S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 08-145

County Powers to Regulate a Sawmill on Land Zoned for Agriculture

QUESTIONS

1. Whether a County legislative body has the power or authority under State law to regulate, through the adoption of one or more resolutions, the operation of a lumber sawmill located on property zoned A-1 Agricultural in the following areas:

(a) Hours of operation;
(b) Noise levels;
(c) Noxious odors, fumes, and smoke emitted from the property;
(d) Burning of wood;
(e) Size and number of the physical building(s) used as a sawmill on the property;
(f) Minimum number of acres on which a sawmill may be located;
(g) The setback requirements in locating a sawmill operation and related structures on a given tract or parcel of real property;
(h) Minimum number of feet a sawmill operation must be located from residential structures;
(i) Minimum percentage of the sawmill's total operations that must be derived from trees harvested from real property owned by the owner(s) of the property on which the sawmill is located; and
(j) Volume of business that may be conducted by a sawmill from such property.

2. Whether the operation of a sawmill in which trees are harvested from land other than where the sawmill is located, delivered to the sawmill, cut into boards, and sold commercially is considered:

a. An "agricultural use" or for an "agricultural purpose" as such terms are used in Tenn. Code Ann. § 13-7-114 and/or Tenn. Code Ann. § 6-54-126;
b. "Incidental to the [an] agricultural enterprise" as such terms are used in Tenn. Code Ann. § 13-7-114;
c. An "agricultural enterprise" as such terms are used in Tenn. Code Ann. § 13-7-114 and/or Tenn. Code Ann. § 4-31-102(2); or
d. A "farm operation" as such terms are used in Tenn. Code Ann. § 43-26-102.

3. If the answer to any of the items listed in paragraph 2 above is yes, what impact, if any, will such statutes have on a County legislative body's power and authority to regulate certain activities or conditions as listed in paragraph 1 above?

OPINIONS

1. Based on the information provided in the request, a Tennessee court would likely determine that a county, under its general police powers, may regulate the activities listed in subparts (a), (b), (d), (i), and (j), which include hours of operation, noise levels, the burning of wood, percentage of the sawmill's total operations that must be derived from trees harvested from real property owned by the owner(s) of the property on which the sawmill is located, and the volume of business that may be conducted by a sawmill from such property. While the state generally retains authority to regulate environmental concerns involving air quality, a county may regulate the activities listed in subpart (c), relating to emission of noxious odors, fumes, and smoke from the property, provided the county regulations are no less stringent that the state standards and the county has been granted a certificate of exemption from the Pollution Control Board of the Tennessee Department of Environment and Conservation.

A county may regulate under its zoning authority the matters listed in subparts (e), (f), (g), and (h), concerning the size and number of the physical building(s), minimum number of acres on which a sawmill may be located, setback requirements, and minimum number of feet a sawmill operation must be located from residential structures.

2. No. Given the definition accorded to the terms "agricultural use" and "agricultural purpose" in Tennessee law, and considering the conclusions of other jurisdictions that have already addressed this specific issue, it is likely that a Tennessee court would find that the operation of a sawmill in which trees are harvested from land other than where the mill is located is not an agricultural use.

3. Because the answer to all items listed in paragraph 2 is "no," question 3 does not require an answer.

ANALYSIS

(1) While counties lack inherent power to control the use of private property within their boundaries, they have been delegated certain express authority to enact zoning ordinances and general police power regulations by the state legislature. *421 Corp. v. Metro Gov. of Nashville*, 36 S.W.3d 469, 475 (Tenn. Ct. App. 2000). The two specific delegations of authority relevant to the questions posed in this Opinion request are County zoning authority granted in Tenn. Code Ann. § 13-7-101 et seq., and the general regulatory power granted to counties pursuant to Tenn. Code Ann. § 5-1-118.

Pursuant to a County's delegated zoning authority,

> [t]he county legislative body of any county is empowered, in accordance with the conditions and the procedure specified in this part, to regulate, in the portions of such county which lie outside of municipal corporations, the location, height and size of buildings and other structures, the percentage of lot which may be occupied, the sizes of yards, courts, and other open spaces, the density and distribution of population, the uses of buildings and structures for trade, industry, residence, recreation or other purposes, and the uses of land for trade, industry, residence, recreation, agriculture, forestry, soil conservation, water supply conservation or other purposes.

Tenn. Code Ann. § 13-7-101(a)(1).

Additionally, Tenn. Code Ann. § 5-1-118(c) states that "any county may[1] . . . exercise those powers granted to all or certain municipalities by § 6-2-201(22) and (23)," thereby effectively granting counties the authority to:

> (22) Define, prohibit, abate, suppress, prevent and regulate all acts, practices, conduct, businesses, occupations, callings, trades, uses of property and all other things whatsoever detrimental, or liable to be detrimental, to the health, morals, comfort, safety, convenience or welfare of the inhabitants of the municipality, and exercise general police powers;
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> (23) Prescribe limits within which business occupations and practices liable to be nuisances or detrimental to the health, morals, security or general welfare of the people may lawfully be established, conducted or maintained.

Tenn. Code Ann. § 6-2-201(22) and (23).

The Tennessee Supreme Court has noted that the local government's authority to exercise the police power of the sovereign is necessarily broad so as to meet the needs of our "complex civilization." *City of Norris v. Bradford*, 321 S.W.2d 543, 546 (Tenn. 1958). Likewise, the court has also stated that county legislative bodies are granted "broad powers to enact and amend zoning regulations governing the use of land." *Fallin v. Knox County*, 656 S.W.2d 338, 342 (Tenn. 1983). This broad authority notwithstanding, there are also several significant limitations to local government regulatory power, the most basic of which is that a local government may not exceed the power expressly granted to it in the delegation statutes. *421 Corp*, 36 S.W.2d at 475. Thus, while granted "considerable discretion" in the exercise of their delegated regulatory authority, local

[1]Before a county may exercise these regulatory powers it must first go through a local adoption process whereby the regulatory powers are formally adopted by a resolution passed by a two-thirds majority of the county legislative body. Tenn. Code Ann. § 5-1-118(c)(1). Any subsequent exercise of these powers must also be approved by a two-thirds vote. *Id.*

government zoning and police power regulations may not conflict with state laws. *Id.* Additionally, the exercise of delegated regulatory authority is also subject to limitations imposed by preemptive federal legislation and state and federal constitutional provisions. *See Riggs v. Burson*, 941 S.W.2d 44 (Tenn. 1997).

This Opinion request poses ten separate suggested regulations of a sawmill operation and inquires whether a county legislative body has the "power or authority" to impose such regulations. As counties have been delegated broad zoning and police powers, the answer as to each of the ten proposed regulations depends on whether any zoning or general police power authority limitations are applicable. The applicability of county regulatory power and authority limitations is necessarily heavily dependant upon the specific facts of each individual case. Based on the information provided in the Opinion request, it is the opinion of this Office that the regulation of: (a) hours of operation, (b) noise levels, and (d) burning of wood, are all legitimate exercises of a county's general police power. Such restrictions relate to the legitimate purpose of ensuring the safety, health, morals, comfort and welfare of a county's citizens. This conclusion presumes that there are no complications pertaining to the scope or jurisdiction of the county's delegated authority.[2] Also, as addressed below in the analysis of Question 2, this conclusion also assumes that the operation of the sawmill does not qualify for the "agricultural use" exemption from county zoning and regulatory authority.

In addition, the suggested regulations limiting the (i) minimum percentage of the sawmill's total operations that must be derived from trees harvested from real property owned by the owner(s) of the property on which the sawmill is located, and regulating the (j) volume of business that may be conducted by a sawmill from such property likely fall within the general police power authority delegated to counties. These restrictions impose a limitation on the size of a sawmill's operations commensurate with the property on which the sawmill is located and an absolute operation size restriction, respectively. Both embody reasonable efforts to limit potential nuisances associated with the operation of a sawmill while balancing these concerns with a landowner's right to process the produce of his or her own land. The Tennessee Supreme Court has stated that when no fundamental right is involved,[3] a land use restriction need only meet the "rational basis" test to survive a constitutional due process challenge;[4] thus a restriction that is "reasonably related to a legitimate legislative purpose" is permissible. *Riggs*, 921 S.W.2d at 51. In this instance, the two regulations

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[2]As discussed above, a county may not exceed the scope of authority expressly granted to it by the state under the delegation statutes. Also, county regulatory authority is limited to its effective jurisdiction. *See* Tenn. Code Ann. § 13-7-101(a)(1) (county zoning authority is limited to unincorporated areas of the county), and Tenn. Code Ann. § 5-1-118(c)(1) (county general police powers limited to unincorporated areas and cannot interfere with local municipality authority).

[3]The right to operate a sawmill is not a "fundamental right" under state or federal law.

[4]The Tennessee Supreme Court has determined that the "law of the land" provision of article I, section 8 of the Tennessee Constitution is synonymous with the due process clause of the U.S. Constitution. *Newton v. Cox*, 878 S.W.2d 105, 110 (Tenn. 1994). Accordingly, the "rational basis" due process standard for non-fundamental rights is the same standard applicable for a Tennessee constitutional challenge.

targeting sawmills would likely meet the burden of being "rationally related" to the legitimate purpose of ensuring the health and safety of the public by limiting or prohibiting large-scale sawmills of a commercial nature in areas zoned for agricultural use.

County regulation of (c) "noxious odors, fumes, and smoke emitted from a property" is permissible if it conforms to certain provisions of the Tennessee Air Quality Act. Tenn Code Ann.§ 5-1-118(c)(2) provides that the grant of county police power "shall not apply to those activities, businesses, or uses of property and business occupations and practices that are subject to regulation pursuant to . . . title 68, chapters 201-221." Tenn. Code Ann. Title 68, chapters 202 to 221 constitute the "Tennessee Air Quality Act," which expressly reserves regulation of Tennessee air quality to the state Department of Environment and Conservation with limited, statutorily enumerated exceptions. The Tennessee Air Quality Act does provide for municipal ordinances or county regulations addressing air quality standards in two specific circumstances. First, any city or county with a population of over 600,000 may establish its own air quality ordinances in addition to the state regulations as long as the local regulations are not less stringent than the state standards.[5] *See* Tenn. Code Ann. § 68-201-202(a). Second, any county or municipality, regardless of population, may enact its own air quality regulations to serve in place of the state regulations as long as: 1) such regulations are not less stringent than the state standards, and 2) the local governing body applies for and receives a "certificate of exemption" from the Pollution Control Board of the Tennessee Department of Environment and Conservation. Tenn. Code Ann. § 68-201-115. The requisite certificate of exemption will be issued only if the Pollution Control Board determines that the proposed county regulations are not less stringent than state regulations and the county will adequately enforce its air quality regulations. Tenn. Code Ann. § 68-201-115(b)(3). Moreover, the Department of Environment and Conservation will "frequently" monitor the county and determine if the county is in fact complying with the terms of the certificate of exemption. Noncompliance may lead to suspension of the certificate of exemption. Tenn. Code Ann. § 68-201-115(b)(7). In short, the police power authority of a county with a population under 600,000 to regulate air quality is limited in that its regulation and enforcement are subject to state approval and oversight, and its regulations may never apply standards less stringent than the established state standards. However, none of the requirements of the Tennessee Air Quality Act apply to emissions from the burning of wood waste "solely for the disposition of such wood waste." Tenn. Code Ann. § 68-201-115(c)(1).

The four proposed land use restrictions itemized in this opinion request as (e), (f), (g), and (h), that address building size and number, minimum acre requirements, setback requirements, and distance from residential structures, all appear to be legitimate land use restrictions permissible under a county's zoning power and authority, assuming there are no conflicts involving preexisting

[5]A county or municipality with a population of over 600,000 that elects to establish its own local air quality regulations pursuant to Tenn. Code Ann. § 68-201-202(a) must also comply with the certificate of exemption requirements of Tenn. Code Ann. § 68-201-115 before its local regulations will serve in lieu of the state regulations.

use.[6] Additionally, while this Opinion addresses whether a county has the authority under state law to impose the ten proposed areas of regulation, it should be noted that the designation of property as "A-1 Agricultural" as stated in the request is a purely county-level designation. As such, one would be wise to also consult existing county zoning regulations before imposing new or amended land use restrictions. For example, what may constitute an acceptable use of land zoned by a county as "A-1 Agricultural" depends in large part on what that county's zoning regulations define as acceptable use. While our research has not discovered any Tennessee case law pertaining directly to the operation of a sawmill on land zoned A-1 Agricultural, we note that many Tennessee counties expressly allow a variety of patently non-agricultural uses on land zoned for agricultural use.[7] It is also worthy of note that outside of Tennessee, for example, Frederick County, Maryland,[8] Eau Clair County, Wisconsin,[9] and St. Charles County, Missouri,[10] all have county zoning regulations that expressly allow, at least on a conditional basis, the operation of sawmills on land zoned for agricultural use. Accordingly, the necessity of consulting local zoning ordinances is readily apparent.

(2) The request next inquires whether a sawmill that obtains trees harvested off-site would qualify as an operation termed "agricultural use," "agricultural purpose," "[a]gricultural enterprise," or a "farm operation" as those terms are used in four specific sections of the Tennessee Code.[11] The implied question is whether such a sawmill operation qualifies for the agricultural use limitations on a county's zoning and police power authority, thereby exempting such use from

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[6]Tennessee statutes and case law clearly limit county authority to prohibit preexisting land uses. *See* Tenn. Code Ann. § 13-7-208(b)(1) and *Chadwell v. Knox County*, 980 S.W.2d 378, 382 (Tenn. Ct. App. 1998) (allowing preexisting land uses to continue in the event of a zoning change), and Tenn. Code Ann. § 5-1-118(c)(3) (incorporating the zoning statute's preexisting use "grandfather clause" restriction to county police power authority).

[7]*Rutherford County v. Murray*, 2004 WL 1870066, at *1 (Tenn. Ct. App. 2004) (Rutherford County allowed auto repair shops); *Parker v. Roane County*, 2000 WL 134911, at *1 (Tenn. Ct. App. 2000) (Roane County allowed exotic pet displays); and *Wilson County Youth Emergency Shelter v. Wilson County*, 13 S.W.3d 338, 340 (Tenn. Ct. App. 1999) (Wilson County allowed a variety of activities on land zoned for agricultural use, ranging from hospitals and golf courses to bicycle service and repair businesses).

[8]*Singley v. County Com'rs of Frederick*, _A.2d_, 2008 WL 565315 (Md. App. 2008).

[9]*Horlacher v. Eau Claire County Bd. of Land Use*, 650 N.W.2d 560 (Wis. Ct. App. 2002).

[10]*State ex rel. St. Charles County v. Samuelson*, 730 S.W.2d 607 (Mo. Ct. App. 1987).

[11]The term "agricultural purposes" in Tenn. Code Ann. § 6-54-126, as referenced in subpart (a) of the question, applies only to municipal government zoning authority, not county zoning authority, and is therefore not relevant to the issue raised in this Opinion request. The term "agricultural enterprise" in Tenn. Code Ann. § 4-31-102(2), as referenced in subpart (c) of the question, applies only to the "Tennessee Local Development Authority Act," which provides local governments with development assistance and loans, and is therefore not directly relevant to the issue raised in this Opinion request. The term "farm operation" in Tenn. Code Ann. § 43-31-102(2), as referenced in subpart (d) of the question, applies only to the "Tennessee Right to Farm Act," a very narrowly tailored statutory provision guiding Tennessee tort law with regard to nuisance claims, and is therefore not relevant to the issue raised in this Opinion request. The agricultural terms found in Tenn. Code Ann. § 13-7-114 are applicable to the issue raised in this Opinion request and are addressed in detail below.

county regulations. This latter question is addressed in detail below.

As addressed above, counties have broad zoning authority granted pursuant to Tenn. Code Ann. § 13-7-101 et seq., and equally broad general regulatory power granted pursuant to Tenn. Code Ann. § 5-1-118. However, both of these authority-delegating statutory provisions also expressly prohibit the county from restricting agricultural pursuits. County authority to restrict land use through zoning regulations does not extend to "agricultural uses of land" or to the placement of restrictions on buildings "incidental to an agricultural enterprise." Tenn. Code Ann. § 13-7-114. Thus, a county may not restrict through a zoning ordinance any land use deemed "agricultural" nor place restrictions on buildings deemed "incidental" to agriculture. Likewise, a county's delegated authority to exercise general police powers does not extend "the power to prohibit or regulate normal agricultural activities," Tenn. Code Ann. § 5-1-118(b), nor the power to regulate "buildings used primarily for agricultural purposes" or "to inhibit normal agricultural activities." Tenn. Code Ann. § 5-1-122. Unfortunately, neither the zoning nor general police power agricultural exemption provisions define what constitutes agricultural use or purpose.

The Tennessee legislature has, in other contexts, provided definitions for what it considers agricultural pursuits. For example, for purposes of qualifying for the agricultural development loan program, an "agricultural enterprise" is defined as property "necessary or suitable for use in farming, ranching, the production of agricultural commodities, including products of agriculture and silviculture, or necessary and suitable for treating, processing, storing or transporting raw agricultural commodities." Tenn. Code Ann. § 4-31-102. In the context of fuel tax, "agricultural purposes" includes "plowing, planting, harvesting, raising or processing of farm products at a farm, nursery or greenhouse; or operating farm irrigation systems." Tenn. Code Ann. § 67-3-103(1). For purposes of sales and use tax the definition is the same but adds "or operating motor vehicles or other logging equipment used exclusively, whether for hire or not, in cutting and harvesting trees." Tenn. Code Ann. § 67-6-102(1). Thus, while the Tennessee legislature has in certain situations adopted an expansive view of the activities considered "agricultural purposes," including silviculture and the cutting and harvesting of trees, it is the opinion of this Office that a sawmill that imports trees harvested off-site is not "processing" agricultural commodities, but rather manufacturing lumber for commercial sale.[12]

As further evidence to support the conclusion that the operation of a commercial sawmill does not constitute an "agricultural use" or "purpose," we note that the Tennessee legislature has defined "[a]gricultural work" as "the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities, the raising of livestock or poultry, and any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations," Tenn. Code Ann. § 50-5-102(1). While Tennessee labor

[12]This conclusion is limited to the facts presented in the Opinion request, specifically that the sawmill in question obtains trees "harvested from land other than where the sawmill is located." The conclusion of this Opinion, that land used to operate a sawmill which obtains trees from off-site is not an "agricultural" use or purpose, does not necessarily extend to other fact scenarios, such as a portable sawmill used to process trees grown on the same tract of land.

laws generally restrict the employment of minors in most occupations, the Tennessee Code expressly exempts "agricultural work" from these restrictions, Tenn. Code Ann. § 50-5-107(3). Thus, minors are allowed to be employed in "agricultural work," but are expressly prohibited from working in "occupations in the operation of any sawmill." Tenn. Code Ann. § 50-5-106(4). Accordingly, in the labor law context, the legislature clearly has not equated the operation of a sawmill with "agricultural" work.

It is also worthy of note that other jurisdictions that have directly addressed the issue of whether a sawmill that obtains logs from off-site constitutes an "agricultural purpose" for land use restriction purposes have also concluded that such operations are not agricultural use. For example, courts in Massachusetts,[13] Vermont,[14] and Pennsylvania[15] have all determined that a sawmill operation does not qualify as "agricultural purposes" when logs are brought in from off-site. Ohio has determined that because a sawmill operation is "manufacturing in nature," land used primarily for operating a sawmill could not qualify for an agricultural use exemption.[16]

Based on analogous definitions of agricultural activities provided by the Tennessee legislature in other areas of Tennessee law, as well as the sound reasoning of other jurisdictions that have addressed this same issue, this Office concludes that the operation of a commercial sawmill that obtains timber from off-site is not an agricultural use of land nor an activity that qualifies as an agricultural purpose. We consider the manufacturing of boards through the operation of such a sawmill to be an "independent productive activity"from the harvesting and processing of trees.[17] Accordingly, such a sawmill operation does not qualify for an agricultural exemption from county zoning and police power authority.

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[13]*Town of Rowley v. Kovalchuk*, 735 N.E.2d 1269 (Mass. Ct. App. 2000) (stating that the "operation of a sawmill to process lumber which is imported to the site from other locations does not constitute an activity which is incidental to an agricultural use of the site.").

[14]*In re Charlotte Farm & Mills*, 779 A.2d 684, 686 (Vt. 2001) (upholding the lower court's determination that "agricultural and forestry uses did not authorize the operation of a portable sawmill on the property to process logs and other materials brought in from off-site.").

[15]*Younker v. Berks County*, 83 P. D. & C.4th 258, 264-65 (Pa. Com. Pl. 2007) (holding that a "landowner's sawmill use in not an agricultural use" because the "agricultural commodity produced must be produced directly from the land" and not, as the case was, imported from off-site).

[16]*Columbia Township Trustees v. French*, 1994 WL 117115, at *2 (Ohio App. 1994). *But cf. State v. Spithaler,* 2000 WL 263817, at *3 (Ohio App. 2000) (holding that where a portable sawmill "processed" timber from only on-site, such land use was "agricultural use" and qualified for the land use regulation exemption).

[17]"[W]hether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity" is determinative of whether the activity is "agricultural." *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 761 (1949).

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

GREGORY O. NIES
Assistant Attorney General

Requested by:

The Honorable David Shepard
State Representative
37 Legislative Plaza
Nashville, Tennessee 37243-0133