

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

September 21, 2018

John D. Sutton, City Attorney
Town of Monticello
Post Office Box 1157
Monticello, MS 39654

Re: Authority of municipality to regulate outdoor burning through ordinance

Dear Mr. Sutton:

Attorney General Hood is in receipt of your request for an official opinion on behalf of Monticello, and it has been assigned to me for research and reply.

Background and Question Presented

Your request states, in part:

Recently, several board members have received complaints from citizens about individuals burning yard and/or other waste outdoors instead of disposing of same through the town's waste disposal carrier. As you can imagine, such burning, depending on the time of day and presence of other environmental factors, causes potentially harmful smoke to intrude upon neighboring properties and also creates unwanted odors that extend beyond the boundaries of the land upon which the burning is conducted, not to mention the risks inherent with such fires possibly spreading.

* * *

Your question is whether, assuming the requisite factual determinations are met, a municipality may pass an ordinance that regulates the times and dates that yard and/or other waste can be burned outdoors.

Applicable Law and Analysis

In response, the general rule is that municipalities may not regulate activity that has been preempted by state law. *Delphi Oil, Inc. v. Forrest County Bd. of Sup'rs*, 114 So.3d 719 (Miss.2013); MS AG Op., *Thomas* (April 10, 1998).

Several state laws appear to have some bearing on a response to your question. Mississippi Code Section 49-19-351 provides for a statewide scheme by which drought or wildfire conditions may be assessed and by which the Forestry Commission may recommend that counties adopt burn bans. This office has previously opined that this particular statute is not a comprehensive general law regarding burn bans and does not preempt or supersede local ordinances or regulations regarding the implementation of same. MS AG Op., *Miller* (November 17, 2000).

Also relevant to your inquiry is Miss. Code Ann. Sections 49-17-1, *et seq.*, the Mississippi Air and Water Pollution Control Law. Specifically, Section 49-17-17 authorizes the Mississippi Commission on Environmental Quality to supervise the administration and enforcement of the Air and Water Pollution Law as well as the Solid Wastes Disposal Law, Miss. Code Ann. Sections 17-17-1, *et seq.*¹ Pursuant to its authority under this Chapter, the Commission has adopted regulations pertaining to air quality including the following specific to open burning:

- G. **The open burning of residential, commercial, institutional, or industrial solid waste, is prohibited, except as specified herein.** This prohibition does not apply to infrequent burning of agricultural wastes in the field, silvicultural wastes for forest management purposes, land-clearing debris, debris from emergency clean-up operations, and ordinance; and permitted open burning at hazardous waste disposal facilities subject to regulation under Subtitle C of the Federal Resource Conservation and Recovery Act (RCRA).

(4) The prohibition of open burning of residential solid waste applies to open burning of leaves and other yard waste by residential property owners, except when the Department has deferred the regulation of the burning of leaves and other yard wastes to a county board of supervisors and/or municipal governing body, and that county or municipal governing body has in effect a local ordinance that regulates such open burning and has been approved by the Department. Local ordinances approved by the Department must provide that the leaves or other yard waste is burned on the residential property where it originated. Approved local ordinances

¹ Restrictions on burning of garbage are also addressed in Section 17-17-9 which reads: No garbage, or rubbish containing garbage or other putrescible materials, or hazardous wastes shall be burned except in approved incinerators meeting the necessary temperature requirements and air pollution controls as now established or may later be established. The open burning of rubbish shall be permitted only under controlled circumstances where sanitary landfill and landfill is not feasible, and not in proximity to sanitary landfill or landfill operations where spread of fire to these operations may be a hazard in the opinion of the controlling agency.

must also be deemed protective of air quality and public welfare by the Department and must provide for appropriate burning prohibitions and restrictions during Air Quality Action Days. Additionally, approved local ordinances must include fire safety provisions including prohibitions and restrictions on open burning coordinated through the State Forestry Commission during dry weather conditions.

MS ADC 11-2:1.3. (Emphasis added).

Conclusion

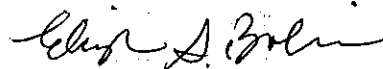
In conclusion, a municipality may regulate open burning by ordinance so long as the ordinance is not in conflict with state law or any corresponding regulations regarding same. As noted above in Rule 1.3, the Mississippi Department of Environmental Quality must defer regulation to the municipality and approve the ordinance.

Please let us know if this office can be of further assistance.

Sincerely,

OFFICIAL OPINION
JIM HOOD, ATTORNEY GENERAL

By:



Elizabeth S. Bolin
Special Assistant Attorney General