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Opinion No. 01-053

Municipal regulation of smoking in restaurants

QUESTIONS

1. Does Tenn. Code Ann. § 39-17-1551 or any other provision of Tennessee Code Annotated prevent a municipality from enacting an ordinance that would prohibit smoking in places of public accommodation such as restaurants?

2. If municipalities may enact an ordinance to prohibit smoking in public places such as restaurants, is there any statutory prohibition to placing the matter on the ballot for a vote by the citizens of Cleveland, as suggested by one of the city council members?

OPINIONS

1. Under Tenn. Code Ann. § 39-17-1551, a municipality is not currently authorized to enact an ordinance that would ban smoking in restaurants located in buildings not owned or leased by the city.

2. The answer to the first question renders the second question moot.

ANALYSIS

Material included with the opinion request states that a resident of Cleveland, Tennessee, has requested the city council to enact an ordinance that would ban smoking in places of public accommodation such as restaurants. But a question has arisen concerning whether the council has the authority to enact the proposed ordinance in light of Tenn. Code Ann. § 39-17-1551, which provides:

> The general assembly intends by this part and other provisions of Tennessee Code Annotated to occupy and preempt the entire field of legislation concerning the regulation of tobacco products. Any law or regulation of tobacco products enacted or promulgated after March 15, 1994, by any agency or political subdivision of the state or any agency thereof is void; provided, that cities, counties and counties having a metropolitan form of government may regulate the use of tobacco products in buildings owned or leased by such political subdivisions; and provided further, that airport authorities created pursuant to the

> provisions of title 42; utility districts created pursuant to the provisions of title 7; and special school districts may regulate the use of tobacco products in buildings owned or leased by such entities. Notwithstanding any other provision of the law to the contrary, individual owners or operators of retail establishments located within an enclosed shopping mall shall retain the right to determine the policy on the use of tobacco products within such person's establishment.

In our opinion, the statute is clear. A municipal governing body may prohibit smoking in a building owned or leased by the city. But a municipal ordinance enacted after March 15, 1994, that sought to prohibit smoking in restaurants located within the city in buildings not owned or leased by the city would be void under Tenn. Code Ann. § 39-17-1551. Thus, the City of Cleveland presently lacks the authority to enact the proposed ordinance.

2. If a municipal governing body could prohibit smoking in privately-owned restaurants, Question 2 asks if there is any statutory prohibition to placing the matter on the ballot for a vote by the citizens of Cleveland. This question is moot in light of our answer to the first question, but we note that municipalities are without authority to place any question on the ballot for the electorate to decide an issue without express authority in either the Tennessee Constitution, the general statutes, or the charter of the municipality. *See generally* Op. Tenn. Atty. Gen. 96-095 (July 29, 1996).

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