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

March 3, 2003

Opinion No. 03-024

Blount County Ordinance

QUESTIONS

1. Under Tenn. Code Ann. § 5-1-118(c), any county that does not have zoning regulations in effect throughout the county may, by a two-thirds vote of its legislative body, exercise certain regulatory powers granted to cities. Is this provision constitutional even though it does not apply uniformly to all counties?

2. The Blount County Commission has adopted extensive regulations, Resolution No. 02-02-004, regarding unincorporated parts of the county. Are these ordinances a proper exercise of the powers conferred on counties under Tenn. Code Ann. § 5-1-118?

3. Assuming the ordinances are valid, to which court should persons who violate them be cited?

4. Who is responsible for prosecuting these ordinances, and who is responsible for hiring and paying the prosecutor?

OPINIONS

1. The statute is constitutional.

2. Resolution No. 02-02-004 is defensible under the statute.

3. Under Tenn. Code Ann. § 5-1-123, the General Sessions Court or court exercising the powers of a General Sessions Court in any county has jurisdiction over violations of rules adopted under Tenn. Code Ann. §§ 5-1-118 — 5-1-123. Since rules adopted under Tenn. Code Ann. § 5-1-118(c) apply only in unincorporated parts of the county, the court would need to have jurisdiction over offenses committed in that area.

4. A suit to enforce the ordinance is a civil action. Because the statutory scheme does not designate a specific officer to prosecute ordinance violations, it appears that suits to enforce an ordinance would be brought by the county attorney, who is paid out of the general county fund.

ANALYSIS

1. Constitutionality of Tenn. Code Ann. § 5-1-118(c)

This opinion addresses several issues related to an ordinance adopted by the Blount County Commission under the authority of Tenn. Code Ann. § 5-1-118(c), Resolution No. 02-02-004 ("the Resolution"). Under subsection (a) of this statute, counties, in addition to other powers authorized by general law or private act, may exercise certain statutory powers granted to cities. Subsection (c), as recently amended, provides:

> (c)(1) In addition to those powers granted to counties pursuant to subsection (a), any county, which does not have zoning regulations in effect throughout the county, may, by adoption of a resolution by two-thirds (2/3) vote of their respective legislative bodies, exercise those powers granted to all or certain municipalities by § 6-2-201(22) and (23), except as provided in subsection (b) and subdivisions (c)(2) and (3). The powers granted to counties in this subsection (c) apply only within the unincorporated areas. Nothing in this subsection (c) may be construed to allow any county to prohibit or in any way impede any municipality in exercising any power or authority the municipality may lawfully exercise. If, prior to April 17, 2002, a county has adopted a resolution by a two-thirds (2/3) vote, pursuant to previous acts enacted by the general assembly, to exercise the powers granted in accordance with this subsection (c), no further action by the legislative body of such county is necessary to continue exercising such powers.
>
> (2) The powers granted by § 6-2-201(22) and (23) shall not apply to those activities, businesses, or uses of property and business occupations and practices which are subject to regulation pursuant to title 57, chapter 5; title 57, chapter 6; title 59, chapter 8; title 60, chapter 1; title 68, chapters 201 through 221; or title 69, chapters 3, 8, 11 and 12.
>
> (3) All court decisions and statutory laws relating to variances and non-conforming uses applicable to zoning ordinances and land use controls shall apply to the enforcement and exercise of those powers granted pursuant to subdivision (c)(1).

Tenn. Code Ann. § 6-2-201(22) and (23), referred to in the statute, provide that every municipality incorporated under the mayor-aldermanic form of government 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[.]

The first question is whether the classification established in the statute is constitutional. There is a strong presumption in favor of the constitutionality of acts passed by the legislature. *See, e.g., Bozeman v. Barker,* 571 S.W.2d 279, 282 (Tenn. 1978); *West v. Tennessee Housing Development Agency,* 512 S.W.2d 275, 279 (Tenn. 1974). The burden of proof rests on one challenging the constitutionality of the statute to rebut the presumption that the act is constitutional. *State Personnel Recruiting Services Board v. Horne*, 732 S.W.2d 289, 291 (Tenn. Ct. App. 1987), *p.t.a. denied* (1987). Article I, Section 8, Article XI, Section 8, and the United States Constitution, Amendment 14 guarantee that "all persons similarly circumstanced shall be treated alike." *State v. Robinson,* 29 S.W.3d 476, 480 (Tenn. 2000); *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993) (both quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 562, 64 L.Ed.2d 989 (1920)). Under all these provisions, the same rules are applied as to the validity of classifications made in legislative enactments. *City of Memphis v. State ex rel. Ryals*, 133 Tenn. 83, 88, 179 S.W. 631 (1915).

All classifications that do not affect a fundamental right or discriminate as to a suspect class are generally subject to the rational basis test. *State v. Tester,* 879 S.W.2d 823, 828 (Tenn. 1994). Under this test, the classification will be upheld "if any state of facts may reasonably be conceived to justify it." *Id.* (citing *Tennessee Small School Systems v. McWherter,* 851 S.W.2d 139, 153 (Tenn. 1993)*; Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978). The question is "whether the classifications have a reasonable relationship to a legitimate state interest." *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988) (citing *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982), *rehearing denied* (1982)).

As recently amended, Tenn. Code Ann. § 5-1-118(c) grants certain police powers to counties that have not enacted county-wide zoning. We think there is a rational basis for this classification.

Counties that have enacted county-wide zoning have already exercised their police powers with regard to land use and need no additional powers. Counties that have not exercised this authority now may exercise some police powers without having to enact county-wide zoning. There is a constitutionally sufficient rational basis for this distinction.

2. Authority for Blount County Ordinance

The second question is whether the Blount County ordinance, or Resolution, is authorized under Tenn. Code Ann. § 5-1-118(c). Section 1 of the ordinance contains extensive traffic regulations. Section 2 places limits on disturbing the peace, loitering, prowling, dumping gravel, drinking in public, and making noise. We assume your question is limited to whether the ordinance is authorized under the statute, and have not reviewed it to ensure that it is consistent with state statutes regulating these matters, nor have we reviewed it in detail to ensure that every provision is constitutional.[1]

The legislative history of 2002 Tenn. Pub. Acts Ch. 627, which enacted Tenn. Code Ann. § 5-1-118(c) in its present form, indicates that the statute was intended to allow counties to regulate nuisances and land use by some method other than zoning. The statute, on its face, applies only to counties that have not enacted county-wide zoning regulations. In addition, subdivision (c)(3) expressly provides that "[a]ll court decisions and statutory laws relating to variances and non-conforming uses applicable to zoning ordinances and land use controls shall apply to the enforcement and exercise of those powers granted pursuant to subdivision (c)(1)." All of the matters regulated in the ordinance are, arguably, related to land use.

The next question is whether the ordinance violates the limits that the statute sets in subdivision (c)(2). Under that provision, the powers granted under the statute do not apply to those "activities, businesses, or uses of property and business occupations and practices which are subject to regulation pursuant to title 57, chapter 5; title 57, chapter 6; title 59, chapter 8; title 60, chapter 1; title 68, chapters 201 through 221; or title 69, chapters 3, 8, 11, and 12."

Title 57, Chapter 5 and Title 57, Chapter 6 govern the sale and taxation of alcohol. Regulation No. 44 of the Resolution prohibits a person from possessing an open container of or consuming any alcoholic beverage or beer on the premises of any business that does not have a liquor license, or on any public street or other public property, or any privately owned parking lot held open to use by the public. On the other hand, regulation of consumption of alcoholic beverages is governed by Tenn. Code Ann. §§ 57-4-101, *et seq.*, which is not listed in subdivision (c)(2). Nor

[1] Under *City of Chattanooga v. Davis*, 54 S.W.3d 248 (Tenn. 2001), for example, it is unlikely that the county will be able to impose a fine of more than fifty dollars for an ordinance violation without a jury trial.

does the ordinance purport to regulate the sale of alcohol. For this reason, we think an argument can be made that Regulation No. 44 does not violate the limits set in Tenn. Code Ann. § 5-1-118(c)(2).

Title 59, Chapter 8 regulates strip and open pit mining. The ordinance does not attempt to regulate in this area. Title 60, Chapter 1 regulates oil and gas production. The ordinance does not attempt to regulate in this area. Title 68, Chapters 201 through 221 regulate various environmental areas, including air pollution, nuclear materials, solid waste disposal, hazardous waste management, sanitary landfills, petroleum underground storage, oil spill cleanup, and water and sewage control. The ordinance does not attempt to regulate in these areas. Title 69, Chapters 3, 8, 11, and 12 regulate water pollution, water management, water wells, and dams. The ordinance does not attempt to regulate in these areas. For these reasons, we think an argument can be made that the entire Resolution is authorized under the statute.

3. Court to which Ordinance Violators are Cited

The next question is, assuming the Resolution is valid, to which court the violators should be cited. Under Tenn. Code Ann. § 5-1-123, the General Sessions Court or court exercising the powers of a General Sessions Court in any county has jurisdiction over violations of rules adopted under Tenn. §§ 5-1-118 — 5-1-122. Since rules adopted under Tenn. Code Ann. § 5-1-118(c) apply only in unincorporated parts of the county, the court would have to have jurisdiction over offenses committed in that area.

4. Prosecuting Ordinance Violations

The last question is who is responsible for prosecuting violations of county ordinances and who is responsible for hiring and paying the prosecutor. Tenn. Code Ann. § 8-7-103(1) provides that each district attorney general "[s]hall prosecute in the courts of the district all violations of the state *criminal* statutes and perform all prosecutorial functions attendant thereto, including prosecuting cases in a municipal court where the municipality provides sufficient personnel to the district attorney general for that purpose[.]" (Emphasis added). But no statute provides that a violation of a county ordinance enacted under Tenn. Code Ann. § 5-1-118(c) is a criminal offense. The statutes only authorize the county to impose a fine for violating such an ordinance. Tenn. Code Ann. § 5-1-121. Since the statutory scheme does not designate a specific officer to prosecute ordinance violations, it appears that suits to enforce an ordinance would be brought by the county attorney. Tenn. Code Ann. § 5-6-112(1). Under that provision, the county attorney is paid out of the general county fund.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Mike Flynn
District Attorney General
942 E. Lamar Alexander Pkwy.
Maryville, TN 37804-5002