Note from the Attorney General's Office:

1959 Op. Att'y Gen. No. 59-850 was overruled by 1969 Op. Att'y Gen. No. 69-129.

850

"RESIDENCE DISTRICT"—INTERPRETED TO MEAN ANY DISTRICT COMPOSED OF TWO OR MORE CONTIGUOUS ELECTION PRECINCTS IN WHAT MORE THAN ONE-HALF OF AREA IS DEVOTED TO RESIDENTIAL USE. §4301.32, R. C.

SYLLABUS:

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.

Hon. John D. Sears, Jr., Prosecuting Attorney
Crawford County, Bucyrus, Ohio

Dear Sir:

I have before me your request for my opinion, which request reads as follows:

> "I respectfully request your opinion in regard to your interpretation of what is meant by the phrase 'a residential district' in Section 4301.32 of the Revised Code of Ohio, Sub-section B.
>
> "Section 4301.32 of the Revised Code confers upon the electors of certain districts the privilege of local option as to the sale of intoxicating liquors. Subsection B defines one of the districts as follows: 'A residential 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.'
>
> "There is to be presented to the Board of Elections of Crawford County, Ohio a Petition for a local option under Sub-section B, however, one of the precincts has within its boundaries The General Electric Company, and the other precinct has two industrial plants, one being The Bucyrus Blades and the other The Swan Rubber Company, plus three private businesses, one being an electrical store, one being a grocery store and the third being a heating store. Part of the boundaries of these two precincts is the Pennsylvania Railroad track and; therefore, my question is whether or not under the interpretation of Section 4301.32 of the Revised Code could this be considered a residential district?
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> "My purpose in writing to you at this time is that there will be a protest filed with the Board of Elections and I probably will

be called upon as Prosecuting Attorney to interpret the phrase 'a residential district.' If there is any further information needed, I will be glad to furnish the same to you if I can."

Since its enactment in 1933, Section 4301.32, Revised Code, which was formerly Section 6064-31, General Code, has read as follows:

"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."

In 1937, in the case of *Fleaka* v. *Craver, et,* 25 O.L. Abs., 12, which concerned a similar question, i.e., the definition of "residence district" under Section 4301.32, Revised Code, then Section 6064-31, General Code, the court held that a zoning ordinance which established various districts as residential and commercial could not be looked to for a determination of what constitutes a residential district wherein local option elections may be held under Section 6064-31, General Code, since the law providing for local option elections is of a general nature requiring uniform operation. Thus, it is established from the court's conclusion that the municipal zoning plan could not be used to define two or more contiguous election precincts as a "residence district," for the reason that it would not have a uniform application throughout the state and would be unconstitutional as a result.

But the question naturally arises as to who defines such districts, and the court in the *Fleaka* case said, on page 15:

"The sufficiency of a petition to require a submission of the issue to the electors involved the proposition as to whether or not they resided in the residential district, *and the context of this section (section 6064-32 similar to the present section 4301.33) indicates that this proposition was to be determined by the Board of Elections."* (Emphasis added)

Section 6064-32, General Code, to which the court referred, read in pertinent part as follows:

"Upon presentation of a petition to the Board of Elections of the county wherein the district or any part thereof is located, signed by qualified electors of the district concerned, equal to fifteen percentum of the total number of votes cast for governor at the last regular state election shall proceed as follows:

"(1). Within five days after such presentation, *determine the sufficiency of such petition,* * * *." (Emphasis added)

The analogous present Section 4301.33, Revised Code, reads in pertinent part:

"(A). Such board shall, not later than the eighty-fourth day before the day of a general election, examine and determine the sufficiency of the signatures, *determine the validity of such petition,* * * *." (Emphasis added)

There has been a small change in the wording of this statute as regards the word "sufficiency," but the phrase "determine the validity of such petition" in Section 4301.33, Revised Code, certainly provides the same, if not more, authority as "determine the sufficiency of such petition" contained in Section 6064-32, General Code. It appears correct to say, therefore, that it is still the duty of the board of elections to determine whether or not the electors who submit a local option petition reside in a "residence district." But if the Revised Code contains no definition as to exactly what constitutes a "residence district," and if municipal zoning plans cannot be followed, what, then can a board of elections use as a definition? It is to this question that we now turn.

The court in *Fleaka* v. *Craver, supra,* said that "the conclusion that a district is residential in character is required by the fact that the district contains property of which nine-tenths is residential, notwithstanding the existence of a comparatively small amount of commercial business."

But this provides us with no rule, for this conclusion was made only in regard to the facts of that case alone. It leaves us with the question of how much more business property in any certain district may be allowed before it loses its character as a residence district for purposes of a local option election. The court said in the *Fleaka* case at page 15:

"One of the established rules for construction of statutes is that doubtful provisions should, if possible, be given a reasonable, rational, sensible or intelligent construction. Accordingly, it is the duty of the courts, if the language of a statute fairly permits, or unless restrained by the clear language of the statute,

so to construe it as to avoid unreasonable, absurd or ridiculous consequences."

Keeping the above statement in mind and in light of the fact that the court in the *Fleaka* case held that two contiguous election precincts were nonetheless a "residence district" even though that district contained property ten percent of which was devoted to business or commercial purposes, one must conclude that in the absence of a definite rule to the contrary the only reasonable way to construe the statute is to define a "residence district" as any district composed of two or more contiguous election precincts in which over half of the area is devoted to residential use, in contradistinction to business or commercial use. Not only does this appear to be the only conclusion that one can reasonably reach in view of the *Fleaka* case and Section 4301.33, Revised Code, but it appears to be the intent of the legislature that for purposes of a local option election a district not only need not be exclusively residential, but may, in fact, contain frontage area very approximate to but still less than one-half of the total area of the district. This is reflected in the definition of "residence district" adopted by the general assembly before the advent of prohibition. The pertinent sections of the General Code then read as follows:

Section 6068:

"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."

Section 6161:

"The maximum length of a residence district shall not exceed three times its maximum width unless the boundary of a municipal corporation or exempted territory prevents the district from containing the requisite number of voters, in which case the boundary shall follow the proportionate length and breadth provided herein as nearly as possible. Such district shall not contain a block one-half or more of the foot frontage of which is occupied by buildings and premises actually devoted to commercial, mercantile, manufacturing or other business purposes not including saloons; nor shall such district contain the property or premises abutting on a section of the street lying between two consecutive cross or intersecting streets, from street to street, or extending for a distance of not less than five hundred feet along such street on which such

premises abut, when sixty-five per cent of the foot frontage of such abutting property on each side of such street is occupied for and devoted to manufacturing, mercantile or other business purposes not including saloons if such section of such street is in the central or main business part of the municipal corporation. When a part of a street is exempted from the provisions of this section, lot lines may be used in outlining the boundary of the district to exempt the property facing on such part of such street."

Section 6162:

"In determining the total foot frontage in residence districts, buildings which have more than one-half of their floor space used for residence purposes, parks in residence districts, and property devoted to educational, religious or charitable uses shall be counted as residence property; public property devoted to uses other than those herein specified shall be counted as business property; and property occupied by saloons shall not be counted as either business or residence property."

These sections were repealed during prohibition, but in the absence of a present statutory definition of "residence district" they do provide a useful reference as to how much business or commercial property may be included in a "residence district" without changing its character.

Of course the application of these principles to any given district will involve particular foot frontages and the nature and extent of industrial or commercial development. For this reason I am unable to give you a definite answer as to whether the district you describe is in fact residential

It is my opinion, however, and you are, therefore, accordingly advised that 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.

Respectfully,
MARK MCELROY
Attorney General