



FILE

Subject

*Licenses - Liquor
City Election Requirements*

Copy to

STATE OF KANSAS

Office of the Attorney General

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

VERN MILLER
Attorney General

July 15, 1974

Opinion No. 74- 232

Thomas W. Stockwell
Merriam City Attorney
9000 West 62nd Terrace
Merriam, Kansas 66202

Dear Mr. Stockwell:

You advise that when the proposition to amend section 10 of Article 15 of the Kansas Constitution was submitted at the general election held on November 2, 1948, the territory now comprising the City of Merriam, Kansas, now a city of the second class, was at that time unincorporated, lying within two townships, being Mission and Shawnee. Records in the office of the Johnson County Election Commissioner disclose that there were at that time three precincts within the above-mentioned area, and that the vote was as follows as to the question of package sales:

Merriam Precinct	Yes - 459	No - 300
South Park Precinct	Yes - 316	No - 220
Milburn Precinct	Yes - 465	No - 293

The resulting totals disclosed 1,240 votes in favor of the amendment and 813 opposed.

On October 23, 1950, the City of Merriam was legally incorporated as a city of the third class pursuant to K.S.A. 15-101. On March 13, 1951, Ordinance No. 17 was adopted, giving notice of the regular general election to be held April 3, 1951, for the election of certain city officials. In the same ordinance, the question of "shall the sale of alcoholic liquor by the package be licensed in the City of Merriam" was directed to be submitted to the vote of the people. The ordinance bears the following certification.

"I hereby certify that this ordinance was personally posted by me for publication on the [unclear] day of March, 1951." [City Clerk]

At the election, 133 votes were cast in favor, and 236 opposed.

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K.S.A. 41-302 provides in pertinent part thus:

"Upon the filing of a sufficient petition or upon the adoption of a proper resolution as herein provided, the governing body shall call any election required by this section and notice of such election shall be given in like manner as now provided by law for the notice of bond elections in such city."

The ordinance calling the election was posted, the above certification indicates, for publication pursuant to G.S. 1949 15-107, and was not published as required by G.S. 10-120.

Thus, the first question presented is whether the election on the question submitted on April 3, 1951, pertaining to the licensing of retail package liquors, was void, and if so, whether the majority vote in the November 2, 1948, election would take precedence and authorize the Director of Alcoholic Beverages to issue licenses for the sale at retail of package liquor within the city.

"The failure to publish the notice of a special election for the full time required by law is a fatal defect, rendering the election void" Eberhardt Construction Co. v. Sedgwick County Board of County Comm'rs, 100 Kan. 394 (1917). The fact that the election was held on the day of a city general election did not alter its status as a special election. Eberhardt, supra. In State ex rel. Beck v. Allen County Board of County Comm'rs, 143 Kan. 898, 57 P.2d 450 (1936), the court stated thus:

"Voters are presumed to know the date of general elections, as they are fixed by statute. This is not true of special elections. As to the latter, the voter expects and has the right to receive official notice of the date and issues to be submitted. For this reason it is the general rule, and this court has frequently held, notice prescribing [sic] for special elections is mandatory." 143 Kan. at 901.

It may be argued that this strict rule loses its force as the years pass, and that a given election should not under ordinary circumstances be deemed invalid many years after it was conducted because of some defect or omission in giving the required notice thereof. There is authority that the courts will not permit a party objecting to the validity of an election on the basis of an error or irregularity in the conduct thereof to withhold his objection for assertion at a belated date, where the affairs of affected governmental bodies and the citizenry have proceeded

in reliance on the basis of the election. This is not such an instance. Here, no bonds have been issued, no buildings have been erected, and no other arrangements of the city have been settled in long-standing reliance upon the results of the 1951 election.

Elections, of course, are held to determine the will of the people. Notice of an election, particularly of a special election, is vital to assure that all are equally and fairly advised of the election and the questions submitted. In this instance, we are virtually obliged to determine which of two elections more fairly reflects the wishes of the electorate, that held in 1948 at which a substantial majority cast their votes in favor of licensed package sales, and a special election held three years later, defectively noticed, at which a contrary result was reached. Under long-standing election principles in Kansas, where, as appears here, no notice whatever was given of the 1951 special election in the manner required by the applicable law, that election was void at the outset, and remains so, in our opinion. City records will reflect more accurately than the material available to us whether the required notice was published as required by G.S. 1949 10-120. If it was not, in our opinion, the 1951 election upon the question of licensing the sale at retail of package liquor, is void.

The question then arises whether such sale shall be licensed by virtue of the affirmative vote given the amendment to Article 15, Section 10, of the Kansas Constitution at the general election on November 2, 1948. K.S.A. 41-301 states in pertinent part thus:

"The director shall issue to qualified applicants . . . licenses to sell alcoholic liquor at retail in the original package within the corporate limits of cities and outside the corporate limits of cities in certain townships as provided in this act: Provided, That no such . . . license shall be issued for any premises within . . . cities of the third class located in a township, or townships, who voted on said proposition to amend the constitution at said election [election held in November, 1948, to amend § 10, Art. 15] shall have voted against its adoption, until a majority of the qualified electors of such city voting at an election held as provided by section 18 [41-302] of this act, shall have declared by their votes to be in favor of the licensing of the sale of alcoholic liquor by the package in such city."

K.S.A. 41-302 states in pertinent part thus:

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"For the purpose of determining as provided in section 17 [41-301] and in this section of this act whether a majority of the qualified electors of a township in which a third-class city is located voting against the adoption of the liquor amendment at the general election held in November, 1948, if any city of the third class is located in two or more townships, the total vote for and against said amendment in all the townships in which such city is located shall be used to determine whether such third-class city is located in a township in which a majority of the qualified electors voted against said amendment."

Thus, in order to authorize licensing of package sales in the City of Merriam, notwithstanding the apparent invalidity of the special election held in 1951 on the question, it is necessary that a majority of all the voters in both Mission and Shawnee townships have voted in favor of the amendment in 1948. The office of the Johnson County Election Commissioner advises us that in Shawnee township, 1,562 votes were cast in favor of the amendment, and 1,138 against. In Mission township, 7,231 votes were in favor, and 4,045 opposed.

A majority of the electors of the two townships, Mission and Shawnee, in which the City of Merriam was incorporated in 1950, having cast their votes in favor of the amendment to Article 15, § 10 of the Kansas Constitution at the time of the 1948 general election, and the subsequent election in 1951 being void, if, as appears, the required notice was not given, it is then our opinion that the Director of Alcoholic Beverage Control is lawfully authorized, and indeed required, to issue a license to sell alcoholic beverages at retail in the original package to qualified applicants for premises located within the City of Merriam.

Yours very truly,



VERN MILLER
Attorney General

VM:JRM:jsm