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OPINION COMMITTEE

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The State of Texas



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Hope Andrade
Secretary of State

December 29, 2009

The Honorable Greg Abbott
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548

RQ-0848-GA

Re: Request for opinion concerning when a deposit is required for certain local option liquor elections

Dear General Abbott:

I am writing to seek clarification regarding when county clerks and elections administrators must require a deposit in connection with local option liquor elections. The statutory sections requiring clarification are Sections 501.107 and 501.108 of the Texas Election Code. Those sections pertain to when a county is required to pay the costs of a local option alcoholic beverage election (also known as a local option liquor election) (Section 501.107), and when a county is required to collect a deposit from petitioners (Section 501.108).

Various correspondents have asserted different readings of those sections. Some have asserted that a county may not require a deposit in connection with the first local option election in a one-year time period for an election within a city located entirely in one county. Other correspondents have asserted that the county must require that deposit.

Our office has given preliminary advice on this matter in the attached Letter of September 11, 2009. That letter explains what I believe to be the bases for the competing readings of Sections 501.107 and 501.108. As indicated in the attached letter, the Secretary of State is concerned that county clerks and elections administrators across the state face a dilemma. Specifically, if they require the deposit, they face potential challenge under civil law for imposing an illegal hardship upon petitioners. Alternately, if they do not require the deposit, they face potential criminal charges.

Accordingly, I believe future local option election petitioners, the election officials reviewing option election petitions, and local prosecutors require your office's opinion to resolve uncertainty regarding the application of Sections 501.107 and 501.108 of the Texas Election Code.

Sincerely,

A handwritten signature in black ink, appearing to read "John Sepehri", followed by a horizontal line.

John Sepehri
General Counsel, Texas Secretary of State's Office

Enclosures

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Hope Andrade
Secretary of State

September 11, 2009

Mr. Craig T. Enoch
Winstead P.C.
401 Congress Avenue, Suite 2100
Austin, Texas 78701

Dear Justice Enoch:

Thank you for your letter concerning the proper interpretation of Sections 501.107 and 501.108 of the Texas Election Code (the "Code"). In that letter, you stated that this office has recently issued incorrect informal advice concerning those sections. Of course, Sections 501.107 and 501.108 of the Code pertain to when a county is required to pay the costs of a local option liquor election (Section 501.107) and when a county is required to collect a deposit from petitioners (Section 501.108). Specifically, you assert that under those sections, a county may not require a deposit in connection with the first local option election in a given year for an election within a city located entirely in one county.

After reconsidering the matter based on your arguments, this office has determined it will advise counties in the future that petitioners may not need to provide a deposit for such an election. We will principally do so because the Legislature's use of the word "reimburse" in Section 501.107(1)'s exception to the general Section 501.107 requirement, that a county pay the costs of a local option liquor election, suggests the Legislature truly intended a distinct two phase process whereby counties must initially "pay" for city elections entirely within a county and are only later allowed to make a decision as to whether to obtain recoupment from the pertinent city.¹ Because Section 501.108 provides that a deposit is only required if a county is not required to "pay" for the expense of a local option election, under your reading of section 501.108 the county may not charge a deposit for the first yearly municipal local option election in a city located entirely in one county since it "pays" for that election. In sum, we agree that the legislative language suggests the Legislature did not view the

¹ The section reads as follows: "The county shall pay the expense of holding a local option election authorized by this chapter in the county, justice precinct, or municipality in that county except that:

- (1) If an election is to be held within the corporate limits of a municipality located wholly within the county, then the county may require the municipality to reimburse the county for all or part of the expenses of holding the election;
- (2) County payment of the expense of an election to legalize the sale of alcoholic beverages is limited to the holding of one election in a political subdivision in a one-year period; and
- (3) County payment of the expense of an election to prohibit the sale of alcoholic beverages is limited to the holding of one election in a political subdivision in a one-year period.

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situation as being one where counties in substance do not have to "pay" for elections in cities wholly within a county since they can seek reimbursement.


Notwithstanding the foregoing, this office believes there are complications that require some nuance in this office's future advice to counties. Your letter actually touches upon one of them in that you argue the Legislature intended no substantive change when it recodified Section 251.40 of the Texas Alcoholic Beverage Code into Section 501.108 of the Code. You assert that widespread prior understanding of the statute before the recodification held no deposit should be required for local option elections in cities wholly within a county.

Unfortunately, the recodification does appear to have caused confusion. Indeed, at least based in part on the recodification, one major county, Dallas County, has urged this office to interpret the current relevant statutes differently than your interpretation. Combined with the fact that one can argue the substantive effect of Section 501.107 of the Code is to exempt a county from ultimately bearing the costs of a municipal local option election for a municipality entirely located in the county, this office does not conclude the matter to be as unequivocal as your letter suggests. That is, this office does not conclude it is wholly improper to read the statute to provide the county does not have to "pay" for the first municipal local option election in a city entirely within one county.

Moreover, Section 501.108 provides (1) that the county clerk may not issue a petition unless petitioners pay required deposits and (2) that a premature issuance is a criminal offense punishable by fine or imprisonment. See TEX. ELEC. CODE ANN. § 501.108(c) & (e) (Vernon Supp. 2008). This office does not wish to subject local officials to criminal prosecution when there is arguably some confusion or ambiguity in the law. Accordingly, this office intends to advise county officials that there are competing interpretations of the law and that it may be prudent for them to consult with their county attorney or even county officials charged with enforcing the criminal sanctions in section 501.108 before failing to charge deposits. We will also seek an opinion from the Office of the Attorney General to obtain additional assurances regarding the correct reading of Sections 501.107 and 501.108 of the Code.

In that regard, you make some interesting constitutional arguments concerning whether requiring deposits unconstitutionally restricts ballot access. This office generally presumes that election statutes enacted by the Legislature are constitutional. Accordingly, we view your constitutional arguments as perhaps more properly addressed by the Office of the Attorney General in an opinion request. This office is open to further discuss this last point, as well as any of the foregoing with you in more detail. Should you wish to do so, please do not hesitate to contact me or the agency's General Counsel, John Sepehri.

Sincerely,



Ann McGeehan
Director of Elections

AM:JK:sf