



THE ATTORNEY GENERAL  
OF TEXAS

AUSTIN 11, TEXAS

GROVER SELLERS

~~JOHN HENSON~~  
ATTORNEY GENERAL

Honorable Bert Ford, Administrator  
Texas Liquor Control Board  
Austin, Texas

Dear Sir:

Opinion No. O-6917

Re: Proper form of ballot to be used in a local option election in a city part of which is "dry" under a former local option election and part of which has since been annexed and is "wet."

You have requested an opinion of this department based on facts contained in a letter written to you by Mr. Jos. F. Henson of Pasadena, Texas. The letter, in part, is as follows:

"We are preparing to petition the Commissioners Court of Harris County for an order authorizing and ordering an election in the City of Pasadena to determine whether or not the sale of all alcoholic beverages shall be legalized or shall be prohibited in the City.

". . . .

"Our problem is this: part of the corporate area of the City is 'dry' by a local option election, as stated above, held in 1937, and a part is 'wet' as stated above, because it was 'wet' prior to its being annexed to the City. The question is: Which form of the ballot, if either, would be proper under these circumstances?"

From the facts set forth in the above letter it appears that the City of Pasadena contains approximately four square miles which is "dry" under a local option election held in 1937, and approximately six square miles annexed since 1940 which is "wet." We have been advised by the Texas Liquor Control Board that the sale of all intoxicating liquors in the annexed portion of the City of Pasadena has been legalized.

We assume that there is no question as to the validity of either the annexation of the "wet" territory of the local option election held in 1937. The legal effect of the annexation of a "wet"

territory to a "dry" city was before the Supreme Court of Texas in the case of Houchins vs. Plainos, 110 S.W. (2d) 549. In that case the court speaking through Judge Critz stated that no provision is made in our law for a change in the local option status of a "wet area" merely through its annexation to a "dry area" by ordinance.

Section 20 of Article XVI of the Texas Constitution, last amended in 1935, provides in part as follows:

"(b) the legislature shall enact a law or laws whereby the qualified voters of any county, justice's precinct or incorporated town or city, may, by a majority vote of those voting, determine from time to time whether the sale of intoxicating liquors for beverage purposes shall be prohibited or legalized within the prescribed limits; and such laws shall contain provisions for voting on the sale of intoxicating liquors of various types and various alcoholic content."  
(Emphasis added.)

The Supreme Court in the Houchins case cited above declared that since this constitutional amendment provided for the method of determining whether or not intoxicating liquors may be legalized within a prescribed area then this was the exclusive means by which this question could be decided. See also on this question Attorney General's Opinion No. 0-6880, a copy of which is attached.

It is a well settled rule under the Texas cases that whenever a local option law is once legally put into operation in a given territory, it must remain in force until it has been voted out by the voters of the territory where such law was originally vitalized. See Ex Parte Pollard, 103 S.W. 878 and Walling vs. King, County Judge, 87 S.W. (2d) 1074. Article XVI, Section 20 of the Texas Constitution provides for elections only in the county, justice's precinct or incorporated town or city.

Having determined that the exclusive method of changing the status of a "dry" or "wet" area is by an election, we now proceed to the question of the form of the ballot to be used in an election in an incorporated city part of which is "wet" and part of which is "dry."

Pursuant to Section 20 of Article XVI of the Texas Constitution, previously set forth in this opinion, the Forty-fourth Legislature in 1935 passed the Texas Liquor Control Act which is to be found in Articles 666 and 667 of Vernon's Annotated Penal Code, 1925. Article 666-23 defines a "dry area" and a "wet area" as follows:

"Whenever the term 'dry area' is used in this Act it shall mean and refer to all counties, justice precincts, incorporated cities or towns wherein the sale of alcoholic beverages has been prohibited by valid local option elections held under the laws of the State in force at the time of the taking effect of Section 20, Article XVI, Constitution of Texas in the year 1919. It likewise shall mean and refer to any such areas where sale of such alcoholic beverages shall be prohibited under the terms of this Act.

"The term 'wet area' shall mean and refer to all other areas of the State." (Emphasis added.)

An examination of the above underscored language in Article 666-33 forces us to the conclusion that the determination of the status of one of the political subdivisions mentioned in Article XVI, Section 20 of the Texas Constitution depends upon a consideration of the status of the county, justice precinct, or incorporated town or city as a whole, and that one of the above subdivisions may not be part "dry" and part "wet" for the purposes of a local option election. It is our further opinion that if any part of the subdivision is "wet" then the entire subdivision is "wet" for purposes of a local option election. The City of Pasadena, despite the fact that the entire city was originally a "dry area," is now a "wet area" by virtue of the fact that liquor may now be legally sold in a portion of the incorporated city.

Articles 666-35 and 666-40 of Vernon's Annotated Penal Code, 1925, concern the form and requisites of ballots used in a local option election. Article 666-35 reads, in part, as follows:

"(a) At said election the vote shall be by official ballot which shall be printed or written thereon at the top thereof in plain letters the words 'Official Ballot.' Said ballot shall have also written or printed thereon the issue or issues appropriate to the election order as provided in Section 40 of this Act, . . . " (Emphasis added.)

Article 666-40 provides for three methods of legalization of the various types of liquors, and likewise three degrees of prohibition. This article sets out one form of ballot to be used in a "wet area" and another form to be used in a "dry area." Since we have concluded that this election is to be held in a "wet area" we will quote only the provisions applicable to elections in such areas.

"In areas where the sale of all alcoholic beverages has been legalized one or more of the

following issues shall be submitted in any prohibitory election:

"(d). 'For prohibiting the sale of all beverages that contain alcohol in excess of four (4%) percentum by weight' and 'Against prohibiting the sale of all beverages that contain alcohol in excess of four (4%) percentum by weight.'

"(e). 'For prohibiting the sale of all alcoholic beverages that contain alcohol in excess of fourteen (14%) percentum by volume' and 'Against prohibiting the sale of all alcoholic beverages that contain alcohol in excess of fourteen (14%) percentum by volume.'

"(f). 'For prohibiting the sale of all alcoholic beverages' and 'Against prohibiting the sale of all alcoholic beverages.'  
(Emphasis added.)

Since the letter enclosed by you states that the forthcoming election is "to determine whether or not the sale of all alcoholic beverages shall be legalized or shall be prohibited in the City" it appears that section (f) underscored above contains the proper issues to be submitted in the forthcoming election.

It is important that the form of the ballot called for in Article 666-40 be strictly followed. In the case of Moyer vs. Kelley, et al., 93 S.W. (2d) 503, the San Antonio Court of Civil Appeals used this language:

"The word 'shall' found in Section 35(a) makes it mandatory that the form of ballot herein given or one or more of the forms of ballots set forth in Section 40, shall be used in all elections held on the liquor question."

In the same opinion we find the following statement:

"The failure to use the form of ballot prescribed by statute constitutes a violation of the mandatory provisions of the Liquor Control Act and renders the election voidable, when seasonably attacked in a proper election context."

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For additional cases holding that the statutory form of ballot must be used see Cain, County Attorney vs. Garvey, 187 S.W. 1111; Griffin vs. Tucker, County Attorney, 119 S.W. 338 and Flowers vs. Shearer, 107 S.W. (2d) 1049.

It is the opinion of this department, that for purposes of a local option election, the City of Pasadena is a "wet area" within the meaning of the Texas Liquor Control Act. It is the further opinion of this department that all qualified voters now residing in the incorporated City of Pasadena who desire to vote may do so and they must be furnished with a ballot printed in strict conformity with Articles 666-35 and 666-40, Section (f) of Vernon's Annotated Penal Code, 1925.

We trust this satisfactorily answers your questions.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By  
s/ C. Y. Mills  
C. Y. Mills  
Assistant

CYM:zd:segw

APPROVED OCT 5, 1946

s/ Grover Sellers

ATTORNEY GENERAL OF TEXAS

Approved Opinion Committee  
By BWB Chairman