S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 02-023

Hours for Beer Sales on Sundays

QUESTIONS

1. In a county in which several municipalities have approved sales of liquor by the drink, if one municipality has declined to take action as provided in Tenn. Code Ann. § 57-5-301 to override the 10:00 a.m. Sunday sale time for liquor by the drink, does the starting time for beer sales in the rest of the county remain at 10:00 a.m.?

2. Does this ruling thereby allow for 10:00 a.m. Sunday beer sales at package stores or convenience stores that have a permit to sell beer for off-premises consumption?

3. If one city chooses to limit Sunday liquor sales to another time, i.e., noon, what would be the starting time for Sunday beer sales in the rest of the county?

OPINIONS

1. Yes. The starting time for the sale of beer remains at 10:00 a.m., as set by the Alcoholic Beverage Commission.

2. Yes. The 10:00 a.m. starting time for beer sales is applicable to sales by stores for off-premises consumption, as well as sales for consumption on the premises.

3. 10:00 a.m., except in municipalities that have not approved sales of liquor by the drink and have established different hours for Sunday beer sales.

ANALYSIS

This Office has been advised that all of these questions have been presented because of uncertainties regarding the effect of Tenn. Code Ann. § 57-4-203(d)(5) and Alcoholic Beverage

Commission Rule 0100-1-.03(2). As amended by Chapter 819, Public Acts 2000, Tenn. Code Ann. § 57-4-203(d) added a new subpart (5) as follows:

> (5) The Commission is authorized to extend the hours of sale in the jurisdictions which have approved the sale of liquor by the drink by referendum. Upon petition by any licensee or group of licensees under this chapter, the commission may, after conducting a rule-making hearing pursuant to the Uniform Administrative Procedures Act, adopt rules expanding the hours during which it is legal to sell or give away alcoholic beverages, malt beverages and wine, pursuant to this chapter. The Commission is hereby directed to consider such factors as the hours of sales in contiguous states and the need to compete with jurisdictions elsewhere in the country for convention and tourism business. The governing body of any municipality or metropolitan government which has approved liquor by the drink by referendum may, at any time, opt out of any extension of hours adopted under this section by passage of a resolution. Further, any municipality or metropolitan government that has opted out may, at a later date, opt in by passage of a resolution.

Chapter 819, Public Acts 2000 also made other minor changes to the language of Tenn. Code Ann. § 57-4-203(d) so as to make the provisions of the statute internally consistent.

After enactment of Chapter 819, the Alcoholic Beverage Commission did change the hours for the sale of liquor by the drink by adoption of a new rule. Rule 0100-1-.03(2), "Consumption on Licensed Premises" reads "[n]o licensee shall permit alcoholic or malt beverages to be consumed on the licensed premises between the hours of 3 a.m. and 10 a.m. on Sunday." Before Chapter 819 was enacted and the new rule promulgated pursuant to it, Tenn. Code Ann. § 57-4-203(d) prohibited the sale of liquor by the drink between the hours of 3 a.m. and 12:00 noon. Thus, those establishments and businesses with the appropriate license may sell liquor drinks as early as 10:00 a.m. on Sunday mornings, as opposed to having to wait until noon.

For purposes of this discussion, it is important to note that the term "malt beverages" as used in this statute does not refer to "beer" which has an alcohol content of 5% or less. The regulation of beer sales is discussed in chapter 5 of Title 57 of the Tennessee Code. Tenn. Code Ann. § 57-5-101 provides in pertinent part that

> (a) It is lawful in this state to transport, store, sell, distribute, possess, receive and/or manufacture beer of alcoholic content of not more than five percent (5%) by weight, or any other beverage of like alcoholic content, except wine as defined in § 57-3-101, subject to the privilege taxes and

> regulations hereinafter set out and provided . . .
> (b) For purposes of this chapter, "beer" means the beverages described in subsection (a).

Tenn. Code Ann. § 57-5-301(b)(5), which is discussed *infra,* incorporates the definition of beer found at Tenn. Code Ann. § 57-6-102(1): "beer, ale or other malt beverages, or any other beverages having an alcoholic content of not more than five percent (5%) by weight, except wine as defined in § 57-3-101."

Pursuant to Tenn. Code Ann. § 57-4-201, the Alcoholic Beverage Commission administers parts 1-3 of chapter 4, Title 57 of the Tennessee Code. Neither beer nor "malt beverages" are mentioned in the licensing provisions of Tenn. Code Ann. § 57-4-201; only "wine" and "alcoholic beverages" are referenced. "Alcoholic beverage" or "beverage" is defined, for purposes of chapter 4 of Title 57 of the Tennessee Code as

> alcohol, spirits, liquor, wine, and every liquid containing alcohol, spirits, wine and capable of being consumed by a human being, **other than patented medicine or beer where the latter contains an alcoholic content of five percent (5%) by weight or less.**

Tenn. Code Ann. § 57-4-102(1) (emphasis added). Thus, throughout this opinion, "beer" refers to beer that has an alcohol content of 5% or less.

In addition, this Office assumes that the questions refer to a county that has not approved liquor by the drink through a county-wide referendum, but does contain more than one municipality that has approved liquor by the drink through its own referendum.

1. In counties that have not approved liquor by the drink by means of a county-wide referendum, but contain several municipalities that have approved liquor by the drink, the hours for the sale of beer in areas of the county outside of incorporated municipalities, and within those municipalities that have adopted liquor by the drink, will be those set by the Alcoholic Beverage Commission for the sale of liquor by the drink. This is clear from the plain language of Tenn. Code Ann. § 57-5-301(b)(5):

> In any county in which an incorporated municipality has authorized the sale of liquor by the drink, as provided for in chapter 4 of this title, the hours for the sale of beer as defined in § 57-6-102(1), in that part of the county outside of incorporated municipalities and in all of its municipalities which have authorized the sale of liquor by the drink, **shall be the same as the hours authorized by the rules and regulations promulgated by the alcoholic beverage commission for establishments selling liquor by the drink**; provided, however, that the county legislative body of any such

> county and the governing body of each municipality within the county which has authorized the sale of liquor by the drink shall have the authority to extend the hours for the sale of beer as defined in § 57-6-102(1), within the territorial jurisdiction of each governing body. This subdivision shall not apply to counties and municipalities that have legalized the sale of liquor by the drink by a county-wide referendum. (emphasis added)

Because the county that is the subject of this opinion request has not approved liquor by the drink by means of a county-wide referendum, the hours for the sale of beer will be those set for the sale of liquor by the drink by the Alcoholic Beverage Commission, in areas outside of incorporated municipalities and in those municipalities that have approved liquor by the drink. Because the current hours for the sale of liquor by the drink as set by the Alcoholic Beverage Commission begin at 10:00 a.m. on Sundays, beer sales in these areas of the county may begin as early as 10:00 a.m. on Sundays.

2. The question refers to "package stores" and "on premises consumption." Tennessee's beer laws do not distinguish between beer permit holders that sell beer for off-premises consumption and those that sell beer for on-premises consumption, unless specifically stated in an applicable statute. Tenn. Code Ann. § 57-5-103(a)(1) prohibits any businesses from engaging in the "sale" of beer without an appropriate city or county permit. One permit is sufficient for a business that engages in the sale of beer for both on-premises and off-premises consumption. Tenn. Code Ann. § 57-5-103(a)(4).

In Op. Tenn. Atty. Gen. No U93-74 (June 17, 1993) and Op. Tenn. Atty. Gen. No. 01-157 (October 25, 2001), this Office stressed that a county commission may not incorporate a "consumption" requirement into the provisions of Tenn. Code Ann. § 57-5-105(b)(1) and set distance requirements for package stores and grocery stores that differ from businesses that sell beer for on-site consumption. This Office noted in Opinion No. 01-157 that 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. *Howard v. Wilcocks*, 525 S.W.2d 132 (Tenn. 1975). This Office noted in the same Opinion that different distance requirements for package stores and restaurants or bars would constitute a discriminatory application of a county's authority to enforce a distance standard.

The cases cited in these opinions addressed situations in which a county legislative body had invalidated its beer permit distance requirement by issuing permits in violation of its footage limitation. They did not address the question presented — whether the hours for beer sales at a package store will be the same as those for beer sales at a business that offers on-site consumption. Nevertheless, the general prohibition against discriminatory application of an applicable rule still applies. There is nothing in the applicable statutes or ABC rules that suggests that hours for the sale of beer apply only to either on-site consumption businesses or businesses that sell beer for off-site consumption. The hours are applicable to

all beer sales.

3. The final question posits a hypothetical situation in which an incorporated municipality that has approved liquor by the drink decides by resolution to "opt out" of the expanded time for Sunday liquor-by-the-drink sales in order to return to the previous starting time of 12:00 noon. The question becomes the effect, if any, such a resolution has on the times for beer sales. The short answer is that the passage of such a resolution has no effect on the hours for beer sales.

As discussed in the answer to question one, in counties that have not approved liquor by the drink by means of a county-wide referendum, but contain municipalities that have approved liquor by the drink by municipal referendum, the hours for the sale of beer in areas of the county outside of incorporated municipalities, and within those municipalities that allow liquor by the drink, will be those set by the Alcoholic Beverage Commission for the sale of liquor by the drink. The hours for the sale of liquor by the drink as set by the Alcoholic Beverage Commission apply to beer sales as described in Tenn. Code Ann. § 57-5-301(a)(5) and as discussed in the answer to question one. Currently, the ABC has set 10:00 a.m. as the starting time for the sale of liquor by the drink on Sundays, and, as a result, this is also the starting time for beer sales on Sundays in the parts of the county outside of incorporated municipalities, and within those municipalities that have adopted liquor by the drink. Only incorporated municipalities that have not adopted liquor by the drink would remain free to set their own hours for beer sales.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

M. TY PRYOR
Assistant Attorney General

Requested by:

The Honorable Jo Ann Graves
State Senator
18th Senatorial District
10 Legislative Plaza
Nashville, Tennessee 37243-0218

The Honorable Mike McDonald
State Representative
17 Legislative Plaza
Nashville, Tennessee 37243-0144

The Honorable Diane Black
State Representative
113 War Memorial Building
Nashville, Tennessee 37243