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OPINION COMMITTEE

FILE # ML-46861-11
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August 15, 2011

Attorney General of Texas
Att'n: Opinion Committee
P. O. Box 12548
Austin, Texas 78711-2548

Request for Attorney General Opinion

Dear Chairmen and Members of the Committee:

At the request of one of the County Commissioners of Clay County, Texas I am requesting an attorney general opinion on the following issues:

- 1) Can the County Commissioners Court place further restrictions, limitations, or exemptions to a burn ban issued under Section 352.081 of the Local Government Code?
- 2) Can the County Commissioners place further restrictions on the activities exempted under §352.081(f)?

I have attached a brief on this issue, including a statement of facts giving rise to the situation.

If additional information or clarification is needed, please contact me by any of the methods listed above.

Thank you, in advance, for your attention to this matter.

Very truly yours,

Seth C. Slagle

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ISSUES PRESENTED

1. Can the County Commissioners' Court place further restrictions, limitations, or exemptions to a burn ban issued under Section 352.081 of the Local Government Code?
2. Can the County Commissioners place further restrictions on the activities exempted under §352.081(f)?

STATEMENT OF FACTS

The Clay County Commissioners' Court has regularly enacted a burn ban under §352.081 of the Local Government Code. The County burn ban generally tracked the language of the statute. There is currently a disagreement among the Commissioners on whether or not they can place further restrictions or exemptions to the statutory burn ban. Some counties have added restrictions prescribing when they would be exempted from a burn ban, such as, for agricultural purposes, when the wind is below 10 miles per hour, the humidity is above 25 percent, and the Volunteer Fire Department is on standby. Some counties have enacted burn bans that have added exemptions for burning agricultural crop lands, pasture lands, and/or brush piles.

ARGUMENT

- I. **The County Commissioners' Court may place further restrictions or exemptions under a local burn ban issued under §352.081 of the Local Government Code.**
- II. **Section 352.081(f) specifically exempts certain activities and types of burning from any burn ban.**

Generally, "the power to pass laws rests with the Legislature, and that power cannot be delegated to some commission or other tribunal." *Brown v. Humble Oil & Refining Co.*, 126 Tex. 296, 306, 83 S.W.2d 935, 941 (1935) There has been a long standing history of the legislature delegating to agency the power to carry out some legislative purpose, both on a state level and at the federal level. The doctrine was discussed in *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454 (Tex.1997) and the stated "the Texas Legislature may delegate its powers to agencies established to carry out legislative purposes, as long as it establishes "reasonable standards to guide the entity to which the powers are delegated. Requiring the legislature to include

every detail and anticipate unforeseen circumstances would ... defeat the purpose of delegating legislative authority." The separation of powers clause requires that the standards of delegations be "reasonably clear and hence acceptable as a standard of measurement."

Section 352.081 of the Local Government Code state, in relevant part, "The commissioners court of a county by order may prohibit or restrict outdoor burning in general or outdoor burning of a particular substance in all or part of the unincorporated area of the county."

The legislatures use of the phrases "may prohibit or restrict....in general.... a particular substance" means that the legislature has given a general grant of authority to the County Commissioners to implement a burn ban, when the conditions are necessary.

This statute certainly seems reasonably clear and hence acceptable as a standard of measurement.

There are six situations where a delegation of a legislative duty is not unconstitutional, here we are dealing with the classification that exists when "the legislature because of the nature of the subject of legislation cannot practically and efficiently exercise such powers." *see Hous. Auth. of City of Dallas v. Higginbotham*, 135 Tex. 158, 171-172, 143 S.W.2d 79, 87 (1940)".

This situation is analogous to the case of *State v. Rhine* where the TCEQ gave a citation for violations of the Clean Air Act. TCEQ has been granted the authority to promulgate rules for establishing the level of quality to be maintained in the state's air; and control the quality of the state's air, among other things. The delegation of this authority was attacked and the court held, "that it is neither practical nor efficient for the Texas Legislature, which meets every other year for a few months, to determine exactly what materials should be banned from outdoor burning, and under what circumstances, including the wind speed, time of day, and other minutiae related to curbing the

legislatively-defined "air pollution." "see *State v. Rhine*, 255 S.W.3d 745 (Tex. App.--Fort Worth 2008), *aff'd*, 297 S.W.3d 301 (Tex. Crim. App. 2009)".

Lawson v. State is another case where a delegation of the authority for trial judges to enter injunctions enjoining gang activity. Section 125.065 of the civil practice and remedies code outlines when a trial court can enter a temporary or permanent injunction against a criminal street gang member and section 71.021 of the penal code provide the penalty for a violation of a injunction. The statute was attacked under the delegation doctrine and the court of appeals upheld the delegation stating "that the legislature can delegate power to a coordinate branch, so long as the legislature has declared a policy and fixed a primary standard for its implementation." see *Lawson v. State*, 283 S.W.3d 438 (Tex. App.--Fort Worth 2009, pet. denied) citing *Ex Parte Granviel*, 561 S.W.2d 503, 514 (Tex. Crim. App. 1978) (en banc)".

Section 352.081 is certainly clear on whether or not commissioners can restrict the exempted activity under sub-section (f) of the statute. 352.081(f) states "this section does not apply to outdoor burning activities: (1) related to public health and safety that are authorized by the Texas Natural Resource Conservation Commission for: (A) firefighter training: (B) public utility, natural gas pipeline, or mining operations; or (C) a planting or harvesting of agriculture crops; or (2) that are conducted by a prescribed burn manager certified under Section 153.048, Natural Resources Code, and meet the standards of Section 153.047, Natural Resources Code." Tex. Loc. Gov't Code 352.081 It is clear that the Legislature intended to exempt this activity from any burn ban issued under this section. Any burn ban that attempted to restrict this type of activity would be invalid because this section does not apply to the activity listed in sub section (f).

SUMMARY

The Commissioner Court of a County can limit or restrict outdoor burning in whatever manner that is reasonable, however they cannot further limit or restrict those certain activities listed under sub section (f).