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OPINION COMMITTEE

RQ-0656-GA

December 19, 2007

Honorable Greg Abbott
Attorney General
300 W. 15th Street
Austin, TX 78701

VIA UPS DELIVERY

FILE # ML-45489-07
I.D. # 045489

Re: **REQUEST FOR AN OPINION -**
Regarding the Effect of a County-wide Election on the Status of Beer and
Wine Sales in certain areas of Brazoria County

Dear Mr. Abbott:

This request for an opinion is submitted to determine, following a County-wide election in Brazoria County in November, 2007, the legal status of certain beer and wine sales in parts of Brazoria County where there have been previous local option elections and to obtain an opinion on the availability or non-availability of certain permits or licenses under the Texas Alcoholic Beverage Code.

Several questions have been presented to this office by the Brazoria County Clerk's Office and other County officials following the County-wide election of November 6, 2007, as discussed herein below.

I.

FACTUAL BACKGROUND

On November 6, 2007 Brazoria County voters voted affirmatively "FOR" two (2) different propositions for the sale of alcohol: "The legal sale of beer and wine for off-premise consumption only" and "The legal sale of mixed beverages in restaurants by food and beverage certificate holders only". (See Exhibit A, Order No. 53 from Commissioners' Court Minutes of November 14, 2007).

Previously, on January 4, 1958 the voters of former Justice Precinct No. 5 voted affirmatively "FOR" prohibiting the legal sale of beer. This old JP Precinct No. 5 area includes the City of Sweeny. (See Exhibit B, History of Alcoholic Beverages, Brazoria County, Texas,

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showing past local option elections). Also, on November 5, 1968, the City of Richwood voted affirmatively "FOR" the "legal sale of beer off premise only". (See Exh. B).

Following the election of November 6, 2007 several questions arose among County officials and prospective applicants for licenses or permits under the Texas Alcoholic Beverage Code as to whether or not beer sales would be allowed in the City of Sweeny, and what permits or licenses, if any, were allowable by the Alcoholic Beverage Code for sale of wine only. In response to questions directed to the office of the District Attorney, a memorandum was issued which essentially concluded that all beer sales remain completely prohibited within the City of Sweeny and that only wine¹ sales were legally allowed as a result of the County-wide election. It was recommended that the County Clerk restrict and limit any certification of a "wet area" pursuant to Section 11.37 of the Alcoholic Beverage Code as only applying to wine sales. Subsequently, a follow up e-mail message recommended that a notation be inserted on Mixed Beverage Permit applications as well as Wine & Beer Retail Permit applications stating/clarifying that "Beer is excluded from this Certification". (See Exhibits C and E, memo and e-mail).

Recently, a prospective applicant in the City of Richwood has made inquiries as to the availability of a mixed beverage permit.

The Texas Alcoholic Beverage Commission ("TABC") has taken the position that (1) there is no permit or license for wine-only off-premise retail sales², (2) that a Wine & Beer Retailer's Off-Premise Permit (designated "BQ") cannot be issued and limited to wine only, and (3) TABC will not issue a permit for wine only and will not issue any permit or license if the County Clerk fails to sign the Certificate on its form as is and without qualifying or limiting its certification.

II.

DISCUSSION/ANALYSIS OF QUESTIONS PRESENTED

A. QUESTIONS PRESENTED

The following questions are presented for analysis:

¹ Subsequently, a clarification e-mail message noted that the County-wide election also authorized the sale of mixed beverages in restaurants and this would be applicable in Sweeny with the exception of beer sales, which would remain prohibited.

² There is a "Wine-Only Package Store Permit" (designated "Q" by the Texas Alcoholic Beverage Commission on its application form). See generally, TEX. ALCO. BEV. CODE ANN. § 1.04, § 28.01 et seq.

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1. Following the County-wide election of November 6, 2007, are wine and beer sales allowed in the City of Sweeny, or do beer sales remain completely prohibited in the former JP Precinct No. 5 (which includes the City of Sweeny) due to the previous local option election of 1958?
2. If beer sales remain completely prohibited in the City of Sweeny/former JP Precinct No. 5, can the County Clerk certify, pursuant to Section 11.37, Alcoholic Beverage Code, locations in the City of Sweeny as a "wet area" for *both wine and beer* sales on the Certification part of an application for a Wine & Beer Retailer's Off-Premise permit?
3. If the County Clerk cannot and should not certify the former JP Precinct No. 5 as "wet" for beer, what certification, if any, should be made on the Application form furnished by the Texas Alcoholic Beverage Commission (See Exhibit D, Application form)?
 - (a) Should the County Clerk enter qualifying words of limitation such as "BEER IS EXCLUDED FROM THIS CERTIFICATION", or, because there is no statutorily authorized permit or license for a wine-only retailer's off-premise permit, should the County Clerk decline to make any type of certification?
 - (b) Same question as to mixed beverage certificate (for restaurants with food and beverage certificates in Sweeny). Should the County Clerk enter qualifying words of limitation, such as "BEER IS EXCLUDED FROM THIS CERTIFICATION", or, because a mixed beverage permit includes authorization to sell beer, should the County Clerk simply decline making any type of certification? (or more specifically, decline signing the certification on the TABC application form that represents the location is in a "wet area" for the particular permit requested, a mixed beverage permit)?
4. If (with respect to a Wine and Beer Retailer's Permit application or Mixed Beverage Permit application) the County Clerk inserts "BEER IS EXCLUDED FROM THIS CERTIFICATION" or otherwise revises or qualifies the certification presented on the TABC form, can the TABC legally issue a *modified* permit for the retail sale of wine-only off-premises or a modified permit for the sale of mixed beverages excluding beer?

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5. Can mixed-beverage permit applications be certified as "wet" for locations within the City of Richwood, or must certifications under Section 11.37 be declined or qualified as not including beer due to Richwood's limitation of beer sales to "off-premises" in its local option election of 1968?
6. If on-premises sale of beer remains prohibited in Richwood, can a mixed-beverage permit (which by definition includes beer) be issued for locations in the City of Richwood?

B. EFFECT OF AFFIRMATIVE VOTES IN LOCAL OPTION ELECTIONS TO PROHIBIT OR ALLOW ALCOHOL SALES

1. Statutory and Case Law

Statutory law provides that a voting unit's affirmative vote in a local option election for prohibition or legalization of the sale of alcohol remains in effect "until that status is changed by a subsequent local option election in the same authorized voting unit." TEX. ALCO. BEV. CODE ANN., § 251.72. In addition, Section 251.80 of the Alcoholic Beverage Code states that local option status, once established as a result of a vote in a justice precinct, "shall remain in effect until the status is changed as the result of a vote in the same territory that comprised the precinct when such status was established." TEX. ALCO. BEV. CODE ANN., § 251.80.

In a case interpreting and applying the local option election sections of the Texas Constitution, the appellate Court in *Coker v. Texas Alcoholic Beverage Commission* specifically held that a justice precinct that had previously voted to prohibit sale of alcoholic beverages remained dry notwithstanding a subsequent county-wide vote to legalize the sale of alcoholic beverages in the County. *Coker v. Texas Alcoholic Beverage Commission*, 524 S.W. 2d 570, 574 – 576 (Tex. Civ. App. – Dallas 1975, writ refused n.r.e.). See also, *Powell v. Smith*, 90 S.W. 2d 942, 943 – 944 (Tex. Civ. App. – Fort Worth 1936, no writ).

2. Prior Attorney General Opinions and Other Authority

Prior Attorney General Opinions also support the conclusion that a voting unit's local option status, once affirmatively established, is not changed by a county-wide election or by redistricting of justice precincts. See e.g., Op. Tex. Atty's Gen. No. JM-1177 (1990); H-59 (1973). See also, 36 Tex. Prac., County & Special District Law, § 37.8.

C. APPLICATIONS, AND LICENSES UNDER THE TEXAS ALCOHOLIC BEVERAGE CODE.

1. County Clerk's Certification Pursuant to Section 11.37 and Section 61.37

Sections 11.37 (permit applications) and 61.37 (license applications) of the Alcoholic Beverage Code require that the County Clerk certify whether a given location in the application "is in a wet area" and whether the sale of alcoholic beverages is prohibited by commissioners court order. In the Alcoholic Beverage Code, an area "is a 'wet area' as to an alcoholic beverage of a particular type and alcoholic content if the sale of that beverage is lawful in that area." TEX. ALCO. BEV. CODE ANN. § 251.71 (a). Conversely, an "area is a 'dry area' as to an alcoholic beverage of a particular type" if that beverage's sale is unlawful in that area. *Id.*

2. Permits and Licenses At Issue

Subtitles A. and B. of Title 3 of the Alcoholic Beverage Code contain the provisions on procedures for obtaining permits and licenses to sell alcohol and describe the permits and licenses available for the sale of different types of alcohol by different types of businesses. The permits chiefly at issue in these questions presented are the Wine and Beer Retailers Off-Premise Permit (designated by letters "BQ" on Application form, Exhibit D) and the Mixed Beverage Permit (for restaurants with food and beverage certificate, "RM" on the Application form). See Chapters 26 and 28, Alcoholic Beverage Code. It is notable that there is not a permit or license listed in the Alcoholic Beverage Code for a *wine-only* retailer's off-premise permit.

III.

CONCLUSIONS

A. FORMER JP PRECINCT NO. 5/CITY OF SWEENY

Based on the above referenced law, the sale of beer remains completely prohibited in the former JP Precinct No. 5, including the City of Sweeny, pursuant to the provisions of Sections 251.72 and 251.80 of the Alcoholic Beverage Code and other applicable law discussed herein. The local option election of November 6, 2007 did not change that area's status regarding the prohibition of beer sales.

Pursuant to Section 11.37 (or Section 61.37 as to license applications) the County Clerk should not certify locations within the former JP Precinct No. 5/City of Sweeny as a "wet area" for beer sales on either Wine and Beer Retailer's Off-Premise Permit applications or on Mixed Beverage Permit applications. In this regard, the County Clerk should either qualify or limit its certification of "wet" to wine-only or otherwise note that beer is excluded from the certification

COUNTY COURTHOUSE, 111 E. LOCUST, SUITE 408A, ANGLETON, TX 77515

Honorable Greg Abbott
Attorney General
December 19, 2007
Page 6

statement shown on the TABC form. Alternatively, because the Certificate language on the TABC form certifies an area as wet for a "Wine and Beer" retailer's permit, the Clerk may simply decline any certification at all on a Wine and Beer Retailer's Permit application on the basis that beer sales are prohibited in that area³.

A similar dilemma is presented regarding the Mixed Beverage (for restaurants with food and beverage certification) Permit application because "mixed beverages", by definition, includes beer and the sale of beer is authorized under a mixed beverage permit. TEX. ALCO. BEV. CODE ANN. §§ 1.04, 28.01. The County Clerk, given the language on the TABC form, cannot certify without qualification the Sweeny area on the form as a "wet area for a mixed beverage permit" because the sale of beer remains prohibited in that area. The Clerk should either insert words of limitation and qualification in the certification (such as "Beer is excluded from this certification"), or alternatively, decline to sign the certification statement as stated in the TABC form.

B. CITY OF RICHWOOD

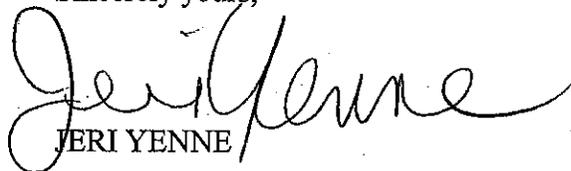
Any *on-premises* sale of beer remains completely prohibited within the City of Richwood due to the affirmative vote in the local option election of 1968 authorizing beer sales "off premises only". (See Exhibit B).

As with the former JP Precinct No. 5/City of Sweeny area, the County Clerk should either limit or qualify any certification under Section 11.37 by noting the exclusion of beer or that the area is not wet for beer, or alternatively, decline to sign the certification statement as stated in the TABC form⁴.

Please issue an opinion on the above referenced questions and, due to the urgency of these matters, we ask for expedited consideration of these questions.

Thank you for your attention to this matter.

Sincerely yours,



JERI YENNE

³ As previously noted, there is no listed wine-only retailer's permit under the Alcoholic Beverage Code, but there is a Wine-Only Package Store Permit. TEX. ALCO. BEV. CODE ANN. § 24.01, et seq. "Package store" does not appear to be defined, but this permit could be granted in the Sweeny area if an applicant otherwise qualifies.

⁴ There is no mixed beverage permit in the Alcoholic Beverage Code that excludes beer.
COUNTY COURTHOUSE, 111 E. LOCUST, SUITE 408A, ANGLETON, TX 77515

Honorable Greg Abbott
Attorney General
December 19, 2007
Page 7

xc: Henry W. Prejean
Commissioners Court
County Clerk

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