



TENNESSEE

I. Summary of Home Rule in Tennessee

- The Tennessee constitution offers home rule to both cities and counties, though only two counties and 14 cities have adopted home rule charters.
- Municipalities that adopt home rule can generally enact any legislation that is not in conflict with state law.
- The General Assembly retains the sole power to enlarge or increase the taxation power of municipalities, though general acts.¹

II. Source of Municipal Home Rule Authority

The Tennessee constitution allows cities in Tennessee to adopt a home rule charter.² It also gives the state legislature the authority to allow counties to adopt a home rule charter,³ which the legislature has done.⁴

III. Scope of Municipal Home Rule Authority

a. Cities

The Tennessee Constitution allows municipalities to become “home rule” cities.⁵ With respect to municipal home rule, only 14 of Tennessee’s 348 cities have adopted home-rule charters since the enactment of the municipal Home Rule Amendment in 1953.⁶ These cities include some of Tennessee’s most populous, including three of the top four: Memphis, Knoxville, and Chattanooga.⁷ Home rule powers for cities in Tennessee “fundamentally change[d] the relationship between the General Assembly and [home rule municipalities], because such entities now derive their power from sources other than the prerogative of the legislature.”⁸ The charters of home rule cities “cannot be amended or repealed through legislative acts” by the General

¹ Tenn. Const. art. XI, § 9.

² *Id.*

³ Tenn. Const. art. VII, § 1.

⁴ Tenn. Code Ann. § 5-1-201 et seq.

⁵ Tenn. Const. art. XI, § 9.

⁶ See Cities in Tennessee, Ballotpedia, available at https://ballotpedia.org/Cities_in_Tennessee (last visited May 8, 2017); see also Don Darden, Home Rule Charters in Tennessee 1, 6 (May 2005), available at [http://www.mtas.tennessee.edu/Knowledgebase.nsf/0/C9DD85972D740F6B8525702A004EBFCA/\\$FILE/Home%20Rule%20Charters%20in%20Tennessee.pdf](http://www.mtas.tennessee.edu/Knowledgebase.nsf/0/C9DD85972D740F6B8525702A004EBFCA/$FILE/Home%20Rule%20Charters%20in%20Tennessee.pdf).

⁷ *Id.*

⁸ *S. Constructors, Inc. v. Loudon Cty. Bd. of Educ.*, 58 S.W.3d 706, 714 (Tenn. 2001).

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Assembly.⁹ Municipalities that do not operate under home rule are generally subject to Tennessee’s application of Dillon’s Rule, which strictly and narrowly construes local authority.¹⁰

For the fourteen home-rule cities, the effect of home rule appears to be twofold: 1) to provide a firmer foundation of delegated power from the state, liberating them from the strictures of Dillon’s Rule; and 2) to provide limited immunity from preemption in the personnel realm. The Tennessee Constitution’s grant of home rule allows municipalities to “operate under [their] existing charter, or amend the same, or adopt and thereafter amend a new charter to provide for [their] governmental and proprietary powers, duties and functions, and for the form, structure, personnel and organization of [their] government.”¹¹ However, charter provisions other than those relating to the compensation of municipal personnel, cannot be inconsistent with state law.¹² In addition, a home rule city’s taxation powers cannot “be enlarged or increased except by general act of the General Assembly.”¹³ As discussed below in Section VII (b), the General Assembly can “act with respect to [a] home rule municipality only by laws which are general in terms and effect.”¹⁴

b. Counties

To date, only 2 of 95 counties – Knox (which includes Knoxville) in 1988 and Shelby, the most populous (which includes Memphis), in 1984 – have adopted home rule charters.¹⁵ The primary benefit of county home rule in Tennessee appears to be enhanced freedom to choose the structural form of government.¹⁶ Statutory grants of regulatory power to non-charter counties since the enactment of the county home-rule amendment have “somewhat diminished the distinction between the powers of counties, including charter counties.”¹⁷ The General Assembly has granted all counties various express powers through Section 5-1-118.

⁹ *Id.* at n.7.

¹⁰ Courts have applied Dillon’s Rule in Tennessee to hold that “municipal governmental authority should be strictly construed, and . . . that a municipal government may exercise a particular power only when one of the following three conditions is satisfied: (1) the power is granted in the ‘express words’ of the statute, private act, or charter creating the municipal corporation; (2) the power is ‘*necessarily or fairly implied* in, or *incident* to[,] the powers expressly granted’; or (3) the power is one that is neither expressly granted nor fairly implied from the express grants of power, but is otherwise implied as ‘essential to the declared objects and purposes of the corporation.’” *Id.* at 710–11 (emphasis in original). In addition, any “fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied.” *Id.* at 711 (internal quotations and citation omitted).

¹¹ Tenn. Const. art. XI, § 9.

¹² *Id.* (“[N]o charter provision except with respect to compensation of municipal personnel shall be effective if inconsistent with any general act of the General Assembly and provided further that the power of taxation of such municipality shall not be enlarged or increased except by general act of the General Assembly.”).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Ron Darden, *U. Tenn. Mun. Tech. Advisory Serv., The Charter County Form of Government 1*, available at https://nanopdf.com/download/by-ron-darden-municipal-management-consultant_pdf.

¹⁶ *Id.* at 3-4 (noting that powers special to charter counties include structural matters like methods of election, size of governing body, qualifications for office, terms and term limits, and other issues related to local separation of powers).

¹⁷ *Id.* at 4.

c. Consolidated City-Counties

Nashville, the second most-populous city in the state, has a unique form of consolidated metropolitan government with surrounding Davidson County.¹⁸ The 1953 Home Rule Amendment permitted the legislature to establish a process for creating consolidated city-county governments, which the legislature first enacted in 1957.¹⁹ Besides Nashville, two other city-counties have availed themselves of the consolidation option.²⁰ While the consolidation law allows merged city-counties to hold on to their previously held powers, and the Nashville-Davidson County charter lays claim to vast regulatory authority, it does not appear that merged city-county governments are presumptively considered “home rule” entities under Article XI, § 9.²¹

IV. Preemption

With respect to immunity from state preemption, municipal home rule is stronger than county home rule. Charter cities enjoy immunity with respect to “compensation of municipal personnel,” as stated in the Home Rule Amendment. There is no case law interpreting this phrase. In contrast to home-rule cities, which enjoy a sliver of immunity under the constitutional text, all home-rule county enactments are subject to consistency with “general law.”²²

All other enactments by a charter city or county, however, are void “if inconsistent with any general act of the General Assembly.” In applying this provision, the Tennessee courts refer to all intrastate preemption situations as “conflict” analysis; the term preemption is used exclusively in the federal-state context.²³ Ultimately, the test “of whether [a] county or municipal rule is in ‘conflict with and repugnant to’ a statute is whether the rule takes away a right granted by the

¹⁸ See Carol Bucy, *A Short History of the Creation of Metropolitan Government for Nashville-Davidson County*, available at <https://www.nashville.gov/Portals/0/SiteContent/Government/docs/MetroHistoryBucy.pdf> (discussing voters’ adoption of a metropolitan charter in 1962); *Frazer v. Carr*, 360 S.W.2d 449 (Tenn. 1962) (upholding state law by which Nashville and Davidson County adopted metropolitan government).

¹⁹ See 1957 Tenn. Pub. Acts c. 120, § 3, codified as amended at TENN. CODE ANN. § 7-1-103 (2016) (“[C]onsolidation, when complete, shall result in the creation and establishment of a new metropolitan government to perform all, or substantially all, of the governmental and corporate functions previously performed by the county and by the municipal corporations . . .”).

²⁰ See D. Eric Sutterland, Note, *Two Claims, Two Keys – Overcoming Tennessee’s Dual-Majority Voting Mechanism to Facilitate Consolidation Between Memphis City and Shelby County*, 41 U. MEM. L. REV. 933, 946 (2011) (noting that the two other consolidated governments are Lynchburg City-Moore County and Hartsville-Trousdale County).

²¹ See Tenn. Code Ann. § 7-1-102 (2016) (“post consolidation retention of functions”); Nashville-Davidson County Charter, art. 2 (“Powers”), available at <http://www.coj.net/city-council/docs/consolidation-task-force/2014-01-09-nashvillecharter.aspx>.

²² *Cty. of Shelby v. McWherter*, 936 S.W.2d 923, 934 (Tenn. 1996).

²³ See also *Southern Ry. Co. v. City of Knoxville*, 442 S.W.2d 619 (Tenn. 1968) (“Municipal ordinances in conflict with and repugnant to a State law of a general character and state-wide application are universally held to be invalid.”).

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state, or conversely grants a right denied by the state.”²⁴ Notably, “[t]he mere fact that the state, in the exercise of the police power, has made certain regulations does not . . . prohibit a municipality from exacting additional requirements.”²⁵ As a “general rule, additional regulation to that of the state law does not constitute a conflict therewith.”²⁶ “The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescriptions.”²⁷ A local ordinance cannot “ignore[] the State’s own regulatory acts, or deny rights granted by the State or grant rights denied by the State and thus in effect nullify the State law.”²⁸ More simply, if the ordinance does not authorize something that a statute forbids and does not forbid something that a statute requires, both a statute and an ordinance “can co-exist and be effective.”²⁹

V. Emergency Powers

State law gives political subdivisions the power to provide for the health and safety of persons and property, including emergency assistance to the victims of any emergency, in carrying out the state’s emergency powers laws.³⁰ In addition, various provisions in the charter or code of ordinances adopted by Memphis, Knoxville, Chattanooga, Nashville, and Shelby County pertain to emergency declarations or other local emergency powers. A court may view an exercise of emergency powers (and preemption of a policy enacted through emergency powers) differently from an exercise of powers during non-emergency circumstances, especially if the emergency policy is clearly temporary.³¹

State law provides the governor with authority to suspend any law, rule, or regulation prescribing procedures for the conduct of state business if strict compliance would in any way prevent, hinder, or delay necessary action in coping with an emergency.³² Local officials and advocates

²⁴ *Crawley v. Hamilton Cty., Tennessee*, No. E200303028COAR3CV, 2005 WL 123495, at *2 (Tenn. Ct. App. Jan. 21, 2005), *aff’d sub nom. Crawley v. Hamilton Cty.*, 193 S.W.3d 453 (Tenn. 2006).

²⁵ *S. Ry. Co. v. City of Knoxville*, 442 S.W.2d 619, 621 (Tenn. 1968) (internal quotations and citation omitted); *see also State ex rel. Beasley v. Mayor & Aldermen of Town of Fayetteville*, 196 Tenn. 407, 415, 268 S.W.2d 330, 334 (1954) (“An ordinance enacted in the exercise of police power is not necessarily inconsistent with a State law on the same subject because the city provides for greater restrictions or makes higher standards than is provided or made by the statute.”).

²⁶ *Id.* (internal quotation and citation omitted).

²⁷ *Id.* (internal quotation and citation omitted).

²⁸ *State ex rel. Beasley v. Mayor & Aldermen of Town of Fayetteville*, 196 Tenn. 407, 415, 268 S.W.2d 330, 334 (1954).

²⁹ *Id.* at 623.

³⁰ Tenn. Code Ann. § 58-2-110.

³¹ *See Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 471 (Tenn. 2004) (striking down an emergency ordinance blocking certain construction permits as conflicting with state land use law, but indicating that a “temporary moratorium” or an ordinance that would “seek to preserve the status quo pending the implementation or consideration of a comprehensive zoning plan” might be viewed differently).

³² Tenn. Code Ann. § 58-2-107(e)(1). Case law does not clarify what statutes might pertain to the “conduct of state business,” but the Attorney General has concluded that such laws include, for example, the state laws governing the

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could potentially ask the governor to use this power to suspend the preemption laws that prohibit local paid sick leave, minimum wages, contracting standards, sanctuary policies, and rent control/affordable housing policies.

VI. Local Legislative Immunity

Forty-three state constitutions have some sort of “speech or debate” clause, which essentially provides *absolute immunity* to state legislators for their legislative acts. Federal legislators enjoy the same immunity. These constitutional provisions ensure that legislators cannot be held liable for their actual speech or debate on the legislative floor, nor for other legislative acts such as voting and participating in committee meetings.

Unfortunately, this legislative immunity generally does not explicitly extend to local legislators. As a result, states can punish local legislators for the exact kinds of actions for which state officials themselves are immune from liability.

The Tennessee Constitution provides for “privilege from arrest” during the session of the general assembly in all cases, except treason, felony, or breach of the peace, and “for any speech or debate in either House, they shall not be questioned in any other place.”³³ Tennessee courts have found federal common law legislative immunity to apply to local legislators, although no cases have extended the legislative immunity provided to state legislators under the Tennessee Constitution to local legislators. A city councilmember successfully raised legislative immunity as a defense against a slander suit brought against him for statements the member had made during a city council meeting.³⁴ The member’s statement was made in the course of conducting business for the city and thus protected by common law legislative privilege.

VII. Private Law Exception

An additional consideration in assessing whether a local government has the authority to adopt a particular policy is whether state law recognizes a “private law exception.” Private law can generally be defined as law that “establishes legal rights and duties between and among private entities.”³⁵ Some states, either by constitutional provision, statute, or case law, prohibit municipalities from regulating private law. This can take the form of a “subject-based” exception prohibiting any regulation of “private law” or a narrower exception prohibiting private rights of action.³⁶

Tennessee does not appear to explicitly bar local governments from regulating subjects considered to be “private law.”

licensing of health care professionals. Tenn. Op. Att’y Gen. No. 07-107 (July 13, 2007).

³³ Tenn. Const. art. II, § 13.

³⁴ Miller v. Wyatt, 457 S.W.3d 405 (Tenn. App. 2014).

³⁵ Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. Rev. 671, 688 (1973).

³⁶ See Paul A. Diller, *The City and the Private Right of Action*, 64 Stan. L. Rev. 1109 (2012).

Tennessee caselaw is “ambiguous” on the question of whether localities can create a private right of action for the violation of local laws: “there is no clear judicial authority for or against the proposition that cities may create private rights of action” One indicium that cities can create a private right of action is that in Tennessee, violation of a local ordinance can amount to negligence per se.³⁷

VIII. State Procedural Constraints on Enacting Preemption Laws

a. Single-Subject Rules

In the State legislature, “no bill shall become a law which embraces more than one subject, that subject to be expressed in the title.”³⁸ The term “subject” is interpreted liberally, and ambiguities should be interpreted in favor of finding an enactment constitutional.³⁹ A bill violates the single subject rule when the subjects contained within can by “no fair intendment be related to the caption thereof.”⁴⁰ That is, “any provision of the act, directly or indirectly, relating to the subject expressed in the title, and having a natural connection therewith, and not foreign thereto, should be held to be embraced in it.”⁴¹ The purpose of this provision is to “prevent surprise or fraud upon the Legislature,” which might occur if the title misrepresents the content of the bill, leading to its unintentional passage.⁴²

b. General Law Requirement

With respect to home rule municipalities, the General Assembly may only act by laws which are “general in terms and effect.”⁴³ The constitution’s text constrains the legislature from singling out any counties or cities in legislation.⁴⁴ Hence, the requirement of preemption by “general law” in Tennessee appears to have some substantive, judicially enforceable meaning. In reviewing the constitutionality of a state statute alleged to be “local” in nature and therefore an impermissible interference with the general purpose of “local control of local affairs,” the Tennessee Supreme Court noted that the “sole constitutional test must be whether the legislative enactment, irrespective of its form, is local in effect and application.”⁴⁵ Specifically, the inquiry is “whether th[e] legislation [in question] was designed to apply to any other county in Tennessee, for if it is potentially applicable throughout the state it is not local in effect even

³⁷ *Id.* at 1170, citing to *Smith v. Owen*, 841 S.W.2d 828, 831 (Tenn. Ct. App. 1992).

³⁸ Tenn. Const. art. II, § 17.

³⁹ *Liquor Transp. Cases*, 205 S.W. 425, 425 (Tenn. 1918).

⁴⁰ *Selmer v. Allen*, 63 S.W.2d 663, 664 (Tenn. 1933).

⁴¹ *Wilson v. State*, 224 S.W. 168, 170 (Tenn. 1920).

⁴² *Tenn. Mun. League v. Thompson*, 958 S.W.2d 333, 336 (Tenn. 1997).

⁴³ Tenn. Const. art. XI, § 9.

⁴⁴ Tenn. Const. art. XI § 9 (“[A]ny 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” unless approved by the municipality or county).

⁴⁵ *Civil Serv. Merit Bd. of City of Knoxville v. Burson*, 816 S.W.2d 725, 729 (Tenn. 1991) (citing *Farris v. Blanton*, 528 S.W.2d 549, 551 (Tenn. 1975)).

though at the time of its passage it might have applied to [only one county].”⁴⁶ The legislature may classify cities and counties as long as the classification is reasonable, but a class of one may or may not be permissible.⁴⁷

c. Prohibition Against Unfunded Mandates

Tennessee’s constitution forbids unfunded mandates by the state legislature: “No 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.”⁴⁸ This article only applies to mandatory programs; the state is not required to share costs when a municipality opts into voluntary state programs or voluntarily undertakes additional costs.⁴⁹ Tennessee courts have drawn a distinction between laws which “expressly impose increase expenditure requirements” and laws which might require municipalities to expend money to come into compliance; only the first category are forbidden by the Constitution.⁵⁰ The Tennessee Court of Appeals has found that a General Assembly raising the limit of liability for municipalities under the Government Tort Liability Act from \$20,000 to \$40,000 did not violate the Constitution, even though it could result in additional expenditures.⁵¹ The court reasoned that the only expenditures mandated by the Act were those resulting from negligent acts or omissions by the local government, and “the Act does not require cities and counties to commit those negligent acts or omissions.”⁵²

⁴⁶ *Burson*, 816 S.W.2d at 729 (citing *Farris*, 528 S.W.2d at 552).

⁴⁷ Compare *Frazer v. Carr*, 360 S.W.2d 449, 452 (Tenn. 1962) (upholding statutory procedures for the creation of a metropolitan government that applied only to Davidson County/Nashville); *Burson*, 816 S.W.2d at 729 (upholding state law that applied only to Knoxville), with *Lawler v. McCanness*, 417 S.W.2d 548, 553 (Tenn. 1967) (striking down alteration of a county court system that applied only to one county).

⁴⁸ Tenn. Const. art. II, § 24.

⁴⁹ Tenn. Op. Atty. Gen. No. 93-45 (May 12, 1993)

⁵⁰ *Id.*, citing to Tenn. Op. Atty. Gen. No. 87-79 (April 30, 1987).

⁵¹ *Swafford v. City of Chattanooga*, 743 S.W.2d 174, 178 (Tenn. App. 1987).

⁵² *Id.*

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