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Powers to Prevent and Abate Nuisances

Dear Reader:

The following document was created from the CTAS website (ctas.tennessee.edu). This website is maintained by CTAS staff and seeks to represent the most current information regarding issues relative to Tennessee county government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

Sincerely,

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Powers to Prevent and Abate Nuisances

Reference Number: CTAS-563

In 2002, the General Assembly amended a part of the County Powers Act to authorize counties without zoning to exercise the certain regulatory powers granted to municipalities under T.C.A. § 6-2-201(22) and (23). T.C.A. § 5-1-118. The powers are described in the law as the ability to:

- Define, prohibit, abate, suppress, prevent and regulate all acts, practices, conduct, businesses, occupations, callings, trades, uses of property and all other things whatsoever detrimental, or liable to be detrimental, to the health, morals, comfort, safety, convenience or welfare of the inhabitants of the municipality, and exercise general police powers; and
- Prescribe limits within which business occupations and practices liable to be nuisances or detrimental to the health, morals, security or general welfare of the people may lawfully be established, conducted or maintained. T.C.A § 6-2- 201(22) and (23).

The next year, the General Assembly revisited the statute and expanded its application to allow all counties the ability to use these powers after adoption of a local resolution by a two-thirds (2/3) vote of the county legislative body.

Limitations on the Exercise of Regulatory Authority. While this new authority is a broad expansion of county regulatory power, the grant of authority came with several restrictions. The exercise of these powers by counties is limited in a number of ways by both the statute itself and the state and federal constitutions.

Local Adoption

Reference Number: CTAS-564

Even though all counties are eligible to exercise the powers in T.C.A. § 6-2-201(22) and (23), a county may not pass any such regulations pursuant to that authority unless it first adopts those powers by a resolution passed by a two-thirds (2/3) majority of the county legislative body. Also, Chapter 57 of the Public Acts of 2003 clarified that the county must not only pass such a resolution by a two-thirds (2/3) majority but also must pass any subsequent regulations by a two-thirds (2/3) majority. T.C.A. § 5-1- 118.

Jurisdiction

Reference Number: CTAS-565

By law, the authority granted to counties by T.C.A. § 5-1-118(c) may be exercised only in the unincorporated areas of the county. Additionally, the law states that it should not be construed to allow any county to prohibit or in any way impede any municipality in exercising any lawful municipal power or authority.

Exempted Activities

Reference Number: CTAS-566

The law also exempts certain businesses and practices from regulation. The powers conferred upon counties by T.C.A. § 5-1-118(c) do not apply to the following activities, which are regulated under other provisions of general law:

- Sale of beer and alcoholic beverages;
- Wholesale of beer;
- Surface mining; production of oil and gas;
- Activities covered by environmental protection laws and regulations dealing with air pollution, atomic energy, solid waste disposal and management, landfills, hazardous waste management, petroleum underground storage, oil spill cleanup, dry cleaning, water, wastewater and sewerage;
- Water management;
- Wells; and
- Dams.

Additionally, T.C.A. § 5-1-118(b) provides that counties may not use these powers to prohibit or regulate normal agricultural activities.

Grandfathered Uses

Reference Number: CTAS-567

In T.C.A. § 5-1-118(c)(3), the law provides further that all court decisions and statutory laws relating to variances and nonconforming uses applicable to zoning ordinances and land use controls shall apply to the enforcement and exercise of these new regulatory powers. For example, if a county determined that the sound of planes taking off and landing at an airport could potentially be a nuisance to surrounding residential properties and passed a regulation prohibiting the location of an airport within one-half mile of a residential property, this regulation may limit the location of future airports in the county, but an airport that was in existence at the time the regulation was passed that violated the distance rule would be allowed to continue to operate as a pre-existing nonconforming use.

Constitutional Limitations

Reference Number: CTAS-568

As with all government action, regulations passed under this new authority must be both written and enforced in such a manner that they do not violate the constitutional rights of people affected by the regulations. For example, the county could not pass a regulation that prohibited passing out literature of a political nature. This would obviously violate a citizen's First Amendment right to freedom of speech.

The county could not pass regulations prohibiting religious ceremonies or the ownership of guns. The regulations could not discriminate on the basis of race, gender, or other protected classes. These limits are obvious. Issues that are more likely to arise would involve challenges that a regulation resulted in taking property without just compensation or failed to provide due process. If the regulation is so burdensome on a property owner that the owner can no longer get use, enjoyment, or value out of the property, a court may find that the regulation effectively "took" the value of the property from the owner without providing compensation. In that case, the regulation may be struck down, or the county may be required to compensate the injured property owner. Due process problems may arise if citizens are not provided a means to dispute or appeal a penalty under the regulation. Part of providing due process in a regulation also involves giving the public adequate notice of the regulation. This standard of adequate notice requires a regulation to be clear in its language and application so that those affected understand the regulation. If a county regulation is so vague that the public cannot ascertain what conduct is regulated or how it is regulated, it may be struck down as unconstitutional.

Enforcement

Reference Number: CTAS-569

The laws passed in 2002 and 2003 did not include any specific provisions regarding how these new regulatory powers would be enforced. Therefore, enforcement will fall under existing statutory authority. As part of the original "County Powers Act," the legislature passed T.C.A. §§ 5-1-121 and 5-1-123. These statutes authorize enforcement of county regulations by monetary penalties and direct that the general sessions court is the proper venue for enforcement of the regulations. In T.C.A. § 5-1-121, the legislature provided that the penalties for violation could be up to \$500 per violation; however, subsequent court decisions probably place limits on this monetary penalty. See *Chattanooga v. Davis*, 54 S.W.3d 248 (Tenn. 2001). According to the Tennessee Supreme Court in that case, a punitive fine levied by a local government cannot exceed \$50 unless the defendant is allowed to have a jury trial. Higher fines could be enforced if they are remedial in nature rather than punitive, but this distinction is difficult to make.

Therefore, a county should generally limit monetary penalties to \$50 or less per violation. Penalty provisions of any regulations should be carefully considered by the county attorney. The county attorney should also be involved in the development of any regulations as he or she will most likely be involved in enforcing the regulations and defending any legal challenges to the regulations. Attorney General's Opinion 03-024 states that ordinances or regulations passed under T.C.A. 5-1-118(c) are to be enforced by a civil lawsuit brought on behalf of the county. The attorney general further opined that since the statutory scheme does not designate a specific officer to prosecute ordinance violations, it appears that suits to enforce a regulation would be brought by the county attorney.

Other Methods of Enforcement

Reference Number: CTAS-2179

In addition to the authority granted to counties by the County Powers Act, counties may also file suit to abate nuisances pursuant to T.C.A. § 29-3-101 *et seq.* Under this set of statutes, petitions can be brought in the name of the state, upon relation of the attorney general and reporter, or any district attorney general, or any city or county attorney, or without the concurrence of any such officers, upon the relation

of ten (10) or more citizens and freeholders of the county wherein such nuisances may exist. T.C.A. § 29-3-102.

The court is authorized to issue a temporary injunction during the proceedings and if the court finds that a nuisance exists at the conclusion of the case, the court will issue an order of abatement. T.C.A. §§ 29-3-105, 110. As part of the order of abatement, the court may assess costs of public services required to abate or manage the nuisance, including, but not limited to, law enforcement costs, if any, caused by the public nuisance. The governmental entity must submit evidence of such costs to the court in order to be reimbursed. T.C.A. § 29-3-110.

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