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Opinion Committee

October 16, 1995

Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548

Attention: Ms. Sarah J. Shirley, Chair
Opinions Committee

FILE # ML-36590-95
I.D. # 36590

Dear General Morales:

As Director of the Department of Public Safety, I hereby request your opinion on a possible conflict between recently enacted Senate Bill 60, [to be codified as TEX. REV. CIV. STAT. ANN. art. 4413(29ee)], relating to licensing of persons to carry concealed handguns, and provisions of the Alcoholic Beverage Code. Simply stated, art. 4413(29ee) appears to permit a license holder to carry a concealed handgun on certain, though not all, licensed alcohol establishments. The Alcoholic Beverage Code prohibits most persons from carrying a firearm on the premises of a licensed alcohol establishment.

With certain exceptions, it is currently a third degree felony for a person to carry a handgun on any premises licensed or issued a permit by this state for the sale of alcoholic beverages. TEX. PENAL CODE ANN. §46.02(f). Effective September 1, 1995, TEX. PENAL CODE ANN. §46.02(b)(7) will negate §46.02(f) as applied to a license holder, establishing a "defense to prosecution" under §46.02 for a license holder who is carrying a concealed handgun and a valid license to carry a concealed handgun. (The effective date of Senate Bill 60 is September 1, 1995, but no license to carry a concealed handgun may be effective before January 1, 1996.)

In place of the prior prohibition against carrying weapons in an alcohol establishment, TEX. PENAL CODE ANN. §46.035 provides that a license holder commits an offense if the license holder intentionally, knowingly, or recklessly carries a handgun under the authority of art. 4413(29ee) on

or about the license holder's person on the premises of a business that has a permit or license issued under Chap. 25, 28, 32, or 69, Alcoholic Beverage Code, if the business derives 51% or more of its income from the sale of alcoholic beverages for on-premises consumption. Alcohol establishments which do derive 51% or more income from on-premises consumption are required to post special notices. TEX. REV. CIV. STAT. ANN. art. 4413(29ee), § 31. Thus, Senate Bill 60 appears to authorize a license holder to carry a concealed handgun on the premises of certain licensed alcohol establishments, i.e., those establishments which derive less than 51% of their income from the sale of alcoholic beverages for on-premises consumption.

By contrast, the Alcoholic Beverage Code provides that a licensee or permittee of an alcohol establishment (with certain exceptions) may not allow a person to carry firearms on the licensed premises. A permittee or licensee is subject to both an administrative penalty (license cancellation) [see Alcoholic Beverage Code §11.61(e), and §61.71(f)], and a criminal penalty [see Alcoholic Beverage Code §1.05] for allowing a person to carry a firearm on the licensed premises. Finally, the Alcoholic Beverage Code requires a licensee to post warning signs that carrying weapons where alcoholic beverages are sold is a felony. Alcoholic Beverage Code §61.11.

The new provisions of Senate Bill 60 appear to create a dilemma for the alcohol establishments. Their livelihood depends on remaining in compliance with the Alcoholic Beverage Code, which has not been explicitly amended by Senate Bill 60. At the same time, alcohol establishments will be hard pressed to enforce statutes against patrons who may be licensed to carry a concealed handgun, and who have good cause to believe they may lawfully carry the concealed handgun on many licensed premises.

One additional point which has caused some confusion are competing definitions of the term "premises." TEX. PENAL CODE ANN. §46.035 defines "premises" very narrowly: "The term does not include any public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area." "Premises" is not defined elsewhere in Chapter 46 of the Penal Code, but appears to have a distinct usage for purposes of §46.02 and §46.03. Alcoholic Beverage Code §11.49 defines "premises" much more broadly, to include "the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person." Again, an alcohol establishment licensee is obliged to bar persons with firearms from the premises. The concealed handgun license holder will not consider himself to be on the premises while in the parking lot under S.B. 60. In addition, the alcohol establishment licensee will not be able to tell who is licensed to carry a concealed handgun.

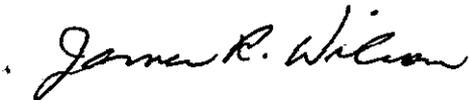
My questions are:

- (1) How are provisions of Penal Code §46.035 to be reconciled with the above-referenced provisions of the Alcoholic Beverage Code, or does Senate Bill 60 repeal these provisions by implication?

- (2) Can it be lawful for a concealed handgun license holder to enter certain alcohol establishments, and yet at the same time unlawful for the alcohol establishment licensee to allow the license holder to enter or remain on premises? Is the alcohol establishment licensee protected or immune from civil or criminal prosecution due to required concealment of the handgun by the handgun license holder?
- (3) What is the relevant measuring time period during which the 51% of income from sales of alcoholic beverages is to be measured, e.g., fiscal year 1995 or the last fiscal quarter?
- (4) If Senate Bill 60 has repealed by implication the provisions of the Alcoholic Beverage Code, are licensees and permittees of alcohol establishment still required to post the warning notices required by Alcoholic Beverage Code §61.11, or are these notices superseded by those required by TEX. REV. CIV. STAT. ANN. art. 4413(29ee), §31?
- (5) Is the special definition of the term "premises" found in TEX. PENAL CODE ANN. §46.035, to be restricted to that section, or to be applied generally throughout Penal Code Chapter 46 and throughout Senate Bill 60?

If I can provide any additional assistance to you regarding this request, please do not hesitate to call me, or John C. West, Jr., Chief of Legal Services. We sincerely appreciate your assistance in this matter.

Sincerely,



James R. Wilson, Director
Department of Public Safety

JRW:JCW:KMR

xc: Senator Patterson
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