

## **Opinion No. 81-09**

May 28, 1981

**OPINION OF:** Jeff Bingaman, Attorney General

**BY:** Arthur J. Waskey, Assistant Attorney General; Noelle, L'Hommedieu Schoen, Assistant Attorney General

**TO:** Honorable Tito Chavez, State Senator-District Thirteen, 4177 Montgomery Blvd., N.E., Albuquerque, New Mexico 87109

**ALCOHOLIC BEVERAGES; ELECTIONS; MUNICIPALITIES**

Synopsis: 1. The City of Albuquerque and the County of Bernalillo must be considered separate local option districts for purposes of Laws 1981, Chapter 39.

2. The Bernalillo County Board of County Commissioners and the Albuquerque City Council may be considered appropriate governing bodies for purposes of holding an election pursuant to the procedures in Laws 1981, Chapter 39, Section 15.

3. The City of Albuquerque or the County of Bernalillo may not use paper ballots for an election held pursuant to the procedures in Laws 1981, Chapter 39, Section 15.

4. The County of Bernalillo may not combine a bond election and an election held pursuant to the procedures in Laws 1981, Chapter 39, Section 15 on the same ballot.

5. The City of Albuquerque or the County of Bernalillo would not be allowed to use "mail-in" ballots for an election held pursuant to the procedures in Laws 1981, Chapter 39, Section 15.

6. The County of Bernalillo and the City of Albuquerque may each impose a license tax upon persons operating liquor licenses within their separate territories pursuant to Laws 1981, Chapter 39.

7. It is mandatory that an election be held regarding Sunday sales of alcoholic beverages as provided in Laws 1981, Chapter 39, Section 15.

### **QUESTIONS**

1. Must the City of Albuquerque and the County of Bernalillo be considered separate local option districts for purposes of Laws 1981, Chapter 39?

2. May both the Bernalillo County Board of County Commissioners and the Albuquerque City Council be considered appropriate governing bodies for purposes of holding an election pursuant to the procedures in Laws 1981, Chapter 39, Section 15?

3. May the City of Albuquerque or the County of Bernalillo use paper ballots for an election held pursuant to the procedures in Laws 1981, Chapter 39, Section 15?
4. May the County of Bernalillo combine a bond election and an election held pursuant to the procedures in Laws 1981, Chapter 39, Section 15 on the same ballot?
5. Would the City of Albuquerque or the County of Bernalillo be allowed to use "mail-in" ballots for an election held pursuant to the procedures in Laws 1981, Chapter 39, Section 15?
6. May the County of Bernalillo and the City of Albuquerque each impose a license tax upon persons operating liquor licenses within their separate territories pursuant to Laws 1981, Chapter 39?
7. Is it mandatory that an election be held regarding Sunday sales of alcoholic beverages as provided in Laws 1981, Chapter 39, Section 15?

### **CONCLUSIONS**

1. Yes.
2. Yes.
3. No.
4. No.
5. No.
6. Yes.
7. Yes.

### **ANALYSIS**

1. The term "local option district" is used throughout Laws 1981, Chapter 39, (hereinafter referred to as the **new** Liquor Control Act), to designate subordinate governmental entities where certain rights relative to liquor licenses attach or are lost, depending on the specific license transaction taking place. The term is defined at Section 3(M) as "either a municipality of over five thousand population . . . or a county which has voted in favor of the sale of alcoholic beverages within the limits of that county or municipality under the terms of the Liquor Control Act or any former Act."

### **OPINION**

Since 1933, when New Mexico enacted its first liquor regulatory laws following the repeal of prohibition, the Legislature has provided for qualifying counties and municipalities to hold elections approving of the sale of alcoholic beverages. See, Laws 1933, Ch. 159, Section 3; Laws 1935, Ch. 112, Section 301; Laws 1937, Ch. 130, Section 501; Laws 1939, Ch. 236, Section 501; Laws 1981, Ch. 39, Section 15. Because of the use of disjunctive conjunctions in the definition at Section 3(M), to contrast and alternate municipality with county, the definition requires each separate municipality and county to hold its own election in order to become an independent local option district. Opinion of the Attorney General No. 71-116, November 17, 1971. If an affirmative vote is cast at one of these elections, the municipality or county becomes a "local option district." However, the law does provide that if a local option district election is held at the county level, it is not necessary for municipalities over five thousand population to hold separate or different elections on the local option question. The sale of alcoholic beverages within municipal boundaries would be permitted if the county voted to become a local option district.\*\* See, e.g., Laws 1981, Chapter 39, § 15(G). Opinion of the Attorney General No. 71-116, {223} November 17, 1971. This is what occurred in 1933, when the majority of the residents in Bernalillo County voted in favor of the sale of alcoholic beverages and Bernalillo County became a "local option district" which included the City of Albuquerque. New Mexico Blue Book, 1933.

Under these circumstances, the plain language of the definition of the term "local option district" applies only to a county which held an election approving the sale of alcoholic beverages, e.g., Bernalillo County, and not to a municipality within that county which has not held an election, e.g., Albuquerque. However, a local option district election permits the residents within a geographic area to decide if they wish to allow the sale of alcoholic beverages. The election does not necessarily define a jurisdictional entity for purposes of the administration and enforcement of the Liquor Control Act. Nevertheless, the term "local option district" is used through the **new** Liquor Control Act to refer to both counties and municipalities within counties which have voted to become local option districts, regardless of whether the municipalities have independently held elections approving the sale of alcoholic beverages. For example, license quotas are established separately for incorporated municipalities within a county and for unincorporated areas within the county, Section 35(A), but both are referred to as "local option districts," Section 35(B), notwithstanding the fact that the incorporated municipalities may not have held separate elections as specified in the definition.

Similarly, the transfer provisions of Section 113 are drafted in terms of "local option districts" but are intended to refer to the jurisdictions in which the number of licenses are limited, i.e., an incorporated municipality and the unincorporated area of a county, since they prohibit or allow license transfers statewide depending on the allowable number of licenses within those jurisdictions. See Sections 113(D)(1) and (2). Indeed, Section 114(B) uses the undefined term "quota district" instead of "local option district" in the same context that the term "local option district" is used in Section 113(F) to mean a jurisdiction for which license quotas are allotted.

Finally, Section 38 substitutes the term "local option district" for the term "political subdivision" in the license application provision which requires approval of the issuance of a license by the local governing body, currently enacted as Section 60-7-18(A)(3) NMSA 1978. Nothing in the new Liquor Control Act would indicate any intent on the part of the legislature to divest any political subdivision, whether an incorporated municipality or county, of its local control over license transactions. Moreover, Section 40 provides for the approval of licenses and transfers by the "appropriate governing body"; the term "governing body" is defined at Section 3 (J) to mean "the board of county commissioners of a county or the city council or city commissioners of a municipality."

In short, regardless of the definition at Section 3(M), the **new** Liquor Control Act uses the term "local option district" to mean any incorporated municipality or the unincorporated area of a county in which alcoholic beverages are sold. This conflict or inconsistency between the definition and the use of the term "local option district" may be resolved by resort to rules of statutory construction.

{\*224} Although the definition of "local option district" is plain and unambiguous on its face, the intent of the legislature with respect to the meaning of the term as it is used in the **new** Liquor Control Act will prevail over its literal sense. **Martinez v. Research Park**, 75 N.M. 672, 410 P.2d 200 (1965). Legislative intent as to the meaning of the term "local option district" can be discerned by reading the Act as a whole so that the term can be construed in relation to the other provisions. **Clinton Realty Co. v. Scarborough**, 78 N.M. 132, 429 P.2d 330 (1967).

Taken as a whole, the **new** Liquor Control Act depends to a considerable extent upon local control over various matters with respect to the sale of alcoholic beverages. For example, quotas are allotted to incorporated municipalities and to the unincorporated areas of counties, Section 35; approval of license applications and transfers must be given by the governing body of the municipality, or county, Sections 40 and 113; and municipalities and counties may each separately impose a license tax on licenses within their exclusive jurisdictions. Sections 124 and 125.

In the context of the **new** Liquor Control Act, where the term "local option district" is used to identify the local governmental entity charged with the responsibility of exercising local control, or established as a jurisdictional territory where rights and limitations on license transactions are imposed, it must be given a meaning consistent with the legislative intent in order to accomplish the purposes of the Act. A statute may not be construed to defeat such purpose but rather must be interpreted in accordance with common sense and reason. **State ex rel. Newsome v. Alarid**, 90 N.M. 790, 568 P.2d 1236 (1977). The definition of the term "local option district" at Section 3(M), being too narrow to accommodate legislative intent, must therefore give way to a broader meaning. For purposes of the **new** Liquor Control Act, the term "local option district" must be read to mean any county which has voted to approve the sale of alcoholic beverages, such as Bernalillo County, or any incorporated municipality which falls within such a county, such as the City of Albuquerque, or any incorporated municipality over 5000 which has independently approved the sale of alcoholic beverages.

2. Having concluded that the term "local option district", as used throughout the **new** Liquor Control Act, has an expanded meaning, referring to both counties and municipalities in areas where the sale of alcoholic beverages have been approved, the Act would not prevent a municipal government from calling its own independent election under the provisions of Section 15, which set out the substance and procedures for elections on the local option question. That section also provides that a "local option district" may vote to discontinue the sale of alcoholic liquors previously approved. So, depending on the circumstances, either the City or County can hold an election under Section 15.

The procedure in Section 15 is also the procedure to be used to administer the election called for in Section 21, to approve the issuance of restaurant licenses. Section 21(A) provides that "a local option district may approve the issuance of restaurant licenses for the sale of beer and wine by holding an election on that question pursuant to the procedures set out in Section 15. . . ." Since the City of {\*225} Albuquerque and the County of Bernalillo must both be considered distinct "local option districts" under the new Liquor Control Act, the City should be petitioned by its registered electors to hold the election for approval of restaurant licenses within the City, and the County should be petitioned by its registered electors to hold that election for approval of restaurant licenses in the unincorporated areas of the County. This would also be the case for the election permitted in Section 113 concerning the transfer of licenses between local option districts.

3. Section 15 states that:

"B. the election shall be conducted, counted and canvassed substantially in the manner provided by law for general elections within the county of municipality, except as otherwise provided in this section;

C. the votes at the election shall be counted, returned and canvassed as provided for in the case of general elections."

The term general election refers to "the one, fixed general election in the State . . . the statewide biennial election, held on the Tuesday after the first Monday in November of each even-numbered year when all state and county officials as well as our congressional representatives are elected." **Benson v. Williams**, 56 N.M. 560, 561, 246 P.2d 1046 (1952), New Mexico Constitution, Article XX, Section 6.

General elections are governed by the Election Code, Sections 1-1-1 through 1-21-14 NMSA 1978. Section 1-1-19(A)(1) NMSA 1978. "To the extent procedures are incorporated or adopted by reference by separate laws governing such elections or to the extent procedures are not specified by such laws, certain provisions of the Election Code shall also apply to: (3) . . . other special district elections." Section 1-1-19(B)(3) NMSA 1978. Section 1-9-5 NMSA 1978 requires that voting machines be used in general elections. Voting machines are used in all elections in New Mexico except in those elections for which paper ballots are specifically authorized. See Laws 1981,

Chapter 290 (school elections); Laws 1981, Chapter 206 (certain municipalities); and Section 6-15-26 NMSA 1978 (bond elections). There is no provision in the law allowing for the use of paper ballots in elections held pursuant to the **new** Liquor Control Act, and they therefore cannot be used in a Section 15 election.

Nothing in this opinion, however, shall prevent the use of emergency paper ballots if the need arises under Section 1-12-43(C) NMSA 1978, or paper absentee ballots in accord with Section 1-6-1 through 1-6-25 NMSA 1978. Opinion of the Attorney General No. 77-16, dated June 1, 1977.

4. Section 15(F) states that: "No election held pursuant to this section shall be held within forty-two days of any primary, general, municipal or school district election." Thus, an election under Section 15 could not be held with a municipal or school bond election, or with a bond election held in conjunction with the primary or general elections.

However, Section 15 is silent on the question of whether a Section 15 election could be held in conjunction with a county bond election. It appears that there is nothing in the law prohibiting this arrangement so long as the scheduling and other requirements of Section 15 and the sections of the law {226} governing the bond election are compatible.

5. Neither the Election Code nor the **new** Liquor Control Act authorize voting by mail, except for certain voters unable to go to polls on election day under the Absent Voter Act, Section 1-6-1 through 1-6-25, NMSA 1978. Accordingly, mail in ballots may not be used in Section 15 elections.

6. As previously indicated in the answer to question 1, Sections 124 and 125 of the **new** Liquor Control Act specifically provide that municipalities and counties may separately impose an annual license tax upon the privilege of persons holding liquor licenses within the municipalities' and counties' respective areas of exclusive jurisdiction.

7. Section 47 of the **new** Liquor Control Act sets the legal hours and dates that alcoholic beverages may be sold, served, delivered or consumed on licensed premises. Section 47(E) provides for a referendum election on whether alcoholic beverages may be sold on Sundays. It states, in pertinent part:

"At the first general election following the effective date of the Liquor Control Act, the secretary of state shall order placed on the ballot in each local option district the question 'shall Sunday sales of alcoholic beverages be made in this local option district?'. Until such election, Sunday sales shall be permitted on the same basis in any local option district as provided under any former Act. If the question is disapproved by a majority of those voting upon the question in the local option district, Sunday sales shall be unlawful in that local option district upon certification of the election returns . . .  
."

Because of the express authorization for the continuation of Sunday sales as permitted under any former law until the question is reconsidered at the next general election, it is clear that the legislature fully intended that such reconsideration take place. The election on Sunday sales shall thus be a mandatory one administered by the Secretary of State pursuant to the Election Code.

### **ATTORNEY GENERAL**

Jeff Bingaman, Attorney General

### **GENERAL FOOTNOTES**

[n\\*](#) Section references hereafter shall be to sections of Laws 1981, Chapter 39.

n\*\* Where, on the other hand, a county-wide election disapproves the sale of alcoholic beverages, a municipality of more than 5000 within that county may become a separate local option district if its voters approved the sale of alcoholic beverages at the county-wide election, or, it's residents may subsequently vote at their own election, as in the case of Clovis and Portales, to become a city-wide local option district. Section 15(G).