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Opinion No. 08-188

County and City Authority to Regulate Vendors on State Highways

QUESTION

Do counties and cities have the authority to regulate street vendors, tent vendors, and/or vendors doing business along state highways in their respective jurisdictions?

OPINION

Counties are authorized and required to issue permits for transitory businesses subject to the requirements of Tenn. Code Ann. §§ 62-30-101, *et seq.* But this statutory scheme is not exclusive. Counties also may exercise general regulatory authority as described in Tenn. Code Ann. § 5-1-118(c)(1). Similarly, cities incorporated under general act charters have general regulatory authority. Depending on the purpose for the regulation, these provisions could authorize county and city regulation of itinerant vendors. The authority of cities incorporated under private acts or home rule charters would depend on the provisions of those acts or charters. While statutes creating the state highway system accord some responsibility for state highway maintenance and safety to state officials, they do not appear to prevent local governments from regulating activity that takes place along state highways. It appears, therefore, that local governments may regulate itinerant vendors and temporary sales activity that takes place along a state highway. The regulation should not conflict with Department of Transportation regulations or interfere with the ability of state officials to carry out their responsibilities with regard to the highways.

ANALYSIS

This opinion addresses the authority of counties and cities to regulate street vendors, tent vendors, and/or vendors doing business along state highways in their respective jurisdictions. We assume this question refers to itinerant vendors as well as temporary sales activity in the respective city or county. Of course a definitive answer to this question depends on specific facts and circumstances, including, among other factors, applicable private acts and charter provisions, as well as the type of regulation contemplated. This opinion will not address sales or other state tax law as applied to itinerant vendors and temporary sales activity.

Under Tenn. Code Ann. §§ 62-30-101, *et seq.*, a "transitory vendor" must obtain a mobile vendor's permit from the county clerk before conducting business in a county. The term "transitory vendor" is defined in Tenn. Code Ann. § 62-30-101(3). The statute exempts fairs, trade shows, flea markets, charitable organizations, and certain other organizations and activities from this requirement. Tenn. Code Ann. § 62-30-104. The vendor must furnish proof of identity, a description of motor vehicles used in conducting business in the county, and the dates, place or places, and times during which business shall be conducted in the county. Tenn. Code Ann. § 62-30-102. Thus, counties are authorized and required to issue permits for transitory businesses subject to the requirements of Tenn. Code Ann. §§ 62-30-101, *et seq*. This statutory scheme, however, does not appear to be exclusive or to preempt further local regulation.

State statutes grant cities and counties broad regulatory and police powers. These powers could be used as a basis for reasonable regulation of itinerant vendors or temporary sales activity. The power of any particular city will depend, first, on the charter under which it was incorporated. The authority of cities incorporated under private acts or home rule charters would depend on the provisions of those acts or charters. General act city charters grant broad regulatory powers to cities incorporated under those acts. For example, a city incorporated under the Mayor-Aldermanic form of government, Tenn. Code Ann. §§ 6-1-101, *et seq.*, may exercise the general powers listed under Tenn. Code Ann. § 6-2-201. The following powers would be relevant to regulation of street and tent vendors:

> Every municipality incorporated under this charter may:
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> * * * *
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> (20) License and regulate all persons, firms, corporations, companies and associations engaged in any business, occupation, calling, profession or trade not prohibited by law;[1]
>
> (21) Impose a license tax upon any animal, thing, business, vocation, pursuit, privilege or calling not prohibited by law;
>
> (22) Define, prohibit, abate, suppress, prevent and regulate all acts, practices, conduct, businesses, occupations, callings, trades, uses of property and all other things whatsoever detrimental, or liable to be detrimental, to the health, morals, comfort, safety, convenience or welfare of the inhabitants of the municipality, and exercise general police powers;
>
> (23) Prescribe limits within which business occupations and practices liable to be nuisances or detrimental to the health, morals, security or general welfare of the people may lawfully be established, conducted, or maintained[.]

[1] For example, state law already makes it illegal for itinerant physicians or vendors "by writing, print, or other methods, to profess to cure or treat diseases of deformity by any drug, nostrum, manipulation or other expedient in this state." Tenn. Code Ann. § 63-6-202. Local governments, therefore, may not attempt to license or regulate this activity.

Tenn. Code Ann. § 6-2-201(20)-(23). Cities incorporated under the City Manager-Commission Charter and the Modified Manager-Council Charter have similar authority. Tenn. Code Ann. § 6-19-101 (City-Manager Commission Charter); Tenn. Code Ann. § 6-33-101 (Modified Manager-Council Charter). Depending on the purpose of proposed regulation, any of these powers could authorize a city incorporated under the general act charters to regulate itinerant vendors and temporary sales activity.

Under Tenn. Code Ann. § 5-1-118(c)(1), within certain limits, counties may exercise powers granted to cities under Tenn. Code Ann. § 6-2-201(22) and (23), quoted above. This statute provides:

> any county may, by adoption of a resolution by a two-thirds (2/3) vote of their respective legislative bodies, exercise those powers granted to all or certain municipalities by § 6-2-201(22) and (23), except as provided in subsection (b) [normal agricultural activities] and subdivisions (c)(2) and (3). Any such regulations shall be enacted by a resolution passed by a two-thirds (2/3) vote of the county legislative body. The powers granted to counties in this subdivision (c)(1) apply only within the unincorporated areas. Nothing in this subdivision (c)(1) may be construed to allow any county to prohibit or in any way impede any municipality in exercising any power or authority the municipality may lawfully exercise. If, prior to April 17, 2002, a county has adopted a resolution by a two-thirds (2/3) vote, pursuant to previous acts enacted by the general assembly, to exercise the powers granted in accordance with this subdivision (c)(1), no further action by the legislative body of such county is necessary to continue exercising such powers.

Tenn. Code Ann. § 5-1-118(c)(1). The powers granted under this statute do not apply to certain practices subject to regulation under statutes enumerated in Tenn. Code Ann. § 5-1-118(c)(2).

The request specifically asks whether county and city regulation of itinerant vendors or temporary sales activity could extend to activities along state highways located in the city or county. We have reviewed the statutes creating and regulating the state highway system, Tenn. Code Ann. §§ 54-5-101, *et seq.* While these statutes accord some responsibility for state highway maintenance and safety to state officials, they do not appear to prevent local governments from regulating activity that takes place along state highways. It appears, therefore, that local governments may regulate itinerant vendors and temporary sales activity that takes place along a state highway. The regulation should not conflict with Department of Transportation regulations or interfere with the ability of state officials to carry out their responsibilities with regard to the highways.

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