

VARYING REAL PROPERTY TAX RATES WITHIN TAXING DISTRICTS

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"Taxes . . . shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax. . . ."¹ This is a common state constitutional provision,² which means that the millage or rate of tax per one hundred dollars assessed valuation shall be the same throughout the taxing district on the same class of property. As the title indicates, the variable rate idea concerns only taxes on real property. Where state constitutional provisions or decisions require that all non-exempt property—real and personal, tangible and intangible—be taxed in equal proportion to value, the variable scheme is unworkable by definition. A provision to allow real property tax rate variety in a draft of a revised state constitution is the subject of this discussion.

In 1964, the Kentucky General Assembly created a Constitution Revision Assembly as an arm of the state's Legislative Research Commission. The Assembly was enjoined to carry on "[A] program of study, review, examination, and exposition of the Constitution of Kentucky. . . . The Assembly shall prepare and propose in detail . . . drafts, amendments, or revisions. . . ."³ The 1966 state legislature submitted the revisions prepared by the Constitution Revision Assembly to the electorate at the November, 1966, general election.⁴ The revision suffered an overwhelming defeat.

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1. Ky. Const. § 171.

2. *E.g.*, Ariz. Const. art IX, § 1; Colo. Const. art X, § 3; Del. Const. art. VIII, § 1; Idaho Const. art. VII, § 5; Mo. Const. art. X, § 3; Mont. Const. art. XII, § 11; and Pa. Const. art. IX, § 1.

3. Ky. Rev. Stat. § 7.170(2) (Cum. Supp. Ann. 1967).

4. Ch. 37, [1967] Ky. Acts 295. *See* Gatewood v. Mathews, 403 S.W.2d 716 (Ky. 1966), and Oberst and Wells, *Constitutional Reform in Kentucky—The 1966 Proposal*, 55 Ky. L.J. 50 (1966), for accounts of the interesting and unusual direct submission of the document to the voters under the "right of revolution" section, Ky. Const. § 4, rather than by the more prosaic convention, Ky. Const. § 258, or amendment, Ky. Const. § 256, routes.

The variable rate provision of the draft⁵ stated:

An ad valorem tax shall be at a uniform rate upon all property of the same class within the taxing district unless the General Assembly provides for reasonable differences in the rate within areas of the taxing district. Those differences shall relate directly to differences between governmental services and benefits giving land urban character which are furnished in all of any area in contrast to other areas of the taxing district.⁶

If the variable rate idea is ever again proposed, the first sentence should state: "An ad valorem tax shall be at the uniform rate upon all property of the same class within the taxing district unless the General Assembly provides for reasonable differences in the rate *on the class containing the surface of the land* within areas of the taxing district."⁷ Without the addition, a state legislature might authorize rate variations on tangible personal property, intangible property, warehoused whisky, or any of the other classes of taxable property clever lawyers and legislators invent. The phrase, "real property," may be used instead of the phrase, "on the class containing the surface of the land," and it might make cleaner constitutional language; however, in states such as Kentucky, where all property not exempted from ad valorem taxation by the constitution must be taxed,⁸ a court might hold that use of the phrase "real property" precludes sub-classification.⁹ The result of such a decision could bar use of a graded tax, placing the main tax burden on the value of each parcel without respect to the improvements upon it. Reference to the "surface" of land rather than merely the "land" permits classification as well as separate taxation of mineral estates. These classification questions are not quibbles in Kentucky, though perhaps they could be ignored elsewhere.

The key phrase is "giving land urban character." If a local government granting general assistance to the poor learns that ninety-nine

5. Copies of the proposal appear beginning at Ky. Rev. Stat. 12 (Cum. Supp. Ann. 1966) and ch. 37, [1966] Ky. Acts 296. The draft is cited herein to the appropriate article and section of the Kentucky Constitution Revision Assembly draft, hereinafter cited as Ky. CRA.

6. Ky. CRA art. X, § 2(1).

7. Emphasis added to suggested addition.

8. Ky. Const. §§ 3, 170; Ky. CRA art. I, § 3, and art. X, § 1.

9. Ky. Const. § 171 states, "The General Assembly shall have the power to divide property into classes and to determine what class or classes shall be subject to local taxation." Ky. CRA art. X, § 2(2) provides, "Nothing shall prevent the General Assembly . . . from making reasonable classifications of property and setting the rate of ad valorem taxation thereupon. . . ."

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per cent of the payments are made to people who reside within a well-defined poverty ghetto, some administrations might be tempted to increase the real property tax within the area to offset the general assistance cost. General assistance is a governmental service or benefit, but it does not give land an urban character.

The host of municipal activities that meet the needs and convenience of urban residents could give rise to more difficult issues. City hospitals, theatres, park systems, elevator inspection bureaus, public markets, and rapid transit systems may be reasonably considered to be urban concerns. Not all are urban by definition, but most are urban in the historical sense. A court faced with deciding whether to permit variable property taxation for any such activity could look for help to the modifying words "furnished in all of any area in contrast to other areas of the taxing district." The municipal activities just mentioned may have a single situs (at least they do not cover the whole taxing district like a fog), but they are available to all within the local government's boundaries if not the public at large. Another way to frame the issue is to ask: Is the service or benefit more of a people-oriented one than a land-oriented one? The broader the enabling legislation, the more judicial initiative there would be in deciding what it is that government does that gives land urban character.

Were draftsmen allowed to testify about their legislative intent, this one¹⁰ would say that he thinks the major use of the exception to the uniformity rule would be for local government activities which, whether within or without the traditional scope of special benefit assessments, make land more urban without necessarily increasing its value. Because suburban sprawl is a fact of life, there is now much land in an urban setting where few urban services are provided. This is especially true of the subdivision not located in an incorporated jurisdiction. Fire protection is an example.

Though fire hydrant installation can be paid for by special benefit assessments, the operating costs of a metropolitan fire department¹¹ should be met from tax revenues rather than front-foot special benefit assessments. Suburban population and building densities are usually less than those in the core city. To provide suburban fire protection

10. One of the purposes of these articles is to allow authors of legislation proposed but not adopted to discuss their idea. This draftsman was on the staff of the Constitution Revision Assembly.

11. This example assumes such a department serving a central city and its suburbs would be more efficient than a multiplicity of independent suburban fire companies plus a core city fire department.

which is equal in quality to that in the central city, more fire stations per thousand people would be necessary to afford an equal number of fire stations per square mile. After all, the ultimate test of fire protection, assuming parity of equipment and firemen, is how fast the firefighters get to the fire. People who pay uniform taxes would, presumably, make political demands for equal fire protection; to give such protection in suburban areas would penalize the core city property owner. Highly developed areas require excellent fire protection to prevent fires from spreading to adjacent buildings; lower building density reduces the risk. The suburban owner is best served by giving him the level of fire protection that minimizes the sum of his annual fire insurance premium and that part of his annual tax that supports the fire department. A variable rate of tax on real property is a method of equitably providing deliberately unequal fire protection.

There are other examples; nearly all improvements financed by special benefit assessments could be paid for through variable rate real property taxation.¹² The advantage of taxation instead of special benefit assessment is that use of the former presents no questions about the propriety of paying for operation or maintenance.

While the scheme was designed for local governments,¹³ nothing in the proposed revision of the Kentucky Constitution so limited the use of variable rates. The omission may have been an oversight; the legislative history is silent on the point. Though there is little likelihood that a Kentucky legislature would have made use of the idea insofar as state property taxes were concerned,¹⁴ the want of the limitation was not undesirable. The availability of the variable rate system to the state (itself an entire taxing district) would give a political weapon to opponents to state spending policies that favor some urban areas over others for such matters as maintenance of purely local roads.

12. Where a graded or single tax is in effect, paying for such improvements from the tax on the land would be similar to special benefit assessments levied in proportion to the value of each parcel not counting the value added by improvements already on the land. *See, e.g.*, Ky. Rev. Stat. ch. 107 (1962), *as amended*, (Cum. Supp. Ann. 1967); *Robertson v. City of Danville*, 291 S.W.2d 816, 819-20 (Ky. 1956).

13. Debates of the Constitution Revision Assembly, Dec. 2, 1965, 27-30 (filed in the office of the Legislative Research Commission, The Capitol, Frankfort, Kentucky 40601). At that time Ky. CRA art X, § 2, was merely "new" section 171; the phrase "giving land urban character" was added by subsequent amendment.

14. Under full-value assessment commanded by *Russman v. Lockett*, 391 S.W.2d 694 (Ky. 1965) (construing Ky. Const. § 172), the current state real property tax rate is one and one-half cents per one hundred dollars of value. Ky. Rev. Stat. § 132.020 (Cum. Supp. Ann. 1967).

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The debates of the Constitution Revision Assembly¹⁵ indicate that the immediate purpose of the variable rate system was to enable the establishment in Kentucky of unitary local governments similar to the Metropolitan Government of Nashville and Davidson County, Tennessee.¹⁶ Nevertheless, the legislature (had the revised constitution been adopted) could have allowed cities¹⁷ to use variable rates, and it could have authorized county subordinate taxing areas without creating additional and overlapping taxing districts.¹⁸ The desirability of local government consolidations is outside the scope of this discussion, yet too many overlapping local taxing districts taxing the same property cannot be healthy.¹⁹ Whether the variable rate system would be used to foster unitary, consolidated local government in the Nashville fashion, or county subordinate taxing areas advocated by the Advisory Commission on Intergovernmental Relations, or more politically palatable annexation of suburban regions to central cities is not too important. The result in any case is, hopefully, the avoidance of the all-or-nothing tax effect that annexation questions produce where uniformity is the rule; furthermore, the lower tax rate theoretically reduces the political demand for full levels of urban services in annexed suburban areas where the cost of full services is prohibitive.

15. See note 13, *supra*.

16. For a general description of that government see *Frazer v. Carr*, 210 Tenn. 565, 360 S.W.2d 449, (1962).

17. The section of the proposed revision dealing with local governments was vague and perhaps overly ambiguous; the material parts of Ky. CRA art. VIII, § 1(1) stated:

The General Assembly shall have the power to provide for the government, officers and functions of units of local government, and to create, alter, consolidate and dissolve them. . . . The General Assembly may create classifications of units of local government as it deems necessary by population, geography or any other reasonable basis, and enact legislation relating to one or more classes. Units of local government may create any democratic form of government or perform any functions not denied to them by the Constitution, by law or by their own charters. . . .

Ky. CRA art. VIII, § 2, gave the legislature power to limit maximum rates of property taxation on classes subject to local taxation, and Ky. CRA art. X, § 2(2) spoke of the legislature delegating "parts of the taxing power" to units of local government. In short, the taxing power was not within whatever home rule the local government section purported to establish.

18. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, 1966 STATE LEGISLATIVE PROGRAM 47-53 (Report No. M-27, October, 1965), contains comment on and a draft of a statute for county subordinate taxing areas.

19. See RESEARCH AND POLICY COMMITTEE, COMMITTEE FOR ECONOMIC DEVELOPMENT, MODERNIZING LOCAL GOVERNMENT 11 (July, 1966).

The unique part of the Kentucky proposal was its lack of a limit on the number of rate tiers. Both the Nashville and Advisory Commission plans employ but two. Where the computer figures the individual's property tax bill, there is no reason why a greater variety cannot be introduced. If there exist several zones of fire protection levels, sewer construction costs, road maintenance costs, etc., and the zones for each class of service or benefit do not exactly overlap, the computer is well-suited to take into account all the differences when tax bills are prepared.

The possibilities suggest the hazards. Area cost accounting for urban services—i.e., allocation of parts of the cost to portions of the area served—is not a well-established matter. Political interference with the tasks of local government technicians is not unknown. The traditional reluctance of the judiciary to set aside discretionary determinations made by the legislative or executive branches could grow stronger when the subject is one with which judges were not familiar. The challenge to the draftsman preparing legislation enabling a multi-tiered variation would indeed be awesome.

The current general impasse in intrastate local government organization within single metropolitan areas presents a large problem to students and administrators of local government. The postwar development of suburbs of relatively low density has relegated to history the older concept of the densely developed municipality with uniform tax rates and with definite boundaries beyond which lie only agricultural and fallow land. Today the Chinese Wall of the city boundary may run down the middle of a bustling street. Annexation's decline is the result of the retention in law of the older concept. The proliferation of the suburban absurdity called a bedroom city (with its low but uniform tax rate) is another result of the older concept.

Those who would tinker with local government structure may find that tax rate classifications within single units of local government are tempting. So long as there is a varying need for governmental services and benefits giving land urban character, we cannot expect suburban residents to look with favor upon the full city tax bill that annexation brings unless those residents are assured they will receive all municipal services in full measure. Nor can we expect financially desperate cities eagerly to swallow suburbs where providing all municipal services would cost more than the increase in revenue produced

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by the annexation. The growing practice of using county revenues collected from the entire county tax base to provide urban services solely in certain suburban areas is disgraceful.²⁰

Through annexation, city-county consolidation, or shifts to counties or metropolitan governments we do need to place the welfare and poverty cost burdens now carried by central cities on a broader tax base. The same is true for the cost of central city amenities (parks, libraries, and theatres for instance) paid for by the city's taxpayers but serving a whole region. Securing a wider tax base is no easy political accomplishment. Upon those who doubt that the states or federal government will ever pick up the whole bill rests a responsibility to adjust local government to make it adequate for the task. The variable rate idea is a means of adjustment.

20. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 18, at 47.