S T A T E O F T E N N E S S E E
OFFICE OF THE
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Opinion No. 01-170

Removal and Development of Designated Natural Areas Under Natural Areas Preservation Act

QUESTIONS

1. May an area classified under the Natural Areas Preservation Act be removed from the state system or in any way altered, without legislative action?

2. May a designated natural area be used for any purpose or in any manner that may be inconsistent with the Act's goal of "perpetual preservation?" For example, may a roadway be constructed through or on a designated natural area in a manner not expressly provided for in the rules promulgated under the Act, absent legislative action?

OPINIONS

1. No. It is only the General Assembly that has the authority to make alterations to or deletions from the classification system set out in the Natural Areas Preservation Act.

2. It is the opinion of this Office that a designated natural area may not be used in a manner that would be inconsistent with the legislative purpose underlying the Act. But the Commissioner of the Tennessee Department of Environment and Conservation has authority under the Act to establish rules permitting limited development activities for each natural area. This delegation comes with the caveat that any activity or deviation from the rules approved by the Commissioner must ultimately conform to the Act's goal of "perpetual preservation." Therefore, a road project that is not expressly contemplated under the current rules may only be permitted as a deviation under the natural resource area's "master plan" if it will accord with the Act's stated purpose and the respective resource legislation.

ANALYSIS

1. The Natural Areas Preservation Act of 1971, Tenn. Code Ann. §§ 11-14-101 to 11-14-407, has as its stated objective the protection of areas possessing "scenic, scientific, including biological, geological and/or recreational values" and which are in danger of being destroyed or diminished through the actions of man. Tenn. Code Ann. § 11-14-102. The Act seeks to accomplish this objective by designating specific areas for inclusion in the natural areas system and classifying them as "worthy of

perpetual preservation" in one of two classes: Class I - scenic recreational areas; and Class II - natural scientific areas. Tenn. Code Ann. § 11-14-105; *see also* § 11-14-108.

The Act provides that the Department of Environment and Conservation, in cooperation with the Tennessee Wildlife Resources Agency and the Tennessee Wildlife Resources Commission, is to submit to the General Assembly an initial list of areas to be made part of the system. Thereafter, the Department "shall submit annually to each succeeding general assembly *proposals* for additions and alterations to Class I or Class II areas . . . ." Tenn. Code Ann. § 11-14-107 (emphasis supplied). But the Act expressly authorizes the General Assembly to "designate" the Class I and Class II areas, either spontaneously or as "proposed" by the Commissioner of the Department of Environment and Conservation. Tenn. Code Ann. § 11-14-108(a).

While the Act does not expressly address the issue of removing or deleting areas previously classified, it does mention "additions and alterations," as proposed by the Commissioner. Tenn. Code Ann. § 11-14-107. Moreover, the language contained in the provisions cited above suggests that since the legislature alone has the power to designate or alter a Class I or Class II area, removal or delisting of a previously classified area could only be accomplished through legislative action. The Department's powers in this regard, as with designations, are advisory only, although the Commissioner is authorized to promulgate rules governing the administration, development and enhancement of classified natural areas. *See* Tenn. Code Ann. §§ 11-14-104(c) and 11-14-106(b).

2. You have also inquired whether a designated natural area can be used for a purpose or activity that might be contrary to the Act's stated objective of "perpetual preservation," absent legislative action. By way of example, you have suggested the construction of a roadway other than one expressly provided for under the rules governing natural resource areas found at Tenn. Comp. R. & Reg., ch. 0400-2-8.-01 through 0400-2-8-.33. We further understand that you are inquiring specifically about a through road.

First, as we noted above, the Commissioner's rulemaking authority does extend to development activities for the natural areas, but this delegation comes with the statutory caveat that the activities permitted "not be inconsistent with the purpose of perpetual preservation." Tenn. Code Ann. § 11-14-106(b). The Act contains the following additional criteria to guide the Commissioner:

> Either class may be developed with such facilities as may be reasonably necessary for the dissemination of educational material *and for the safe and proper management and protection of the area*; provided, that no such facility shall be constructed or sited in such a manner to be inconsistent with the preservation of the natural or scientific values in a Class II area or as an intrusion upon the scenic and recreational values in a Class I area.

Tenn. Code Ann. § 11-14-106(a)(2) (emphasis supplied).

The rules currently contain provisions restricting the installation and use of service roads and public access roads in designated natural areas. No other class of roads is addressed. By and large, the rules require that installation of such roads is to be governed by the natural area's "master plan," or by criteria laid out in the rules. Tenn. Comp. R. & Reg., ch. 0400-2-8-.12 and .26. The rule mandating the development of a master plan for each area is set out at Tenn. Comp. R. & Reg., ch. 0400-2-8-.05 and provides in pertinent part:

> (1) There shall be a master plan for each Natural Resource Area. Development of each master plan shall adhere to a standardized outline format. The Department shall consult with citizens' organizations, as well as federal, state and municipal agencies in the preparation of these plans as much as possible. . . .
>
> (2) Management of each Natural Resource Area shall be in accordance with these rules except for deviations as may be provided in the master plan for the particular area.
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> (3) Whenever it is required by the area master plan that there be a deviation from the rules in the management of a Natural Area, such deviation shall be set forth in detail, together with the reasons therefore, in the master plan. *A deviation from these rules shall take effect only upon approval by the Commissioner . . . , and only when in accordance with the provisions and restrictions of the respective resource legislation.*

(Emphasis supplied).

The rules further address the issue of environmental "intrusions," including land uses, structures, or works of man that may negatively impact a natural resource area. Tenn. Comp. R. & Reg., ch. 0400-2-8-.08. Some limited intrusions may be permitted under an area's master plan when treated as a "deviation" under Rule 0400-2-8-.05. Tenn. Comp. R. & Reg., ch. 0400-2-8-.08(2). But it is our understanding that the Department does not construe this rule to include a road project among the contemplated intrusions. Rather, roads are addressed separately in Rule 0400-2-8-.12. The courts generally give great deference to an agency's interpretations of its own rules. *Jackson Express, Inc. v. Tennessee Public Service Comm'n*, 679 S.W.2d 942, 945 (Tenn. 1984).

Finally, the Commissioner has also promulgated rules governing general use of and access to natural resource areas that may have a bearing on this inquiry. The rule concerning use references the master plan, which "shall define the use of each portion of the Natural Resource Area and specify the

controls and restrictions to be placed on access and use." Tenn. Comp. R. & Reg., ch. 0400-2-8-.26(1).

The same rule prohibits "visitor activities" that are not compatible with the goal of preserving the area's natural character, and this rule requires the master plan to specify the permissible carrying capacity for each natural area or section thereof . Tenn. Comp. R. & Reg., ch. 0400-2-8-.26(2). The rule governing access control states that "[i]ngress and egress shall be allowed only at such locations and under such conditions as may be specified in the master plan." Tenn. Comp. R. & Reg., ch. 0400-2-8-.28.

Given the limited facts presented in your request, these rules, along with the enabling legislation, lead us to believe that a resolution of your second inquiry may be governed in part by the provisions contained in the master plan for the natural resource area in question. If the road project does not qualify as either a service road or public access road under the current rules, the master plan could allow for such a deviation only with the Commissioner's approval, and then only if it would be compatible with "the respective resource legislation" governing that particular natural area. Tenn. Comp. R. & Reg., ch. 0400-2-8-.05(3). We believe that while the Commissioner has authority under the Act to approve certain developmental activities in designated natural areas, his authority to approve a road project that deviates from the rules would be constrained by the Act's stated purpose of perpetual preservation and its rulemaking criteria in Tenn. Code Ann. 11-§14-106.

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