



GENTNER DRUMMOND
ATTORNEY GENERAL

**ATTORNEY GENERAL OPINION
2023-16**

The Honorable Brad Boles
Oklahoma House of Representatives, District 51
2300 N. Lincoln Boulevard, Room 244
Oklahoma City, OK 73105

December 29, 2023

Dear Representative Boles:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

- 1. May a municipality adopt a zoning or land use ordinance which has the effect of prohibiting any business that sells tobacco, nicotine, or vapor products from locating within 300 feet of any existing facility which is used primarily by persons under twenty-one years of age?**
- 2. If a municipality may adopt such a zoning or land use ordinance, would a “grandfathered-in” business lose that status upon its sale to new ownership?**

**I.
SUMMARY**

An Oklahoma municipality may lawfully enact an ordinance to restrict the zoning of an establishment selling nicotine or tobacco products. Determining whether a “grandfathered-in” business loses its lawful nonconforming use status will depend on the specific text of the ordinance adopted and thus turns on a question of fact. Notwithstanding, the proposed ordinance, as written, complies with title 11’s requirements concerning nonconforming use.

**II.
BACKGROUND**

A. Municipal legal authority concerning zoning

Oklahoma law is well established that a municipality has the authority to “regulate and restrict . . . the *location and use* of buildings” in order to promote “the health, safety, morals, or the general welfare of [its] community.” 11 O.S.2021, § 43-101 (emphasis added); *Vinson v. Medley*, 1987 OK 41, ¶ 6, 737 P.2d 932, 936 (citing *Garrett v. City of Okla. City*, 1979 OK 60, ¶ 4, 594 P.2d 764, 765). The Oklahoma Supreme Court has said “zoning is a valid exercise of the municipal police power and a legislative function,” which the courts will not override unless the particular

ordinance in question “is found to be unreasonable, arbitrary, or to constitute an unequal exercise of police power.” *Garrett*, 1979 OK 60, ¶¶ 4–5, 594 P.2d at 765–66.

B. Prevention of Youth Access to Tobacco Act

Passed by the Oklahoma Legislature in 1994, the Prevention of Youth Access to Tobacco Act (“Act”) aims to reduce tobacco use by youth and young adults in the State of Oklahoma. 1994 Okla. Sess. Laws ch. 137 (now codified at 63 O.S.2021, §§ 1-229.11–229.26).¹ To achieve its intended aim, the Act allows the fining of any person selling tobacco or vapor products to any person under the age of twenty-one or any person buying tobacco or vapor products for any person under the age of twenty-one. 63 O.S.2021, § 1-229.13. Among other educational requirements and access restrictions, the Act also asserts the State’s preemption over tobacco and vapor product regulation. But the Act did reserve the right for “any agency or political subdivision . . . [to] exercis[e] its lawful authority to regulate zoning or land use” *Id.* § 1-229.20. This language has been in place for almost thirty years. It should be noted, however, that the Oklahoma judiciary has invalidated municipal ordinances that had the effect of prohibiting conduct which was otherwise lawful. *See e.g., 7-Eleven, Inc. v. McClain*, 1967 OK 7, 422 P.2d 455 (municipal zoning ordinances prohibiting sale of intoxicating beverages declared void as they encroached on a field of legislation reserved by the State and such conduct is allowed under state law); *Fancy’s Entertainment L.L.C. v. City of Enid*, 2007 OK CIV APP 112, 171 P.3d 928 (municipal ordinance prohibiting the admittance of underage persons in areas of an establishment conflicted with state law, which generally covered the field, and allowed underaged persons in areas of the establishment designated for a purpose other than selling low point beer). Accordingly, municipalities must tailor their ordinances such that their effect does not prohibit conduct permissible under state law, especially when the state has clearly established a subject as a field it intends to regulate.

III. DISCUSSION

A. Oklahoma law permits a municipality to adopt a zoning or land use ordinance regarding the location of a business selling tobacco, nicotine, or vapor products.

Your first question inquires about the relationship between section 43-101 of title 11 and section 1-229.20 of title 63, which prohibits municipalities from adopting any “order, ordinance, rule, or regulation concerning the sale, purchase, distribution, advertising, sampling, promotion, display, possession, licensing or taxation of tobacco products, nicotine products or vapor products.” 63 O.S.2021, § 1-229.20. Although the language at the beginning of section 1-229.20 would necessarily prohibit the proposed ordinance, section 1-229.20 includes a key exception: “nothing in this section shall preclude or preempt any agency or political subdivision from exercising its *lawful authority to regulate zoning or land use . . .*” *Id.* (emphasis added). Put simply, section 1-229.20 *explicitly* preserves municipalities’ zoning authority related to tobacco, nicotine, or vapor products. Accordingly, this office concludes that section 1-229.20 affirms that a municipality may

¹The Act has been amended and recodified since its enactment in 1994. Initially, the Act only applied to tobacco products, and the sale of such products was allowed to persons aged eighteen or older.

enact an ordinance restricting the location of any business engaged in selling tobacco, nicotine, or vapor products based on its lawful authority to regulate zoning or land use.

B. Municipalities have discretion concerning nonconforming uses.

Your second question concerns whether a municipality may terminate a non-conforming business's "grandfathered-in" status. Specifically, you ask whether a municipality that enacts the proposed ordinance may further provide that a pre-existing, grandfathered-in business would lose its status upon its sale to a new owner. Title 11, section 44-107.1(A) of the Oklahoma Statutes states: "The lawful nonconforming use of a building, structure or premises as such existed at the time of the adoption and recording of any ordinance affecting it, *may be continued*, although such use does not conform with the provisions of such ordinance." (Emphasis added.) The plain and ordinary language of section 44-107.1 of title 11 clearly requires a municipality to include a provision to grandfather in existing businesses that are non-conforming.² ³ Section 44-107.1(A) also provides for a number of avenues to terminate nonconforming uses, including a winding-down period, the designation of facts or circumstances that terminate the right to continue any nonconforming use, and the adoption of a formula or formulas allowing for an amortization of the business's investment.⁴

Notably, the Legislature carved out two exceptions to municipalities' authority to terminate nonconforming uses. First, section 44-107.1(C) prohibits a municipality from terminating "oil and/or gas activity," which are lawful nonconforming uses. Second, section 44-107.1(D) proscribes a municipality from terminating a lawfully nonconforming sign "unless such sign is altered in a manner that increases the degree of nonconformity or is abandoned for a period of more than two (2) years." 11 O.S.2021, § 44-107.1(C–D).

However, no municipality can adopt or amend regulations or restrictions that "affect[] the termination of nonconforming uses . . . [without a prior] notice and hearing as provided in Sections 43-104 and 43-105 of Title 11 of the Oklahoma Statutes." *Id.* § 44-107.1(B). To comply with 43-104, "parties in interest" must be afforded an opportunity to be heard in a public hearing before the "regulation, restriction, or boundary" becomes effective. 11 O.S.2021, § 43-104(A). Notice of the date, time, and place of the hearing must be provided by publication in a "newspaper of general circulation in the municipality" and "include a map of the area to be affected which indicates street names or numbers, streams, or other significant landmarks in the area." *Id.* Section 43-105 adds

²The Court of Civil Appeals considers the grandfather clause as a requirement under section 44-107.1 despite the use of the word "may." *Material Serv. Corp. v. Town of Fitzhugh*, 2015 OK CIV APP 13, ¶ 11, 343 P.3d 624, 627.

³Section 44-107.1(A), however, also allows a municipality to "terminat[e] . . . lawful nonconforming uses . . . *by designating conditions or circumstances which shall cause such use to cease . . .*" 11 O.S.2021, § 44-107.1(A) (emphasis added).

⁴If a municipality decides to designate a change in use as a condition or circumstance that would result in the grandfather clause's expiration, a municipality should be mindful of the Oklahoma Supreme Court's holding in *Triangle Fraternity v. City of Norman ex rel. Norman Bd. of Adjustment*, 2002 OK 80, 63 P.3d 1. Fearing arbitrary decision-making by municipalities, the *Triangle Fraternity* court held a property's use must have substantially changed or be of such a character that would change the neighborhood. *Id.* ¶ 14, 63 P.3d at 6. Whether any property's use is indeed different is a fact-dependent question that falls outside the scope of an Attorney General opinion. 74 O.S.2021, § 18b(A)(5).

another potential hurdle to a new regulation, restriction, or boundary for land use that arises when either “owners of twenty percent (20%) or more of the area of the lots included in a proposed change” or “owners of fifty percent (50%) or more of the area of the lots within a three hundred (300) foot radius of the exterior boundary of the territory included in the proposed change” file protests against the proposed change. *Id.* § 43-105(B)(1–2). When either of these conditions are met, the new provision will “not become effective except by the favorable vote of three-fourths of all the members of the municipal governing body where there are more than seven members . . . and by three-fifths favorable vote where there are seven or less members in the governing body.” *Id.* § 43-105(B)(2).

Turning to the proposed ordinance at issue, section III provides a grandfather clause that reads as follows: “[c]urrent license tobacco/e-cigarette store[s] within 300 feet of any school are exempt from the amendment to the zoning ordinance. If current license tobacco/e-cigarette store is sold then the new owner would no longer be able to use the grandfathering clause to obtain a license.”⁵ In other words, the proposed ordinance designates a circumstance which terminates the provided nonconforming use exception—a practice specifically authorized by section 44-107.1(A) of title 11. Consequently, if adopted, it likely complies with section 44-107.1(A) of title 11.

It is, therefore, the official Opinion of the Attorney General that:

- 1. Section 1-229.30 of title 63 of the Oklahoma Statutes does not prohibit a municipality from enacting an ordinance restricting the location of a business engaged in the sale of nicotine or tobacco products.**
- 2. Subject first to required notice and hearing requirements under sections 43-104 and 43-105 of title 11 of the Oklahoma Statutes, and a grandfather clause under the Oklahoma Municipal Code, a municipality may adopt or amend an ordinance which regulates or restricts the zoning of land within its jurisdiction which causes a business to lose its right to operate by a lawful nonconforming use.**



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⁵Tobacco Zoning Ordinance (proposed) (on file with author).