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## Hot Topic: The Recent Attorney General Opinion and Its Effect on the Availability of Development Taxes and Impact Fees to Municipalities

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# MTAS Municipal Technical Advisory Service

*In cooperation with the  
Tennessee Municipal League*

#137

HOT  
topic

**February 27, 2007**

## **THE RECENT ATTORNEY GENERAL OPINION AND ITS EFFECT ON THE AVAILABILITY OF DEVELOPMENT TAXES AND IMPACT FEES TO MUNICIPALITIES**

**Josh Jones, Legal Consultant**

Until recently, the cities of Tennessee had two means of raising revenue through private act to ensure adequate facilities for all new developments within their borders: adequate facilities taxes and impact fees. Both of these revenue sources are commonly referred to as “privilege taxes” on development. For cities, taxes are generally preferable to fees, whose expenditure must be directly related to costs. Conversely, cities may spend taxes with far less restraint. Particularly in fast-growing cities, both taxes and fees have the potential to provide much needed revenue to meet increased demands on infrastructure and government services. Recent legislation and subsequent elucidation bring the availability of these revenue sources into question. Since the passage of the County Powers Relief Act (T.C.A. § 67-4 Part 29) and its interpretation by the recent attorney general opinion (Opinion No. 07-06), it appears that municipalities:

1. MAY NOT levy any new or increase any existing adequate facilities taxes; and
2. MAY levy new and increase any existing impact fees with proper legislative authorization.

The development taxing authority of local governments was significantly altered by the County Powers Relief Act, which went into effect June 20, 2006. The act provides for

a privilege tax to be “the exclusive taxing authority for local governments to adopt new or additional adequate facilities taxes on development.” This privilege tax must be subsequent to the adoption of a capital improvement program and, more importantly, is not available to cities. Additionally, the act precludes subsequent adequate facilities taxes and impact fees for counties but only restricts cities in their ability to enact new adequate facilities taxes.

This new law caused much discussion among local government officials who were unsure of the statute’s effect on local taxing authorities. Then recently, a Tennessee county attempted to enact a new development tax. The tax initiative was challenged, and the issue was brought before the attorney general. The question presented to the attorney general was, “Does this provision (the County Powers Relief Act) prohibit any county or municipality which has imposed any type of development tax prior to June 20, 2006, from increasing the tax in existence on that date?” The nonbinding opinion holds that counties are now precluded from enacting any further impact fee or development tax. For cities, the crux of the opinion lies in the last sentence, which reads, “... any private act passed after June 20, 2006, and authorizing a county or municipality to impose a new development

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tax or adequate facilities tax or to increase the rate of such a preexisting tax would be invalid because it would be in conflict with the general law expressed in Tenn. Code Ann. § 67-4-2913.” A municipality with a development tax enacted under a private act prior to June 20, 2006, may still levy this tax for so long as the private act is in effect. Subsequent legislation authorizing new or amending existing development taxes is invalid.

Municipalities are seemingly still at liberty to impose impact fees on new developments. The language of T.C.A. § 67-4-2913 states that “no county shall be authorized to enact an impact fee on development,” clearly speaking to counties. In the same paragraph, referring to previously enacted development taxes, the author specifically mentions

municipalities, as do other sections of the act. This leads the reader to assume that the omission of municipalities from the ban on impact fees was deliberate and that such fees are still a viable option for cities.

The attorney general’s opinion solidifies the fears of many city officials, as it confirms that the new law nullifies the authority of cities to levy adequate facilities taxes after the effective date. The County Powers Relief Act considerably limits the options of Tennessee cities in meeting the needs of their expanding populations. Some cities may be able to make up this lost revenue with impact fees. Others may be forced to raise property taxes or refinance debt structures. Only time will tell.

For more information, please contact your MTAS municipal management consultant.

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