STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

July 6, 2018

Opinion No. 18-30

County Regulation of Concentrated Animal Feeding Operations

Question 1

Do Tennessee's zoning statutes authorize counties to regulate concentrated animal feeding operations?

Opinion 1

No.

Question 2

Does Tenn. Code Ann. § 44-18-104 authorize counties to regulate concentrated animal feeding operations?

Opinion 2

No. Tennessee Code Annotated § 44-18-104 is not an independent source of authority for a county to enact zoning requirements or regulations; it merely states which zoning requirements and regulations are applicable in determining whether a feedlot, dairy farm, or poultry production house can be afforded absolute immunity from a nuisance claim.

Question 3

If counties may regulate concentrated animal feeding operations pursuant to Tenn. Code Ann. § 44-18-104, must the regulations have been in effect as of April 12, 1979?

Opinion 3

As stated in Opinion 2, Tenn. Code Ann. § 44-18-104 is not an independent source of authority for a county to enact zoning requirements or regulations. It merely states which zoning requirements and regulations are applicable in determining whether a feedlot, dairy farm, or poultry production house can be afforded absolute immunity from a nuisance claim. Generally, feedlots, dairy farms, and poultry production houses established prior to April 12, 1979, must comply with zoning requirements and regulations in effect on that date. But later zoning requirements and regulations can apply when the feedlot, dairy farm, or poultry production house has an "established date of operation" subsequent to the effective date of a zoning requirement or regulation.

Question 4

Does Tenn. Code Ann. § 13-7-114 affect the reservation of local regulatory authority found in Tenn. Code Ann. § 44-18-104?

Opinion 4

No. As stated in Opinion 2, Tenn. Code Ann. § 44-18-104 is not an independent source of authority for a county to enact zoning requirements or regulations. Therefore, there is no conflict between Tenn. Code Ann. § 13-7-114 and Tenn. Code Ann. § 44-18-104.

Question 5

What is the effect of Tenn. Code Ann. § 44-18-104(b) and (d), which direct compliance with the section when no zoning requirements or regulations exist?

Opinion 5

Tennessee Code Annotated § 44-18-104(b) and (d) do not direct compliance with the section when no zoning requirements or regulations exist. When no zoning requirements or regulations exist, these provisions convey that a person's compliance with the section is deemed to be established as a matter of law.

ANALYSIS

This opinion addresses local government regulation of "concentrated animal feeding operations." This term has its origin in the federal Clean Water Act of 1972, 33 U.S.C. §§ 1251-1387. Congress passed this Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the Act established a permitting system that prohibits the discharge of pollutants from "point sources" into navigable waters except as authorized by a National Pollution Discharge Elimination System (NPDES) permit. 33 U.S.C. §§ 1311, 1342(a). The Act defines "point source" as including "concentrated animal feeding operations (CAFOs)."[1] 33 U.S.C. § 1362(14). CAFOs with more than a defined number of animals require NPDES permits. 40 C.F.R. § 122.23.

[1] Federal regulations initially define an "animal feeding operation" as follows:

> Animal feeding operation ("AFO") means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:
>
> (i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
>
> (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

40 C.F.R. § 122.23(b)(1). The regulations then classify the AFOs as large, medium, or small "concentrated animal feeding operations" based on the type and number of animals and the manner in which pollutants of the operations are discharged into the waters of the United States. 40 C.F.R. § 122.23(b)(4),(6) and (9).

Under the Act, NPDES permits may be issued by the Environmental Protection Agency (EPA) or by an EPA-approved state permit program. 33 U.S.C. § 1342; *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). In conformance with the Act, Tennessee has had an EPA-approved NPDES permitting program since 1977. 51 Fed. Reg. 32834-03 (1986); 46 Fed. Reg. 51644-02 (1981). This program is currently codified as the Tennessee Water Quality Control Act of 1977 at Tenn. Code Ann. §§ 69-3-101 to -148. The Tennessee Department of Environment and Conservation (TDEC) implements the program, *see id*., and TDEC's Division of Water Resources issues NPDES permits in Tennessee. *See* Tenn. Comp. R. & Regs. 0400-40-05-.02(63).

In sum, CAFOs in Tennessee that require NPDES permits receive those permits through TDEC. *See* Tenn. Code Ann. § 69-3-108(b). *See, e.g., Tennessee Envtl. Council v. Tennessee Water Quality Control Bd.*, 254 S.W.3d 396, 400 (Tenn. Ct. App. 2007). The questions posed concern the authority that *counties* might have to also regulate CAFOs.

County Control of Private Property Through Zoning Laws and General Powers

Since the power to control private property belongs to the State, *see Ready Mix, USA, LLC v. Jefferson Cnty*., 380 S.W.3d 52, 64 n. 17 (Tenn. 2012); *Lafferty v. City of Winchester*, 46 S.W.3d 752, 757 (Tenn. Ct. App. 2000), a county lacks the inherent authority to control the use of private property within its boundaries. *Shore v. Maple Lane Farms*, LLC, 411 S.W.3d 405, 425 (Tenn. 2013); *Lafferty*, 46 S.W.3d at 757. A county's power to control private property must derive from the State through specific delegation by the General Assembly. *Shore*, 411 S.W.3d at 426; *Edwards v. Allen*, 216 S.W.3d 278, 284 (Tenn. 2007). Accordingly, the validity of any county regulation of CAFOs must be measured against the statutes that authorize local governments to act. *KLN Assocs. v. Metro Dev. & Hous. Agency*, 797 S.W.2d 898, 902 (Tenn. Ct. App. 1990).

1. Since 1935, the General Assembly has empowered counties to adopt zoning ordinances. *Id*. *See Shore*, 411 S.W.3d at 426. Tennessee's zoning statutes empower counties to regulate the use of real property and the structure and design of buildings within their boundaries. *Lafferty*, 46 S.W.3d at 758. *See* Tenn. Code Ann. §§ 13-7-101 to -119.

The grants of power in these statutes are broad, *Fallin v. Knox Cnty. Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn. 1983), but not without limit. *421 Corp. v. Metropolitan Gov't of Nashville and Davidson Cnty.*, 36 S.W.3d 469, 475 (Tenn. Ct. App. 2000). Ever since county zoning statutes were enacted, counties have not been authorized to regulate "agricultural uses" of property:

> *This part shall not be construed as authorizing the requirement of building permits nor providing for any regulation of the erection, construction, or reconstruction of any building or other structure on lands now devoted to agricultural uses* or which may hereafter be used for agricultural purposes, except on agricultural lands adjacent or in proximity to state federal-aid highways, public airports or public parks; provided, that such building or structure is incidental to the agricultural enterprise. *Nor shall this chapter be construed as limiting or affecting in any way or controlling the agricultural uses of land*.

Tenn. Code Ann. § 13-7-114(a) (emphasis added). *See Shore*, 411 S.W.3d at 426.

These statutory prohibitions on county regulation of buildings and other structures devoted to agricultural uses and on county regulation of agricultural uses of land are reaffirmed in Chapter 1 of Title 5 of the Code, which governs the powers of counties generally. In 1995, the General Assembly granted counties certain powers that previously had been granted to municipalities but made clear that it was not granting counties "the power to prohibit or regulate normal agricultural activities." *See* 1995 Tenn. Pub. Acts ch. 264 (codified at Tenn. Code Ann. § 5-1-118(b)). Furthermore, the General Assembly reiterated: "The powers granted to counties by this part do not include the regulation of buildings used primarily for agricultural purposes; it being the intent of the general assembly that the powers granted to counties by this part should not be used to inhibit normal agricultural activities." *See id.* (codified at Tenn. Code Ann. § 5-1-122).

In sum, Tenn. Code Ann. § 13-7-114(a), § 5-1-118(b), and § 5-1-122 prevent counties from regulating buildings and other structures devoted to agricultural uses or purposes and from regulating normal agricultural activities and the agricultural uses of land.

Neither "agriculture" nor its adjectival form, "agricultural," is defined in any of these provisions, but the definition of "agriculture" provided in Tenn. Code Ann. § 43-1-113(b)(1) applies "unless a different definition is specifically made applicable to the part, chapter, or section in which the term appears," Tenn. Code Ann. § 43-1-113(a), just as the identical definition of "agriculture" in Tenn. Code Ann. § 1-3-105(a)(2)(A) applies wherever "agriculture" is used in the Code "unless the context otherwise requires." Tenn. Code Ann. § 1-3-105(a)(2)(A). Thus, by applicable statutory definition "agriculture" means:

> (A) The land, buildings and machinery used in the commercial production of farm products and nursery stock;
>
> (B) The activity carried on in connection with the commercial production of farm products and nursery stock;
>
> (C) Recreational and educational activities on land used for the commercial production of farm products and nursery stock; and
>
> (D) 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(a)(2)(A) and § 43-1-113(b)(1). And because the natural and ordinary meaning of "agricultural" is "of or relating to agriculture," this definition of "agriculture" applies as well to define "agricultural" as used in Tenn. Code Ann. § 13-7-114(a), § 5-1-118(b), and § 5-1-122. *See* Tenn. Att'y Gen. Op. 17-35 (July 26, 2017).

Based on the applicable definitions of "agriculture" and "agricultural," CAFOs clearly involve "agricultural" activities and the "agricultural" use of land and structures. Thus, a county is not authorized to regulate CAFOs under its zoning powers or its general powers under Chapter 1 of Title 5 of the Code.

Tennessee Code Annotated §§ 44-18-101 to -104

2. - 4. Tennessee Code Annotated §§ 44-18-101 to -104 is a right-to-farm law[2] that protects "feedlots, dairy farms, and poultry production houses" from nuisance suits. Margaret Rosso Grossman & Thomas G. Fisher, *Protecting the Right to Farm*: *Statutory Limits on Nuisance Actions Against the Farmer*, 1983 Wis. L. Rev. 95, 118 n. 108 (1983). Right-to-farm laws became prevalent throughout the United States in the late 1970s as a means to curtail the conversion of farmland to nonagricultural uses. *Id*. at 97, 117-118. These laws were designed to stem farmland conversion by insulating farming operations from nuisance liability. *Id*. at 117-118. While the States differ in their approach to providing this insulation, right-to-farm laws generally codify the common-law concept of "coming to a nuisance." *Id*. at 118.

Tennessee's law embodies the "coming to a nuisance" doctrine in Tenn. Code Ann. § 44-18-102. Subsections (a) and (b) of this statute shield feedlots, dairy farms, and poultry production houses from nuisance claims when they are in compliance with applicable rules and regulations. Subsections (a) and (b) specify that when conditions or circumstances alleged to constitute a nuisance are subject to the rules and regulations in § 44-18-103 or § 44-18-104, proof of compliance with those rules and regulations is an "absolute defense" to a nuisance action when the plaintiff's date of ownership of realty is subsequent to the defendant's "established date of operation"[3] or when the plaintiff's actual or proposed use of realty for residential or commercial purposes is subsequent to the defendant's established date of operation. Subsection (c) states that the "normal" noises, odors, and appearance of feedlots, dairy farms, and poultry production houses are not grounds for a nuisance action if the plaintiff's date of ownership is subsequent to the established date of operation.

The statutory provision in question – Tenn. Code Ann. § 44-18-104 – addresses the "*applicability* of zoning requirements and regulations."[4] As explained above, compliance with

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[2] Tennessee has two right-to-farm laws. 4 Am. Law Zoning § 33:5 n. 7 (5th ed). The other is codified at Tenn. Code Ann. §§ 43-26-101 to -104. *Id*. *See Shore*, 411 S.W.3d at 421-424.

[3] "'Established date of operation' means the date on which a feedlot, dairy farm or poultry production house commenced operating." Tenn. Code Ann. § 44-18-101(3). The date of a subsequent expansion is "deemed to be a separate and independent 'established date of operation,'" but does not divest the feedlot, dairy farm, or poultry production house of its previously established date of operation. *Id*.

[4] Tennessee Code Annotated § 44-18-104 provides:

(a) The applicability of zoning requirements is as follows:

(1) A zoning requirement shall apply to a feedlot, dairy farm or poultry production house with an established date of operation subsequent to the effective date of the zoning requirements;

(2) A zoning requirement shall not apply to a feedlot, dairy farm or poultry production house with an established date of operation prior to the effective date of the zoning requirement;

(3) A zoning requirement that is in effect on April 12, 1979, shall apply to a feedlot, dairy farm or poultry production house with an established date of operation prior to April 12, 1979; and

§ 44-18-103 and § 44-18-104 can afford a feedlot, dairy farm, or poultry production house with absolute immunity from a nuisance action. Accordingly, § 44-18-103 sets forth the TDEC rules that are "applicabl[e]" and § 44-18-104 sets forth the "zoning requirements"[5] and "regulations"[6] that are "applicabl[e]" for the purpose of determining whether absolute immunity is to be afforded to a feedlot, dairy farm, or poultry production house under Tenn. Code Ann. § 44-18-102.

The applicable zoning requirements and regulations under § 44-18-104 are generally as follows: Feedlots, dairy farms, and poultry production houses established prior to April 12, 1979, must comply with zoning requirements and regulations in effect on that date; and later zoning requirements and regulations can apply when the established date of operation of the feedlot, dairy farm, or poultry production house is subsequent to the effective date of a zoning requirement or regulation. [7]

In sum, § 44-18-104 merely sets forth *which* zoning requirements and regulations apply when determining whether a feedlot, dairy farm, or poultry production house is to be afforded absolute immunity from a nuisance claim. But § 44-18-104 does not provide *authority* for a county

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(4) A zoning requirement adopted by a city shall not apply to a feedlot, dairy farm or poultry production house that becomes located within an incorporated or unincorporated area subject to regulation by that city by virtue of an incorporation or annexation that takes effect after April 12, 1979.

(b) A person shall comply with this section as a matter of law where no zoning requirement exists.

(c) The applicability of regulations shall be as follows:

(1) A regulation shall apply to a feedlot, dairy farm or poultry production house with an established date of operation subsequent to the effective date of such regulation;

(2) A regulation shall not apply to a feedlot, dairy farm or poultry production house with an established date of operation prior to the effective date of the regulation;

(3) A regulation that is in effect on April 12, 1979, shall apply to a feedlot, dairy farm or poultry production house with an established date of operation prior to April 12, 1979; and

(4) A regulation adopted by a city shall not apply to a feedlot, dairy farm or poultry production house that becomes located within an incorporated or unincorporated area subject to regulation by such city by virtue of an incorporation or annexation that takes effect after April 12, 1979.

(d) A person shall comply with this section as a matter of law where no regulation exists.

[5] "'Zoning requirement' means a regulation or ordinance that has been adopted by a city, county, township, school district, or any special-purpose district or authority, that materially affects the operation of a feedlot, dairy farm or poultry production house. . . ." Tenn. Code Ann. § 44-18-101(14).

[6] "'Regulations' means a resolution by the county legislative body or an ordinance by the governing body of any municipality regulating or prohibiting the normal noises of animals or fowls, the noises in the operation of the equipment, the odors normally associated with any feedlot, dairy farm, or poultry production house, or the preclusion of any animals or fowls from within the city or from within a defined area of the county." Tenn. Code Ann. § 44-18-101(12).

[7] *See* note 4 *supra*.

to enact zoning requirements or regulations. *See Howard v. Willocks*, 525 S.W.2d 132, 135 (Tenn. 1975) (counties have no authority other than that expressly given by statute or necessarily implied from the provisions of such statute).

Moreover, the General Assembly specifically provided in its definition of "zoning requirement" that "[n]othing in this chapter shall be deemed to empower any agency described in this definition to make any regulation or ordinance." Tenn. Code Ann. § 44-18-101(14). Consequently, Tenn. Code Ann. § 13-7-114, which prevents counties from using their zoning power to regulate structures and land used for agricultural purposes, is not in conflict with Tenn. Code Ann. § 44-18-104 because there is no independent source of zoning power bestowed upon any local entity under this right-to-farm law.

5. The last question concerns the effect of subsections (b) and (d) of Tenn. Code Ann. § 44-18-104 when no zoning requirements or regulations exist. Subsection (b) states that "[a] person *shall* comply with this section *as a matter of law* where no zoning requirement exists," and subsection (d) similarly states that "[a] person *shall* comply with this section *as matter of law* where no regulation exists." (Emphasis added.)

When the word "shall" appears in a statute, it is normally construed as a mandatory, *Home Builders Ass'n of Middle Tennessee v. Williamson Cnty*, 304 S.W.3d 812, 819 (Tenn. 2010), and means "must." *Bateman v. Smith*, 183 Tenn. 541, 543, 194 S.W.2d 336, 336 (1946). Such a construction here, however, would lead to an absurd result: a person would be commanded to comply with zoning requirements and regulations that do not exist. A statute is not to be interpreted in a manner that yields an absurd result. *State v. Fleming*, 19 S.W.3d 195, 197 (Tenn. 2000). To avoid an absurd result in this instance, the most reasonable construction is that a person is deemed "as a matter of law" to have complied with the section when no zoning requirements or regulations exist. *See State v. Turner*, 913 S.W.2d 158, 160 (Tenn. 1995) ("We must seek a reasonable construction in light of the purposes, objectives, and spirit of the statute based on good sound reasoning.").

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