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February 7, 2007

**RQ-0568-GA**

The Honorable Greg Abbott, Attorney General  
P. O. Box 12548  
Austin, TX 78711-2548

Re: Request for an Opinion Letter in regard to "BYOB" operation, in a dry area of the City of Corsicana, of a pool hall possessing no on-premises alcoholic beverage permit

Dear General Abbott:

Pursuant to the authority to issue advisory opinions granted to the Attorney General in Section 22 of Article IV of the Texas Constitution, as that authority is more specifically described in Sections 402.041, *et seq.* of the Government Code (and particularly §4.02.043 thereof), this letter is being submitted to request an opinion regarding circumstances which are occurring in the City of Corsicana, Navarro County, Texas.

As will be explained in more detail in the accompanying brief, prior to the rather limited local option election held on May 15, 2005, the City of Corsicana had been a "dry" area in all respects. At that election, the voters of the City of Corsicana voted to legalize the sale of beer and wine for off-premises consumption and to legalize the sale of mixed beverages in restaurants by food and beverage certificate holders only. Since the election (again as shown more fully in the accompanying brief), the City of Corsicana has enacted ordinances regulating the lawful consumption of alcohol in Corsicana. Corsicana also has long had, and continues to have, an ordinance requiring special use permits for private clubs.

Recently, a business establishment has indicated its intention to open in the downtown area of the City of Corsicana. The nature of this business is understood to be a pool hall; and it has not obtained – and apparently does not plan to obtain – a food and beverage certificate or private club license, nor does it apparently plan to act in any respect as a restaurant. However, without having obtained any type of permit or certificate from either the Texas Alcoholic Beverage Commission or the City of Corsicana, this business apparently intends to operate on a "BYOB" basis whereby customers can bring onto the premises, and remove from the premises, alcoholic beverages for their own consumption, and for that of any members of their party, while they are on the premises.

The Honorable Greg Abbott, Attorney General  
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The Alcoholic Beverage Code does not appear to deal specifically or by name with "BYOB" operations, and there appear to be differences of opinion as to whether representatives of the Commission, or other law enforcement officers, have the authority to take any action against either the owners or operators of the business or against any persons who may be found to be consuming an alcoholic beverage on the premises of the pool hall.

The City of Corsicana is of the opinion that this operation is unlawful and that representatives of the Commission ought to intervene or that law enforcement officers be authorized to intervene. Alternatively, irrespective of the actions, or lack thereof, of the Commission's representatives, it is the City's position that, for the reasons set out more specifically in the accompanying brief, the nature of the "BYOB" operation is such that the City should be able to enforce its own ordinances against this establishment and prevent its continuing to operate in this business unless and until it has complied with all applicable laws, rules, and ordinances. Please respond to this request for an Attorney General's Opinion regarding these matters.

Respectfully submitted,



Lowell Thompson, District Attorney  
Navarro County, Texas



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February 7, 2007

The Honorable Greg Abbott, Attorney General  
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Re: Brief in support of letter from Navarro County District Attorney requesting an Opinion Letter in regard to "BYOB" operation, in a dry area of the City of Corsicana, of a pool hall possessing no on-premises alcoholic beverage permit

Dear General Abbott:

Pursuant to the authority to issue advisory opinions granted to the Attorney General in Section 22 of Article IV of the Texas Constitution, as that authority is more specifically described in Sections 402.041, *et seq.* of the Government Code (and particularly §402.043 thereof), this letter is being submitted as a brief to the Attorney General in regard to the questions involved in the above-referenced letter from the undersigned, Navarro County District Attorney Lowell Thompson, requesting an opinion regarding circumstances which are occurring in the City of Corsicana, Navarro County, Texas.

**I.**

**CORSICANA'S 2004 LOCAL OPTION ELECTION**

Prior to the rather limited local option election held on May 15, 2004 (as described more completely below), the City of Corsicana had been a "dry" area in all respects. At that election, the voters of the City of Corsicana voted to adopt these two propositions: (1) "The legal sale of beer and wine for off-premise consumption only" and (2) "The legal sale of mixed beverages in Restaurants by food and beverage certificate holders only." [Attached to this brief as Exhibit A are true and correct copies, consisting of five pages, of documents evidencing the scope and result of the local option election.]

Prior to 2005, the Alcoholic Beverage Code, Title 6, Local Option Elections, Chapter 251 contained detailed provisions for local option elections. Most of them were repealed in 2005 and can now be found in V.T.C.A Election Code §501.021 *et seq.* However, **Subchapter D** “**Miscellaneous Local Option Provisions**”, Section 251.71, *et seq.* can still be found in the Alcoholic Beverage Code. Section 251.71, Wet and Dry Areas, describes the “dry area” versus “wet area” status of the City of Corsicana with regard to various types of alcoholic beverage sales:

**§251.71. Wet and Dry Areas**

(a) An area is a “dry area” as to an alcoholic beverage of a particular type and alcohol content if the sale of that beverage is unlawful in the area. 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 the area.

(b) Those areas that are wet or dry when this code takes effect retain that status until the status of the area is changed as provided in this code.

(c) All trial courts of this state shall take judicial notice of the wet or dry status of an area in a criminal prosecution.

(d) In an information, complaint, or indictment, an allegation that an area is a dry area as to a particular type of alcoholic beverage is sufficient, but a different status of the area may be urged and proved as a defense.

(e) For purposes of this code:

(1) a reference to a local option election means an election held under Chapter 501, Election Code; and

(2) a local option election held under Chapter 501, Election Code, is considered to have been held under this code.

Also; given the limited nature of the Corsicana Local Option Election, the following provisions of that same subchapter are important:

**§251.72. Change of Status**

Except as provided in Section 251.73 of this code, an authorized voting unit that has exercised or may exercise the right of local option retains the status adopted, whether absolute prohibition or legalization of the sale of alcoholic beverages of one or more of the various types and alcoholic contents on which an issue may be submitted under the terms of Section 501.035, Election Code, until that status is changed by a subsequent local option election in the same authorized voting unit.

The above statutory provisions, coupled with the limited nature of the local option election in Corsicana, make it clear that, except for the types and locations of sales which were specifically authorized by the election, Corsicana remains a "dry area". [Attached hereto as Exhibit B is a true and correct copy from the Code of Ordinances, City of Corsicana, of Chapter 14 ALCOHOLIC BEVERAGES, ARTICLE 14.400 REGULATION OF LAWFUL CONSUMPTION OF ALCOHOL. Most of this Article was passed as Ordinance 2381, adopted 6/1/04. However, amendments and additions were later passed as follows: Ordinance 2393, adopted 10/5/04, amending Sec. 14.4.05. Since then, the Council has passed Ordinance 2476, adopted 7/18/04, adopting the new Sec. 14.413, and Ordinance 2509 adopted 11/7/06, adopting the new Sec. 14.414.]

**II.**  
**BUSINESSES WHICH HOLD NO ON-PREMISES**  
**ALCOHOLIC BEVERAGE PERMIT, BUT WHICH NEVERTHELESS**  
**PURPORT TO ALLOW CUSTOMERS TO CONSUME ALCOHOLIC BEVERAGES**  
**ON A "BYOB" BASIS**

The particular circumstance which has given rise to the District Attorney's inquiry (although other similar circumstances might perhaps occur in the future) is the recently announced opening for business of a pool hall which possesses no TABC permit at all. However, while this business does not sell alcoholic beverages, it intends to permit the consumption thereof on a "BYOB" basis whereby the customers bring their own alcoholic beverages for their own consumption or that of their guests. For the reasons more fully described below, the City of Corsicana takes the position that this conduct is unlawful and improper.

While the term "BYOB" is a generally familiar one, it is perhaps rather surprising that it is not specifically dealt with, in those terms, in the Alcoholic Beverage Code. Further, a computer word search for that terminology yields surprisingly little mention thereof in court opinions or other statutes. It is mentioned in the district court opinion in *LLEH, Inc. vs. Wichita County, Texas*, 121 F.Supp. 2d 513, 517 (N.D. TEX. 2000), rev'd in part, *LLEH, Inc. vs. Wichita County, Texas*, 289 Fed.3d 358, 362 (5<sup>th</sup> Cir. 2002). One of the plaintiffs in that case is a sexually oriented business, located in an unincorporated area of Wichita County, Texas (*LLEH, Inc., d/b/a BABE's*) which features nude dancing. The opinion deals with first amendment challenges to the ordinance imposing restrictions on nude and partially nude dancing, rather than on the consumption of alcohol. So the only mention that the district court opinion makes of drinking at *BABE's* is the following:

*Babe's* is a "BYOB" ("bring your own bottle") establishment; it does not sell alcoholic beverages and, therefore, it is exempt under the Texas Alcoholic Beverage Code ("TABC").

The Fifth Circuit opinion affirmed the district court in part, reversed in part, vacated in part, and remanded the case. However, it mentions the "BYOB" operation only in stating that "*LLEH* planned to open *Babe's* BYOB, a SOB, on the property." (289 Fed.3d at 362). So the Fifth Circuit opinion does not comment on the above-quoted statement by the district court that a "BYOB" establishment

is exempt under the TABC because it does not sell alcoholic beverages. This statement by the district court is dictum in any event, though, since the opinion deals with various measures taken by Wichita County to restrict the operation of SOBs.

**III.**  
**CAN A POOL HALL WHICH HOLDS NO ON-PREMISES ALCOHOLIC  
BEVERAGE PERMIT BE TERMED A "CLUB"**

**A. Statutory Background Regarding Private Clubs**

Other questions to be considered are whether a business like the one to which this requested opinion relates could properly be considered to be a "private club", or simply a "club". Currently, the Alcoholic Beverage Code makes provisions for alcoholic beverages in private clubs. See **Chapter 32. Private Club Registration Permit**. Before the passage of the Alcoholic Beverage Code, provisions for "Private Clubs" were contained in Vernon's Penal Code Ann. art. 66-15e. This statute is mentioned, and quoted in part, in *Robinson v. Steak and Ale 105 Club*, 607 S.W.2d 286, 287 (Tex.Civ.App.-Texarkana 1980, no writ). The former article 66-15e 1(a), quoted in *Robinson*, contained a definition of the term "Private Club". Under the Alcoholic Beverage Code, it is not presented as a definition, per se. Instead, §32.03 of the Alcoholic Beverage Code provides, in its various subsections, the "requirements" which must be present in order for a club to be issued a private club registration permit. Taken together, the various subsections of §32.03 require a considerable degree of organization and uniformity in various respects, including, for example:

\* \* \*

(b) The club must be an association of persons . . . for the promotion of some common object.

(c) Members of the club must be passed on and elected by a committee or board made up of members of the club. . .

(d) No application for membership may be approved until the application has been filed with the chairman of the membership committee or board and approved by the Chairman. . . .

(e) At least 50 members of the club must reside in the county in which the premises of the club are located, or at least 100 members must reside in an area comprised of the county in which the premises of the club is located and an adjacent county or counties.

(f) The club must own, lease, or rent a building, or space in a building of such extent and character as in the judgment of the commission is suitable and adequate for the club's members and their guests.

(g) A club must provide regular food service adequate for its members and their guests.

\* \* \*

(k) A private club registration permit may not be issued to or maintained by a club for a premises located in a dry area if the club operates a sexually oriented business, as defined by §243.002, Local Government Code, on the premises.

The above are only a portion of the specific requirements for a Private Club Registration Permit; and it is apparent that a good deal of organizational formality is required. There are other significant provisions, including **§32.12 Inspection of Premises**, which provides that acceptance of a private club registration permit constitutes express consent on the part of the private club to an inspection by any authorized representative of the commission or any peace officer. **Section 32.13 Inspection of Books and Records** provides that the club's books and records are to be made available to the commission or its representatives upon request.

By contrast with the requirements for private clubs, the Code clearly prohibits unregistered clubs from enjoying the privileges which are available to private clubs with appropriate registration permits:

#### **§32.14. Unregistered Clubs; Prohibited Activities**

(a) No permittee, licensee, or any other person shall deliver, transport, or carry an alcoholic beverage to, into, or on the premises of any establishment, location, room, or place purporting to be a club, or *holding itself out to the public or any person as a club or private club*, unless the club holds a private club registration permit.

(b) No person may store, possess, mix, or serve by the drink or in broken or unsealed containers an alcoholic beverage on the premises of any establishment, location, room, or *place purporting to be a club or private club* unless the club holds a private club registration permit.

(c) An alcoholic beverage stored or possessed on the premises of any establishment, location, room, or place purporting to be a club, or *holding itself out to the public or any person as a club or private club*, is declared to be an illicit beverage and subject to seizure without a warrant unless a private club registration permit has been issued for the premises, location, room or place.

(Emphasis added).

## B. Diverse Types of "Clubs"

The repetition of the emphasized language ("a club or private club") ought to be interpreted to suggest that there are types of "clubs," other than "private clubs," as the latter are provided for in the TABC. While many clubs have in their nature a sense of commonality found in a specific type of formal association of persons, others have come to be much less formal and may in fact involve no specific group or association at all. An easy way to observe the variation in "dictionary definitions" of "private club" and of "club" is to go the website <http://www.onelook.com>, do a word search for the term to be defined, and read the definitions from a number of different dictionaries. It is of interest that a search for "private club" leads to only one dictionary with English definitions: Wikipedia, the free encyclopedia:

**We found one dictionary with English definitions that includes the word private club:** *Tip: Click on the first link below to go directly to a page where "private club" is defined.*

### General (1 matching dictionary)

1. Private club: Wikipedia, (the Free Dictionary) [have info]

A true and correct copy of the page reflecting the above search result is attached to this brief as Exhibit C. Clicking as directed above takes one to a four-page article which begins as follows:

### Club

From Wikipedia, the free encyclopedia  
(Redirected from Private club)

*This article is about clubs referring to a particular organization of people. For other article subjects named club, see club (disambiguation)\* [See note at asterisk below]*

A **club** is generally an association of people united by a common interest or goal, as opposed to any natural ties of kinship. Such clubs occur in all ancient states of which we have detailed knowledge. Once people started living together in larger groups, there was need for men with a common interest to be able to associate despite having no ties of kinship.

The term **club** now has broader implications. The Service club, for example, exists for voluntary or charitable activities; there are clubs devoted to all sorts of hobbies, sports, and games, political and religious clubs, Social Activities Clubs that appeal to a variety of interests, and so forth. See for example BSAC (a big British scuba diving club). The term *Club* can also refer to a



nightclub or discotheque. . . . [There follow sections dealing with 18<sup>th</sup> century English origins of clubs, Coffee houses, Service clubs, Social clubs, and Social Activities Clubs. A copy of this entire article is attached to this brief as Exhibit D].

\*Clicking on "**club (disambiguation)**" brings up a one-page article which begins in part as follows:

From Wikipedia, the free encyclopedia

A **club** may be any of several things:

- For groups or gathering places of people, such as
  - **social organizations with formal or informal membership, see club.**
  - **business places (generally open to the public, and rarely requiring formal membership) for social activities and usually selling entertainment and refreshments, including nightclubs, dance clubs, comedy clubs, and the like, see nightclub. . . .**

(Emphasis added in bold). A copy of this entire article is attached to this brief as Exhibit E.

Changing the onelook.com word search to "Club" produced references to 39 English dictionaries having definitions including the word "club," – with this entire list being shown on the attached Exhibit F.

Many of these definitions refer to the other and more formal type of club. The "Quick definitions (club)" in the right column, and a number of the 39 listed dictionaries, refer to the more "formal" type of "association of people" which has perhaps been more common in the past; for example:

•*noun*: a formal association of people with similar interests (Example "He joined a golf club").

(*Id.*) Increasingly, however, a particular type of "club" may refer less to an organization or association and more to a particular type of activity or entertainment in which people (who may not be "members" of an "organization" at all) like to engage in the evenings or their spare time. Thus:

•*noun*: a spot that is open late at night and that provides entertainment (as singers or dancers) as well as dancing and food and drink (Example: "*The gossip columnist got his information by visiting nightclubs every night*"). (www.rhymezone.com).

Or,

•verb: unite with a common purpose (Example: "the two men clubbed together.")

One of the 13 noun definitions given at [encarta.msn.com](http://encarta.msn.com) is:

7. **place for dancing:** a place where people dance to recorded music, usually with bars or other leisure facilities."

The website [www.askoxford.com](http://www.askoxford.com) refers to "3. a nightclub with dance music." (Indeed, most dictionaries refer to "nightclub", "cabaret", "club (dance)", or the like).

The above examples are only a few of the more common types of "clubs" which demonstrate that the characteristics and formalities of a more traditional type of "private club" are not necessarily associated with many places where people gather to eat or drink, to watch, to listen to, participate in, etc. some type of common interest. It could be a dance club, a chess club, a backgammon club, a karaoke club, a pool club, or any of many others. So, the Alcohol Beverage Code ought to be interpreted to regulate the consumption of alcohol in "clubs" as well as "private clubs."

**C. City of Corsicana Ordinance Requiring Specific Use Permits for Private clubs.**

Attached hereto and incorporated herein as Exhibit G is a true and correct copy of Corsicana's "Article 12.600 SPECIFIC USE PERMITS - PRIVATE CLUBS". This Ordinance (No. 2161, adopted 6/17/97) provides in part as follows:

**Sec. 12.601 Definitions**

*Private Clubs.* For the purpose of this article, a private club is defined as any association, person, firm or corporation, key club, bottle club, locker club, **pool club** or any other kind of club or association, excluding the general public from its premises or place of meeting or congregating or operating or exercising control over any other place where persons are permitted to drink alcoholic beverages other than a private home. (Emphasis added).

\* \* \*

**Sec. 12.602 Permit Required**

It shall be unlawful for any association, person, firm or corporation to maintain or operate any private club for the purpose of selling, bartering or giving away any alcoholic beverage after the enactment of this article without first obtaining a specific use zoning permit as approved by the City council. Fraternal and Veteran's organizations are exempt from private club specific use permit requirements (Alcohol Beverage Code, Sec. 32.11).

\* \* \*

As we have been discussing, in modern usage, a night club, a karaoke club, a pool club, etc. might well be a place where people who are not "members" of any group or association gather to engage in a common interest. However, at least for the City of Corsicana, a "pool club" (other than in a private home) where people gather, and where they are permitted to drink alcoholic beverages," requires "a specific use zoning permit as approved by the City council." In the case of the establishment about which this inquiry is being made, no such action has been taken. So, as argued above, this is a place in Corsicana which is still "dry" and where alcohol consumption – whether on a "BYOB" basis or on any other basis – is unlawful. It is requested that the Attorney General so declare.

#### IV. STATUTORY PROVISIONS FOR ALCOHOLIC BEVERAGES PURCHASED BY INDIVIDUAL MEMBERS

In the case of a private club having the proper permits, it can be permissible for individual members to purchase and own alcoholic beverages which they consume on the club premises:

##### **§32.05. Locker System**

The locker system of storage is a system whereby the club rents a locker to a member in which he may store alcoholic beverages for consumption by himself and his guests. All alcoholic beverages stored at a club under the locker system must be purchased and owned by the member individually.

Not surprisingly, there is no corresponding provision for a locker system to be employed by an unregistered club. The City submits that this is very strong evidence that the "BYOB" method of operation is not permissible. Similarly, under a "BYOB" approach, the persons who "brought their own" would generally expect that they would be able to remove the unconsumed portion from the club premises. But, in the case of private clubs, this is prohibited under Section 32.15:

##### **§32.15. Removal of Beverages from Premises**

A private club, irrespective of location or system of storage of alcoholic beverages, may not permit any person to remove any alcoholic beverages from the club premises, except as authorized by Subsection (b) of Section 28.10 of this code.

If a "BYOB" system were permissible, members of or attendees at *unpermitted* clubs would thus have privileges which are not available to clubs which *do* have permits. This would be a nonsensical result. If people were free to "Bring Their Own Bottle" to a public place (not possessing a State permit), keep it with them for their consumption, and take the remainder home, why would anyone ever bother to jump through all of the hoops which are necessary to maintain a private club

system, keep all required records, etc.? Section 28.10(b) (referenced in the indented quote above) provides as follows:

(b) A mixed beverage permittee may not permit any person to take any alcoholic beverage purchased on the licensed premises from the premises where sold, except that a person who orders wine with food and has a portion of the open container remaining may remove the open container of wine from the premises.

Again, §32.14 ought to be interpreted to regulate BYOB in clubs and we request the Attorney General to so declare.

## V.

### **POLICE POWER AS THE JUSTIFICATION FOR REGULATION**

Governmental regulations of virtually any type, and at virtually every level of government, are normally held to be justified on the basis of the exercise of the police power in order to facilitate the accomplishment of good results or to prevent bad results. It has been the common human experience that, while many people find the consumption of alcohol to be acceptable or even desirable within certain bounds, it is also subject to great abuse. For this reason, the sale and consumption of alcohol are among the activities as to which significant government regulation has been found to be acceptable in order to prevent – or at least restrict – potential undesirable conduct associated with the failure to control the consumption of alcoholic beverages. It is submitted that prevention or regulation of the potential bad conduct which justifies the use of the police power is the same regardless of the circumstances of the sale, or the specific circumstances under which the alcohol came to be on the premises or be consumed on the premises. It is the on-premises consumption – and the resulting effect upon behavior – which is of concern. From this standpoint, what justification can there possibly be for carving out a “BYOB” exception to every statute, ordinance, or other enabling document? The result would be (or is) to create a sort of black market system – operating outside the law – whereby citizens can ignore the statutes and regulations and do pretty much whatever they choose to do in “public” just as though they were in their homes. Thus, the fact that the Alcoholic Beverage Code does not specifically mention “BYOB” operations should not mean that the Commission and its representatives – or other persons charged with the enforcement of laws regulating alcohol – ought to allow the unwritten “exception” to swallow the rules whereby the complex scheme of regulation has been created. The inclusion of “clubs” in §32.14 means the Legislature intended to regulate more than just “private clubs.”

## VI.

### **PREVIOUS ATTORNEY GENERAL'S OPINIONS ON RELATED MATTERS**

#### **A. Giving Away Alcoholic Drinks With A Meal In a Dry Area is Unlawful.**

Although not directly on point (particularly in regard to the “BYOB” inquiry), there are prior Attorney General’s opinions which are of some interest in regard to some aspects of the current

question. The first is Attorney General Opinion DM-84 (1992), responding to the question "Whether the owner of a restaurant in a dry area violates Section 101.31 of the Alcoholic Beverage Code by giving away wine to patrons or using alcoholic beverages for cooking." Relying on Alcoholic Beverage Code Section 251.71(a) (quoted above), the opinion states that "[a]n area is a 'dry area' as to an alcoholic beverage of a particular type and alcoholic content if the sale of that beverage is unlawful there." Based on the statement that the restaurant in question was located in a "dry" area, the opinion states that "we assume that the area is dry as to all alcoholic beverages, including wine." Attorney General Opinion DM-84 at 2. [Similarly, in the present case, Corsicana remains "dry" with respect to every sale of an alcoholic beverage other than (1) beer and wine for off-premise consumption only, and (2) mixed beverages sold in restaurants by food and beverage certificate holders only.] So, since the area in question was "dry" as to wine, the opinion states:

In response to your first question, we conclude that a restaurateur or his employee may not give away a glass of wine to patrons during meals in a dry area without violating Section 101.31 of the code.

The restaurant owner in that case had perhaps noted that Section 101.31 does not specifically mention a "gift" of alcoholic beverages as actually being equivalent to a sale, since Section 101.31 provides:

Except as otherwise provided in this code, no person in a dry area may manufacture, distill, brew, sell, import into the state, export from the state, transport, distribute, warehouse, store, solicit, or take orders for, or possess with intent to sell an alcoholic beverage.

However, the previous Attorney General Opinion C-421 (1965), relying in part of *Savage vs. State*, 88 S.W. 351 (Tex.Crim.App. 1905), had specifically held that it would be a violation for the owner of a hotel and restaurant in a dry area to give away beer or mixed drinks with meals. DM-84 quotes at some length from what had originally been the dissenting opinion in *Savage vs. State*, and also from Attorney General Opinion C-421. The reasoning is that the purchase of the meal itself included everything that went to make up the meal, whether a specific price was attached to each separate item or not.

In footnote 1 of Opinion DM-84, it is stated that "[w]e note that there is now an express statutory exception to the general prohibition found in Section 101.31 that authorizes the furnishing of alcoholic beverages in dry areas." This is by virtue of the 1979 amendment to the private club provisions of the code found in Chapter 32, to allow the "pool system" for alcoholic beverage storage to be "used in any area" in private clubs. Acts 1979, 66<sup>th</sup> Leg ch. 777, §8, at 1968; See now Alco.Bev.Code §32.06(a). By virtue of a private club registration permit, alcoholic beverages belonging to members of the club may be stored, possessed, and mixed on the club premises; and "... served for on-premises consumption only to members of the club and to their families and guests, by the drink or in sealed, unsealed, or broken containers of any legal size. . . ." (Section 32.01(a)(1) and (2).) Accordingly, the footnote concludes that: "The use of the pool system of

storage allows a private club to be located in a dry area.” However, it is an insurmountable leap to contend that a club which does not possess a private club registration permit has such freedom. In this respect, Section 32.14(a) (Unregistered Clubs), quoted above, is directly on point.

It is of interest to note that it is the second question asked in the DM-84 (having to do with alcohol used in cooking) – but not the first question – which is made to turn on the question of whether a restaurateur who possesses more than one quart of an alcoholic beverage should be subject to the presumption that he possesses it “with intent to sell” pursuant to Section 101.32 (“(a) Possession of more than one quart of liquor in a dry area is prima facie evidence that it is possessed with intent to sell”). In the case of the “BYOB” pool hall which is the subject of the presently-requested opinion, we are unaware of any indication that the possession of the alcoholic beverages brought in by customers are possessed with “intent to sell”. However, it is submitted that a rationale similar to that employed with respect to the giving away of beer or mixed drinks with meals should well apply here. First, the fact that customers are encouraged to bring alcoholic beverages onto the premises evidences that the consumption of alcoholic beverages is an important part of the overall on-premises experience. In addition, the prohibition of Section 32.14 ought to be applicable in the absence of a private club registration permit. Even if this enterprise is not a “private club”, Section 32.14 (“Unregistered Clubs; Prohibited Activities”) rather clearly evidences that it applies to an establishment which – while it may be a “a club or private club” – is not a registered “private club” possessing an alcoholic beverage permit:

(a) *No permittee, licensee, or any other person shall deliver, transport, or carry an alcoholic beverage to, into, or on the premises of any establishment, location, room or place purporting to be a club, or holding itself out to the public or any person as a club or private club, unless the club holds a private club registration permit.*

(Emphasis added). Further, and perhaps even more clearly, the prohibition of Section 32.15 against any person’s removal of any alcoholic beverages from the premises of a private club evidences that a person could no more legally bring his own bottle onto non-permitted the premises than he could remove it from the premises.

#### **B. Games of Chance in Businesses Holding an On-Premises Alcoholic Beverage Permit.**

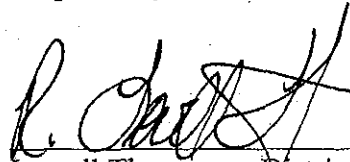
There is an Attorney General’s opinion which deals with the question whether a business that holds an on-premises alcoholic beverage permit may host a poker tournament. (Tex.Att’y Gen.O. No. GA-0335) While this opinion deals specifically with certain types of poker tournaments, the principles involved could also be applied to instances when other types of games of chance are played on premises holding an alcoholic beverage permit. The applicable provisions of the Texas Penal Code, the Alcoholic Beverage Code, and the Alcoholic Beverage Commission Rules are either all quoted or referenced in this June 20, 2005 Opinion. The first of the two specific fact scenarios presented by the questions asked is whether a business which was a holder of an on-premise alcoholic beverage permit may host a poker tournament in which participants risk money or any other thing of value for the opportunity to win a prize. The Opinion acknowledges that “Chapter 47

of the Penal Code does not contain any specific reference to a person or company that holds an on-premise beverage permit.” (*Id.*, p. 4). Nevertheless, “[t]he fact that the permittee itself does not profit directly from the gambling [taking place on its premises] is irrelevant to the question of whether the permittee has violated either Section 47.04(a) of the Penal Code or the Commission’s Rule 35.31.” (*Id.*, p. 5). In any event, a permittee who commits the offense of “keeping a gambling place” can be subject, after notice and hearing, to the suspension or cancellation of its license. (*Id.*).

For our present purposes, it might well be that gambling would take place incident to the pool playing which is or will be occurring. However, aside from this question, it has already been shown that there are at least two other reasons why this facility ought not to be able to operate with alcohol being consumed on a “BYOB” basis. First, this business would be a club which, according to Section 2.14(a) of the Alcoholic Beverage Code, could not be operated without a private club registration permit. Second, under Article 12.600 of Corsicana’s Ordinances, this is a “pool club” which cannot be operated without both a permit from the Commission and a specific use permit from the City of Corsicana. Thus, this renegade operation may not be permitted to operate on a “BYOB” basis.

The Attorney General is requested to so declare for this and all other reasons mentioned in this brief.

Respectfully submitted,



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