STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 12-02

Issuance of Beer Permits Near Cemeteries

QUESTION

Is a cemetery considered a place of public gathering under Tenn. Code Ann. § 57-5-105(b)(1), if the cemetery does not sell plots and is infrequently visited by the public?

OPINION

As this Office opined in Tennessee Attorney General Opinion 92-51 (September 16, 1992), whether a particular cemetery constitutes a place of public gathering in the context of Tenn. Code Ann. § 57-5-105(b)(1) is a question of fact, to be determined by the trier of fact.

ANALYSIS

It is well established that the sale of beer is subject to control by the State of Tennessee pursuant to the State's police power. The State may delegate this power to counties and municipalities, which are given extremely broad powers to regulate the sale of alcoholic beverages within their boundaries. *Exxon Corp. v. Metropolitan Government* 72 S.W.3d 638, 642 (Tenn. 2002); *American Show Bar Series, Inc. v. Sullivan County*, 30 S.W.3d 324, 332 (Tenn. Ct. App. 2000).

The State of Tennessee has established an extensive regulatory framework that delegates to counties and municipalities the authority to regulate by permit the sale of beer. Tenn. Code Ann. §§ 57-5-103 to 109. Local governments are divided into two broad categories for the purposes of regulating beer, those being (1) Class A counties and (2) Class B counties, cities and towns. Class A counties are defined as counties not governed by metropolitan governments, whereas Class B counties consist of all counties governed by a metropolitan government and all cities and towns. Tenn. Code Ann. § 57-5-103(b). *See also* Tenn. Att'y Gen. No. 10-113 (November 18, 2010).

This opinion request seeks clarification on the narrow issue of whether a cemetery is a "place of public gathering" for purposes of determining whether a Class A county may issue a beer permit within the county defined distance of the place of public gathering. These regulatory provisions state in relevant part as follows:

> (a) The owner of a business desiring to sell, distribute, manufacture, or store beer in any Class A county outside the limits of any incorporated city or town shall file an application for a permit with the county legislative body or committee appointed by the county legislative body.
>
> (b) In order to receive a permit, an applicant must establish that:
>
> (1) No beer will be sold except at places where such sale will not cause congestion of traffic or interference with schools, churches, or other places of public gathering, or otherwise interfere with public health, safety and morals, the county legislative body having the right to forbid such storage, sale or manufacture at places within two thousand feet (2,000) of such places of public gathering in its discretion….

Tenn. Code Ann. § 57-5-105(a) & (b)(1).

For purposes of this opinion request, the county legislative body is assumed to have adopted a requirement that the sale of beer cannot be made within a defined distance of places of public gathering.[1]

Our review of this regulatory process is guided by well-established principles of statutory construction. Thus, the primary objective in reviewing these statutes is to determine and implement the Legislature's intent without limiting or expanding the statute's coverage beyond what the Legislature intended. *Brown v. Tennessee Title Loans, Inc*. 328 S.W.3d 850, 855 (Tenn. 2010); *Shelby County Health Care Corp. v. Nationwide Mutual Insurance Corp.* 325 S.W.3d 88, 92 (Tenn. 2010). In the case of regulatory provisions governing the sale of intoxicating liquor, courts will generally construe such regulatory provisions liberally in favor of the places of the places or institutions they are designed to protect, and strictly against the applicants for beer or liquor licenses or permits. *Tennessee Sports Complex, Inc. v. Lenoir City Beer Board*, 106 S.W.3d 33, 35-36 (Tenn. Ct. App. 2003) (citing *Youngblood v. Rutherford County Beer Board,* 707 S.W.2d 507, 509 (Tenn. 1986)).

Tennessee courts and this Office have addressed on several occasions the meaning of the term "places of public gathering" as used in Section 57-5-105(b)(1). In an early opinion by the Tennessee Supreme Court in 1937, a county had forbidden the sale of beer and other alcoholic beverages within 2,000 feet of public gatherings. The Court found the store, filling station and dance hall selling alcoholic beverages was not a "public place" and was not located within 2,000 feet of a "place of public gathering," and accordingly the Court overturned the owner's conviction of selling beer in violation of local resolutions. *Wright v. State,* 171 Tenn. 628, 639, 106 S.W.2d 866, 871 (Tenn. 1937).

In a later case, the Tennessee Supreme Court found that a baptismal site located on private property was not a public gathering place, concluding as follows:

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[1] This opinion is therefore limited to an interpretation of Tenn. Code Ann. § 57-5-105 and does not address other issues, including any possible application of Tenn. Code Ann. § 57-5-109 to the facts presented.

> The record shows that the public has no *right* to use the site indicated for baptismal purposes, and according to the proof such site was used with and by permission and consent of the owner which would, of course, take away from it any element of being a public place. It is, in fact, private property to which access has been given to the public on occasions over a long period of time, but this permission has not ripened into an absolute right to use the same as a baptismal place by the general public so as to make it a public gathering place.

Adams v. Monroe County Quarterly Court, 214 Tenn. 270, 276, 379 S.W.2d 769, 772 (1964). (Emphasis in original).

In so holding, the Court defined a "public place" as follows:

> A place to which the general public has a right to resort, not necessarily a place devoted solely to uses of public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public. *People v. Whitman* 178 App. Div. 193, 165 N.Y.S. 148, 149. *Roach v. Dugene*, 23 Or. 376, 31 P. 825.

*Id. (*quoting Black's Law Dictionary*, 4th ed.). See also Tennessee Sports Complex, Inc.,* 106 S.W.3d at 34-36 (finding that a privately owned daycare center, which was part of a sports complex, was a place of public gathering but a privately owned National Guard Armory whose primary mission was to support the United States Army and to train and house the National Guard was not a place of public gathering); *Boyd's Creek Enterprises, LLC v. Sevier County,* 2002 WL 185474 (Tenn. Ct. App. Feb. 6, 2002) (finding it was a question of material fact as to whether a privately owned park which was occasionally used for public events, such as a youth soccer league, was a place of public gathering); Op. Tenn. Att'y Gen. No. 98-069 (March 25, 1998) (finding a privately owned daycare center was a place of public gathering); Op. Tenn. Att'y Gen. No. 97-060 (May 1, 1997) (finding a daycare center owned by a church meets the definition of public gathering); Op. Tenn. Att'y Gen. No. 80-409 (August 14, 1980) (noting that generally a museum would be regarded as a public place).

This Office has twice addressed the specific question presented in this opinion request, that being whether a cemetery is a place of public gathering. In 1991, this Office opined that a small public cemetery constituted a public gathering place, noting as follows:

> Cemeteries require public access. The friends and relatives of the deceased wish to visit their gravesides and decorate their graves. It would be just as offensive to those mourners to have beer sold nearby as it would for churchgoers to have beer sold near a church. …
>
> In 14 C. J. S. Cemeteries § 1 it is further stated: "A public cemetery is as much a public place as a courthouse or a market." From these principles it must be concluded that even if the cemetery in question is on private property, the owner does not have the right to forbid its use for cemetery purposes. Therefore, the County Commission's two-thousand foot (2,000 foot) rule would apply.

Op. Tenn. Att'y Gen. No. 91-57, at 1- 2 (June 10, 1991).

However, in 1992, this Office clarified its prior opinion based upon a review of an unpublished Tennessee Supreme Court decision, finding that whether a particular cemetery is a place of public gathering is dependent on the facts of the particular case. Op. Tenn. Att'y Gen. No. 92-51 (September 16, 1992).

The Tennessee Supreme Court case relied upon by this Office in its 1992 opinion was an unpublished decision issued in 1970.[2] In this case, the Court concluded that on the specific facts presented the cemetery in question was not a place of public gathering, finding as follows:

> In this case, we cannot conclude that a cemetery is, or is not, as a matter of law, a "place of public gathering". However, when the phrase in question, "places of public gathering" is considered in context, it must follow that the cemeteries in this case are not within the meaning of the statute. Schools and churches are institutions which are dedicated and intended for the use and benefit of the general public. The cemeteries in question both engage in the sale of lots to those wishing to be interred there. **We do not believe it was the intention of the Legislature to include such enterprises as places of public gathering.**

Allen v. Gibson County Beer Board Commission, Gibson Law, at p. 6 (Tenn. 1970). (Emphasis added).

Opinion No. 92-51, after consideration of the *Allen* case, found there may exist circumstances where cemeteries may not be places of public gathering, depending on the facts presented. This finding is particularly appropriate given the innumerable small cemeteries existing throughout the State of Tennessee which may no longer be in use and rarely are visited by the public. *See generally* http://www.usgwtombstone.org/tennessee. The opinion nonetheless observed that, since the issuance of the *Allen* case in 1970, the General Assembly's adoption of extensive regulation of public and private cemeteries was a recognition that cemeteries were generally dedicated for the benefit and use of the public. The opinion thus concluded:

> Since the General Assembly has declared through an Act adopted in 1989 that the operation of a cemetery is a public purpose and that maintenance of a cemetery serves a public purpose, we conclude that like schools and churches, many cemeteries could be considered dedicated for the use and benefit of the public. In addition, the reasoning of the Tennessee Supreme Court's published decision supports that conclusion. As the unpublished opinion demonstrates, however, not all cemeteries must be considered public gathering places in the context of T.C.A. § 57-5-105(a)(3). Thus, a determination as to whether a particular cemetery constitutes a "public gathering place" is dependent on the relevant facts.

Op. Tenn. Att'y Gen. No. 92-51, at 5-6.

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[2] Rule 4 of the Tennessee Supreme Court specifically notes that, except between the parties, an unpublished opinion shall be considered merely persuasive, rather than controlling, authority. Tenn. Sup. Ct. R. 4(G).

The Tennessee Supreme Court issued its ruling on cemeteries as public gathering places in 1970, over forty years ago, and this Office issued its opinion on this issue in 1992, almost twenty years ago. The General Assembly has not acted to change these interpretations, which is persuasive evidence of legislative adoption of the Court's and this Office's construction that the question of whether a particular cemetery is a public gathering place remains dependent on the relevant facts, to be determined by the trier of fact. *See Freeman Industries, LLC v. Eastman Chemical Co.,* 172 S.W.3d 512, 519 (Tenn. 2005); *Jones v. D. Canale & Co.,* 652 S.W.2d 336, 337-338 (Tenn. 1983).

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