STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

September 4, 2014

Opinion No. 14-79

County Zoning of Buildings Used as Residences by Farmers and Farm Workers

QUESTIONS

1. What qualifies as a building that would be "incidental to the agricultural enterprise" under Tenn. Code Ann. § 13-7-114? What impact does this provision have on local ordinances regulating the type of construction, cost of construction, placement of construction, etc.?

2. Does Tenn. Code Ann. § 13-7-114, as recently amended, conflict with other laws relative to the definition of "buildings used as residences by farms and farm workers," such as Tenn. Code Ann. § 43-1-113 and § 43-26-102?

3. What is the definition of what constitutes a farm? Will a farm be defined by acreage or by gross or net amount of agricultural product produced, and will a family garden qualify?

4. If a building is deemed "incidental to the agricultural enterprise," what effect will Tenn. Code Ann. § 13-7-114 have on a community's Adequate Facilities Tax program?

OPINIONS

1. A building qualifies as "incidental to the agricultural enterprise" when it is subordinate or tangentially related to the enterprise. Any such building would be exempt from county zoning regulation.

2. No.

3. Tennessee Law defines a "farm" as "a tract of land of at least fifteen (15) acres . . . engaged in the production of growing crops, plants, animals, nursery, or floral products . . . [that] produce[s] gross agricultural income averaging at least one thousand five hundred dollars ($1,500) per year over a three-year period" and "the land, buildings, and machinery used in the commercial production of farm products and nursery stock." Tenn. Code Ann. §§ 2-2-122, 43-26-102.

4. Tenn. Code Ann. § 13-7-114 could impact upon a county's collection of its adequate-facilities tax.

ANALYSIS

1. The General Assembly has delegated zoning authority to the county governments. *See* Tenn. Code Ann. §§ 13-7-101 to -119. But counties may not apply their zoning laws to buildings or structures on lands used for agricultural purposes if the buildings or structures are "incidental to the agricultural enterprise." Tenn. Code Ann. § 13-7-114.[1] Similarly, while counties have been delegated general police powers under Tenn. Code Ann. § 5-1-118, that authority does not include the regulation of "buildings used primarily for agricultural purposes," *id.* § 5-1-122.

The term "agricultural enterprise" as used in Tenn. Code Ann. § 13-7-114 is not defined within Title 13, but this Office has previously observed that the terms "agriculture" and "agricultural use" have traditionally been broadly defined and that "[c]ourts construing the meaning of 'agricultural enterprise' have generally given the term a broad definition." Tenn. Att'y Gen. Op. 13-80, at 2, 3 (Oct. 22, 2013). Title 1 of the Tennessee Code defines the term "agriculture" to mean:

> (i) The land, buildings and machinery used in the commercial production of farm products and nursery stock;
> (ii) The activity carried on in connection with the commercial production of farm products and nursery stock;
> (iii) Recreational and educational activities on land used for the commercial production of farm products and nursery stock; and
> (iv) Entertainment activities conducted in conjunction with, but secondary to, commercial production of farm products and nursery stock, when such activities occur on land used for the commercial production of farm products and nursery stock.

Tenn. Code Ann. § 1-3-105(2)(A); *see also id.* § 43-1-113(b)(1) (same). The ordinary meaning of "incidental" includes "'subordinate to something of greater importance'" and "'functions that are tangentially related to the principal activity'" of the enterprise. Tenn. Att'y Gen. Op. 13-80, at 2 (quoting *Braden Trust v. Cnty. of Yuma*, 69 P.3d 510, 513 (Ariz. Ct. App. 2003)).

This Office cannot of course identify every possible building or structure that would qualify as "incidental to the agricultural enterprise," but in Tenn. Att'y Gen. Op. 13-80, this Office opined that buildings used as residences by farmers and farm workers are incidental to the agricultural enterprise under Tenn. Code Ann. § 13-7-114. In 2014 Tenn. Pub. Acts, ch. 524, the statute was amended to expressly so provide. Such a building or structure would be exempt from county zoning regulation.

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[1] Tenn. Code Ann. § 13-7-114 applies only to county governments. Tenn. Att'y Gen. Op. 10-12, at 2 & n.1 (Jan. 28, 2010). *See Shore v. Maple Lane Farms, LLC*, 411 S.W.3d 405, 426 (Tenn. 2013).

2. Tenn. Code Ann. § 13-7-114, as amended, does not create a conflict with other statutes; it stands merely as a narrow exception to a county's broad zoning authority. *See Shore v. Maple Lane Farms, LLC*, 411 S.W.3d 405, 425-26 (Tenn. 2013). Tenn. Code Ann. § 43-1-113, which defines the term "agriculture," makes commerce an essential element. *See, e.g., id.* § 43-1-113(b)(1)(A) ("land, buildings and machinery used in the *commercial* production of farm products and nursery stock") (emphasis added). The same is true of Tenn. Code Ann. § 43-26-102's definitions of "farm" and "farm operation." *See id.* § 43-26-102(1), (2). But this commerce element is necessarily also part of Tenn. Code Ann. § 13-7-114, since it applies to buildings and structures on lands used for *agricultural* purposes, so long as the building or structure is incidental to the *agricultural* enterprise.

3. While Title 13 does not expressly define a "farm," the Tennessee Code defines "farm" in two other titles. Tenn. Code Ann. § 43-26-102(1) defines a "farm" under the Right to Farm Act as "the land, buildings, and machinery used in the commercial production of farm products or nursery stock." Tenn. Code Ann. § 2-2-122(c)(2) defines a "farm" for voter-registration purposes as "a tract of land of at least fifteen (15) acres constituting a farm unit engaged in the production of growing crops, plants, animals, nursery or floral products. Such farm shall produce gross agricultural income averaging at least one thousand five hundred dollars ($1,500) per year over a three-year period." A family garden is unlikely to qualify as a "farm" under either definition.

4. The County Powers Relief Act, Tenn. Code Ann. §§ 67-4-2901 to -2913, "authorize[s] counties to levy a privilege tax on persons and entities engaged in the residential development of property." Tenn. Code Ann. § 67-4-2902. Except as discussed below, it is the "exclusive authority for local governments to adopt any new or additional adequate facilities taxes on development." *Id.* § 67-4-2913. "Development" under this statute means "the construction, building, erection, or improvement to land by providing a new building or structure that provides floor area for residential use," and "residential development" means "the development of any property for a dwelling unit or units." *Id.* § 67-4-2903(6), (13). The term "building" expressly does not mean "any structures used primarily for agricultural purposes." *Id.* § 67-4-2903(1). *See also id.* § 67-4-2906 ("This part shall not apply to development of: . . . "[b]arns or other outbuildings used for agricultural purposes.").

Tenn. Code Ann. § 13-7-114 could have an impact on a county's collection of its adequate-facilities tax, because there is not complete overlap between the buildings exempted by § 67-4-2903 and those exempted by § 13-7-114. For example, a building used as a farm residence is "incidental to the agricultural enterprise" and thus exempt from any building-permit requirement under § 13-7-114, as discussed above. But such a residence is likely not "used *primarily* for agricultural purposes" (emphasis added), and thus would not be exempt from the adequate-facilities tax under § 67-4-2903(1). Collection of that tax, however, is initiated at the time of

application for a building permit. Tenn. Code Ann. § 67-4-2910(a)(1). Without the requirement for a building permit, there would be no mechanism for collecting the tax.

A county may, however, continue to exercise the authority granted by any private act in effect prior to June 20, 2006, to levy or collect similar development taxes. *Id.* § 67-4-2913. Whether a county's collection of such taxes may be similarly hampered by § 13-7-114 will depend on the specific provisions of the private act and any local implementing laws. *See, e.g.*, 2003 Tenn. Priv. Acts, ch. 21, § 9 (providing that land-development privilege tax in Hickman County "shall be collected at the time of application for a certificate of occupancy"); *see also id.* § 2(e) (defining "certificate of occupancy" as "a license for occupancy of a building or structure issued in Hickman County" and providing that "[s]uch certificate shall not indicate compliance with any federal, state or local building codes").

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