

February 9, 2009 Elections to Approve the Issuance of Beer and Wine Restaurant Licenses

The Honorable Joseph Cervantes
New Mexico State Representative
2610 South Espina
Las Cruces, NM 88001

Re: Opinion Request – Elections to Approve the Issuance of Beer and Wine Restaurant Licenses

Dear Representative Cervantes:

You have requested our opinion regarding a local option district election in Doña Ana County to approve the issuance of restaurant licenses for the sale of beer and wine under NMSA 1978, Section 60-6A-4 (1981, as amended through 2003) (hereinafter “Section 60-6A-4 election(s)”). Specifically, you have asked: (1) who is permitted to vote in such elections; (2) if other ballot issues, including a general obligation bond, may be included on the ballot in such elections, and; (3) whether the sixty-day limitation under NMSA 1978, Section 60-5A-1(F) (1981, as amended through 1987), applies to such elections. Based on our examination of the relevant New Mexico statutes, opinions and case law, and on the information available to us at this time, we first conclude that Section 60-6A-4 elections are limited to voters in the local option district that is holding the election. If the district is a county, voters would be limited to those in unincorporated areas of the county. If the district is an incorporated municipality, voters would be limited to those within the municipality. It is our understanding the Alcohol and Gaming Division of the New Mexico Regulation and Licensing Department follows this interpretation, and we find no reason to disagree. Second, we conclude that placing other issues on the ballot is not explicitly prohibited as long as the types of elections specified in Section 60-5A-1(F) are separate from a Section 60-6A-4 election, and as long as such an arrangement is in accordance with the remaining procedures under Section 60-5A-1. Finally, we conclude that the sixty-day limitation contained in Section 60-5A-1(F), does not apply to a Section 60-6A-4 election that has been called by a resolution of the Board of County Commissioners.

1. Who Can Vote in Section 60-6A-4 Elections?

Section 60-6A-4(A) provides, in relevant part, that “[a]t any time after the effective date of the Liquor Control Act, 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 60-5A-1 NMSA 1978.” Section 60-5A-1 governs elections to form a local option district. A district is formed either by a county or independently by a municipality with a population exceeding five thousand. See § 60-5A-1; § 60-3A-3(N). If the voters in a county approve the creation of a district, then incorporated municipalities within the county automatically become local option districts

without a separate election, unless they have a population exceeding five thousand and independently elect to become a local option district. See § 60-5A-1; § 60-3A-3(N).

Based on the above, voters in a Section 60-6A-4 election are the voters in the local option district that is holding the election. Local option districts exist at two levels: a municipal level and a county level. Incorporated municipalities are always considered independent local option districts, whether they have a population exceeding five thousand and independently elected to become a local option district, or whether they are within a county that has elected to become a local option district. It follows then that if incorporated municipalities within a county are considered independent local option districts, then at the county level, the district essentially consists of the remaining portions of the county – the unincorporated areas. Therefore, a local option district consists of either an incorporated municipality or the unincorporated areas of a county. Otherwise, a municipality could be its own district and within a county district, and thus raise issues of duplication or conflicting oversight mechanisms.

As a local option district consists of either an incorporated municipality, or the unincorporated areas of a county, a Section 60-6A-4 election would be limited accordingly. If the local option district holding the Section 60-6A-4 election is a county, voters would be limited to those in unincorporated areas of the county. If the district holding the election is an incorporated municipality, voters would be limited to those within the municipality.

2. Can Other Issues Be Included on the Ballot in Section 60-6A-4 Elections?

The election is governed by the same procedures for holding a local option district election. See § 60-6A-4(A). Specifically, such elections cannot be held “within forty-two days of any primary, general, municipal, or school district election.” See § 60-5A-1(F). In a previous opinion, we pointed out that this provision prohibits local option district elections from being held in conjunction with a municipal or school bond election, or with a bond election held in conjunction with a primary or general election. N.M. Att’y Gen. Op. No. 81-9 (1981). However, Section 60-5A-1(F) does not expressly prohibit holding local option district elections in conjunction with a general obligation bond election, or other elections besides primary, general, municipal, or school district elections. See *id.*

We again emphasize, as we did in our prior opinion, that while such an arrangement is not expressly prohibited, in order to hold a Section 60-6A-4 election in conjunction with a general obligation bond election, the remaining provisions of Section 60-5A-1 and the procedures governing general obligation bond elections, must not be in conflict. A determination of whether the procedures governing each election are compatible, is beyond the scope of this opinion and material submitted for our review.

3. Does the Sixty-Day Limitation Under Section 60-5A-1(F) Apply to Section 60-6A-4 Elections That Have Been Called By Resolution of the Board of County Commissioners?

Section 60-5A-1(F) provides that “[i]f, within sixty days from the verification of any petition as provided in Subsection A of this Section, a primary, general, municipal or school election is held, the governing body may call an election for a day not less than sixty days after the primary, general, municipal, or school election.” Subsection A outlines the procedures for petitioning the governing body of a local option district to initiate an election. An election to approve the issuance of restaurant licenses may be initiated by such petitioning procedures. See § 60-6A-4(A). In this circumstance, the sixty-day limitation would apply. However, an election in this area may also be initiated by a resolution adopted by the governing body of a local option district. See § 60-6A-4(A). Under a straightforward reading of Section 60-5A-1(F), which is triggered by the “verification of any *petition*,” the sixty-day limitation does not apply to elections initiated by a resolution adopted by the governing body of the local option district.

This conclusion is supported by the history behind Section 60-6A-4 elections. Originally, a Section 60-6A-4 election could only be initiated by petitioning the governing body of the local option district. In 2003, this section was amended to provide an alternative to the petitioning procedure which allows a governing body to initiate such an election on its own. The legislature is presumed to know of existing law when it enacts legislation. *Kmart Corp. v. Taxation and Revenue Dept.*, 2006-NMSC-006, ¶ 15, 139 N.M. 172, 131 P.3d 22. Thus, when the legislature amended Section 60-6A-4 to allow governing bodies to initiate Section 60-6A-4 elections by resolution, it is presumed that it knew of the sixty-day limitation for petitions contained in 60-5A-1(F). Yet, this section was not amended accordingly. As it remains, the language in Section 60-5A-1(F) is clear and unambiguous, and we refrain from further interpretation. See *Sims v. Sims*, 1996-NMSC-078, ¶ 17, 122 N.M. 618, 930 P.2d 153.

In sum, it is our opinion that Section 60-6A-4 elections are limited to voters in either an incorporated municipality or unincorporated areas of a county, that other ballot issues may be included on the ballot in such elections provided that the procedures in Section 60-5A-1 are not compromised, and that the sixty-day limitation in Section 60-5A-1(F) does not apply to resolution initiated elections.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

ELAINE LUJAN
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General