

OPINION NO. 69-129

Syllabus:

The phrase "residence district" as used in Section 4301.32, Revised Code, means any two or more contiguous election precincts within a municipal corporation. Opinion No. 850, Opinions of the Attorney General for 1959, is hereby overruled.

To: Ted W. Brown, Secretary of State, Columbus, Ohio
By: Paul W. Brown, Attorney General, September 26, 1969

Your request for my opinion regarding local option as to the sale of intoxicating liquors reads as follows:

"A protest has been lodged against a local option petition in Washington County requesting that the Board of Elections determine that said petitions are not valid for the reason that the petitions seek an election in two or more contiguous election precincts in a municipal corporation and that said precincts are more than one-half commercial in use.

"We question whether the Opinion of the Attorney General, 1959 OAG 850, should be followed as it relates to the interpretation of 'residence district' as used in Section 4301.32 of the Revised Code. It appears that the General Assembly, in enacting Amended House Bill No. 616 authorizing a local option election on the Sunday sale of liquor, probably intended such elections to be held within a residence district essentially commercial in character.

"Would you please give me your opinion as to whether the two or more contiguous election precincts referred to in Section 4301.32 (B) of the Ohio Revised Code must have more than one-half of their area devoted to residential use as opposed to an industrial or commercial use."

Section 4301.32, Revised Code, provides:

"The privilege of local option as to the sale of intoxicating liquors is hereby conferred upon the electors of the following districts:

"(A) A municipal corporation;

"(B) A residence district in a municipal corporation consisting of two or more contiguous election precincts, as defined by the petition authorized by section 4301.33 of the Revised Code;

"(C) A township, exclusive of any municipal corporation or part thereof located in such township."

The Syllabus of Opinion No. 850, Opinions of the Attorney General for 1959, page 550, holds:

"The term 'residence district' as contained in Section 4301.32, Revised Code, should be reasonably interpreted to mean any district composed of two or more contiguous election precincts in which more than one-half of the area is devoted to residential use as opposed to an industrial or commercial use."

It is apparent that the General Assembly intended to grant the right of local option under Section 4301.32, supra, to three distinct geographical areas. The first of these is a municipal corporation, the boundaries of which are established by Chapter 707, Revised Code; the second is a township (exclusive of any municipal corporation or part thereof located in such township), the boundaries of which are established pursuant to Chapter 305, Revised Code; and the third of such geographic areas is a "residence district" within a municipal corporation. It is this latter geographic area, i.e., a "residence district", that is the subject of your opinion request and which is not otherwise specifically defined or described in the Revised Code. My predecessor, in Opinion No. 850, supra, interpreted the intent of the General Assembly to be that a "residence district" should consist of two or more contiguous election precincts in which more than one-half of the area is devoted to residential use. In support of his opinion, my predecessor relied upon former Sections 6068, 6161 and 6162 of the General Code. The General Code Section 6068 referred to in the preceding sentence read as follows:

"The phrase 'residence district,' as used in this chapter and in the penal statutes of this state means a clearly described, contiguous, compact section or territory in a municipal corporation bounded by street, corporation or other well recognized lines or boundaries and containing not less than three hundred qualified electors, nor more than five thousand qualified electors."

Sections 6161 and 6162, General Code, provided in detail as to the length, width, proportion of commercial and other business use, and the proportion of residential, educational, religious and other like uses, on a front footage basis, which could be contained

in a "residence district". These Sections were repealed by the General Assembly and were never re-enacted. In place of the above quoted Section 6068, General Code, we now have Section 4301.32, supra (formerly Section 6064-31, General Code). Notwithstanding the fundamental distinction between the tests provided for the establishment of a "residence district" between Sections 6068, 6161, 6162 of the General Code and Section 4301.32 of the Revised Code, my predecessor concluded that such General Code provisions "provide a useful reference as to how much business or commercial property may be included in a 'residence district' without changing its character." Opinion No. 850, supra, at page 554. I cannot agree with my predecessor. The General Assembly, in enacting present Section 4301.32, supra, abandoned the type of test prescribed in the General Code sections referred to above and adopted a new and different test. I do agree with my predecessor, however, that the one pertinent case, Fleaka v. Craver, 25 Ohio Law Abs. 12 (1937), cannot be looked to for a determination of the intent of the General Assembly.

This leaves then the question as to what test the General Assembly did intend by its use of the phrase "residence district" in Section 4301.32, supra. I think it significant that the General Assembly provided that a "residence district" must consist of two or more contiguous election precincts. A precinct is defined, in Section 3501.01 (K), Revised Code, as follows:

"'Precinct' means a district within a county established by the board of elections of such county within which all qualified electors having a voting residence therein may vote at the same polling place."

Voting residence is defined, in the same section at subparagraph (J) as follows:

"'Voting residence' means that place of residence of an elector which shall determine the precinct in which he may vote."

Section 3501.18 of the Revised Code provides that a board of elections may divide a political subdivision into precincts and that each precinct "shall contain as nearly as practicable not more than four hundred nor less than two hundred fifty electors." It is obvious from the foregoing that an elector shall vote in the precinct in which his place of residence is located. It is equally obvious that a precinct must contain, as nearly as practicable, the residences of at least two hundred fifty and not more than four hundred electors. Since the General Assembly has already, by statute, established the number of residences and the method of determining the geographic area which must be contained in a precinct and, in addition, has then required that a "residence district" must contain at least two (or more) contiguous precincts, it follows that the General Assembly has likewise established the number of residences and the geographic area which must be contained in a "residence district". It is both un-

reasonable and illogical to engraft an additional requirement as to the number of residences which must be contained in a "residence district" on the sole premise that the General Assembly must have intended some additional test, without spelling out what that test should be, by the use of the word "residence".

Based upon the fact that prior General Code sections spelled out with great specificity the definition of a "residence district", which sections were then repealed and never subsequently re-enacted, and the fact that the General Assembly has established a new test of the number of residences and geographic area which must be contained in a "residence district" by requiring such district to consist of at least two election precincts, I can only conclude that the General Assembly used the phrase "residence district" as a phrase of no independent legal significance and that such phrase means any two or more contiguous precincts within a municipality.

Therefore, it is my opinion and you are hereby advised that the phrase "residence district" as used in Section 4301.32, Revised Code, means any two or more contiguous election precincts within a municipal corporation. Opinion No. 850, Opinions of the Attorney General for 1959, is hereby overruled.