

STATE OF TENNESSEE

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September 15, 2010

Opinion No. 10-98

Implementation of Beer Permit Distance Requirement

QUESTIONS

1. If a county increases the distance requirement for a beer permit after a beer permit application is filed but before the application is considered, which distance requirement should the county beer board apply?
2. If the beer board applied the shorter distance requirement and issued the permit, but the board should have applied the longer distance requirement and denied the application, which distance requirement should the board apply to subsequent applications?
3. If the beer board applied the shorter distance requirement and issued the permit, but the board should have applied the longer distance requirement and denied the application, is the applicant's beer permit automatically invalid?

OPINIONS

1. The beer board should apply the distance requirement in effect at the time the board votes on the application.
2. In this scenario, the beer board mistakenly applied the wrong distance requirement when issuing the permit. The board's error was not made with the intent to discriminate, so the actual distance requirement was not invalidated by the issuance of that permit. However, once the board is aware of the error, it must act to revoke the erroneously issued permit or eliminate it in another manner, such as through attrition. If the board fails to do so, the actual distance requirement is invalidated and cannot be enforced against other applicants.
3. In this scenario, the erroneously issued beer permit is not automatically invalid. The beer board must take action to revoke the permit or eliminate it in another manner, such as through attrition.

ANALYSIS

1. Pursuant to Tenn. Code Ann. § 57-5-105(b)(1) (Supp. 2009), counties generally may require beer-selling establishments to be located up to 2,000 feet away from schools, churches, or other public gathering places. When determining whether a beer permit applicant's

establishment satisfies the distance requirement, the Tennessee Supreme Court has held that a beer board must apply the requirement in effect at the time it votes on the application rather than the one in effect at the time the application was filed. *Coffman v. Washington County Beer Bd.*, 615 S.W.2d 675, 676-77 (Tenn. 1981). This is consistent with the general principle that the law in effect at a particular time governs actions taken at that time. One does not by filing an application obtain any right to be governed by the law in effect at the time of filing. Accordingly, if a county increases the distance requirement for a beer permit after a beer permit application is filed but before the application is considered, the county beer board should apply the new, longer distance requirement.

2. As discussed in previous opinions of this Office, if a beer board has discriminatorily enforced a distance requirement, the requirement is invalidated and can be restored only by the revocation or other elimination, such as through attrition, of the discriminatorily issued permits. *See Op. Tenn. Att’y Gen. Nos. 01-157 (Oct. 25, 2001) and 04-012 (Feb. 3, 2004)*. Generally, a beer board acts discriminatorily if it issues permits to some establishments in violation of the distance requirement while denying others also in violation and then takes no action to revoke or eliminate those permits. *See City of Murfreesboro v. Davis*, 569 S.W.2d 805, 807-08 (Tenn. 1978); *Reagor v. Dyer County*, 651 S.W.2d 700, 701 (Tenn. 1983); and *Cox Oil Co. v. City of Lexington Beer Bd.*, No. W2001-01489-COA-R3-CV, 2002 WL 31322533 (Tenn. Ct. App. Oct. 10, 2002). A beer board has not discriminatorily enforced the requirement if it “was in error in the manner in which it measured distances.” *Needham v. Beer Bd. of Blount County*, 647 S.W.2d 226, 231 n.3 (Tenn. 1983). A board has not acted discriminatorily if it performed an investigation and found no evidence of a distance requirement violation where there was uncertainty as to whether the place from which the distance was being measured, a privately-owned park, constituted a “place of public gathering.” *Boyd’s Creek Enterprises, LLC v. Sevier County*, No. E2001-01975-COA-R3-CV, 2002 WL 185474, *2 (Tenn. Ct. App. Feb. 6, 2002).

In the instant fact scenario, the beer board mistakenly applied the wrong distance requirement and issued the permit. The board made an error, but it did not intend to proceed contrary to the distance requirement. Thus, the distance requirement was not invalidated by the issuance of that permit. However, once the board is aware of the error, it must act to revoke the permit or eliminate it in another manner, such as through attrition. If the board fails to do so, the distance requirement is invalidated and may not be invoked to deny a permit to other applicants.

3. A beer permit that is issued contrary to the law is not automatically invalid, but it is subject to revocation by the beer board. Tenn. Code Ann. § 57-5-108(c) (Supp. 2009). As discussed above, a beer board must act to revoke the permit or eliminate it in another manner; otherwise, the distance requirement will be invalid.

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