

MUNICIPAL REGULATION OF ALCOHOLIC BEVERAGES*

**(*or “No, Mr. Mayor, we really can’t stop that
keg party by rezoning the property!”)**

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During his 12+ years with the cities of Midland and Kerrville, Kevin performed legal services in virtually every area of municipal government including, but not limited to, economic development and land use planning and development. Kevin has extensive experience in the preparation of ordinances and resolutions covering a wide range of matters, including the revision of the City of Kerrville, Texas, Zoning Regulations adopted in 1997. Kevin's current practice involves providing advice and counsel in all areas of municipal law to the firm's client cities in the Greater Dallas/Ft. Worth Metroplex.

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DISCLAIMER

As you might expect with an attorney, there must always be some type of disclaimer, so here goes:

You're not my client (yet), and I am not your attorney (for now)(unless of course you happen to be on the planning staff of one of our firm's client cities). Therefore, while the information contained in this paper and in the presentation made by me at this conference is readily available at your local law library, how I put this paper together and the comments I make about this topic may not be the same way your own city attorney may do things or the way he or she would advise you. My hope is that you can use this as a reference tool to help in a pinch when your mayor or city manager comes to you and asks "can we do this?" or worse, use it as a shield when they come to you and tell you "we ARE going to do this." But PLEASE, because fact situations are different and new laws and court decisions can change the outcome of any prior opinion, always consult your own city's legal counsel when dealing with these or similar issues in your own venue. If nothing else, your attorney will be pleased about being kept in the loop as well as being given the chance to do the one thing to which most of us aspire - practicing *preventative* law.

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MUNICIPAL REGULATION OF ALCOHOLIC BEVERAGES

(or “No, Mr. Mayor, we really can’t stop that keg party by rezoning the property!”)

INTRODUCTION

This paper is intended to be a nuts and bolts of the “do’s,” “don’ts,” “can’s,” and “can not’s” regarding the local regulation of the manufacture, sale, possession and consumption of alcoholic beverages in Texas to the extent such regulations impact the areas of land use planning and code enforcement. This paper will not discuss issues relating to local option elections, nor will it address criminal offenses related to the sale, possession of consumption of alcoholic beverages.

ZONING IS A MATTER OF LOCAL CONCERN

Municipalities often face a severe impediment to development and redevelopment efforts as the result of problems associated with alcoholic beverage establishments. It is readily conceded by the liquor industry that over-concentration of alcoholic beverage establishments in a municipality and the associated sale and consumption of alcohol causes severe problems including increased crime, drinking on premises, litter, loitering, public intoxication, urinating in public, and harassment of the occupants of neighboring residential areas.

Regulation of alcoholic beverage establishments through municipal zoning is not a matter of being “for” or “against” alcoholic beverages but is rather a matter of local concern for the quality of the community raised by those who live in the community. Zoning is a matter best left to the local legislators who have a pulse on the particular land use needs of the community and not the state legislature or a state agency. If municipalities can not control the location of alcoholic beverage establishments, then their zoning power has been relegated to the Texas Alcoholic Beverage Commission through its process of granting licenses and permits to such businesses. In the absence of local zoning power, a municipality which merely seeks to control the density of such businesses to achieve a reduction in the problems associated with the sale of alcohol must look to the Texas Alcoholic Beverage Commission for protection of the health, safety and welfare of the citizens. It is impossible for the Texas Alcoholic Beverage Commission to obtain sufficient information in the licensing and permitting process to determine whether, how and where to impose restrictions in the hundreds of municipalities throughout the state where alcoholic beverage establishments are located. The Texas Alcoholic Beverage Commission has not undertaken this responsibility and does not have the resources to perform such functions. In the absence of local zoning control, the liquor industry and the state control the location of alcoholic beverage establishments throughout the state of Texas.

TEXAS LIQUOR CONTROL ACT - PRE TEX. ALCO. BEV. CODE

Prior to 1977, alcoholic beverages were regulated by the Texas Liquor Control Act. The legislature codified the Texas Liquor Control Act into the Texas Alcoholic Beverage Code in 1977. Texas Alcoholic Beverage Code was intended as a recodification only, and no substantive

change in the law was intended by the Act. Prior to codification, several courts of appeals held that various ordinances of home-rule cities restricting the sale of alcoholic beverages were not pre-empted by the Texas Liquor Control Act. *See, City of Clute v Linscomb*, 446 S.W.2d 377 (Tex.Civ.App.--Houston [1st Dist] 1969, no writ)¹; *T&R Associates, Inc. v City of Amarillo*, 688 S.W.2d 622 (Tex.App.--Amarillo 1985, writ ref'd, n.r.e.)²; *Louder v Texas Control Board*, 214 S.W.2d 336 (Tex.Civ.App.--Beaumont 1948, writ ref'd n.r.e.); *Eckert v Jacobs*, 142 S.W.2d 374 (Tex.Civ.App.--Austin 1940, no writ)³.

Subsequent to the codification, the Court of Appeals in *Young, Wilkerson & Roberts v City of Abilene*, 704 S.W.2d 380, 383 (Tex.App.--Eastland 1985, writ ref'd n.r.e.)⁴ held that the Texas Alcoholic Beverage Code did not pre-empt ordinances prohibiting the sale of alcoholic beverages. There the court held that the Constitution and general statutes of this State do not deny a home-rule city the right to regulate the area of the city in which liquor may be sold.” *See also, Abilene Oil Distributors v City of Abilene*, 712 S.W.2d 644 (Tex.App.--Eastland 1986, writ ref'd n.r.e.)⁵ *SDJ, Inc. v Houston*, 837 F.2d 1268 (5th Cir. 1988), *reh den, en banc*, 841 F.2d 107

¹ The Court held that the zoning laws of the State had no relation to the regulation of liquor businesses and that the Liquor Control Act was not intended as limitation of the police powers of cities granted under the Home-Rule Amendment to the State Constitution. The Court determined that the Ordinance was not dependent on the state statute for its validity, since the statute stated that all incorporated cities and towns were authorized to designate certain zones in their jurisdiction where the sale of beer could be prohibited. The Court found nothing in Liquor Control Act which took away from the City the right to zone areas for liquor sales.

² Amarillo Court of Appeals held the denial of a specific use permit for the location of an alcoholic beverage establishment was a proper exercise of the City’s police power. Plaintiff had applied for a SUP to sell alcoholic beverages without food sales. The Court noted that it is well established that the regulation of the sale of alcoholic beverages through zoning ordinances is a proper exercise of a City’s police power. The issuance of a specific use permit constitutes an amendment to the zoning ordinance and such action is presumed valid absent a clear abuse of discretion. The court concluded that the granting of a specific use permit by the City Council was discretionary and that the denial of the specific use permit for an alcoholic beverage establishment was within the City’s powers and discretion.

³ City relied upon a general comprehensive zoning ordinance which classified properties within the City which prohibited the sale of beer in a commercial zoning district. The Court determined that the Liquor Control Act was manifestly one of restriction, not one of enlargement of the sale of intoxicating liquors. The Court said the Act was in no way intended as a limitation of the City’s police powers granted to it under the home-rule amendments of the Constitution. Court stated that to construe the state statutes limiting the powers of the City in zoning ordinances affecting the sale of liquor, would be, as far as liquor zoning was concerned, to repeal many other provisions of the statute giving broad governing powers to home-rule cities.

⁴ Court held a zoning ordinance requiring structures with on-premise consumption of alcohol be located at least three hundred (300) feet of any lot in a residential district, did not conflict with the Texas Alcoholic Beverage Code regulations governing the sale of alcoholic beverages near schools, churches or hospitals. The ordinance imposed restrictions which applied to any lot in addition to the state restrictions applicable to churches, public schools and public hospitals. The Court reasoned that the zoning ordinance did not conflict with the Code because the zoning ordinance placed restrictions which applied to any lot in the residential district in addition to restrictions applicable to churches, schools and public houses.

⁵ Court affirmed a judgment upholding a municipal zoning ordinance which adopted a different method of measuring the distance from a liquor store to a public school from the method used in the Tex. Alco. Bev. Code 109.33.. The Court stated that despite the fact that the City system of measurement required a liquor store to be further away from the public school than was required by state law, the ordinance could be inconsistent with the Code if the ordinance imposed higher standards.

(5th Cir. 1988) *cert den* 489 U.S. 1052, 103 L. Ed. 2d 579, 109 S.Ct 1310⁶; *Williams v Ft. Worth*, 782 S.W.2d 290 (Tex.App.--Fort Worth 1989, writ granted).⁷

PREEMPTION OF LOCAL ZONING

Subsequent to the codification of the Liquor Control Act into the Texas Alcoholic Beverage Code, in response to the court decisions holding that local zoning ordinances were not pre-empted by the Texas Alcoholic Beverage Code, the Texas Legislature adopted Section 109.57, which today reads as follows:

Sec. 109.57. APPLICATION OF CODE; OTHER JURISDICTIONS.

(a) Except as is expressly authorized by this code, a regulation, charter, or ordinance promulgated by a governmental entity of this state may not impose stricter standards on premises or businesses required to have a license or permit under this code than are imposed on similar premises or businesses that are not required to have such a license or permit.

(b) It is the intent of the legislature that this code shall exclusively govern the regulation of alcoholic beverages in this state, and that except as permitted by this code, a governmental entity of this state may not discriminate against a business holding a license or permit under this code.

(c) Neither this section nor Section 1.06 of this code affects the validity or invalidity of a zoning regulation that was formally enacted before June 11, 1987, and that is otherwise valid, or any amendment to such a regulation enacted after June 11, 1987, if the amendment lessens the restrictions on the licensee or permittee or does not impose additional restrictions on the licensee or permittee. For purposes of this subsection, "zoning regulation" means any charter provision, rule, regulation, or other enactment governing the location and use of buildings, other structures, and land.

(d) This section does not affect the authority of a governmental entity to regulate, in a manner as otherwise permitted by law, the location of:

(1) a massage parlor, nude modeling studio, or other sexually oriented business; or

(2) an establishment that derives 75 percent or more of the establishment's gross revenue from the on-premise sale of alcoholic beverages.

(e) A municipality located in a county that has a population of 2.2 million or more and that is adjacent to a county with a population of more than 400,000 or a municipality located in a county with a population of 400,000 or more and that is adjacent to a county

⁶ A zoning ordinance restricting the location of topless bars did not conflict with the Alcoholic Beverage Code. The ordinance regulated sexually oriented businesses, not alcoholic beverages, the court explained, and where the sale of alcoholic beverages is not directly regulated, a zoning scheme may be enacted in addition to the scheme set out in the Alcoholic Beverage Code.

⁷ Court held that zoning regulation of topless bars was not pre-empted by the Alcoholic Beverage Code. The statute provided that no person authorized to sell beer could engage in or permit lewd or immoral conduct on the premises or permit lewd or vulgar entertainment. The zoning ordinance restricted the location of topless bars. The court held that while the state statute pre-empted the regulation of business regarding the sale of alcoholic beverages, other activities that take place on such premises were subject to regulation by local governments

with a population of 2.2 million or more may regulate, in a manner not otherwise prohibited by law, the location of an establishment issued a permit under Chapter 32 or 33 if:

(1) the establishment derives 35 percent or more of the establishment's gross revenue from the on-premises sale or service of alcoholic beverages and the premises of the establishment are located in a dry area; and

(2) the permit is not issued to a fraternal or veterans organization or the holder of a food and beverage certificate.

It is well settled that until the adoption of Tex Alco. Bev. Code §109.57 in 1987, home-rule municipalities had the power to regulate the location of alcohol-related businesses within their incorporated limits by use of their zoning regulations which were not pre-empted by the general provisions of the Texas Alcoholic Beverage Code. Such is no longer the case.

Cities still have a statutorily created right to be exempt from the preemption if the city enacted valid zoning regulations prior to June 11, 1987.⁸ However, amendments to pre-1987 ordinances may not withstand scrutiny if the amended ordinances add new restrictions or regulations regarding alcoholic beverages.

For instance, the common practice in dry areas of requiring a specific use permit to operate a private club was addressed in *Courtney v. City of Sherman*, 792 S.W. 2d 135 (Tex. App. - Dallas 1990, writ den'd.) Prior to 1987, the City of Sherman had enacted a zoning ordinance requiring all private clubs⁹ to obtain a specific use permit that required the establishment, on an annual basis, to maintain gross revenues from the sale of food equal to or greater than the gross revenues from the sale of alcoholic beverages. Relying on Tex. Alco. Bev. Code §1.06, the Court of Appeals found the city's zoning ordinance was preempted by the Code's regulation of private clubs which only required that a private club "provide regular food service adequate for its members and their guests¹⁰." Since the state had specified the qualifications for a private club, the city could not impose stricter standards in food service. *Courtney*, 792 S.W.2d at 137. The Court of Appeals also rejected the city's argument that the Zoning Enabling Act, Tex. Loc. Gov't. Code §211.013, allows the city to impose these higher standards, noting that §211.013, while authorizing cities to impose higher standards regarding the regulation of the location, use, spacing, and the physical nature and character of buildings and lots, it does not permit the regulation of the manufacture, sale, distribution, transportation, and possession of alcoholic beverages governed exclusively by the Code. *id.*

The *Courtney* court went on to say:

⁸ It should be noted that most of the previously mentioned cases establishing a municipality's right to regulate the location of alcohol related businesses, including the *T&R Associates* case, were decided even in light of §§1.06 and 109.31-109.33 of the TABC. However, In *Dallas Merchant's and Concessionaire's Association v City of Dallas*, 852 S.W.2d 489 (Tex. 1993), the Texas Supreme Court summarily set aside pre-1987 cases as not applicable when determining the effect of §109.57. *Dallas Merchant's* in footnote 4, 852 S.W. 2d at 492.

⁹ i.e. establishments that are allowed to serve alcoholic beverages in a dry area.

¹⁰ Tex. Alco. Bev. Code §32.03(g)

In our view, the legislature has attempted to preempt the field concerning private club regulation. The City's ordinance, which imposes upon the private club the requirement that it procure as much or more revenues from the sale of food as it does from the service of alcohol, is in direct conflict with the Code. By zoning ordinance, the City has attempted to make more onerous the requirements of operating a private club than required under the Code. If the ordinance were allowed to stand, the result would be to make illegal that which is legal under the laws of the State of Texas.

Courtney, 792 S.W.2d at 137-138.

Just nine years later, the same Court of Appeals upheld a City of Irving zoning ordinance that restricted sale of alcoholic beverages to no more than 40% of the annual total sales. *West End Pink, Ltd. v. City of Irving*, 22 S.W.3d 5 (Tex. App. – Dallas, 1999, pet. den'd.) This ordinance dates from 1981. The restaurant brought suit using the *Courtney* argument that the ordinance is unconstitutional as conflicting with the TABC. While the Court agrees the TABC preempts municipal regulation, the Court agreed with the City's argument that the validation acts of 1985, 1987 and 1989 validated the ordinance. The court reasoned that because the legislature could have passed a law in the first instance authorizing the City to adopt the ordinance, it could later validate the City's ordinance and, in fact, did so¹¹. *West End Pink, Ltd*, 22 S.W.3d. at 8.

In a more recent unreported federal case, the City of Denison's specific use permit ordinance, adopted before 1987, was determined by the court to not be pre-empted by the Code and the court denied the summary judgment overturning the city's ordinance as requested by the restaurant owner seeking an SUP for a private club. *Aero Meridian Associates DP, d/b/a Morton Plaza, v. City of Denison, Texas*, 2007 WL 2900536 (E.D. Tex.). The Denison city council had denied the plaintiff's SUP application after applying the standards and criteria set forth in its ordinance¹². *Aero Meridian Associates DP*, 2007 WL 2900536 at *4. After citing and discussing *Dallas Merchant's*, *Courtney*, and *West End Pink, Ltd.*, the court determined the Denison ordinance was not pre-empted by the Code (1) because the city was only applying those standards that were in the ordinance pre-1987, (b) that Tex. Alco. Bev. Code §109.57 exempts

¹¹ The Court also noted that subsequent validation statutes specifically provided that they do not validate any ordinance that violates Tex. Alco. Bev Code §1.06 or §109.57. *West End Pink, Ltd*, 22 S.W.3d. at 8.

¹² The Denison ordinance at issue reads as follows:

Sec. 28-72. Application data.

The city planning and zoning commission, in considering and determining its recommendation, or the city council, in considering any request for a specific use permit, may require from the applicant, plans, information, operating data and expert evaluation concerning the location, function and characteristics of any building or use proposed. The city council may in the interest of the public welfare and to assure compliance with this chapter, establish conditions of operation, location, arrangement and construction of any use for which a permit is authorized. *In authorizing the location of any of the uses listed as specific use permits, the city council may impose such development standards and safeguards as the conditions and location indicate important to the welfare and protection of adjacent property from excessive noise, vibration, dust, dirt, smoke, fumes, gas, odor, explosion, glare, offensive view or other undesirable or hazardous conditions.*[emphasis added] City of Denison Code of Ordinances §28-72.

from pre-emption pre-1987 ordinances, (c) as in *West End Pink, Ltd.*, the Denison ordinance had been validated by various validation statutes, and (d) the Denison ordinance did not involve a post-1987 amendment that increased regulations. *id.* at 7-8.

As noted, the *Aero Meridian* case is unreported and has been settled, meaning there will not be a case going to the Fifth Circuit for review and opinion. However, the arguments made by the City of Denison and the discussion of the law regarding the pre-emption of local ordinances by the court – especially relating to pre-1987 ordinances – are worth reviewing for those cities who are challenged by applicants seeking SUP’s for location of an establishment that will be selling alcoholic beverages or who otherwise have older regulations on the books. However, any amendments to the zoning ordinances after the 1989 validation act, even if they decrease the restrictions or do not impose additional restrictions on a licensee, and that seem to be allowable under §109.57(c), may still face a challenge under *Courtney*, since there is no validation act to save them.

Notwithstanding, state pre-emption of most local regulation of the sales of alcoholic beverages, from time to time there are still attempts...or at least discussions about...getting around the express pre-emption language contained in Tex. Alco, Bev. Code §1.06 and §109.57. The following are some examples of cases and attorney general opinions....some even pre-1987...that hold certain types of local regulation prohibited:

- 👉 City may not adopt ordinance requiring licensee to obtain a local beer sales license. *Munoz v. City of San Antonio*, 318 S.W. 2d 741 (Tex. Civ. App. – San Antonio, 1959, writ dismissed)
- 👉 City cannot prescribe lesser penalty for violating prohibited acts under the Code than what the Code proscribes. Op. Tex. Atty. Gen. C-754 (1966)
- 👉 Ordinance requiring closing of package stores on certain holidays in which Liquor Control Act allowed sales and to close at 8:00 p.m. on days where the Act allowed operations until 9:00 p.m. held invalid. *Royer v. Ritter*, 531 S.W. 2d 448 (Tex. Civ. App. – Beaumont 1975, writ refused n.r.e.)
- 👉 Municipality may not adopt an ordinance prohibiting the possession of open container of alcoholic beverage in motor vehicles. Op. Tex. Atty. Gen. JM-112 (1983)
- 👉 Rejecting the argument that the Code does not regulate “consumption” by holding that “consumption” necessarily requires “possession” and that the local regulation of “possession” of an alcoholic beverage is pre-empted, the Attorney General held that a municipality may not adopt an ordinance prohibiting the consumption of alcoholic beverages by people operating motor vehicles. Op. Tex. Atty. Gen. JM-619 (1987)
- 👉 An ordinance prohibiting consumption of alcoholic beverages on certain public sidewalks would be preempted if enacted. Tex. Atty. Gen. Letter Opinion LO-88-46 (1988) (citing Op. Tex. Atty. Gen. JM-112 and JM-619)

- 👉 An ordinance prohibiting people under the age of 21 from entering a place that sells alcoholic beverages unless accompanied by a parent or adult guardian would be pre-empted. Tex. Atty. Gen. Letter Opinion LO-88-56 (1988) (citing Op. Tex. Atty. Gen. JM-112 and JM-619)
- 👉 Zoning ordinance adopted post-1987 amended pre-1987 zoning ordinance requiring specific use permit for private clubs by adding standards requiring revenues of sales of alcoholic beverages be at least 50% of total revenues from establishment sales. Post-1987 amendments required higher standards regarding sales of alcoholic beverages than the Code and, therefore, were pre-empted. *Courtney v. City of Sherman*, 792 S.W. 2d 135 (Tex. App.-Dallas 1990, writ den'd.)
- 👉 Because it had the effect of prohibiting the sale of alcoholic beverages in non-residential areas...which is preempted, city ordinances prohibiting sale of alcoholic beverages within 300 feet of residentially-zoned areas are pre-empted. *Dallas Merchants and Concessionaires Assoc. et al v. City of Dallas*, 852 S.W. 2d 489 (Tex. 1993)
- 👉 An ordinance adopted as a health regulation with the goal of inhibiting the spread of the HIV virus that requires business that sells alcoholic beverages for on-premises consumption to make condoms available for sale at the counter or restroom vending machines pre-empted because it would impose stricter standards on licensed establishments than on similar business that do not sell alcoholic beverages. Op. Tex. Atty. Gen. DM-229 (1993)[This is a post- *Dallas Merchants and Concessionaires Assoc.* opinion.]
- 👉 Without expressing an opinion on the validity of any such ordinance under Federal constitutional issues, city is not preempted from adopting an ordinance banning the sale of *all* beverages in glass containers, but cannot single out in such an ordinance the sale of alcoholic beverages. Op. Tex. Atty. Gen. GA-0110 (2003)
- 👉 Even though the Texas Alcoholic Beverage Code does not specifically regulate “bring your own bottle” (BYOB) establishments, because the Code preempts the regulation of possession and consumption of alcoholic beverages, a city cannot adopt an ordinance regulate possession or consumption of an alcoholic beverage in an establishment operating on a BYOB-basis. Op. Tex. Atty. Gen. GA-0561 (2007)

So with all of the regulations that a city CANNOT adopt, what CAN a city regulate? Fortunately, the Texas legislature does provide cities some areas in which they may regulate. Some express areas include:

- 🚫 A city may prohibit the sale of liquor in its residential areas ***through its charter***. TEX. ALCO. BEV. CODE § 109.31. “Liquor” is defined as “... any alcoholic beverage containing alcohol in excess of four percent by weight, unless otherwise indicated.”

- A city may prohibit the sale of beer in residential areas **by charter or ordinance**. TEX. ALCO. BEV. CODE ANN. § 109.32. A city may also regulate the sale of beer in other areas and prescribe the hours in which it may be sold.
- A municipality may regulate the sale of wine for off-premises consumption pursuant to Tex. Alco. Bev. Code §26.04 , which states:

[t]he restrictions in [the Texas Alcoholic Beverage Code] relating to beer as to the application of local restrictions ... apply to the sale of alcoholic beverages by a wine and beer retailer's off-premise permittee.

Since an establishment that sells wine for off-premise consumption must obtain a wine and beer retailer's off-premise permit, the establishment is subject to the local regulations pertaining to the sale of beer. Thus, the municipality can regulate both beer and wine for off-premise consumption.

- Pursuant to Tex. Alco. Bev. Code §109.33, a city or county may adopt an ordinance or order, respectively, prohibiting the sale of all alcoholic beverages within:
 - three hundred (300) feet of a church, public school, or public hospital;
 - subject to certain exceptions in the statute, one thousand (1,000) feet of a public school if the commissioners court or the governing body receives a request for the board of trustees of a school district under Section 38.007 of the Election Code (which is limited to school districts the majority of which are located in cities with a population of 900,000 or more);
 - subject to certain exceptions in the statute, one thousand (1,000) feet of a private school if the county commissioners court or city council receive a request from the governing body of the private school;
- Pursuant to Tex. Alco. Bev. Code §109.331, the distance rules applicable to public schools are also applicable to day care centers and child care facilities, subject to a number of exceptions [detailed discussion of this exception will follow below];
- Pursuant to Tex. Alco. Bev. Code §109.35, a city may seek from the Alcoholic Beverage Commission an order prohibiting open containers or the public consumption of alcoholic beverages in central business districts; provided, however, the Commission's order cannot prohibit possession or consumption in a motor vehicle, a building not owned by the city, a residential structure, or a licensed premises located in the central business district. TEX. ALCO. BEV. CODE §109.35;
- Pursuant to Tex. Alco. Bev. Code §109.36(b), a city may adopt regulations prohibiting the possession of an open container or the consumption of an alcoholic beverage on a public street, public alley, or public sidewalk within 1000 feet of the property line of a

homeless shelter¹³ or substance abuse treatment center that it *not* located in a central business district¹⁴.

- A city may continue to regulate the location of massage parlors, nude modeling studios, and other sexually oriented businesses. Tex. Alco. Bev. Code §109.57(d)(1). Furthermore, because the Alcoholic Beverage Code regulates only the manufacture, sale, distribution, transportation, and manufacture of alcoholic beverages, it does not preempt a city's power to regulate secondary activities occurring on the premises by zoning ordinances, such as regulating sexually oriented businesses. *MJR's Fare of Dallas, Inc. v. City of Dallas*, 792 S.W.2d 569, 576 (Tex. App. – Dallas 1990, writ denied); *Robinson v. City of Longview*, 936 S.W.2d 413 (Tex. App.- Tyler 1996, no writ); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1995).
- A city may regulate the location of establishments that derive seventy-five percent (75%) or more of their gross revenue from on-premise sale of alcoholic beverages. Tex. Alco. Bev. Code §109.57(d)(2)
- A city located in a county with a population of 2.2 million or more that is adjacent to a county with a population of 400,000 or more, or a city in a county with a population of 400,000 or more adjacent to a county with a population of 2.2 million or more, may regulate the location of private clubs issued permits under Ch. 32 or 33 of the Code if (1) the establishment derives 35% or more of its gross revenues from on-premise sale or service of alcoholic beverages, and (2) the establishment is located in a dry area, and (3) the permit is not issued to a fraternal or veterans organization or holder of a food and beverage certificate. Tex. Alco. Bev. Code §109.57(e).

MORE ON REGULATION OF HOURS

The Code sets forth regulations relating to days and hours during which alcoholic beverages may be sold, offered for sale, served, or delivered. In some instances, a city or county has the authority to extend those hours beyond what is set forth in the Code and are noted as follows:

§105.03 Hours of Sale: Mixed Beverages

A mixed beverage permittee may sell and offer for sale mixed beverages between 7 a.m. and midnight on any day except Sunday. On Sunday he may sell mixed beverages between midnight and 1:00 a.m. and between 10 a.m. and midnight, except that an alcoholic beverage served to a customer between 10 a.m. and 12 noon on Sunday must be provided during the service of food to the customer. A city or county other than a city or county with a population of

¹³ "Homeless shelter" means a supervised publicly or privately operated shelter or other facility that is designed to provide temporary living accommodations to individuals who lack a fixed regular and adequate residence. Tex. Alco. Bev. Code §109.36(a)(2).

¹⁴ "Central business district" means a compact and contiguous geographical area of a municipality used for commercial purposes that has historically been the primary location in the municipality where business has been transacted. Tex. Alco. Bev. Code §109.36(a)(1).

(a) 800,000 or more, according to the last preceding federal census, or (b) 500,000 or more, according to the 22nd Decennial Census of the United States, as released by the Bureau of the Census on March 12, 2001, may adopt an order or ordinance, respectively, to extend the hours for the sale of mixed beverages and the offer to sell them by a holder of a mixed beverages late hours permit until 2 a.m. on any day of the week.

§105.05 Hours of Sale: Beer

A person authorized to sell, offer to sell, or deliver beer, do so between 7 a.m. and midnight on any day except Sunday. On Sunday, he may sell, offer for sale, or deliver beer between midnight and 1:00 a.m. and between noon and midnight, except that a permittee or licensee authorized to sell beer for on-premises consumption may sell to a customer between 10 a.m. and 12 noon on Sunday as long as the customer is served food with the beverage. A city or county other than a city or county with a population of (a) 800,000 or more, according to the last preceding federal census, or (b) 500,000 or more, according to the 22nd Decennial Census of the United States, as released by the Bureau of the Census on March 12, 2001, may adopt an order or ordinance, respectively, to extend the hours for the sale, offer, to sell, or delivery of beer until 2 a.m. on any day of the week.

§105.04 Hours of Sale: Wine and Beer Retailer

The hours of sale and delivery for alcoholic beverages sold under a wine and beer retailer's permit or a wine and beer retailer's off-premise permit are the same as those prescribed for the sale of beer under Section 105.05 of the Code, except that no sale shall be allowed between 2 a.m. and noon on Sunday. As §105.04 fails to say differently, if a city or county extends the hours of sale for beer under a local order or ordinance, then the hours with respect to a wine and beer retailer are likewise extended since the those hours "prescribed for the sale of beer under Section 105.05..." would include the extension of hours granted under Section 105.05.

§105.07 Hours of Sale and Consumption: Sports Venue

For those cities with a sports venue or a public entertainment facility defined in §108.73, that is primarily designed for live sporting events, a licensed or permitted premises located in a sports venue may sell alcoholic beverages between 10 a.m. and noon without service of food to the customer.

MORE ON SPACING REGULATIONS RELATING TO CHURCHES, SCHOOLS, HOSPITALS, AND CHILD CARE FACILITIES

§109.33 Sales Near School, Church, or Hospital

In adopting a local ordinance to establish the prohibitions regarding the distance between churches, public and private schools, public hospitals, there are a few initial questions that need to be addressed:

What is a public school? The Texas Alcoholic Beverage Code does not define what constitutes a “public school.” The most recent Attorney General Opinion summarizes these previous opinions, to state that “an institution is a ‘public school’ for purposes of Section 109.33(a) (1) of the Alcoholic Beverage Code if it is supported, in whole or in part, by public funds.” Tex. Atty. Gen. LO-96-134 (1996). The Attorney General’s Office has not specifically addressed whether an Open-Enrollment Charter School is a public school for the purpose of applying the three hundred feet (300’) restriction. However, it seems that the reasoning and analysis in the Attorney General’s opinion(s) would recognize an Open-Enrollment Charter School as a “public school” on one of two grounds. First, the Texas Education Code specifically states that an Open-Enrollment Charter School, which has been granted a charter under Chapter 12 of the Texas Education Code, is “part of the public school system of this state.” Tex. Educ. Code Ann. §§ 5.001 and 12.105(a). Second, an Open-Enrollment Charter School is entitled to receive public funds from both the state and local school district. Tex. Educ. Code Ann. §§ 12.106 and 12.107. Such a school’s ability to charge tuition to an eligible student is restricted, Tex. Educ. Code Ann. § 12.108, very nearly ensuring that the Open-Enrollment Charter School will have to seek and accept public funds.

What is a private school? A “private school” is defined by the Code as 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. Tex. Alco. Bev. Code §109.33(i).

What is a public hospital? The Texas Alcoholic Beverage Code does not define “public” hospital. The legislature has seen fit to limit this provision to a “public hospital” rather than just merely “hospital.” It seems that had it been the legislature’s intent to encompass all hospitals open to the public, it would have merely used the word “hospital,” as both public and private hospitals are open to the public. Since a definition is not listed, we turn to the common meaning of the word. A “public” hospital is commonly understood to be a hospital that is supported by public funds and would be consistent with the definition of “public school.”

What is the front door? “Any door leading into the church or saloon is a front door; in other words, it is held that a church or saloon may have several front doors and may face upon two or more streets.” *Stubbs v. Liquor Control Board*, 166 S.W.2d 178 (Tex. Civ. App. – Dallas, 1942, writ ref. want merit). In *Stubbs*, the licensee whose license was cancelled attempted to argue that the front door of the church was the main exterior door leading to the worship center that was located around the corner and more than 300 feet from the front door of the store. However, the Court held that the correct measurement was to the door to the church’s Sunday School building entrance located almost directly across the street from the store. *Stubbs*, 166 S.W.2d at 180.

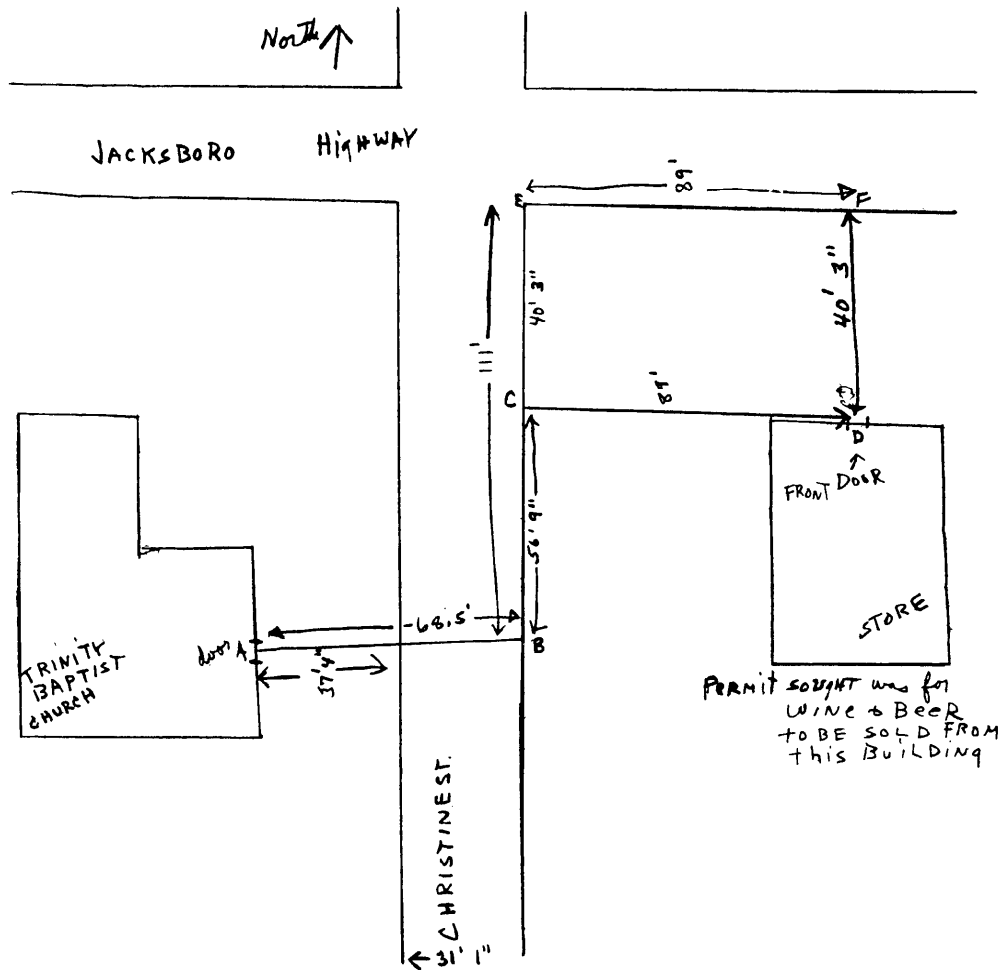
So how should measurements be made under §109.33(b)?

Churches and Public Hospitals

The first sentence of Tex. Alco. Bev. Code §109.33(b) reads as follows:

(b) The measurement of the distance between the place of business where alcoholic beverages are sold and the church or public hospital shall be along the property lines of the street fronts and from front door to front door, and in direct line across intersections.

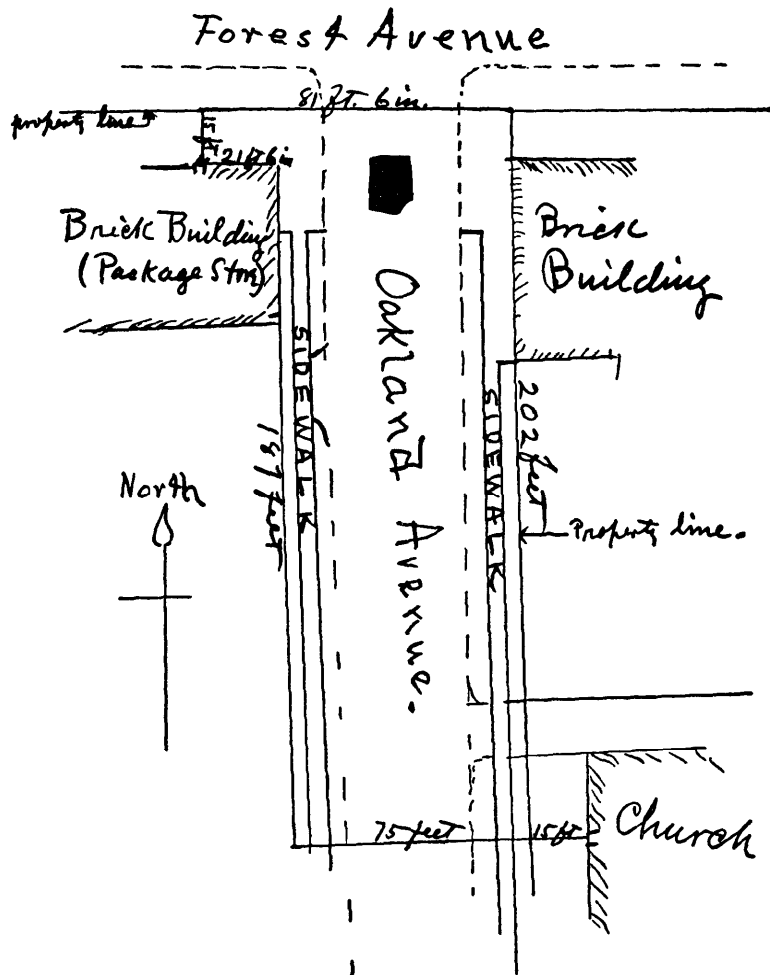
In *Ezell v. Tex. Alcohol Bev. Comm'n* 528 S.W.2d 888 (Tex. Civ. App. –Ft. Worth 1975, no writ), the court was faced with two opposing interpretations of how a measurement from the front door of the licensed establishment to the property line. As seen in the diagram below (which is the diagram from the court's opinion), the licensee advocated measuring the distance from the front door of the church to a point directly across the street (Point A to Point B), then from Point B to the corner of the intersection (Point E), then turn the corner and go to a point along the street frontage immediately opposite the front door of the store (Point F), then to the front door of the store (Point G), with a total distance exceeding 1000 feet.



On the other hand, the TABC advocated, and the court agreed, that the measurement to the front door of the store should be from the closest point of the store door to the nearest property line in order to create the shortest distance, which is depicted above as the path from

Point A to Point B to Point C and finally to Point D, which distance was less than 300 feet. *Ezzell*, 528 S.W.2d at 891.

In a case on which the *Ezzell* court relied, the Dallas court of appeals made a similar interpretation of the measurement regarding where to cross the street with the measurement. In *Robinson v City of Dallas*, 198 S.W.2d 821 (Tex. Civ. App.-Austin 1946 writ ref.), the question was again whether or not the city's ordinance, based on the predecessor to §109.33(b), required (1) measuring from the closest exterior door of the store, and (2) whether or not to take the measurements all the way to the corner of the property before crossing the street to reach the door. The following diagram from the court's opinion helps illustrate the issue.



In interpreting the statute, the *Robinson* court determined that the distance should be measured by starting at the church door adjacent to the nearest property line, take it across the street to the property line on the opposite side of the street, north along the property line to a point perpendicular to the nearest door of the package store, then to the door. *Robinson*, 193 S.W.2d at 823.

So when the church or hospital and the building in which alcoholic beverage sales are proposed are on blocks diagonal and across intersections from each other, how do you measure? In other words, what is meant by the phrase “in direct line across intersections?” The only case to directly address this issue is *Hallum v. Texas Liquor Control Board*, 166 S.W.2d 175 (Tex. Civ. App.- Dallas 1942 writ ref’d). In answering the question, the court held that “Instead of following the two sides of the angle created by the intersection, we think the hypotenuse should be measured.” *Hallum*, 166 S.W.2d at 177. Interestingly, there are no other cases in over sixty years that has challenged this holding.

Public or Private Schools

The remaining portion of §109.33(b) dealing with the measurements related to public and private schools reads as follows:

(b)...The measurement of the distance between the place of business where alcoholic beverages are sold and the public or private school shall be:

(1) in a direct line from the property line of the public or private school to the property line of the place of business, and in a direct line across intersections; or

(2) if the permit or license holder is located on or above the fifth story of a multistory building, in a direct line from the property line of the public or private school to the property line of the place of business, in a direct line across intersections, and vertically up the building at the property line to the base of the floor on which the permit or license holder is located.

Following are a couple of notes about the difference between measuring for churches and public hospitals and measuring for schools.

First, note there is no “door” element in dealing with measuring the distance from a business selling alcoholic beverages to a school. Consequently, the measurements will go from closest property line to closest property line. This can get interesting where a school is located near a commercial area with a shopping mall in which is located a licensed premises. Even though the two closest doors may in fact be thousands of feet away from each other, it is possible the property lines are less than 300 feet apart.

Second, with respect to the license holder being located above the fifth story of a building, note that the additional measurement up the side of the building applies ONLY when the license holder is above the fifth floor (i.e. 6th floor or higher). If the license holder is on Floor 5 or lower, the measurement is still only property line to property line.

The Exceptions to the Rule

In cities where ordinances extending the distance between the public or private school and the point of sale have been extended to 1000 feet, Section 109.33 provides the 1000 foot rule will NOT apply to the following licensees or permittees:

(1) a holder of a retail on-premises consumption permit or license if less than 50 percent of the gross receipts for the premises is from the sale or service of alcoholic beverages;

(2) a holder of a retail off-premises consumption permit or license if less than 50 percent of the gross receipts for the premises, excluding the sale of items subject to the motor fuels tax, is from the sale or service of alcoholic beverages; or

(3) a holder of a wholesaler's, distributor's, brewer's, distiller's and rectifier's, winery, wine bottler's or manufacturer's permit or license, or any other license or permit held by a wholesaler or manufacturer as those words are ordinarily used and understood in Chapter 102 of the Code.

Tex. Alco. Bev. Code §109.33(f).

The following additional licensees or permittees are exempt from the 1000 foot rule when applied to a *private* school only:

(1) the holder of a temporary and special wine and beer retailer's permit (Chapter 27), caterer's permit (Chapter 31), or temporary license for the sale of beer at picnics, celebrations, or similar events (Chapter 72) who is operating on the premises of a private school; or

(2) the holder of a license or permit for a package store that is located within 1,000 feet of a private school.

Tex. Alco. Bev. Code §109.33(g).

Finally, even the 300 foot rule will not apply with respect to private schools in the case of a holder of:

(1) a license or permit who also holds a food and beverage certificate covering a premise that is located within 300 feet of a private school; or

(2) a license or permit covering a premise where minors are prohibited from entering under Section 109.53 and that is located within 300 feet of a private school.

Sales Near Day-Care Center or Child Care Facility

A city may also adopt an ordinance that makes the 300 foot rule that applies to public schools applicable to day-care centers and child care facilities. Tex. Alco. Bev. Code

§109.331(b). The rule cannot be changed from 300 feet to 1000 feet like public schools in large counties. *id.* This section applies only to a permit or license holder of a Wine and Beer Retailer's Permit under Chapter 25, a Mixed Beverage Permit under Chapter 28, a Private Club Registration Permit under Chapter 32, a Retail Dealer's On Premise License under Chapter 69, or a Brewpub License under Chapter 74 if any of such permit or license holders do not hold a food and beverage certificate. Thus, the 300 foot rule cannot be made to apply to a license or permit under any other chapter such as a Wine and Beer Retailer's Off-Premise License issued pursuant to Chapter 26. Tex. Alco. Bev. Code §109.331(a).

For purposes of §109.331, child-care facilities and day-care centers are defined as follows:

“Child-care facility”: a facility licensed, certified, or registered by the department to provide assessment, care, training, education, custody, treatment, or supervision for a child who is not related by blood, marriage, or adoption to the owner or operator of the facility, for all or part of the 24-hour day, whether or not the facility is operated for profit or charges for the services it offers. Tex. Hum. Res. Code Ann. §42.002(3)

“Day-care center”: “a child-care facility that provides care for more than 12 children under 14 years of age for less than 24 hours a day.” Tex. Hum. Res. Code Ann. §42.002(7).

In light of the above definitions, a city will be required to make an inquiry of the facility to determine the type of license, the number of clients for which care is provided, and the nature of the operations.

The 300 foot rule does not apply to a permit or license holder who sells alcoholic beverages if:

- (1) the permit or license holder and the day-care center or child-care facility are located on different stories of a multistory building; or
- (2) the permit or license holder and the day-care center or child-care facility are located in separate buildings and either the permit or license holder or the day-care center or child-care facility is located on the second story or higher of a multistory building.

Tex. Alco. Bev. Code §109.331(c).

Finally, a city cannot make the 300 foot rule apply to a foster group home, foster family home, family home, agency group home, or agency home as those terms are defined by Section 42.002, Human Resources Code.

PERMITS AND LICENSES OF INTEREST

State law provides for a smorgasbord of permits and licenses. One question which may be of interest to planners is what different permits of interest allow and what if anything, a city can (or cannot) do with respect to regulating such categories of permittees or licensees. This brief bullet summary is not intended to be comprehensive and, as with anything else, is subject to change with each legislative session that passes.

Brewer's Permit (TABC Ch. 12)

The holder of a Brewer's Permit may:

- (1) manufacture, bottle, package, and label malt liquor;
- (2) import ale and malt liquor acquired from a holder of a nonresident brewer's permit;
- (3) sell the ale and malt liquor only to wholesale permit holders in this state or to qualified persons outside the state;
- (4) dispense ale and malt liquor for consumption on the premises; and
- (5) conduct samplings of ale or malt liquor, including tastings, at a retailer's premises.

An agent or employee of the holder of a brewer's permit may open, touch, or pour ale or malt liquor, make a presentation, or answer questions at a sampling event.

The importance of the Brewer's Permit is the tasting section. Tasting parties can be conducted by someone with a Brewer's Permit in an establishment with a retailer's permit for sale of alcoholic beverages for on or off-premises consumption, depending on the type of retailer's permit the establishment holds.

Winery Permit (TABC Ch. 16)

The holder of a Winery Permit may, among other activities besides making and bottling wine:

- sell wine to ultimate consumers for consumption on the winery premises, or in unbroken packages for off-premises consumption in an amount not to exceed 35,000 gallons annually;
- dispense free wine for consumption on the winery premises.
- conduct wine samplings, including wine tastings at a retailer's premises where a winery employee may open, touch, or pour wine, make a presentation, or answer questions at a wine sampling

- do any of the above in a dry area even if the sale of wine has not been authorized by a local option election as long as the wine is bottled in Texas and at least 75% of the fermented juice of grapes or other fruit are grown in Texas.

Again, note the ability of the holder of a Winery Permit to make certain sales of their wine on premises, give it away on premises, or conduct tasting parties at a retail permit holder's establishments.

Package Store Permit (TABC Ch 22)

The holder of a package store may, among other activities:

- sell liquor in unbroken original containers on or from his licensed premises at retail to consumers for **off-premises consumption only** and not for the purpose of resale, except that if the permittee is a hotel, the permittee may deliver unbroken packages of liquor to bona fide guests of the hotel in their rooms for consumption in their rooms
- sell malt and vinous liquors in original containers of not less than six ounces
- sell non-alcoholic products and conduct other business in the store, but must be closed for everything during the hours when the sale of alcoholic beverages are not permitted

The holder of a package store permit may NOT:

- may not break or open a container containing liquor or beer or possess an open container on the premises of the package store;
- sell, barter, exchange, deliver, or give away any drink of alcoholic beverages from a container that has been opened on the premises
- knowingly employ or use anyone in the package store who is under the age of 21 unless it is a owner's child or ward
- operate in premises that is not physically completely separate from any other business

There are also Wine Only Package Store Permits (TABC Ch. 24). The authorized and unauthorized activities for a Wine Only Package Store are very similar to those of a general package store permit holder under Chapter 22. Wine Only Package Store permit holders may hold wine samplings on premises, but may not *sell* product for on-premises consumption.

Wine and Beer Retailer's Permit (TABC Ch. 25)

The holder of a Wine and Beer Retailer's Permit may sell:

- for consumption *on or off the premises* where sold, but not for resale, wine, beer, and malt liquors containing alcohol in excess of one-half of one percent by volume and not more than 17 percent by volume; and
- for consumption *on the premises* traditional port or sherry containing alcohol in excess of one-half of one percent by volume and not more than 24 percent by volume.

The holder of a Wine and Beer Retailer's Permit must have a seating area to allow customers to consume the beverage on premises.

A Wine and Beer Retailer's Permit holder may also get a Food and Beverage Certificate if the holder is primarily a food service establishment. To receive and maintain the certificate, the business must:

1. Have on site food preparation facilities (take out will not work) for multiple entrees (not just a single product menu of finger foods, and
2. Gross receipts for alcoholic beverages may not exceed 50 percent of the total gross sales receipts.

Wine and Beer Retailer's Off-Premise Permit (TABC Ch. 26)

The holder of a Wine and Beer Retailer's Off-Premise Permit may:

- sell for *off-premises consumption only*, but not for resale, wine, beer, and malt liquors containing alcohol in excess of one-half of one percent by volume but not more than 17 percent by volume, and
- conduct *free* product samplings of wine, beer, and malt liquor containing alcohol in excess of one-half of one percent by volume but not more than 17 percent by volume on the permit holder's premises during regular business hours.

The statute is clear in a couple of sections that ON-premise consumption is a big problem, to the point that warning signs must be posted to warn that on-premise consumption is prohibited.

Mixed Beverage Permit (TABC Ch. 28)

The holder of a Mixed Beverage Permit may:

- sell, offer for sale, and possess mixed beverages, including distilled spirits, for consumption *on the licensed premises*

- purchase wine, beer, ale, and malt liquor containing alcohol of not more than 21 percent by volume in containers of any legal size from any permittee or licensee authorized to sell those beverages for resale; and
- sell the wine, beer, ale, and malt liquor for consumption *on the licensed premises*.
- obtain a food and beverage certificate if the gross receipts from the sale of mixed beverages does not exceed 50% of the total gross receipts and the establishment has on-site food preparation facilities making multiple entrees.

Note that the holder of a Mixed Beverage Permit may also sell beer and wine for on-premise consumption without a separate beer and wine on-premise sales permit.

CONCLUSION

This paper probably barely scratches the surface of the many fact situations the city planner will run across in dealing with permit holders to sell alcoholic beverages. I did not even attempt to get into the issues dealing with local option elections, as that topic, while certainly interesting, is not usually within the scope of the planning department. However, in those cities where local option elections will be considered some day, city planners can have a great influence in the ultimate decision to move forward with such election as you determine just where any licensed locations could go through the analysis of existing zoning classifications, and the protective bubble around all churches, schools, public hospitals, and day care centers. I hope this paper and presentation will at least give you a head start in dealing with these and other issue in this field in the coming years.