

# Memorandum



DATE April 1, 2010

TO The Honorable Mayor and Members of the City Council

SUBJECT Local Option Elections

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Please find enclosed the materials for Wednesday's briefing on the local option elections.

Please contact me should you have any questions.



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City Attorney

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# LOCAL OPTION ELECTIONS

John Rogers

Assistant City Attorney

April 7, 2010

# Proposed Elections

- Allow sale of mixed beverages in restaurants that have a food and beverage (F&B) certificate.
- Allow sale of beer and wine for off-premise consumption only.
  - Grocery stores
  - Convenience stores
  - Stores that sell only beer and/or wine
  - Not package stores with hard liquor

# Source Law

- Texas Constitution Art. XVI, Section 20
- Texas Alcoholic Beverage Code Chapter 251
- Texas Election Code Chapter 501

# General

- All areas within Texas are “wet” for the sale of all kinds of alcoholic beverages, unless that status is changed by local option election.
  - But most of Texas is dry to some extent due to historic elections.
- The local option provisions give voters the ability to determine whether the sale of specific types of alcoholic beverages will be prohibited or allowed within an area.

# General

- An area is “dry” as to a particular type of alcoholic beverage if the sale is prohibited.
  - A dry area will still have private clubs (bars) because they serve alcohol rather than sell alcohol.
  - A dry area will not have package stores (off-premise consumption).
- An area is “wet” as to a particular type of alcoholic beverage if the sale of alcohol is allowed.

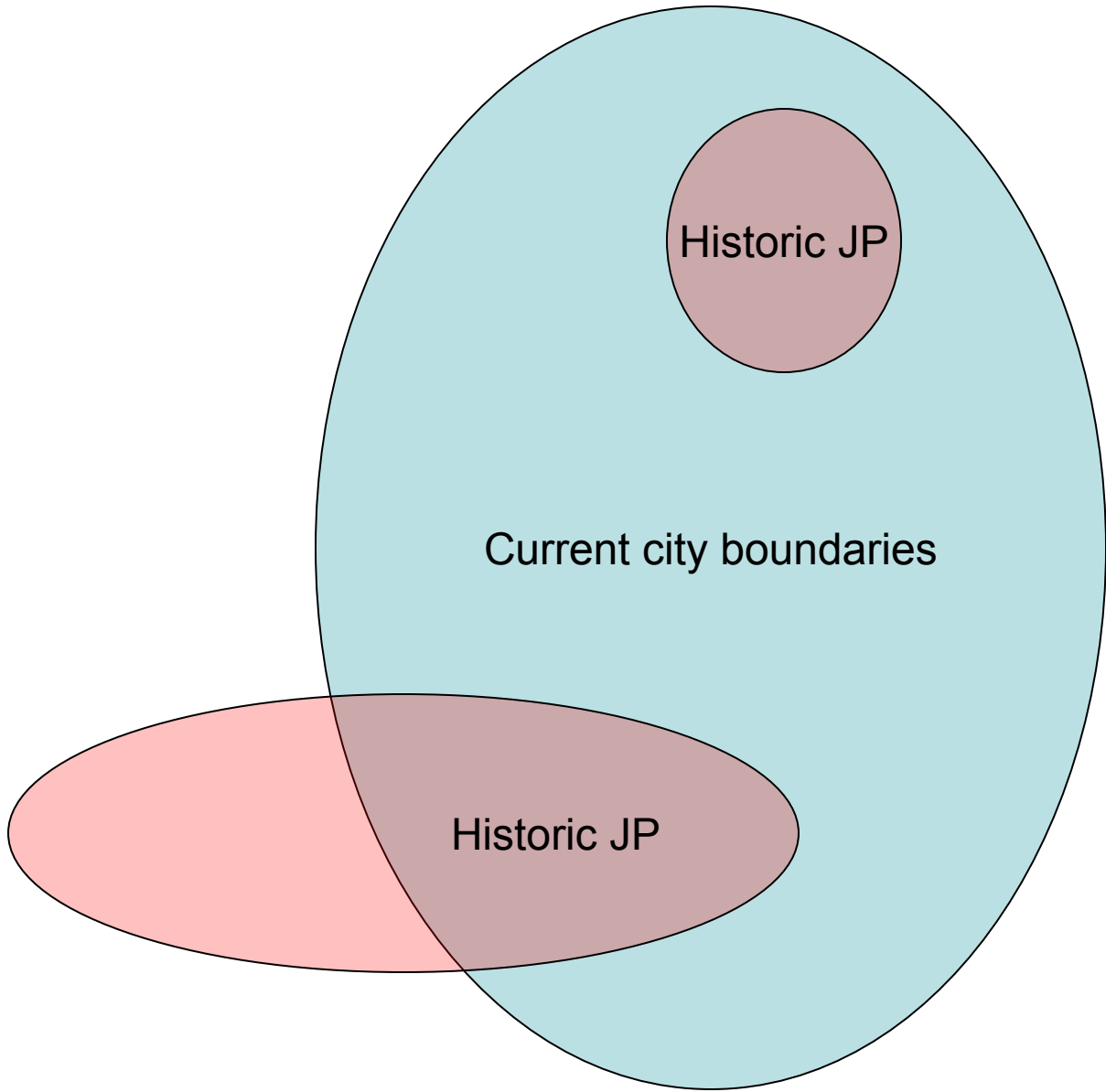
# General

- An area can be “wet” for one purpose and “dry” for another purpose.
  - An area can be “wet” for off-premise consumption, but “dry” for on-premise consumption.
  - An area can be “wet” for beer and wine, but “dry” for hard liquor.

# General

- Elections can be held within the boundary of a county, city, or JP precinct.
- A voting unit retains its wet or dry status until changed by election in the same voting unit.
- If two overlapping voting units have different local option status, the smallest voting unit controls.
  - The local option status of a city controls over the local option status of a JP precinct if only part of the JP precinct is within the city limits.
  - The local option status of a JP precinct controls over the local option status of a city if the JP precinct is wholly within the city limits.
  - The relative dates of the elections are of no consequence.





# General

- If sale of alcohol is prohibited, the following licenses and permits are exempt from the prohibition:
  - Manufacturer's licenses or brewer's permits.
  - Distiller's and rectifier's permit.
  - Licensed distributor of beer.
  - Wholesaler's permit.
- Wholesaler and distributor licenses can be issued in any area that is wet for any type of alcohol.

# History of Local Option

- Local option was added to the Texas Constitution in 1891.
- In 1918, national prohibition went into effect. In 1919, Texas adopted state prohibition.
- In 1933, national prohibition was repealed. In 1935, Texas prohibition was repealed.
- Areas that voted dry before prohibition remained dry after repeal of prohibition.

# History of Local Option

- There have been 55 elections within JP precincts or within Dallas County between 1877 and 1985.
  - Most of the elections prohibited alcohol.
  - 18 elections were unsuccessful.
  - 37 elections were successful.
  - The portion of Dallas that is currently wet was made wet by an election in 1935.
- There have been 49 elections in suburb cities within Dallas County between 1985 and 2010.
  - All of these elections were to allow alcohol sales.
  - 14 elections were unsuccessful.
  - 36 elections were successful.
- Amendments in 2003 made it easier to hold elections.
  - The number of petition signatures needed was reduced from 35% of registered voters to 35% of voters in last gubernatorial election.
  - 60 days to gather signatures on a petition rather than 30 days.
  - Cities located in several counties can now hold elections.
- There has never been a city-wide election in Dallas.

# Boundaries

- An election in a city or county may include any area added to the voting unit after its creation.
- JP precinct elections must be held in the boundaries at the time the local option status was determined.
  - If the JP precinct boundaries have changed since the local option status was established, the county must determine the JP precinct boundaries.

# Local Option Procedures – Application

- The voting unit must have been in existence for at least 18 months.
- If the election is held in a city that is located in more than one county, the city must conduct the election.
  - The city assumes the duties of the county.

# Local Option Procedures - Application

- At least 10 qualified voters within the city must submit an application to the City Secretary requesting a petition.
  - The application must be published in a newspaper of general circulation.
- The city is required to pay for one election per year.
  - If there is a second election, the petitioners must give a deposit of 25 cents per registered voter. The deposit cannot be refunded.

# Local Option Procedures – Petition

- The petition must have the issue to be voted on, date issued, serially numbered pages, and City Secretary's seal.
  - The City Secretary must supply up to one page for every 10 registered voters.
    - Applicants want 20,000 petitions per issue (40,000 total).
  - The City Secretary must keep a copy of each petition and a record of the applicants.
- Within 5 days after issuing the petition, the City Secretary must notify the TABC and Secretary of State that a petition was issued.



# Local Option Procedures - Petition

- A petition is valid if submitted to the City Secretary within 60 days and is signed by a number equal to 35% of the registered voters within the city who voted in the last gubernatorial election.
  - For this city-wide election, 68,462 signatures are needed.

# Local Option Procedures - Petition

- The City Secretary must verify the signatures on the petition.
  - A statistical sampling can be used to verify signatures, unless a citizen requests and pays for 100% verification.
  - The City Secretary must certify to the City Council the number of signatures on the petition.
  - Each signature must also have the printed name, date of birth, county, address, and date. A signature is valid if it uses ditto marks, or does not give the state or zip code.
  - A signer may withdraw his signature up until the petition is submitted to the City Secretary.
- The City Council must record the petition in its minutes.

# Local Option Procedures - Election

- At the next regular meeting that is 30 days or more after submission of the petition, the City Council shall order an election if a valid petition is submitted.
- The order to hold an election is prima facie evidence of compliance with the petition requirements.
- The election order must state:
  - Whether the election is to prohibit or legalize.
  - The issue to be voted on.
  - The election precincts.
  - The polling place for each precinct.
  - The early voting places and hours.
  - The address for sending mailed ballots.

# Local Option Procedures - Election

- An election must comply with the requirements of the Texas Election Code.
  - Notice of the election must be posted on the public bulletin board at least 21 days before the election.
  - Notice of the election must be published in a newspaper of general circulation at least once 30 to 10 days before the election.
  - Notice must be given to election judges 15 days after the election is ordered.
  - Notice of the election must be given to the county clerk 60 days before the election.

# Local Option Procedures - Election

- An election on a particular issue may not be held within one year after the last election on that issue.
- An election for a city must be held in city election precincts. The election must be held at customary polling places.
- It is a Class B misdemeanor to misrepresent the purpose or effect of a petition.

# Local Option Procedures - Election

- The City Secretary must furnish ballots equal to the number of registered voters plus 10%.
- The ballot must state the issues.
  - The issues must be the same as on the petition.
  - The issues must be exactly as stated in the Election Code.
- The city pays for the election.
- The votes must be counted within 24 hours after the polls close.

# Local Option Procedures - Election

- After completion of the canvassing, City Council must enter an order declaring the results of the election.
  - The election is decided by majority vote.
  - Entry of an order is prima facie evidence of compliance with election requirements.
- Within 3 days after the results of the election have been declared, the City Secretary must certify the results to the Secretary of State and the TABC.
- An election does not affect the sale of mixed beverages unless the proposition specifically mentions mixed beverages.

# Local Option Procedures - Contest

- An election can be contested.
  - The local option status is not suspended during an election contest.
  - An election contest settles all questions relating to the election. An election cannot be challenged in another lawsuit.
- If an election is not timely challenged within 30 days by an election contest, the election is valid and binding.



# FAQs - Procedures

- Q: Could City Council order the election without an application and petition?
  - A: No. Local option status can be changed only by following the TABC and Election Code procedures.
- Q: Could City Council declare an area wet or dry?
  - A: No. Local option status can be changed only by following TABC and Election Code procedures. Municipal regulation of alcohol is preempted by the TABC.

# FAQs – Procedures

- Q: What happens if the applicants do not get enough signatures on the petition?
  - A: The City Secretary will still present the results to the City Council, but an election will not be ordered.

# FAQs – Partial elections

- Q: Can only a portion of a county, city, or JP precinct have an election?
  - A: No. The entire county, the entire city, or the entire JP precinct must hold the election.

# FAQs – Election day

- Q: What day will the election be held?
  - A: Tuesday, November 2, 2010 because it is the next uniform election date that is more than 60 days after the petition was issued.
- Q: Will citizens who live in the portion of Dallas that is already wet be allowed to vote?
  - A: Yes. Any registered voter within the city of Dallas will be allowed to vote.

# FAQs – Failed election

- Q: If the election fails, does it affect the wet or dry status of Dallas?
  - A: No. Wet or dry status can only be changed by a successful election. That portion of Dallas that is currently wet would remain wet. The remainder of Dallas would remain dry.

# FAQs – Effective date

- Q: If the election is successful, when will alcohol sales be allowed?
  - A: Legalization takes effect at the time that the results of the election are officially canvassed. But it takes about 45-60 days to obtain permits from the TABC.

# FAQs – Current wet area

- Q: Will this city-wide election affect the status of the portion of Dallas that is currently wet?
  - A: No. The portion of Dallas that is currently wet for on-premise mixed beverage permits without a F&B certificate (bars) and for off-premise licenses (package stores) will remain wet for those purposes.

# FAQs - Annexation

- Q: Does annexation or disannexation change the wet or dry status?
  - A: No. The local option status can only be changed by election.
    - Subsequently annexed or disannexed areas do not change their local option status.
    - The wet or dry status of the annexed or disannexed area can only be changed by election in the entire county, entire city, or entire JP precinct (not the annexed or disannexed area alone).



# FAQs - Redistricting

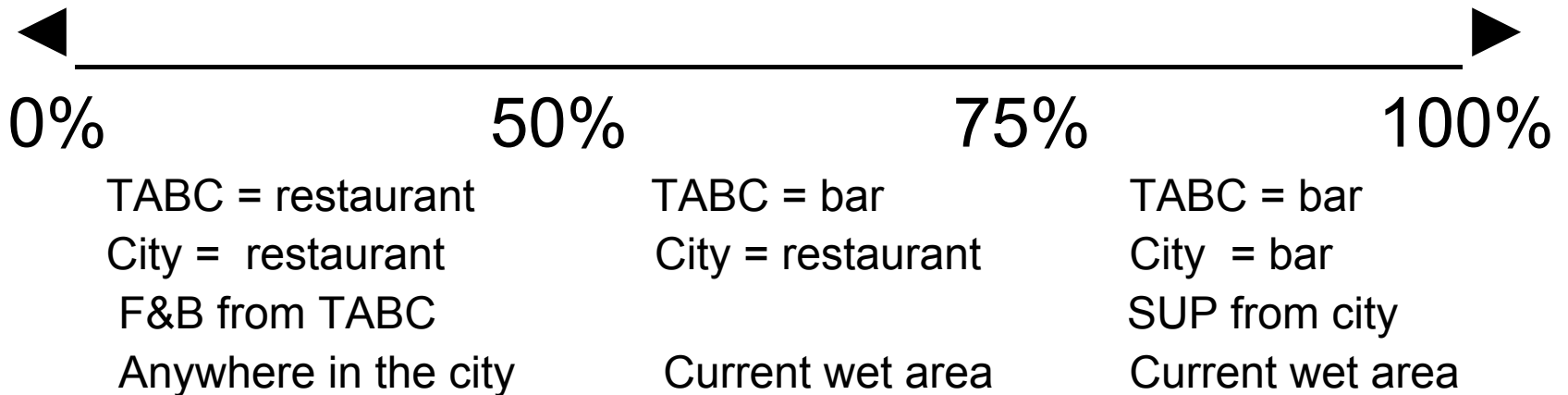
- Q: Does redrawing district lines change the local option status?
  - A: No. The local option status can only be changed by election.

# FAQs - Bars

- Q: Will the election change the zoning where bars (alcoholic beverage establishments) are allowed?
  - A: No.
    - “Bar, lounge or tavern” gets 75% of its revenue from on-premise sale of alcohol.
      - Bars will still only be allowed in that portion of Dallas that is currently wet because the election is only for mixed beverage with a F&B certificate (50% or less alcohol).
    - “Private-club bar” has a private club permit, is in dry area, gets 35% of its revenue from on-premise service of alcohol, and does not have a F&B certificate.
      - Most of Dallas (except the portion that is currently wet) will still be “dry” for private clubs without a F&B certificate, so private club bars can still locate in most of Dallas.
    - Allowed in GO(A), CR, RR, CS, I, CA, MU, MC, MF-4, LO(A), MO(A), UC-2, and UC-3 by SUP only.
    - The election will not change the zoning regulations that apply to bars.

# FAQs - Bars

- If the election is successful, how restaurants and bars will be classified and treated by the TABC and the city:



# FAQs – Retail alcohol stores

- Q: Will the election affect where stores that sell alcohol are allowed?
  - A: Yes, if the store sells only beer or wine. No, if the package store sells hard liquor.
    - A store that sells only beer and wine will be allowed anywhere in the city if the zoning allows it.
    - A package store that sells hard liquor will still be allowed only in that portion of Dallas that is currently wet and if the zoning allows it.
    - “Liquor store” is principally for retail off-premise sale of alcohol.
      - Grocery stores and convenience stores are not “liquor stores.”
    - By right in CR, RR, CS, CA, MU-2, MU-3, MC-2, MC-3, and MC-4.
    - The election will not change the zoning regulations that apply to liquor stores.

# FAQs – Private clubs

- Q: Would existing private clubs have to apply for a new mixed beverage on-premise permit with a F&B certificate?
  - A: No.
    - The existing permit remains valid until the expiration date.
    - Private club permits can still be issued in any part of Dallas.
    - But they will probably apply for a new mixed beverage permit with a F&B certificate because (1) the permit allows sales for profit rather than nonprofit service, (2) the recordkeeping is less, and (3) there are advantages to having a F&B certificate.

# FAQs – D and D-1 Overlays

- Q: Will the election affect the D and D-1 zoning overlays?
  - A: No.
    - Cannot sell or serve alcohol in a D overlay.
    - Can sell or serve alcohol in D-1 with SUP.
    - Valid only if created before June 11, 1987.

# FAQs - Spacing

- Q: Will the election change the spacing rules?
  - A: No.
    - Alcohol sales are prohibited within 300 feet of a church, public or private school, or public hospital, day-care center, or child-care facility.
    - Alcohol sales are prohibited within 1,000 feet of alcohol-free schools.
    - Measurement of spacing.
      - Church and hospital: From front door to front door.
      - Schools, day-care centers, child-care facilities: From property line to property line.
      - The city cannot require a different measurement.
    - The alcohol business is grandfathered if it existed before the church, school, hospital, day-care center, or child-care facility.
    - City Council can grant variances to the spacing rules.

# FAQs – Permit process

- Q: What is the process to get a beer and wine off-premise permit?
  - A:
    - Application to the TABC.
    - City signs off that the area is wet, zoning allows the use, and spacing is OK.
    - TABC does background check on criminal history.
    - Applicant posts notice sign on the property and mails notice to residential uses within 300 feet.
    - Applicant posts surety bond if within 1,000 feet of a school.



# FAQs – Permit process

- Q: What is the process to get a mixed beverage on-premise permit with a F&B certificate?
  - A:
    - Application to the TABC.
    - City signs off that the area is wet, zoning allows the use, and spacing is OK.
    - TABC does background check on criminal history.
    - No bond or newspaper notice because they have a F&B certificate.

# FAQs – F&B Certificates

- Q: What are the requirements to get a F&B certificate?
  - A: To get a F&B certificate:
    - food service must be the primary business,
    - must have a kitchen for preparation of multiple entrees, and
    - alcohol sales must be 50% or less.

# FAQs – F&B Certificate continued

- Q: What are the advantages of a F&B certificate?
  - A:
    - no conduct surety bond.
    - can have employees under 18.
    - exempt from spacing from private schools, day-care centers, and child-care facilities.
    - do not have to mail notice of TABC application to residents within 300 feet.

# FAQs – F&B Certificate continued

- Q: How does the TABC monitor the 50% rule for F&B certificates?
  - A: The Texas Comptroller of Public Accounts monitors the monthly gross receipts tax report. If the business has more than 50% alcohol, the Comptroller reports that to the TABC and the TABC takes enforcement action.
    - The city can also ask the alcohol business for records to determine the percentage of revenue from alcohol.

# FAQs - Protest

- Q: If a specific location becomes a problem, does the city have any recourse?
  - A: Yes. The city can protest the alcohol permit.
    - The mayor, a councilmember, the police chief, or the city attorney can file a protest asking that a permit or license be denied, suspended, or revoked.
    - The protest must show that the place or manner of operation harms the general welfare, health, peace, safety, or public sense of decency.
    - Protest must be supported by sworn statement of one credible person.

# FAQs - Preemption

- Q: Can the city impose additional regulations on businesses that sell alcohol, such as convenience stores, beer barns, or drive-through windows?
  - A: No.
    - Dallas Merchants v. Dallas - Alcohol regulation is preempted by the TABC.
      - The city cannot impose regulations on a business merely because it has an alcohol permit.
      - The city cannot impose stricter standards on a business that sells alcohol.
      - The city cannot discriminate against a business that sells alcohol.
    - The city can impose zoning or other regulations on all retail businesses if it affects alcohol and non-alcohol businesses equally.
    - The city can regulate the location of a business the derives 75% or more of its revenue from alcohol. The city requires an SUP for bars.

# QUESTIONS and DISCUSSION