S T A T E O F T E N N E S S E E
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Opinion No. 09-11

Consumption of Alcoholic Beverages on the Premises in Unincorporated Areas of a County

QUESTIONS

1. Upon a county's passage of a properly conducted referendum to allow the sale of alcoholic beverages for consumption on the premises, may alcoholic beverages be sold for consumption on the premises in unincorporated areas of a county?

2. If the answer to the question 1 is "no," then can the general assembly pass legislation that would allow the legal sale of alcoholic beverages for consumption on the premises in unincorporated areas of a county that has previously passed a county wide referendum allowing such sales throughout the county?

3. If the answer to question 2 is "yes," then would legislation be constitutionally defensible if the general assembly were to only allow such sales in counties having a charter form of government?

OPINIONS

1. No. Tenn. Code Ann. § 57-4-103, which incorporates the restrictions applicable to retail sales set forth in Tenn. Code Ann. § 57-3-106, permits sales of alcoholic beverages for consumption on the premises only in municipalities or in unincorporated areas of a county contained within a civil district with a population of 30,000 people or more, so long as there is not a municipality located within the civil district.

2. Yes. The general assembly may enact any legislation that is not prohibited by the Tennessee or United States Constitutions, and the legislation described would not contravene any provision of either constitution.

3. Yes. The legislation would be constitutionally defensible as a general law made under the police power of the general assembly. Furthermore, there is a rational basis for only including counties with a charter form of government.

ANALYSIS

1. Tennessee Code Annotated, Title 57, Chapter 4 addresses consumption of alcoholic beverages on the premises. Pursuant to Tenn. Code Ann. § 57-4-103(a)(1):

> The provisions of this chapter shall be effective in any jurisdiction which authorizes the sale of alcoholic beverages for consumption on the premises in a referendum in the manner prescribed by § 57-3-106.

This office has previously opined that all of the provisions contained in Tenn. Code Ann. § 57-3-106 apply to sales of liquor for the consumption on the premises as well as to sales of liquor in package stores. In Op. Tenn. Att'y Gen. 02-092 (Aug. 28, 2002), this office opined:

> [A] referendum to authorize the sale of liquor by the drink is to be conducted in the same manner as a referendum to authorize the sale of liquor not for consumption on the premises (i.e., through package stores) as described in § 57-3-106. While making this general reference, § 57-4-103 does not specify whether it incorporates merely the mechanics for a referendum set out in § 57-3-106, or all of the intricate provisions of that section. Nevertheless, this Office has previously indicated that all of the provisions contained in § 57-3-106 apply to sales of liquor by the drink as well as to sales of liquor in package stores.

See also Op. Tenn. Att'y Gen. 87-139 (Aug. 18, 1987) (county referendum authorizing liquor by the drink has the effect of permitting such sales only in the municipalities of the county). Therefore, it has been, and continues to be, the opinion of this office that the provisions contained in Tenn. Code Ann. § 57-3-106 that govern retail package sales also apply to sales of liquor for consumption on the premises. The question whether alcoholic beverages may be sold for consumption on the premises in unincorporated areas of a county thus must be examined within the statutory framework contained in Tenn. Code Ann. § 57-3-106.

Tenn. Code Ann. § 57-3-106(a)(1) authorizes voters of any county to decide whether alcoholic beverages may be sold within the county. That subsection also provides that if such sales are authorized, retail sales may only be made in certain areas. [1] Subsection (a)(1) states, in relevant part:

> [P]rovided, that sales at retail as herein defined shall be made only in the municipalities in such county as herein defined, or within a civil district of such county, which district shall have a population of thirty thousand (30,000) persons or over according to the federal census for the year 1950 or any subsequent

[1] "Sale at retail" means a sale to a consumer or to any person for any purpose other than for resale. Tenn. Code Ann. § 57-3-101(16).

> census, but which civil district shall not have lying either wholly or partly within its boundaries a municipality as herein defined.[2]

The objective of statutory construction is to ascertain and give effect to the intent of the legislature. *In re Adoption of A.M.H.*, 215 S.W.3d 793 (Tenn. 2007). If the statutory language is plain and unambiguous, courts will apply its plain meaning. *Brown v. Erachem Comilog, Inc.*, 231 S.W.3d 918 (Tenn. 2007). In considering the meaning of a statute, courts also apply a rule of construction that the express mention of a subject or subjects in a statute means the exclusion of subjects that were not mentioned. *Wells v. Tenn. Bd. of Regents*, 231 S.W.3d 912 (Tenn. 2007).

The language of Tenn. Code Ann. § 57-3-106 clearly and expressly states that, in counties where sales of alcoholic beverages are permitted, such sales may be made in municipalities and certain civil districts only. There is no mention about sales in other parts of a county. The omission of such areas from the statutory language indicates that the legislature did not intend to allow such sales in the unincorporated areas of counties that do not lie within a civil district in which sales are expressly authorized by Tenn. Code Ann. § 57-3-106(a)(1).

This analysis is consistent with Op. Tenn. Att'y Gen. 87-139 (Aug. 18, 1987), which opined that the passage of a county referendum that authorizes the sale of liquor for consumption on the premises has the effect of permitting such sales within municipalities that meet the definition of municipality in Tenn. Code Ann. § 57-3-101(11).

2. Your question deals with hypothetical legislation that would allow the sale of alcoholic beverages for consumption on the premises in unincorporated areas of a county that has previously passed a referendum allowing such sales in accordance with Tenn. Code Ann. § 57-3-106. As discussed above such sales are currently prohibited.

The State's authority to regulate the possession, sale, and distribution of alcoholic beverages rests with the general assembly. *Martin v. Beer Bd.*, 908 S.W.2d 941 (Tenn. App. 1995). The general assembly has the authority to prohibit the manufacture and sale of alcoholic beverages and, therefore, has the power to regulate the sale and distribution of alcoholic beverages pursuant to the police powers of the state. *Metropolitan Government of Nashville & Davidson County v. Shacklett*, 554 S.W.2d 601 (Tenn. 1977). The proposed legislation would be constitutionally defensible, so long as the legislation is not prohibited under either the Tennessee or United States Constitutions. *Fentress County Beer Bd. v. Cravens*, 356 S.W.2d 260 (1962). As further discussed below, it is the opinion of this office that such legislation would be constitutionally defensible.

3. Art. XI, § 8 of the Tennessee Constitution prohibits the legislature from enacting laws for the benefit of a particular individual or individuals. It states, in relevant part:

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for

[2] A "municipality" is defined as an incorporated town or city having a population of one thousand (1,000) persons or more by the federal census of 1950 or any subsequent federal census. Tenn. Code Ann. § 57-3-101(a)(11).

> the benefit of individuals inconsistent with the general laws of the land, nor to pass any law granting to any individual or individuals, rights, privileges, immunitie, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

In determining whether or not a statute violates Article XI, § 8, the first consideration is whether the statute suspends a general law that is "mandatorily applicable statewide." *Rector v. Griffith*, 563 S.W.2d 899, 904 (Tenn. 1978). The authority of the legislature may not be used to suspend a general law which is mandatorily applicable statewide unless there is a reasonable or rational basis for the classification or exception. *Id.*; *City of Chattanooga v. Davis*, 54 S.W.3d 248, 276 (Tenn. 2001).

The first consideration, therefore, is whether the hypothetical legislation, that would allow only counties with a charter form of government to legalize the sale of alcoholic beverages for consumption on the premises in unincorporated areas of a county, would suspend a general law that is mandatorily applicable statewide.[3] Currently Tenn. Code Ann. § 57-3-106(a)(1) has provided a general scheme for the regulation of sales of alcoholic beverages for consumption on the premises throughout the state. The hypothetical legislation enabling counties with a charter form of government to allow the sale of alcoholic beverages for consumption on the premises in unincorporated areas of a county would appear to suspend the general law provided in Tenn. Code Ann. § 57-3-106(a)(1).

However, Art. XI, § 8 of the Tennessee Constitution does not prohibit the legislature from enacting laws that might benefit a particular class. Such a statute will be upheld so long as the statute will apply to any county that can bring itself into the same situation and circumstances as are embraced by the statute. In such a situation, courts will construe the statute as being general in nature. *Cole Mfg. Co. v. Falls*, 90 Tenn. 466, 16 S.W. 1045 (1891).

A properly drafted statute that permitted the retail sale of alcoholic beverages in the unincorporated areas of a county that voted in favor of such sales would apply to any county that could bring itself within the same situation and circumstances (enacting a charter form of government) that would be embraced by that statute. It would therefore be a law of general application, and would probably be upheld.

The 1978 amendments to the Tennessee Constitution revised Article VII, Section 1, added a third paragraph as follows:

> The General Assembly may provide alternative forms of county government including the right to charter and the manner by which a referendum may be called. The new form of government shall

[3] It is important to note that, according to the University of Tennessee, County Technical Assistance Service, at this time Knox and Shelby are the only counties with a charter form of government. *See, e.g.*, the *Tennessee County Government Handbook*, which can be found at http://www.ctas.tennessee.edu *last viewed January 16, 2009.*

> replace the existing form if approved by a majority of the voters in the referendum.

The county charter enabling law is found in Tenn. Code Ann. § 5-1-207 *et seq.* Charter counties have been given the discretion by the general assembly to alter the form or structure of the county government through the charter writing and referendum approval process. Tenn. Code Ann. § 5-1-203. Additionally, a charter county may adopt ordinances applicable to its locality without having to solicit the approval of the state legislature. Tenn. Code Ann. § 5-1-211. The county legislative body is also authorized to provide penalties for the violation of its ordinances but the penalties cannot exceed statutory maximums. *Id.*

Under these provisions, any county could adopt a charter form of government if its citizenry, by referendum, chose to do so. If a county adopts a charter form of government, under the hypothetical legislation, sales of alcoholic beverages for on premises consumption would be permitted so long as the other requirements of Tenn. Code Ann. § 5-1-201 *et seq.* are satisfied. Since it is possible that other counties could avail themselves of the advantages of the hypothetical legislation, it would therefore be a general law and not implicate Article XI, § 8.

Assuming Article XI, § 8 is implicated, however, it would then be necessary to determine whether there is a rational basis for allowing only counties with a charter form of government to permit the sale of alcoholic beverages for consumption on the premises in unincorporated areas of the county.[4]

There would be a rational basis for authorizing charter form county governments to permit sales of alcoholic beverages for on premises consumption. That form of county government offers the flexibility to enable it to adopt the appropriate mechanisms to effectively administer and enforce such laws. For example, such a form of county government could more usefully create the needed administrative bodies that might be required to regulate such sales.[5] Since this office can speculate as to a reason that the general assembly might have for enacting such hypothetical legislation, it, therefore, is the opinion of this office that legislation that would allow counties with a charter form of government to allow the sale of alcoholic beverages for consumption on the premises in unincorporated of the county would be constitutionally defensible.

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[4] If any possible reason can be conceived to justify the classification, it will be upheld and deemed reasonable. *Stalcup v. City of Gatlinburg*, 577 S.W.2d 439 (Tenn. 1978).

[5] In order to facilitate the sale of alcoholic beverages for consumption on the premises throughout the county, the county legislative body has the ability to adopt and enforce ordinances, as well as establish the administrative body that would regulate such sales with appropriate approval by the citizenry.

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