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Opinion No. 10-113

Prohibiting the Sale of Beer Through Drive-Up Windows

QUESTION

Do beer boards have the authority to prohibit sales of beer for off-premises consumption through drive-up windows, drive-through service, or curb service?

OPINION

Class A counties do not have the statutory authority to deny beer permits based solely on the sale of beer through drive-up windows, drive-through service, or curb service; however, cities, towns and Class B counties are vested with broad power and discretion to regulate the sale of beer, including the authority to enact ordinances that restrict the sale of beer via drive-up windows, drive-through service, and curb service.

ANALYSIS

Authority to regulate the sale of beer has been statutorily delegated to local governments and is administered through the permit process. Tenn. Code Ann. §§ 57-5-103 *et seq*. Local governments are divided into two broad categories for purposes of regulating beer: (1) Class A counties, and (2) Class B counties, cities and towns. Class A counties are defined in Tenn. Code Ann. § 57-5-103(b) as counties not governed by metropolitan governments as defined in Tenn. Code Ann. § 7-2-101. Class A counties have been given the authority to create beer boards and issue beer permits subject to specified state requirements listed in Tenn. Code Ann. § 57-5-105. Class B counties, consisting of all counties governed by a metropolitan government and all cities and towns, have likewise been granted authority to create beer boards and issue beer permits, but have additionally been granted broad discretion to regulate, restrict, or even prohibit beer sales pursuant to Tenn. Code Ann. § 57-5-106. The Tennessee Court of Appeals has highlighted the relevant distinction in regulatory authority between the two categories of local governments as follows: "[i]ncorporated cities have greater control over the sale [of] beer than counties. While counties are limited to enforcing the restrictions in state law, cities may impose additional restrictions on the sale of beer." *Martin v. Beer Bd. for City of Dickson*, 908 S.W.2d 941, 945-46 (Tenn. Ct. App. 1995).

Class A Counties

Tenn. Code Ann. § 57-5-105(b) sets forth the conditions and provisions which an applicant for a beer permit must meet in order to be authorized to sell beer in a Class A county. These requirements include establishing that beer sales will not interfere with public health, safety and morals, that sales will not be made to minors, that both owners and employees involved in the sales do not have a specified criminal record, and that sales for on-premises consumption require special application. Tenn. Code Ann. § 57-5-105(b)(1) through (5).[1] By statute, an applicant who "complies with the conditions and provisions of [section 105] *shall* have issued to such applicant the necessary license or permit." Tenn. Code Ann. § 57-5-105(e) (emphasis added). The mandatory "shall" as used in the controlling statute leaves no room for discretion at the county level; the General Assembly has listed the requirements in the statute.

Tennessee courts have consistently held that the statutory provision pertaining to Class A counties, now found in Tenn. Code Ann. § 57-5-105, must be interpreted as excluding county legislative bodies from making any additional regulations or conditions for obtaining a permit outside of those expressly provided in the statutes. In addition to the language of Tenn. Code Ann. § 57-5-105, the Tennessee Supreme Court reasoned,

> There appears to be express authority of cities and towns to pass proper ordinances governing the issuance and revocation of licenses . . . . If it were intended that the county court should exercise like authority and to make ordinances or resolutions beyond the provisions of the legislative act, this authority, we think, would not have been expressly given to municipal corporations without being given to the county court. The language of the statute, granting such authority only to municipal corporations, seems upon its face to exclude county courts from making any regulation beyond the provisions of the statute.

Wright v. State, 106 S.W.2d 866, 870 (Tenn. 1937). Accordingly, the Tennessee Supreme Court has held that counties do not have the authority to impose restrictions on beer sales in addition to those imposed by the legislature, but rather the legislature has "mandated that an applicant for a beer permit [in a Class A county], who complies with all the legal requirements, shall be entitled to have such license or permit issued to him." *Howard v. Willocks*, 525 S.W.2d 132, 136 (Tenn. 1975). *See also Flowers v. Benton County Beer Bd*., 302 S.W. 2d 335, 339 (Tenn. 1957) (a county beer board has no legal authority to prescribe restrictions, limitations, or conditions in granting or revoking beer permits other than those provided by statute); *McCarter v. Goddard*, 609 S.W.2d 505, 508 (Tenn. 1980) (a county beer board must issue a permit to an applicant who complies with all the legal requirements laid out by statute and cannot prescribe additional conditions); *Harvey v. Rhea County Beer Bd*., 563 S.W.2d 790, 792 (Tenn. 1978), and *Lones v. Blount County Beer Bd.*, 538 S.W.2d 386, 389 (Tenn. 1976) (an applicant for a beer permit who complies with the requirements set out in the statute is entitled to the beer permit).

[1] Additionally, while not granted to the beer board, the county legislative body itself has the statutory authority to modify distance requirements, Tenn. Code Ann. § 57-5-105(i), and impose training or certification requirements, Tenn. Code Ann. § 57-5-105(j).

Based on the clear Tennessee case precedent, this Office has also consistently held that the language of "Tenn. Code Ann. § 57-5-105 must be taken as excluding county legislative bodies from making any regulations beyond its provisions." Op. Tenn. Att'y Gen. No. U81-006 (Jan. 9, 1981). *See also* Op. Tenn. Att'y Gen. No. 84-154 (May 3, 1984) ("[p]owers of Class A counties are much more closely circumscribed by [Tenn. Code Ann.] § 57-5-105, and, where an applicant meets the statutory criteria, issuance of a permit is mandatory."); Op. Tenn. Att'y Gen. No. 05-024 (Mar. 14, 2005) ("[i]t is clear then that Class A counties do not possess the power to create beer permit requirements in addition to those contained in Tenn. Code Ann. § 57-5-105(b).").

Accordingly, the power of a Class A county to regulate the issuance of beer permits is limited to a determination of whether each applicant for a permit has met the statutory conditions and provisions set out in Tenn. Code Ann. § 57-5-105. If these conditions are met, the county must issue a beer permit. *See* Tenn. Code Ann. § 57-5-105(e). Tenn. Code Ann. § 57-5-105 neither expressly provides for a ban on issuing permits to those who will sell through a drive-up window, drive-through service, or curb service, nor does the statute provide the county beer board or legislative body with the discretion to create such restrictions.

The most elastic of the enumerated restrictions available to the legislative bodies of Class A counties, Tenn. Code Ann. § 57-5-105(b)(1), states that, "no beer will be sold except at places where such sale will not cause congestion of traffic or interference with schools, churches, or other places of public gathering, or otherwise interfere with public health, safety and morals[.]" However, based on prior case law interpreting the language of this restriction, it is unlikely that a Tennessee court would conclude that selling beer through drive-through windows or providing curb service is a per se interference with public health, safety and morals that would justify a complete ban on these activities. *See Al-Koshshi v. Memphis Alcohol Com'n,* 2005 WL 1692947 (Tenn. Ct. App. 2005) (holding that simply establishing a history of loitering, littering, and prostitution in an area is insufficient to deny a beer permit and requiring the local board to establish a causal link between beer sales and interference with public health, safety and morals); *Suleiman v. City of Memphis Alcohol Com'n*, 290 S.W.3d 844, 849 (Tenn. Ct. App. 2008) (holding that "the record must contain some factual evidence showing ‚how or why the particular permit requested would interfere with public health, safety and morals,'" citing *Harvey v. Rhea County Beer Bd.,* 563 S.W.2d 790, 792 (Tenn.1978)); *Harvey,* 563 S.W.2d at 792 (finding no factual evidence regarding how or why the permit would interfere with public health, safety, and morals, and noting that opposition was largely based on the fear that beer might become more readily available to high school students).

In *Coffman v. Hammer,* 548 S.W.2d 310, (Tenn. 1977), the Tennessee Supreme Court reversed a local board's denial of a beer permit based on reasoning that convenience in getting beer into the hands of drivers interferes with public safety. In that case the reasons stated for denial of a beer permit were that the proposed location was right at the entrance to a highway and as such, "the sale of beer [at that location] will lead to its consumption, and in most instances, a portion of that consumption will occur as soon as the purchaser gets onto the highway" thereby greatly increasing the danger to the safety of the public. *Id.* at 311-12. However, the Court disallowed this reasoning, ruling instead that there was no evidence to indicate any adverse effect upon the public welfare. *Id.* Accordingly, if a Class A county were to argue that any drive-up

window or curb service presumptively interferes with public health, safety, or morals, a Tennessee court would likely disagree, absent specific factual findings linking the service to actual interference with public health, safety, or morals.[2] Thus, a Class A county legislative body does not have the authority to create a generally applicable rule or policy denying the issuance of beer permits to applicants based solely on intent to sell beer through a drive-up window, drive-through service, or curb service.

Cities, Towns and Class B Counties

Tenn. Code Ann. § 57-5-106(a) sets forth the extent of a city, town, or Class B county's authority to administer beer permits, stating:

> All incorporated cities, towns and Class B counties in the state of Tennessee are authorized to pass proper ordinances governing the issuance and revocation or suspension of licenses for the storage, sale, manufacture and/or distribution of beer within the corporate limits of the cities and towns and within the general services districts of Class B counties outside the limits of any smaller cities as defined in § 7-1-101(8) and to provide a board of persons before whom such application shall be made, but the power of such cities, towns and Class B counties to issue licenses shall in no event be greater than the power herein granted to counties, but cities, towns and Class B counties may impose additional restrictions, fixing zones and territories and provide hours of opening and closing and such other rules and regulations as will promote public health, morals and safety as they may by ordinance provide.

Tenn. Code Ann. § 57-5-106(a). Based on this statutory grant of authority, this Office has previously opined that "Tennessee municipalities have extensive powers to regulate the sale, storage, and manufacture of beer within their corporate limits, even to the extent of completely banning the sale of beer. *See Watkins v. Naifeh*, 635 S.W.2d 104 (Tenn. 1982); *Thompson v. City of Harriman*, 568 S.W.2d 92 (Tenn. 1978); *Barnes v. City of Dayton*, 216 Tenn. 400, 392 S.W.2d 813 (1965)." Op. Tenn. Att'y Gen. No. 02-092 (August 28, 2002). The Tennessee Supreme Court has declared that "it has long been held in this state that, consistent with T.C.A. § [57-5-106], municipalities have extensive authority to regulate the sale of beer within their boundaries." *State ex rel. Amvets Post 27 v. Beer Bd. of the City of Jellico*, 717 S.W.2d 878, 881 (Tenn. 1986). *See also Fritts v. Wallace*, 723 S.W.2d 948, 949 (Tenn. 1987) ("This Court has repeatedly recognized that [§ 57-5-106(a)] vests each municipality with an extremely broad power and discretion in the regulation and control over the sale of beer within the city limits."). In fact, while a Class A county may not, a municipality may regulate the sale of beer to the point of complete prohibition. *Thompson v. City of Harriman*, 568 S.W.2d 92, 94 (Tenn. 1978). In short, "[t]he only limits placed on [municipalities'] regulatory powers are found in the state and federal constitutions, the state statutes, and in the requirement that cities cannot exercise their power in an arbitrary or discriminatory manner." *Martin v. Beer Bd. for City of Dickson*, 908 S.W.2d 941,

[2] While Tennessee courts have not addressed this specific fact scenario directly, it is worthy of note that an appellate court in Louisiana has recently held that drive-through beer and liquor service is not a per se interference with public safety and health. *Toups v. City of Shreveport*, 37 So.3d 406 (La. Ct. App. 2010).

946 (Tenn. Ct. App. 1995) (citing *Beer Bd. v. Brass A Saloon of Rivergate, Inc*., 710 S.W.2d 33, 35 (Tenn. 1986)). Furthermore, the burden is on the party attacking a regulatory ordinance to prove the regulation is arbitrary or discriminatory, and courts are required to uphold the regulation if they can conceive of any rational basis for the regulatory measure that is reasonably related to a legitimate government purpose. *Fritts*, 723 S.W.2d at 949.

Accordingly, municipalities have broad authority to regulate sales of beer within their corporate limits through the permit process. Moreover, in exercising this authority, municipalities also have broad discretion in crafting ordinances as long as the regulations are exercised in good faith, are not discriminatory or arbitrary, and do not contradict the state constitution or state statutes. *See DeCaro v. City of Collierville*, 373 S.W.2d 466, 469 (Tenn. 1963). As such, there is little doubt that a municipality has the authority to pass an ordinance that prohibits the sale of beer through a drive-up window, drive-through service, or curb service. In fact, several Tennessee municipalities have done just that. *See* Adamsville Mun. Code §8-214(5) (1998) (prohibiting any beer permit holder to "sell, deliver or dispense beer to any person unless the person enters the building of the permittee. No beer shall be sold through a drive-up window."); Ardmore Mun. Code §8-224 (2002) (mandating that beer "shall not be sold, given away, served or otherwise dispensed to persons in automobiles or other motor vehicles."); Franklin Mun. Code §8-226 (2009) (declaring it unlawful for any beer permit holder to "allow beer to be sold through any drive-through or delivery window or by curb service (curb sales) by any retail establishment possessing an on-premises or off-premises beer sale permit. Any sales for consumption on the premises but outside the building from which the business is operated shall be made from within the building."). Such ordinances are well within the authority granted to municipalities to regulate beer sales.

It is settled law in Tennessee that Tenn. Code Ann. § 57-5-106(a), which authorizes municipalities to pass ordinances governing beer licenses, extends to the enactment of ordinances establishing restrictions upon issuance of permits to sell beer. *Fritts*, 723 S.W.2d at 949. However, your inquiry specifically asks if "beer boards" have the authority to prohibit the issue of beer permits for the sale of beer through drive-up windows, drive-through service, or curb service. Based upon the language of the controlling statute and applicable case law, it is likely Tennessee courts would determine that while a municipality's legislative body could prohibit such sales via ordinance, a local beer board alone lacks the authority to do the same absent a properly enacted ordinance.

Tenn. Code Ann. § 57-5-106(a), which grants municipalities the authority to regulate the sale of beer, explains that the power is exercised through "ordinances." The statute uses the term "ordinance" four times.[3] In the Tennessee Supreme Court case of *Brooks v. Garner*, 566 S.W.2d 531 (Tenn. 1978), the Court reversed the denial of a beer permit by a municipal beer board based on the board's determination that there were already a sufficient number of beer outlets because such a limitation was not fixed by ordinance. The Court, in interpreting the language now in Tenn. Code Ann. § 57-5-106(a), stated that the "authority thus delegated [to municipalities] must

[3] The statute authorizes municipalities to "pass proper ordinances governing" beer sales; to "impose additional restrictions . . . by ordinance," and twice refers to the authority granted to municipalities pursuant to the statute as "[t]he ordinance power granted to a municipality by this section."

be exercised through enactment of ordinances." *Brooks,* 566, S.W.2d at 532, (citing *Case v. Carney*, 376 S.W.2d 492 (Tenn. 1964)). The Court further noted that "the powers of a municipality are to be carried into effect and discharged through provisions of ordinances enacted by the council or other governing authority," and therefore concluded that the authority of municipalities to regulate beer sales "must be exercised only through the enactment of proper ordinances so providing." *Id.* The *Brooks* Court held that limiting the issuance of beer permits based solely on the number of already existing beer outlets was a valid exercise of a municipality's authority to regulate beer sales, but only if done through a properly enacted ordinance, and impermissible if done simply through the decision of a local beer board. Likewise, a Tennessee court would likely hold that a municipality has the authority to adopt a generally applicable ordinance denying beer permits to applicants who intend to sell beer through a drive-up window, drive-through service, or curb service, but that such a regulation may not be imposed simply by a local beer board rule or decision.

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