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Opinion No. 04-012

Beer Permits - Distance Requirement

QUESTIONS

1. If a county legislative body had passed a resolution prohibiting the issuance of a beer permit for locations within two thousand feet of schools, churches, or other places of public gathering, and later issued permits in violation of such distance requirement, may the county legislative body at a later date readopt such a distance restriction, the effect of which would basically grandfather all such permits without revoking all permits issued in violation of the earlier adopted distance?

2. If the answer to question (1) is no, may a county legislative body adopt a distance requirement of less than two thousand feet by setting the distance at a point which would basically grandfather all permits issued in violation of the earlier two thousand foot distance?

3. If the answer to question (1) is no, would your answer change if the following language, revised from that which presently applies to Tenn. Code Ann. § 57-5-105(i), were added at the end of the first sentence of § 57-5-105(b)(1):

> This provision shall not apply to locations where beer permits or licenses have been issued prior to the date of adoption, or readoption, of a resolution by the county legislative body establishing such a distance requirement.

OPINIONS

1. No.

2. Yes.

3. Yes.

ANALYSIS

1. Tenn. Code Ann. § 57-5-105(b)(1) provides that outside the limits of incorporated cites and towns in Class A counties (meaning counties without a metropolitan form of government):

> (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 gatherings in its discretion***. Nothing in this subdivision shall apply to places of business that are located in the terminal or main building at public airports serviced by commercial airlines with regularly scheduled flights. (emphasis added)

In the hypothetical county which is the subject of your inquiry, such a restriction is in place; however, for some reason an unknown number of beer permits have been issued which allow beer sales less that 2000 feet from such locations. Your question relates to passing a new 2000 foot restriction which would grandfather in these erroneously permitted operations.

In *City of Murfreesboro v. Davis*, 569 S.W.2d 805 (Tenn. 1978), the Tennessee Supreme Court held that when such a restriction has been discriminatorily enforced, the effect is to invalidate the rule. The court stated:

> Discriminatory enforcement of a beer permit distance ordinance cannot be rectified by post facto amendments. Restoration of the validity of a distance ordinance can only be achieved by revocation or other elimination, such as attrition, of the discriminatorily-issued permits and licenses.

569 S.W.2d at 808. *See also Reagor v. Dyer County,* 651 S.W.2d 700 (Tenn. 1983); *Rutherford County Beer Board v.* Adams, 571 S.W.2d 830 (Tenn. 1978); *Seay v. Knox County,* 541 S.W.2d 946 (Tenn. 1976); *Serv-U-Mart, Inc. v. Sullivan County*, 527 S.W.2d 121 (Tenn. 1975).

Addressing the same issue, this office stated in Opinion No. 01-157 (copy enclosed):

> Thus, if a county has issued beer permits to businesses within 20 feet of a church, it cannot enforce its 300 foot distance rule so long as such a business, or any other business, continues to use its beer permit in violation of the rule. A county that has not enforced or has discriminatorily enforced its beer permit distance rule must revoke all

> permits issued in violation of the distance standard it seeks to apply or wait for those permits to become invalid through disuse, close of business, or other attrition if it desires to enforce the rule again.
>
> Tenn. Code Ann. § 57-5-108 details the processes by which a beer board or other appropriate governmental body may revoke a beer permit as well as the permissible reasons for revoking a permit. Yet, a beer board has the right to revoke a beer permit for any of the reasons which would disqualify an applicant for a beer permit in the first instance. *See Midgett v. Smith*, 591 S.W.2d 765 (Tenn. 1979). If a business did not qualify for a beer permit in the first instance because it did not comply with the distance rule, its permit is subject to revocation, so long as the county uniformly applies the rule, and revokes all permits issued in violation of it after January 1, 1993.

The significance of the January 1, 1993, date springs from Tenn. Code Ann. § 57-5-109, which provides:

> **57-5-109. Proximity to schools, churches, places of public gatherings.** — (a) A city or county shall not suspend, revoke or deny a permit to a business engaged in selling, distributing or manufacturing beer on the basis of the proximity of the business to a school, residence, church, or other place of public gathering if a valid permit had been issued to any business on that same location as of January 1, 1993. This section shall not apply if beer is not sold, distributed or manufactured at that location during any continuous six-month period after January 1, 1993.
>
> (b) For the purposes of this section, "on that same location as of January 1, 1993" means within the boundaries of the parcel or tract of the real property on which the business was located as of January 1, 1993. The provisions of this section apply whether or not a business moves the building on the location and whether or not the business was a conforming or nonconforming use at the time of the move.
>
> (c) If a business applies for a beer permit within the continuous six-month period referenced in this section, and if the city or county denies the business a permit and if the business appeals that denial, a new six-month continuous sale period shall begin to run on the date when the appeal of that denial is final. [Acts 1993, ch 297, §9; 1997, ch 560, §1; 2002, ch. 744, §1.]

The facts as stated in your question indicate, however, that the non-conforming permits, whether issued before or after January 1, 1993, were not valid when issued; therefore the provisions of Tenn. Code Ann. § 57-5-109 do not apply.

Despite the language in *City of Murfreesboro v. Davis* and the other cases above cited, the Tennessee Court of Appeals has recently held that if a distance restriction is violated without any intent of discriminatory enforcement, it may not thereby become invalid. *Boyd's Creek Enterprises, LLC v. Sevier County*, 2002 WL 185474 (Tenn. Ct. App. 2002). In that case, the county had issued a permit in violation of its 2000-foot restriction. Twelve years later, it was argued that this action invalidated the restriction. The Court rejected the view that "***one*** inadvertently issued permit invalidated the rule" (emphasis in original) and stated that "circumstances must be considered as to whether the issuance constitutes a discriminatory application of the rule. The members of the Beer Board investigated the proposed location and found no evidence that it was located within 2000 feet of a place of public gathering. This fact weighs heavily against an indication of discriminatory application and thus the case at Bar stands in sharp contrast to *Reagor, Adams, Serve-U-Mart, Seay,* and others cited by the appellants." Thus, if the erroneous permits were issued inadvertently and under circumstances that do not show any discriminatory intent, the distance requirement may well remain intact, depending on the circumstances.

If, however, there was a discriminatory application of the rule, it was invalidated and can only be reinstated by revocation of all non-conforming permits not protected by Tenn. Code Ann. § 57-6-109, or by allowing all non-conforming permits to expire through disuse or attrition. The latter method may prove problematic in practice, since new applicants might well apply for permits before existing ones terminate. But the Tennessee Supreme Court has suggested, in *Reagor v. Dyer County,* that implementation of a formal "policy" regarding attrition, such as not renewing permits for new owners of the affected locations, might be sufficient to maintain the restriction in force. 651 S.W.2d at 701.

2. Under Tenn. Code Ann. § 57-5-105(b)(1), counties many impose a distance restriction of 2000 feet or less as the minimum distance from a church, school, or public gathering place within which beer can be sold. *Youngblood v. Rutherford County Beer Board*, 707 S.W.2d 507 (Tenn. 1986). Relaxing the 2000 foot limit could result in bringing the non-compliant locations into compliance. If, for example, all the permitted locations are less than 2000 feet, but more than 1000 feet, from a church, school, or public gathering place, then establishing a 1000 foot limit would bring them into conformity. This would of course mean that any future applicant located outside the new limit would likewise be entitled to a permit, assuming the other statutory requirements were met. This office is of the opinion that such a new limit would not be a post facto amendment of the vitiated 2000-foot limit, but rather would be a new, generally applicable, and less restrictive limit, and therefore would be valid and enforceable, if adopted.

3. This office is of the opinion that the legislation proposed in the third question would grandfather preexisting locations. A grandfather clause is a statutory exemption that allows

those already doing something that violates a new restriction to continue doing it, when they would otherwise be stopped by the new law. *Outdoor West of Tennessee, Inc. v. City of Johnson City*, 39 S.W.3d 131 (Tenn. Ct. App. 2000); *Teague v. Campbell County*, 920 S.W.2d 219 (Tenn. Ct. App. 1995). That is, in fact, what the date restriction in Tenn. Code Ann. § 57-5-109 accomplishes. The statement in *City of Murfreesboro* to the effect that the only way to reinstate the provisions of a discriminatorily enforced distance limit is through revocation or elimination of the discriminatory permits would no longer apply if the statute were thus amended.

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