified at Tenn. Code Ann. § 5-9-113(b)).

On the same date that the General Assembly passed this Act, the General Assembly also expanded a metropolitan government’s enumerated functions to include the utilization of certain real property for affordable or workforce housing:

Upon the acquiring of real property pursuant to § 67-5-2507(a) or § 67-5-2508<sup>1</sup> by any county having a metropolitan form of government, and after the period of redemption has lapsed, the legislative body of the county having a metropolitan form of government may, by resolution, authorize the conveyance of the real property by grant to a nonprofit organization for the purpose of constructing affordable or workforce housing. The grant shall be in accordance with the regulations and guidelines of the county having a metropolitan form of government for the disposal of real property, which shall provide generally that any real property granted pursuant to this subsection (e) shall be used to construct affordable or workforce housing for residents of the county having a metropolitan form of government.

2015 Pub. Acts, ch. 410, § 1 (codified at Tenn. Code Ann. § 7-3-314(e)).

Article II, section 29 of the Tennessee Constitution provides in pertinent part:

Sec. 29. Counties and towns—Power to tax—Credit.—The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for County and Corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation. But the credit of no County, City, or Town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified

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<sup>1</sup> These statutory provisions address the purchase of real property by a local governmental entity at a delinquent tax sale.

voters of such county, city or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder with others in any company, association or corporation except upon a like election, and the assent of a like majority.

This constitutional provision applies to any “county, city, or town” – entities to which the General Assembly may delegate taxing authority. *Ragsdale v. City of Memphis*, 70 S.W.3d 56, 66 (Tenn. Ct. App. 2001) (citations omitted). Because a metropolitan government is clearly a taxing authority,<sup>2</sup> this constitutional provision applies to its financing transactions.

The first sentence of article II, section 29 prohibits counties and cities from appropriating funds for anything but a public purpose. See *Metropolitan Dev. and Hous. v. Leech*, 591 S.W.2d 427, 429 (Tenn. 1979); *Southern v. Beeler*, 183 Tenn. 272, 300, 195 S.W.2d 857, 869 (1946). The lending-of-credit clause, which follows, also requires that expenditures be for public purposes. It is “fundamental that the public taxes or, which is the same thing, the public credit can not be donated or applied to anything but a public use . . . .” *McConnell v. City of Lebanon*, 203 Tenn. 498, 509, 314 S.W.2d 12, 17 (1958). Tennessee courts have found that the word “credit” as used in the lending-of-credit clause implies the creation of some new financial liability upon a county, city or town which in effect results in the creation of a public debt for the benefit of private enterprise. *Copley v. County of Fentress*, 490 S.W.2d 164, 169 (Tenn. Ct. App. 1972). See *Ragsdale*, 70 S.W.3d at 69-70. Thus, the issuance of bonds and notes under the Local Government Public Obligations Act is a form of credit subject to the constraints of the lending-of-credit clause. See *City of Chattanooga v. Harris*, 223 Tenn. 51, 60, 442 S.W.2d 602, 607 (1969); *McConnell*, 203 Tenn. at 539, 314 S.W.2d. at 29.

Turning to Tennessee House Bill 1426/Senate Bill 1446, we initially observe that the development of affordable housing or workforce housing constitutes a public purpose. Our courts have found that a public purpose is anything that promotes the public health, safety, morals, general welfare, security, prosperity, and contentment of the residents within the municipal corporation. *Shelby Cnty. v. Exposition Co.*, 96 Tenn. 653, 661, 36 S.W. 694, 695 (1896); *Nichol v. Mayor of Nashville*, 28 Tenn. 252, 269-70 (1848). Accord *Ragsdale*, 70 S.W.3d at 73-74. Moreover, “an enterprise does not lose its character of a public use because of the fact that its service may be limited by circumstances to a comparatively small part of the public.” *Knoxville Hous. Auth. v. City of Knoxville*, 174 Tenn. 76, 84, 123 S.W.2d 1085, 1088 (1939). Accord *West v. Tennessee Hous. Dev. Auth.*, 512 S.W.2d 275, 279 (1974); *Imboden v. City of Bristol*, 132 Tenn. 562, 565, 179 S.W. 147, 148 (1915). Accordingly, our courts have found that the provision of housing accommodations for persons of limited means serves a public purpose. *West*, 512 S.W.2d at 280; *Knoxville Hous. Auth.*, 174 Tenn. at 84, 123 S.W. at 1088. See *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 369 (2009).

Consequently, the remaining question is whether a metropolitan government’s assumption of obligations under the Local Government Public Obligations Act must be approved by a referendum under article II, section 29. As explained in the Tennessee Supreme Court’s landmark decision of *Berry v. Shelby County*, the election requirement turns on whether the public purpose

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<sup>2</sup> See Tenn. Code Ann. 7-2-108; *Metropolitan Gov’t of Nashville and Davidson Cnty. v. Schatten Cypress Co.*, 530 S.W.2d 277, 281 (Tenn. 1975).

served is direct or indirect. The *Berry* case involved an action to enjoin the issuance of bonds by Shelby County in aid of Bolton College, a private school. *Berry v. Shelby Cnty.* 139 Tenn. 532, 278 S.W. 748 (1918). After setting forth a list of municipal actions that had been held to be examples of public purposes, the Court stated:

It is perceived that some of the purposes are direct, as public bridges, public schools, waterworks, gasworks, . . . whilst others, as the construction of a railroad into a county, or into a city are indirect. The former promote directly the welfare of the county or city, while the latter effect this result in an incidental way, . . .

Where the purpose is direct, and is accomplished by direct action of the county or city, as in building, or employing others to build for it, . . . to be owned by the county or city, the matter falls under the first paragraph of section 29 of article 2, . . . the Legislature need not require an election; . . .

*Berry*, 139 Tenn. at 542-43, 201 S.W. at 750. The Court also clarified that an election is required even if a direct purpose is present if the purpose is made effective by the city's lending of its credit to some other corporation, company, association, or person. *Id.* at 543, 201 S.W. at 751. Consequently, the Court held the county's proposed issuance of bonds void because the county had failed to submit the proposition to a vote of the people of Shelby County.

The development of affordable and workforce housing authorized by House Bill 1426/Senate Bill 1446 constitutes an indirect public purpose because it promotes the public welfare within a metropolitan government in an incidental way. A direct public purpose is not present because the housing will be used by private individuals. Accordingly, we are of the opinion that House Bill 1426/Senate Bill 1446 must provide for a referendum under article II, section 29. *See, e.g., Mayor of Fayetteville v. Wilson*, 212 Tenn. 55, 58, 367 S.W.2d 772, 774 (1963) (election was required when proceeds of bonds were to be used to improve or construct industrial buildings to be leased to private firms); *Berry*, 139 Tenn. 538, 201 S.W. at 749 (referendum required for issuance of bonds in aid of private college that educated county residents).

In the absence of such a referendum provision, the statute would be fatally incomplete and void. *Berry*, 139 Tenn. 544-45, 201 S.W. at 751.

An election cannot be held unless its holding be directed by law. The Constitution does not order it. It only makes the election a condition of the validity of the lending of the aid of the county or city. It seems clear that the act authorizing the lending of credit should provide for the election; otherwise it is fatally incomplete and is void.

*Id.* *See Jarrolt v. Moberly*, 103 U.S. 580, 587-88 (1880) (elections held by counties, cities or towns without legislative direction or authority are futile).

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