

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO Box 20207
NASHVILLE, TENNESSEE 37202

June 12, 2009

Opinion No. 09-118

Validity of Local Ordinance Prohibiting Firearms in Establishment with Beer Permit

QUESTION

May a municipality, under the authority of Tenn. Code Ann. § 57-5-106, adopt a local ordinance that would make it unlawful for any person to bring a firearm onto the premises of an establishment with a permit to sell beer, in light of the General Assembly's newly enacted legislation, found in House Bill 962, which exempts handgun carry permit holders from the criminal prohibition against possessing a firearm within a building where alcoholic beverages are served?

OPINION

No. While municipalities have broad discretion to regulate the sale of beer through the permit process as described in Tenn. Code Ann. § 57-5-106, a local ordinance banning “any person” other than on-duty law enforcement officers from possessing a firearm in an establishment with an on-premises beer permit is not the regulation of the sale of beer, but rather is a local regulation pertaining to the possession of firearms and is therefore prohibited by Tenn. Code Ann. § 39-17-1314(a).

ANALYSIS

Tenn. Code Ann. § 39-17-1305(a) provides, in applicable part, that “[i]t is an offense for a person to possess a firearm within the confines of a building open to the public where . . . beer, as defined in § 57-6-102(1), [is] served for on premises consumption.” However, this general prohibition has statutory exemptions to allow law enforcement, military, and shopkeepers of the establishment to lawfully possess firearms in such places, *see* Tenn. Code Ann. § 39-17-1305(c)(1) and (2). The General Assembly has recently passed an additional exemption from this prohibition for authorized handgun carry permit holders. The language of the new law, which is to be codified as Tenn. Code Ann. § 39-17-1305(c)(3), can be found in House Bill 962 and provides that the general criminal prohibition against carrying a firearm in a building where beer is served shall not apply to a person who is:

(A) Authorized to carry a firearm under § 39-17-1351 who is not consuming beer, wine or any alcoholic beverage, and is within the confines of a restaurant that is open to the public and serves alcoholic beverages, wine or beer.

(B) As used in this subdivision (c)(3), “restaurant” means any public place kept, used, maintained, advertised and held out to the public as a place where meals are served and where meals are actually and regularly served, such place being provided with adequate and sanitary kitchen and dining room equipment, having employed therein a sufficient number and kind of employees to prepare, cook and serve suitable food for its guests. At least one (1) meal per day shall be served at least five (5) days a week, with the exception of holidays, vacations and periods of redecorating, and the serving of such meals shall be the principal business conducted.

House Bill 962, Section 1 (passed May 14, 2009, vetoed by Governor on May 28, 2009, veto over-ridden by House on June 3, 2009 and by Senate on June 4, 2009).

The Metropolitan Government of Nashville and Davidson County (Metro) has a local ordinance that makes it unlawful for any person to bring prohibited drugs or bring alcoholic beverages from off-premises without valid identification to any premises issued a beer permit by Metro and makes it unlawful for anyone under age 21 to possess beer except for legitimate employment purposes. *See* Metro Code § 7.08.130 A, B, and C. According to information and documentation supplied to this Office, legislation has been introduced before the Metropolitan Council that would amend Metropolitan Code, Chapter 7.08, entitled “Beer and Alcoholic Beverages.” The amendment is titled “An ordinance amending Chapter 7.08 of the Metropolitan Code to prohibit firearms in any establishment with an on-premises beer permit” and would add the additional prohibition:

It is unlawful for any person:

D. To bring, to cause, or to allow to be brought a firearm onto the premises of any establishment with a retailer’s “on-sale” permit.¹ This prohibition shall not apply to on-duty enforcement officers.

The proposed ordinance further states in the preamble the reasons underlying the legislation:

WHEREAS, the Tennessee General Assembly recently overrode Governor Phil Bredesen’s veto of House Bill 962 [i]n order to allow persons with a handgun carry permit [sic] to bring firearms upon the premises of restaurants that sell alcoholic beverages; and

WHEREAS, Tennessee Code Annotated § 57-5-106 provides that cities and Class B counties, which includes the Metropolitan Government, have the authority to

¹ We assume “on-sale” permit is synonymous with the more familiar “on-premises” beer permit, which allows the consumption of beer on the premises of the location issued a beer permit. *See* Tenn. Code Ann. § 57-5-103.

impose additional restrictions on the sale of beer “as will promote public health, morals and safety”; and

WHEREAS, the Metropolitan Council deems it to be necessary to prohibit persons from carrying firearms upon premises where beer is sold in order to protect the public health, safety and welfare.

Id.

Authority to regulate the sale of beer has been statutorily delegated to local governments and is administered through the permit process.² Tenn. Code Ann. §§ 57-5-103 *et seq.* Tenn. Code Ann. § 57-5-106(a) grants municipalities authority to issue and administer beer permits. Accordingly, municipalities may 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 and may establish a board to which permit applications are to be submitted.

As to the extent of the local government’s authority to administer beer permits, the General Assembly specifically stated:

[T]he 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 subsection does not permit a municipality to establish residency requirements for its applicants. 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.

Tenn. Code Ann. § 57-5-106(a). Based on this statutory grant of authority, this Office has previously opined that “Tennessee municipalities have extensive powers 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*

² This issue involves only the purported regulation of the sale of beer pursuant to the authority granted to local governments in Tenn. Code Ann. § 57-5-106(a). We note the proposed Metro ordinance would not affect establishments serving non-beer alcoholic beverages which have not been issued a beer permit by Metro. Licensing for the sale of “alcoholic beverages,” which includes spirits with an alcoholic content of five percent or more, and thus is generally applicable to sales of hard liquor and wine, is governed by Tenn. Code Ann. §§ 57-3-101 *et seq.* However, permits for the sale of beer are governed by Tenn. Code Ann. §§ 57-5-101 *et seq.* Thus, while regulatory authority over the sale and consumption of beer has been statutorily delegated to local governments, “[t]he Tennessee Alcoholic Beverage Commission has generally been given primary, although not exclusive, responsibility for regulating the distribution and sale of alcoholic beverages other than beer.” *State el rel. Amvets Post 27 v. Beer Bd. of the City of Jellico*, 717 S.W.2d 878, 881 (Tenn. 1986).

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). The Tennessee Supreme Court has declared that “it has long been held in this state that, consistent with T.C.A. § [57-5-106], municipalities have extensive authority to regulate the sale of beer within their boundaries.” *State ex rel. Amvets Post 27 v. Beer Bd. of the City of Jellico*, 717 S.W.2d 878, 881 (Tenn. 1986). Additionally, “[t]he only limits placed on the cities’ regulatory powers are found in the state and federal constitutions, the state statutes, and in the requirement that cities cannot exercise their power in an arbitrary or discriminatory manner.” *Martin v. Beer Bd. for City of Dickson*, 908 S.W.2d 941, 946 (Tenn. Ct. App. 1995) (citing *Beer Bd. v. Brass A Saloon of Rivergate, Inc.*, 710 S.W.2d 33, 35 (Tenn. 1986)).

Accordingly, municipalities have broad authority to regulate sales of beer within their corporate limits through the permit process to promote the public health, morals and safety. Moreover, in exercising this authority, municipalities also have broad discretion in crafting ordinances as long as the regulations are exercised in good faith, are not discriminatory or arbitrary, and do not contradict the state constitution or state statutes. *See DeCaro v. City of Collierville*, 373 S.W.2d 466, 469 (Tenn. 1963). However, the proposed ordinance at issue in this Opinion, amending Chapter 7.08 of the Metropolitan Code to prohibit firearms in any establishment with an on-premises beer permit, more closely resembles regulation of the possession of firearms than an appropriate regulation pertaining to the sale of beer as authorized under Tenn. Code Ann. § 57-5-106(a). The proposed ordinance does not address the conditions for issuance of a beer permit, which would fall under the regulatory power delegated to Metro, but instead directly addresses who may carry a firearm and where it may be carried.

Article I, § 26 of the Tennessee Constitution provides that: “the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.” The Tennessee Supreme Court has recognized that the legislature has the authority, under this section of the Constitution, to enact legislation to regulate the wearing and carrying of arms in public “with a view to prevent crime.” *Andrews v. State*, 50 Tenn. 165, 181, 3 Heisk. 165, 181 (Tenn. 1871). Most significantly, in the late 1980’s the legislature clarified that it reserved to itself all authority pertaining to the regulation of ownership, possession and transportation of firearms. Tenn. Code Ann. § 39-17-1314(a) states:

No city, county, or metropolitan government shall occupy any part of the field of regulation of the transfer, ownership, possession or transportation of firearms, ammunition or components of firearms or combinations thereof; provided, that the provisions of this section shall be prospective only and shall not affect the validity of any ordinance or resolution lawfully enacted before April 8, 1986.

Accordingly, the above-cited provision preempts the field of handgun regulation in public places by a local authority. *See also* Op. Tenn. Att’y Gen. No. 95-118 (Nov. 28, 1995).

It is well established that a municipality “cannot adopt ordinances which infringe the spirit of a state law or are repugnant to the general policy of the state.” *Capitol News Co., Inc. v. Metropolitan Gov’t*, 562 S.W.2d 430, 434 (Tenn. 1978). *See also Nichols v. Tullahoma Open*

Door, Inc., 640 S.W.2d 13, 18 (Tenn. Ct. App. 1982); *City of Bartlett v. Hoover*, 571 S.W.2d 291, 293 (Tenn. 1978); Op. Tenn. Att’y Gen. No. 98-038 (Feb. 9, 1998). As noted in the preamble to the proposed Metro ordinance, the amendment to the Metro Code was crafted for the express purpose of reversing, at least within Metro’s corporate limits, the state legislature’s newly declared public policy of allowing authorized handgun carry permit holders to possess firearms within Tennessee establishments serving alcoholic beverages. The proposed Metro ordinance was expressly designed to counter the law found in House Bill 962, which expands the rights of authorized handgun carry permit holders to possess firearms in restaurants and bars.

The plain meaning of the language of Tenn. Code Ann. § 39-17-1314(a) leads to the conclusion that the General Assembly has preempted local governments from any authority to regulate the possession of firearms except as expressly provided for by statute.³ Accordingly, the proposed Metropolitan Government ordinance amending Chapter 7.08 of the Metropolitan Code to prohibit firearms in any establishment with an on-premises beer permit exceeds the authority delegated to a municipality and would therefore be preempted by the state’s exclusive right to regulate firearms as stated in Tenn. Code Ann. § 39-17-1314(a).⁴

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

GREGORY O. NIES
Assistant Attorney General

³ For example, Tenn. Code Ann. § 39-17-1359 authorizes local government entities to prohibit anyone, even persons with a valid handgun carrying permit, from carrying weapons at meetings conducted by, or on property owned, operated, or managed by the local government. Op. Tenn. Att’y Gen. 00-161 (Oct. 17, 2000).

⁴ All local government “power derives from the State through specific delegation by the General Assembly.” *421 Corp. v. Metropolitan Government*, 36 S.W.3d 469, 475 (Tenn. Ct. App. 2000) (citing *State ex rel. SCA Chem. Servs. v. Sanidas*, 681 S.W.2d 557, 562 (Tenn.Ct.App.1984); *Family Golf of Nashville, Inc. v. Metropolitan Gov’t*, 964 S.W.2d 254, 257 (Tenn.Ct.App.1997)). A local government cannot effectively nullify state law on the same subject by enacting ordinances that ignore applicable state laws, that grant rights that state law denies, or that deny rights that state law grants. See generally *State ex rel. Beasley v. Mayor & Aldermen of Fayetteville*, 268 S.W.2d 330, 334 (Tenn. 1954).

Requested by:

The Honorable Doug Jackson
State Senator
302 War Memorial Building
Nashville, Tennessee 37243-0025