



**Office of the Attorney General  
State of Texas**

**DAN MORALES**  
ATTORNEY GENERAL

July 24, 1992

Honorable Mike Driscoll  
Harris County Attorney  
1001 Preston, Suite 634  
Houston, Texas 77002-1891

Letter Opinion No. 92-25

Re: Whether a county is required to give security for costs when it contests an application for a beer license pursuant to Texas Alcoholic Beverage Code section 61.39, and related questions (RQ-381)

Dear Mr. Driscoll:

You asked for the attorney general's opinion concerning the interpretation of section 61.39 of the Texas Alcoholic Beverage Code. This section provides:

Any person may contest the facts stated in an application for a license to distribute, manufacture, or sell beer at retail, or the applicant's right to secure a license, if he gives security for all costs which may be incurred in the contest if the case should be decided in favor of the applicant. No security for costs may be required of an officer of a county or incorporated city or town.

Tex. Alco. Bev. Code § 61.39.

You first inquire whether "costs" required for security under section 61.39 include attorneys' fees and damages that a license applicant may suffer due to a delay in the issuance of a license.

Section 61.39 does not define "costs"; however, we assume that the legislature intended for "costs" to be understood according to its common and accepted legal meaning. See *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942); *Smith v. Texas Co.*, 53 S.W.2d 774, 776-77 (Tex. Comm'n App. 1932, holding approved); *Weaver v. Robison*, 268 S.W. 133 (Tex. 1924). "Costs" under section 61.39 are ordinary court costs. *State v. Gutschke*, 233 S.W.2d 446, 448 (Tex. 1950). The term "costs" has been

given a very narrow meaning in the Texas statutes and by the Texas courts. Texas Civil Practice and Remedies Code section 31.007(b) states:

A judge of any court may include in any order or judgment all costs, including the following:

- (1) fees of the clerk and service fees due the county;
- (2) fees of the court reporter for the original of stenographic transcripts necessarily obtained for use in the suit;
- (3) masters, interpreters, and guardians ad litem appointed pursuant to these rules and state statutes; and
- (4) such other costs and fees as may be permitted by these rules and state statutes.

Tex. Civ. Prac. & Rem. Code § 31.007(b). We also note that Civil Practices and Remedies Code section 38.001 treats attorneys' fees as distinct from costs. Traditionally, attorneys' fees have been borne by the party incurring the same unless there is a particular statute or contract providing to the contrary. See *New Amsterdam Casualty Co. v. Texas Indus., Inc.*, 414 S.W.2d 914, 915 (Tex. 1967). Accordingly, the Texas courts have held that attorneys' fees are not recoverable as "costs." See *State v. Estate of Brown*, 802 S.W.2d 898, 901 (Tex. App.--San Antonio 1991) (holding that attorneys' fees are not recoverable as costs pursuant to TEX. R. CIV. P. 131, 141). The Texas courts have also held that the annoyance and expense of responding to even an ill-founded claim is not recoverable as a "cost." See *Brown v. Meyers*, 163 S.W.2d 886, 889 (Tex. Civ. App.--Galveston 1942, writ ref'd). We therefore conclude that neither attorneys' fees nor the delay due to a license challenge are recognized costs under Texas law or for the purposes of Texas Alcoholic Beverage Code section 61.39.

You next inquire whether a county is required to give security for costs under section 61.39. The provision expressly states: "No security for costs may be required of an officer of a county or incorporated city or town." Where a county or city officer acts in his official capacity, he is, by definition, acting in the name of the political subdivision that he represents. See *Bagg v. University of Texas Medical Branch at Galveston*, 726 S.W.2d 582, 586 (Tex. App.--Houston [14th Dist.] 1987,

writ ref'd n.r.e.); *Kelly v. Galveston County*, 520 S.W.2d 507, 512-13 (Tex. Civ. App.--Houston [14th Dist.] 1975); *Dallas County Flood Control Dist. v. Fowler*, 280 S.W.2d 336, 339 (Tex. Civ. App.--Waco 1955, writ ref'd n.r.e.). On the other hand, a county or city can act only through its officers. Therefore, we believe that the reference in the statute to the "officer of a county or incorporated city or town" is meant to also refer to the county, city, or town that the officer officially represents, and that such a political subdivision need not post security for costs.

**S U M M A R Y**

Neither attorneys' fees nor the delay due to a license challenge are recognized costs under Texas Alcoholic Beverage Code section 61.39.

A county, city or town is not required to post costs under section 61.39.

Very truly yours,



Geoffrey Hennessey  
Assistant Attorney General  
Opinion Committee