

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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June 11, 2009

Opinion No. 09-115

Procedure for Local Approval of Landfills Under Tenn. Code Ann. § 68-211-703

QUESTIONS

1. Did the Cumberland County Commission's simultaneous publication of notice of a proposed landfill along with separate notice of a public hearing on the same proposal comply with the public notice provisions in Tenn. Code Ann. § 68-211-703, and, particularly, with certain of the substantive provisions in subsection 703(g)?
2. What minimum information must a local governing body consider under the Local Approval Law before approving or disapproving "plans" for a new solid waste disposal or solid waste processing facility within its boundaries?
3. May a local governing body initiate the local approval process and issue the first public notice allowed under Tenn. Code Ann. § 68-211-703 for a new solid waste landfill in the absence of actual written plans for such a facility?
4. May a local governing body initiate the local approval process and then approve a new landfill under the provisions of Tenn. Code Ann. §§ 68-211-701 through 68-211-707 without reviewing a draft permit for the facility?

OPINIONS

1. Yes. The publication provisions set out in Tenn. Code Ann. § 68-211-703 neither expressly nor implicitly prohibit the simultaneous publication of both the notice of a proposed landfill and the notice of a public hearing on the proposal, as long as the timing requirements in Tenn. Code Ann. §§ 68-211-703(d) and (f) are met. The substantive provision in Tenn. Code Ann. § 68-211-703(g)(7) does not apply in instances where the local governing body has set the public hearing on its own initiative.
2. The only information required to be included in the submission of "plans" under the Local Approval Law is that which will enable the local governing body to assess the eight land use criteria outlined in Tenn. Code Ann. § 68-211-704(b). It is not necessary for local governing bodies to review, from a technical or engineering standpoint, the construction plans for a new

landfill facility or the draft permit before reaching a determination under Tenn. Code Ann. § 68-211-704(a).

3. At a minimum, the local governing body would need such information as would enable it to include in the notice of proposed landfill all of the information set out in Tenn. Code Ann. § 68-211-703(b).

4. Yes. The response to this question is contained in response to question 2.

ANALYSIS

1. The Tennessee Solid Waste Disposal Act, Tenn. Code Ann. §§ 68-211-101 to 68-211-124, authorizes the Tennessee Department of Environment and Conservation (TDEC) to supervise and control all aspects of solid waste disposal, including the issuance of permits to construct and operate solid waste landfills. But in 1989, the General Assembly amended the solid waste statutes to grant local governing bodies the power to approve or disapprove the construction of any “new” solid waste facility either within their respective jurisdictions or in close proximity thereto. 1989 Tenn. Pub. Acts, ch. 515, codified at Tenn. Code Ann. §§ 68-211-701 to 68-211-707 (“Part 7” or “Local Approval Law”).

According to the request, the Cumberland County Commission, which received an application for a proposed landfill using coal combustion products, or fly ash, from the TVA Kingston fossil plant for the purpose of reclamation of a surface coal mining operation in that county, simultaneously published notice of the proposed landfill, along with a separate notice of a public hearing on the proposal, on May 15, 2009. These notices reflected that the public hearing would be held on June 2, 2009, before and at which time comments would be accepted from the public, and the county commission would then review and vote on the entire proposal at its meeting on June 15, 2009. This request inquires whether the county commission followed the proper procedure under the Local Approval Law in the publication of these notices.

First, this Office can find no legal defect in the county’s simultaneous publication of both the notice of the proposed landfill and the notice of a public hearing on the proposal. The publication provisions set out in Tenn. Code Ann. § 68-211-703 neither expressly nor implicitly prohibit this. In fact, the very detailed procedures of this statute specifically address only three timing matters: (1) interested persons have thirty days “or such greater period as is allowed” from the date of the public notice of the proposal within which to submit written comments on it. Tenn. Code Ann. § 68-211-703(d); (2) requests for a public hearing must be filed within the period allowed for public comment. Tenn. Code Ann. § 68-211-703(e); and (3) notice of a public hearing shall be circulated “[n]o less than fifteen (15) days in advance of the hearing.” Tenn. Code Ann. § 68-211-703(f).

The language in the notice of public hearing reflects that the county commission decided on its own initiative to schedule a public hearing on the landfill proposal without waiting for requests from interested persons “in anticipation of significant interest in the project and to allow the public as much input as possible.” There is nothing in the Local Approval Law to preclude

this. The notice of public hearing was published on May 15, 2009, more than fifteen days before the hearing date set for June 2, 2009, so it would appear the county complied with the timing provision in Tenn. Code Ann. § 68-211-703(f). Moreover, since the public notices reflect that the local governing body would be accepting public comments up through June 15, 2009, the date on which the county commission would be voting on whether to approve or deny the proposed landfill, the county also appears to have complied with the minimum thirty day period for the submission of written comments in Tenn. Code Ann. § 68-211-703(d).

You have also inquired whether the notice of public hearing published by the Cumberland County Commission complied with the substantive provisions in Tenn. Code Ann. § 68-211-703(g)(7), which provides as follows: “Each notice of a public hearing shall include at least the following contents: . . . (7) A concise statement of the issues raised by the persons requesting the hearing.” It is the opinion of this Office that this provision is only applicable in instances where the public hearing has been requested by the “interested persons” contemplated in Tenn. Code Ann. § 68-211-703(e). But this latter subsection merely provides that such persons “may” request that the local governing body hold a public hearing. It does not foreclose the possibility that the local government may spontaneously decide to schedule such a hearing. As stated above, the county commission decided on its own initiative to hold a public hearing and published timely notice of it. That notice of public hearing appears to contain all of the additional information required under Tenn. Code Ann. § 68-211-703(g).

2. The Local Approval Law requires that parties seeking to construct a new solid waste landfill submit “plans” for such a facility to the local governing body, if that locality has opted into the law. Tenn. Code Ann. §§ 68-211-701 and 68-211-707. While the statutes contained in Part 7 do not specify what information these plans must contain, Tenn. Code Ann. § 68-211-704(b) establishes the following very specific criteria that local governing bodies must consider before deciding to approve or disapprove the proposed new construction:

- (b) The following criteria shall be considered in evaluating such construction:
 - (1) The type of waste to be disposed of at the landfill;
 - (2) The method of disposal to be used at the landfill;
 - (3) The projected impact on surrounding areas from noise and odor created by the proposed landfill;
 - (4) The projected impact on property values on surrounding areas created by the proposed landfill;
 - (5) The adequacy of existing roads and bridges to carry the increased traffic projected to result from the proposed landfill;
 - (6) The economic impact on the county, city or both;
 - (7) The compatibility with existing development or zoning plans; and

- (8) Any other factor which may affect the public health, safety or welfare.

This Office has previously opined that the purpose of the Local Approval Law is “to provide ‘local governments that did not have zoning ordinances’ the authority to review and approve, from a land use perspective, proposals for landfills and other solid waste facilities that were submitted to the Department.” Op. Tenn. Att’y Gen. 98-136 (Aug. 6, 1998) (quoting *Profill Development, Inc. v. Dills*, 960 S.W.2d 17, 20 (Tenn. Ct. App. 1997)). The criteria set out in Tenn. Code Ann. § 68-211-704(b) reinforce this conclusion. But the decision to construct a solid waste disposal landfill is not a purely, or even primarily, local affair. The Local Approval Law is comprised not only of the provisions in Part 7, but also includes Tenn. Code Ann. § 68-211-105(h). See 1989 Pub. Acts, ch. 515, § 1. The latter statute provides:

The Commissioner shall not review or approve any construction for any new landfill for solid waste disposal or for solid waste processing in any county or municipality which has adopted the provisions of §§ 68-211-701 – 68-211-704 and § 68-211-707 until such construction has been approved in accordance with the provisions of such sections.

Local governing bodies are not authorized to license or permit these new landfill facilities. That authority falls squarely to TDEC, as set out in the Solid Waste Disposal Act at Tenn. Code Ann. §§ 68-211-105 and 68-211-106. Thus, the “draft permit” and “fact sheet” referenced in Tenn. Code Ann. § 68-211-703(g)(8) are documents that will be prepared by TDEC once the local governing body approves the proposed construction and the Department also approves the application. The public policy provisions set out in Tenn. Code Ann. § 68-211-102 emphasize that the purpose of the solid waste statutes is “to provide a coordinated statewide solid waste disposal program.”

For these reasons, it is not necessary for local governing bodies to review, from a technical or engineering standpoint, the construction plans for a new landfill facility or a draft permit. The only information required to be included in the submission of “plans” under the Local Approval Law is that which will enable the local governing body to assess the eight land use criteria outlined in Tenn. Code Ann. § 68-211-704(b).

3. Much of the same reasoning cited above in response to question 2 would apply with respect to issuance of the initial public notice under Tenn. Code Ann. § 68-211-703. While it would not be necessary for the local governing body to have possession of formal construction plans in order to initiate the local approval process and issue the first public notice, at a minimum, the local governing body would need such information as would enable it to include in the notice of proposed landfill all of the information set out in Tenn. Code Ann. § 68-211-703(b).

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