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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, METROPOLITAN NASHVILLE BOARD OF PUBLIC EDUCATION, and SHELBY COUNTY GOVERNMENT,

Plaintiffs,

v. No. 20-0143-II

TENNESSEE DEPARTMENT OF EDUCATION, PENNY SCHWINN, in her official capacity as Education Commissioner for the Tennessee Department of Education, and BILL LEE, in his official capacity as Governor for the state of Tennessee,

Defendants.

GREATER PRAISE CHRISTIAN ACADEMY; SENSATIONAL ENLIGHTENMENT ACADEMY INDEPENDENT SCHOOL; CIERA CALHOUN; ALEXANDRIA MEDLIN; AND DAVID WILSON, SR.'S [PROPOSED] MEMORANDUM OF LAW AND FACTS IN SUPPORT OF MOTION TO DISMISS UNDER RULE 12.02(8) AND 12.02(6)

INTRODUCTION

In May, 2019, the State of Tennessee enacted the Tennessee Education Savings Account ("ESA") Pilot Program to help low-income students in low-performing school districts. Tenn. Code Ann. § 49-6-2601 – § 49-6-2612. The ESA Pilot Program awards an ESA to qualifying students to attend a participating private school. Earlier this month, Plaintiffs filed this action against the state, arguing that the ESA Pilot Program is unconstitutional and that it should be enjoined from starting this August.

Greater Praise Christian Academy and Sensational Enlightenment Academy Independent

School (the "Schools") and Ciera Calhoun; Alexandria Medlin; and David Wilson, Sr., on behalf of themselves and their minor children (the "Parents"), moved to intervene in the case as Defendants. Attached to their Memorandum of Law and Facts in Support of their Motion to Intervene, they filed a Motion to Dismiss pursuant to Rules 12.02(8) and 12.02(6) of the Tennessee Rules of Civil Procedure, and they also attach this Memorandum of Law and Facts in Support of their Motion to Dismiss.

In support of this Memorandum, the Schools and Parents state the following. Plaintiff Metropolitan Nashville Board of Public Education should be dismissed as a party from the case, pursuant to Tenn. R. Civ. P. 12.02(8) and 9.01, because it is barred from bringing the lawsuit under the explicit terms of the ESA Pilot Program. Also, a motion to dismiss for failure to state a claim is the appropriate vehicle for deciding counts in a complaint when those claims are plainly foreclosed by existing law. *Gibson v. Solideal USA, Inc.*, 489 F. App'x 24, 30 (6th Cir. 2012) (construing cognate F.R.C.P. 12(b)(6)). Count 1 of the Complaint runs headlong into precedent interpreting the Tennessee Constitution's home rule clause. Count 2 cannot be justified under the generous rational basis review that Tennessee courts afford legislative decisions. Count 3 is directly contrary to existing Tennessee Supreme Court precedent interpreting the Tennessee Constitution's education clause. Therefore, the entire Complaint should be dismissed.

FACTUAL BACKGROUND

The ESA Pilot Program

The ESA Pilot Program "provides funding for access to additional educational options to students who reside in [public school districts] that have consistently and historically had the lowest performing schools." Tenn. Code. Ann. § 49-6-2611(a)(1). In particular, the pilot program is open to Kindergarten - 12th grade students whose annual household income is less than or

equal to twice the federal income eligibility guidelines for free lunch. Tenn. Code. Ann. § 49-6-2602(3).[1] The student must have attended a Tennessee public school the prior school year, must be entering Kindergarten for the first time, must have recently moved to Tennessee, or must have received an ESA the prior year. Tenn. Code. Ann. § 49-6-2602(3)(A). Finally, an eligible student must reside in a neighborhood zoned to attend a school in the Achievement School District, which runs the state's lowest performing schools, or reside in a school district with ten or more schools identified as priority schools in 2015, with ten or more schools among the bottom ten percent of schools in 2017, and with ten or more schools identified as priority schools in 2018. Tenn. Code. Ann. § 49-6-2602(3)(C).

The ESA provides each student with his or her per pupil expenditure of state funds from the Basic Education Program (BEP) as well as a portion of the local BEP funds to create an individualized education savings account. Tenn. Code. Ann. § 49-6-2605(a). The amount of the ESA will be approximately $7,100 for the school year beginning in August. *See* Education Savings Accounts Explained, available at https://www.schoolchoicetn.com/education-savings-accounts-explained/ (retrieved Feb. 19, 2020). The ESA can be used for a wide variety of educational services approved by the Department of Education: private school tuition, textbooks, computers, school uniforms, school transportation, tutoring, summer or afterschool educational programs, and college admission exams. Tenn. Code. Ann. § 49-6-2603(a)(4). The ESA is different from a school voucher, which can only be used for private school tuition, because of its flexibility in spending and because any unused funds in the individualized account roll over each

[1] The maximum eligible income is $43,966 for a household of two, and it increases with household size. *See* 84 Fed. Reg. 54 (Mar. 20, 2019), available at https://www.govinfo.gov/content/pkg/FR-2019-03-20/pdf/2019-05183.pdf (retrieved Feb. 19, 2020).

year. Tenn. Code. Ann. § 49-6-2603(l). Any unused ESA funds remaining after 12th grade may be rolled over into a college fund for tuition, fees, and textbooks at eligible colleges and universities, vocational, technical, or trade schools. Tenn. Code. Ann. § 49-6-2603(g).

A participating private school must be a Category I (approved by the Department of Education), Category II (approved by a private school accrediting agency), or Category III (regionally accredited) private school. Tenn. Code. Ann. § 49-6-2602(9). A participating private school also must administer the state end-of-year Tennessee Comprehensive Assessment Program (TCAP) tests for Math and English Language Arts for students with an ESA in grades 3-11 each year. Tenn. Code. Ann. § 49-6-2606(a).

In order to "assist the general assembly in evaluating the efficacy" of the ESA Pilot Program, "the office of research and education accountability (OREA), in the office of the comptroller of the treasury, shall provide a report to the general assembly" at the end of the third year of the pilot program and each year thereafter. Tenn. Code. Ann. § 49-6-2611(a)(2). The report will include participating student performance, graduation rates, parental satisfaction, audit reports, and recommendations for legislative action if the list of low-performing school districts changes based on the most recent data from the Department of Education. Tenn. Code. Ann. § 49-6-2606(c); Tenn. Code. Ann. § 49-6-2611(a)(2).

Finally, the ESA Pilot Program creates a school improvement fund to pay financially affected school districts for children that they no longer have to educate. Tenn. Code. Ann. § 49-6-2605(b)(2)(A). This ghost reimbursement lasts for three years after children have left the school system. *Id*. The ESA Pilot Program is capped at five thousand students in year one, rising to fifteen thousand students in year five. Tenn. Code. Ann. § 49-6-2604(c). Any leftover funds from the ghost reimbursement fund must be disbursed as an annual school improvement grant to

other school districts that have priority schools. Tenn. Code. Ann. § 49-6-2605(b)(2)(A). After the first three years, the school improvement fund will be disbursed as school improvement grants for programs to support priority schools throughout the state. *Id*.

The Complaint

On February 6, 2020, the Complaint in this case was filed by three Plaintiffs: 1) Metropolitan Government of Nashville and Davidson County, 2) Metropolitan Nashville Board of Public Education, and 3) Shelby County Government. The Complaint asserts that the ESA Pilot Program violates the Tennessee Constitution in three counts. Count I of the Complaint alleges a violation of Article XI, Section 9 of the Tennessee Constitution, which prohibits legislation that is local in effect without consent from the local legislature or electorate. Count II of the Complaint alleges a violation of the Tennessee Constitution's Equal Protection clauses in Article I, Section 8 and Article XI, Section 8, which prohibits classifications that are not rationally related to a legitimate state interest. Count III of the Complaint alleges a violation of Article XI, Section 12 of the Tennessee Constitution, which requires the General Assembly to establish and support a system of public education that provides substantially equal educational opportunities to all students.

ARGUMENT

Plaintiff Metropolitan Nashville Board of Public Education ("Metro Bd. of Ed.") should be dismissed as a party from the case, pursuant to Tenn. R. Civ. P. 12.02(8) and 9.01, because the party does not have the capacity to bring the lawsuit. Tenn. Code Ann. § 49-6-2611(d) specifically bars a "local board of education," which is a creature of the state, from challenging the legality of the Tennessee Education Savings Account ("ESA") Pilot Program, Tenn. Code Ann. § 49-6-2601 – § 49-6-2612.

Count I of the Complaint, alleged violation of Article XI, Section 9 of the Tennessee Constitution, should be dismissed because the ESA Pilot Program is not "applicable to a particular county or municipality," as required for a violation of that constitutional provision. Tenn. Const. Art. XI, Sec. 9.

Count II of the Complaint, alleged violation of the Tennessee Constitution's Equal Protection clauses in Article I, Section 8 and Article XI, Section 8, should be dismissed because the legislature expressed a rational basis to begin the ESA Pilot Program with "the LEAs that have consistently had the lowest performing schools on a historical basis." Tenn. Code Ann. § 49-6-2611(a)(1).

Count III of the Complaint, alleged violation of Article XI, Section 12 of the Tennessee Constitution, should be dismissed for three reasons. First, when school districts lose students, they may reduce their funding. *See* Opinion of Attorney General Robert E. Cooper, Jr., No. 08-194 (Dec. 29, 2008). Second, the education clause does not require equality of funding but quality and equality of education. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 156 (Tenn. 1993). Third, the clause allows for innovation through pilot programs: "Given the very nature of education, an adequate system, by all reasonable standards, would include innovative and progressive features and programs." *Id; see also* Opinion of Attorney General Robert E. Cooper, Jr., No. 13-27, at *7-8 (March 26, 2013).

I. Metro Bd. of Ed. lacks the capacity to sue.

Legal capacity is a doctrine closely related to but distinct from standing; it asks whether a party has a "personal or official right to litigate the issues presented by the pleadings; . . . and is not dependent upon the character of any claim." *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976). Tennessee Rule of Civil Procedure 9.01 provides:

> When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or to be sued in a representative capacity, he or she shall do so by specific negative averment . . . .

Tenn. R. Civ. P. 9.01. Further, Tennessee Rule of Civil Procedure 12.02(8) permits a motion to dismiss based on "specific negative averments made pursuant to Rule 9.01." *Accord Byrn v. Metro. Bd. of Pub. Educ*., Appeal No. 01-A-01-9003-CV-00124, 1991 Tenn. App. LEXIS 46, at *6 n.1 (Ct. App. Jan. 30, 1991), attached as Exhibit 1 (this very same party, the Metro Bd. of Ed., brings a motion to dismiss under Rule 12.02(8) asserting that it lacked the legal capacity to be sued in a dispute with its employees). Finally, Tennessee Rule of Civil Procedure 17.02 provides that "[t]he capacity of any party to sue or be sued shall be determined by the law of this state."

Defendant-Intervenors specifically negatively aver, pursuant to Rule 9.01, that the Metro Bd. of Ed. lacks the capacity to bring this suit, pursuant to the law of this state; therefore, the Metro Bd. of Ed. should be dismissed from the case, pursuant to Rule 12.02(8). The Metro Bd. of Ed. is a local board of education under Tennessee law. *See* Tenn. Code Ann. §§ 49-2-201 -- 49-2-213. As such, it exists and has its powers and authorities at the sufferance of the Legislature. *Hamblen Cty. v. Morristown*, 584 S.W.2d 673, 675 (Tenn. Ct. App. 1979). The Legislature may confer powers on local boards of education, and the Legislature may limit or withdraw powers for local boards of education. *Knox Cty. v. Knoxville*, Nos. 736, 737, 1987 Tenn. App. LEXIS 3225, at *27-28 (Tenn. Ct. App. Dec. 30, 1987), attached as Exhibit 2. *Accord Byrn v.* 1991 Tenn. App. LEXIS at *12.

The Legislature, in the exercise of its plenary power over public education, has decided to limit the authority of local boards of education to bring or fund legal challenges against the ESA Pilot Program. Tennessee Code Annotated § 49-6-2611(d) provides that, "A local board of

education does not have authority to assert a cause of action, intervene in any cause of action, or provide funding for any cause of action challenging the legality of this part," referring to the ESA Pilot Program at issue in this case. Because the Metro Bd. of Ed. is a local board of education, it lacks the legal capacity, or authority, to assert the cause of action in this case, and therefore, must be dismissed as a party.

II. The Home Rule clause only prohibits legislation targeting one specific county.

The Home Rule clause of the Tennessee Constitution provides:

> The General Assembly shall have no power to pass a special, local or private act having the effect of removing the incumbent from any municipal or county office or abridging the term or altering the salary prior to the end of the term for which such public officer was selected, and any act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval of a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.

Tenn. Const. Art. XI, § 9.

Plaintiffs allege that the ESA Pilot Program violates this provision because it currently affects only two counties. Compl. ¶¶ 175-188. However, this provision of the constitution only applies when a legislative act applies to a single ("particular") county. *See, e.g., Lawler v. McCanless*, 417 S.W.2d 548, 553 (Tenn. 1967); *Chattanooga-Hamilton Cty. Hosp. Auth. v. Chattanooga*, 580 S.W.2d 322, 328 (Tenn. 1979); *Farris v. Blanton*, 528 S.W.2d 549, 552 (Tenn. 1975); *First Util. Dist. v. Clark*, 834 S.W.2d 283, 287 (Tenn. 1992).

A law that applies to multiple counties, even if small in number, does not violate the Home Rule Clause. *Bozeman v. Barker*, 571 S.W.2d 279 (Tenn. 1978) (two counties); *Civil Serv. Merit Bd. v. Burson*, 816 S.W.2d 725, 730 (Tenn. 1991) (three counties); *Frazer v. Carr*, 360 S.W.2d 449 (Tenn. 1962) (four counties).

Additionally, the Legislature is free to use categories or classifications that may currently affect only a small number of counties but are flexible to change or add additional counties over time. *Cty. of Shelby v. McWherter*, 936 S.W.2d 923, 935-36 (Tenn. Ct. App. 1996) (law applicable to a population category that currently includes only one county does not violate home-rule clause); *Doyle v. Metro. Gov't of Nashville & Davidson Cty*., 471 S.W.2d 371, 373 (1971) (law applicable to a type of municipal government that at the time only included one municipality does not violate home-rule clause); *Metro. Gov't of Nashville & Davidson County v. Reynolds*, 512 S.W.2d 6, 9-10 (Tenn. 1974) (same). *See Burson*, 816 S.W.2d at 728-30 (discussing Legislature's prerogative of classification). *See also* Opinion of Attorney General Robert E. Cooper, Jr., No. 09-04, at *1-2 (Jan. 22, 2009) ("The fact that a law, at the time of its enactment, applies to one municipality only will not necessarily affect its validity. The test is whether the statue could potentially apply to any other municipality, even though, at the time of enactment, the statute applied to a single municipality. *Civil Service Merit Bd. v. Burson*, 816 S.W.2d 725, 729 (Tenn. 1991). If a statute could only ever apply to one county without further action of the General Assembly, it would then be in violation of Art. XI, § 9. *Farris v. Blanton*, 528 S.W.2d 549, 552-53 (Tenn. 1975).").

Plaintiffs rely in their complaint on two cases, *Farris v. Blanton*, 528 S.W.2d 549 (Tenn. 1975) and *Leech v. Wayne Cty*., 588 S.W.2d 270, 270 (Tenn. 1979). Compl. ¶¶ 177, 181, 182. Both cases are over forty years old. And both are inconsistent with the Supreme Court's later precedent, particularly *Burson*. In fact, *Burson* specifically cabins *Farris* to its unique situation, not applicable here, that "only Shelby County was affected by the statute at the time of passage and that no other county was potentially affected by it." 816 S.W.2d at 729. *Accord* A.G. Cooper, Opinion No. 09-04, at *2.

The ESA Pilot Program applies to a student who

> (i) Is zoned to attend a school in an LEA, excluding the achievement school district (ASD), with ten (10) or more schools: (a) Identified as priority schools in 2015, as defined by the state's accountability system pursuant to § 49-1-602; (b) Among the bottom ten percent (10%) of schools, as identified by the department in 2017 in accordance with § 49-1-602(b)(3); and (c) Identified as priority schools in 2018, as defined by the state's accountability system pursuant to § 49-1-602; or (ii) Is zoned to attend a school that is in the ASD on the effective date of this act.

Tenn. Code Ann. § 49-6-2602(3)(C).

This law obviously meets the constitutional standard for three reasons. One, it applies to a category of school districts (those with at least ten failing schools), not to particularly named districts. Two, it currently applies to more than one county: low-income students in both Davidson and Shelby counties will benefit from the pilot program. Three, its application to the Achievement School District (ASD) means that it could potentially affect any county in Tennessee. The Achievement School District has the authority to operate and oversee schools in the bottom 5% of schools statewide, regardless of where they are geographically located. Tenn. Code. Ann. §§ 49-1-602, 49-1-614. Therefore, the law affects more than one county.

III. The Legislature had a rational basis for starting its ESA Pilot Program in the three school districts with the most failing schools.

Tennessee's Equal Protection clauses, invoked by Plaintiffs' Complaint (¶¶ 190-209), "confer essentially the same protection upon the individuals subject to those provisions" as the Fourteenth Amendment to the U.S. Constitution. *Tenn. Small Sch. Sys. v. McWherter,* 851 S.W.2d 139, 152 (Tenn. 1993). A recent case from the Tennessee Supreme Court recites the relevant law:

> This Court has concluded that Article I, section 8 and Article XI, section 8 of the Tennessee Constitution provide 'essentially the same protection' as the Equal Protection Clause of the United States Constitution. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993). Moreover, when analyzing the merit of an equal protection challenge, this Court has utilized the three levels of scrutiny—strict scrutiny, heightened scrutiny, and reduced scrutiny, which applies

> a rational basis test—that are employed by the United States Supreme Court depending on the right that is asserted. *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994) (citations omitted). 'Strict scrutiny applies when the classification at issue: (1) operates to the peculiar disadvantage of a suspect class; or (2) interferes with the exercise of a fundamental right.' *Gallaher*, 104 S.W.3d at 460 (citation omitted). Heightened scrutiny applies to cases of state sponsored gender discrimination. *See United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982)); *Mitchell v. Mitchell*, 594 S.W.2d 699, 701 (Tenn. 1980). Reduced scrutiny, applying a rational basis test, applies to all other equal protection inquiries and examines 'whether the classifications have a reasonable relationship to a legitimate state interest.' *Tenn. Small Sch. Sys*., 851 S.W.2d at 153 (quoting *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988)).

Hughes v. Tenn. Bd. of Prob. & Parole, 514 S.W.3d 707, 715-16 (Tenn. 2017). Plaintiffs' Complaint acknowledges that the rational-basis test is the appropriate test in this case. Compl. ¶ ¶ 198-201, 203, 205-209.

Rational basis review is a "generous" standard of scrutiny. *Chattanooga Metro. Airport Auth. v. Thompson*, C/A NO. 03A01-9610-CH-00319, 1997 Tenn. App. LEXIS 209, at *7 (Tenn. Ct. App. Mar. 24, 1997), attached as Exhibit 3. Courts will uphold the law "if some reasonable basis can be found for the classification, or if any state of facts may reasonably be conceived to justify it." *In re Estate of Combs*, No. M2011-01696-COA-R3-CV, 2012 Tenn. App. LEXIS 597, at *18 (Tenn. Ct. App. Aug. 28, 2012), attached as Exhibit 4.

The ESA Pilot Program has a clear rational basis for several reasons. First, courts recognize that legislatures may create geographically targeted pilot programs to test new public policy ideas. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 214 (Ohio 1999) (state does not violate equal protection by using a classification which enacts reforms for one urban school district); *Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1087 (Pa. 2003) (same); *Welch v. Bd. of Educ.*, 477 F. Supp. 959, 965 (D. Md. 1979) ("The need for freedom of state legislatures to experiment with different techniques and schemes is one of the rational bases for differences..."). *See Davis*

v. Grover, 480 N.W.2d 460, 469 (Wis. 1992) (state justified in recognizing a "substantial distinction" between a single urban school district and all other districts in the state, such that reforms may apply to only that one district). *See also State v. Scott*, 96 Or. App. 451, 453, 773 P.2d 394, 395 (1989) (*citing McGlothen v. Dept. of Motor Vehicles*, 71 Cal App 3d 1005, (1977); *Dept. of Mot. Veh. v. Superior Ct., San Mateo Cty*., 58 Cal App 3d 936, (1976)) (geographically limited pilot program does not violate equal protection).

Second, stripped of the rhetoric, the Plaintiffs' Complaint basically comes down to two classifications: 1) the use of local education agency lines rather than individual schools and 2) the inclusion of two large education agencies and the Achievement School District to the exclusion of all others. Both have several conceivable rational bases.

The state may have chosen to apply the program based on performance of schools in an entire local educational agency rather than to individual schools for administrative convenience, as the agency is the state's standard local subunit for educational programs. *Strehlke v. Grosse Pointe Pub. Sch. Sys.*, 654 F. App'x 713, 721 (6th Cir. 2016). It may have done so to avoid confusion on the part of parents, since it is easier to communicate with parents based on broad, recognized geographic classifications rather than based on quixotic zone boundaries for individual schools. It may have done so to avoid splitting up siblings. In an individual school-based system, a younger sibling may attend a failing elementary school, while an older sibling may attend a non-failing middle school. In fact, this preference to keep siblings together was referenced in the text of the law. *See* Tenn. Code Ann. § 49-6-2604(e)(1). Under the agency-based line, both siblings could use an ESA to attend the same K-8 school.

The Legislature could have set the classification to only cover large urban school districts because these districts have unique challenges that demand policy responses different from those

in rural districts. *See Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 362 (6th Cir. 2002). Fayette and Madison counties, mentioned specifically in the Complaint (¶¶ 204-05), for instance, both have populations under 100,000. The Legislature may also have believed that there are fewer private schools in rural districts, such that it would make sense to limit the initial ESA Pilot Program to urban areas with heavy concentrations of alternative private schools. *See* Nat. Center for Ed. Statistics Geocoding, available at https://nces.ed.gov/programs/edge/Geographic/SchoolLocations. Or the Legislature may have believed that large urban districts were better able to absorb or spread out the fixed costs of buildings and pensions than small rural districts. Or the Legislature may have believed that large urban districts would see greater population growth over time than small rural districts, more promptly replacing students who chose to use the ESA to enroll in a private school.

"[A]s a legislative decision, the rational basis test is satisfied if there is a 'conceivable' or 'possible' reason for the [Legislature's] decision." *Cunningham v. Bedford Cty.*, No. M2017-00519-COA-R3-CV, 2018 Tenn. App. LEXIS 632, at *10 (Tenn. Ct. App. Oct. 29, 2018), attached as Exhibit 5. *Accord* A.G. Cooper, Opinion No. 09-04, at *2 ("To uphold a statute under the rational basis test, all that is required is an articulable justification for its enactment."). The Legislature retains broad freedom to experiment and innovate, including by enacting geographically limited pilot programs. Here the Legislature drew lines based on size and agency that have conceivable, articulable justifications.

These justifications were clearly spelled out in the legislation, so there is no need for the Court to selectively pick through quotations in the Complaint from legislators who opposed the law and deliberately sprinkled the record with language for a court to strike it down. The law laid out its rational basis in clear, plain language, leaving no need to consult legislative history:

> The general assembly recognizes this state's legitimate interest in the continual improvement of all LEAs and particularly the LEAs that have consistently had the lowest performing schools on a historical basis. Accordingly, it is the intent of this part to establish a pilot program that provides funding for access to additional educational options to students who reside in LEAs that have consistently and historically had the lowest performing schools.

Tenn. Code Ann. § 49-6-2611(a)(1). Therefore, the rational basis test is obviously met, and the count must be dismissed.

IV. The Education Clause of the Tennessee Constitution does not prohibit creating a pilot program to fund low-income students to leave failing school districts for a better education.

The Education Clause of the Tennessee Constitution provides:

> The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such postsecondary educational institutions, including public institutions of higher learning, as it determines.

Tenn. Const., Art. XI, § 12. Plaintiffs allege the ESA Pilot Program violates this clause by limiting the pilot program to two counties, which will result in unequal educational opportunities because only these two counties will face an inequitable diversion of public funds from their local public schools. Compl. ¶¶ 210-18. In other words, school districts in every other county can hold on to their students and dollars, whereas these districts will have fewer dollars because of the ESAs.

This argument fails on several counts. First, the ESA Pilot Program is built on the simple principle that the dollars follow the child. If a student enrolls using an ESA rather than choosing a local education agency's school, that agency is excused from educating that child. Though the dollars go from the agency to the ESA, so too, does the responsibility for education. The agency does not have to pay for teaching, curriculum, services, supplies, or the numerous other costs that come with educating that child. And for those children who choose to remain in the system (or

are prevented from leaving by the enrollment caps built into the ESA program), the Plaintiffs will continue to receive the same full Basic Education Program (BEP) grants to provide their educations. *See* Opinion of Attorney General Robert E. Cooper, Jr., No. 08-194 (Dec. 29, 2008) (noting that under the Basic Education Program's maintenance-of-effort requirement, school districts may reduce their funding when student population decreases).

Moreover, a three-year special funding stream of $25 million annually to the affected agencies will ease the transition, recognizing that certain fixed costs like buildings and libraries must be covered. Marta W. Aldrich, "Tennessee governor huddles with school leaders in cities affected by his voucher proposal," Chalkbeat.org (April 16, 2019), available at https://chalkbeat.org/posts/tn/2019/04/16/tennessee-governor-huddles-with-school-leaders-in-cities-affected-by-his-voucher-proposal/.

Second, the Education Clause is not simply about quantity of dollars, but quality and opportunity. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 156 (Tenn. 1993) ("The essential issues in this case are quality and equality of education. The issue is not, as insisted by the defendants and intervenors, equality of funding."). Even if the agencies must continue to bear certain fixed costs spread across a smaller student count than they had otherwise projected, this minimal cost would hardly prevent those agencies from providing students "the opportunity to acquire general knowledge, develop the powers of reasoning and judgment, and generally prepare students intellectually for a mature life." *Id*. at 150-51. As long as the agencies can continue to meet the state's constitutional requirement to provide an adequate basic education, the clause is met.[2] *Accord* Tenn. Att'y Gen. Opinion No. 05-078, at *2 (May 10, 2005)

[2] The Complaint focuses on inequitable and unequal funding between different counties; it does not allege that the local education agencies will force such drastic cuts systemwide that they will

(validating a pre-K system only available in certain school districts: "Equal protection does not require absolute equality. Nor does it mandate that everyone receive the same advantages.").

Third, the Tennessee Supreme Court has recognized that the clause gives the Legislature the elbow room it needs to explore alternatives and test pilot programs. "Given the very nature of education, an adequate system, by all reasonable standards, would include innovative and progressive features and programs." *McWherter I*, 851 S.W.2d at 156. When asked to opine on a similar bill providing private school options for parents of children in failing schools, Attorney General Robert E. Cooper, Jr. concluded:

> HB190 provides the parents of a limited number of Tennessee schoolchildren attending the public schools in the bottom five percent in terms of scholastic achievement the voluntary choice of utilizing a voucher program to attend a private school that is subject to state educational requirements. In light of the Tennessee Supreme Court's recognition of the General Assembly's constitutional flexibility in the field of education, the program created by HB190 should be defensible to a facial challenge based upon article XI, section 12, of the Tennessee Constitution.

Tenn. Att'y Gen. Opinion No. 13-27, at *7-8 (March 26, 2013). General Cooper also opined that the Legislature's "broad authority" and "plenary power" granted by the clause permitted another innovative option that had originally affected only students in large urban school districts: charter schools. Tenn. Att'y Gen. Opinion No. 12-68, at *2.

The creation of a pilot program, especially one to help disadvantaged students, is a rational basis for limiting a law's initial effect. *See* Opinion of Attorney General Robert E. Cooper, Jr., No. 07-60 (May 1, 2007). As the Attorney General noted in 2004, "a legislature is allowed to attack a perceived problem piecemeal. . . . Underinclusivity alone is not sufficient to state an equal protection claim." Tenn. Op. Att'y Gen. No. 04-087 (May 5, 2004) (quoting Tenn.

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lack "adequate funding" to carry out their basic missions because of the program. *See Tenn. Small Sch. Sys. v. McWherter* (*McWherter II*), 894 S.W.2d 734, 738-39 (Tenn. 1995).

Op. Att'y Gen. No. 01-106 (June 27, 2001)) (quoting *Howard v. City of Garland*, 917 F.2d 898, 901 (5th Cir. 1990)) (quoting *Jackson Court Condominiums v. City of New Orleans*, 874 F. 2d 1070, 1079 (5th Cir. 1989)) (citing *City of New Orleans v. Dukes*, 427 U.S. 297 (1976)). *See also Opinion of the Justices*, 135 N.H. 549, 608 A.2d 874 (1992) (implementation of a pilot program in one part of the state does not violate equal protection).

Count 3 must also be dismissed. The Legislature has broad authority over education, including the right to test innovative and creative solutions to improve student achievement through a pilot program. The Education Clause of the state constitution concerns quality of opportunity, not quantity of dollars. Even if it did, Plaintiffs will continue to have adequate funds to educate the children who choose to remain in their systems because Plaintiffs will continue to receive the same per pupil Basic Education Program (BEP) dollars as before plus the ghost reimbursement for three years for those children who leave and their share of the $25 million school improvement fund. Tenn. Code. Ann. § 49-6-2605(b)(2)(A).

CONCLUSION

For the reasons stated above, Metro Bd. of Ed. must be dismissed as a Plaintiff in the lawsuit, and all three counts, being foreclosed by clear, on-point precedent, must be dismissed for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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Exhibit

1

Byrn v. Metropolitan Bd. of Public Educ.

Court of Appeals of Tennessee, Middle Section, At Nashville

January 30, 1991, Filed

Appeal No. 01-A-01-9003-CV-00124

Reporter
1991 Tenn. App. LEXIS 46 *; 137 L.R.R.M. 2105

WILLIAM W. BYRN, JR., Plaintiff/Appellant, v. METROPOLITAN BOARD OF PUBLIC EDUCATION and METROPOLITAN NASHVILLE EDUCATION ASSOCIATION, Defendants/Appellees

Prior History: [*1] Appeal from the Second Circuit Court for Davidson County at Nashville, Tennessee; The Honorable Harry S. Lester, Judge.

Disposition: REVERSED AND REMANDED

Case Summary

Procedural Posture
Appellant teacher challenged an order of the Second Circuit Court for Davidson County at Nashville (Tennessee), which granted appellee school board's motion to dismiss the teacher's declaratory judgment action regarding his right to a hearing concerning the school board's decision not to renew his contract.

Overview
The school board decided not to renew the teacher's contract after informing him that he had been accused of using profanities and of making racial remarks in front of his students. The teacher filed a formal grievance under a collective bargaining agreement between the school board and the teacher's union, but the refusal of the school board and union to appoint an arbitrator halted the process. The court reversed and remanded, holding that the teacher's complaint stated a claim for which declaratory relief was available. In so ruling, the court held that: 1) the school board had capacity to be sued, as such was a necessary implication of the school board's exclusive authority to negotiate and to enter into contracts with or for the benefit of their teachers; 2) the teacher was not required to await the final outcome of his grievance before seeking judicial relief, as the joint inaction of the school board and the union amounted to a repudiation of the grievance procedure; 3) the teacher was entitled to a hearing despite his non-tenured status, as the collective bargaining agreement did not distinguish between tenured and non-tenured teachers.

Outcome
The court reversed and remanded the judgment, which dismissed the teacher's declaratory judgment action regarding his right to a hearing concerning the school board's decision not to renew his contract.

Counsel: *Attorneys for Plaintiff/Appellant*: Dan R. Alexander, John Edward Herbison, Nashville, Tennessee.

Attorneys for Defendant/Appellee Metro Board of Public Education: Susan Short Jones, Wm. Michael Safley, Metropolitan Dept. of Law, Nashville, Tennessee.

Attorney for Defendant/Appellee Metro Nashville Education Assoc.: Charles Hampton White, CORNELIUS & COLLINS, Nashville, Tennessee.

Judges: William C. Koch, Jr., Judge. Henry F. Todd, Presiding Judge, Samuel L. Lewis, Judge, Concur.

Opinion by: KOCH

Opinion

OPINION

This appeal involves a non-tenured public school teacher's efforts to obtain a hearing before a local school board concerning the basis for its decision not to renew His contract. When the board would not hear his grievance, the teacher filed an action in the Circuit Court for Davidson County, requesting a declaration of his rights under the board's collective bargaining agreement with the union representing its teachers. The trial court granted the board's motion to dismiss, and the teacher has appealed. We find that the teacher is entitled to **[*2]** a declaratory judgment and, therefore, reverse the trial court's dismissal of his complaint.

I.

The Metropolitan Board of Public Education ("Board") hired William Byrn in 1985 to teach social studies and to serve as the wrestling coach at Nashville's Pearl-Cohn High School. Like any other new teacher, Mr. Byrn was not eligible to be considered for permanent tenure until he had taught for three full school years. During his first three years of teaching at Pearl-Cohn, Mr. Byrn received favorable performance evaluations from the school's administrators.

Mr. Byrn continued to receive favorable recommendations during the beginning of his fourth year of teaching. In October, 1988, Pearl-Cohn's assistant principal recommended that he be granted a professional license and a Career Level I certificate. The Board concurred in the recommendation in December, 1988, and the Department of Education approved the recommendation in January, 1989. All appeared to be well until an incident in February, 1989 cut Mr. Byrn's teaching career short.

In February, 1989, school administrators informed Mr. Byrn that he had been accused of using profanities and of making racial remarks in front of his students. **[*3]** During Mr. Byrn's annual evaluation conducted in March, 1989, the same vice principal who had recommended Mr. Byrn's retention just five months earlier rated Mr. Byrn's performance as unsatisfactory and recommended against offering him a contract for the next school year.

Mr. Byrn denied making any inappropriate remarks in front of his students and attempted to resolve the matter informally with his superiors at Pearl-Cohn. He sought access to the derogatory information against him, but Pearl-Cohn's administrators, and later the employees of the Board, refused to identify the persons who had complained about his

conduct. They also declined to give him an opportunity to rebut the complaints against him.

After his informal efforts bore no fruit, Mr. Byrn filed a formal grievance under the five-step grievance procedure contained in Section VIII of the Board's collective bargaining agreement with the Metropolitan Nashville Education Association ("MNEA") for the 1988-1989 school year. While the record is far from clear, it seems that Mr. Byrn claimed in his grievance that his evaluation violated state law. the Board's instructional improvement and evaluation policies, and the collective **[*4]** bargaining agreement because (1) the evaluators refused to identify the persons accusing him of using inappropriate language in front of his students and (2) because the recommendation not to rehire him was in retaliation for his seeking the MNEA's assistance in resolving the dispute.

Mr. Byrn's grievance was processed through the first three steps of the grievance procedure. At the third step, the Director of Schools took the position that state law and the Department of Education's regulations did not support Mr. Byrn's claims and that the procedural rights contained in the collective bargaining agreement were not available to Mr. Byrn because he was a non-tenured teacher.

Mr. Byrn filed a timely appeal from the Director's decision to the Board - the fourth level of the grievance procedure. The Board, however, declined to even consider the grievance. The Board stated two grounds for its decision: (1) Mr. Byrn "did not possess a bona fide grievable matter" because he was a non-tenured teacher and (2) Mr. Byrn was "not entitled to a name-clearing hearing."

On August 25, 1989, Mr. Byrn requested arbitration before a three-member advisory panel - the fifth and final step of the grievance **[*5]** procedure. The MNEA appointed its representative to the panel on August 31, 1989, and the Board appointed its representative on September 1, 1989. Neither the representatives nor the Board nor the MNEA, however, took steps to select the third member of the panel even though the collective bargaining agreement envisioned that the third member would be selected within ten school days or the American Arbitration Association would be requested to provide the third member.

With the consideration of his grievance at a standstill, Mr. Byrn filed suit on October 6, 1989, seeking a declaratory judgment or, in the alternative, a writ of certiorari. The Board moved to dismiss the complaint because (1) it was not a legal entity that could be sued, (2) Mr. Byrn had not exhausted his remedies under the grievance procedure, and (3) Mr. Byrn was seeking relief to which he was not entitled. The MNEA also asserted that the complaint should be dismissed. In January, 1990, the trial court, without elaboration, granted the Board's motion and dismissed Mr. Byrn's complaint.

II.

We find it necessary to turn our attention first to the procedural aspects of this case because they dictate the standard by which **[*6]** we will review the trial court's dismissal of Mr. Byrn's complaint. The Board's motion to dismiss relied upon three grounds, and since the trial court did not explain the basis for its order, we have no alternative other than to assume that it agreed with each ground.

The Board presented matters outside the pleadings to support its motion to dismiss. Thus, unless the trial court excluded the extrinsic evidentiary material from consideration, it was required to treat the Board's motion as one for summary judgment insofar as the motion is based on grounds included within Tenn. R. Civ. P. 12.02(6). *Hixson v. Stickley*, 493 S.W.2d 471, 473 (Tenn. 1973); *Jacox v. Memphis City Bd. of Educ.*, 604 S.W.2d 872, 873-74 (Tenn. Ct. App. 1980).

The first ground of the Board's motion takes issue with its capacity to be sued. This ground embodies a defense under Tenn. R. Civ. P. 12.02(8) because the capacity to be sued is a specific negative

averment under Tenn. R. Civ. P. 9.01. [1] Consideration of matters outside the pleadings does not transform a Tenn. R. Civ. P. 12.02(8) motion into a motion for summary judgment. Thus, we will review the trial court's disposition of the Board's first ground **[*7]** using the standard of review normally applicable to factual and legal determinations made by the trial court sitting without a jury.

[*8] The second ground of the Board's motion was based on Mr. Byrn's purported "failure . . . to exhaust those prescribed administrative remedies available to him." The Board, in its motion, erroneously characterized this ground as one challenging the trial court's subject matter jurisdiction in accordance with Tenn. R. Civ. P. 12.02(1).

Subject matter jurisdiction relates to a court's power to hear and decide a particular type of controversy. *Standard Sur. & Casualty Co. v. Sloan,* 180 Tenn. 220, 230, 173 S.W.2d 436, 440 (1943); *Swift & Co. v. Memphis Cold Storage Warehouse Co.,* 128 Tenn. 82, 100, 158 S.W. 480, 485 (1913). This power finds its source in the common law, the Constitution of Tennessee, and state law. *Turpin v. Conner Bros. Excavating Co.,* 761 S.W.2d 296, 297 (Tenn. 1988); *Kane v. Kane,* 547 S.W.2d 559, 560 (Tenn. 1977). [2]

[*9] The exhaustion defense, like the standing defense, is a judge-made doctrine whose purpose is to winnow out claims that are not ripe for adjudication. It is not intended to test the court's jurisdiction, but rather to test whether the plaintiff has stated a claim upon which relief should be granted. Accordingly, a motion to dismiss predicated on a failure to exhaust administrative remedies should be viewed as a Tenn. R. Civ. P. 12.02(6), rather than a Tenn. R. Civ. P. 12.02(1), motion. [3]

The third ground in the Board's motion is "that Petitioner is seeking relief to which he is not entitled." The only reasonable construction of this language is that it was intended to raise the defense embodied in Tenn. R. Civ. P. 12.02(6).

The second and third grounds in the Board's motion fall within Tenn. R. Civ. P. 12.02(6). Since the trial **[*10]** court considered matters outside the pleadings in ruling on these grounds, we must review its decision as if it were a summary judgment under Tenn. R. Civ. P. 56. Thus, the trial court's decision, insofar as it is based upon the second and third grounds of the Board's motion, will be affirmed only if no material factual disputes exist and if the Board is entitled to a judgment as a matter of law. *Brookins v. The Round Table, Inc.,* 624 S.W.2d 547, 550 (Tenn. 1981); Tenn. R. Civ. P. 56.03. We must examine each issue separately, viewing the pleadings and the evidence in the light most favorable to Mr. Byrn. *Blocker v. Regional Medical Center,* 722 S.W.2d 660, 660 (Tenn. 1987); *Poore v. Magnavox Co.,* 666 S.W.2d 48, 49 (Tenn. 1984).

One procedural issue affecting our consideration of the second and third grounds of the Board's motion remains. Even though he did not object in the trial court, Mr. Byrn now challenges the admissibility of the documents filed in support of the Board's

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[1] We recognize that this conclusion conflicts with dicta in a Supreme Court opinion stating that a party's capacity can be challenged using a Tenn. R. Civ. P. 12.02(6) motion. *Knierim v. Leatherwood,* 542 S.W.2d 806, 808 (Tenn. 1976). While the dicta appears to be derived from an authoritative text on the Federal Rules of Civil Procedure, *see* 5 C. Wright A. Miller, *Federal Practice & Procedure* § 1294 at 570-71 (1990), we decline to follow it in this case. The federal courts' interpretations of Fed. R. Civ. P. 12(b)(6) are not helpful in this instance because the federal rules do not contain a provision analogous to Tenn. R. Civ. P. 12.02(8). Since the Tennessee rules specifically provide that Tenn. R. Civ. P. 12.02(8) is the proper vehicle to raise issues concerning a party's capacity, it would be inappropriate and confusing to hold that a Tenn. R. Civ. P. 12.02(6) motion can serve the same purpose.

[2] The trial court clearly has the power under state law to consider and decide declaratory judgment actions concerning a person's rights, status, or other legal relations under a written contract. Tenn. Code Ann. §§ 29-14-102(a), -103, -106 (1980).

[3] A motion to dismiss challenging the plaintiff's standing has nothing to do with the subject matter jurisdiction of the court. *Knierim v. Leatherwood,* 542 S.W.2d 806, 808 (Tenn. 1976).

motion to dismiss. Mr. Byrn should have challenged these documents in the trial court. *See Wilson v. Wilson*, 159 Ill. App. 3d 1091, 513 N.E.2d 121, 124 (1987). Along with this shortcoming, his objection **[*11]** lacks merit because the documents attached to the Director of School's affidavit are the Board's official business records that would be admissible at trial if introduced through the Director or some other appropriate custodian. The Board's documents meet the requirements of Tenn. R. Civ. P. 56.05. Since they were filed prior to the trial court's decision, Tenn. Ct. App. R. 4(a) permits us to consider them along with the remainder of the record.

III.

The first ground of the Board's motion to dismiss challenges the Board's capacity to be sued. The Board asserts that it is legally indistinguishable from the Metropolitan Government and that state law does not explicitly permit local boards of education to sue or be sued. We find that teachers may file declaratory judgment actions seeking to construe their rights under a collective bargaining agreement between their local school board and the teacher's union representing them.

A.

Local school boards are integral parts of this State's educational system. *Reed v. Rhea County*, 189 Tenn. 247, 251, 225 S.W.2d 49, 50 (1949); *Donathan v. McMinn County*, 187 Tenn. 220, 235, 213 S.W.2d 173, 179 (1948). Even though they are "endowed with **[*12]** county functions," *Boswell v. Powell*, 163 Tenn. 445, 448, 43 S.W.2d 495, 496 (1931), their primary purpose is to aid in carrying out an essential state purpose - education. Constitution of Tennessee, Article XI, Section 12; *see also Board of Educ. v. Shelby County*, 155 Tenn. 212, 218, 292 S.W. 462, 463 (1927).

These local boards are creatures of state law and do not owe their existence or powers to the actions of local legislative bodies. *See* Tenn. Code Ann. § 49-2-201(b)(1) (1990). Under state law, they have the authority, substantially free from local governmental control, to manage and administer the schools within their jurisdiction. *Howard v. Bogart*, 575 S.W.2d 281, 283 (Tenn. 1979); *State ex rel. Bobo v. Moore County*, 207 Tenn. 622, 630, 341 S.W.2d 746, 749 (1960). Part of their authority includes the exclusive right to contract and be contracted with. *Benson v. Hardin County*, 173 Tenn. 246, 248, 116 S.W.2d 1025, 1026 (1938).

State law specifically empowers local boards "to make written contracts with all employees." Tenn. Code Ann. § 49-2-203(a)(1) (1990). Accordingly, teachers' employment contracts are with their local board, rather than with the individual **[*13]** board members or with the county. *See Cox v. Greene County*, 26 Tenn. App. 628, 631-32, 175 S.W.2d 150, 151 (1943). In furtherance of this authority, the Education Professional Negotiations Act [4] requires local boards to recognize and to bargain collectively with appropriately certified unions representing the teachers within their systems. The teachers are the intended beneficiaries of these collective bargaining agreements. *Gilbert v. Nampa School Dist. No. 131*, 104 Idaho 137, 657 P.2d 1, 11 n.17 (1983); *Board of Educ. v. Bremen Dist. No. 228 Joint Faculty Assoc.*, 114 Ill. App. 3d 1051, 449 N.E.2d 960, 964 (1983).

B.

State law does not specifically empower local boards to bring suit, nor does it specifically provide that local boards can be sued. Specific authority, however, is not required insofar as declaratory judgment actions seeking to construe collective bargaining agreements are concerned. In these cases, the combined effect of the Education Professional **[*14]** Negotiations Act and the declaratory judgment statutes [5] is to permit these actions to be maintained.

The local boards, not the counties, have the

[4] Tenn. Code Ann. §§ 49-5-601, -613 (1990).

[5] Tenn. Code Ann. §§ 29-14-101, -113 (1980).

exclusive authority to negotiate and to enter into contracts with or for the benefit of their teachers. By necessary implication, the power to contract must be accompanied by the responsibility to perform the contract and the obligation to be held accountable for failure to perform. Any other conclusion would make a mockery of the contracting process.

Shielding local boards from suits pertaining to their contracts undermines their accountability. Thus, at least insofar as their contracts are concerned, local school boards may sue and be sued in their own right even in the absence of specific statutory authority. *Benson v. Hardin County*, 173 Tenn. at 248, 116 S.W.2d at 1026. *See also Grenada Mun. Separate School Dist. v. Jesco, Inc.*, 449 So. 2d 226, 227 (Miss. 1984); *Flood v. Board of Educ. Joint School Dist. No. 1,* **[*15]** 69 Wis. 2d 184, 230 N.W.2d 711, 715-16 (1975).

Permitting local boards to be sued in their own name in actions seeking to construe their contracts is also consistent with the declaratory judgment statutes. These statutes should be liberally construed, *Cummings v. Beeler*, 189 Tenn. 151, 160, 223 S.W.2d 913, 917 (1949), since declaratory judgments are intended to provide expeditious relief from uncertainty and insecurity with regard to written contracts, *Snow v. Pearman*, 222 Tenn. 458, 462, 436 S.W.2d 861, 863 (1968); *Tennessee Farmers Mut. Ins. Co. v. Hammond*, 200 Tenn. 106, 111, 290 S.W.2d 860, 862 (1956).

Despite their beneficial purpose, declaratory judgments are not available unless all the proper parties are before the court. [6] *Harrill v. American Home Mortgage Co.*, 161 Tenn. 646, 648, 32 S.W.2d 1023, 1023 (1930), *reh'g denied*, 162 Tenn. 371, 377, 36 S.W.2d 888, 890 (1931); *Engert v. Peerless Ins. Co.*, 53 Tenn. App. 310, 315, 382 S.W.2d 541, 544 (1964). Proper parties include all those who must be bound by the decree in order to make it effective and to avoid the recurrence of additional litigation on the same subject. *State ex rel. Dossett v. Obion* **[*16]** *County*, 188 Tenn. 538, 552-53, 221 S.W.2d 705, 711 (1949). Persons having only an indirect interest in the subject matter of the suit need not be joined. *Shelby County Bd. of Commr's v. Shelby County Quarterly Court*, 216 Tenn. 470, 480, 392 S.W.2d 935, 940 (1965).

Identifying the necessary parties in a declaratory judgment action depends upon the type of case and the issues involved. In actions to construe a written contract, all contracting parties having a justiciable dispute must be joined. *See* 1 W. Anderson, *Actions for Declaratory Judgments* § 137 (2d ed. 1951). If the dispute affects an intended beneficiary's rights under the contract. the intended beneficiary is likewise a proper party. *See Keystone Ins. Co. v. Warehousing* **[*17]** *& Equip. Corp.*, 402 Pa. 318, 165 A.2d 608 611-12 (1960) (Jones, C.J. concurring).

Mr. Byrn's suit involves a teacher's rights under the collective bargaining agreement between the Board and the MNEA. Mr. Byrn, a teacher and MNEA member, is a proper party because he is one of the intended beneficiaries of the contract. The Board and the MNEA are also proper parties because they are the only signatory parties to the collective bargaining agreement. [7]

In summary, the Board is a creature of state law and has an existence separate and apart from Metropolitan Government. State law has given the Board the exclusive authority to enter into collective bargaining **[*18]** agreements governing teachers' wages, hours, and working conditions. This authority carries with it the responsibility to be

[6] Tenn. Code Ann. § 29-14-107(a) provides:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be adversely affected by a declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings.

[7] The Metropolitan Government could conceivably have been a proper party if Mr. Byrn's suit affected one of its interests or responsibilities, such as taxation or funding. The Metropolitan Government does not have a direct or substantial interest in teachers' rights under the collective bargaining agreement; therefore, its participation in this suit is unnecessary.

accountable for the performance of the contract. The Board is, therefore, a proper party in its own right to any declaratory judgment action seeking to construe its collective bargaining agreement with the MNEA.

IV.

The Board also asserts that Mr. Byrn's complaint warranted dismissal because he filed it before his grievance had run its full course. We disagree. Under the facts of this case, Mr. Byrn was not required to await the final outcome of his grievance before seeking a judicial declaration of his rights under the collective bargaining agreement.

A.

Ever since March, 1989, Mr. Byrn has insisted that the evaluation process resulting in the recommendation not to renew his contract was not conducted in accordance with pertinent state law, the Board's policies, and the collective bargaining agreement. He filed a formal grievance only after his attempts to resolve the matter informally were unsuccessful.

The Board's staff treated Mr. Byrn's complaint as a grievable matter until the third step of the process when the Director of Schools decided that Mr. Byrn's **[*19]** complaints were not grievable because state law, not the collective bargaining agreement, governed his rights as a non-tenured teacher. On the fourth step, the Board reached the same conclusion when it determined that Mr. Byrn "did not possess a bona fide grievable matter."

Mr. Byrn had only one more step available to him after the Board declined to consider his grievance. The collective bargaining agreement describes the procedure for the fifth and final step of the grievance process as follows:

If resolution of the grievance is not reached at Level Four, upon written request of either party within twenty (20) school days, an advisory panel shall be named to aid in the resolution of the grievance. Such advisory panel shall contain three (3) persons: One (1) to be appointed by the MNEA and a second by the Board of Public Education within five days and a third member of the advisory panel to be selected by the other two within ten (10) school days from the date of said request. If the third is not chosen within ten (10) school days either the Board or the Association may make a written request to the American Arbitration Association (AAA) to assign a third member. Notice of this **[*20]** request shall be served on the opposite party.

Mr. Byrn filed a timely request for the fifth step consideration of his grievance. While the Board and the MNEA appointed their representatives as required. the proceedings came to an abrupt halt for no apparent reason. Neither the Board, nor the MNEA nor their representatives on the advisory panel have taken any of the required steps to appoint the advisory panel's third member. Mr. Byrn has followed every procedure available to him to obtain a fifth step consideration of his grievance. Only the joint inaction of the Board and MNEA has prevented final consideration of his grievance.

B.

Employees covered by a collective bargaining agreement are required, as a general rule, to pursue their contract rights using the grievance procedures established by the collective bargaining agreement. *See Vaca v. Sipes,* 386 U.S. 171, 184, 87 S. Ct. 903, 914 (1967). Accordingly, courts will not consider contract claims by employees who have not at least attempted to exhaust their contractual remedies. *Brewer v. Argo-Collier Truck Lines Corp.,* 592 S.W.2d 322, 326 (Tenn. 1979).

Exhaustion, however, is not required in every instance. The failure to **[*21]** conclude a contractually mandated grievance process is excused when the employer's conduct amounts to a repudiation of the procedure itself or when the union representing the employee wrongfully refuses to process the employee's grievance. *See Anderson v. Ideal Basic Indus.,* 804 F.2d 950, 952 (6th Cir. 1986).

The conduct of the Board and the MNEA obviated the need for Mr. Byrn to complete the grievance process before seeking a judicial declaration of his rights under the collective bargaining agreement. At the time Mr. Byrn filed suit, the Board and the MNEA had not pursued the fifth step of his grievance, and Mr. Byrn had no assurance that they ever would. The Board's position that he did not have a grievance coupled with its failure to seek the appointment of the third advisory panel member amounts to a repudiation of the grievance procedure as far as Mr. Byrn's grievance was concerned. The MNEA's failure to seek the appointment of the third advisory panel member, likewise, amounts to its failure to pursue Mr. Byrn's grievance as it should.

V.

The Board and the MNEA advance one final reason for dismissing Mr. Byrn's complaint. Because Mr. Byrn did not have tenure, they assert **[*22]** that he is not entitled to the collective bargaining agreement's procedural protections and that he is not entitled to a name-clearing hearing. We disagree. Mr. Byrn's procedural rights are not dictated by his tenure status.

A.

Non-tenured teachers are not entitled to the same procedural protections state law provides to their tenured counterparts. They are not entitled to continued employment as a matter of right, *Shannon v. Board of Educ. of Kingsport,* 199 Tenn. 250, 263, 286 S.W.2d 571, 577 (1955), and they are not entitled to the tenure law's procedural protections if their employment contracts are not renewed. *Gibson v. Bulter,* 484 S.W.2d 356, 359-60 (Tenn. 1972).

State law, however, is not the only source of a non-tenured teacher's rights. The board employing the teacher and the union representing the teacher may, by contract, create and establish additional rights. This is precisely what the collective bargaining process authorized by the Education Professional Negotiations Act is all about. [8] Once created, these contract rights are as enforceable as those created by statute.

[*23] The collective bargaining agreement involved in this case is the cumulative result of several years of negotiation between the Board and the MNEA. According to its introduction, it embodies "a mutual agreement between the certificated employees and the Board of Public Education." By its own terms, it is intended to benefit the "teachers" or "certificated employees" working for the Board.

Even though the collective bargaining agreement does not define "teacher" or "certificated employee," the terms are well understood in the education community. The terms are generally interchangeable. Teachers are certificated employees because they must possess a state teacher's certificate in order to be permitted to teach in the public schools. *See* Tenn. Code Ann. § 49-5-501(a)(10) (1990) (tenure law includes "certificated personnel" in its definition of "teacher"); Tenn. Code Ann. § 8-34-145(b) (1988) (for the purposes of the retirement laws, "teachers" include any employees required to be certificated as a teacher). [9]

[*24] The terms themselves draw no distinction between non-tenured and tenured personnel. Thus, based on the plain meaning of the collective bargaining agreement the procedural rights available to "teachers" or "certificated employees" are equally available to both tenured and non-tenured employees.

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[8] The collective bargaining agreements specifically cover grievance procedures and other working conditions. *See* Tenn. Code Ann. § 49-5-611 (a)(2), (5) (1990). Their scope is broad, and they may include any matter not in conflict with state or federal law or the provisions of a municipal charter. *See* Tenn. Code Ann. § 49-5-612(a). The purpose of the collective bargaining process is to secure for teachers more rights than they are otherwise provided under state law.

[9] *See also* 3A Tenn. Admin. Comp. ch. 0520-1-2-.12, 0520-2-1-.01, 0520-2-1-.04.

The Board's collective bargaining agreement with the MNEA provides teachers with the following rights:

1. the right to due process "to insure that any adverse action shall be for just cause and can be dealt with fairly and equitably," Section II.D.2;

2. the right to assistance from the MNEA Section II.D.1;

3. the right, upon request, to review the contents of his personnel file, Section II.G.1;

4. the right to be apprised of "material of derogatory nature" being placed in his permanent personnel file and the right, upon request, to attach a response to this material, Section II.G.3;

5. the right, upon request, to review any derogatory information before it is used in an evaluation or "for making a record of permanence, Section II.G.4;" and

6. the right to submit grievances concerning perceived misinterpretations or misapplications of state law or board policy to a five-step grievance **[*25]** procedure, Section VIII.

Mr. Byrn's grievance invokes one or more of these rights, and therefore, neither the Board nor the MNEA has demonstrated that they are entitled to a judgment as a matter of law. Mr. Byrn's allegations that the Board failed to follow its agreed upon and established evaluation procedures in deciding not to employ him for another year states a claim upon which declaratory relief can be granted. Therefore, the trial court erred in dismissing his complaint.

B.

Mr. Byrn also requested the Pearl-Cohn administrators and the Board to provide him with an opportunity to refute the charges that he made racial remarks and used inappropriate language in front of his students. The Board decided that Mr. Byrn was not entitled to a name-clearing hearing, presumably because he did not have tenure. Tenure status, however, does not control a teacher's right to a name-clearing hearing.

Public employers are not required to provide a hearing every time they give a statement of reasons for dismissing an employee. *Weathers v. West Yuma County School Dist.,* 530 F.2d 1335, 1339 (10th Cir. 1976); *Gray v. Union County Intermediate Educ. Dist.,* 520 F.2d 803, 806 (9th Cir. 1975); **[*26]** *Burk v. Unified School Dist. No. 329,* 646 F.Supp. 1557, 1565 (D. Kan. 1986). They are, however, required to provide a hearing if the dismissal is based on charges of dishonesty, immorality, or other types of improper conduct that might seriously damage the employee's standing and associations in the community and might interfere with future employment prospects. *Board of Regents v. Roth,* 408 U.S. 564, 573, 92 S. Ct. 2701, 2707 (1972); *McGhee v. Draper,* 564 F.2d 902, 910 (10th Cir. 1977); *Gray v. Union County Intermediate Educ. Dist.,* 520 F.2d at 806.

The right to a name-clearing hearing need not be based on the employee's property interest in continued employment. It can also be based on the employee's constitutionally protected liberty interest. Thus, name-clearing hearings of the type described in *Board of Regents v. Roth,* are available to probationary public employees such as non-tenured teachers. *Board of Regents v. Roth,* 408 U.S. at 573, 92 S. Ct. at 2707; *Palmer v. Board of Educ.,* 603 F.2d 1271, 1274 (7th Cir. 1979); *McGhee v. Draper,* 564 F.2d at 910; *Burden v. Hayden,* 275 Ark. 93, 627 S.W.2d 555, 557 (1982); *Phillips v. Civil Serv. Comm'n,* **[*27]** 192 Cal. App. 3d 996, 237 Cal. Rptr. 751, 755 (1987); *Wertz v. Southern Cloud Unified School Dist.,* 218 Kan. 25, 542 P.2d 339, 343-44 (1975).

Mr. Byrn alleges that the charges that he used profanities and made inappropriate racial remarks have damaged his standing in the community and have diminished his employment prospects. Despite his non-tenured status, these claims, if true could justify granting him a hearing. Therefore, the trial court erred when it declined to decide whether Mr.

Byrn had a right to a name-clearing hearing.

VI.

Our holding in this case is limited. We have determined only that the trial court should not have dismissed Mr. Byrn's complaint because it states a claim for which declaratory relief can be granted and because the Board and the MNEA have not demonstrated that they are entitled to a judgment as a matter of law. We have not held that Mr. Byrn is entitled to reinstatement, continued employment, or even a name-clearing hearing, and we have not undertaken to define the procedures available to him to challenge the Board's basis for not renewing his contract. These issues are for the trial court to decide.

We reverse the dismissal of Mr. Byrn's complaint **[*28]** and remand the case for further proceedings consistent with this opinion. We also tax the costs of this appeal in equal proportions against the Metropolitan Board of Public Education and the Metropolitan Nashville Education Association for which execution, if necessary, may issue.

End of Document

Exhibit

2

Knox County v. Knoxville

Court of Appeals of Tennessee, Eastern Section

December 30, 1987, Filed

Nos. 736, 737

Reporter
1987 Tenn. App. LEXIS 3225 *; 1987 WL 31640

Knox County, Tennessee; Earl Hoffmeister, Superintendent of Public Instruction; and The Knox County Board of Education, Plaintiffs-Appellants and Cross-Appellees, v. The City of Knoxville; James Lawell: and John McCook, Defendants-Appellees and Cross-Appellants; Dorothy Aldmon, et al., Plaintiffs-Appellees, v. Charles E. Smith, Commissioner of Education, et al., Defendants-Appellees

Prior History: [*1] Knox Chancery

Honorable Frederick D. McDonald, Judge.

Disposition: AFFIRMED, AS MODIFIED, and REMANDED

Case Summary

Procedural Posture

Appellants, county, county board of education, and its superintendent, challenged a judgment of Knox Chancery Court (Kentucky), which upheld the constitutionality of Tenn. Code Ann. § 49-5-203 and held that the county was obligated to honor a contract with appellee city employees after appellee city abolished its school system. The trial court found that the county was required to fund future employer liability for pension service credit.

Overview

After the abolition of the city school system and its transfer to the county, the county sought a declaratory judgment to determine the rights of former city employees under Tenn. Code Ann. § 49-5-203 and the statute's constitutionality. The dispute also encompassed the issue of the rights of certain former city teachers to state annuity payments under Tenn. Code Ann. § 8-35-303. The trial court upheld the constitutionality of § 49-5-203 and held that the county was obligated to honor a contract with the city employees after the city abolished its school system. The court modified the judgment and held that the county was required to provide former city employees the substantive rights they previously had under a repealed city charter. In all other respects, the court affirmed the trial court's judgment. Under § 49-5-203, the former city teachers' rights were preserved after the school system was abolished. The county had no discretion in hiring or not hiring the former city employees and had no discretion regarding their tenure status. The city employees received comprehensive protection and continuity to their pension rights under City of Knoxville, Tenn., City Charter § 1380.

Outcome

The court modified the trial court's judgment to hold that the county was required to provide former

city employees the substantive rights they previously had under a repealed city charter. In all other respects, the court affirmed the trial court's judgment.

Counsel: DALE C. WORKMAN of Knoxville for Appellants Knox County, Tennessee; Earl Hoffmeister, Superintendent of Public Instruction; and The Knox County Board of Education.

J. ANTHONY FARMER of Knoxville, for Cross-Appellants and Appellees, Dorothy Aldmon, et al.

CHARLES HAMPTON WHITE and RICHARD L. COLBERT of Nashville for, Cross-Appellants and Appellees John McCook, the Knoxville Education Association, and the Knox County Education Association; and for Appellee James Lawell.

CHRISTINE MODISHER of Nashville for Attorney General W. J. Michael Cody, W. J. MICHAEL CODY and CHRISTINE MODISHER of Nashville, for Appellee Charles E. Smith, Commissioner of Education.

JOHN T. BATSON, JR. of Knoxville, for Appellees, City of Knoxville and City Council of the City of Knoxville

Judges: ANDERSON, J., GODDARD, J., FRANKS, J., CONCUR.

Opinion by: ANDERSON

Opinion

OPINION

Anderson, J.

This declaratory judgment action arises out of the abolition of the City of Knoxville ("City") School System and its transfer to the Knox County ("County") School System. The dispute focuses on the rights of former City employees **[*2]** under the provisions of T.C.A. 49-5-203, *Change in school organization -- Teacher's rights preserved,* and on the constitutionality of that statute. The dispute also encompasses the issue of the rights of certain former City teachers to state annuity payments under T.C.A. § 8-35-303, *State annuity for teachers eligible to participate in local funds,* and on the constitutionality of that statute.

FACTS

The City is a municipal corporation operating under the home rule provisions of Article XI, Section 9, of the Constitution of Tennessee. Until July 1, 1987, it exercised its discretionary power under the provisions of T.C.A. § 49-2-401, et seq., and operated a municipal school system under Articles VI and XII of its Charter. In addition, under Sections 1320 through 1380 of Charter Article XIII, the City maintained a local pension plan for all its employees, including employees of the City School System.

By ordinance, the Knoxville City Council submitted to City voters a referendum to abolish the City School System by repealing Articles VI and XII of the Charter and thus to effectively transfer the City School System to the County on July 1, 1987. The referendum was approved **[*3]** by City voters on November 4, 1986. Thereafter, the City of Knoxville Board of Education ("City Board") notified its employees that the City School System would be abolished and that no employee contracts would be renewed. At the time of the transfer, some 1600 certified employees -- employees holding teacher certificates issued by the state Commissioner of Education -- were employed by

the City School System.

Before July 1, 1987, the County had operated a school system independent of the City's. In contemplation of the City's proposed abolition of the City School System, on October 1, 1986, the Knox County Board of Education ("County Board") approved a plan for the creation of a unitary school system, which would include the former City School System. That plan was forwarded to Robert McElrath, then-Commissioner of the Tennessee Department of Education, immediately following the City voters' approval of the abolition. Commissioner McElrath approved the plan, subject to certain conditions.

On May 1, 1987, the Attorney General of Tennessee issued an opinion on the effect of T.C.A. § 49-5-203 on the City School System abolition. That opinion was adopted by Commissioner McElrath's **[*4]** successor, Charles E. Smith ("Commissioner"), who also accepted the County Board's plan and approved the transfer of the City School System, subject to the preservation of certain rights of the former City teachers.

On May 13, 1987, the County filed a complaint in Knox County Chancery Court seeking a declaratory judgment under T.C.A. § 29-14-101 regarding the pension and employment contract rights of the former City teachers, the constitutionality of T.C.A. § 49-5-203, and the proper interpretation of certain provisions of that statute and of the City's Charter. Thereafter, the Attorney General was notified of the County's challenge to the constitutionality of T.C.A. § 49-5-203, and intervened in the suit. In addition, Motions to Intervene were granted to the Commissioner, to the Knox County Education Association ("KCEA"), which represents County teachers in collective bargaining, and to the Knoxville Education Association ("KEA"), which had represented City teachers in their prior collective bargaining negotiations with the City Board. On May 17, 1987, Dorothy Aldmon and eleven of her fellow certified employees ("Aldmon") of the City School System filed their complaint for declaratory **[*5]** judgment, focusing chiefly on the same issues as the County's complaint.

In accord with the provisions of the Educational Professional Negotiations Act, T.C.A. § 49-5-601, et seq., the City Board and KEA had entered into a Memorandum of Understanding on September 30, 1986. That contract was to have been effective until September 30, 1989. Under the same statutory provisions, on April 9, 1986, the County Board and KCEA entered into a Memorandum of Understanding that was to extend until June 30, 1988. The two contracts differed in the number of days of the standard work year, the length of the standard work day, salary schedules, and fringe benefits.

Following the abolition of the City School System, effectively all of the city's 1600 certified employees were to be hired by the County. The KEA would cease to exist as an organization after the transfer of the City School System to the County, and the KCEA would then be the sole collective bargaining representative for all County School System employees.

The City's certified employees had been covered under three distinct pension plans, depending upon the dates they were hired. In Article XIII of the Charter, the City provided two **[*6]** of the plans. Plan B covered those employed before January 1963, and Plan A covered those employed between January 1963 and December 1976. Those employed by the City after January 1977 were covered by the state-wide Tennessee Consolidated Retirement System ("TCRS"). County School System employees were covered only by TCRS; there was no local pension plan in effect for them. The Attorney General's opinion of May 1, 1987, noted in part

that the City of Knoxville teachers who have vested interest in divisions B and A of the City Retirement System have contractual and constitutional rights to both accrued and future benefits under the system. Therefore, these rights may not be impaired,

interrupted, or diminished by the abolition of the City School System. Any diminishment of benefits for future accruals would therefore be a diminishment of rights and benefits, in violation of T.C.A. 49-5-203. Knoxville City teachers have a protected right to benefits equal to the amount currently provided under Divisions A and B of the City Plan, plus the amount currently provided by the state annuity statute to members of a local plan.

Local pension plans in Tennessee consist of two separate annuities; **[*7]** the member annuity derived from the employee's contribution to the plan, and the employer annuity derived from the local governing body's contribution to the plan. That is how Plans A and B of the City Pension System are designed to operate.

TCRS operates in essentially the same fashion for an employee not coming under a local plan. The member annuity is derived from the employee's contributions, and the state annuity is derived from the contribution of the employer -- typically, the state or one of its political or administrative subdivisions.

Regardless whether a teacher is a member of TCRS or a local plan, Tennessee pays the state annuity into TCRS. Upon the teacher's retirement, that state annuity is then paid to the local pension system in six of the seven local pension plans in Tennessee that operate under the provisions of T.C.A. § 8-35-303, and thus effectively reimburses the local governing body's employer annuity up to the amount of the state annuity. [1] In Knoxville, however, at the request of the City Pension System in 1971, TCRS was to "henceforth pay the entire amount of the state annuity directly to the members" under the provisions of § 8-35-303(5). As a result, **[*8]** Plan A and B members of the City Pension System would receive a retirement allowance based upon three, rather than two, annuities, and thus would receive a larger retirement benefit than members of the same age, years of service, and rate of pay of other local pension systems or of TCRS.

A 1986 study by Joseph McAlister, actuary for the City's plan and for TCRS, showed that the City plan's accrued liability -- the difference between actual employer contributions and previously estimated employer contributions required -- was $ 38,213,530 for Plan A and $ 53,309,610 for Plan B. McAlister set the total accrued liability of the City Board for past service at approximately fifty million dollars, and asserted that the County's future cost for assuming the teachers' portion of the City plan, based on present value, would be between fifty and fifty-five million dollars, if active former City employees continued to accrue future service in the City plan. If the former City **[*9]** plan members were to become TCRS members, the County would have no liability for their future service costs.

As a result of the abolition, the County Board was to assume the operation and administration of education throughout Knox County, including the former City School System. The only additional funds that the County will receive from the State as the result of the City School System's abolition are the foundation funds that the City received on an average daily attendance ("ADA") basis.

The abolition of the City School System included repealing the City Charter tenure system provisions. The County operates under a County tenure system enacted by private act. The County's organizational plan for expansion to a single school system reduced the number of directors, assistant superintendents, and supervisors from the total number formerly employed in the two systems. All former City personnel desiring employment were required to fill out a normal application for employment with the County, and the County Board offered contracts through a formal election process.

The two cases were consolidated for trial, and were

[1] Any excess in the state annuity over the amount of employer annuity is then to be paid directly to the teacher rather than to the local pension system under § 8-35-303(1) -- a provision not at issue in this case.

heard before Chancellor Frederick D. McDonald on June 29 and 30, **[*10]** 1987. The Chancellor issued a Memorandum Opinion and Addendum following the trial, and entered judgment on July 16, 1987.

FINDINGS OF THE TRIAL COURT

The trial court found that the Memorandum of Understanding between KEA and the City Board was a "right" as contemplated by T.C.A. § 49-5-203(c), and that the County was obligated to honor that contract with former City teachers until September 30, 1989. The trial court found, however, that the County's obligation under the KEA contract extended only to substantive matters, e.g., salary and fringe benefits, and that procedural matters for former City teachers would be governed by the Memorandum of Understanding between the County Board and the KCEA, since KEA had ceased to exist and thus could no longer represent the former City employees in procedural matters.

The trial court further found that the County was obligated to fund future employer liability for pension service credit for former City employees, finding that Plan A and B members were entitled to remain in the City Pension System and that the County should assume the City's responsibility of future funding of the employer annuity. The court allowed the County the option of **[*11]** establishing a County pension system for accruing that future service for members of Plans A or B, and of requiring those members to join the new system, so long as the system accrued benefits at no lesser rate and no greater cost to the teachers than had the City system.

The trial court also found that the Plan A and B members had no vested interest in the state annuity. Hence, the court held, the local plan's managing board could repeal or amend its previous resolution and redirect the state annuity to the local pension system itself.

The trial court upheld the constitutionality of T.C.A. § 49-5-203 and found that it applied to the abolition of the City School System. It found that "teacher" as defined by T.C.A. § 49-5-501(10) was the same as "teacher" contemplated by T.C.A. § 49-5-203, and that the County Board had the same obligation and authority to employ former City teachers as had the City Board before abolition.

Finally, the trial court found that Article XII of the City Charter had been validly repealed and, thus, that the Knox County Private Tenure Act was the sole tenure provision applicable to all County teachers, including former City teachers. The City administrative **[*12]** structure having been abolished, the court found that former City administrators were entitled to their protected tenure status, but not to any specific administrative positions.

This appeal followed.

ISSUES

I. CONSTITUTIONALITY.

Knox County argues that T.C.A. § 49-5-203 violates Article II, Section 24, and Article XI, Sections 8 and 9 of the Tennessee Constitution. The County further argues that T.C.A. § 8-35-303(5) also violates Article XI, Sections 8 and 9. The Attorney General responds that the County lacks standing to raise both constitutional issues, and that not having raised the constitutionality of § 8-35-303(5) at trial, the County may not now raise it on appeal.

Standing.

Standing is a legal doctrine that can be "used to refuse to determine the merits of a legal controversy irrespective of its correctness where the party advancing it is not properly situated to prosecute the action." *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976). A party with standing has

a direct, immediate, and substantial interest in the subject matter of the litigation [when it has] a

personal or property right to assert or defend in court in [its] own name, **[*13]** not a mere general interest in the subject matter of the litigation in common with other citizens . . . .

Ray v. Trapp, 609 S.W.2d 508, 512 (Tenn. 1980).

In the instant case the record establishes beyond refute that the County has "a personal or property right to assert or defend." The abolition of the City School System and establishment of a unitary school system for all Knox County would have a direct, immediate, and substantial impact on the administration and finances of Knox County. The County clearly is entitled to bring this declaratory judgment action challenging the constitutionality of statutes that by their operation would significantly affect the County's interests.

Issue raised first time on appeal.

The general rule in Tennessee is that issues not raised in the trial court may not be raised on appeal. *Sutton v. Bledsoe*, 635 S.W.2d 379, 382 (Tenn.App. 1981) (and numerous cases cited therein). An exception to that rule was noted in *Langford v. Vanderbilt University* for instances in which the issue raised was one of the constitutional validity of a statute, 199 Tenn. 389, 404, 287 S.W.2d 32, 39 (1956). That exception, however, has been narrowly **[*14]** construed. The Supreme Court made abundantly clear in *Lawrence v. Stanford* that the general rule will apply "to an attempt to make a constitutional attack upon the validity of a statute for the first time on appeal unless the statute involved is so obviously unconstitutional on its face as to obviate the necessity for any discussion." 655 S.W.2d 927, 929 (Tenn. 1983). We have examined the statute closely and in no way can conclude that it "is so obviously unconstitutional on its face as to obviate the necessity for any discussion."

The County insists that it raised the issue in its trial brief below by asserting that the statute was "clearly in violation of public policy, illegal, and unconstitutional and has previously been so held." This bare assertion, devoid of supporting authority or further elucidation, afforded the trial court "no opportunity . . . for the introduction of evidence which might be material and pertinent in considering the validity of the statute," *Id*., 655 S.W.2d at 929, and we therefore decline to examine on appeal the issue of the constitutionality of T.C.A. § 8-35-303(5).

Constitutionality of T.C.A. § 49-5-203.

The statute reads as follows:

49-5-203. **[*15]** Change in school organization -- Teacher's rights preserved. -- (a) The change in the government structure of a school system or institution through the process of annexation, unification, consolidation, abolition, reorganization, or transfer of the control and operation of a school system or institution to a different type governmental structure, organization, or administration, shall not impair, interrupt, or diminish the rights and privileges of a then existing teacher and such rights and privileges shall continue without impairment, interruption or diminution.

(b) If the teacher becomes the employee of another school system or institution as a result of a change in the governmental structure, then the rights and privileges of such a teacher shall continue without impairment, interruption, or diminution as obligations of a new government, organization or administration.

(c) The term "rights and privileges" as used in this section shall include, but not be limited to, salary, pension or retirement benefits, sick leave accumulation, tenure status and contract rights, whether granted by statute, private act, or governmental charter.

(d) Prior to the change in any governmental structure **[*16]** or organization becoming effective, the state commissioner of education shall determine that the rights and privileges protected by this section are not impaired, interrupted, or diminished.

In addition to the remedies available to a teacher aggrieved by a change in the governmental structure, organization, or administration of a school system or institution, the state commissioner of education is authorized to withhold state funds in the enforcement of this section.

The County asserts that the statute violates Article II, Section 24, of the Tennessee Constitution, which in pertinent part dictates that "[n]o law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost." The statute clearly is a law of general application, but we are not convinced that the statute imposes increased expenditure requirements on the County. The statute is a remedial one, enacted in order to ensure that no rights of the former teachers of one school system would be diminished by the transfer of that system to another. *See, Wagner v. Elizabethton City Board of Education*, 496 S.W.2d 468, **[*17]** 471 (Tenn. 1973). Any increased expenditures incurred by a city or county as a result of the operation of the statute are too indirect and speculative to trigger the state-share mechanism of Article II, Section 24. The statute does not require that cities and counties abolish, transfer, or reorganize their school systems, and absent a local system's taking such a step, the statute imposes *no* expenditure requirements, direct or indirect, on a city or county.

Even if we were to hold that Article II, Section 24, applied to the indirect consequences of the General Assembly's having adopted the statute, we believe that the state cost share requirement would be adequately met by the additional ADA funds provided because of the County School System's increased enrollment. The constitution mandates only that there be a state share; it does not mandate the size or proportion of that share.

The County also argues that the statute violates Article XI, Section 8, of the Tennessee Constitution, the relevant portions of which read as follows:

> Sec. 8. General laws only to be passed. -- The Legislature shall have no power to suspend any general law for the benefit of any particular individual, **[*18]** 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, immunitie [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 such law.

We cannot agree that the statute creates a constitutionally impermissible class. As the Supreme Court held in *Estrin v. Moss*, "[t]he sole test of the constitutionality of any particular classification is that it must be reasonable; that is, made upon a reasonable basis, . . ." and, the Court continued, "[t]he reasonableness of any particular classification depends upon the particular facts of the case." 221 Tenn. 657, 665, 430 S.W.2d 345, 349 (1968) (citations omitted). The *Estrin* court further held that "[t]he burden of showing [that] the classification does not rest upon a reasonable basis is upon [the] complainant." *Id.*, 221 Tenn. at 667, 430 S.W.2d at 349. The statute was enacted not to create new rights but to protect the existing rights of teachers employed in the local school systems **[*19]** of Tennessee. Absent the terms of that statute, teachers employed by local school systems would not be protected adequately when those school systems were abolished, reorganized, or consolidated into other systems. The classification created by the statute is one that applies equally and consistently to those who are under or who may come under its protection. It is entirely reasonable in light of the facts, and the County has failed to show otherwise.

Neither are we convinced that the statute unconstitutionally infringes upon the protections afforded the City by the home rule provisions of Article XI, Section 9, of the Tennessee Constitution. The County's argument focuses on these parts of the Section:

Sec. 9. Power over local affairs -- Home rule for cities and counties -- Consolidation of functions. -- . . . any act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election **[*20]** by a majority of those voting in said election in the municipality or county affected.

Any municipality may by ordinance submit to its qualified voters in a general or special election the question: "Shall this municipality adopt home rule?"

In the event of an affirmative vote by a majority of the qualified voters voting thereon, and until the repeal thereof by the same procedure, such municipality shall be a home rule municipality, and the General Assembly shall act with respect to such home rule municipality only by laws which are general in terms and effect.

Any municipality after adopting home rule may continue to operate under its existing charter, or amend the same, or adopt and thereafter amend a new charter to provide for its governmental and proprietary powers, duties and functions, and for the form, structure, personnel and organization of its government, provided that no charter provision except with respect to compensation of municipal personnel shall be effective if inconsistent with any general act of the General Assembly.

The County asserts that the statute prohibits a home rule municipality's amending its charter or exercising its discretion to propose a local **[*21]** municipal school tax under T.C.A. § 49-2-401. We fail to follow the County's reasoning. We are not required to construe a statute in light of remote or strained interpretations that conflict with the clear and unambiguous meaning of the statute's language. *State v. Thomas*, 635 S.W.2d 114, 166 (Tenn. 1982). The statute's purpose, as we have already discussed, is to protect the rights of teachers throughout the state where changes in the government structure of school systems occur. There is nothing in the record before us or in the statute itself that suggests that its operation would have the effect that the County's interpretation proposes, and we decline to adopt that interpretation.

II. APPLICABlLlTY OF T.C.A. § 49-5-203.

The County questions whether the statute applies when there has not been a complete change in the governmental structure, e.g., by annexation or by adopting metropolitan government. This is, again, a strained construction of the clear and unambiguous meaning of a statute, the operation of which is triggered by a "change in the government structure *of a school system* . . . through the process of *abolition* . . ." T.C.A. § 49-5-203(a) (emphasis **[*22]** added). We find no merit to the County's position. The statute clearly applies.

III. CONTRACT.

The County also insists the contract between KCEA and the County Board, rather than the contract between KEA and the City Board, applies to the former City employees. It asserts that because the Education Professional Negotiations Act [2] allows only one organization to represent the professional employees, the KCEA is the exclusive representative of all County School System employees, including the former City School System employees. The County argues that because KCEA is the exclusive representative of all County School System employees, the contract between KCEA and the County Board is the sole contract for all employees. It cites as authority *N.L.R.B. v. Burns International Security Services*, which held that a successor employer is not bound to the terms of a contract negotiated between the predecessor employer and the employees' collective bargaining representative. 406 U.S. 272, 291, 92 S.Ct. 1571, 1584 (1972). *Burns*, however, focused solely on

[2] T.C.A. §§ 49-5-601, et seq.

interpreting the terms of the National Labor Relations Act, 29 U.S.C.A. §§ 151, et seq. (1973), and that Act specifically excludes **[*23]** states and their political subdivisions from its definition of "employer." *Id.*, at § 152(2). Therefore, we find that *Burns* and similar National Labor Relations Act cases are not applicable to the case at bar.

We find instead that the applicability of T.C.A. § 49-5-203 to this case is mandated by *Wagner v. Elizabethton City Board of Education*, which held that where the City of Elizabethton formed a school system separate from Carter County, the former Carter County teachers' rights were preserved, even though those rights conflicted with an existing contract between Elizabethton and Carter County. Justice McCanless, speaking for a unanimous court, pointedly noted that

[t]he statute insured that no right of a teacher in Elizabethton High School should be diminished by reason of the transfer of its control and operation from the county system to the city system. The circumstance that it conflicts in its effect with the provisions of the contract of June, 1969, under which the control and operation of the school was transferred is of no legal significance. This statute, enacted in furtherance of the police power of the state, may **[*24]** be given retrospective effect in so far as it guarantees the teachers all the rights and privileges [that] they enjoyed under the county system at the time of the transfer.

496 S.W.2d 468, 471 (1973) (citation omitted). We can find no factual or legal distinction of significance between *Wagner* and the instant case. We believe that the court's reasoning in *Wagner* is equally applicable where the control and operation of the City school system is transferred to the County and where the protection of the rights and privileges of the teachers is given prospective rather than retrospective effect.

IV. VALIDITY OF CITY CHARTER REPEAL.

Aldmon questions whether Article XII of the City Charter was validly repealed in the November, 1986 referendum. She argues that the ordinance authorizing the referendum conflicted with T.C.A. § 49-5-203 because the statute was designed to protect those tenure rights created by Article XII.

We find no such conflict between the statute and the Charter repeal. The statute is specifically designed to protect those "rights and privileges," including tenure status, to which Aldmon is entitled, and it vests the Commissioner of Education with **[*25]** the power to enforce the protection of those rights and privileges. Thus, as we discuss more fully below, the repeal of the tenure provisions of the City Charter does not conflict with the continuation of the rights of employees created by those Charter provisions.

V. TENURE RIGHTS.

The County argues that the Chancellor defined "teacher" too broadly, and that "teacher" under T.C.A. § 49-5-203 means only classroom teacher. The County bases its argument on § 49-5-201, but that section merely defines the duties of a teacher without defining the term itself.

We believe that the more appropriate definition of "teacher" is that found in T.C.A. § 49-5-501(10), which reads as follows:

"Teacher" includes teachers, supervisors, principals, superintendents and all other certificated personnel employed by any local board of education, for service in public elementary and secondary schools in Tennessee, supported in whole or in part by state or federal funds.

This definition was adopted by the General Assembly in 1951 specifically for use in the teacher tenure statute. Since § 49-5-203 protects tenure status in addition to other rights, and since § 49-5-203 is a remedial statute, **[*26]** it should be construed broadly to include all the certified former City employees, which the proof shows include the superintendent, assistant superintendents, principals, assistant principals, supervisors, directors, and classroom teachers. Statutes which relate to the same subject matter should be

construed together in order to make the legislative scheme operate in a consistent and uniform manner. *Belle-Aire Village, Inc. v. Ghorley*, 574 S.W.2d 723, 726 (Tenn. 1978).

The County also questions whether § 49-5-203 requires that it employ all "teachers," and, if so, for how long. It argues that employment of former City employees is purely at the County Board's discretion. Although the County hired effectively all former City employees for the 1987-1988 school year, the County implies that those employees have no tenure or contract rights beyond that school year. [3]

Article XII of the City Charter, Section 1201, provided that City employees would attain tenure after having served **[*27]** two years and having been hired for a third year. Section 1202 provided that once tenured, an employee could not have suffered a reduction in salary, demotion, or dismissal unless specified charges had been sustained. It also provided that if a reduction in force or salary reductions were required, seniority would govern. Section 49-5-203(c) specifically sets out tenure status as one of the rights and privileges to be protected in the event of a governing change. If tenure is not protected by the statute, the balance of the statute relating to other rights and privileges incidental to employment would make no sense. The statute is likewise specific that the successor school system is obligated to see that those rights and privileges continue.

Public education is a state function. A county is a political subdivision of the state, and local boards of education have only whatever power over education the General Assembly delegates. *Hamblen County v. City of Morristown*, 584 S.W.2d 673, 675 (Tenn.App. 1979). As the Supreme Court pointed out in *Howard v. Bogart*, the power possessed by the Knox County Board of Education to employ personnel to operate the school system is conferred **[*28]** by the General Assembly and may be modified by the General Assembly. 575 S.W.2d 281, 283 (1979). When the General Assembly enacted § 49-5-203, it modified the terms of the general statutes granting that power to local school boards.

It is clear, under the terms of the statute, that the County had no broad, general discretion in hiring or not hiring the former City employees, and had no discretion regarding their tenure status under Article XII as contemplated by § 49-5-203. The statute requires the County to afford full Article XII protection. The County may reduce personnel for legitimate financial or enrollment reasons, but it must do so, as to former City employees, solely under the substantive provisions of Article XII, providing all seniority and other protections required.

The Chancellor found that, because of the repeal of Article XII, the Knox County Private Tenure Act would be the sole tenure act applicable to County employees, including the former City employees. The Chancellor found specifically that the former City employees' rights would be adequately protected by the County Act. Aldmon, however, insists that the County Tenure Act approved by the Chancellor diminishes **[*29]** her rights under Article XII and § 49-5-203. We agree. As we have already noted, Aldmon's Article XII rights are protected by § 49-5-203 whether Article XII is repealed or not, and an examination of Article XII and the County Act reveals substantive differences regarding classes of employees, years of service to qualify for tenure, termination of tenure, and disciplinary grounds leading to tenure termination. The procedural requirements of Article XII and the County Act, however, do not differ significantly.

The mandate of § 49-5-203 is clear. Therefore, we modify the Chancellor's opinion to hold that the County must provide former City employees the same substantive rights afforded them by Article XII. We agree with the Chancellor that the procedural provisions of the County Act are an

[3] The Commissioner originally sued to enjoin the County to hire the former City employees. After the County agreed to hire them for the 1987-1988 school year, the Commissioner dropped the suit.

adequate means of enforcing the full panoply of substantive rights created by Article XII.

VI. PENSIONS.

The County argues that it may require former City employees to become members of TCRS, and questions whether and to what extent it must assume pension liability if § 49-5-203 applies to former City employees' pension rights.

The Chancellor found that the former Plan A and B employees **[*30]** could continue under the City Pension System, that the City was solely responsible for the plans' current liability until July 1, 1987, and that the County was solely responsible for future employer liability of the Plan A and B employees. The Chancellor allowed the County the option of establishing a separate pension system for the Plan A and B employees, so long as it accrued benefits at no lesser rate and at no greater cost to employees than Plans A and B. The Chancellor held that because such a plan would not diminish the employees' rights under § 49-5-203, the County could require the Plan A and B members to become members of its new plan for the accrual of future benefits.

Although the November referendum abolished the City school system and City teacher tenure provisions of the Charter, it left intact the City pension system, because the pension system also applied to employees of other City departments. The City pension plans were designed so that the pension rights of Plan A and B members, all of whom were employed before January 1977, would vest after ten years service. Thus, by the time of the transfer -- July 1, 1987 -- the rights of all Plan A and B teachers had vested.

[*31] Both Plans A and B require that members be City employees in order to participate, and provide, depending whether vesting has occurred, either that contributions be returned or that the benefit level be frozen when employment terminates. Therefore, the City argues, none of the former City teachers may remain members of Plans A and B because their employment was terminated as a result of the referendum, and because § 49-5-203 requires the County -- "the new government, organization or administration" -- to assume the City's obligations under Plans A and B. We believe that the plain language of T.C.A. § 49-5-203 requires otherwise. We cannot state with more clarity the mandate of subsection 203(a) that "[t]he change in the government structure of a school system . . . shall not impair, interrupt, or diminish the rights and privileges of a then existing teacher and such rights and privileges *shall continue* without impairment, interruption or diminution." (emphasis added). The statute is equally clear in dictating that "[t]he term 'rights and privileges' . . . shall include, but not be limited to . . . *pension or retirement benefits*." § 49-5-203(c) (emphasis added).

The **[*32]** Commissioner determined, in accord with his statutory responsibility, that teachers' rights would be impaired should they be forced out of the City pension plan. We agree that the right to remain in the City pension plan is a "pension benefit" protected by the statute, and that the City is required by the statute to allow the teachers full participating membership in the City pension plan.

In *Blackwell v. Quarterly County Court of Shelby County,* the Supreme Court directly addressed "the extent to which a local legislative body may validly modify the terms of a retirement and pension plan which it had previously adopted for the benefit of public employees," the reasonableness of a particular modification, and a "determination of those members to whom it can be validly applied." 622 S.W.2d 535, 537 (1981).

The *Blackwell* court adopted

the so-called Pennsylvania rule, which permits reasonable modifications [to a public employee retirement and pension plan] when necessary to protect or enhance actuarial soundness of the plan, provided that no such modification can adversely affect an employee who has complied with all conditions necessary to be eligible for a retirement **[*33]** allowance.

622 S.W.2d at 543. The *Blackwell* court emphasized

that public policy demands that there be a right on the part of the public employer to make reasonable modifications in an existing plan if necessary to create or safeguard actuarial stability, *provided that no then accrued or vested rights of members or beneficiaries are thereby impaired*.

622 S.W.2d at 541 (emphasis added).

The focus of *Blackwell* was upon a governing body's attempt: to effect changes in its pension plan where the employees "continued to be employed by the County and to accrue benefits : in the future" after their rights had vested. *Id*., at 543. The *Blackwell* court noted that those rights could not be taken from the employees without their consent and, thus, that those vested employees continuing in the plan would do so under the provisions in force at the time that their rights had vested. *Id*. The Supreme Court also noted in *Roberts v. Tennessee Consolidated Retirement System* that the right to a retirement pension would remain vested even after a vested employee left the system. 622 S.W.2d 544, 545 (1981) (explaining effect of *Blackwell* and applying its holding **[*34]** to employee who had attained minimum number of years of service but had not then reached retirement age).

The Supreme Court's enunciation of a public policy that protects the rights of public employees who are vested pension plan members is certain, and is entirely harmonious with the protections afforded Plan A and B members by the General Assembly under T.C.A. § 49-5-203. The County insists that the pension benefit rights of Plan A and B teachers do not include those based on future accruals. We do not agree. Subsection 203(b) directs that the rights and privileges of teachers "shall continue . . . as obligations of the new government." That the rights "shall continue" indicates that the members' rights as they exist under the City pension plan shall continue, and those rights include future accruals. Under *Blackwell*, the City could not eliminate or diminish the right to future accruals, and the statute ensures that neither may the County do so. That the rights shall continue "as obligations of the new government" indicates merely that the County, instead of the City, must pay the future employer contribution "obligation" to the City pension system, or to an equivalent system **[*35]** established by the County that will provide no less than the same benefits -- including future accruals -- at no greater cost to the Plan A and B members.

Even absent the protections afforded the Plan A and B employees by the statute and *Blackwell*, we think it certain that those employees could remain in the City pension system by the terms of the plan itself. Section 1380 of the City Charter reads in pertinent part as follows:

1380. Proviso in the Event of Consolidation of Local Governmental Functions, Metropolitan Government or Other Related Eventualities.

(A) In the event of the consolidation of schools, departments, units, boards or other employing bodies of any other name of Knox County and the City of Knoxville, followed by a determination by the pension board that such consolidation has resulted in a member of this system becoming an employee of Knox County, such member may continue to be a member of the system, notwithstanding any provision in this amendment or of the pension act of any other law to the contrary,

(D) The employer shall be authorized and empowered to enter into appropriate contractual or other arrangements with Knox County under which Knox County **[*36]** shall become legally obligated to pay periodically into the fund as though it were the employer in this system, the portion of cost of benefits not provided by employee contributions under this system . . . .

(E) In the event that the City of Knoxville shall hereafter be superseded by or replaced or consolidated with some other form or successor form of government, it is the declared intent that the system shall apply to such other or successor

form of government and that such other or successor form of government shall assume the obligations of the employer hereunder as if such other or successor form of government were the employer under this system in all cases where the employee-employer relationship between a member of this system and the other or successor form of government continues without interruption.

Webster's Third New International Dictionary defines *consolidation* as

the process of uniting or the quality or state of being united : COMBINATION, UNIFICATION <<the [consolidation] of several works into one volume> <<the present [consolidation] of rural schools> . . .

Although the City Charter does not define "consolidation," we think it clear that the intent **[*37]** of § 1380 was to provide comprehensive protection and continuity to the pension rights of the City employees. Subsection (A) broadly states that "[i]n the event of the consolidation of schools . . . or other employing bodies of any other name," the former City employees may remain in the system, "notwithstanding any provision . . . to the contrary." Further, subsection (E) provides that if the City is "superceded by or replaced or consolidated with some other form or successor form of government, *it is the declared intent that the system shall apply to such other or successor form of government*" (emphasis added). Such language does not require a contractual transfer of schools. Neither does it exclude as a means of "consolidation" the abolition of the City School System and its transfer by operation of law to the County. Rather, it clearly contemplates just such an occurrence, and entitles Plan A and B employees to remain full participating members of the City pension system. [4]

Because we find **[*38]** that the Plan A and B employees are protected by the terms of their pension plan, by § 49-5-203, and by *Blackwell*, we need not address the constitutional question regarding whether their pension rights were contract rights unconstitutionally impaired under the circumstances here. *Pyle by Pyle v. Morrison*, 716 S.W.2d 930, 936 (Tenn.App. 1986); *Stokes v. Leung*, 651 S.W.2d 704, 711 (Tenn.App. 1982).

VII. STATE ANNUITY.

Both KEA and KCEA argue that payment of the state annuity directly to City Plan A and B members upon their retirement [5] was a right that vested in those members by operation of T.C.A. § 8-35-303. Ordinarily, that statute directs that

the board of trustees shall pay from the state accumulation fund of this retirement system to the managing board of the local retirement fund a state annuity equal to the state annuity which would have been payable under this retirement system if such teacher had been a member of this retirement system . . . .

Section 8-35-303(5) provides, however, that

[n]otwithstanding any provisions of this part to the contrary, the board of trustees shall, upon the request of the managing board of a local retirement **[*39]** fund, *henceforth* pay the entire amount of the state annuity directly to the members of said local retirement fund.

(emphasis added). KEA and KCEA insist that because the City requested under § 8-35-303(5) that the state annuity be "henceforth" paid directly to the members, the annuity may not now be redirected. We disagree.

Webster's New International Dictionary, Second Edition, defines "henceforth" as follows:

[4] Because Plan A and B employees may remain in the City Pension system, they come under the mandate of T.C.A. § 8-35-301, which provides that they shall not be members of TCRS.

[5] The Chancellor's opinion determined only whether a right to the state annuity had vested in those Plan A and B members who have yet to attain eligibility for retirement. He specifically declined to consider, as do we, whether such a right has vested in those members who already are receiving their retirement allowance.

henceforth - from this time forward.

Black's Legal Dictionary (5th Ed. 1979) defines it as follows:

henceforth: a word of futurity which as employed in legal documents, statutes, and the like, always imports a continuity of action or condition from the present time forward but excludes all the past.

These definitions indicate *direction* in time but do not indicate *distance* in time. The General Assembly easily could **[*40]** have made the operation of § 8-35-303(5) irrevocable had it desired. Indeed, the predecessor to Section 303, T.C.A. § 49-1542(1), did just that. It read as follows:

Notwithstanding any provision of the law or municipal charter provisions to the contrary, the governing body of any political subdivision having a local retirement fund from which retired members receive benefits made by ordinance or other resolution authorize the board of trustees to pay directly to the retired member of such local retirement fund whatever state annuity as provided for them. The adoption of such ordinance or resolution *shall be permanent* and such action *may not be repealed* to the detriment of any retired member.

(repealed 1972, and replaced by present provision) (emphasis added).

In amending the statute, the General Assembly obviously could have used similar language to express a legislative intent that the annuity not be redirected, but it chose not to do so. Leaving aside the question whether the state annuity could vest in *any* Plan A or B members, it follows that because the language of the statute allowed local plans the unrestricted option of redirection, any "right" of members **[*41]** to receive the state annuity certainly could not vest in those members who had not yet retired.

We believe that KEA and KCEA's other arguments regarding the state annuity depend upon the proposition that the annuity may not be redirected, and they thus fail as that argument fails. Since the City, at any time, could have requested that the state annuity be redirected to the City pension fund, the Plan A and B members had no contractual "right" to the state annuity under T.C.A. § 49-5-203 and thus had no contract rights impaired within the meaning of Article I, Section 20, of the Constitution of Tennessee. Although we think it clear that payment of the state annuity directly to members was not part of the City pension plan itself, a decision regarding its redirection would be grounded in the same

public policy [that] demands that there be a right on the part of the public employer to make reasonable modifications in an existing plan if necessary to create or safeguard actuarial stability, provided that no then accrued or vested rights of members or beneficiaries are thereby impaired.

Blackwell, 622 S.W.2d at 541.

As a result of the foregoing, we modify the Chancellor's **[*42]** opinion to hold that the County must provide former City employees the same substantive rights afforded them by Article XII of the City Charter. In all other respects, we affirm the Chancellor's opinion and remand. Costs are taxed equally to the City of Knoxville and Knox County.

Houston M. Goddard, J., Herschel P. Franks, J., Concur.

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Exhibit

3

Chattanooga Metro. Airport Auth. v. Thompson

Court of Appeals of Tennessee, Eastern Section

March 24, 1997, FILED

C/A NO. 03A01-9610-CH-00319

Reporter
1997 Tenn. App. LEXIS 209 *; 1997 WL 129366

CHATTANOOGA METROPOLITAN AIRPORT AUTHORITY, Plaintiff-Appellee, v. E. RAY THOMPSON, d/b/a EAST RIDGE CAB COMPANY, JAMES KENNEDY, LONNIE J. HICKS, Defendants-Appellants, and STATE OF TENNESSEE, Defendant.

Prior History: [*1] CHANCERY COURT. HAMILTON COUNTY. HON. R. VANN OWENS, CHANCELLOR.

Disposition: AFFIRMED AND REMANDED.

The airport authority brought a declaratory judgment action seeking to have Tenn. Code Ann. § 7-51-1006 declared unconstitutional. On appeal, the operator of licensed taxicabs contended that there was no justiciable controversy and that the trial court erred in declaring Tenn. Code Ann. § 7-51-1006 unconstitutional. The court affirmed the trial court's judgment declaring Tenn. Code Ann. § 7-51-1006 unconstitutional under Tenn. Const. art. XI, § 8. The trial court acted properly in resolving the dispute between the parties. An act which suspended the general law violated Tenn. Const. art. XI, § 8 unless there was a reasonable or rational basis for the exclusion. The Tennessee Passenger Transportation Services Act, Tenn. Code Ann. § 7-51-1001 et seq., was "general" for the purposes of Tenn. Const. art. XI, § 8.There was no rational basis for the exemption provided in Tenn. Code Ann. § 7-51-1006.

Case Summary

Procedural Posture
Defendant operator of licensed taxicabs appealed a judgment from the Chancery Court, Hamilton County (Tennessee) declaring Tenn. Code Ann. § 7-51-1006 unconstitutional under Tenn. Const. art. XI, § 8 in this declaratory judgment action brought by plaintiff airport authority.

Outcome
The court affirmed the trial court's judgment declaring a statute unconstitutional in this declaratory judgment action brought by the airport authority.

Counsel: HUGH J. MOORE, JR., and JOEL A. CONKIN, WITT, GAITHER & WHITAKER, P.C., Chattanooga, for Plaintiff-Appellee.

Overview

ROBERT H. CRAWFORD, CRAWFORD & CRAWFORD, Chattanooga, for Defendants-Appellants.

Judges: Herschel P. Franks, J., CONCUR: Houston M. Goddard, P.J., (Not participating). Don T. McMurray, J.

Opinion by: Herschel P. Franks

Opinion

OPINION

Franks. J.

In this declaratory judgment action, the Trial Court declared Tennessee Code Annotated § 7-51-1006 unconstitutional under Article XI, § 8, Constitution of Tennessee, and defendant has appealed.

Plaintiff, Chattanooga Metropolitan Airport Authority (Authority), oversees the operation of the Lovell Field airport in Chattanooga, and Defendant operates licensed taxicabs in and around the city of Chattanooga, including the airport.

The Tennessee Passenger Transportation Services Act (TPTSA), codified at T.C.A. § 7-51-1001 *et seq*, gives government entities the power to control and regulate private passenger-for-hire vehicles within the entity's jurisdiction. The definition of governmental entity includes airport authorities. T.C.A. § **[*2]** 7-51-1003(b)(1). Hamilton County, as specified through the use of its population bracket, was excluded from this act. T.C.A. § 7-51-1006 [1].

Despite this exclusion, the Authority used the power given in TPTSA and arranged an exclusive service agreement with a taxi cab company other than defendant's cabs. When defendant's drivers continued to operate at the airport taxi stand, they were arrested and charged with criminal trespass. The charges were dismissed in the Hamilton County General Sessions Court.

The Authority then filed this action for declaratory judgment.

Defendant argues that the Authority is a state agency, as defined **[*3]** in the Uniform Administrative Procedure Act. T.C.A. § 4-5-102(2) [2]. The UAPA provides that venue for such a state agency is Davidson County. T.C.A. § 4-5-224(a) [3].

[*4] In asserting jurisdiction, the Trial Court relied on UAPA which states that "the provisions of this chapter shall not apply to . . . to county and municipal boards, commissions, committees, departments or officers." T.C.A. § 4-5-106(a). The

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[1] This exemption reads:

> The provisions of this part shall not apply to any governmental entity of a county having a population of not less than two hundred eighty-seven thousand seven hundred (287,700) nor more than two hundred eighty-seven thousand eight hundred (287,800) according to the 1980 federal census or any subsequent federal census.
>
> T.C.A. § 5-51-1006.

[2] This section reads:

> Definitions. - As used in this chapter: . . . (2) "Agency" means each state board, commission, committee, department, officer, or any other unit of state government authorized or required by any statute or constitutional provision to make rules or to determine contested cases . . . .
>
> T.C.A. § 4-5-102.

[3] This provision reads in part:

> Declaratory judgments. - (a) The legal validity or applicability of a statute, rule or order of an agency to specified circumstances may be determined in a suit for a declaratory judgment in the chancery court of Davidson county, unless otherwise specifically provided by statute, if the court finds that the statute, rule, or order, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the complainant. . . .
>
> T.C.A. § 4-5-224.

statute which authorized Chattanooga to create an Airport Authority declared that "airport authorities created pursuant to this chapter shall be public and governmental bodies acting as agencies and instrumentalities of the creating and participating municipalities. . . ." T.C.A. § 42-4-102(a)(emphasis added). The Authority is not an agent of the state within the meaning of UAPA and the issue was properly before the Chancery Court.

Next, defendant contends there was no justiciable controversy. A chancellor's decision regarding whether to grant or deny declaratory judgment is largely discretionary and will not be disturbed on appeal unless such decision is arbitrary. *Huntsville Utility District of Scott County, Tenn. v. General Trust Co.,* 839 S.W.2d 397, 400 (Tenn.App. 1992).

The dispute is due to a conflict over who may use the taxicab stand at the airport. The conflict has led to citations for criminal trespass, and the record indicates **[*5]** that the Sessions Court dismissed the charges because of the civil nature of the dispute. The Trial Court acted properly in resolving the dispute between the parties.

Next, defendant argues that summary judgement was not appropriate on this record.

Plaintiff points out that it submitted several affidavits to support its motion for summary judgment. It argues that "the nonmoving party cannot simply rely upon his pleadings . . ." and if he/she does, "summary judgment . . . shall be entered against him." *Byrd v. Hall,* 847 S.W.2d 208, 211 (Tenn. 1993). Since defendant did not respond with affidavits, plaintiff argues that it was entitled to summary judgment.

Defendant argues the dispute is a question of law, and he did not have to challenge the facts alleged by plaintiff, and summary judgment will not be appropriate unless the moving party is entitled to a judgment as a matter of law. T.R.C.P. 56.03. We agree.

The issue thus becomes, is Hamilton County's exemption unconstitutional as a special law suspending the general law?

The Tennessee Constitution requires that:

> General laws only to be passed. - The Legislature shall have no power to suspend any general law for the **[*6]** 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 such law. . . .

TN. Const. Art. XI, § 8.

An Act which suspends the general law violates this provision unless there is a reasonable or rational basis for the exclusion. *Leech* v. *Wayne County,* 588 S.W.2d 270 (Tenn. 1979).

Defendant first points out that a general law is one which has "mandatory statewide application." *Rector v. Griffith,* 563 S.W.2d 899 (Tenn. 1978). He argues that TPTSA is not a general law because instead of requiring an affirmative action by the local governments, it merely enables them to establish an airport authority. However, laws which authorize local actions have repeatedly been considered "general" within the context of Art. XI, § 8. *Taylor Theater v. Town of Mountain City,* 189 Tenn. 690, 227 S.W.2d 30, 31 (Tenn. 1950); *Brentwood Liquors* **[*7]** *Corp. of Williamson County v. Fox,* 496 S.W.2d 454 (Tenn. 1973); *Nolichuckey Sand Co., Inc. v. Huddleston,* 896 S.W.2d 782 (Tenn.App. 1994). The TPTSA is a uniform, state-wide plan for dealing with passenger transportation. It is "general" for the purposes of Article XI, § 8.

Next, defendant asserts that "if any reasonable justification for the law may be conceived, it must be upheld by the courts." *State v. Tester,* 879 S.W.2d 823, 830 (Tenn. 1994). Defendant proposes

a possible rationale:

> Chattanooga had already created an public transit authority which regulated taxis, in the form of CARTA (Chattanooga Area Regional Transportation Authority), pursuant to authority granted in T.C.A. § 7-56-102(a).

Defendant suggests that perhaps the legislators were attempting to avoid duplicative jurisdiction over taxi cab service.

However, the earlier statute authorizing the creation of a public transportation authority was also of state-wide application. Numerous communities presumably already have local transit authorities. It is not readily apparent why this circumstance would distinguish Hamilton County. More important, even the generous rational basis standard requires **[*8]** that an exclusion based on a population bracket have some relation to a distinctive characteristic of that size population. *Knoxville's Community Development Corp. v. Knox County,* 665 S.W.2d 704, 705 (Tenn. 1984); *State ex rel. Bells v. Hamilton County,* 170 Tenn. 371, 95 S.W.2d 618, 619 (Tenn. 1936).

There is no factual evidence in the record to establish a rational basis for a diversity of laws based upon the population of Hamilton County. We conclude there is no rational basis for the exemption, and the judgment of the Trial Court is affirmed, declaring the statute unconstitutional.

The cost of the appeal is assessed to the appellant, and the cause remanded.

Herschel P. Franks, J.

CONCUR:

Houston M. Goddard, P.J.

(Not participating).

Don T. McMurray, J.

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Exhibit

4

In re Estate of Combs

Court of Appeals of Tennessee, At Nashville

March 28, 2012, Session; August 28, 2012, Filed

No. M2011-01696-COA-R3-CV

Reporter
2012 Tenn. App. LEXIS 597 *; 2012 WL 3711748

IN RE ESTATE OF MAVIS A. COMBS

Prior History: [*1] Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Probate Court Affirmed. Appeal from the Probate Court for Davidson County. No. 10P652. David Randall Kennedy, Judge.

Disposition: Judgment of the Probate Court Affirmed.

Case Summary

Overview
The decedent's adult daughter and the decedent's three adult grandchildren appealed from the trial court's judgment that the grandchildren were not entitled to survivor pension benefits under the decedent's employee pension plan with a local government entity. On appeal, the court found that summary judgment was appropriate because there existed no legal basis under the local government entity's code on which survivor pension benefits could have been extended to the grandchildren under the plan and the plan did not violate equal protection provision of Tenn. Const. art. XI, § 8.

Outcome
Judgment affirmed.

Counsel: Jessie Ray Akers, Jr. and David Matthew Dolan, Nashville, Tennessee, for the appellants, Vicki Spurlock, William Stephen Earl Patterson, Mavis Jennie Lynette Lew, and Mary Michelle Shawhan.

Cynthia Ellen Gross, Jason Paul Bobo, and Kathryn S. Evans, Nashville, Tennessee, for the appellee, Metropolitan Government of Nashville and Davidson County.

Judges: ANDY D. BENNETT, J., delivered the opinion of the Court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

Opinion by: ANDY D. BENNETT

Opinion

Decedent's adult daughter and three adult grandchildren appeal from the trial court's judgment that the grandchildren are not entitled to survivor pension benefits under decedent's employee pension plan. Summary judgment was appropriate because there are no genuine issues of material fact and because there exists no legal basis on which to extend survivor pension benefits to the grandchildren. We affirm.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

The decedent, Mavis A. Combs ("Ms. Combs"), worked **[*2]** for the Metropolitan Government of Nashville and Davidson County ("Metro") for many years. She died intestate on February 7, 2010. At the time of her death, Ms. Combs was unmarried and was survived by her daughter, Vicki Spurlock ("Ms. Spurlock"), and three adult grandchildren, William Stephen Earl Patterson, Mavis Jennie Lynette Lew, and Mary Michelle Shawhan ("Ms. Shawhan").

Ms. Shawhan had Ms. Combs's power of attorney and, beginning in November 2009, attempted to apply through the Metro Human Resources Department ("HR") for pension benefits on Ms. Combs's behalf. On February 7, 2010, Ms. Combs died before completing the pension application process, thus her pension benefits never commenced.

In April 2010, Ms. Spurlock, the administratrix of Ms. Combs's estate, filed a petition for declaratory relief requesting a declaration that Ms. Combs's three grandchildren, rather than the estate, are the legal beneficiaries of the pension plan. Metro filed a motion for summary judgment arguing that there was no legal authority pursuant to the Metropolitan Code of Laws for the payment of survivor pension benefits to the grandchildren or to the estate. The trial court, finding no genuine issues **[*3]** of material fact and finding that Metro had satisfied its burden as the moving party, granted the motion for summary judgment on the ground that there is no ordinance or other legal authority extending survivor pension benefits to the grandchildren. Ms. Spurlock and the grandchildren appeal.

Metro Pension System and Application Process: Undisputed Facts[1]

Metro and its Employee Benefit Board regulate pensions in accordance with the Metropolitan Charter and the Metropolitan Code of Laws. A Metro employee who has at least five years of credited service earns a vested pension benefit. Before 1987, Metro employees contributed money to the pension fund, but since then Metro alone has funded the pension benefits for general government employees. Metro offers seven pension options.

To initiate the pension application process, a Metro **[*4]** employee first contacts the HR benefits staff. Then, the employee has an intake meeting with a benefits staff member who provides the employee with necessary paperwork and a list of documents the employee must provide to HR so that his or her pension application will be processed. These required documents include a birth certificate, Social Security card, and Medicare card. The employee must present additional documentation if he or she desires to leave a pension benefit to a survivor beneficiary, including the potential beneficiary's birth certificate and Social Security card. Metro requires these documents because it calculates an employee's various pension options based on actuarial tables and data. For example, an employee's monthly pension benefit would be lower if he or she had designated a young survivor beneficiary versus an older one.

[1] In its order granting summary judgment, the trial court "adopt[ed] the undisputed facts in the record as the facts in this case." The undisputed facts recited herein regarding Metro's pension system and application process are from the trial court's order which is fully supported by the testimony of Shannon Hall, the HR liason to the Metro Employee Benefit Board.

Once a benefits staff intake employee compiles the required documents and forms, another HR employee known as the pension calculator calculates the employee's various pension options. If an employee has provided the necessary documents and wants to see pension options that include a designated survivor beneficiary, the pension calculator will **[*5]** calculate all of the pension options listed on the application for benefits, with certain exceptions where additional information may be needed. If the employee does not intend to designate a survivor beneficiary, then the pension calculator will calculate only two of the pension options. Once the pension calculator has calculated the various options, he or she meets with the employee and the employee elects one of the pension options.

Separate from the application for benefits is the "Beneficiary Designation Form - Last Pension Check and Contributions." An employee lists beneficiaries on this form for two purposes: (1) If an employee's pension has commenced, no matter the pension option selected, those listed on the beneficiary designation form will receive the final pension check in the month in which the employee dies because the employee cannot collect that final check; and, (2) If an employee's pension has not commenced, the beneficiaries listed will receive the employee's pension contributions, if applicable.

Designating one or more beneficiaries on the beneficiary designation form is not the same as designating a survivor beneficiary for a pension. If an employee desires to designate **[*6]** a survivor beneficiary to receive his or her pension, he or she must list this beneficiary on the application for benefits after the pension options are calculated and after he or she selects one that includes a survivor benefit. Only one person may receive an employee's survivor pension benefit.

If an employee has a vested pension benefit and dies before electing a pension option, and the employee has a legal spouse or dependent children, then a survivor pension benefit is provided for the spouse and/or any dependent children. However, if an employee who does not have a legal spouse or dependent children has a vested pension benefit and dies before electing a pension option, then the employee's beneficiaries are entitled only to the employee's pre-1987 pension contributions.

Ms. Combs's Pension Application: Undisputed Facts

Ms. Shawhan lived with Ms. Combs for two and a half years preceding her death. To begin the application process for Ms. Combs's pension benefit, Ms. Shawhan met with HR employee Pamela McInish on November 20, 2009. Ms. McInish instructed Ms. Shawhan that she would need to submit certain documents so that Ms. Combs's pension application would be processed.[2] During **[*7]** the meeting, Ms. Shawhan filled out and signed on Ms. Combs's behalf a form entitled Metro Human Resources Service Pension Application Request, but left empty the blank in which an optional beneficiary could be designated. However, Ms. McInish prepared an estimate (dated November 20, 2009) of Ms. Combs's benefits. The estimates of the joint and survivor options were calculated "based on a beneficiary date of birth of

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[2] Ms. Shawhan's deposition testimony reads as follows:

> Q. Okay. What was—well, during that first meeting [with Ms. McInish], were you told that you would have to provide certain documents to HR?
>
> A. Yes.
>
> Q. What documents were you told that you would have to provide in order for the pension application to be processed?
>
> A. It was a whole list. I can't be sure exactly all of the documents. I know that [Ms. Combs's] birth certificate and Social Security card were at least two of them, but I can't be sure what the rest of them were.
>
> Q. Okay. Did you leave with an actual written-down list of what you would need to—
>
> A. Yes.
>
> Q. —bring back?
>
> A. Yes. [Ms. McInish] had given me a list along with all the other paperwork.

3/11/1981," Ms. Shawhan's birth date. Ms. McInish also gave Ms. Shawhan the beneficiary designation form. This form bears Ms. Combs's signature, is dated 12/15/09, designates as beneficiaries Ms. Shawhan and Ms. Combs's two other adult grandchildren, and specifically states:

> The pension check beneficiary is the person you name to receive the last pension check owed to you for the month in which you die. If you have contributed to the pension plan and you die before your total monthly pension benefit payments equal the amount you contributed and there is no monthly survivor pension benefit owed at your death, then pension contributions may be payable to the person you name.

Ms. Shawhan, as power of attorney for Ms. Combs, did not receive a copy of the application for benefits **[*8]** during the November 20, 2009 meeting because the pension calculator had not yet calculated Ms. Combs's various pension options.

HR had in its possession Ms. Combs's Social Security number because it was listed on Ms. Combs's I-9 Employment Eligibility Verification form, twice on the beneficiary designation form, twice on the service pension application request, and throughout Ms. Combs's employee file and personnel records. Nevertheless, HR insisted that Ms. Combs's actual Social Security **[*9]** card be produced before processing her pension request.

Ms. McInish sent a letter dated December 16, 2009 reminding Ms. Combs and Ms. Shawhan that they still needed to provide HR with a copy of Ms. Combs's Medicare and Social Security cards, and noting that "we cannot proceed any further with [the] pension request" unless that was done. Ms. Combs's Social Security card could not be found, so Ms. Shawhan made numerous attempts to contact Ms. McInish by telephone to ask if she could instead submit a printout from the Social Security Administration. Ms. McInish did not return these telephone calls, but sent to Ms. Combs another letter dated January 8, 2010 stating: "though I have received all the necessary information from your department, and have received Board approval to process your Service Retirement, we cannot proceed any further with your pension request until you provide [the Social Security card] . . . . These documents are required for the successful processing of your current request for pension benefits."[3] On Friday, February

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[3] Metro does not dispute the disheartening fact that Ms. McInish failed to return Ms. Shawhan's telephone calls. Ms. Shawhan explained:

> Q. Okay. So at that point, December 16, 2009, is it correct that [Ms. Combs's Social Security and Medicare cards] had not been provided?
>
> A. Correct.
>
> Q. Okay.
>
> A. That's when I started calling to ask if I could get something from the Social Security office, because I was unable to locate her Social Security card at that time.
>
> Q. Okay. Tell me about that. Who did you call and who did you talk to?
>
> A. I called the board and Pam McInish, and I wasn't ever actually able to have someone give me an answer on if a printout from the Social Security office was acceptable or not.
>
> Q. Did you actually speak to a person when you called?
>
> A. There was a couple times somebody would answer the phone. I didn't get their names, and even if I did, I have no clue what they are now, but they told me that I would have to speak directly to Pam, that Pam would have to be able to answer that question.
>
> Q. Okay. Did you specifically ask the person that you talked to the question or—
>
> A. Yes.
>
> Q.—Did you just ask to talk to Pam?
>
> A. I asked them if I—if they knew if the **[*11]** printout from the Social Security office would be acceptable or not, and they said that Pam would have to be able to answer that because she was the one that worked the case.
>
> Q. Okay. How many times did you call for Pam to ask specifically about the Social Security card?
>
> A. I don't have an exact number. I know I called several times on the office number. I also had her personal cell number, and so I called and also tried to text her, and I never heard anything back.

We have all experienced the frustration of "red tape." Though we

5, 2010, Ms. Shawhan obtained a printout from the Social Security Administration as proof of Ms. Combs's Social Security number and faxed it to HR. Ms. **[*10]** Combs died two days later.

Ms. Combs died before completing the pension application process. The next steps would have been the pension calculator's computation of Ms. Combs's various pension options based on the information contained in the initial documents, Ms. Combs's or her power of attorney's election of a specific pension option so that the pension would commence, and the designation of a survivor beneficiary of the pension. Pursuant to the Metropolitan **[*12]** Code of Laws, the pension benefit belonging to an unmarried employee with no dependent children who dies before his or her pension has commenced does not default to a beneficiary. *See* Metro Code §§ 3.40.041 and 3.40.045. Ms. Combs was unmarried and was survived by one adult daughter and three adult grandchildren so, after her death, the grandchildren received from Metro a check in the amount of her pre-1987 pension contributions, pursuant to the beneficiary designation form.

STANDARD OF REVIEW

A party against whom a declaratory judgment is sought may move for summary judgment at any time. Tenn. R. Civ. P. 56.02. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. P. 56.04. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we must determine whether factual disputes exist. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). **[*13]** If a factual dispute exists, we must determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Id.; Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App.1998). To shift the burden of production to the nonmoving party who bears the burden of proof at trial, the moving party must negate an element of the opposing party's claim or "show that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 8-9 (Tenn. 2008).[4]

ANALYSIS

Metro and its Employee Benefit Board regulate employee pensions in accordance with the Metropolitan Charter and the Code of the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro Code"). Metro Code section 3.33.010 **[*14]** provides that a Metro employee "who has credited employee service, shall be eligible following termination to receive an employee service pension in accordance with the provisions of this chapter . . . . " However, "[b]efore any benefit payable from the trust fund can be paid, all conditions applicable to the payment of the benefit shall be met . . . ." Metro Code § 3.08.160. The appellants do not challenge the fact that Ms. Combs's pension did not commence before her death because she did not complete the application process and did not elect a pension option and concede that "the [Metro] Code provides no automatic default provision for the employee's post-1987 pension benefits of

sympathize with Ms. Shawhan, the fact that Ms. McInish did not return her telephone calls cannot influence our decision because neither this fact nor any causes of action arising from it were properly and timely alleged. *See infra* section I.

[4] Tennessee Code Annotated section 20-16-101 (2011), a provision that is intended to replace the summary judgment standard adopted in *Hannan*, is inapplicable to this case. *See Sykes v. Chattanooga Hous. Auth.*, 343 S.W.3d 18, 25 n.2 (Tenn. 2011) (noting that section 20-16-101 is only applicable to actions filed on or after July 1, 2011).

unmarried persons with no dependent children who die before their pension applications can be processed." Instead, they challenge the constitutionality of the relevant Metro Code provisions and argue that Metro "is estopped in equity from denying payment of the pension due to its negligence, obstruction of the process, and lack of good faith and fair dealing with its employee, Ms. Combs."

I. *Equitable Claims*

In response to Metro's motion for summary judgment, the appellants alleged, for the first time, alternative **[*15]** claims for relief—namely, that Metro has been unjustly enriched and that Metro should be estopped in equity from not paying the potential pension benefits, based on its negligence and lack of good faith and fair dealing with Ms. Combs.[5] The appellants neither alleged any facts to support these claims nor raised these claims in their petition for declaratory relief nor moved to amend their petition pursuant to Tenn. R. Civ. P. 15.01. The purpose of the pleading requirements in the Tennessee Rules of Civil Procedure is to "provide the parties and the trial court with notice of the claims and defenses involved in the case." *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 300 (Tenn. Ct. App. 2001) (citing *Poster v. Andrews*, 182 Tenn. 671, 189 S.W.2d 580, 582 (Tenn. 1943)). Furthermore, "a plaintiff may not raise a new theory of recovery for the first time in response to . . . [a] motion for summary judgment." *Blackburn & McCune, PLLC v. Pre-Paid Legal Servs., Inc.*, No. M2009-01584-COA-R3-CV, 2010 Tenn. App. LEXIS 416, 2010 WL 2670816, at *28 (Tenn. Ct. App. Jun. 30, 2010). "Rather, the proper procedure [is] to seek to amend the complaint to assert [an] alternative form of relief." *Id*. Thus, we decline to consider the **[*16]** appellants's claims of negligence, lack of good faith and fair dealing, unclean hands, and unjust enrichment because they were untimely and improperly raised.

II. *Constitutionality of Metro Code Provisions*

The appellants argue that the Metro Code provisions that deny survivor pension benefits to unmarried persons with no dependent children are unconstitutional, that they violate the 14th Amendment of the United States Constitution and Article XI Section 8 of the Tennessee Constitution, **[*17]** and that the state has no rational basis or legitimate state interest for such regulations."[6]

Article XI, § 8 of the Tennessee Constitution provides in pertinent part:

> 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, immunitie [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 such law.

This provision of our state Constitution provides for equal protection of laws and affords "essentially the same protection" as the United States Constitution's equal protection clause. *State v. Tester*, 879 S.W.2d 823, 827 (Tenn. 1994) (quoting *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993)). Unless a legislative classification disadvantages a "suspect class" or interferes with the exercise of a "fundamental **[*18]** right," requiring strict scrutiny analysis, it is

[5] Though the appellants's brief also raises the issue of whether Metro "should be estopped from claiming [Ms. Combs] did not properly fill out her retirement paperwork, due to the unclean hands doctrine," they offer no argument on this issue. Tennessee Rule of Appellate Procedure 27(a)(7) requires "[a]n argument . . . setting forth the contentions of the appellant with respect to the issues presented, and the reasons there for, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record . . . ." Because the appellants's argument fails to meet this basic requirement with respect to the unclean hands issue, we will not consider it.

[6] The appellants cite no authority in support of this argument and incorrectly cite to Article XI, § 6 of the Tennessee Constitution.

examined under the "rational basis test." *Tester* at 828.

The appellants concede that the Metro Code provisions[7] that limit the number of individuals who are eligible to receive survivor pension benefits should be examined under the rational basis test, which has been described as follows:

> The concept of equal protection espoused by the federal and our state constitutions guarantees that "all persons similarly circumstanced shall be treated alike." Conversely, things which are different in fact or opinion are not required by either constitution to be treated the same. "The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States," and legislatures are given considerable latitude in determining what groups are different and what groups are the same. In most instances the judicial inquiry into the legislative choice is limited to whether the classifications have a reasonable relationship to a legitimate state interest.

Tenn. Small Sch. Sys., 851 S.W.2d at 153 (quoting *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988)) (citations omitted). "Under this standard, if some reasonable basis **[*19]** can be found for the classification, or if any state of facts may reasonably be conceived to justify it, the classification will be upheld." *Tenn. Small Sch. Sys.* at 153 (quoting *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978)).

We find that Metro has a rational basis for limiting survivor pension benefits to surviving spouses and dependent children because these are the classes of individuals who most depend on the employee's income. Generally, adult children and adult grandchildren, like the appellants, earn their own living and do not depend on a parent's or grandparent's income. Also, the limiting of survivor pension benefits has a reasonable relationship to Metro's legitimate interest in controlling the financial burden placed on the pension system that it fully funds for the benefit of all eligible Metro employees. Other courts have found that a government's decision to limit beneficiaries to prevent undue burden on a pension system meets the rational basis test. *See e.g., Bd. of Trustees of Policemen's and Firemen's Ret. Fund v. Cardwell*, 400 So.2d 402, 406 (Ala. 1981) (finding that the Alabama **[*20]** legislature had a rational basis to limit the number of individuals who receive pension benefits as well as the period of coverage provided by the pension system); *Freeman v. N.Y.C. Dep't of Corr*., 420 N.Y.S.2d 536, 101 N.Y. Sup. Ct. 22 (1979). We, therefore, find that the Metro Code provisions regarding survivor pension benefits pass the rational basis test and are constitutionally sound.

CONCLUSION

The trial court did not err in holding that the appellants are not entitled to a pension benefit that never began. Because no genuine issues of material fact remain and because Metro has shown that the appellants cannot prove the existence of any legal authority to support their claims, we affirm the trial court's decision. We sympathize with the appellants's situation, but we cannot create a pension benefit where none exists in the law.

Costs of appeal are assessed against the appellants, Vicki Spurlock, William Stephen Earl Patterson, Mavis Jennie Lynette Lew, and Mary Michelle Shawhan, and execution may issue if necessary.

ANDY D. BENNETT, JUDGE

End of Document

[7] Metro Code §§ 3.40.041, 3.40.045, and 3.08.010 (defining "Dependent Child").

Exhibit

5

Cunningham v. Bedford Cty.

Court of Appeals of Tennessee, At Nashville

March 14, 2018, Session; October 29, 2018, Filed

No. M2017-00519-COA-R3-CV

Reporter
2018 Tenn. App. LEXIS 632 *; 2018 WL 5435401

GRADY CUNNINGHAM, ET AL. v. BEDFORD COUNTY, TENNESSEE, ET AL.

Subsequent History: Appeal denied by Cunningham v. Bedford Cty., 2019 Tenn. LEXIS 128 (Tenn., Feb. 21, 2019)

Prior History: Tenn. R. App. P. 3 **[*1]** Appeal as of Right; Judgment of the Chancery Court of Bedford County is Reversed in Part and Affirmed in Part. Appeal from the Chancery Court for Bedford County. No. 30129. J. B. Cox, Chancellor.

Disposition: Judgment of the Chancery Court of Bedford County is Reversed in Part and Affirmed in Part.

Case Summary

Overview
HOLDINGS: [1]-A denial of plaintiff property owner's rezoning application was not arbitrary and capricious because community opposition was a rational basis for the denial; [2]-The denial was not a regulatory taking because the owner did not protect himself from it, his expectation of rezoning created no legal duty of defendant commission to approve it, and the denial had a rational basis; [3]-His procedural and substantive due process claims failed because he had no protectable interest in rezoning, he had notice and an opportunity to be heard, and the commission had broad discretion to deny his application; [4]-An award of damages and fees erred because no statutory basis was cited, and holdings that could give rise to a claim for monetary relief were reversed.

Outcome
Judgment reversed in part, affirmed in part.

Counsel: Josh A. McCreary, Murfreesboro, Tennessee, for the appellants, Grady Cunningham, and Celebration 2000, Inc.

Ginger Bobo Shofner, Shelbyville, Tennessee, for the appellees, Tony Smith, Jimmy Patterson, Ed Castleman, Bobby Fox, Billy King, Jr., Bob Davis, Janice Brothers, Phillip Farrar, Mark Thomas, John Brown, Linda Yockey, Tony Barrett, Jeff W. Yoes, Don Gallagher, Jimmy Woodson, Denise Graham, Joe Tillett, Bedford County, Tennessee, and Bedford County Board of Commissioners.

Judges: RICHARD H. DINKINS, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and W. NEAL MCBRAYER, J., joined.

Opinion by: RICHARD H. DINKINS

Opinion

A landowner filed a declaratory judgment action alleging that the Bedford County Board of Commissioners' denial of his request to rezone his property was arbitrary and capricious, violated his due process rights under 42 U.S.C. section 1983, constituted a regulatory taking, and that the Commission violated **[*2]** the Tennessee Open Meetings Act when it met with its counsel prior to taking the vote. The landowner requested compensatory damages for the manner in which his application to rezone his property was handled and compensation for the taking of his property. After a bench trial, the trial court held that the Commission's decision was arbitrary and capricious and violated the landowner's due process rights; the court ordered the property rezoned from residential to commercial and awarded the landowner damages. The court held that there had been no regulatory taking and no violation of the Open Meetings Act. Both parties appeal. Upon review, we have determined that the court erred in holding that the Commission's decision to deny the application for rezoning was arbitrary and capricious and in ordering the property rezoned; in holding that the landowner's due process rights were violated and in awarding damages and attorney fees to the landowner; we affirm the decision in all other respects.

OPINION

I. Factual and Procedural History

Plaintiff, Grady Cunningham, purchased real estate located at 2506 Highway 231 North, Bedford County, Tennessee ("the Property") on October 13, 2005. At the time **[*3]** of purchase, the property was zoned residential, and he tried unsuccessfully several times to have the property rezoned for commercial use. At issue in this case is his most recent application for rezoning, which was filed in May 2013.

In June 2013, the Bedford County Planning Commission (the "Planning Commission") recommended that the Bedford County Board of Commissioners (the "Commission") rezone the property into the C-2 (commercial) category; the recommendation was put on the agenda for the Commission's July meeting. At that meeting, Mr. Cunningham was the only person who spoke about his rezoning application; a motion to approve the rezoning was made and seconded, but failed to pass.

Mr. Cunningham's rezoning application was then placed on the Commission's agenda for its September 2013 meeting. A public hearing was held as part of the meeting, at which Mr. Cunningham and his attorney spoke in favor of the application; a resident of Candlewood Subdivision, located adjacent to the Property, spoke against it. The minutes of the meeting recite that, at the business portion of the meeting, a motion was made to defer consideration of the rezoning application until the Commission's October **[*4]** meeting in order to "send [Mr. Cunningham's rezoning application] back to the Planning Commission and waive their one-year rule on hearing requests." The motion passed.

The Commission met again on October 8; Mr. Cunningham's application to rezone the property was again on the agenda. Prior to considering the application, the Commission recessed to confer with its attorney. After returning, a motion to

approve the application was made and seconded, and the motion failed; neither Mr. Cunningham nor his counsel was given the opportunity to speak prior to the vote.

Mr. Cunningham filed this proceeding in the Chancery Court for Bedford County on January 16, 2014, seeking a declaratory judgment that the denial of his rezoning application was "arbitrary, capricious and illegal for which there is no rational or justifiable basis."[1] The complaint alleged that the Defendants violated Mr. Cunningham's constitutional rights to due process and equal protection of laws, that they were liable for inverse condemnation of his property under Tennessee Code Annotated section 29-16-123, and that they violated the Open Meetings Act, Tennessee Code Annotated section 8-44-101, et seq. Mr. Cunningham moved and was granted leave to amend his complaint to add a claim that Defendants' actions constituted **[*5]** a regulatory taking under *Phillips v. Montgomery County*, 442 S.W.3d 233 (Tenn. 2014). Mr. Cunningham was granted leave to amend his complaint a second time to add Celebration 2000, Inc., a corporation he owned, as a plaintiff.

The non-jury trial was held on August 23, 25, 26, and September 1, 2016. On October 28, the court entered its Memorandum Opinion, and on December 2, entered its Final Order and Judgment, which incorporated the Memorandum Opinion and held that:

> 1. The decision of the Defendant Bedford County Board of Commissioners was arbitrary, capricious and not fairly debatable.
>
> 2. The process engaged in by the Defendants violated Mr. Cunningham's due process rights, both procedurally and substantively.
>
> 3. There has been no regulatory taking by the Bedford County Board of Commissioners.
>
> 4. There has been no violation of the Sunshine Law.
>
> 5. The members of the Board of Commissioners were acting within the scope of their authority in carrying out their duties.

The court ordered that the Property be rezoned from residential to commercial, dismissed the Complaint against the individual Commissioners, and awarded Mr. Cunningham damages in the amount of $75,600.00, plus interest, and attorney's fees in the amount of $10,000.00.

Mr. Cunningham moved **[*6]** to alter the judgment on November 23, asking the court to "revisit [the] award of lost profits, including, but not limited to, the time period October, 2013 through the present, and an award of real estate taxes" and "to clarify its finding on violations of substantive and procedural due process." The court thereafter entered an order declining to alter or amend the monetary award; the court amended the prior order to add that "[t]he Defendants violated Plaintiffs' substantive and procedural due process in violation of 42 U.S.C. § 1983."

Mr. Cunningham appeals, stating two issues:

> Whether the trial court calculated damages correctly when the Defendants violated Plaintiffs' due process rights under 42 U.S.C. section 1983, and the Plaintiff presented expert proof on lost profits and other damage caused by the Defendants' wrongful acts.
>
> Whether the trial court erred by not finding a regulatory taking under *Phillips v. Montgomery County*, 442 S.W.3d 233 (Tenn. 2014).

Defendants raise an additional issue:

> Whether the trial court erred in finding that the Bedford County Commission of Commissioners' decision to deny the rezoning request was arbitrary, capricious, and not fairly debatable and that a violation of due process rights under 42 U.S.C. section 1983 occurred.

II. STANDARD OF REVIEW

[1] The complaint named Bedford County, the Bedford County Board of Commissioners, and the individual members of the Commission as defendants; in this opinion our reference to the "the Commission" shall, unless otherwise noted, be to all defendants.

Review of the trial court's **[*7]** findings of fact is *de novo* upon the record, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Kaplan v. Bugalla*, 188 S.W.3d 632, 635 (Tenn. 2006). Review of the trial court's conclusions of law is *de novo* with no presumption of correctness afforded to the trial court's decision. *Kaplan*, 188 S.W.3d at 635.

III. ANALYSIS

A. The Denial of the Rezoning Request

The trial court opined that the Commission's decision on Mr. Cunningham's rezoning request was reviewed according to the "fairly debatable, rational basis" standard as articulated in *Fallin v. Knox Cty. Bd. of Com'rs.*, 656 S.W.2d 338 (Tenn. 1983); the court concluded that the Commission's denial of the application was "not fairly debatable," but was, "in fact[,] arbitrary and capricious." On the basis of this holding, the court ordered the Property rezoned. The Commission contends that the trial court should have applied the "rational basis" test and concluded that the Commission had a rational basis for denying Mr. Cunningham's application for rezoning.

"Amending a zoning ordinance is a legislative act . . . intended to protect the health, safety, and welfare of the citizens living in the community covered by the ordinance." *Cato v. The Montgomery Cty. Bd. of Com'r*, No. M2001-01846-COA-R3-CV, 2002 Tenn. App. LEXIS 369, 2002 WL 1042179, at *2 (Tenn. Ct. App. May 23, 2002) (citations omitted). Legislative **[*8]** bodies, like the Commission here, are given "broad discretion in enacting or amending zoning ordinances." *Family Golf of Nashville, Inc. v. Metro. Gov't of Nashville*, 964 S.W.2d 254, 260 (Tenn. Ct. App. 1997). "When the act of a local governmental body is legislative, judicial review is limited to 'whether any rational basis exists for the legislative action and, if the issue is fairly debatable, it must be permitted to stand as valid legislation.'" *McCallen v. City of Memphis*, 786 S.W.2d 633, 640 (Tenn. 1990) (quoting *Keeton v. City of Gatlinburg*, 684 S.W.2d 97, 98 (Tenn. Ct. App. 1984)); *see also Cato*, 2002 Tenn. App. LEXIS 369, 2002 WL 1042179, at *2 ("[T]he courts will decline to second-guess a decision either to approve or to disapprove an amendment to a zoning ordinance as long as the decision has some conceivable, appropriate basis to justify it."). Accordingly, when the validity of an amendment to a zoning ordinance is fairly debatable, the courts must not substitute their judgment for that of the local legislative body. *Cato*, 2002 Tenn. App. LEXIS 369, 2002 WL 1042179, at *2 (citing *McCallen*, 786 S.W.2d at 641).

Mr. Cunningham argues that the opposition of the residents of Candlewood subdivision does not provide a basis on which the Commission could lawfully refuse to rezone his property. He cites two cases in support of his position: (1) *Rogers Grp., Inc. v. Cty. of Franklin, By & Through Franklin Cty. Reg'l Planning Comm'n*, No. 01A01-9110-CH-00378, 1992 Tenn. App. LEXIS 370, 1992 WL 85805 (Tenn. Ct. App. Apr. 29, 1992); (2) *Mullins v. City of Knoxville*, 665 S.W.2d 393 (Tenn. Ct. App. 1983). Neither of these cases, however, involved a proposed zoning change which, as noted **[*9]** above, is a legislative act.[2]

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[2] The plaintiff in *Rogers Group, Inc. v. County of Franklin, By & Through Franklin County Regional Planning Commission* had submitted a plot plan for the operation of a rock quarry, rock crushing plant, and portable hot mix asphalt plant to the Planning Commission, which voted to deny the plan. The decision at issue was to determine if the proposed use fit within the existing zoning, which was an administrative decision because it involved executing laws already in existence. *See McCallen*, 786 S.W.2d at 639 (observing that "[i]n order to qualify as an administrative, judicial, or quasi-judicial act, the discretionary authority of the government body must be exercised within existing standards and guidelines.").

Similarly, in *Mullins v. City of Knoxville*, the plaintiff submitted a "site development plan," which had to be reviewed and approved by the Knoxville Metropolitan Planning Commission before the proposed use would be allowed. 665 S.W.2d at 394. The Commission approved the plan, and a community association

The role that community opposition to a rezoning decision plays was before the court in *Day v. City of Decherd*, in which property owners argued that the City "had arbitrarily and capriciously refused to rezone the property from residential to commercial uses." No. 01A01-9708-CH-00442, 1998 Tenn. App. LEXIS 440, 1998 WL 684533, at *1 (Tenn. Ct. App. July 1, 1998). On appeal, we rejected the argument, holding that:

> . . . Legislative classifications in a zoning law are valid if any possible reason can be conceived to justify them. *State ex rel. SCA Chemical Waste Services, Inc. v. Konigsberg*, 636 S.W.2d 430 (Tenn. 1982). Specifically, zoning decisions are immune from judicial interference if the validity of the ordinance is "fairly debatable." *Fallin v. Knox County Bd. of Commissioners*, 656 S.W.2d 338 (Tenn. 1983).

1998 Tenn. App. LEXIS 440, [WL] at *2. In this regard, we recognized that basing a "decision solely on neighborhood opposition" was error when the government body is sitting in an *administrative* capacity; however, we recognized a different approach for *legislative* decisions:

> Legislators, however, do what legislators do: they listen to their constituents; they test the wind; they try to please as many people as possible, consistent with the constitution and a good conscience. **[*10]** And they are not to be condemned for doing so. That is their job.

1998 Tenn. App. LEXIS 440, [WL] at *3.

Mr. Cunningham argues that "the minutes from the October 2013 County Commission meeting are entirely void of reasons as to why the County Commission did not approve the Plaintiff's application. This alone was enough to require a reversal." Mr. Cunningham cites no authority for this contention, and the law indicates the opposite. As our Supreme Court has recognized:

> [A]dministrative determinations, judicial or quasi-judicial in nature, . . . are accompanied by a record of the evidence produced and the proceedings had in a particular case, whereas, the enactment of ordinances or resolutions, creating or amending zoning regulations, is a legislative, rather than an administrative, action and is not ordinarily accompanied by a record of evidence, as in the case of an administrative hearing.

Fallin, 656 S.W.2d at 342. Further, as a legislative decision, the rational basis test is satisfied if there is a "conceivable"[3] or "possible"[4] reason for the Commission's decision.

The record shows that residents of the Candlewood Subdivision, which abuts the Property, opposed the request for rezoning. As we have held, "local legislative bodies cannot be faulted **[*11]** for responding to their constituents when it comes to rezoning property as long as their actions are consistent with the state and federal constitutions and with good conscience." *Cato*, 2002 Tenn. App. LEXIS 369, 2002 WL 1042179, at *2 n.5 (citing *Day*, 1998 Tenn. App. LEXIS 440, 1998 WL 684533, at *3). Factually based neighborhood opposition to the request, articulated through statements made before the Commission, is part and parcel of the consideration of rezoning requests. In this context, the opposition from the residents of Candlewood Subdivision is a rational basis for the Commission's decision.

Because there was a rational basis for the

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appealed the Planning Commission's decision to the city council under a provision of the ordinance which permitted such an appeal. *Id.* The City Council held a hearing at which a representative of the community association expressed opposition to the development, after which the council, without expressing any reason for its action, voted to accept the appeal and reverse the action of the Planning Commission. *Id.* On certiorari review, the chancery court sustained the council's action. *Id.* On further appeal, this court reversed, holding that the proposed use fit within the existing zoning ordinance. *Id.* Thus, *Mullins* is not applicable to the facts before us, as it dealt with an administrative decision rather than a legislative one.

[3] *Cato*, 2002 Tenn. App. LEXIS 369, 2002 WL 1042179, at *2.

[4] *Fallin*, 656 S.W.2d at 342.

Commission's decision, we reverse the trial court's holding that the decision was arbitrary and capricious and ordering the Property rezoned.

B. **Regulatory Taking**[5]

In the Conclusions of Law portion of the Memorandum Opinion, the court stated that "[t]here has been no regulatory taking by the Bedford County Board of Commissioners as the remedy provided by the Court will allow for Mr. Cunningham to benefit from the rezoning he requested." Although not included as a finding of fact or a conclusion of law, in the Analysis portion of the opinion, the trial court stated:

> Mr. Cunningham bought a piece of property that was zoned R-1 with absolutely no guarantee that it would be rezoned. He did not make his purchase contingent upon rezoning. He did not execute an option that would have allowed him to avoid the risks associated with land ownership if he could not accomplish his intent to have the property rezoned.

In his brief on appeal, Mr. Cunningham contends that the trial court erred in holding that there was no regulatory taking:

> The facts in the case clearly establish a basis for a finding of a regulatory taking. Here, the Plaintiff testified without dispute that the subject property was purchased with the expectation of moving his commercial **[*13]** business. He was led to believe at or about the time of buying the property that rezoning the property to C-2 for this purpose would be no problem. Thus, the Plaintiff had a reasonable investment-backed expectation. The Defendants, in violation of existing law, thwarted those efforts for approximately 10 years through improper application of the Bedford County Zoning Ordinance. Thus, the extent to which the regulation was improperly applied and interfered with the Plaintiff's distinct investment-backed expectations was significant.
>
> In considering the "character of the governmental action," the Court specifically found there were problems with the process involved (actually making a finding that the Plaintiffs' due process rights were violated, and that participants on behalf of the County Commission had clear conflicts of interest). Thus, the conduct of the Defendant government in improperly applying the regulation to the Plaintiffs' property was egregious. Clearly, the trial court should have found these actions constituted a regulatory taking under *Phillips v. Montgomery County* and should be reversed on this issue.

For the reasons below, we concur with the holding that no regulatory **[*14]** taking occurred.

In *Phillips v. Montgomery County*, the Tennessee Supreme Court held that article I, section 21 of the Tennessee Constitution, which states that "no man's particular services shall be demanded, or property taken, or applied to public use, . . . without just compensation being made therefor" encompasses regulatory takings to the same extent as the "Takings" clause of the Fifth Amendment to the United States Constitution. 442 S.W.3d 233, at 242-44 (Tenn. 2014) (citing U.S. Const. amend. 5 ("[P]rivate property" shall not be "taken for public use, without just compensation."). The *Phillips* court reversed the Court of Appeals' judgment dismissing the property owners' petition for certiorari, which had alleged that the Regional

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[5] The evolution of the concept of a regulatory taking was set forth in *Phillips v. Montgomery County*:

> The concept of a regulatory taking first emerged almost a century ago in *Pennsylvania Coal Co. v. Mahon*. While recognizing that government could not function if it had to pay every time regulations diminished land values, the Court held that a taking occurs "if regulation goes too far." With this "storied but cryptic formulation," the Court first declared that governmental action which diminishes private property rights, but which does not amount to a direct appropriation **[*12]** or physical invasion of private property may constitute a taking that necessitates the payment of "just compensation."

442 S.W.3d at 239 (internal citations omitted).

Planning Commission's denial of their preliminary plat that would subdivide 15.62 acres constituted a regulatory taking, and remanded the case for consideration of the claim. *Id.* at 236-37, 245. In so doing, the court adopted the principles set forth in *Lingle v. Chevron U.S.A. Inc.*, stating:

> The *Lingle* Court reiterated the two categories of governmental regulatory actions generally recognized as *per se* takings under the Fifth Amendment. The first category involves situations in which the government "requires an owner to suffer a permanent physical invasion of her property—however minor" and therefore must provide the owner just compensation. **[*15]** The second category consists of "total regulatory takings," in which governmental action deprives a property owner of "'*all* economically beneficial us[e]' of her property." Both categories of per se regulatory takings are "relatively narrow," *id.*, and the latter especially "rare."
>
> *Lingle* also instructed that when a claim involves neither of these categories, governmental action alleged to constitute a regulatory taking must be assessed under the standards first established in *Penn Central Transportation Co. v. New York City*. The two "primary" Penn Central factors to be considered are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." The "character of the governmental action" may also be a third factor that will be relevant to determining if a taking has occurred. These "ad hoc, factual inquiries, [and] careful examination and weighing of all the relevant circumstances," have been widely recognized as the "polestar" of federal takings law.

442 S.W.3d 233, 240 (Tenn. 2014) (internal citations omitted).

Mr. Cunningham does not cite to specific testimony, other evidence, or particular findings of the **[*16]** court in support of his argument. We have identified the following findings that are pertinent to the holding that no regulatory taking occurred:[6]

> 1. Mr. Cunningham purchased the property in question in 2005, knowing it was zoned R-1.
>
> 2. Mr. Cunningham did not make his contract to purchase contingent upon a zoning change.
>
> 3. Mr. Cunningham did not purchase his property by use of an option so that he would not be bound to purchase the property if the rezoning could not be accomplished.
>
> ***
>
> 7. Mr. Cunningham's first application in 2005 was made before he had actually closed on the property.
>
> ***
>
> 19. His May 2013 application came before the Planning Commission in June of 2013 and the Planning Commission voted to recommend rezoning of the property to C-2.
>
> 20. Mr. White, the Planning and Zoning Director, opined that the property met all the requirements to comply with Mr. Cunningham's request, and he recommended rezoning the property as C-2.
>
> 21. Ms. Keylon [a consultant for the Planning Commission] also opined that the property met all the requirements, and in her opinion should be rezoned C-2.
>
> ***
>
> 25. At the County Commission meeting in July of 2013, a motion was made and seconded that the property **[*17]** should be rezoned. This motion failed by a majority vote.
>
> ***
>
> 43. [At a meeting of the County Commission on October 8, 2013,] [t]he motion to rezone the property was voted upon and it failed by a majority of the votes of the Commissioners.

[6] Neither party contends that the trial court's findings are not supported by the evidence, nor cites to evidence that preponderates against any finding.

> ***
> 127. Mr. Cunningham testified that he bought the property to be a commercial property and he wanted to move his business out to that location, and that it would be a good investment for his kids and grandkids.
> 128. He paid $180,000.00 for the property and has paid interest on the note over the years.
> 129. He pays $1,200.00 per month rent in his present location.
> 130. Mr. Cunningham has a note on the property and he pays interest at a rate of six percent on this note and has done so since he purchased the property.

Mr. Cunningham does not argue that the Commission's decision falls into either category of *per se* takings identified in *Lingle* and adopted in *Phillips*; consequently, in our resolution of this issue we look to the three "Penn Central" factors, adopted in *Phillips*, quoted above.

1. **The economic impact of the regulation on Mr. Cunningham**. The trial court found that Mr. Cunningham incurred a $180,000 obligation to purchase the Property in order **[*18]** to locate his existing business there. As a result of having his rezoning application denied he has been unable to relocate his business there and continues to pay rent at his current location. The court correctly found that he did not take action that would have protected him if the rezoning was not successful.

2. The extent to which the regulation has interfered with his distinct investment-backed expectations. Mr. Cunningham's argument in this regard proceeds on the premise that Commission was in some manner obliged to grant his request to have his property rezoned. He fails to identify the "existing law" he contends the Commission violated or to delineate the "improper application of the Bedford County Zoning Ordinance" of which he complains. Simply put, his expectation that the property would be rezoned does not create a legal obligation on the Commission to approve his application. His planned use of the property was in fact a hopeful use. Mr. Cunningham knew the property was zoned residential at the time he purchased the property, and he also knew that he intended to use the property for commercial purposes. The trial court specifically found that "Mr. Cunningham bought a piece **[*19]** of property that was zoned R-1 with absolutely no guarantee that it would be rezoned"; that "Mr. Cunningham purchased the property in question in 2005, knowing it was zoned R-1"; that "Mr. Cunningham did not make his contract to purchase contingent upon a zoning change"; and that "Mr. Cunningham did not purchase his property by use of an option so that he would not be bound to purchase the property if the rezoning could not be accomplished." While he argues that "[h]e was led to believe at or about the time of buying the property that rezoning the property to C-2 for this purpose would be no problem," Mr. Cunningham cites no evidence, and we have found none in the record, that would give rise to this belief, or that, in any event, would require the Commission to approve his application.

3. The character of the governmental action. Mr. Cunningham references the court's holdings that his due process rights were violated and that some of the Commission members had conflicts of interest as bearing on this inquiry. The action at issue, however, is the denial of his rezoning application; as held earlier, there was a rational basis for the Commission's decision and, as a consequence, no element **[*20]** of a regulatory taking was presented in the denial of the application.

On the record presented, we conclude that no regulatory taking occurred and affirm the court's holding in this regard.[7]

[7] In the Memorandum Opinion, the court held that there had not been a regulatory taking "as the remedy provided by the Court will allow for Mr. Cunningham to benefit from the rezoning he requested." We affirm the trial court's dismissal of this claim on the basis stated herein and not upon the rationale stated by the trial court. *See* Section III A, *supra*.

C. Due Process Claims

Private citizens whose federal rights have been violated by state officials are afforded a remedy via 42 U.S.C.A. section 1983.[8] *Parks Props. v. Maury County*, 70 S.W.3d 735, 743 (Tenn. Ct. App. 2001). As noted in *Parks Props.*:

> Section 1983 creates no substantive rights of its own. Rather, it creates a species of tort liability that provides a federal cause of action for the violation of rights independently established either in the United States Constitution or federal law. Thus, the first step in analyzing any Section 1983 claim is to identify the specific federal right allegedly being infringed. There can be no successful claim under Section 1983 unless the defendant has deprived the plaintiff of a right "secured by the Constitution and laws" of the United States.
>
> The Due Process Clause provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." As interpreted by the United States Supreme Court, the Due Process Clause safeguards rights in two ways. First, procedural due process requires state and local governments to employ fair procedures when they deprive persons of a constitutionally **[*21]** protected interest in "life, liberty, or property." Procedural due process protections do not prevent deprivations of "life, liberty, or property" but rather guard against "substantively unfair or mistaken deprivations of property."
>
> The Due Process Clause, however, guarantees more than fair process. It also has a substantive component that bars certain governmental actions regardless of the procedures used to implement them. Thus, substantive due process is the second way that the Due Process Clause protects "life, liberty, or property."

70 S.W.3d. at 743-44 (internal citations and footnotes omitted).

1. *Procedural Due Process*

In *Martin v. Sizemore*, this court discussed the nature of the interest protected by procedural due process:

> The Due Process Clause of the Fourteenth Amendment and Tenn. Const. art. I, § 8 provide similar procedural protections and guarantees. Both provisions provide procedural protections for property and liberty interests against arbitrary governmental interference. While they contain a guarantee of fair process, they do not prevent the deprivation of property interests. Rather, procedural due process guards against unfair or mistaken deprivations of property interests.
>
> The threshold consideration with regard to any procedural due process claim is whether the plaintiff has a liberty or property interest that is entitled to protection under U.S. Const. amend. XIV, § 1 and Tenn. Const. art. I, § 8. To qualify for constitutional protection, a property interest must be more than a "unilateral expectation" or an "abstract need or desire." It must be a "legitimate claim of entitlement" created and defined by "existing rules or understandings that stem from an **[*23]** independent source such as state law."
>
> The types of interests entitled to protection as property interests are varied. However, they

[8] 42 U.S.C.A. section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory **[*22]** decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

> share the common characteristic that they are an individual entitlement, grounded in state law, that cannot be removed except "for cause."

Martin, 78 S.W.3d 249, 262 (Tenn. Ct. App. 2001) (internal citations omitted). Further, as noted in *Rowe v. Board of Education*:

> A section 1983 action based upon procedural due process has thus three elements: (1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; and (3) lack of process. In addressing a claim of an unconstitutional denial of procedural due process, we apply a two-step analysis. Initially, we must determine whether [the plaintiff's] interest rises to the level of a constitutionally protected liberty or property interest. If there is a constitutionally protected interest, then the second step is to weigh the competing interests of the plaintiff and government to determine what process is due and whether deprivation has occurred.

938 S.W.2d 351, 354 (Tenn. 1996) (internal citations omitted). "The extent and nature of the required procedural due process protections depend on the nature and circumstances of the case." *Martin*, 78 S.W.3d at 263.

While he accurately **[*24]** states that procedural due process protects against unfair deprivations of property, Mr. Cunningham has not identified any constitutionally protected property interest that would implicate the protections of the due process clause in this case. The property was zoned residential at the time he purchased it, and he sought to have it rezoned for commercial purposes; he does not challenge the fact that the property was zoned residential but, rather, the failure of the Commission to grant his application to rezone. He has failed to demonstrate that he was entitled to have it rezoned and, consequently, was not deprived of procedural due process.[9] He has no legitimate claim of entitlement to a discretionary decision. *Richardson*, 218 F.3d at 517.

Even if we were to assume that Mr. Cunningham succeeded in showing a constitutionally protected property interest, in weighing "the competing interests of the plaintiff and government to determine what process is due and whether deprivation has occurred" here, Mr. Cunningham received the process he was due. *See Martin*, 78 S.W.3d at 263. "At its core, procedural due process requires 'notice and an opportunity to be heard at a meaningful time and in a meaningful manner.'" *Puckett v. Lexington-Fayette Urban Cty. Gov't*, 833 F.3d 590, 606 (6th Cir. 2016) (quoting *Garcia v. Fed. Nat'l Mortg. Ass'n*, 782 F.3d 736, 740-41 (6th Cir. 2015)). Mr. Cunningham had notice of the meetings at which his rezoning application would be considered, both before the Planning Commission and the Commission. He spoke at the July 2013 meeting of the Commission when the Commission first considered the application; when the application was heard at the Commission's September meeting, he appeared, with his attorney, and again advocated for its approval. While Mr. **[*26]** Cunningham takes issue with the fact that he was not afforded a chance to speak during the October meeting, his prior appearances before the Commission afforded him procedural due

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Appeals held:

> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). In order to state a successful procedural due process claim, therefore, Richardson must establish the existence of a protected property interest. An abstract need or unilateral expectation does not suffice to create a property interest; rather, a person must "have a legitimate claim of entitlement." *Id* at 577, 92 S.Ct. 2701. The Supreme Court **[*25]** has explained that the Constitution does not create property interests: "[T]hey are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*

[9] In *Richardson v. Township of Brady*, the Sixth Circuit Court of 218 F.3d 508, 516-17 (6th Cir. 2000).

process.

2. *Substantive Due Process*

As noted earlier, amending a zoning ordinance is a legislative act. *Cato*, 2002 Tenn. App. LEXIS 369, 2002 WL 1042179, at *2. In our consideration of this issue, we are guided by the discussion in *Parks Properties*:

> The substantive due process analysis applies to both legislative acts and non-legislative or executive acts. Legislative acts, generally including statutes, ordinances, and broad administrative regulations, apply to large segments of society; while non-legislative or executive acts typically apply to one person or a limited number of persons.
> Typically, a legislative act will withstand a substantive due process challenge if the government identifies a legitimate governmental interest that the legislative body could rationally conclude was served by the legislative act. Legislative acts that burden certain fundamental rights may be subject to stricter scrutiny.
> * * *
>
> To prevail on a substantive due process claim under Section 1983, a plaintiff must establish as a threshold matter that it has an interest entitled to protection under **[*27]** the Due Process Clause. These interests are limited to interests in "life, liberty, or property" and other interests explicitly protected by other constitutional provisions. Regrettably, the case law provides relatively little specific guidance as to what constitutes a property interest worthy of substantive due process protection.
> When a Section 1983 claim is based upon the alleged deprivation of a property interest, the property interest must be something more than either an abstract need or desire or a unilateral expectation of a claimed right. Rather, the person claiming the property right must have a legitimate claim of entitlement to it.
>
> The United States Constitution does not create property interests. They are created and their dimensions are defined by existing rules and understandings that stem from independent sources such as state law. However, the courts must look to federal law to determine whether a particular property right is entitled to substantive due process protection. For a property right to provide a basis for a substantive due process claim under Section 1983, the right must involve an interest that is deemed to be fundamental under the United States Constitution.

Parks Prop., 70 S.W.3d at 743-45 (internal citations omitted).

In *Parks **[*28]** Properties*, the developers of a warehouse facility filed suit to compel the Director of Community Development for the County to issue a building permit, contending that the Director and the Planning Commission had agreed to waive a requirement that the warehouses have automatic sprinkler systems, and to recover damages under 42 U.S.C. section 1983. *Id.* at 740. The trial court held that the county had violated the developers' substantive due process rights and awarded damages of $445,152.55. *Id.* at 741. On appeal this court reversed, holding that neither of the developers had a property interest protected by substantive due process. *Id.* at 749. In so ruling, we noted:

> Section 1983 claims by developers against local building and zoning officials are common, even though rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process concerns. For these sorts of claims, a protectable property interest is "what is securely and durably yours under state or federal law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain." When seeking a permit or authorization, a developer has a protectable property interest in

> a permit or authorization **[*29]** only if it can prove that it has a legitimate claim of entitlement to the permit or authorization.
>
> The application of this "strict entitlement" test focuses on the extent to which the local authority may exercise discretion in arriving at a decision. A property interest protectable by substantive due process exists if the local authority has no discretion to decline to issue a permit, license, or other authorization to an applicant who demonstrates compliance with all pre-existing requirements. On the other hand, no protectable property interest in a permit or authorization exists if the local authority retains broad discretion to grant or deny the permit or authorization.

Parks Prop. 70 S.W.3d at 746 (internal citations omitted).

In the present case, as noted earlier, the Commission retained broad discretion to amend the zoning ordinance. As respects Mr. Cunningham's substantive due process rights at issue, we discern no difference between the "broad discretion to grant or deny the permit or authorization" at issue in *Parks Properties* and the discretion vested in the Commission to grant or deny his rezoning request. In the absence of such a protectable property interest, Mr. Cunningham was not deprived of substantive **[*30]** due process.[10]

Accordingly, we reverse the trials court's holding that Mr. Cunningham's rights to procedural and substantive due process were violated.

D. Award of Damages and Fees

The trial court did not specify the basis upon which it awarded damages of $75,600; the $10,000 award of attorney's fees was made "pursuant to the [unspecified] statute." Inasmuch as we have reversed the holdings that would give rise to a claim for monetary relief, we reverse the awards of damages and attorney's fees.

IV. CONCLUSION

For the foregoing reasons, we reverse the holding that the Commission's decision to deny the rezoning application was arbitrary and capricious and the order that the property be rezoned; we reverse the holding that Mr. Cunningham's rights to due process were violated; and we reverse the awards of damages and attorney's fee; we affirm the holding that there was no regulatory taking of Plaintiffs' property.

RICHARD H. DINKINS, JUDGE

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[10] In his brief, Mr. Cunningham asserts that a denial of an amendment to a zoning ordinance may violate substantive due process if it is "arbitrary, capricious, or not rationally related to a legitimate public purpose." Our holding in III. A., *supra*, addresses this argument.