STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

January 9, 2014

Opinion No. 14-03

Sale of Alcoholic Beverages at Locations Owned by the City of Clarksville

QUESTIONS

1. Does Tennessee law prevent or prohibit the City of Clarksville ("City") from selling liquor by the drink, wine, or beer to private party lessees and their guests at City-owned property, including the Wilma Rudolph Events Center, Freedom Point Pavilion, or municipal golf courses?

2. Does Tennessee law prevent or prohibit the City from selling liquor by the drink, wine, or beer to the public generally during public events at City-owned property, including the Wilma Rudolph Events Center, Freedom Point Pavilion, or municipal golf courses?

3. Does Tennessee law allow the City, as a municipal corporation, to obtain a license to sell liquor by the drink at a fixed site owned by the City?

4. If the answer to Question 3 is "no," may the City, through a City employee, such as the Director of the Parks and Recreation Department or some other departmental employee, obtain a license to sell liquor by the drink on behalf of the City at a fixed site owned by the City?

5. If the answer to Question 3 is "no," does Tennessee law allow the City to create a non-profit corporation, through which a license to sell liquor by the drink at a "fixed site" owned by the City could be obtained?

6. Does Tennessee law permit the City, as a municipal corporation, to obtain a beer permit to sell beer at a fixed site owned by the City?

7. If the answer to Question 6 is "no," may the City, through a City employee, such as the Director of the Parks and Recreation Department or some other departmental employee, obtain a permit to sell beer on behalf of the City at a fixed site owned by the City?

8. If the answer to question 6 is "no," does Tennessee law allow the City to create a non-profit corporation, through which a permit to sell beer at a fixed site owned by the City could be obtained?

9. Does the City's private act charter specifically or generally authorize the City to sell liquor by the drink, wine, or beer?

OPINIONS

1. Under state law, the City cannot sell alcoholic beverages or beer to private party lessees and their guests.

2. Under state law, the City cannot sell alcoholic beverages or beer to the public generally.

3. No. As a municipal corporation, the City cannot obtain a license to sell liquor by the drink at any location.

4. No. A City employee cannot do on behalf of the City that which the City itself is prohibited from doing.

5. No. A non-profit corporation created and controlled by the City cannot do on behalf of the City that which the City itself is prohibited from doing. A non-profit corporation that is not an instrumentality of the City could obtain a liquor-by-the-drink license for a site identified in Tenn. Code Ann. § 57-4-101.

6. No. As a municipal corporation, the City cannot obtain a beer permit under Tenn. Code Ann. § 57-5-103(a)(2).

7. No. A City employee cannot do that which the City itself is prohibited from doing.

8. No. A non-profit corporation created and controlled by the City cannot do on behalf of the City that which the City itself is prohibited from doing. A non-profit corporation that is not an instrumentality of the City could obtain a permit to sell beer for consumption on the premises at locations that are approved for licensing under Tenn. Code Ann. § 57-4-101.

9. No. A municipal government cannot do under charter or ordinance that which is not allowed by a Tennessee general statute.

ANALYSIS

1. Tennessee law expressly provides that "[i]t is lawful to sell wine and other alcoholic beverages as defined in § 57-4-102, and beer as defined in § 57-6-102, to be consumed on the premises" of certain locations listed in § 57-4-101 and defined in § 57-4-102. Tenn. Code Ann. § 57-4-101(a). Further, "[e]xcept with respect to a caterer licensed under this chapter, it is unlawful for any person, firm, corporation, partnership, or association to allow the dispensing of alcoholic beverages except sacramental wines and beer, in any establishment unless such establishment is

licensed under this title." Tenn. Code Ann. § 57-4-203(i)(1)(A). The license so required must be obtained from the Tennessee Alcoholic Beverage Commission. Tenn. Code Ann. § 57-4-201(b)(1). In order to obtain a license, the applicant must meet the requirements of Tenn. Code Ann. §§ 57-3-110, 57-4-101, and 57-4-102. Tenn. Code Ann. § 57-4-201(d)(3). Similarly, Tenn. Code Ann. § 57-5-103(a)(8) requires a beer permit from a county or city for the sale of beer for on-premises consumption.

Tennessee courts have recognized the General Assembly's plenary power to regulate the distribution and sale of alcoholic beverages, restricted only by the federal and Tennessee Constitutions, stating:

> The State's power over alcoholic beverages rests with the General Assembly. Only the General Assembly may legalize the sale of alcoholic beverages, *Ewin v. Richardson,* 217 Tenn. 534, 539, 399 S.W.2d 318, 320 (1966); *Case v. Carney,* 213 Tenn. 597, 604, 376 S.W.2d 492, 495 (1964), and the General Assembly's power is limited only by the state and federal constitutions. *Fentress County Beer Bd. v. Cravens,* 209 Tenn. 679, 687, 356 S.W.2d 260, 263 (1962).

Martin v. Beer Bd. for City of Dickson, 908 S.W.2d 941, 945 (Tenn. Ct. App. 1995). As this Office has previously explained:

> No person has the inherent right to sell or serve alcoholic beverages. *Safier v. Atkins*, 199 Tenn. 574, 288 S.W.2d 441 (1955); *Ketner v. Clabo*, 189 Tenn. 260, 225 S.W.2d 54 (1950). The State of Tennessee has the authority to regulate or prohibit the sale and distribution of alcoholic beverages within the state, and this authority is derived from the state's inherent police power to protect the health, safety and welfare of its citizens, as preserved by the Twenty-first Amendment of the United States Constitution. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966); *Landman v. Kiser*, 195 Tenn. 13, 225 S.W.2d 6 (1953).
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> An analysis of existing liquor legislation must begin from the absolute prohibition which existed with the 'bone dry' laws of this state. Tenn. Code Ann. § 39-2501 *et seq*. Unless the legislature has elsewhere permitted the sale, distribution or serving of alcoholic beverages, such is not permitted. *See*, *generally*, *Chadrick v. State*, 175 Tenn. 680, 137 S.W.2d 284 (1940). Thus, unless the legislature has permitted, either expressly or implicitly, the type of distribution of liquor contemplated by the nonprofit museum in question, it is not permitted.

Tenn. Att'y Gen. Op. 80-409, at 1 (Aug. 14, 1980). Tennessee's liquor-by-the-drink law reinforces this analysis, providing as follows:

> Except with respect to a caterer licensed under this chapter, it is unlawful for any person, firm, corporation, partnership, or association to *allow the dispensing* of alcoholic beverages except sacramental wines and beer, in any establishment unless such establishments are licensed under this title.

Tenn. Code Ann. § 57-4-203(i)(1)(A) (emphasis added).

A "municipality is merely a creature of the State." *Metropolitan Development and Housing Agency v. South Central Bell Telephone Co.*, 562 S.W.2d 438, 443 (Tenn. Ct. App. 1977). A municipality must comply with state law in matters in which the State has exercised its broad legislative prerogative. *City of Bartlett v. Hoover*, 571 S.W.2d 291, 293 (Tenn. 1978); *Southern Ry. Co. v. Knoxville*, 223 Tenn. 90, 96, 442 S.W.2d 619, 621 (1968); *State v. Mayor and Aldermen of Town of Fayetteville*, 196 Tenn. 407, 415-16, 268 S.W.2d 330, 333-34 (1954). Accordingly, the City must comply with the limitations set forth in Title 57, Chapters 4 and 5, which restrict the sale of alcoholic beverages for consumption on the premises and of beer, respectively.

Initially, the City cannot obtain a license to sell alcoholic beverages for on-premises consumption. Only a "person, firm, corporation, partnership, or association" can obtain a license to "allow the dispensing of alcoholic beverages except sacramental wines and beer." Tenn. Code Ann. § 57-4-203(i)(1)(A). Similarly, a beer permit is required for the sale of beer for on-premises consumption, and permits may be obtained only by a "person, firm, corporation, joint-stock company, syndicate, or association." Tenn. Code Ann. § 57-5-103(a)(8). A municipality is not a "person, firm, corporation, partnership, or association" capable of obtaining a license under these statutes. The terms "person, firm, corporation, partnership, or association" are not generally defined by either statute. *See* Tenn. Code Ann. §§ 57-4-102; 57-5-502; 57-5-603 (definition sections). *But cf.* Tenn. Code Ann. § 57-5-502(5) (defining "person" as "any individual, partnership, corporation, association, syndicate, or any other combination of individuals" for purposes of part 5 of Chapter 5, Title 57). Although the term "person" is sometimes defined in the Tennessee Code to include municipalities, *see, e.g.,* Tenn. Code Ann. § 68-221-1102(5), no comparable definition is found in Chapters 4 or 5 of Title 57. Many of the references to "person" in these chapters, however, refer only to attributes of individuals. *See, e.g.,* Tenn. Code Ann. § 57-4-201(c)(2) (stating that "persons" to be in actual charge of the sale of alcoholic beverages must be of "good moral character"). In addition, "[o]rdinarily, absent legislation, neither the state, a political subdivision thereof, nor a municipal corporation is a 'person' within the meaning of a statute using the term." *Johnson City v. Cowles Communications, Inc.*, 477 S.W.2d 750, 753 (Tenn. 1972). Thus, the term "person" does not include municipalities, and a municipality would not qualify as a firm, partnership, joint-stock company, syndicate, or association.

Nor is a municipality a "corporation" within the meaning of Tenn. Code Ann. §§ 57-4-203(i)(1)(A) and 57-5-103(a)(8). This Office has opined on numerous occasions that the term "corporation," as used in earlier versions of Section 57-4-203(i)(1)(A), refers only to private, not municipal, corporations. On May 22, 1967, the Attorney General advised the Alcoholic Beverage Commission: "It is my opinion that under the law as it now exists a liquor license may not be granted to a municipal corporation and that the word 'corporation' as used in Section 57-117, Tennessee Code Annotated, refers only to private corporations." Letter from George F. McCanless, Attorney General, to Carl A. Jones, Chairman, Alcoholic Beverage Commission (May 22, 1967). *See also* Letter from W. Collins Bonds, Assistant Attorney General, to James D. Senter, III (Feb. 3, 1970); Letter from W. Collins Bonds, Assistant Attorney General, to Scott Alden, Director of Alcoholic Beverage Commission (July 23, 1969); Letter from W. Collins Bonds, Assistant Attorney General, to Chester Powell, Mayor, City of South Pittsburgh (June 6, 1969); Letter from Robert F. Hedgepath, Assistant Attorney General, to James H. Epps, III, City Attorney (June 21, 1967).

These opinions remain sound law. It is well-established that the term "corporation" does not include municipalities. *See* 62 C.J.S. *Municipal Corporations* § 12 (stating that "[o]rdinarily, the word 'corporation' does not embrace municipal corporations"). *See also Keeble v. Loudon Utilities*, 370 S.W.2d 531, 535 (Tenn. 1963). The principle that a municipal corporation is instituted for public purposes only and has none of the peculiar qualities of a commercial corporation, except that of acting in a corporate capacity, can be found as early as the United States Supreme Court's decision in *The Mayor v. Ray*, 86 U.S. 468, 475 (1873), which involved ultra vires actions taken by the mayor and city treasurer of Nashville.

In addition, these various Attorney General's opinions and the Alcoholic Beverage Commission's reliance on them date back to 1967, when the sale of liquor by the drink was first permitted in Tennessee after Prohibition. Since 1967, the General Assembly has made numerous amendments to Section 57-117, Tennessee Code Annotated (now Tenn. Code Ann. § 57-4-203), but the General Assembly has not amended the law to specify that it should be read to include municipal corporations. In *Covington Pike Toyota, Inc. v. Cardwell*, 829 S.W.2d 132 (Tenn. 1992), the Supreme Court stated that "administrative interpretations of statutes by the agency charged with enforcement or administration are entitled to great weight in determining the intention of the legislature." *Id.* at 134 (citing *Nashville Mobilphone Co., Inc. v. Atkins,* 536 S.W.2d 335, 340 (Tenn. 1976)); *see also SunTrust Bank, Nashville v. Johnson*, 46 S.W.3d 216, 226 (Tenn. Ct. App. 2000). The Court further stated that "[t]his is especially true where the administrative interpretations are unchallenged over a long period of time." *Id.* (citing *Gallagher v. Butler,* 214 Tenn. 129, 140, 378 S.W.2d 161, 166 (1964)). The longstanding administrative interpretation of Tenn. Code Ann. § 57-4-203 thus bolsters the

conclusion that municipalities are not entities entitled to obtain a liquor license or beer permit in Tennessee.

2. For the reasons stated above in response to Question 1, the City as a municipal corporation could not obtain permits to sell liquor-by-the-drink, wine, or beer to the public generally.

3. For the reasons stated above in response to Question 1, the City, as a municipal corporation, could not obtain a license to sell liquor by the drink at a fixed site owned by the City.

4. If a City employee sought to obtain a liquor-by-the-drink license and conduct the business of selling alcoholic beverages at one of the locations in question "on behalf of the City," that employee would not be acting as a private person but rather under authority delegated by the City. Generally, a municipal officer or employee or a municipality's agent cannot do that which is forbidden to the municipality itself by statute or charter. The Tennessee Supreme Court, in finding that the City of Ripley was prohibited from entering into contracts that exceeded the authority granted to it by charter or statute, *Allmand v. Pavletic,* 292 S.W.3d 618, 628 (Tenn. 2009), also held that the city's gas department was prohibited from entering into such ultra vires contracts. *Id.* at 630 ("One cannot do indirectly what is prohibited directly."); *see also The Mayor v. Ray*, 86 U.S. at 476-77. Here, the City is barred by both Tenn. Code Ann. §§ 57-4-102 and 57-4-203 from obtaining a license to sell alcoholic beverages at the locations in question, and thus any City employee acting as such would be barred as well, in that the employee cannot do under authority delegated by the City what the City itself cannot do.

5. For the same reason, the City also could not create a City-controlled not-for-profit corporation to obtain a license to sell liquor by the drink at a location owned by the City. Again, it is a "well settled principle of law that one cannot do indirectly what cannot be done directly." *Bennett v. Visa U.S.A., Inc.,* 198 S.W.3d 747, 752-53 (Tenn. Ct. App. 2006) (quoting *Haynes v. City of Pigeon Forge,* 883 S.W.2d 619, 622 (Tenn. Ct. App. 1994)). Nevertheless, the City could allow a non-profit corporation that is not controlled by the City to sell liquor-by-the drink at a site designated by statute. Although a municipality itself cannot obtain a liquor-by-the-drink license, state law allows the sale of alcoholic beverages on city-owned property by an appropriate permit holder if that property qualifies as a "convention center," "club," "restaurant," or other facility eligible for a liquor-by-the-drink license under Tenn. Code Ann. §§ 57-4-101 and -102 or when sales are made by a caterer under Tenn. Code Ann. § 57-4-203(i)(3).[1]

[1] Neither the Wilma Rudolph Event Center nor Freedom Point Pavilion appears to fall within any of the narrowly defined categories in Tenn. Code Ann. § 57-4-102. A City-owned golf course would

6. An earlier opinion by this Office described the extent of the State's regulatory control over the sale of beer and the State's ability to delegate that authority to municipalities, stating:

> 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).

Tenn. Att'y Gen. Op. 12-02, at 1 (Jan. 6, 2012).

Although the State has delegated considerable authority over the sale of beer to counties and municipalities in Title 57, Chapter 5, that authority is limited by the requirements for obtaining a beer permit set forth in Tenn. Code Ann. § 57-5-103, which provides that it is "unlawful to operate any business engaged in the sale, distribution, manufacture, or storage of beer without a permit issued by the county or city where such business is located under the authority herein delegated to counties and cities." Tenn. Code Ann. § 57-5-103(a)(1). This section further provides that "[p]ermits shall be issued to the owner of a business, whether a person, firm, corporation, joint-stock company, syndicate, or association." Tenn. Code Ann. § 57-5-103(a)(2).

As previously discussed, the list "person, firm, corporation, partnership, or association" in Tenn. Code Ann. § 57-4-203(i)(1)(A) does not include municipal corporations. For this reason, the City as a municipal corporation does not come within the list in Tenn. Code Ann. § 57-5-103(a)(2) and is not eligible to obtain a beer permit.

7 & 8. For the reasons stated above in response to Questions 4 and 5, neither a City official nor a not-for-profit corporation created and controlled by the City would be eligible to obtain a beer permit.

9. As stated above, the City may not obtain a license to sell alcoholic beverages for consumption on the premises at any location, and neither a City employee nor a not-for-profit corporation created and controlled by the City may obtain such a license on the City's behalf.

All of these conclusions emanate from the restrictions the State has imposed on the sale of alcoholic beverages and beer, a subject over which the State's

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qualify as a "club" only if it meets the definition of "club" in Tenn. Code Ann. § 57-4-102(8)(A), which requires among other things the existence of a non-profit association with at least 100 members.

authority is supreme. The City's charter, regardless of its wording, cannot grant to the City any authority to pass an ordinance or regulation that conflicts with the general law of Tennessee. *See, e.g., City of Bartlett v. Hoover,* 571 S.W.2d 291, 292 (Tenn. 1978).

Section 5(A)(55) of the City's charter grants to the City the following powers:

> Adoption and enforcement of ordinances not specifically enumerated. To adopt and enforce such further ordinances, rules and regulations, whether or not specifically enumerated in this act, as may be deemed necessary or proper for the good government, function and administration of the corporation, and for the accomplishment of its objects and purposes.

1957 Tenn. Priv. Acts, ch. 292, § 5(A)(55), *as amended by* 1981 Tenn. Priv. Acts, ch. 139, § 1. Section 5(A)(56) of the charter grants to the City the following additional powers:

> Powers granted herein not restrictive. To exercise and enjoy all other powers, functions, rights, privileges and immunities necessary or desirable to promote or protect the safety, health, peace, security, good order, comfort, convenience, morals and general welfare of the city and its inhabitants, and all implied powers necessary to carry into execution all powers granted in this act as fully and completely as if such powers were fully enumerated herein. No enumeration of particular powers in this act shall be held to be exclusive of others nor restrictive of general words and phrases granting powers, but shall be held to be in addition to such powers unless expressly prohibited to cities under the constitution or applicable public acts of the state.

1957 Tenn. Priv. Acts, ch. 292, § 5(A)(56), *as amended by* 1981 Tenn. Priv. Acts, ch. 139, § 1.

A municipality may not act in conflict with the general law. Even though a municipality created before the 1953 amendments to the Tennessee Constitution, Tenn. Const. art. XI, § 9, may have a charter enacted by private act, such private acts are superseded to the extent necessary to give effect to a general statutory plan. *State ex rel. Strader v. Word*, 508 S.W.2d 539, 546 (Tenn. 1974). Further, the City would have to pass an ordinance authorizing it to request from the appropriate licensing authority either a license for the sale of alcohol or a beer permit at one of the locations in question. However, a city "may not pass an ordinance which ignores the State's own regulatory acts." *State ex rel. Beasley v. Mayor & Aldermen of Fayetteville*, 196 Tenn. 407, 415-16, 268 S.W.2d 330, 334 (1954). *See also City of Bartlett v. Hoover,* 571 S.W.2d at 292.

Accordingly, an ordinance granting the City the power to obtain a license for the sale of alcoholic beverages or a beer permit for one of the locations in question would violate the provisions of Title 57 strictly limiting the granting of such licenses and permits.

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