

Where Town and Country Collide

Should Counties Have Veto Power over Cities' Efforts to Control Land Use Within Their Urban Growth Boundaries?

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Should a county legislative body in a county without zoning have the right to approve or reject a municipality's efforts to extend its planning, regulations and zoning into the territory between its corporate boundary and the urban growth boundary? The General Assembly has requested guidance from the Tennessee Advisory Commission on Intergovernmental Relations (TACIR) on this issue. The following report is the Commission's response.

The Law Today

Most municipalities and many counties in Tennessee have planning commissions and enforce land-use regulations. Some municipalities have planning jurisdiction outside their corporate boundaries, and some have zoning jurisdiction in these "extraterritorial" planning regions. State law grants direct authority to municipalities to establish planning commissions.¹ All other planning commissions are "regional" planning commissions established by the state through the Local Government Planning Advisory Committee (LGPAC) of the Tennessee Department of Economic and Community Development (TDECD).² Neither cities nor counties can adopt subdivision regulations³ or zoning ordinances⁴ without first having a planning commission in place.

Municipal planning commissions may be designated "regional" by LGPAC and given authority to plan and regulate land use beyond their corporate boundaries within the urban growth boundaries established under Tennessee's Growth Policy Act. LGPAC's long-established practice has been to approve these municipal regional planning commissions only in counties that have not adopted zoning ordinances or where counties agree to relinquish their planning authority. If a county objects to the designation, LGPAC will hear evidence from both sides to determine which entity can best manage the region. Tennessee's Growth Policy Act,⁵ adopted in 1998, added a new wrinkle in counties without zoning provisions:

Notwithstanding the extraterritorial planning jurisdiction authorized for municipal planning commissions designated as regional planning

¹ Tennessee Code Annotated, Title 13, Chapter 4.

² Tennessee Code Annotated, Title 13, Chapter 3.

³ Tennessee Code Annotated Title 13, Chapter 3, Part 4 (counties) and Chapter 4, Part 3 (municipalities).

⁴ Tennessee Code Annotated § 13-7-102 (counties) and § 13-7-202 (municipalities).

⁵ Public Chapter 1101, Acts of 1998.

*commissions in Title 13, Chapter 3, nothing in this chapter shall be construed to authorize municipal planning commission jurisdiction beyond an urban growth boundary; provided, that in a county without county zoning, a municipality may provide extraterritorial zoning and subdivision regulation beyond its corporate limits with the approval of the county legislative body.*⁶ (Emphasis added.)

This statute effectively puts counties without zoning in a position to block attempts by municipalities there to exercise planning and zoning authority outside their corporate boundaries, even within the urban growth boundaries established under the Growth Policy Act. Cities in counties without zoning can still acquire extraterritorial planning regions from TDECD, but they can no longer implement their plans through regulation and zoning without county consent.

Effect of the Bill

The bill referred to TACIR by the General Assembly is simple:⁷

Tennessee Code Annotated, Section 6-58-106(d), is amended by deleting the following language:

; provided, that in a county without county zoning, a municipality may provide extraterritorial zoning and subdivision regulation beyond its corporate limits with the approval of the county legislative body

The bill deletes the provision permitting municipalities to provide zoning and subdivision regulation beyond their corporate limits in counties without zoning only with the approval of county legislative body.

The Conflict

Extraterritorial planning and zoning often generates controversy, and municipalities and counties do not always agree on who should exercise what authority where. Zoning is especially controversial because it limits what landowners can do with their property and affects its resale value. Many counties and even some cities do not have zoning ordinances for this reason. Where they do not, land-use decisions are effectively made one parcel at a time, by private individuals, with only as much regard to what's next door as may affect the owner of the property whose use is changing.

⁶ Tennessee Code Annotated § 6-58-106(d).

⁷ House Bill 0125 by Sargent, Senate Bill 0347 by Haynes.

Cities' efforts to plan and zone tend to be most controversial in their extraterritorial regions because the people residing there are not represented by the elected officials who adopt the regulations. The General Assembly attempted to at least partially resolve this problem with Public Chapter 253, Acts of 2007, which provided these residents representation on the cities' regional planning commissions: If a municipal-regional planning commission has five members, at least one must reside within the planning area outside of the municipal boundaries; if the commission has six to 10 members, then two must reside in the area. Two years later, Public Chapter 600, Acts of 2009, limited the provision allowing for two representatives for the extraterritorial area to situations in which the area outside the city limits is at least half of the entire planning region. If the area is less than half of the entire planning region, then only one commission member must reside in the extraterritorial area regardless of the number of members on the commission.⁸ This representation has done little to defuse opposition to extraterritorial authority.

Municipalities argue that development in the area adjoining but outside of their corporate limits has a material effect on the area inside the city and that, eventually, the area may be annexed into the city. Municipalities want to ensure that development within their urban growth boundaries is comparable to development in the municipality as a whole. Counties argue that their legislative bodies represent the people who reside outside the municipalities and that those residents must have a vote in the process.

Potential Solutions

Cities and counties with cooperative relationships may negotiate and agree on the appropriate planning region for each and on the areas in which each legislative body will handle zoning. This happens most often in the more densely populated counties that have more experience with growth and development. Conflicts over extraterritorial planning and zoning arise more often where counties and municipalities do not have cooperative relationships or where they have less experience with planning and less growth and development. There may be no clear solution for these situations. As it stands now, if a municipality wants to extend its planning authority to its growth boundary, the county must agree with the request or it doesn't occur.

A case can be made for cooperation when there are new developments within the urban growth boundary but the county does not want to pursue planning and land use regulation on its own. A county with a regional planning commission and subdivision regulations can relinquish that authority for the area within a city's urban growth boundary, allowing the municipality to exercise planning, subdivision regulation and zoning authority there if the county does not have zoning. If the county has zoned the

⁸ Tennessee Code Annotated § 13-3-102. (Ten is the maximum number of members allowed on municipal planning commissions per Tennessee Code Annotated § 13-4-101.)

area, then a municipality cannot adopt extraterritorial zoning, but the county could allow the municipality to have a planning region and adopt subdivision regulations to ensure installation of needed infrastructure. If the county is concerned that the city's growth boundary provides too large an area for a grant of extraterritorial authority, then TDECD could grant the city a smaller planning region or the city and the county could reopen the growth plan and reduce the size of the urban growth boundary.

Two routes to cooperation exist in current law: through the Joint Economic and Community Development Boards (JECDB) required by Tennessee's Growth Policy Act or by creation of a jointly governed regional planning commission. TDECD has authority in Title 13, Chapter 3, Part 1, to create jointly governed regional planning commissions and has done so for the following areas:

- Pickett County and Byrdstown
- Hamilton County and the cities of Chattanooga, East Ridge, Lakesite, Lookout Mountain, Ridgeside, and Walden
- Montgomery County and Clarksville
- Knox County and Knoxville

Membership on these commissions requires LGPAC approval. In addition to these four, Shelby County and Memphis have a combined planning commission by private act, and the three counties with metropolitan governments—Davidson, Moore, and Trousdale—have combined planning commissions.⁹

Except for these three metropolitan counties, all counties must have JECDBs comprised of county and municipal officials and representatives of business and industry. The purpose of the board is to “foster communication relative to economic and community development between and among governmental entities.” The legislature stated clearly its intent

*that local governments engage in long-term planning and that such planning be accomplished through regular communication and cooperation among local governments, the agencies attached to them, and the agencies that serve them.*¹⁰

An actively functioning JECDB can foster positive working relationships to ensure that county interests and municipal needs are met.

A possible legislative compromise might be to amend the bill referred to TACIR to remove only the phrase “*and subdivision regulation*” from Tennessee Code Annotated,

⁹ Department of Economic and Community Development, Local Planning Assistance Office. April 2011. *Status of Planning and Land Use Controls*.

¹⁰ Tennessee Code Annotated § 6-58-114.

§ 6-58-106(d). With this change, a county without zoning could still block a city's effort to zone in the area outside its corporate limits but not the city's effort to plan and regulate subdivisions there.

Why Is Extraterritorial Planning and Zoning Authority Needed?

So, why does a municipality have an interest in the adjoining territory surrounding but outside of its corporate limits? An answer lies in the close relationship of that territory to the municipality and the effect of development in that area when it is annexed into the municipality. Fringe area growth has major implications for the future of a city. The enforcement of subdivision regulations within the region can ensure that new development adjacent to the municipality is compatible and consistent with developments inside the corporate boundary and reduce the cost of providing services to newly annexed areas, and zoning can ensure basic compatibility between differing and competing land uses.

The Tennessee Municipal League believes that current law should be expanded to grant any municipality the authority to adopt zoning and subdivision regulations within its urban growth boundary. Their rationale is as follows:

- Pursuant to procedures and processes established in law, a city's urban growth boundary is established within a countywide growth plan and only after review by the public and with the consent of the governing bodies of the county.
- The urban growth boundary essentially denotes the future footprint of the city and, therefore, the city ought to be able to establish a land use policy for an area that all parties have agreed will be included in its corporate boundaries at some point in the future.
- Similarly, any subdivision established within an urban growth boundary will be within corporate limits at some future date and, as such, the city will be responsible for the provision of municipal services to the subdivision and its residents.
- Subdivisions developed according to standards and requirements that differ from those implemented in the incorporated areas often require substantial upgrades and improvements, once they're annexed, to ensure property owners receive the same level of services and protection afforded other city residents.¹¹

The Greater Nashville Regional Council argues that extraterritorial zoning and subdivision regulations and the preparation of a comprehensive plan are necessary for a municipality to manage and control urban expansion as directed by Tennessee

¹¹ Comments of Margaret Mahery, Executive Director, Tennessee Municipal League, October 2011.

Growth Policy Act. Further, the Council questions why, in the 47 counties that have no zoning, the county should be allowed to prohibit land use control in areas inside the urban growth boundaries approved for the future growth of the municipality.¹²

The Growth Policy Act specifies that the urban growth boundaries of a municipality shall

*reflect the **municipality's duty to facilitate full development of resources within the current boundaries of the municipality and to manage and control urban expansion** outside of such current boundaries, taking into account the impact to agricultural lands, forests, recreational areas and wildlife management areas.*¹³ (Emphasis added.)

The legislature appears to have intended for municipalities to have some control over the development within their urban growth boundaries; however, as noted previously, the statute as written limits their ability to do so in counties without county zoning.¹⁴ The same argument is made for municipalities in counties that have zoning since without the ability to adopt regulations, a municipality cannot meet the duty spelled out in the act. Further, the Act provides that, before formally proposing urban growth boundaries,

*the **municipality shall also determine** and report the current costs and **the projected costs** of core infrastructure, urban services and public facilities necessary to facilitate full development of resources within the current boundaries of the municipality and **to expand such infrastructure, services and facilities throughout the territory under consideration for inclusion within the urban growth boundaries.***¹⁵ (Emphasis added.)

Again, the legislature appears to have assumed that the municipality will be the entity that ultimately provides infrastructure and urban services in the area between its current boundaries and its urban growth boundary.

Why Do Counties Oppose Extraterritorial Authority?

One reason that concerns county officials who wish to control the expansion of cities' planning and zoning in areas outside their corporate boundaries is the history of challenges to the extraterritorial authority of municipalities. Residents in areas outside the corporate boundaries of municipalities have challenged this exercise of governmental power without representation, mostly without success. Nearly all such challenges have failed. Most states that allow extraterritorial authority afford no

¹² Comments of Sam Edwards, Executive Director, Greater Nashville Regional Council, August 2011.

¹³ Tennessee Code Annotated § 6-58-106(a)(1)(E).

¹⁴ Tennessee Code Annotated § 6-58-106(d)

¹⁵ Tennessee Code Annotated § 6-58-106(a)(2).

representation to the residents of the unincorporated area.¹⁶ Tennessee is the exception, as noted above, having given some representation to those residents on municipal planning commissions that have extraterritorial authority.

Other reasons for opposing extraterritorial authority include

- the inability of the residents of the region to vote for or influence the elected officials who regulate land use in those areas;
- the preference of some residents to live outside a municipality and without its services;
- the potential reduction of county revenues when development fees go into municipal coffers; and
- a concern that the urban growth boundary provides more land than necessary for projected population growth and development.

The Tennessee County Commissioners Association and the Tennessee County Services Association believe that a county commission should have a vote in the process on behalf of the residents living in unincorporated areas that would be affected by the extraterritorial zoning and have gone on record as opposing the bill. Further, the organizations fear that a municipality could use zoning to prohibit development of commercial businesses within the region, pushing them instead into the municipality and thereby depriving the county of the revenue from such development.¹⁷

Current Status of Regional Planning and Extraterritorial Zoning

Currently, there are 283 active municipal planning commissions in Tennessee. Of those, 100 are designated regional by LGPAC, and of those, 17 have adopted extraterritorial zoning. There are 78 counties that have active planning commissions, including the three counties with a metropolitan form of government; 48 of those counties have adopted zoning, and 70 have adopted subdivision regulations.¹⁸

It should be noted that many counties and municipalities do cooperate in land-use planning. There are counties with their own planning programs and zoning ordinances that have municipal-regional planning commissions within them. An informal sampling of counties revealed the following counties with zoning and municipalities with regional subdivision regulations within their respective regional planning areas:

¹⁶ David E. Hunt. 1977. *The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities*. The University of Chicago Law Review, Vol. 45 No.1.

¹⁷ Comments of David Conner, Executive Director, Tennessee County Commissioners Association. October 2011.

¹⁸ Department of Economic and Community Development, Local Planning Assistance Office. April, 2011. *Status of Planning and Land Use Controls*.

- Blount County–Alcoa, Maryville
- Franklin County–Estill Springs, Decherd, Winchester
- Lincoln County–Fayetteville
- Maury County–Columbia, Mount Pleasant
- Robertson County–Springfield, White House
- Sevier County–Gatlinburg, Pigeon Forge, Sevierville
- Sullivan County–Bristol, Kingsport
- Sumner County–Gallatin, Hendersonville, Portland, White House
- Washington County–Johnson City¹⁹

This is not an exhaustive list of counties that zone and have cities with subdivision regulations in the area zoned by the county. The municipalities that have adopted extraterritorial zoning are listed in the following table.

Municipalities with Extraterritorial Zoning, April 2011

Municipality	County
Atoka	Tipton
Brighton	Tipton
Brownsville	Haywood
Covington	Tipton
Gallatin	Sumner
Henderson	Chester
Hendersonville	Sumner
Jackson	Madison
Memphis*	Shelby
Munford	Tipton
Newbern	Dyer
New Johnsonville	Humphreys
Portland	Sumner
Samburg	Obion
Tiptonville	Lake
Waverly	Humphreys

* Zoning is by private act.

Source: *Status of Planning and Land Use Controls*, Local Planning Assistance Office, Department of Economic and Community Development.

¹⁹ Ibid.

The Regional Planning and Extraterritorial Zoning Process

Regional planning can begin only when a regional planning commission and an accompanying planning region are established by TDECD.²⁰ This charge is carried out by LGPAC. The current policy of LGPAC is to approve new municipal-regional designations in counties without zoning only if a resolution by the county commission both relinquished the territory and approved subdivision regulation authority for the new municipal region in accord with the law. The committee is neutral on the proposed bill.²¹

While cities have independent authority to plan and regulate the subdivision of land within their corporate boundaries,²² counties must seek authority from the state. Likewise, cities interested in planning and adopting subdivision regulations beyond their boundaries must have a planning region approved by the state. Typically, a planning region is a single county in its entirety except for the area within municipalities' boundaries. However, it can be two or more contiguous counties or parts of one or more counties.²³ TDECD has the authority to create and establish a regional planning commission for the region.²⁴ A planning region may also be composed of a single municipality and territory adjoining but outside of the municipality. In this case, TDECD can and typically does designate an existing municipal planning commission the regional planning commission for this extraterritorial area. The planning region cannot extend beyond the municipality's urban growth boundary or more than five miles if the city does not have an urban growth boundary.²⁵

All regional planning commissions are charged with the duty to promote cooperation and coordinated planning²⁶ and to make and adopt a general regional plan for the physical development of the territory of the region.²⁷ Once a regional planning commission has adopted a plan that includes a major road plan, land cannot be subdivided within the region without the commission's approval.²⁸ To exercise its authority to approve a subdivision, the commission must adopt regulations for that purpose.²⁹

²⁰ Tennessee Code Annotated § 13-3-101(a).

²¹ Interview with Dan Hawk, former director of the Local Planning Assistance Office, currently Director of Rural Development, Tennessee Department of Economic and Community Development. September 2011.

²² Tennessee Code Annotated Title 13, Chapter 4.

²³ Tennessee Code Annotated § 13-3-101(a).

²⁴ Tennessee Code Annotated § 13-3-101(b).

²⁵ Tennessee Code Annotated § 13-3-102.

²⁶ Tennessee Code Annotated § 13-3-104.

²⁷ Tennessee Code Annotated § 13-3-301.

²⁸ Tennessee Code Annotated § 13-3-402.

²⁹ Tennessee Code Annotated § 13-3-403.

Zoning is a separate matter under the law and can be done only by a city or county's legislative body and only on the recommendation of the planning commission for the area to be zoned.³⁰ In order for a municipality to adopt extraterritorial zoning, its planning commission must first be designated regional and given a defined planning region by TDECD. The city can do this only where a county has no zoning in force.³¹ The city must notify the county mayor of its intent to zone the territory six months before adopting the zoning ordinance and hold a public hearing.³² The city must also create a three- to five-member board of zoning appeals with a majority of its members residing in the area subject to the regional zoning provisions.³³

If a county later adopts a zoning ordinance for the same area and provides for the administration and enforcement of the ordinance, then the city's zoning is automatically repealed.³⁴ However, the county must first either go through the process described above to gain its own planning region and commission for the area or persuade the city's regional planning commission to send a zoning recommendation to the county legislative body. TACIR staff could find no instance in which a municipal-regional planning commission's region was taken over by a county, but something like the latter occurred in Blount County in 2000. The city of Maryville prepared a land use plan for its extraterritorial planning region and adopted a zoning ordinance for the area in 1995. Five years later, Blount County adopted a county zoning resolution that included Maryville's extraterritorial planning region. The county regional planning commission's recommendations were sent to the city's regional planning commission, the one responsible for the area, for review and comment before the county legislative body acted on it. The county's zoning ordinance replaced the city's, but the city retains planning and subdivision regulation authority within its region. Currently, the city and the county cooperate in the administration of zoning in the region.³⁵ For obvious reasons, LGPAC does not allow overlapping planning regions, but cities and counties can, nevertheless, cooperate in administering them.

Historical Development of Planning and Zoning

The foundations for planning, zoning, and land use regulation in this country and in Tennessee were laid in the 1920s and 1930s. In the 1920s, the U.S. Department of Commerce under the direction of Secretary Herbert Hoover drafted model laws that states could adopt: the Standard State Zoning Enabling Act and the Standard City

³⁰ Tennessee Code Annotated Title 13, Chapter 7.

³¹ Tennessee Code Annotated § 13-7-302.

³² Tennessee Code Annotated § 13-7-303.

³³ Tennessee Code Annotated § 13-7-304.

³⁴ Tennessee Code Annotated § 13-7-306.

³⁵ Interview with Scott Poland, Director of Current Planning, Maryville, Tennessee. November 2011.

Planning Enabling Act.³⁶ And in 1926, the U.S. Supreme Court upheld a local zoning ordinance in a landmark case, ruling that the division of a city into zoning districts was not a taking of property under the Constitution and that the city's regulations had a rational basis.³⁷

The basis for planning and zoning in Tennessee dates back to 1935 when the state's planning and zoning enabling acts were originally adopted. These acts were based on the standard acts developed in the 1920s. The four largest cities in Tennessee and Johnson City established the first planning commissions in the state during this period.³⁸ While there have been many amendments to the statutes since that time, the basic structure remains unchanged.

After the close of World War II, the nation entered a period of consistent growth and prosperity. The population of the country more than doubled between 1950 and 2010, growing from 152,271,417 people in 1950 to 308,745,538 in 2010. Tennessee's population nearly doubled, growing from 3,291,718 in 1950 to 6,346,105 in 2010.³⁹ This growth led to massive housing construction, as well as commercial and industrial development in the municipalities and in areas adjacent to their boundaries. At the same time, planning programs, subdivision standards, and zoning regulations were being developed to attempt to manage that growth.

A large amount of the growth occurred in the urban-rural "fringe." New subdivisions, new shopping centers, and industrial parks replaced open fields and farms. Much of this growth, in Tennessee and elsewhere, took a form that is now called sprawl. Studies have analyzed fringe-area growth to determine its effects. Effects include

- increased demand for roads, water, sewer, utilities, and various other services necessary to support the development;
- fiscal implications for cities, counties, and landowners;
- environmental impacts, ranging from the effects of storm water runoff on water quality to changes in air quality due to increased automobile use;
- implications for farmland preservation; and
- dramatic changes in the social and cultural character of affected areas.⁴⁰

³⁶ Knack, Ruth, Stuart Mack and Israel Stollman. 1996. *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*. Land Use Law. American Planning Association.

³⁷ Village of Euclid v. Ambler Realty Company, 272 U.S. 365 (1926).

³⁸ Greene, Lee Seifert, and Robert Sterling Avery. 1962, *Government in Tennessee*. The University of Tennessee Press. p. 271.

³⁹ U.S. Bureau of the Census, 1950 and 2010.

⁴⁰ David W. Owens. January 2006. *The North Carolina Experience with Municipal Extraterritorial Planning Jurisdiction*. The University of North Carolina School of Government Special Series No. 20.

The critical question raised by continuing population growth and associated land development, much of it on the urban fringe, is who should manage the growth and be responsible for planning and service provision in these areas. The answer generally has been the cities.

Tennessee saw a rapid increase in the creation of planning commissions and the adoption of zoning ordinances at the local level in the 1950s and 1960s. Much of this expansion occurred in municipalities, although some rapidly growing counties also participated. However, most counties did not have planning commissions and were against the adoption of zoning ordinances. The result was that some municipalities felt they had to adopt regional zoning.

The municipal zoning act was amended in 1959 to authorize municipalities to adopt extraterritorial zoning as previously described.⁴¹ Counties were not given a right to veto the zoning, but the law did provide that if a county adopted its own zoning covering that region, the municipal zoning would be replaced by the county zoning.

The law changed in relatively minor ways until 1998 when the state's Growth Policy Act was adopted. While the main intent of the General Assembly was to stem the tide of annexation battles, the Act included provisions designed to foster more coordinated and progressive growth planning.⁴² The effects on the laws governing annexation were substantial, but the effects on existing planning laws were minimal, limited mainly to changes necessary to coordinate those laws with the newly established urban growth boundaries for cities. Except for the provision that is the focus of this report, the law allows counties without zoning to block attempts by cities to extend their subdivision regulations and zoning beyond their borders.⁴³ The Act made no changes in the state's zoning laws.

⁴¹ Tennessee Code Annotated, Title 13, Chapter 7, Part 3.

⁴² Tennessee Code Annotated, Title 6, Chapter 58.

⁴³ Tennessee Code Annotated § 6-58-106(d).