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Opinion No. 08-69

County Authority to Issue Burning Bans

## QUESTION

Does a county, through its elected officials, have the authority, using its police or other powers, to issue a burning ban or otherwise prohibit open burning?

## OPINION

Of course, the legality of any particular ban would depend on its terms and manner of passage. Since open burning is subject to state environmental regulation, counties may not regulate open burning in the exercise of general police powers under Tenn. Code Ann. § 5-1-118. State law authorizes a county to pass a county resolution adopting air pollution regulations not less stringent than state standards. Tenn. Code Ann. § 68-201-115. But the effectiveness of these regulations is conditioned on receiving a certificate of exemption from the Tennessee Air Pollution Control Board under Tenn. Code Ann. § 68-201-115(b).

Several other statutes, however, independently authorize a county to regulate burning. A county may enact fire regulations as part of its zoning ordinances governing unincorporated parts of the county under Tenn. Code Ann. §§ 13-7-101, *et seq.* In addition, a county-wide fire department created under Tenn. Code Ann. §§ 5-17-101, *et seq.*, may adopt regulations to prevent harmful fires and smoke. These regulations have the force of law once approved by the county commission. A county commission is also authorized to adopt and implement a ban on burning through the county emergency management agency created under Tenn Code Ann. § 58-2-110.

## ANALYSIS

This opinion addresses whether current law authorizes counties to issue a burning ban or otherwise prohibit open burning. Of course, the legality of any particular ban would depend on its terms and manner of passage. A county, as a creature of the legislature, has no power except that expressly given by or necessarily implied from state law. *State ex rel. Witcher v. Bilbrey,* 878 S.W.2d 567, 571 (Tenn. Ct. App. 1994), *p.t.a. denied,* (1994).

State law generally bans burning near forests or grasslands without a permit from the state forester or his or her duly authorized representative. Tenn. Code Ann. § 39-14-306. This statute provides:

> (a) It is unlawful for any person to start an open-air fire between October 15 and May 15, inclusive, within five hundred feet (500') of any forest, grasslands or woodlands without first securing a permit from the state forester or the state forester's duly authorized representative. Depending upon the potential for hazardous burning conditions, the state forester may prescribe a period other than October 15 to May 15 within which a permit must be obtained prior to starting an open-air fire. The provisions of this section shall not apply to fires which may be set within the corporate limits of any incorporated town or city which has passed ordinances controlling the setting of fires.
>
> (b) A violation of this section is a Class C misdemeanor.

Thus, state law regulates open-air fires near forests or grasslands October 15 through May 15 of every year. The state forester may prescribe a period other than this time within which a permit must be obtained before starting an open-air fire.

This statute does not prevent a county from regulating open burning. *See, e.g., Southern Railway v. City of Knoxville,* 442 S.W.2d 619, 622 (Tenn. 1968) ("The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescriptions"). Tenn. Code Ann. § 39-14-306 does not expressly preempt local regulations. Obviously, the county could not waive the requirement of obtaining a permit imposed under Tenn. Code Ann. § 39-14-306. But the county could impose additional requirements governing open burning under other authorizing statutes.

Counties may generally exercise broad police powers granted to cities by a resolution adopted by a two-thirds vote of the county commission. Tenn. Code Ann. § 5-1-118. Under subsection (c) of that statute, counties may exercise the authority granted to cities under Tenn. Code Ann. § 6-2-201(22) and (23) subject to certain limits. These provisions include the power to "exercise general police powers." Tenn. Code Ann. § 6-2-201(22). Powers granted to counties under subsection (c)(1) apply only within the unincorporated areas of the county. But Tenn. Code Ann. § 5-1-118(c) outlines limits within which counties may exercise this authority. It appears that state regulations would prevent a county from exercising authority over open burning. Tenn. Code Ann. § 5-1-118(c)(2). This statute provides:

> 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 that are subject to regulation pursuant to title 57, chapters 5 and 6; title 59, chapter 8; title 60, chapter 1; title *68, chapters 201-221*; or title 69, chapters 3, 7, 10 and 11.

(Emphasis added). Rules promulgated by the Tennessee Air Pollution Control Board regulate open burning. Tenn. Comp. R. & Regs. ch. 1200-3-4-01, *et seq.* These rules are authorized under Tenn. Code Ann. §§ 68-201-101, *et seq.*, among other statutes. Since open burning is subject to regulation under Title 68, Chapter 201, a county may not regulate open burning under police powers exercised

under Tenn. Code Ann. § 5-1-118. State law authorizes a county to enact air pollution regulations not less stringent than state standards. Tenn. Code Ann. § 68-201-115. But the effectiveness of these regulations is conditioned on receiving a certificate of exemption from the Tennessee Air Pollution Control Board under Tenn. Code Ann. § 68-201-115(b).

Several other statutes, however, independently authorize counties to adopt fire regulations. First, counties are authorized to adopt zoning regulations covering unincorporated parts of the county under Tenn. Code Ann. §§ 13-7-101, *et seq.* Zoning regulations govern land use and are designed and enacted among other purposes, for the purpose of securing safety from fire and other dangers. Tenn. Code Ann. § 13-7-103. Thus, a county may enact fire regulations as part of its zoning ordinances adopted under this statute.

In addition, Tenn. Code Ann. §§ 5-17-101, *et seq.*, authorize a county commission to form a county-wide fire department. A county-wide fire department is authorized to "[m]ake regulations, *in order to prevent harmful fires and smoke*, that shall have the force of law when approved by the county legislative body or other governing body." Tenn. Code Ann. § 5-17-102(a)(10) (emphasis added). Thus, a county-wide fire department created under Tenn. Code Ann. §§ 5-17-101, *et seq.*, may adopt regulations to prevent harmful fires and smoke. These regulations have the force of law once approved by the county commission.

Finally, a county commission may also adopt and provide for the implementation of a ban on burning under Tenn. Code Ann. §§ 58-2-101, *et seq.* Tenn. Code Ann. § 58-2-110 provides that, "[s]afeguarding the life and property of its citizens is an innate responsibility of the governing body of each political subdivision of the state." Under subsection (1) of this statute, a county must establish an emergency management agency to develop a county emergency management plan and program. Each county emergency management agency must perform emergency management functions within the territorial limits of the county within which it is organized. Tenn. Code Ann. § 58-2-110(1)(C). As used in this statutory scheme, the term "emergency" means "an occurrence, *or threat thereof*, whether natural, technological, or manmade, in war or in peace, that results or may result in substantial injury or harm to the population, or substantial damage to or loss of property." Tenn. Code Ann. § 58-2-101(6) (emphasis added). The term "emergency management" includes preparation for and mitigation of emergencies and disasters. Tenn. Code Ann. § 58-2-101(7). As used in the statute, therefore, the term "emergency management" would include measures to reduce the threat of fire.

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