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OPINION COMMITTEE



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April 23, 2012

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

Re: Request for an Opinion Letter regarding whether a home rule city with a population of less than 900,000 people can enact an ordinance prohibiting the sale of alcoholic beverages within 1,000 feet of a public school.

Dear General Abbott:

Pursuant to the authority to issue advisory opinions granted to the Attorney General in §22 of Article IV of the Texas Constitution and §402.041, et. seq. of the Texas Government Code, this letter is being submitted to you to request an opinion regarding certain provisions of the Texas Alcoholic Beverage Code and Texas Education Code. There is no litigation pending regarding this request for an opinion.

BACKGROUND LAW AND FACTS

The City of Corsicana conducted a wet/dry election in May of 2004, at which time the citizens of Corsicana approved the sale of beer and wine for off premises consumption within the City. Thereafter, the City of Corsicana adopted an ordinance that, among other things, prohibits the sale of alcoholic beverages within 1,000 feet of a public school.¹ The City did so upon receiving a request from the Corsicana Independent School District requesting that the distance requirements be enforced to the maximum extent allowed by law.

¹Other cities have adopted a distance requirement of 1,000 feet from a public school.

The City desires to know and I desire to know as the District Attorney of Navarro County, where Corsicana is located, whether the provisions of §38.007 of the Texas Education Code, §109.33 of the Texas Alcoholic Beverage Code and the Home Rule Amendment to the Texas Constitution authorize the City of Corsicana to enact a regulation prohibiting the sale of alcoholic beverages within 1,000 feet of a public school.

Section 109.33(a)(2) of the Texas Alcoholic Beverage Code provides that an incorporated city or town may enact regulations prohibiting the sale of alcoholic beverages within:

1,000 feet of a public school, if the commissioners court or the governing body receives a request from the board of trustees of a school district under Section 38.007 Education Code.

TEX.ALCO.BEV.C. §109.33(a)(2). Section 109.33(a)(3) likewise establishes a city's authority to enact regulations prohibiting the sale of alcoholic beverages within:

1000 feet of a private school if the commissioners court or the governing body receives a request from the governing body of the private school.

TEX.ALCO.BEV.C. §109.33(a)(3). There is nothing in Texas law that regulates the size of a municipality in which a private school district may be located in connection with the imposition of the 1,000' distance requirement. The provisions pertaining to private schools do not cross reference or incorporate §38.007 of the Education Code, or any other statute or regulation.

Section 38.007 of the Texas Education Code provides that:

The board of trustees of a school district shall attempt to provide a safe alcohol-free environment to students coming to or going from school. The board of trustees may cooperate with local law enforcement officials and the Texas Alcoholic Beverage Commission in attempting to provide this environment and enforcing §§101.75, 109.33 and 109.59, Alcoholic Beverage Code. Additionally, the board, if a majority of the area of a district is located in a municipality with a population of 900,000 or more, may petition the commissioners court of the county in which the district is located or the governing board of an incorporated city or town in which the district is located to adopt a 1,000' zone under §109.33, Alcoholic Beverages Code.

TEX.ED.C. §38.007.

The first sentence of §38.007(b) of the Education Code obligates school boards to attempt to provide a safe alcohol free environment for students. Importantly, the second sentence of §38.007(b) also authorizes school boards to cooperate with local law enforcement officials to provide a safe environment in enforcing distance requirements. The third (and last) sentence of §38.007(b) allows school districts whose area is mostly located within a municipality having a

population of 900,000 to ask the governing board of the municipality to adopt a 1,000' zone. The language contained in the last sentence purports to govern what school boards may do, rather than restrict what municipalities may do. There is no language in the last sentence of §38.007(b) which prohibits school districts in municipalities of less than 900,000 people from making similar requests to the governing bodies of the municipalities in which the school district may reside.

Section 101.075(a) of the Alcoholic Beverage Code provides:

(a) a person commits an offense if the person possesses an open container or consumes an alcoholic beverage on a public street, public alley or public sidewalk within 1,000' of the property line of a facility that is a public or private school . . .

TEX.ALCO.BEV.C. §101.075(a). Section 101.75 of the Alcoholic Beverage Code which deals with consumption of alcoholic beverages near schools, does not make any distinction between private schools or public schools, regardless of the size of the municipality where the public or private school may be located. In all cases, consumption of an alcoholic beverage in public areas within 1,000' of the property of a public or private school is prohibited.

Finally, Article 11, §5 of the Texas Constitution allows cities with 5,000 people or more to hold an election and adopt a charter. Article 11, §5 goes on to provide that:

The adoption or amendment of charters is subject to such limitations as may be prescribed by the legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or the general laws enacted by the legislature of this State.

TEX.CONST. ART. 11, §5. This provision of the Texas Constitution is known as the Home Rule Amendment. It has been held that because home rule cities derive their power from the Texas Constitution and possess the full power of self government, home rule city ordinances are presumed to be valid. *Alexander, et al v. City of Austin*, 302 S.W.3d 885, 888 (Tex.App.–Austin 2009 rev. denied). In addition, a general law in a city ordinance will not be found to be repugnant to one another because a reasonable construction leaving both in effect that can be reached. *Id.*

No reported Texas case has addressed the issue presented by this request for an opinion. Furthermore, although other Attorney General Opinions have addressed §109.33 in the context of other questions, no AG Opinion has directly addressed this issue. *See* Tex.Atty.Gen.Op. LO-98-002 (1998) (does the Education Code prohibit the sale the alcoholic beverages at non-school events held at a student activities complex owned by an independent school district); Tex.Atty.Gen.Op. LO-96-134 (1996) (are private schools such as parochial schools, charter schools, etc. included within the definition of public school in §109.33); Tex.Atty.Gen.Op. LO-89-55 (1989) (does a private community school include a “public school” under §109.33).

Likewise, several decisions from the State Office of Administrative Decisions have discussed §109.33 without specifically addressing the present issue. See *Texas Alcoholic Beverage Commission v. Langemar, LLC* (TABC Case No. 559276), 2007 WL 2161883 (2007) (“An incorporated city or town may enact regulations applicable in the city or town prohibiting the sale of alcoholic beverages by a dealer whose place of business is within 1,000 feet of a public school.”); *Texas Alcoholic Beverage Commission and Forth Worth Police Department and Forth Worth Independent School District v. 3425 Club, Inc.*, 2002 WL 33849508 (2002) (a case involving the Fort Worth ISD, 1,008 feet from the nearest school was an “acceptable” distance).

DISCUSSION

The question is whether the first two sentences of §38.007(b) or Article 11, §5 of the Texas Constitution authorize the City of Corsicana to prohibit the sale of alcoholic beverages by a dealer whose place of business is within 1,000 feet of a public school. In favor of authorizing the City to impose such a prohibition are the following:

1. There is no logical reason to distinguish between private schools in a city of any size, on the one hand, and public schools located primarily within one of the three largest cities in Texas – Dallas, San Antonio and Houston. The same safety considerations apply in the case of private and public schools in cities of any size.
2. The second sentence in §38.007(b) gives the board of trustees broad discretion in cooperation with local government to provide a safe alcohol free environment to protect public school students. Certainly a 1,000 foot buffer for sales and consumption helps accomplish that goal.
3. There is no specific prohibition in the Texas Constitution or in any Texas statute that denies cities with a population of less than 900,000 the ability to impose a 1,000 foot prohibition on the sale of alcoholic beverages near public schools. Nothing in the Alcoholic Beverage Code purports to deny smaller cities the ability to regulate alcohol sales within 1,000 feet of a public school.
4. The 1,000 foot distance requirement for consumption of alcoholic beverages in §101.75 of the Alcoholic Beverage Code does not make any distinctions between public and private schools, and cities of any size.
5. Finally, the preemption provisions in §109.57 of the Alcoholic Beverage Code are not invoked here because the ordinance in question do not purport to discriminate between businesses which sell alcohol and businesses which do not. Rather, the ordinance simply attempts to establish uniformity in how the 1,000 foot prohibition is applied.

QUESTIONS PRESENTED

May a home rule city with a population of less than 900,000 people prohibit the sale of alcoholic beverages within 1,000 feet of a public school?

We recognize that this is a somewhat anomalous situation. We await your decision. Thank you for your courtesies.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'L. Thompson', written over a horizontal line.

Lowell Thompson, District Attorney
Navarro County, Texas