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Opinion No. 06-082

Ability of Municipalities to Prevent Individuals Convicted of D.U.I. from Holding a Beer Permit or Being Employed at an Establishment That Has a Beer Permit

QUESTION

May a municipality adopt an ordinance pursuant to the authority granted by Tenn. Code Ann. § 57-5-106(a) prohibiting a person convicted of driving under the influence of alcohol ("D.U.I.") from holding a beer permit or from being employed at an establishment that has a beer permit?

OPINION

Under Tenn. Code Ann. § 57-5-106(a), Tennessee municipalities may prohibit a person convicted of D.U.I. from holding a beer permit or from being employed at an establishment that has a beer permit, but may not prohibit individuals possessing server permits issued by the Alcoholic Beverage Commission under chapter 3, part 7 of title 57 from working at establishments that also have beer permits.

ANALYSIS

Tenn. Code Ann. § 57-5-106(a) grants municipalities power to issue beer permits. It authorizes municipalities to pass 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" municipality, but also provides that:

> 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. The ordinance power granted to a municipality by this section does not permit a municipality to impose training or certification restrictions or requirements on employees of a permittee if those employees possess a server permit issued by the alcoholic beverage commission pursuant to chapter 3, part 7 of this title.

Under this grant of authority, "Tennessee municipalities have extensive power 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).

For instance, in *Barnes*, the city of Dayton enacted an ordinance to "(1) Prohibit the sale of beer for consumption on the premises, (2) Restrict the sale of beer for consumption off the premises to two (2) outlets, (3) Prohibit the sale of beer on Market Street and within a block on either side, and (4) Regulate the hours and days when beer may be sold." *Barnes*, 216 Tenn. at 404; 392 S.W.2d at 815. This ordinance was upheld. *Id.* at 411; 818. The Court pronounced, "It was not the purpose of the Legislature to make it mandatory upon the municipality to issue licenses for the sale of beer within its corporate limits if by so doing the public morals and welfare would be affected, and with respect as to what is injurious a very large discretion, as previously stated, is vested in the municipal authorities." *Grubb v. Mayor and Aldermen of Morristown*, 185 Tenn. 114, 119, 203 S.W.2d 593, 595 (1947) (*quoting Cravens v. Storie*, 175 Tenn. 285, 289, 133 S.W.2d 609, 610 (1939)). This "enabling statute [Tenn. Code Ann. § 57-5-106(a), previously § 57-5-108] has been given the broadest possible construction by th[e Supreme] Court." *Goodlettsville Beer Bd. v. Brass A Saloon*, 710 S.W.2d 33, 35 (Tenn. 1986). So long as this power is exercised "in good faith and not . . . in a discriminatory and arbitrary manner," municipalities may regulate and restrict the sale of beer "as they think advisable." *DeCaro v. City of Collierville*, 213 Tenn. 254, 259, 373 S.W.2d 466, 469 (1963).

None of the reported cases address a municipal restriction like that posited in the instant request. The only decision in this State striking down an ordinance on the grounds noted in *DeCaro* was in reference to an ordinance "forbid[ding] the issuance of a permit to any applicant whose premises contains less than 3,500 sq. ft. of heated, enclosed floor space." *The Pantry, Inc. v. City of Pigeon Forge*, 681 S.W.2d 23 (Tenn. 1984). The Supreme Court there agreed with the trial court that the power "to regulate the sale of beer may not be exercised in a discriminatory or arbitrary manner. The restrictions and regulations chosen by the City must be such '. . . as will promote public health, morals, and safety . . ..'" *Id.* at 24. The Court reasoned,

> The record in this case fails to disclose that the requirement of 3,500 sq. ft. of enclosed, heated floor space bears any reasonable relation to the public health, morals and safety of the people of Pigeon Forge . . . Nor does the record contain any evidence that would justify a conclusion that the plaintiff's premises which contains 2,400 sq. ft. of heated, enclosed floor space is in any manner not suitable as a location for the sale of beer for consumption off-the-premises or would in any manner be inimical to the public health, morals and safety of the people of Pigeon Forge. This is not to say that a city or town is without power to impose a restriction requiring a reasonable minimum amount of heated, enclosed floor space; we merely hold

> that the requirement of 3,500 sq. ft. of such space is unreasonable and arbitrary.

Id.

Although the posited ordinance is substantially different from the typical restrictions on beer sellers that appear in the case law, this Office is of the opinion that the statutory grant of discretion to municipalities in Tenn. Code Ann. § 57-5-106(a) would permit municipalities to pass an ordinance prohibiting the issuance of beer permits to individuals who have been convicted of D.U.I. Unlike the ordinance in *The Pantry*, the posited regulation would bear a reasonable relationship to "public health, morals and safety" because the criminal offense of D.U.I. and the operation of an establishment selling beer both involve the use of alcoholic beverages. A D.U.I. conviction demonstrates an abuse of such substances, and one who sells beer is in a situation offering greater potential for abuse of such substances than is possessed by the typical person. Given the historically broad discretion accorded to municipalities when exercising their authority to regulate the issuance of beer permits under Tenn. Code Ann. § 57-5-106(a), this relationship is reasonable enough to pass statutory muster.

This rationale justifies the proposed prohibition on holding a beer permit, but it does not apply to any individual who holds a server permit under Tenn. Code Ann. §§ 57-3-701 *et seq.* Tenn. Code Ann. § 57-5-106(a) prohibits municipalities from "impos[ing] training or certification restrictions or requirements on employees of a permittee if those employees possess a server permit issued by the alcoholic beverage commission pursuant to chapter 3, part 7 of this title." This clause of the statute makes clear that a municipality may not place further restrictions upon any individual who holds a server permit issued by the Alcoholic Beverage Commission. Therefore, the posited ordianance could not be applied to such individuals. In other instances, Tenn. Code Ann. § 57-5-106(a) would permit a municipality to prohibit the employment of an individual convicted of D.U.I. under the rationale above, because this would, in practice, amount to a restriction on the permit holder's hiring of such a person, which could be enforced through the municipality's power over the permit holder.

Both prongs of the posited ordinance may therefore be accomplished under the authority of Tenn. Code Ann. § 57-5-106(a), with the significant exception that the municipality's power to prohibit an individual convicted of D.U.I. from working at an establishment with a beer permit does not extend to an individual who holds a valid server permit issued by the Alcoholic Beverage Commission.

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