

ORDINANCE NO. 9-2-80 A

AN ORDINANCE PROHIBITING THE CONSUMPTION OF ALCOHOLIC BEVERAGES OR POSSESSION OF OPEN CONTAINERS CONTAINING ALCOHOLIC BEVERAGES IN PUBLIC PLACES IN THE CITY OF FRANKSTON, TEXAS, PROVIDING PENALTIES THEREFOR AND PROVIDING THE EFFECTIVE DATE FOR SAME.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FRANKSTON:

Section 1: It shall be unlawful for any person to consume alcohol or have in his or her possession an open container containing alcoholic beverages in any public place within the City Limits of the City of Frankston, Texas. The term "public place" shall be defined as any place to which the public has access and includes, but is not limited to, streets, highways, alleyways, and parking lots.

Section 2: Anyone guilty of violating this ordinance shall be fined not to exceed \$200.00.

Section 3.: This ordinance shall become effective from and after its passage and publication, as required by law.

PASSED AND APPROVED AND ADOPTED this 2nd day of Sept., 1980.

THE CITY OF FRANKSTON, TEXAS

BY:

Johnny E. Simmons, Jr.
Johnny E. Simmons, Mayor

ATTEST:

Janie Jennings
City Secretary; Janie Jennings

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EFFECTIVE DATE OF ORDINANCE. That after the passage of this Ordinance, the descriptive caption thereof shall be published in the Frankston Citizen the official paper for the City Council in each issue of said paper for three consecutive weeks, and this Ordinance shall take effect and be in full force from and after such publication.

PASSED AND ADOPTED by the City Council of the City of Frankston, Texas, at a Regular Meeting held in the Council Chamber this the _____ day of _____, 1980.

Johnnie E. Simmons, Jr. MAYOR

Attest:

Janie Jennings, City Secretary



The Attorney General of Texas

December 30, 1983

JIM MATTOX
Attorney General

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Honorable Mike Westergren
Nueces County Attorney
Room 206, Nueces County Courthouse
Corpus Christi, Texas 78401

Opinion No. JM-112

Re: Authority of a county or city to promulgate ordinances banning open containers of alcoholic beverages in motor vehicles

Dear Mr. Westergren:

You have requested our opinion as to whether a municipality or a county may ban the possession of open containers of alcoholic beverages in motor vehicles through an ordinance adopted by the city council or an order adopted by the commissioners court. We conclude that the preemption provisions of the Texas Alcoholic Beverage Code preclude such an order or ordinance.

Section 1.06 of the code provides in full as follows:

Unless otherwise specifically provided by the terms of this code, the manufacture, sale, distribution, transportation, and possession of alcoholic beverages shall be governed exclusively by the provisions of this code.

We believe that this preemption provision is very clear and simply precludes a city or county from enacting a local ordinance banning the possession of alcoholic beverages in automobiles.

In your brief you assert that a city would have such authority under their general grant of power to pass ordinances for the public health and welfare subject to the constitutional provision that

[N]o charter or any ordinances passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State;

Tex. Const. art. XI, §5. See also V.T.C.S. art. 1165. With regard to counties you propose that a commissioners court order banning open

containers would be authorized by provisions of the newly codified "county road and bridge act," Acts 1983, 68th Leg., ch. 288, at 1431, to be codified as article 6702-1, section 2.301(a)(1) which provides as follows:

The commissioners court of any county may regulate and restrict traffic on county roads and on other county-owned land under its jurisdiction.

This section also requires a public hearing before the adoption of traffic regulations and specifically authorizes the commissioners court to adopt speed limits, load limits, and a system of traffic controlled devices.

In the case of Royer v. Ritter, 531 S.W.2d 448, 449 (Tex. Civ. App. - Beaumont 1975, writ ref'd n.r.e.), the court held that a local ordinance passed by a city and which regulated the hours of sale for liquor package stores conflicted with the predecessor Liquor Control Act. The local ordinance prohibited the opening of a package store on days and at times not prohibited by state law. The court recognized five "distinct" areas of municipal regulatory authority over alcoholic beverages: (1) the assessment for local fees, (2) prohibiting sales in residential sections, (3) prohibiting sales near churches and schools, (4) regulating the sale of beer within the city limits, (5) adopting hours for the sale of mixed beverages. See Alcoholic Beverage Code §§11.38; 105.03; 109.31 - .33. The court held that the ordinance in question was unauthorized by the state liquor laws and was inconsistent therewith. The court stated the following:

The Legislature, by granting to the cities power of control in five instances above set forth, has . . . denied this power in any instance not specified. There is no authority in the Texas Liquor Control Act for the Ordinance under review.

Furthermore, this Ordinance is inconsistent with the Act. It is true that the Legislature stated when package stores are not to be open, rather than the converse. But this is merely one way of stating when they may be open. When the Beaumont Ordinance adds to the times they must be closed, the Ordinance is inconsistent with the statute.

* * * *

If the Legislature had intended for the City Council to have the authority to extend the time of closing or opening of package stores from the

state provision, it could have said so. Having failed to do so, we believe they [the Legislature] intended the provision for closing in the act to be statewide and exclusive. (Emphasis in original).

Royer v. Ritter, supra at 449-50. Based on the Royer case, we conclude that the legislature has not authorized cities and counties to adopt an open container ordinance.

S U M M A R Y

A city or county is prohibited from adopting a local ordinance banning the possession of open containers of alcoholic beverages in motor vehicles.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jim Mattox", written over a horizontal line.

J I M M A T T O X
Attorney General of Texas

TOM GREEN
First Assistant Attorney General

DAVID R. RICHARDS
Executive Assistant Attorney General

Prepared by David Brooks
Assistant Attorney General

APPROVED:
OPINION COMMITTEE

Rick Gilpin, Chairman
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