S T A T E O F T E N E S E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 06-142

Use Permitted on Review Zoning Classification

QUESTIONS

1. Under current Tennessee zoning laws, what is meant by the term "use permitted on review"?

2. If a county commission establishes a "use permitted on review" classification in a zoning resolution, must it also establish objective standards within which applications for such uses must be evaluated?

3. If a county commission establishes a "use permitted on review" classification in a zoning resolution, may it authorize the planning commission to impose conditions on the use that are not specified in the zoning resolution itself?

4. If a county grants a use permit, may it later revoke the use permit after the property owner has implemented such use on the property and, if so, under what circumstances?

5. If a county commission establishes a "use permitted on review" classification in a zoning resolution, but fails to provide for objective standards for reviewing and granting such permits, does that use become a use as of right in that district?

OPINIONS

1. Although the term is not defined in Tennessee statutes of general applicability, "use permitted on review" refers to a use of land that is permitted under the applicable zoning ordinance only after the owner obtains a permit.

2. Yes. The decision to issue such a permit is administrative. As a general matter, to be valid, zoning regulations should provide a definite standard and furnish a uniform rule of action to govern the conduct of administrative officials. An ordinance may be valid even though it confers a certain discretion, provided that discretion is sufficiently limited by rules and standards to protect people against arbitrary or unreasonable power.

3. Yes, so long as the conditions fall within its general authority and discretion granted under the applicable ordinance. Whether any particular condition is reasonable and within the

board's authority would depend on the scope of the ordinance and other specific facts and circumstances.

4. As a general rule, a building permit has none of the elements of a contract and may be changed or entirely revoked even though based on a valuable consideration, if it becomes necessary to change or revoke it in the exercise of police power. Tennessee courts have recognized that a property owner may acquire a vested right in a permit once he or she has expended resources in reliance upon it. This principle does not apply if the permit was issued in violation of a zoning ordinance. Courts in Tennessee have not addressed how much work a permit holder must carry out to establish the right.

5. No reported Tennessee case addresses the effect of its ruling that a zoning resolution is invalid because it fails to provide adequate standards for administrative officials. It is not clear whether a court would, as the opinion request suggests, elide the requirement that an owner obtain a permit, thereby converting a use formerly permitted only on review into a use as of right. Generally, where a zoning ordinance is found to be invalid, the land is subject to the zoning regulation in effect before the invalid regulation was enacted. Where the effect of this ruling is to leave the land subject to no zoning at all, however, some courts may remand the matter to a local legislative body with instructions to rezone, or simply wait a reasonable time to give the local legislative body an opportunity to respond to the ruling. This Office is unable to predict what approach a Tennessee court might take.

ANALYSIS

1. Meaning of "Use Permitted on Review"

This opinion addresses several general questions regarding county zoning. The right of a county to enact or amend zoning regulations is based upon powers delegated to it by specific enabling acts of the General Assembly. *Hutcherson v. Criner*, 11 S.W.3d 126 (Tenn. Ct. App. 1999), *p.t.a. denied* (1999). Zoning laws are in derogation of the common law and operate to deprive a property owner of a use of land that would otherwise be lawful and, thus, must be strictly construed in favor of property owners. *Anderson County v. Remote Landfill Services, Inc.*, 833 S.W.2d 903 (Tenn. Ct. App. 1991), *rehearing denied* (1991), *p.t.a. denied* (1992). County commissions are authorized to adopt and enforce zoning ordinances under Tenn. Code Ann. §§ 13-7-101, *et seq.*[1] Private acts may also address county zoning. Tenn. Code Ann. § 13-7-115.

The first question is the meaning of the term "use permitted on review" under Tennessee zoning laws. While the statutes do not expressly refer to this term, Tennessee courts have addressed

[1] Counties also have the authority to regulate land use under Tenn. Code Ann. § 5-1-118(c). Since the question specifically refers to "zoning," this opinion will be confined to county zoning under Tenn. Code Ann. §§ 13-7-101, *et seq.* *But see*, Tenn. Code Ann. § 5-1-118(c)(3)(court decisions and statutory laws relating to variances and non-conforming uses applicable to zoning ordinances and land use controls apply to enforcement and exercise of powers granted under Tenn. Code Ann. § 5-1-118(c)).

zoning ordinances containing this type of restriction. In *Wilson County Youth Emergency Shelter, Inc. v. Wilson County*, 13 S.W.3d 338 (Tenn. Ct. App. 1999), *p.t.a. denied* (2000), for example, the Tennessee Court of Appeals reviewed a zoning board decision under an ordinance that allowed certain listed uses in an area upon appeal to the Board of Zoning Appeals. The Court also referred to the listed uses as "uses permitted on review" The Court explained:

> This means that an applicant for such uses cannot obtain the necessary permit to proceed with its plans without going through the appeal process outlined in the Zoning Ordinance; but once the applicant goes through the process and the requested use satisfies all other pertinent regulations of the local zoning regulations, it must be granted.

13 S.W.3d at 342. Similarly, the Tennessee Court of Appeals addressed a Knox County zoning ordinance classifying a sanitary landfill as a "use permitted on review" for land in an agricultural zone. Under that ordinance, plans for the landfill had to be submitted to the Planning Commission before the landfill could be developed. *State ex rel. Browning-Ferris Industries v. Board of Commissioners of Knox County*, 806 S.W.2d 181 (Tenn. Ct. App. 1991), *p.t.a. denied* (1991). *See also, Robertson v. Knox County*, No. 03A01-9103CH00088 (Tenn. Ct. App. Oct. 31, 1991), 1991 WL. 220603 (under Knox County zoning ordinance, use of land in an agricultural zone for an airstrip was a "use permitted on review," and plans had to be submitted to the planning commission after approval by the county commission before the strip could be built). Thus, although the term is not defined in Tennessee statutes, "use permitted on review" refers to a use of land that is permitted under the applicable zoning ordinance only after the owner obtains a permit.

2. Standards to be Applied

The next question is whether, if a county commission establishes a "use permitted on review" classification in a zoning resolution, it must also establish objective standards within which applications for such uses must be evaluated. We assume your question refers to issuance of permits to engage in a use permitted on review by the body responsible for this function under the county ordinance. Issuance of such a permit is an administrative, rather than a legislative function. *See, e.g., State ex rel. Browning-Ferris Industries v. Board of Commissioners of Knox County, supra* (under state zoning statutes, a county board of commissioners is not authorized to review the decision of an administrative official or body to issue a permit). We assume that, ordinarily, a board of zoning appeals or other administrative body would be charged with evaluating a request for a permit to engage in a use permitted on review. *Hutcherson v. Lauderdale County Board of Zoning Appeals*, 121 S.W.3d 372 (Tenn Ct. App. 2003), *p.t.a. denied* (2003). Generally, a zoning ordinance should be found valid unless it is clearly arbitrary, capricious, or unreasonable, having no substantial relationship to public health, safety, or welfare, or is plainly contrary to governing statutes. *Family Golf of Nashville, Inc. v. Metropolitan Government of Nashville*, 964 S.W.2d 254 (Tenn. Ct. App. 1997), *p.t.a. denied* (1997). To be valid, zoning regulations should provide a definite standard and furnish a uniform rule of action to govern the conduct of administrative officials. 101A C.J.S. *Zoning and Land Planning*, § 29 (2006). An ordinance may be valid even though it confers a certain discretion, provided that discretion is sufficiently limited by rules and standards to protect people

against arbitrary or unreasonable power. *Id.; see generally*, *Bean v. McWherter*, 953 S.W.2d 197 (Tenn. 1997).

3. Imposing Conditions

The next question concerns the authority of an administrative body authorized to evaluate applications for a use permitted on appeal. The request asks whether a county commission may authorize such body to impose conditions on the use that are not specified in the zoning resolution itself. As a general matter, in granting a permit, a zoning authority may, under proper circumstances, impose conditions that are reasonable and within the power conferred by statutes or ordinances. 101A C.J.S. *Zoning & Land Planning,* § 260 (2006). The conditions must be reasonable, and they must be directly related and incidental to the proposed use of the property. *Id.* Whether any particular condition is reasonable and within the board's authority would depend on the scope of the zoning resolution and other specific facts and circumstances. *See, e.g., Hutcherson v. Lauderdale County Board of Zoning Appeals,* 121 S.W.3d 372 (Tenn. Ct. App. 2003), *p.t.a. denied* (2003). In that case, the Court of Appeals found that the Lauderdale County Board of Zoning Appeals was not authorized to impose additional conditions on a permit because the zoning resolution under which it operated did not grant it that discretion. The Court contrasted this resolution with the regulation conferring such discretion on the Wilson County Board of Zoning Appeals in *Wilson County Youth Emergency Shelter v. Wilson County, supra.*

4. Revocation of Permit

The next question is whether a zoning board may revoke a permit for use on appeal once the owner has implemented the use on the land. As a general rule, a building permit has none of the elements of a contract and may be changed or entirely revoked even though based on a valuable consideration, if it becomes necessary to change or revoke it in the exercise of police power. *Schneider v. Lazarov,* 216 Tenn. 1, 390 S.W.2d 197 (Tenn. 1965); *Howe Realty Co. v. City of Nashville,* 176 Tenn. 405, 141 S.W.2d 904 (1940). In both these cases, the Tennessee Supreme Court recognized that a property owner may acquire a vested right in a permit once he or she has expended resources in reliance upon it. This principle does not apply if the permit was issued in violation of a zoning ordinance. *Far Tower Site, LLC v. Knox County,* 126 S.W.3d 52 (Tenn. Ct. App. 2003), *p.t.a. denied* (2004). But courts in Tennessee have not addressed how much work a permit holder must carry out to establish the right. Courts in other states differ on this issue. *See discussion*, 1 Anderson's Am. Law. Zoning § 6.26 (4th ed. 2006).

5. Effect of Invalid Zoning Resolution

The last question is the effect of a failure to provide standards that guide administrative officials charged with issuing permits for a use permitted on review. The request asks whether, in that event, a "use permitted on review" then becomes a use as of right in the area subject to that zoning classification. Only a court of competent jurisdiction could make this determination. There is a presumption in favor of the validity of a zoning ordinance, and those questioning its validity have the burden of proof. *Board of Commissioners of Roane County v. Parker,* 88 S.W.3d 916

(Tenn. Ct. App. 2002), *p.t.a. denied* (2002); 101A C.J.S. *Zoning Land Planning*, § 371 (2006). No reported Tennessee case addresses the effect of its ruling that a zoning resolution is invalid because it fails to provide adequate standards for administrative officials. It is not clear whether a court would, as the request suggests, elide the requirement that an owner obtain a permit, thereby converting a use formerly permitted only on review into a use as of right. The Tennessee Supreme Court has stated:

> The doctrine of elision is not favored. The rule of elision applies if it is made to appear from the face of the statute that the legislature would have enacted it with the objectionable features omitted, and those portions of the statute which are not objectionable will be held valid and enforceable . . . provided, of course, there is left enough of the act for a complete law capable of enforcement and fairly answering the object of its passage. However, a conclusion by the court that the legislature would have enacted the act in question with the objectionable features omitted ought not to be reached unless such conclusion is made fairly clear of doubt from the face of the statute. Otherwise, its decree may be judicial legislation. The inclusion of a severability clause in the statute has been held by this Court to evidence an intent on the part of the legislature to have the valid parts of the statute enforced if some other portion of the statute has been declared unconstitutional.

State v. Harmon, 882 S.W.2d 352, 355 (Tenn. 1994), quoting *Gibson County Special School Dist. v. Palmer*, 691 S.W.2d 544 (Tenn. 1985); *see also American Chariot v. City of Memphis*, 164 S.W.3d 600 (Tenn. Ct. App. 2004), *p.t.a. denied* (2005) (doctrine of elision applied to city ordinance). A Tennessee court's decision to elide a permitting requirement would be governed by these principles and would depend on the terms and history of the particular zoning regulation. In other jurisdictions, where a court invalidates a zoning ordinance, courts impose different results. Generally, where a zoning ordinance is found to be invalid, the land is subject to the zoning regulation in effect before the invalid regulation was enacted. Where the effect of this ruling is to leave the land subject to no zoning at all, however, some courts may remand the matter to a local legislative body with instructions to rezone, or simply wait a reasonable time to give the local legislative body an opportunity to respond to the ruling. *See generally*, 4 Anderson's Am. Law. Zoning § 30:16 (4th ed. 2006). This Office is unable to predict what approach a Tennessee court might take.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Ben West, Jr.
State Representative
Suite 37, Legislative Plaza
Nashville, TN 37243-0160