STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

October 3, 2017

Opinion No. 17-44

Validity of Residential Building Design Ordinances and Regulations

Question

Does Tennessee law authorize counties and municipalities to enact ordinances and regulations that require the observation of appearance-based residential building design standards for the construction of single family dwellings?

Opinion

Assuming the local ordinance or regulation does not violate any state statute or positive constitutional guaranty, such an ordinance or regulation is valid unless the design standard is clearly arbitrary, capricious, or unreasonable, having no substantial relation to the public health, safety, or welfare.

ANALYSIS

Tennessee counties and municipalities lack the inherent authority to control the use of private property within their boundaries. Shore v. Maple Lane Farms, LLC, 411 S.W.3d 405, 425 (Tenn. 2013); Lafferty v. City of Winchester, 46 S.W.3d 752, 757 (Tenn. Ct. App. 2000). Their power derives from the State through specific delegation by the General Assembly. Shore, 411 S.W.3d at 426; Smith Cnty. Reg'l Planning Comm'n v. Hiwassee Village Mobile Home Park, LLC, 304 S.W.3d 302, 309 (Tenn. 2010). Thus, local governments must exercise their delegated powers in a manner that is consistent with the delegation statutes from which they derive their power. 421 Corp. v. Metropolitan Gov't of Nashville and Davidson Cnty., 36 S.W.3d 469, 475 (Tenn. Ct. App. 2000); Family Golf of Nashville, Inc. v. Metropolitan Gov't of Nashville and Davidson Cnty., 964 S.W.2d 254, 257 (Tenn. Ct. App. 1997). Accordingly, the validity of a local ordinance that requires the observation of appearance-based residential design standards for the construction of single family dwellings must be measured against the statutes that authorize local governments to regulate land use. See KLN Assocs. v. Metro Dev. & Hous. Agency, 797 S.W.2d 898, 902 (Tenn. Ct. App. 1990).

Since 1935, counties and municipalities have been statutorily authorized to zone property. Id. In general terms, zoning involves the territorial division of land into districts according to the character of the land and buildings, their suitability for particular purposes, and the uniformity of these uses. Lafferty, 46 S.W.3d at 758; Family Golf, 964 S.W.2d at 258. Zoning regulations focus primarily on property use and the architectural and structural designs of buildings. Id.

Specifically, counties and municipalities are empowered to regulate the location, height and size of buildings and other structures, the percentage of a lot that may be occupied, the density of population, and the sizes of yards, courts, and other open spaces. Tenn. Code Ann. §§ 13-7-101(a)(1), -201(a)(1). They are also authorized to regulate the uses of buildings and structures for trade, industry, residence, recreation or other purposes. *Id*. Further, counties and municipalities are authorized to regulate "the erection, construction, reconstruction, alteration and uses of buildings and structures and the uses of land." Tenn. Code Ann. §§ 13-7-102, -202.

The Tennessee Supreme Court has observed that the grants of power in these statutes are broad. *Shore*, 411 S.W.3d at 426; *Fallin v. Knox Cnty. Bd. Of Comm'rs*, 656 S.W.2d 338, 342 (Tenn. 1983). But the grants are not without limit. *421 Corp*., 36 S.W.3d at 475. *See Shore*, 411 S.W.3d at 426. Counties and municipalities must exercise their power "in accordance with the conditions . . . specified in this part . . . ." Tenn. Code Ann. §§ 13-7-101(a)(1), -201(a)(1). One of the conditions is that local regulation must be "for the purpose of promoting the public health, safety, morals, convenience, order, prosperity and general welfare." Tenn. Code Ann. § 13-7-201(a)(1); Tenn. Code Ann. § 13-7-103 (same).

Local legislative bodies have broad discretion when they exercise their delegated police powers to adopt or amend zoning ordinances. *Fallin*, 656 S.W.2d at 342; *Family Golf*, 964 S.W.2d at 260. The scope of judicial review of such action is quite restricted:

> Zoning is a legislative matter, and, as a general proposition, the exercise of the zoning power should not be subjected to judicial interference unless clearly necessary. In enacting or amending zoning legislation, the local authorities are vested with broad discretion and, in cases where the validity of a zoning ordinance is fairly debatable, the court cannot substitute its judgment for that of the legislative authority. If there is a rational or justifiable basis for the enactment and it does not violate any state statute or positive constitutional guaranty, the wisdom of the zoning regulation is a matter exclusively for legislative determination.
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> [T]he courts should not interfere with the exercise of the zoning power and hold a zoning enactment invalid, unless the enactment, in whole or in relation to any particular property, is shown to be clearly arbitrary, capricious, or unreasonable, having no substantial relation to the public health, safety, or welfare.

Fallin, 656 S.W.2d at 342-343; *Family Golf*, 964 S.W.2d at 260.

The request for this Opinion conveys that certain local governments have enacted ordinances and regulations requiring the observation of appearance-based residential building design standards for the construction of single family dwellings. Examples of what these local governments regulate are: exterior paint colors, cladding material, styles and materials of roofs and porches, exterior non-structural architectural ornamentation features, styles and location of windows and doors, the number and types of rooms and interior layout of rooms, the number of garage doors that must be used, and materials that may be used on the front façade of homes.

These appearance-based design standards are in essence aesthetic ones. In the past, Tennessee adhered to the then-prevailing view that aesthetic considerations alone were insufficient to support the invocation of police power in zoning cases. *See City of Norris v. Bradford*, 204 Tenn. 319, 323-326, 321 S.W.2d 543, 545-546 (Tenn. 1958) (citations omitted) (finding invalid an ordinance that prohibited homeowners from placing fences in their front yards).

But the Tennessee Supreme Court has since retreated from this view. *See State v. Smith*, 618 S.W.2d 474, 477 (Tenn. 1981). In *Smith*, an owner of a junkyard challenged a statute that prohibited the operation of a junkyard facility within 1000 feet of a state thoroughfare on the grounds that the statute was based solely on aesthetic considerations. *Id*. at 475-476. While the Court disagreed that the statute promoted aesthetic goals only, the Court noted that other state courts had determined that regulation based solely upon aesthetic considerations was a valid exercise of police power. *Id*. at 476-77. Additionally, the Court observed that the United States Supreme Court had stated that land use restrictions may be enacted "to enhance the quality of life by preserving the character and desirable aesthetic features of a city" and the legislature may determine that "the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id*. at 477 (quoting *Penn. Central Transport Co. v. New York City*, 438 U.S. 104, 129 (1978) and *Berman v. Parker*, 348 U.S. 26, 33 (1954)). Accordingly, the Court stated that its prior opinion of *City of Norris v. Bradford* no longer represented the prevailing view. *Id*.

Although the *Smith* Court did not have to determine that aesthetics alone is a valid exercise of police powers in order to reach its holding, the Court concluded:

> We therefore are of the opinion that in modern society aesthetic considerations may well constitute a legitimate basis for the exercise of police power, *depending on the facts and circumstances*.

Id. (emphasis added).

Presently, many jurisdictions adhere to the view espoused in *Smith*, and they have upheld aesthetic regulations that are reasonable under the circumstances. *See* 2 *Rathkopf's The Law of Zoning and Planning* §§ 16:5, 16:6 (4th ed. 2017). For example, courts have sustained aesthetic regulations that bear substantially on the economic, social, and cultural patterns of a community or district. *See id*. at § 16:7. This rationale is consistent with long-standing Tennessee case law that an ordinance or regulation is valid unless it is "clearly arbitrary, capricious, or unreasonable, having no substantial relation to the public health, safety, or welfare." *See Fallin*, 656 S.W.2d at 343; *Family Golf*, 964 S.W.2d at 260.

In sum, an ordinance or regulation imposing a design standard is valid unless it violates any state statute or positive constitutional guaranty[1] or unless it is "clearly arbitrary, capricious, or

[1] For instance, an ordinance or regulation would be invalid if it conflicts with Tennessee's Building Code, Tenn. Code Ann. §§ 68-120-101 to -509, or if it goes so far as to deprive an owner of the beneficial use of his property that it becomes confiscatory and constitutes a taking of property without due process of law. *See Far Tower Sites, LLC v. Knox Cnty.*, 126 S.W.3d 52, 69 (Tenn. Ct. App. 2003).

unreasonable, having no substantial relation to the public health, safety, or welfare." Accordingly, whether any given ordinance or regulation requiring the observation of appearance-based residential building design standards for the construction of single family dwellings is valid is a fact-intensive inquiry, the answer to which will depend on the particular facts and circumstances related to the particular community.[2] A given design standard may be reasonable in one community, but not in another.

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[2] Since the validity of any given ordinance can only be evaluated in light of the specific facts and circumstances related to the particular community, this Office is not able to and does not opine on the validity of any such local ordinance or regulation.