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Opinion No. 01-166

County Authority to Regulate Nuisances

QUESTIONS

1. Is there authority in the general law for a county to regulate or control nuisances? If so, what nuisances may a county regulate or control?

2. If there is no authority in the general law for a county to regulate or control nuisances, may a county by private act provide for such regulation or control? If so, what nuisances may a county regulate or control?

3. If a county has no authority to regulate or control nuisances by a private act and if there is no authority in the general law for such regulation or control, may the General Assembly enact legislation to authorize such regulation or control by:

a. Giving the counties automatic authority without further action by the county commission;

b. Giving the counties authority only after action is taken by its county legislative body by resolution, either by a two-thirds or a majority vote of the members;

c. Giving the counties authority only after enacting a private act.

4. Under any of the scenarios listed in Question 3, could the General Assembly limit such authority to regulate only noise or a specific type of noise, an example being mechanical or man-made rather than natural types of noise, or would the General Assembly have to permit regulation of all types of nuisances and be required to specifically define the types of nuisances authorized to be regulated?

OPINIONS

1. Under Tenn. Code Ann. § 29-3-102, an action may be brought on the petition of, among other officials, a county attorney, to abate a nuisance. The term "nuisance" is defined in Tenn. Code Ann. § 29-3-101 to include certain types of establishments as well as anything else declared by statute to be a public nuisance. It appears that under this definition a county attorney could bring an action to abate a

nuisance under Tenn. Code Ann. § 54-5-602 (installation of a signal light on a state highway without the authority of the Commissioner of Transportation); Tenn. Code Ann. § 55-8-113 (unauthorized or prohibited road signs, which may be removed by the entity with jurisdiction over the road); Tenn. Code Ann. § 65-6-120 (building a railroad on a county road or highway without the consent of the county legislative body); and Tenn. Code Ann. § 68-112-112 (conducting an assembly without obtaining the required license). Counties are authorized to regulate dilapidated property and garbage disposal under Tenn. Code Ann. § 5-1-115 and Tenn. Code Ann. § 39-14-504. A county commission is also authorized to adopt and enforce building codes under Tenn. Code Ann. §§ 5-20-101, *et seq.* Counties within a few designated population brackets are also authorized to exercise the general police powers accorded cities under Tenn. Code Ann. § 6-2-201(22) and (23). In addition, of course, counties are accorded zoning authority under Tenn. Code Ann. §§ 13-7-101, *et seq.*

2. A county has no authority to enact a private act. A private act must be enacted by the General Assembly, subject to constitutional limitations discussed below.

3. a. Clearly, the General Assembly could enact a general law granting additional powers to county legislative bodies. But the constitutionality of such legislation would depend on its particular terms, especially the scope of the power conferred and the manner of its exercise.

b. The constitutionality of such an act would depend upon its terms. The question appears to refer to legislation in the nature of a local option act. In that case, under Article XI, Section 9, the legislation would require adoption by a two-thirds vote of the legislative body or by a popular referendum. The General Assembly could also enact general legislation authorizing a county to exercise regulatory authority by passing a resolution or regulation. In that case, the act could constitutionally authorize adoption of such regulations by a majority vote of the county commission.

c. Again, the constitutionality of such an act would depend upon its terms. As noted in our answer to Question 1, counties are currently given extensive land use authority through zoning in Tenn. Code Ann. §§ 13-7-101, *et seq.*, and other statutes. To the extent that a private act might conflict with any of these statutory schemes, there must be a rational basis for placing a particular county under the different law. Whether the private act conflicts with any of these statutes would depend on the particular terms of that act. In addition, a private act may not generally impose criminal penalties, or authorize a county to impose criminal penalties for the violation of county regulations.

4. The General Assembly could limit the county's authority. But the exercise of authority under any such act would have to comply with due process. Further, if the regulatory authority is conferred by a private act, the act cannot constitutionally suspend a law of mandatory statewide application unless there is a rational basis for treating a particular locality differently. In addition, a private act may not generally impose criminal penalties, or authorize a county to impose criminal penalties for the violation of county regulations. Finally, any act, general or private, authorizing a county to regulate nuisances should contain a sufficient basic standard, a definite and certain policy, and a rule of action for the guidance of the

county in administering the law. This Office is unaware of any other constraints on the authority of the General Assembly to authorize counties to regulate nuisances.

ANALYSIS

1. County Authority to Regulate and Control Nuisances

The first question is whether under the general law a county is authorized to regulate and control nuisances. It is not clear whether the question refers to the authority to pass ordinances governing conduct within the county or the authority to bring a legal action to abate an existing nuisance. As a general matter, counties owe their creation to statutes, which confer on them all powers that they possess, prescribe all duties they owe, and impress all liabilities to which they are subject. *Bayless v. Knox County*, 199 Tenn. 268, 281, 286 S.W.2d 579 (1956). Statutes respecting a county's powers are strictly construed. *Id.* at 288. Under Tenn. Code Ann. § 29-3-102, a county attorney, among other public officers, may bring an action to abate the public nuisances defined in Tenn. Code Ann. § 29-3-101. That statute provides:

> "Nuisance" means that which is declared to be such by other statutes, and, in addition thereto, means any place in or upon which lewdness, assignation, prostitution, unlawful sale of intoxicating liquors, unlawful sale of any regulated legend drug, narcotic or other controlled substance, unlawful gambling, any sale, exhibition or possession of any material determined to be obscene or pornographic with intent to exhibit, sell, deliver or distribute matter or materials in violation of §§ 39-17-901--39-17-908, § 39-17-911, § 39-17-914, § 39-17-918, or §§ 39-17-1003--1005, quarreling, drunkenness, fighting or breaches of the peace are carried on or permitted, and personal property, contents, furniture, fixtures, equipment and stock used in or in connection with the conducting and maintaining any such place for any such purpose[.]

Tenn. Code Ann. § 29-3-101(2). Under Tenn. Code Ann. § 29-3-112, carrying on a business or profession without a required license is declared to be a public nuisance. Review of Tennessee statutes indicates that some statutes declaring a particular action to be a public nuisance also specify the official authorized to bring an action to abate it. For example, under Tenn. Code Ann. § 69-3-114, causing pollution is declared to be a public nuisance, but the statute expressly declares that it is to be enforced by an action by the Commissioner of Environment and Conservation through the Attorney General. It is not clear whether under this, and other statutes, a county would also be entitled to bring an action to abate the nuisance through its county attorney under Tenn. Code Ann. § 29-3-102. Several statutes declare activities to be a public nuisance and do not specify the official authorized to bring an action to abate it. These include Tenn. Code Ann. § 54-5-602 (installation of a signal light on a state highway without the authority of the Commissioner of Transportation); Tenn. Code Ann. § 55-8-113 (unauthorized or prohibited road signs, which may be removed by the entity with jurisdiction over the road); Tenn. Code Ann. § 65-6-120

(building a railroad on a county road or highway without the consent of the county legislative body); and Tenn. Code Ann. § 68-112-112 (conducting an assembly without obtaining the required license).

The question also asks about county authority to "regulate" a nuisance. We assume this question refers to the authority to pass some form of resolution or ordinance to prevent a nuisance from occurring. A number of statutes expressly authorize a county legislative body to take action with regard to specific abuses. For example, Tenn. Code Ann. § 5-1-115 authorizes a county governing body to make rules and regulations to regulate dilapidated property as provided in that statute. Tenn. Code Ann. § 39-14-503 authorizes county legislative bodies to impose regulations for litter control, including storage of garbage on private property. A county commission is also authorized to adopt and enforce building and other codes. Tenn. Code Ann. §§ 5-20-101, *et seq.* Under Tenn. Code Ann. § 5-1-118, counties are authorized to exercise certain statutory powers exercised by cities, including many of the general powers accorded cities incorporated as mayor-aldermanic cities under Tenn. Code Ann. § 6-2-201. But that statute does not include the powers accorded cities under Tenn. Code Ann. § 6-2-201(22) and (23), which provide:

> Every municipality incorporated under this charter may:
>
> * * * *
>
> (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;
>
> (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). Tenn. Code Ann. § 5-1-118(c)(1) authorizes counties within a few designated population brackets to exercise the powers under these two provisions, subject to certain limitations. In addition, of course, state law authorizes counties to adopt zoning regulations. Tenn. Code Ann. §§ 13-7-101, *et seq.*

2. County Authority to Regulate and Control Nuisances by Private Act

The second question is, assuming there is no authority in the general law for a county to regulate and control nuisances, whether a county by private act could provide for such regulation or control. A county has no authority to enact a private act. A private act must be enacted by the General Assembly, subject to constitutional limitations discussed below.

3. Form of Authorization to Regulate and Control Nuisances

The third question is whether, assuming general law provides no authority for counties to regulate or control nuisances, and the county cannot itself enact a private act to exercise such authority, whether the General Assembly could enact legislation to authorize such regulation or control by passing various forms of legislation. First, you ask whether the General Assembly could enact legislation to authorize such regulation or control by giving the counties "automatic authority without further action by the county commission."

Clearly the General Assembly could enact a general law granting additional powers to county legislative bodies. But the constitutionality of such legislation would depend on its particular terms. For example, the manner in which the county commission would exercise its authority should comport with the requirements of due process. The Due Process Clause of the Fourteenth Amendment to the United States Constitution accords procedural safeguards to protected interests and protects the substantive aspects of liberty against impermissible government restrictions. *Harrah Independent School District v. Martin,* 440 U.S. 194, 197, 99 S.Ct. 1062 (1979); *Howard v. Grinage,* 82 F.3d 1343 (6th Cir. 1996). Procedural due process guarantees that a state proceeding which results in a deprivation of property is fair, while substantive due process ensures that such state action is not arbitrary and capricious. *Licari v. Feruzzi,* 22 F.3d 344, 347 (1st Cir. 1994). The statutory scheme on zoning, which accords considerable authority to counties, requires that power to be exercised by enacting zoning ordinances with the participation of the regional planning commission. Tenn. Code Ann. § 13-7-104. A county commission that enacts zoning regulations must also create a county board of zoning appeals. Tenn. Code Ann. § 13-7-106. That statutory scheme therefore gives property owners in the county notice and an opportunity to participate in the process of enacting regulations, as well as a local administrative body to which to appeal particular applications of the ordinances. An attempt to regulate land use by a less formal process could be subject to challenge on the grounds that it violates the due process rights of county property owners. *See, e.g., White v. Roughton,* 530 F.2d 750, 754 (7th Cir. 1976) (failure to establish written standards for grant of welfare benefits constitutes denial of due process).

Next, you ask whether the General Assembly could enact legislation giving the counties authority to regulate or control nuisances only after action is taken by its county legislative body by resolution, either by a two-thirds or a majority vote of its members. Again, the constitutionality of this act would depend upon its terms. The question appears to refer to legislation in the nature of a local option act. In that case, under Article XI, Section 9 of the Tennessee Constitution, the legislation would require adoption by a two-thirds vote of the legislative body or by a popular referendum. The General Assembly could also enact general legislation authorizing a county to exercise regulatory authority by passing a resolution or regulation. In that case, the act could constitutionally authorize adoption of such regulations by a majority vote of the county commission.

Finally you ask whether the General Assembly could grant a county authority to regulate or control nuisances by enacting a private act applicable to a particular county. Again, the constitutionality of such

a private act would depend on its particular terms, including the scope of the power and the manner in which it would be exercised. A private act may not contravene a general law of mandatory applicability. Article XI, Section 8 of the Tennessee Constitution provides in part:

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

This provision, Article I, Section 8 of the Tennessee Constitution, and the Fourteenth Amendment to the United States Constitution all guarantee to citizens equal protection of the laws, and the same rules are applied under them as to the validity of classifications made in legislative enactments. *Brown v. Campbell County Board of Education*, 915 S.W.2d 407, 412 (Tenn. 1995), *cert. denied*, 116 S.Ct. 1852 (1996). In order to trigger application of Article XI, Section 8, a statute must contravene some general law with mandatory statewide application. *Riggs v. Burson*, 941 S.W.2d 44, 78 (Tenn. 1997), *reh'g denied*, (1997), *cert. denied*, 118 S.Ct. 444 (1997). Ordinarily, unless a classification involves a suspect class or interferes with a fundamental right, it will be upheld under an equal protection analysis if there is a rational basis for the classification. Under rational basis scrutiny, a statutory classification will be upheld if "some reasonable basis can be found for the classification . . . or if any state of facts may reasonably be conceived to justify it." *Riggs v. Burson*, 941 S.W.2d at 53, quoting *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993). Under this analysis, if the proposed private act is inconsistent with general law regarding county regulation of land use, it would be unconstitutional under Article XI, Section 8 of the Tennessee Constitution unless there is a rational basis for granting different powers to the specific county.

As noted in our answer to Question 1, counties are currently given extensive land use authority through zoning in Tenn. Code Ann. §§ 13-7-101, *et seq.*, and other statutes. To the extent that a private act might conflict with any of these statutory schemes, there must be a rational basis for placing a particular county under the different law. *See* Op. Tenn. Atty. Gen. 01-050 (March 28, 2001) for a more detailed discussion of private act legislation that conflicts with state zoning laws. Whether the private act conflicts with any of these statutes would depend on the particular terms of that act. We also note that a private act may not generally impose criminal penalties, or authorize a county to impose criminal penalties for the violation of county regulations. Laws that bring about such a result have been found to be an unconstitutional delegation of the General Assembly's authority to define criminal conduct. *Jones v. Hayes*, 221 Tenn. 50, 424 S.W.2d 197 (Tenn. 1968); *State v. Toole*, 224 Tenn. 491, 457 S.W.2d 269 (Tenn. 1970).

4. Scope of Authority to Regulate Nuisances

Your last question concerns the scope of authority that could be accorded under any of the different types of acts listed above. Specifically, you ask whether the act could limit the authority to regulate only noise or a specific type of noise, for example, mechanical or man-made types of noise, or whether the act would have to permit regulation of all types of nuisances and be required to define the types of nuisances authorized to be regulated. As discussed above, if the regulatory authority is conferred by a private act, the act cannot constitutionally suspend a law of mandatory statewide application unless there is a rational basis for treating a particular locality differently. In addition, as discussed above, the exercise of authority under any such act would have to comply with due process.

You also ask how specifically any act should define the type of nuisance that the county may regulate. The power to regulate land use for the general health and welfare — whether that power is exercised by zoning or some other means — is part of the State's police power, and the General Assembly may delegate that power to governmental agencies and local governing bodies, so long as it establishes basic standards to guide their actions. *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 655 (1989) (Congress); *Lobelville v. McCanless*, 214 Tenn. 460, 381 S.W.2d 273 (1964) (General Assembly). A private act delegating regulatory authority to the county should therefore contain "a sufficient basic standard, a definite and certain policy and rule of action for the guidance" of the county in administering the law. *Lobelville*, 214 Tenn. at 463-64. This Office is unaware of any other constraints on the authority of the General Assembly to authorize counties to regulate nuisances.

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