



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-015

March 1, 2016

David A. Couch
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Dear Mr. Couch:

I am writing in response to your request for certification, pursuant to Ark. Code Ann. § 7-9-107 (Supp. 2015), of the popular name and ballot title for a proposed initiated act.

At the outset, I wish to make clear to you that the decision to certify or reject a popular name and ballot title is in no way a reflection of my view of the merits of a particular proposal. I am not authorized to, and do not, consider the merits of the measure when making my determination to certify or reject a popular name and ballot title.

The Attorney General is required, pursuant to Ark. Code Ann. § 7-9-107, to certify the popular name and ballot title of all proposed initiative and referendum acts or amendments before the petitions are circulated for signature. The law provides that the Attorney General *may, if practicable*, substitute and certify a more suitable and correct popular name and ballot title. Or, if the proposed popular name and ballot title are sufficiently misleading, the Attorney General may reject the entire petition.

Section 7-9-107 neither requires nor authorizes this office to make legal determinations concerning the merits of the act or amendment, or concerning the likelihood that it will accomplish its stated objective. In addition, consistent with Arkansas Supreme Court precedent, unless the measure is “clearly contrary to

law,”¹ this office will not require that a measure’s proponents acknowledge in the ballot title any possible constitutional infirmities.² Consequently, this review has been limited primarily to a determination, pursuant to the guidelines that have been set forth by the Arkansas Supreme Court, discussed below, of whether the popular name and ballot title you have submitted accurately and impartially summarize the provisions of your proposed act.

The purpose of my review and certification is to ensure that the popular name and ballot title honestly, intelligibly, and fairly set forth the purpose of the proposed act.³

REQUEST

You have requested certification, pursuant to Ark. Code Ann. § 7-9-107, of the following popular name and ballot title for a proposed constitutional amendment:

Popular Name

The On Premise Local Option Election Alcohol Act

Ballot Title

An act to allow a dry county or city of the first class within the dry county to conduct an election to permit the on premise sale and consumption of alcoholic beverages upon the petition of fifteen percent (15%) of the qualified electors residing within the boundaries [sic] of the dry county or city of the first class within the dry county; providing that on premise sale and consumption is allowed only at a hotel, restaurant, microbrewery-resturant [sic] or festival; defining

¹ See *Kurrus v. Priest*, 342 Ark. 434, 445, 29 S.W.3d 669, 675 (2000); *Donovan v. Priest*, 326 Ark. 353, 359, 931 S.W.2d 119, 121 (1996); *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992).

² As part of my review, however, I may address constitutional concerns for consideration by the measure’s proponents.

³ See *Arkansas Women’s Political Caucus v. Riviere*, 283 Ark. 463, 466, 677 S.W.2d 846 (1984).

hotel, restaurant, microwbrewery-resturant [*sic*], festival and other terms; and providing that no sales for off premise consumption is allowed.

This submission is a follow-up to Attorney General Opinion 2016-009, wherein I rejected your proposed popular name and ballot title due to ambiguities in the text of the proposed act that is the subject of your current request.

RESPONSE

The popular name is primarily a useful legislative device.⁴ It need not contain detailed information or include exceptions that might be required of a ballot title, but it must not be misleading or give partisan coloring to the merit of the proposal.⁵ The popular name is to be considered together with the ballot title in determining the ballot title's sufficiency.⁶

The ballot title must include an impartial summary of the proposed amendment or act that will give the voter a fair understanding of the issues presented.⁷ According to the Court, if information omitted from the ballot title is an "essential fact which would give the voter serious ground for reflection, it must be disclosed."⁸ At the same time, however, a ballot title must be brief and concise;⁹ otherwise voters could run afoul of Ark. Code Ann. § 7-5-309's five-minute limit in voting booths when other voters are waiting in line.¹⁰ The ballot title is not required to be perfect, nor is it reasonable to expect the title to cover or anticipate every possible legal

⁴ *Pafford v. Hall*, 217 Ark. 734, 739, 233 S.W.2d 72, 75 (1950).

⁵ *E.g.*, *Chaney v. Bryant*, 259 Ark. 294, 297, 532 S.W.2d 741, 743 (1976); *Moore v. Hall*, 229 Ark. 411, 316 S.W.2d 207 (1958). For a better understanding of the term "partisan coloring," see *infra* at note 12.

⁶ *May v. Daniels*, 359 Ark. 100, 105, 194 S.W.3d 771, 776 (2004).

⁷ *Becker v. Riviere*, 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980) (internal citations omitted).

⁸ *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938, 942 (1994).

⁹ See Ark. Code Ann. § 7-9-107(b).

¹⁰ *Bailey* at 284, 884 S.W.2d at 944.

argument the proposed measure might evoke.¹¹ The title, however, must be “free of any misleading tendency whether by amplification, omission, or fallacy, and it must not be tinged with partisan coloring.”¹² The ballot title must be honest and impartial,¹³ and it must convey an intelligible idea of the scope and significance of a proposed change in the law.¹⁴

Furthermore, the Court has confirmed that a proposed amendment cannot be approved if “[t]he text of the proposed amendment itself contribute[s] to the confusion and disconnect between the language in the popular name and the ballot title and the language in the proposed measure.”¹⁵ The Court concluded that “internal inconsistencies would inevitably lead to confusion in drafting a popular name and ballot title and to confusion in the ballot title itself.”¹⁶ Where the effects of a proposed measure on current law are unclear or ambiguous, it is impossible for me to perform my statutory duty to the satisfaction of the Arkansas Supreme Court without (1) clarification or removal of the ambiguities in the proposed amendment itself, and (2) conformance of the popular name and ballot title to the newly worded amendment.

It is my opinion, based on the above precepts, that a number of additions or changes to your ballot title are necessary in order to more fully and correctly summarize your proposal. I cannot, however, at this time, fairly or completely summarize the effect of your proposed measure to the electorate in a popular name or ballot title without the resolution of the ambiguities in the text of your proposed amendment itself. And thus I cannot determine precisely what changes to the

¹¹ *Id.* at 293, 844 S.W.2d at 946-47.

¹² *Id.* at 284, 884 S.W.2d at 942. Language “tinged with partisan coloring” has been identified by the Arkansas Supreme Court as language that “creates a fatally misleading tendency” (*Crochet v. Priest*, 326 Ark. 338, 347, 931 S.W.2d 128, 133 (1996)) or that “gives the voter only the impression that the proponents of the proposed amendment wish to convey of the activity represented by the words.” (*Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 249, 884 S.W.2d 605, 610 (1994)).

¹³ *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

¹⁴ *Christian Civic Action Committee*, 318 Ark. at 245, 884 S.W.2d at 607 (internal quotations omitted).

¹⁵ *Roberts v. Priest*, 341 Ark. 813, 825, 20 S.W.3d 376, 382 (2000).

¹⁶ *Id.*

ballot title are necessary to fully and correctly summarize your proposal. It is therefore not appropriate, in my opinion, for me to try to substitute and certify a more suitable and correct popular name and ballot title pursuant to Ark. Code Ann. § 7-9-107(b). Instead, you may, if you wish, redesign the proposed measure and ballot title, and then resubmit for certification. In order to aid your redesign, I highlight below the more concerning ambiguities in the *text* of your proposed amendment.

1. You have amended the word “festival” under the proposed act to state:

“Festival” means an event held in a fixed location part of which is on city property or city right-of-way, which the general public may attend. Festival includes arts and craft shows, concerts, entertainment activities, exhibitions, fairs or other *similar events as determined by the Director of the Alcoholic Beverage Control Division, pursuant to 3-2-206.* [Emphasis added.]

The referenced “3-2-206” is a section of the Arkansas Code that authorizes the Director of the Alcoholic Beverage Control Division (“Director”) to promulgate rules and regulations to carry out the State’s alcohol control acts.¹⁷ The reference to this law suggests that the types of events constituting “festivals” will be determined by the Director through his broad rulemaking authority. I also note, however, that the subdivision of your proposal entitled Election Results – Effects states that if there is a majority vote in favor of sales for on-premises consumption, “it shall be lawful for the Director ... to issue *permits authorized in 3-4-105 for festivals.*” (Emphasis added). Section 3-4-105 does not mention “festivals.” This Arkansas Code section authorizes temporary permits for alcohol sales “at a *function sponsored by or for the benefit of a nonprofit organization or charitable organization.*”¹⁸ It is consequently unclear whether the Director’s rulemaking authority as referenced in the proposed act’s definition of “festival” is limited to this possibly narrower category of “function” referenced in connection with permits.

¹⁷ Ark. Code Ann. § 3-2-206(a) (Supp. 2015).

¹⁸ Ark. Code Ann. § 3-4-105(a)(1) (Supp. 2015) (emphasis added).

It is also unclear whether either the rulemaking or the permitting authority extends to determining the “fixed location” of a festival. It would seem that ordinarily, the Director’s rulemaking pursuant to § 3-2-206 would not extend to a determination of this sort. This Code section states that rules and regulations promulgated by the Director shall be “absolutely binding upon all licensees,”¹⁹ thereby signaling that a license has been separately issued. And § 3-4-105, regarding temporary permits for sales at functions sponsored by nonprofits and charities, does not specifically address the matter of the location of such functions. Your proposed act is consequently ambiguous on the matter of determining the “fixed location part of which is on city property or city right-of-way, which the general public may attend.”

2. There is a definition of the term “wet” under the proposed measure, but the term does not appear to be used anywhere in the measure and therefore appears to be without substance.
3. Subsection (a)(1) under the subdivision entitled Local option election – Dry County On-premises authorizes an election “to permit the *sale of alcoholic beverages for on-premises consumption as prescribed in subdivision (a)(2) of this section.*” (Emphasis added). The referenced “subdivision (a)(2)” states that sales are limited to sales for on-premises consumption at the identified locations only (hotel, restaurant, etc.) The prescribed form of the ballot title and the ballot, as out in the Conduct of Election subdivision, similarly refer to the sale of alcoholic beverages for on-premises consumption.

These provisions pertaining to an election held under the act do not appear to recognize the *manufacture* of beer, malt beverage, or hard cider. However, subsection (d) under Conduct of Election states that “[a] majority vote ... shall determine whether or not alcoholic beverages may be sold for on-premises consumption *or manufactured* under subdivision (a) of this section.” (Emphasis added).²⁰ These possible inconsistencies could generate issues in connection with elections held under the act.

¹⁹ Ark. Code Ann. § 3-2-206(c).

²⁰ It should be noted that the phrase “or manufactured under subdivision (a) of this section” is itself ambiguous. The measure is not separated into clearly designated sections. Rather, there are subdivision headings. And there is no reference to the manufacture of alcoholic beverages in the Conduct of Election subdivision under which this phrase appears.

4. I note, moreover, that the Election Results – Effects subdivision of the proposed act states that in the event of a majority vote in favor of sales for on-premises consumption, it will be lawful for the Director to “issue *permits authorized in ... 3-5-1204(a)* for microbrewery-restaurants.” (Emphasis added). Ordinarily, a microbrewery-restaurant license issued under Ark. Code Ann. § 3-5-1204 authorizes the licensee to engage in the manufacture of beer, malt beverage, or hard cider.²¹ Such a license also authorizes the holder thereof to engage in certain other sales and activities, other than sales for on-premises consumption.²² For the reasons stated above, however, there may be some question whether a favorable vote in an election held under the proposed act would effectively authorize a microbrewery-restaurant licensee to engage in any activities other than sales for on-premises consumption.
5. Subsection (a)(1) under the subdivision entitled Local option election – Dry County On-premises states that “[a] dry county or a city of the first class within the dry county *may conduct an election....*” (Emphasis added). The word “may” usually implies discretion. In the context of your proposed act, this might suggest that the county or the first class city has discretion to decide whether to call the election. Such discretion might be buttressed by your proposed ballot title, wherein it refers to the act as one “to allow a dry county or city of the first class within the dry county to conduct an election....”

I recognize in this regard that the measure requires, under the Local option election – Dry County On-premises and Conduct of Election subdivisions, that the “petition procedure” and the “election process” be “conducted under § 3-8-201 et seq.” It may be that you intend, by the reference to § 3-8-201 et seq., to include the requirement under Ark. Code Ann. § 3-8-205 that “the question shall be placed on the ballot” in the event the petition is deemed sufficient.²³ But in my view, this intention is not clearly expressed

²¹ Ark. Code Ann. § 3-5-1204(a) (Supp. 2015).

²² See, e.g., *id.* at § 3-5-1204(a)(4) and (7) (regarding sales to charitable or nonprofit organizations and sales to wholesale dealers).

²³ Ark. Code Ann. § 3-8-205(a) (Supp. 2015) (“If the petition is determined to be sufficient under § 3-8-801 et seq., the county clerk shall certify that finding to the county board of election commissioners, and the question shall be placed on the ballot ... at the next biennial general election as provided in § 3-8-101.”).

and an ambiguity remains regarding the mandatory/discretionary nature of the election.

6. The first sentence of subsection (a)(2) under Local option election – Dry County On-premises appears to be incomplete: “The sale of alcoholic beverages [*sic*] for under this section....”

CONCLUSION

The ambiguities noted above are not necessarily all the ambiguities contained in your proposal, but they are sufficiently serious to require me to reject your popular name and ballot title. I am unable to substitute language in a ballot title for your measure due to these ambiguities. Further, additional ambiguities may come to light on review of any revisions of your proposal.

My office, in the certification of ballot titles and popular names, does not address the merits, philosophy, or ideology of proposed measures. I have no constitutional role in the shaping or drafting of such measures. My statutory mandate is embodied only in Ark. Code Ann. § 7-9-107, and my duty is to the electorate.

Based on what has been submitted, my statutory duty is to reject your proposed ballot title for the foregoing reasons and instruct you to redesign the proposed measure and ballot title.²⁴ You may resubmit your proposed act along with a proposed popular name and ballot title at your convenience.

Sincerely,


LESLIE RUTLEDGE
Attorney General

²⁴ Ark. Code Ann. § 7-9-107(c).

Popular Name

The On Premise Local Option Election Alcohol Act

Ballot Title

AN ACT TO ALLOW A DRY COUNTY OR CITY OF THE FIRST CLASS WITHIN THE DRY COUNTY TO CONDUCT AN ELECTION TO PERMIT THE ON PREMISE SALE AND CONSUMPTION OF ALCOHOLIC BEVERAGES UPON THE PETITION OF FIFTEEN PERCENT (15%) OF THE QUALIFIED ELECTORS RESIDING WITHIN THE BOUNDRIES OF THE DRY COUNTY OR CITY OF THE FIRST CLASS WITHIN THE DRY COUNTY; PROVIDING THAT ON PREMISE SALE AND CONSUMPTION IS ALLOWED ONLY AT A HOTEL, RESTAURANT, MICROBREWERY-RESTURANT OR FESTIVAL; DEFINING HOTEL, RESTAURANT, MICROWBREWERY-RESTURANT, FESTIVAL AND OTHER TERMS; AND PROVIDING THAT NO SALES FOR OFF PREMISE CONSUMPTION IS ALLOWED.

Be it enacted by the people of the State of Arkansas:

Title

This Act shall be known as "The On Premise Local Option Election Alcohol Act."

Definitions

(1) "Beer" means a fermented liquor made from malt or a malt substitute and containing not more than five percent (5%) alcohol by weight.

(2) "Dry" means a county or territorial subdivision that voted to prohibit the manufacture or sale of intoxicating liquor under Initiated Act No. 1 of 1942, as amended, §§ 3-8-201 - 3-8-203 and 3-8-205 -- 3-8-209, or §§ 3-8-302 [repealed], 3-8-303, 3-8-304 [repealed], 3-8-305, and 3-8-306.

(3) "Festival " means an event held in a fixed location part of which is on city property or city right-of-way, which the general public may attend. Festival includes arts and craft shows, concerts, entertainment activities, exhibitions, fairs or other similar events as determined by the Director of the Alcoholic Beverage Control Division, pursuant to 3-2-206.

(4) "Hard cider" means liquor brewed from the fermented juices of fruit and containing more than three percent (3%) and not more than 21 twenty-one percent (21%) of alcohol by weight.

(5) "Hotel" means every building or other structure commonly referred to as a hotel, motel, motor hotel, motor lodge, or by similar name, which is kept, used, maintained, advertised, and held out to the public to be a place where food is actually served and consumed and sleeping accommodations are offered for adequate pay to travelers or guests, whether transient, permanent, or residential, in which fifty (50) or more rooms are used for the sleeping accommodations of such guests, and having one (1) or more public dining rooms with adequate and sanitary kitchen facilities, and a seating capacity for at least fifty (50) persons, where meals are regularly served to such guests, such sleeping accommodations and dining room being conducted in the same building or in separate buildings or structures used in connection therewith that are on the same premises and are a part of the hotel operation.

(6) "Malt beverage" means a liquor brewed from the fermented juices of grain and having an alcoholic content of not less than five percent (5%) and not more than twenty-one percent (21%) of alcohol by weight.

(7) "Microbrewery-Restaurant" For the purposes of this subchapter a microbrewery-restaurant is an establishment licensed pursuant to 3-5-1204(a) except sales directly to the consumer for off premises consumption are prohibited.

(8) "Restaurant" means any public or private place:

(A) (i) That is primarily engaged in the business of serving a meal for consumption on the premises to a guest and has a suitable kitchen facility to serve the entire menu approved by the Alcoholic Beverage Control Division.

(ii) The menu shall contain a selection of food and shall not be limited to sandwiches or salads.

(iii) The kitchen shall:

(a) Have adequate refrigeration to preserve the food on the menu;

(b) Be kept in a sanitary condition; and

(c) Comply with the regulations of the Department of Health; and

(iv) Food from the menu shall be available from opening time until two (2) hours before closing time; or

(B) (i) That qualifies as a "large meeting or attendance facility", which is defined, without limitation, as a facility housing convention center activity, tourism activity, trade show and product display and related meeting activity, or any other similar large meeting or attendance activity and which either itself or through one (1) or more independent contractors complies with all of the following:

(a) Actually serves full and complete meals and food on the premises;

(b) Has one (1) or more places for food service on the premises with a seating capacity for not fewer than five hundred (500) people;

(c) Employs a sufficient number and kind of employees to serve meals and food on the premises capable of handling at least five hundred (500) people; and

(d) Serves alcoholic beverages on the premises at one (1) or more places only on days that meals and food are served at one (1) or more places on the premises.

(9) "Spirituous liquor" means a liquor distilled from the fermented juices of grain, fruits, or vegetables and containing more than twenty-one percent (21%) alcohol by weight or any other liquids containing more than twenty-one percent (21%) alcohol by weight.

(10) "Vinous beverage" means the fermented juices of fruits or a mixture containing the fermented juices of fruits containing more than five percent (5%) and not more than twenty-one percent (21%) alcohol by weight.

(11) "Wet" means a county that voted to permit the manufacture or sale of intoxicating liquor under Initiated Act No. 1 of 1942, as amended, §§ 3-8-201 -- 3-8-203 and 3-8-205 -- 3-8-209, or §§ 3-8-302 [repealed], 3-8-303, 3-8-304 [repealed], 3-8-305, and 3-8-306

Local option election – Dry County On-premises

(a) (1) A dry county or a city of the first class within the dry county may conduct an election to permit the sale of alcoholic beverages for on-premises consumption as prescribed in subdivision (a)(2) of this section.

(2) The sale of alcoholic beverages for under this section shall be limited to beer, hard cider, malt beverages, vinous beverages, and spirituous liquor for on-premises

consumption at a hotel, restaurant, microbrewery restaurant or festival only, within the boundary limits of the dry county or city of the first class within the dry county that has approved the on-premise sale of alcohol. No sales to a consumer for off- premises consumption is allowed under this subchapter.

(b) (1) The petition procedure for a local option election for a dry county or city of the first class within the dry county on-premises election shall be conducted under § 3-8-201 et seq.

(2) Signatures shall be obtained from fifteen percent (15%) of the qualified electors residing within the boundaries of the dry county or city of the first class within the dry county

(3) When fifteen percent (15%) of the qualified voters have filed petitions with the county clerk under this subdivision (b)(2), the county clerk shall determine within ten (10) days the sufficiency of the petitions under §3-8-205;

Conduct of Election

(a) The election process for a local option election under this act shall be conducted pursuant to §3-8-201 et seq.

(b) The ballot title shall be in substantially the following form: "TO DETERMINE WHETHER OR NOT ALCOHOLIC BEVERAGES MAY BE SOLD FOR ON-PREMISES CONSUMPTION AS AUTHORIZED BY ARKANSAS LAW WITHIN (County or city of the first class)".

(c) The ballot shall be in substantially the following form:
"FOR the Sale of Alcoholic Beverages for on-premises consumption, as authorized by Arkansas Law.
"AGAINST the Sale of Alcoholic Beverages for on-premises consumption, as authorized by Arkansas Law."

(d) A majority vote of the qualified electors residing within the county or a city of the first class within the county shall determine whether or not alcoholic beverages may be sold for on-premises consumption or manufactured under subdivision (a) of this section within the boundaries of the county or city of the first class.

Election Results – Effects

(A) (1) In the event a majority of those voting in an election pursuant to this act shall vote for the sale of alcoholic beverages for on-premise consumption, then it shall be lawful for the Director of the Alcoholic Beverage Control Division to issue permits authorized in 3-4-105 for festivals; 3-9-210 for hotels or restaurants; and 3-5-1204(a) for microbrewery-restaurants within the county or within the city of the first class within the county for which the election was held; or

(2) In the event a majority of those voting in an election under this subsection shall vote against the sale for on-premises consumption or manufacture of alcoholic beverages, then it shall be unlawful for the Alcoholic Beverage Control Division to issue licenses or permits for such sale.

(b) A subsequent election under this section shall not be held in the same county or city of the first class within the county until a period of four (4) years has elapsed since the last local option election conducted under this section.

(c) To the extent any of the provisions of this section conflict with §3-8-201 et seq., the provisions of this section control.

Construction

It is expressly declared that this act shall be cumulative to the liquor laws now in force in this state.