

STATE OF TENNESSEE

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Opinion No. 04-080

Fireworks in Washington County

QUESTIONS

1. A proposed local act would repeal a private act prohibiting the sale of fireworks in Washington County and would substitute an act allowing certain fire departments within the county to sell fireworks. Under the bill, each fire department would have to be qualified by the county commission to sell fireworks. Permission to sell fireworks is the equivalent of a seasonal license for the sale of fireworks, and the fire department must abide by all requirements applicable to the holders of seasonal licenses for the sale of fireworks in Tennessee under Tenn. Code Ann. §§ 68-104-101, *et seq.* Would this local bill violate Article XI, Section 8, of the Tennessee Constitution, prohibiting the General Assembly from suspending the general law for the benefit of an individual or group?

2. Would the act violate any other constitutional provision?

OPINIONS

1. The proposed act does not violate Article XI, Section 8, of the Tennessee Constitution.

2. A court could conclude that Section 4 of the proposed act violates the Due Process Clause of the Tennessee and United States Constitutions because it authorizes the sheriff, without notice and a hearing, to confiscate and destroy fireworks held in violation of the act. The proposed act does not violate any other applicable constitutional provisions.

ANALYSIS

This opinion concerns the constitutionality of a proposed local act. A draft of the act was included with the request. The act repeals 1949 Tenn. Priv. Acts Ch. 681, which prohibits the sale of fireworks in Washington County. Under the new act, certain qualifying fire departments are permitted to sell certain fireworks, including D.O.T. Class C common fireworks and special fireworks defined in Tenn. Code Ann. § 68-104-101. Under Section 4 of the act, pyrotechnics possessed by a person not otherwise permitted to possess them by the act are contraband, and it is the duty of the sheriff and other peace officers of Washington County to seize and destroy them. Under Section 6, a fire department approved by the county commission may purchase for resale,

possess, store, use, and sell pyrotechnics. It is lawful for any person, firm, or corporation within Washington County to use pyrotechnics purchased from an approved fire department. Under Section 7 of the act, a fire department must submit an annual application to the county clerk, to be forwarded to the county legislative body. The county legislative body is authorized to issue a permit to a fire department to sell pyrotechnics for one year, upon approval of the application, and upon assurance that the organization has complied with any applicable state law. Under Section 8, the legislative body may establish an annual application fee of no less than two hundred dollars for a permit. Under Section 9, fire departments that receive a permit may only operate as a seasonal retailer under Tenn. Code Ann. §§ 68-104-101, *et seq.*, and only for those dates specified in that statutory scheme. Under that statutory scheme, “seasonal retailer” means any person engaged in the business of making retail sales of fireworks in Tennessee from June 20 through July 5 and December 10 through January 2 of each year. Tenn. Code Ann. § 68-104-101(a)(6). Fire departments may only sell fireworks within such hours and to such persons as the county commission determines is appropriate to protect the citizens of Washington County from the irresponsible use of pyrotechnics. Fire departments must use profits from the sale of pyrotechnics for expenses directly related to enhancing the fire safety of the public. Under Section 10, the county commission is authorized to adopt resolutions or ordinances to provide reasonable rules and regulations to implement the statute:

including but not limited to limiting the hours of operation during which pyrotechnics may be sold, limiting the locations where pyrotechnics may be sold, prescribing civil penalties for any violation of this chapter in its discretion, and prescribing any other necessary and appropriate requirements for the enforcement and administration of this chapter.

Section 11 contains a severability clause. Under Section 12, the act must be approved by a two-thirds vote of the Washington County Commission.

The first question is whether this act violates Article XI, §8, of the Tennessee Constitution. Under that provision:

The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

In order to trigger application of Article XI, § 8, a statute must “contravene *some general law which has mandatory statewide application.*” *Leech v. Wayne County*, 588 S.W.2d 270, 273 (Tenn. 1979) (emphasis added). *See also Trustees of New Pulaski Cemetery v. Ballentine*, 151 Tenn. 622, 271 S.W. 38, 40 (1924) (“general legislation cannot be legally limited to a particular locality by the

population standard, when that mode of classification bears no relation to the subject matter, and is adopted for the sole purpose of confining laws *inherently general* to a particular locality”) (emphasis added).

The question, then, becomes whether the proposed act, by permitting the Washington County Commission to authorize fire departments in the county to sell fireworks as seasonal retailers, violates any general law of mandatory statewide application. Fireworks are generally regulated under Tenn. Code Ann. §§ 68-104-101, *et seq.* Under Tenn. Code Ann. § 68-104-102, the state fire marshal must issue a permit for the manufacture and sale of fireworks. Issuance of state fire marshal permits does not replace or relieve any person of state, county, or municipal privilege licenses as provided by law. Tenn. Code Ann. § 68-104-106.

Tenn. Code Ann. § 68-104-107 regulates permits for public fireworks displays. Permits for public displays are issued by the state fire marshal. Applications for a permit must be approved by the chief supervisory officials of the fire and police departments of the local government where the display is to be held. Under Tenn. Code Ann. § 68-104-108, it is unlawful to sell or ship into the state, except as provided in the act, any pyrotechnics known as “fireworks other than those items classified as D.O.T. Class C common fireworks, or those items that comply with requirements promulgated by the United States Consumer Product Safety Commission and permitted for use by the general public under its regulations.” Under Tenn. Code Ann. § 68-104-110, permissible items of fireworks may be sold by a retailer or a seasonal retailer, with some specific limitations.

Tenn. Code Ann. § 68-104-112 regulates the sale and use of fireworks. With a few exceptions, subdivision (a)(4) prohibits the sale of Class C common fireworks within any county having a population greater than two hundred thousand according to the 1980 federal census or any subsequent federal census. Under Tenn. Code Ann. § 68-104-115, the fire marshal is authorized to seize and destroy fireworks sold or used in violation of the statute. The fire marshal must provide notice and a hearing before seized fireworks may be destroyed. Tenn. Code Ann. § 68-104-116 provides:

This chapter shall not affect the validity of any private act, nor any city ordinance further prohibiting or restricting the sale or use of fireworks; except that in counties with a population of not less than fifty-eight thousand seventy-five (58,075) nor more than fifty-eight thousand one hundred seventy-five (58,175) according to the 1980 federal census or any subsequent federal census, the provisions of § 68-104-105 shall control.

(Emphasis added). Williamson County falls within the population bracket. Washington County does not. The Tennessee Supreme Court noted that the first clause in this statute is a “very clear statement that the Legislature did not intend to disturb Private Acts regulating the sale of fireworks which were in existence at the time the general law was passed.” *Harwell v. Leech*, 672 S.W.2d 761 (Tenn. 1984). In that case, the Court upheld a private act banning the sale of fireworks in counties

within a narrow population bracket. Only Knox County came within the bracket. The Court found that the classification was supported by a rational basis because banning the sale of fireworks in a county with a large population was rationally related to protecting the health and welfare of its citizens. The Court cited the statute as another ground for its conclusion.

The proposed act is defensible under Article XI, §8, on two grounds. First, under Tenn. Code Ann. § 68-104-116, it appears that the General Assembly did not intend the fireworks statutes to be a general law of mandatory statewide application. Second, the request indicates that the Washington County Commission has requested that the private act be passed. We think this is sufficient to provide a rational basis to support the classification. *See* Op. Tenn. Att’y Gen. 98-076 (April 6, 1998).

The bill also contains a local adoption requirement. Under Article XI, §9, “any act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.” But this provision has no relation to the enactment of criminal statutes. *Jones v. Haynes*, 221 Tenn. 50, 424 S.W.2d 197 (1968). Thus, only the legislature may enact criminal laws, and the efficacy of these acts cannot be made to hinge upon the outcome of an election or an approval of the county legislative body. *Id.*

The proposed act, however, does not make violation of the act a crime. The act authorizes local law enforcement officials to confiscate and destroy fireworks held in violation of the act, and it authorizes the county commission to prescribe further civil penalties to enforce the act. In the context of the act, neither of these penalties is criminal. But under Article VI, §15, of the Tennessee Constitution, as interpreted in *City of Chattanooga v. Davis*, 54 S.W.3d 248 (Tenn. 2001), it is unlikely that the city will be able to impose a fine of more than fifty dollars for a violation of the act without a jury trial.

The proposed act authorizes the Washington County Commission to approve applications for fire departments that wish to sell fireworks but provides no standards for the county to follow in awarding permits. While the General Assembly may delegate rulemaking and administrative authority to governmental agencies, the delegation by the legislature of the power to make laws is unconstitutional. *Richardson v. Reese*, 165 Tenn. 661, 667, 57 S.W.2d 797 (1933); Op. Tenn. Att’y Gen. 89-56 (April 17, 1989) (a statute requiring local governmental approval for a hazardous waste site provided no standards and was, therefore, an unconstitutional delegation of legislative authority). But in the absence of a constitutional prohibition, a legislature may delegate to local governments unfettered power to legislate as to purely local affairs. *See, e.g.*, 16 C.J.S. *Constitutional Law*, § 161 (1984), *cited in In Re Garrison Diversion Conservancy District*, 144 N.W.2d 82 (N.D. 1966). Because the sale and use of fireworks within a county is a purely local affair, the proposed act does not represent an unconstitutional delegation of legislative power to the Washington County Commission.

The Fourteenth Amendment to the United States Constitution guarantees equal protection of the laws. But the Fourteenth Amendment does not apply to the manner in which states delegate powers to local governments. A county is a political subdivision of the state. *Claiborne County v. Jennings*, 199 Tenn. 161, 285 S.W.2d 132 (1956). The United States Supreme Court has recognized that the federal constitution does not, except in very limited cases, affect the power of the states to organize its political subdivisions. *Hunter v. Pittsburgh*, 207 U.S. 16, 178-79 (1906). For this reason, the proposed act is not subject to analysis under the Fourteenth Amendment. In any case, as discussed above, we think the application of the private act to Washington County is supported by a constitutionally sufficient rational basis.

Under Section 4 of the act, the sheriff and other peace officers in Washington County are authorized to confiscate and destroy pyrotechnics held in violation of the act. The private act, unlike Tenn. Code Ann. § 68-104-115, does not require notice and a hearing before the pyrotechnics are destroyed. A court could conclude that this provision violates the Due Process Clause of the Tennessee and United States Constitutions. *Helton v. Hunt*, 330 F.3d 242 (4th Cir. 2003), *cert. denied*, ___ U.S. ___, 124 S.Ct. 436, 157 L.Ed.2d 312 (2003). The proposed act implicates no other provision of the United States Constitution.

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