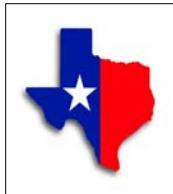


# Top Ten Questions on Alcohol Regulations

Claire E. Swann<sup>1</sup>



## **QUESTION 1**

### **Can city ordinances be more prohibitive than the Texas Alcoholic Beverage Code?**

Municipal regulations are preempted by the Texas Alcoholic Beverage Code (the "Code").<sup>2</sup> A municipality, whether general law or home-rule, will look to the legislature for a grant of authority to regulate businesses selling alcohol ("alcoholic beverage establishments").<sup>3</sup> This has been interpreted to mean that a city generally may not be more prohibitive than the Code.<sup>4</sup>

There are, however, some exceptions to this general rule. A zoning regulation formally adopted by the municipality prior to June 11, 1987 and which is otherwise valid, is NOT preempted by the Code.<sup>5</sup> For example, if a Planned Development District adopted prior to June 11, 1987 requires 1,200-foot spacing between alcoholic beverage establishments, the City can continue to enforce this requirement even though it is more prohibitive than the Code.

But even with zoning regulations adopted before June 11, 1987, municipalities can only amend such zoning regulations if the amendment lessens the restrictions on the alcoholic beverage establishment or does not impose additional restrictions on the alcoholic beverage establishment.<sup>6</sup> A zoning regulation is defined broadly in this context as "any charter provision, rule, regulation, or other enactment governing the location and use of buildings, other structures, and land."<sup>7</sup>

A city is also allowed to be more prohibitive when regulating the location of alcoholic beverage establishments that derive 75% or more of its revenue from the sale of alcohol for on-premise

consumption.<sup>8</sup> This means a bar could be further regulated, but a liquor store could not.<sup>9</sup>

Furthermore, Dallas and Houston are permitted to be more prohibitive than the Code when regulating the location of private clubs if 35% or more of the revenue comes from alcohol sales.<sup>10</sup>



## **QUESTION 2**

### **What is a local option election and how does it affect the city?**

The local option provision of the Code gives voters the ability to determine whether the sale of specific types of alcoholic beverages will be prohibited or allowed within an area.<sup>11</sup> An area is "dry" as to a particular type of alcoholic beverage if the sale is prohibited.<sup>12</sup> An area is "wet" as to a particular type of alcoholic beverage if the sale of alcohol is allowed.<sup>13</sup> An area retains its wet or dry status until changed by local option election in the same authorized voting unit.<sup>14</sup>

A local option status of a city controls over the local option status of a justice precinct if only part of the justice precinct is in the city limits.<sup>15</sup> The local option status of a justice precinct controls over the local option status of a city if the justice of the peace precinct is wholly within the city limits.<sup>16</sup>

A local option election may only be held in the same political subdivision boundaries that originally determined the wet or dry status, but may include any area added to the political subdivision after its creation.<sup>17</sup>

If the boundaries of the justice of the peace precinct have changed since the local option status was

established, the county commissioners court must define the original precinct boundaries.<sup>18</sup>

The city must certify the wet or dry status on permit applications and whether sale of alcohol is prohibited by charter or ordinance.<sup>19</sup> Note: an application for a permit or license should not be certified by the city unless sale of alcohol is permitted by the zoning regulations.



### **QUESTION 3**

#### **Does the Code allow cities to prohibit alcohol sales and/or expand distance requirements?**

Cities may prohibit the sale of liquor in residential areas only by charter.<sup>20</sup> A city may prohibit the sale of beer in residential areas by ordinance or charter<sup>21</sup> and may distinguish between on-premise and off-premise sales of beer.<sup>22</sup>

Cities can adopt distance requirements for alcoholic beverage establishments.<sup>23</sup> Sale of alcohol within 300 feet of a church, public or private school, or public hospital is prohibited.<sup>24</sup> Note that the definition of "public school" is a school supported with public funds.<sup>25</sup> The definition of "private school" means a private school, including a parochial school, that: (1) offers a course of instruction for students in one or more grades from kindergarten through grade 12; and (2) has more than 100 students enrolled and attending courses at a single location.<sup>26</sup>

The 300 foot spacing requirement does not apply to a holder of a food and beverage certificate within 300 feet of a private school.<sup>27</sup> It also does not apply to a liquor store where minors are prohibited from entering within 300 feet of a private school.<sup>28</sup>

Sale of alcohol within 300 feet of a day-care center or child-care facility is prohibited.<sup>29</sup> This restriction only applied to permits or licenses under TABC Chapter 25 (beer and wine retailer), 28 (mixed beverage), 32 (private club), 69 (retail dealer's on-premise license) and 74 (brewpub license).<sup>30</sup> The

restriction does not apply to the holder of a food and beverage certificate.<sup>31</sup>

The restriction does not apply if the alcohol business and the child-care facility are on different floors of a multi-story building.<sup>32</sup> Also, this restriction does not apply if the alcohol beverage establishment and the child-care facility are in separate buildings and the child-care facility is not on the ground floor.<sup>33</sup> Further, this restriction does not apply to foster homes.<sup>34</sup>



### **QUESTION 4**

#### **How does a city measure distance requirements?**

The Code establishes the method of measurement for the distance requirements.<sup>35</sup> A city ordinance cannot require a different method of measurement than the Code.<sup>36</sup>

**Church and public hospital:** Along the property lines of the street fronts and from front door to front door, and in a direct line across intersections.<sup>37</sup> The measurement is from the nearest point of the door, then to the property line of the street front, then to the nearest point of the other door.<sup>38</sup> Front door means any outside entrance facing or fronting a public street. A premise may have more than one front door.<sup>39</sup> An alcoholic beverage establishment may move its front door and in turn, evade the 300 foot distance requirement.<sup>40</sup>

**Schools, day-care centers, and child care facilities:** In a direct line from the property line of the public school/day-care/child care facility to the property line of the alcohol beverage establishment, and in a direct line across intersections.<sup>41</sup>

**General Rules on Measurements:** Measurements can be across street in the middle of the block. You don't have to measure to the intersection.<sup>42</sup> The measurement across intersections is diagonally, not corner to corner. The distance is in a straight line,

not the usually traveled route.<sup>43</sup> The shortest possible distance is the one that controls.<sup>44</sup>

Please note that some large Texas cities require (or are considering requiring) that a permit for an alcoholic beverage establishment be submitted along with a professional survey showing that they meet the distance requirements. This is an attempt to avoid potential measurement errors made by city staff.



## **QUESTION 5**

### **Do alcohol establishments have vested rights?**

An alcoholic beverage establishment is grandfathered with regard to the distance requirements if at the time an original alcoholic beverage permit or license is granted for a premises, the premises satisfies the distance requirements from schools, churches, etc....<sup>45</sup>

On a sale or transfer of the business in which a new original license or permit is required for the premises, the premises shall be deemed to satisfy any distance requirements as if the issuance of the new original permit or license were a renewal of a previously held permit or license.<sup>46</sup>

That being said, the grandfathering of the distance from a public school will be lost if the business violates certain provisions of the Code.<sup>47</sup> A business also can only retain its grandfathering rights from a public school if it is sold to a surviving spouse or child.<sup>48</sup>

Although the Code clearly states that an alcoholic beverage establishment is grandfathered at the time the alcoholic beverage license or permit is issued by the TABC, the following situation may arise. A developer submits a plat to the city for approval. The developer intends to develop the property as a liquor store. At the time the plat was filed, the property meets the alcohol spacing requirements.

Then, before the applicant receives its alcohol permit or license, a church is built within 300 feet of the location where the liquor store will be located. Under the Code, they would not be grandfathered.

Regardless of the Code's express provision, developers will likely try to argue that their rights vested under Chapter 245 when they submitted their initial municipal permit application with the city.

It is this author's opinion that an alcoholic beverage establishment will "vest" with regard to distance requirements only at the time when the alcohol permit/license is granted by the TABC – not when the original permit is filed with the City. I have come to this conclusion for several reasons, two of which are provided below

First, municipalities are preempted by the Code, and the Code explicitly calls out the limited circumstances in which grandfathering rights apply. NOTE: The vested rights issue may ultimately be moot anyway. To operate an alcoholic beverage establishment requires not only city approval, but also TABC approval. Regardless of whether the city recognizes vested rights at an earlier date, the TABC is not bound by Chapter 245, but rather the Code. This means the TABC cannot grant a permit and/or license unless the alcohol beverage establishment meets all of the distance requirements *at the time the TABC grants the permit and/or license*.

Second, Under Chapter 245 of the Texas Local Government Code, submitting a permit application locks in those regulations that are in place at the time the permit application is filed with the city. An argument can be made that even if a developer has to comply with the distance requirements due to intervening development, those are the same distance requirements that were in effect at the time the developer filed its permit application with the city. The city has no control over whether the distance requirements have been triggered by intervening private development.



## **QUESTION 6**

### **Does a food and beverage certificate affect the city's ability to regulate?**

To obtain a food and beverage certificate, food service must be the primary business being operated on the premises, the holder must have food service facilities for the preparation and service of multiple entrees, and alcohol sales may not exceed 50 percent of gross receipts.<sup>49</sup> To renew a food and beverage certificate, the comptroller must certify that alcohol sales do not exceed 50 percent of gross receipts.<sup>50</sup>

When first authorized in 1995, food and beverage certificates originally allowed alcohol sales up to 75 percent.<sup>51</sup> At that time, municipalities were allowed to regulate the location of establishments that derived more than 75 percent of their gross income from on-premise sales.<sup>52</sup> In 2001, the food and beverage certificate was amended to 50 percent,<sup>53</sup> but a coordinating amendment to municipal authority was not made.<sup>54</sup>

If a business has a food and beverage certificate, they are exempt from the 300 foot spacing from private schools, day-care centers and child-care facilities.<sup>55</sup> They are also exempt from municipal regulation of the location of private clubs.<sup>56</sup>

## **QUESTION 7**

### **Can a city create exemptions to its alcohol spacing requirements?**

**Variances.** The Code states that a city council may allow variances to their alcohol spacing requirements if the city council determines that "Enforcement of the regulation in particular instance is not in the best interest of the public, constitutes waste or inefficient use of land or other resources, creates an undue hardship on an applicant for a

license or permit, does not serve its intended purpose, is not effective or necessary, or for any other reasons the city council determines is in the best interest of the community."<sup>57</sup>

Although an argument can be made that a city's zoning ordinance does not need to create a variance process since it is already provided for by state statute, in an abundance of caution, this author recommends that a municipality adopt an ordinance that grants the city council the authority to grant variances before actually issuing variances.

This author also recommends that a municipality not only adopt the variance standard provided by the Code, but also delineate those additional findings that would make up the Code's broad "best-interest" standard. By creating specific parameters as to when a variance can be granted, the ordinance would provide better notice of what standards apply, and the municipality can better ensure that the same standard will apply to all variance applications. This will create an easier administrative process, perhaps cut down on due process and equal protection challenges, and provide a more defensible ordinance.

**Waivers by Adjacent Triggering Use.** Some cities will allow an alcoholic beverage establishment to invade the 300 foot spacing requirement, if a church, school, hospital or other triggering use signs a waiver of the 300 foot spacing requirement. Waivers, however, are not expressly provided for under the Code. Also, such waivers may be viewed as an unlawful delegation of legislative authority. Waivers may also create future problems for a municipality if the triggering use later wants to revoke its waiver. A municipality also must pay particular attention to whether the individual who signed the waiver actually has the legal authority to bind the triggering use. This would require an individual assessment for each use signing a waiver. For example, there are different execution rules for different religious establishments. Some require the vote of the congregation, some just the signature of the minister, some the signature of the president of the board of directors, and some require approval by

a regional religious figure. A municipality does not want to approve a certificate of occupancy for an alcoholic beverage establishment (pursuant to a waiver), only to find out later that the waiver is not enforceable.

**Exempting Certain Areas from spacing requirements.** Some cities have exempted their downtown districts from the 300 foot spacing requirements. There is no case law addressing whether a city can apply the 300 foot spacing requirement to one part of the city and not to others. But, this author believes that a city can exempt certain areas from the 300 foot spacing requirement because it operates similar to a large-scale variance.

If a city exempts a certain area from the 300 foot spacing requirements, this author recommends that the ordinance creating the exemption addresses the variance findings. Furthermore, there must be a valid land-use rationale for the exemption of a particular area. It should be consistent with and promote the comprehensive plan and land use studies for the area. For example, a valid rationale may include the city's attempt to create a mixed use, pedestrian-friendly, and densely-populated urban center. Please contact legal counsel if your city wants to exempt a certain area from the 300-foot spacing requirement. It requires additional legal considerations when drafting the ordinance.



## **QUESTION 8**

**How can cities regulate an alcoholic beverage establishment, if it is permitted under the zoning regulations?**

In addition to general code enforcement rights, the mayor, city council member, chief of police, city marshal, or city attorney may file a protest with the TABC requesting that a license or permit be denied, suspended, or canceled.<sup>58</sup>

The protest must show that the place or manner in which the business is being conducted warrants the cancellation based on the general welfare, health, peace, safety, or public sense of decency.<sup>59</sup>

The TABC must set a cancellation or suspension hearing on the petition of the mayor, chief of police, city marshal, or city attorney supported by the sworn statement of one credible person.<sup>60</sup>

Before considering filing a protest with the TABC, please contact your city attorney.



## **QUESTION 9**

**Can cities regulate BYOB establishments?**

BYOB establishments are not referenced in the Code, and are, therefore, not regulated by it. BYOB establishments are not required to get a permit or license from the TABC.<sup>61</sup> Furthermore, municipalities may not regulate the possession or consumption of alcoholic beverages within a use if that use operates on a BYOB basis.<sup>62</sup> But, if the establishment holds itself out to be a "private club", it may be regulated under Chapter 32 of the Code.<sup>63</sup>



## **QUESTION 10**

**What are alcohol-free school zones?**

Sales of alcohol within 1,000 feet of an alcohol-free school zone is prohibited.<sup>64</sup> The alcohol free school zone must be initiated by the public school district (see limitation below) or board of a private school and created by city council resolution.<sup>65</sup> Please note that a public school district may only petition for an alcohol-free school zone if the majority of the area of

the district is located in a municipality of a population of 900,000 or more.<sup>66</sup>

The alcohol-free school zone does not apply to restaurants (50% or less revenue from on-premise sales), manufacturers, or wholesalers.<sup>67</sup> The restriction does not apply to a caterer's license or permit issued for a private school.<sup>68</sup> The restriction does not apply to a liquor store where minors are prohibited from entering within 1,000 feet of a private school.<sup>69</sup>

A municipality can arguably grant a variance to allow an alcoholic beverage establishment to locate within the alcohol-free school zone. The municipality should have already adopted the variance standard, set forth in the Code. The municipality can also add additional findings for granting a variance to an alcohol-free school zone if the city council determines (when adopting their variance standard) that the additional findings are necessary to ensure that the variance was in the "best interest of the community."

<sup>1</sup> Claire Swann is an attorney at Abernathy, Roeder, Boyd & Joplin P.C. She specializes in municipal zoning and land use law. She can be reached at 214.544.4041 or [cswann@abernathy-law.com](mailto:cswann@abernathy-law.com). I would like to thank Richard Abernathy, Rebecca Brewer, and John Rogers for their help in developing this paper and presentation. They have all been incredible mentors.

<sup>2</sup> Tex. Alco. Bev. Code Ann §1.06, §11.38(c), §61.36(c), and §109.57(b); and *Dallas Merchants and Concessionaire's Association v. City of Dallas*, 852 S.W.2d 489 (Tex. 1993).

<sup>3</sup> *Dallas Merchants and Concessionaire's Association v. City of Dallas*, 852 S.W.2d 489 (Tex. 1993).

<sup>4</sup> *Id.*

<sup>5</sup> Tex. Alco. Bev. Code Ann. §109.57(c).

<sup>6</sup> Tex. Alco. Bev. Code Ann. §109.57(c).

<sup>7</sup> *Id.*

<sup>8</sup> Tex. Alco. Bev. Code Ann. §109.57(d). The Code actually states that a city may regulate the location of a business that derives 75% or ore of its revenue from on-premise sale of alcohol. The Texas Attorney General's office has interpreted "on-premise sale" to mean the sale of alcohol for on-premise consumption. Op. Tex. Att'y Gen. No. DM-289 (1994).

<sup>9</sup> Op. Tex. Att'y Gen. No. DM-289 (1994).

<sup>10</sup> Tex. Alco. Bev. Code Ann. §109.57(e).

<sup>11</sup> Tex. Const. Art. 16 §20; Tex. Alco. Bev. Code Title 6, Chapter 251; Tex. Elec. Code Chapter 501.

<sup>12</sup> Tex. Alco. Bev. Code §251.71(a).

<sup>13</sup> *Id.*

<sup>14</sup> Tex. Alco. Bev. Code §251.71(b) and §251.72.

<sup>15</sup> Tex. Alco. Bev. Code §251.73(1).

<sup>16</sup> Tex. Alco. Bev. Code §251.73(2).

<sup>17</sup> Tex. Alco. Bev. Code §251.80(a). Tex. Elec. Code §501.022(b).

<sup>18</sup> Tex. Alco. Bev. Code §251.80(a).

<sup>19</sup> Tex. Alco. Bev. Code §11.37 (permit) and §61.37 (license).

<sup>20</sup> Tex. Alco. Bev. Code Ann. §109.31.

<sup>21</sup> Tex. Alco. Bev. Code Ann. §109.32(a)(1).

<sup>22</sup> Tex. Alco. Bev. Code Ann. §109.32(c).

<sup>23</sup> See Tex. Alco. Bev. Code Ann. §109.33.

<sup>24</sup> Tex. Alco. Bev. Code Ann. §109.33(a)(1).

<sup>25</sup> Op. Tex. Att'y Gen. 96-134 (1996).

<sup>26</sup> Tex. Alco. Bev. Code Ann. §109.33(h)(2).

<sup>27</sup> Tex. Alco. Bev. Code Ann. §109.33(h)(1).

<sup>28</sup> Tex. Alco. Bev. Code Ann. §109.33(h)(2).

<sup>29</sup> Tex. Alco. Bev. Code Ann. §109.331.

- 
- 30 Tex. Alco. Bev. Code Ann. §109.331(a).  
31 Tex. Alco. Bev. Code Ann. §109.331(a).  
32 Tex. Alco. Bev. Code Ann. §109.331(c)(1).  
33 Tex. Alco. Bev. Code Ann. §109.331(c)(2).  
34 Tex. Alco. Bev. Code Ann. §109.331(d).  
35 See Texas Alco. Bev. Code Ann. §109.33.  
36 Tex. Alco. Bev. Code Ann. §1.06, §11.38(c), §61.36(c), and §109.57(b); and *Dallas Merchants and Concessionaire's Association v. City of Dallas*, 852 S.W.2d 489 (Tex. 1993).  
37 Tex. Alco. Bev. Code Ann. §109.33(b).  
38 Ezell v. TABC, 528 S.W.2d 888 (Tex. Civ. App. - Ft. Worth 1975, no writ).  
39 Op. Tex. Att'y Gen. No. O-2062 (1940).  
40 Op. Tex. Att'y Gen. No. O-2156 (1940)  
41 Tex. Alco. Bev. Code Ann. §109.33(b) and §109.331.  
42 Robinson v. Dallas, 193 S.W.2d 821 (Tex. Civ. App. - Austin 1946, writ ref'd).  
43 Hallum v. Texas Liquor Control Board, 166 S.W.2d 175 (Tex. Civ. App. - Dallas 1942 writ ref'd).  
44 Op. Tex. Att'y Gen. No. O-7528 (1946).  
45 Tex. Alco. Bev. Code Ann. §109.59(a).  
46 Tex. Alco. Bev. Code Ann. §109.59(b).  
47 Tex. Alco. Bev. Code Ann. §109.59(d). These provisions are:  
Tex. Alco. Bev. Code Ann. §11.61(b)(1) (violation of TABC).  
Tex. Alco. Bev. Code Ann. §11.61(b)(6) (permittee is not of good moral character).  
Tex. Alco. Bev. Code Ann. §11.61(b)(7) (place or manner is detrimental to general welfare).  
Tex. Alco. Bev. Code Ann. §11.61(b)(8) (did not maintain bond).  
Tex. Alco. Bev. Code Ann. §11.61(b)(9) (noisy, lewd, disorderly or unsanitary premises).  
Tex. Alco. Bev. Code Ann. §11.61(b)(10) (permittee mentally or physically unable).  
Tex. Alco. Bev. Code Ann. §11.61(b)(11) (permittee uses alcohol in excess).  
Tex. Alco. Bev. Code Ann. §11.61(b)(13) (permittee is intoxicated on premises).  
Tex. Alco. Bev. Code Ann. §11.61(b)(14) (sale to intoxicated persons).  
Tex. Alco. Bev. Code Ann. §11.61(b)(20) (open container on premises).  
Tex. Alco. Bev. Code Ann. §61.71(a)(5) (sale to minors).  
Tex. Alco. Bev. Code Ann. §61.71(a)(6) (sale to intoxicated persons).  
Tex. Alco. Bev. Code Ann. §61.71(a)(7) (sale at time when prohibited).  
Tex. Alco. Bev. Code Ann. §61.71(a)(8) (sale or possession of alcohol on consignment).  
Tex. Alco. Bev. Code Ann. §61.71(a)(11) (lewd, immoral, or offensive conduct on premises).  
Tex. Alco. Bev. Code Ann. §61.71(a)(12) (employee under 18 years old).  
Tex. Alco. Bev. Code Ann. §61.71(a)(14) (refused to allow TABC inspection).  
Tex. Alco. Bev. Code Ann. §61.71(a)(17) (place or manner is detrimental to general welfare).  
Tex. Alco. Bev. Code Ann. §61.71(a)(18) (consumption at time when prohibited).  
Tex. Alco. Bev. Code Ann. §61.71(a)(22) (sale when license was suspended).  
Tex. Alco. Bev. Code Ann. §61.71(a)(24) (physically or mentally incompetent or intoxicated).  
48 Tex. Alco. Bev. Code Ann. §109.59(c).  
49 Tex. Alco. Bev. Code Ann. §25.13 (wine and beer retailer's permit), §28.18 (mixed beverage permit), and §32.23 (private club permit), and §69.16 (retail dealer's on-premise license).  
50 Tex. Alco. Bev. Code Ann. §28.18(d) (mixed beverage permit) and §32.23 (private club permit).  
51 See the historical and statutory notes to Tex. Alco. Bev. Code Ann. §25.13 (wine and beer retailer's permit), §28.18 (mixed beverage permit), and §32.23 (private club permit), and §69.16 (retail dealer's on-premise license).  
52 See the historical and statutory notes to Tex. Alco. Bev. Code Ann. §109.57(d).  
53 See the historical and statutory notes to Tex. Alco. Bev. Code Ann. §25.13 (wine and beer retailer's permit), §28.18 (mixed beverage permit), and §32.23 (private club permit), and §69.16 (retail dealer's on-premise license).  
54 See the historical and statutory notes to Tex. Alco. Bev. Code Ann. §109.57(d).  
55 Tex. Alco. Bev. Code Ann. §109.33(h)(1) (private schools) and §109.331(a) (day-care centers and child-care facilities).  
56 Tex. Alco. Bev. Code Ann. §109.57(e)(2).  
57 Tex. Alco. Bev. Code Ann. §109.33 (e).

- 
- 58 Tex. Alco. Bev. Code §11.41 (deny a permit), §11.46 (deny a permit), §11.61 (suspend or cancel a permit), §11.612  
cancel a private club permit), §61.32(deny a license), §61.71 (suspended or cancel a license), and §61.721 (cancel a  
wine and beer retailer permit or a retail dealer's on-premise license).
- 59 Tex. Alco. Bev. Code §11.46(a)(8) (deny a permit), §11.61(a)(7) (cancel or suspend a permit), §11.612(a) (cancel a  
private club permit), §61.42(a)(3) (deny a license), §61.71(a)(17) (cancel or suspend a license), and §61.721 (cancel  
a wine and beer retailer permit or a retail dealer's on-premise license).
- 60 Tex. Alco. Bev. Code §11.62 (permit) and §61.80 (license).
- 61 Tex. Atty. Gen. Op. GA-0561 (2007).
- 62 *Id.*
- 63 *Id.*
- 64 Tex. Alco. Bev. Code Ann. §109.33(a).
- 65 Tex. Alco. Bev. Code Ann. §109.33(a).
- 66 Tex. Alco. Bev. Code Ann. §109.33 (a)(2) and Tex.Edu.Code §38.007(b)
- 67 Tex. Alco. Bev. Code Ann. §109.33(f).
- 68 Tex. Alco. Bev. Code Ann. §109.33(g)(1).
- 69 Tex. Alco. Bev. Code Ann. §109.33(g)(2).