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Opinion No. 01-157

Legality and Reinstatement of Beer Permit Distance Standards

QUESTIONS

1. Regarding Attorney General Opinion U93-74: If a county has adopted a resolution prohibiting the sale of beer within 300 feet of a church or school for "package-stores" and within 2000 feet of a church or school for "on-premises consumption," would that resolution be contrary to Tenn Code Ann. § 57-5-105?

2. If a county beer board has discriminatorily issued permits in violation of the distance rule, and there are "package stores" and establishments selling beer for "on-premises consumption" that are located within 20 feet of a church, can the county commission re-establish [a] distance rule of 300 feet or further?

3. Since Tenn Code Ann. § 57-5-109 prohibits county beer boards from revoking permits on the basis of the proximity of the business to a church or school if a valid permit had been issued to any business on that same location as of January 1, 1993, can a county re-establish a distance rule without revoking the previously issued permit?

OPINIONS

1. Yes. The provisions of Tenn. Code Ann. § 57-5-105 do not allow for different distance standards to be adopted and applied to different types of establishments that sell beer. Only one distance standard may be established and it must apply the same requirement to all establishments selling beer.

2. Yes. Although a beer permit distance standard is void and of no effect if it has been enforced in a discriminatory manner, if all permits issued in violation of the distance requirement are revoked or allowed to expire, the county commission may then reinstate the same or a different distance requirement.

3. Yes. If a county commission reinstates a beer permit distance requirement as

discussed in the answer to question 2, it may not revoke a "grandfathered" permit that meets the requirements of Tenn. Code Ann. § 57-5-109. The continued existence of such a "grandfathered" permit does not invalidate the reinstated distance requirement.

ANALYSIS

1. Op. Tenn. Atty. Gen. No. U93-74 (June 17, 1993) is still valid. In that opinion, this Office stated that a county could not enact and enforce different distance requirements for the issuance of beer permits to stores that sell beer for off-premises consumption as opposed to businesses that sell beer for on-premises consumption. The provisions of Tenn. Code Ann. § 57-5-105 analyzed in that Opinion are now contained at Tenn. Code Ann. § 57-5-105(b)(1). This statute provides that:

> (b) In order to receive a permit, an applicant must establish that:
> (1) 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, the county legislative body having the right to forbid such storage, sale or manufacture within two thousand feet (2,000') of such places of public gatherings in its discretion. Nothing in this subdivision shall apply to places of business that are located in the terminal or main building at public airports serviced by commercial airlines with regularly scheduled flights;

Thus, the activities subject to the footage limitation are the storage, sale or manufacture of beer.

The question references "package stores" and "on premises consumption." Both package stores and establishments that sell beer for consumption at the site of the sale (e.g. restaurants or bars) may be subject to a distance requirement because they engage in at least one of the enumerated activities - the sale of beer. As stated in Op. Tenn. Atty. Gen. No U93-74 (June 17, 1993), a county commission may not incorporate "consumption" into the provisions of Tenn. Code Ann. § 57-5-105(b)(1). A distance requirement that utilizes consumption to distinguish between package stores and businesses that sell beer for on site consumption would go beyond the authority granted to counties by the legislature. *See Howard v. Wilcocks*, 525 S.W.2d 132 (Tenn. 1975).

Different distance requirements for package stores and restaurants or bars would seemingly be a discriminatory application of a county's authority to enforce a distance standard. The Tennessee courts have long recognized the reasonable discretion allowed to counties in the granting, regulation, and revoking of beer permits. *See State ex. rel. Cravens v. Delk*, 175 Tenn. 614, 136 S.W.2d 524 (1940). Yet, "the legislative intent of the footage rule was based upon policy considerations prohibiting the sale of beer within a certain footage of churches, schools or other places of public gathering in order to protect these institutions, **if the county legislative body which passed the footage rule applied the rule consistently and uniformly**." *Youngblood v. Rutherford County Beer Board*, 707 S.W.2d 507, 509

(Tenn. 1986). (Emphasis added).

Although *Youngblood* and similar cases addressed situations in which a county legislative body had invalidated its distance requirement by issuing permits in violation of the footage limitation and they did not address the factual question presented - whether a county legislative body may promulgate different distance standards for package stores and restaurant or bars - the general prohibition against discriminatory application of the rule is still applicable. As noted *supra*, all of these businesses may be subject to a distance requirement because they engage in the sale of beer. To apply one distance standard to one type of business that sells beer while applying another distance standard to another type of business that sells beer appears to be impermissible.

2. The *Youngblood* case cited *supra* makes it clear that a beer permit distance rule is void and of no effect if it has been enforced and applied in a discriminatory manner. Because the Rutherford County Beer Board had issued several permits in violation of its own distance rule, the Supreme Court held that "[d]iscriminatory enforcement having been established, any distance ordinance is completely removed as a valid ground for denial of a beer permit." *Youngblood* at 946, *citing Knox County Quarterly Court*, 541 S.W.2d 946 (Tenn. 1976). Thus, if a county has issued beer permits to businesses within 20 feet of a church, it can not enforce its 300 foot distance rule so long as such a business, or any other business, continues to use its beer permit in violation of the rule.

The *Youngblood* Court did, however, suggest a manner in which a county could reestablish and validly enforce its distance rule: "[r]estoration of the validity of a distance ordinance can only be achieved by revocation or other elimination, such as attrition, of the discriminatorily-issued permits and licenses." *Youngblood* at 808. A county that has not enforced or has discriminatorily enforced its beer permit distance rule must revoke all permits issued in violation of the distance standard it seeks to apply or wait for those permits to become invalid through disuse, close of business, or other attrition if it desires to enforce the rule again.

Tenn. Code Ann. § 57-5-108 details the processes by which a beer board or other appropriate governmental body may revoke a beer permit as well as the permissible reasons for revoking a permit. Yet, a beer board has the right to revoke a beer permit for any of the reasons which would disqualify an applicant for a beer permit in the first instance. *See Midgett v. Smith*, 591 S.W.2d 765 (Tenn. 1979). If a business did not qualify for a beer permit in the first instance because it did not comply with the distance rule, its permit is subject to revocation, so long as the county uniformly applies the rule, and revokes all permits invalidly issued in violation of it.

3. Tenn. Code Ann. § 57-5-109 provides that

> A city or county shall not suspend, revoke or deny a permit to a business engaged in selling, distributing or manufacturing beer on the basis of the proximity of the business

> to a school, residence, church, or other place of public gathering if a valid permit had been issued to any business on that same location as of January 1, 1993. This section shall not apply if beer is not sold, distributed, or manufactured at that location during any continuous six-month period after January 1, 1993.

These provisions are clear and straight-forward. Simply put, a business located at a site for which a beer permit was validly issued on or before January 1, 1993 will not lose its beer permit for violating a new or newly reinstated distance ordinance. This protection ceases if no beer is sold, distributed, or manufactured at the site for six continuous months.

If a county desires to reinstate its previously inconsistent and discriminatorily applied beer permit distance rule by revoking the permits of those businesses that are in violation of the ordinance, it may do so. However, the "grandfathering" provisions of Tenn. Code Ann. § 57-5-109 apply. A beer permit that was validly issued on or before January 1, 1993 continues in force. The continued existence of such "grandfathered" permits will not invalidate the County's reinstatement of the rule any more than a new rule would be invalidated by such "grandfathered" permits.

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