

OPINION NO. 97-056**Syllabus:**

Pursuant to R.C. 4301.36, the results of a local option election on one or more of the questions specified in R.C. 4301.35(A)-(C) apply to a permit premises located within the precinct in which the local option election is held even though the permit holder for the premises did not receive certified mail notification of the election in accordance with R.C. 4301.33 for the reason that the name and address of the permit holder was not included on the list of affected permit holders that the Division of Liquor Control provided to the petitioner who filed the petition for the local option election, provided the permit holder has not commenced an appropriate legal action to prevent such application.

To: William L. Vasil, Superintendent, Division of Liquor Control, Department of Commerce, Reynoldsburg, Ohio

By: Betty D. Montgomery, Attorney General, December 29, 1997

You have requested an opinion regarding a situation in which a permit holder did not receive notification of a local option election from the petitioner who filed the petition for the local option election. The petitioner did not notify the permit holder because the Division of Liquor Control (Division) did not include the name and address of the permit holder on the list of affected permit holders that the Division furnished to the petitioner pursuant to R.C. 4301.33. The Division did not include the name and address of the permit holder on the list furnished to the petitioner because the address of the permit premises was not located within the precinct in which the local option election was held. However, a portion of the permit premises was located within the precinct. Accordingly, you wish to know whether a local option election held for the submission of one or more of the questions specified in R.C. 4301.35(A)-(C) affects a permit premises located partially within the precinct in which the election is held when the permit holder for the premises was not notified of the election pursuant to R.C. 4301.33 for the foregoing reasons.

R.C. 4301.35, which authorizes the holding of a local option election in a precinct or residence district, provides, in pertinent part:

If a petition is for submission of one or more of the questions specified under this section, a special election shall be held in the precinct or residence district at the time fixed as provided in section 4301.33 of the Revised Code....

At the election any one or more of the following questions, as designated in a valid petition, shall be submitted to the electors of the precinct:

(A) "Shall the sale of wine and mixed beverages by the package, under permits which authorize sale for off-premise consumption only, be permitted in?"

(B) "Shall the sale of wine and mixed beverages, under permits which authorize sale for on-premise consumption only, and under permits which authorize sale for both on-premise and off-premise consumption, be permitted in?"

(C) "Shall the sale of spirituous liquors by the glass be permitted in?"

....
 ... All the questions designated in a valid petition shall be set forth on each ballot and the board shall insert in each question the name or an accurate description of the precinct or residence district in which the election is to be held.

Prior to the submission of one or more of the questions specified in R.C. 4301.35(A)-(C) to the electorate in a precinct or residence district, permit holders who would be affected by the results of the election must be provided with certified mail notification that a petition is being circulated for an election for the submission of the question or questions specified in R.C. 4301.35(A)-(C). In this regard, R.C. 4301.33 provides, in part:

The board of elections shall provide to a petitioner circulating a petition for an election for the submission of one or more of the questions specified in divisions (A) to (C) of section 4301.35 or section 4301.351 of the Revised Code, at the time he takes out the petition, the names of the streets and, if appropriate, the address numbers of residences and business establishments within the precinct or residence district in which the election is sought, and a form prescribed by the secretary of state for notifying affected permit holders of the circulation of a petition for an election for the submission of one or more of the questions specified in divisions (A) to (C) of section 4301.35 or section 4301.351 of the Revised Code. The petitioner shall, not less than forty-five days before the petition-filing deadline for the election, as provided in this section, file with the division of liquor control the information regarding names of streets and, if appropriate, address numbers of residences and business establishments provided by the board of elections, and specify to the division the precinct or residence district that is concerned and the filing deadline. *The division shall, within a reasonable period of time and not later than fifteen days before the filing deadline, supply the petitioner with a list of the names and addresses of permit holders who would be affected by the election. The list shall contain a heading with the following words: "Liquor permit holders who would be affected by the question(s) set forth on petition for a local option election."*

Within five days after a petitioner has received from the division the list of liquor permit holders who would be affected by the question or questions set forth on a petition for local option election, the petitioner shall, using the form provided by the board of elections, notify by certified mail each permit holder whose name appears on that list. The form for notifying affected permit holders shall require the petitioner to state the petitioner's name and street address and shall contain a statement that a petition is being circulated for an election for the submission of the question or questions specified in divisions (A) to (C) of section 4301.35 ... of the

Revised Code. The form shall require the petitioner to state the question or questions to be submitted as they appear on the petition.

....

At the time the petitioner files the petition with the board of elections, *the petitioner shall provide to the board the list supplied by the division and an affidavit certifying that the petitioner notified all affected permit holders on the list in the manner and within the time required in this section and that, at the time each signer of the petition affixed the signer's signature to the petition, the petition paper contained a copy of the list of affected permit holders.*

Within five days after receiving a petition calling for an election for the submission of one or more of the questions specified in divisions (A) to (C) of section 4301.35 ... of the Revised Code, *the board shall give notice by certified mail that it has received the petition to all liquor permit holders whose names appear on the list of affected permit holders filed by the petitioner as furnished by the division. Failure of the petitioner to supply the affidavit required by this section and a complete and accurate list of liquor permit holders as furnished by the division invalidates the entire petition.* (Emphasis added.)

Thus, pursuant to R.C. 4301.33, a permit holder who would be affected by the outcome of an election on one or more of the questions specified in R.C. 4301.35(A)-(C) is entitled to notice by certified mail of the filing of a local option election petition.¹

The responsibility for notifying permit holders who would be affected by the outcome of a local option election is conferred upon the petitioner who files the petition for the local option election. R.C. 4301.33. However, a petitioner is only responsible for providing certified mail notice to those permit holders whose names and addresses are included on the list of affected permit holders furnished to the petitioner by the Division. *Id.*; *accord State ex rel. Cooker Restaurant Corp. v. Montgomery County Bd. of Elections*, 80 Ohio St. 3d 302, 309, __N.E.2d __, __ (1997). Therefore, the duty to compile the names and addresses of permit holders who would be affected by a local option election rests with the Division. *Id.*

With respect to your specific question, no provision within R.C. 4301.33, or elsewhere in the Revised Code, indicates that a local option election held pursuant to R.C. 4301.35(A)-(C) does not apply to a permit holder that is not notified by certified mail of the election, as required

¹ Although permit holders are statutorily entitled to notice of the filing of a local option election petition, *see* R.C. 4301.33, R.C. 4305.14, "a permit holder does not have a constitutional right to specific notice of an impending local-option election since such an election is a legislative action by the electorate of the district involved." *State ex rel. Red Carpet Kamms, Inc. v. Cuyahoga County Bd. of Elections*, 46 Ohio App. 3d 126, 127, 546 N.E.2d 418, 419 (Cuyahoga County 1988); *accord 37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 619 (6th Cir. 1997); *State ex rel. Cooker Restaurant Corp. v. Montgomery County Bd. of Elections*, 80 Ohio St. 3d 302, 309, __ N.E.2d __, __ (1997); *Rickard v. Ohio Dept. of Liquor Control*, 29 Ohio App. 3d 133, 504 N.E.2d 724 (Franklin County 1986). *But see generally Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991) (a holder of an Ohio liquor permit has a property interest protected under the Due Process Clause of the Fourteenth Amendment to the United States Constitution), *cert. denied*, 506 U.S. 820 (1992).

by R.C. 4301.33, because the Division fails to provide the name and address of the permit holder to the petitioner who files the petition for the local option election. To the contrary, R.C. 4301.36 states in part:

If a majority of the electors voting in a precinct or residence district vote "yes" on question (A), (B), or (C) as set forth in section 4301.35 of the Revised Code, the sales specified in such one or more of the questions on which a majority of the electors voting in such precinct or residence district voted "yes" shall be subject in the precinct or residence district only to Chapters 4301. and 4303. of the Revised Code.

If a majority of the electors voting in such precinct or residence district vote "no" on question (A), (B), or (C) set forth in section 4301.35 of the Revised Code, *no C or D permit holder shall sell intoxicating liquor of the kind or in the manner specified* in such one or more of the questions on which a majority of the electors voting in the precinct or residence district voted "no," *within the precinct or residence district concerned*, during the period such election is in effect as defined in section 4301.37 of the Revised Code. (Emphasis added.)

R.C. 4301.36 thus states unequivocally that no permit holder within a precinct or residence district shall sell intoxicating liquor of the kind or in the manner specified in the question or questions on which a majority of the electors voted in the negative. Our research has disclosed no statutory provision that excepts a permit holder that is not notified of the election in accordance with the provisions set forth in R.C. 4301.33 from the language of R.C. 4301.36. It is a fundamental rule of statutory construction that exceptions not made by the legislature cannot be read into a statute. *Morris Coal Co. v. Donley*, 73 Ohio St. 298, 76 N.E. 945 (1906); *Lima v. Cemetery Ass'n*, 42 Ohio St. 128 (1884); 1988 Op. Att'y Gen. No. 88-007 at 2-21; 1981 Op. Att'y Gen. No. 81-101 at 2-386. Thus, absent a clear and unequivocal expression on the part of the General Assembly providing an exception, a variance from the terms of R.C. 4301.36 may not be implied. 1988 Op. Att'y Gen. No. 88-007 at 2-21; 1981 Op. Att'y Gen. No. 81-101 at 2-386. Accordingly, pursuant to R.C. 4301.36, the results of a local option election on one or more of the questions specified in R.C. 4301.35(A)-(C) apply to a permit premises located within the precinct in which the election is held even though the permit holder for the premises was not notified by certified mail of the election because the Division did not include the name and address of the permit holder on the list of affected permit holders it furnished to the petitioner who filed the petition for the local option election.

The recent decision of the Ohio Supreme Court in *State ex rel. Cooker Restaurant Corp. v. Montgomery County Bd. of Elections*, 80 Ohio St. 3d 302, __ N.E.2d __, __ (1997), provides additional support for this conclusion. In that case, a permit holder brought an action for a writ of prohibition to prevent a local board of elections from holding a local option election because the permit holder did not receive certified mail notification from the petitioner who filed the petition for the local option election that the petition would affect one of the permit holder's liquor permits. The list supplied by the Division to the petitioner did not include the name and address of one of the permit holder's permit premises that would be affected by the local option election. Consequently, the petitioner did not provide certified mail notification to the permit holder that a petition was being circulated that would affect one of the permit holder's permit premises.

In denying the permit holder's request for a writ of prohibition, the court reasoned that, notwithstanding the permit holder's "argument to the contrary, liquor permit holders do not

possess a constitutional due process right to notice of an impending local option election because the election is a legislative action by the local electorate." *State ex rel. Cooker Restaurant Corp. v. Montgomery County Bd. of Elections*, 80 Ohio St. 3d 302, 309, __ N.E.2d __, __ (1997). In addition, "R.C. 4301.33 and 4305.14 require only that the petitioner and the board [of elections] provide notice to the liquor permit holders on the list provided by the Division of Liquor Control." *Id.* at 309, __ N.E.2d at __; *cf. State ex rel. Red Carpet Kamms, Inc. v. Cuyahoga County Bd. of Elections*, 46 Ohio App. 3d 126, 127, 546 N.E.2d 418, 418-19 (Cuyahoga County 1988) (under a previous version of R.C. 4301.33, which did not limit the notice requirement to those permit holders specified on the list provided by the Division, permit holders have an express statutory right to notice of the filing of a local option election petition). Thus, the fact that a petitioner does not provide certified mail notification of a local option election to a permit holder whose name and address were omitted from the list of affected permit holders furnished to the petitioner by the Division does not deny the permit holder of due process or deceive or mislead signers of the local option election petition, *State ex rel. Cooker Restaurant Corp. v. Montgomery County Bd. of Elections*, 80 Ohio St. 3d at 309-10, __ N.E.2d at __, nor does it prevent a board of elections from proceeding with a local option election.

The decision of the court in *State ex rel. Cooker Restaurant Corp. v. Montgomery County Bd. of Elections*, while not directly dispositive of your inquiry, does set forth certain general principles that we consider applicable to the situation described in your letter. The court's opinion makes clear that there is compliance with the notification requirements of R.C. 4301.33 whenever a petitioner provides certified mail notification to the permit holders whose names and addresses appear on the list furnished to the petitioner by the Division. Further, there is compliance with such requirements even though the list furnished to the petitioner by the Division omits the name and address of a permit holder who would be affected by the local option election. Accordingly, one may reasonably conclude that the results of a local option election apply to a permit holder whose name and address were omitted from the list of affected permit holders furnished to a petitioner by the Division.

Although the foregoing conclusion may appear harsh from the permit holder's perspective, the language of R.C. 4301.36 and the decision in *State ex rel. Cooker Restaurant Corp. v. Montgomery County Bd. of Elections* compel such a conclusion. There are, however, certain other remedies that may be available to a permit holder that does not receive certified mail notification of a local option election in a circumstance such as you have described. First, a permit holder may file a written protest with the county board of elections pursuant to R.C. 3501.39 and R.C. 4301.33. R.C. 3501.39 states that a board of elections is required to accept any petition described in R.C. 3501.38 unless a written protest against the petition, naming specific objections, is filed, a hearing is held, and a determination is made by the election officials with whom the protest is filed that the petition is invalid, in accordance with any section of the Revised Code providing a protest procedure, or violates any requirement established by law. R.C. 4301.33(B) provides a protest procedure. R.C. 3501.39, therefore, "incorporates the liquor option protest procedures of R.C. 4301.33." *State ex rel. Cooker Restaurant Corp. v. Montgomery County Bd. of Elections*, 80 Ohio St. 3d at 307, __ N.E.2d at __. Accordingly, a permit holder who has not received notification of a local option election because the Division fails to provide his name and address to the petitioner who files the petition for the local option election may file a written protest with the county board of elections pursuant to R.C. 3501.39 and R.C. 4301.33. *See id.* at 307-08, __ N.E.2d at __. In addition, an affected permit holder

may file an election contest pursuant to R.C. 3515.09² for the purpose of having the results of the election set aside. See *State ex rel. Byrd v. Summit County Bd. of Elections*, 65 Ohio St. 2d 40, 417 N.E.2d 1375 (1981) (syllabus, paragraph one) (R.C. 3515.02 (application for recount) and R.C. 3515.09 provide the exclusive remedy for a recounting of votes, or a correction of all errors, frauds, and mistakes which may occur at an election); *Walt's Friendly Tavern v. Ohio Dept. of Liquor Control*, 11 Ohio App. 3d 277, 464 N.E.2d 610 (Cuyahoga County 1983).³

The General Assembly has thus provided several avenues of recourse for a permit holder affected by a local option election who did not receive certified mail notification of such election as provided in R.C. 4301.33. In each instance the burden of pursuing such redress rests with the permit holder. The General Assembly intends the results of a local option election to apply to such permit holder unless the permit holder avails himself of appropriate legal procedures to prevent that application.

Therefore, to the extent that it is possible to provide general guidance on the subject, it is my opinion and you are advised that, pursuant to R.C. 4301.36, the results of a local option election on one or more of the questions specified in R.C. 4301.35(A)-(C) apply to a permit premises located within the precinct in which the local option election is held even though the permit holder for the premises did not receive certified mail notification of the election in accordance with R.C. 4301.33 for the reason that the name and address of the permit holder was not included on the list of affected permit holders that the Division of Liquor Control provided to the petitioner who filed the petition for the local option election, provided the permit holder has not commenced an appropriate legal action to prevent such application.

² R.C. 3515.09 provides, in part:

A contest of election shall be commenced by the filing of a petition with the clerk of the appropriate court signed by at least twenty-five voters who voted at the last election ... for or against the issue being contested ... within fifteen days after the results of any such ... election have been ascertained and announced by the proper authority, or if there is a recount, within ten days after the results of the recount of such ... election have been ascertained and announced by the proper authority. Such petition shall be verified by the oath of at least two such petitioners, ... and shall set forth the grounds for such contest.

See generally R.C. 3515.08 ("the approval or rejection of any issue or question, submitted to the voters, may be contested by qualified electors of the state or a political subdivision").

³ One court of appeals has sanctioned the grant of a writ of mandamus to prevent a board of elections from counting the ballots from a local option election where the board of elections failed to comply with the notification requirements of R.C. 4301.33. *State ex rel. Red Carpet Kamms, Inc. v. Cuyahoga County Bd. of Elections*, 46 Ohio App. 3d 126, 546 N.E.2d 418 (Cuyahoga County 1988). But cf. *State ex rel. Byrd v. Summit County Bd. of Elections*, 65 Ohio St. 2d 40, 417 N.E.2d 1375 (1981) (syllabus, paragraph one) (mandamus and *quo warranto* will not lie to compel the withdrawal of a certificate of election issued following an election); *State ex rel. Shriver v. Hayes*, 148 Ohio St. 681, 687, 76 N.E.2d 869, 872 (1947) ("*quo warranto* will not lie to set aside an election which has become final for the reason that no [election] contest has been instituted").