

## Opinion No. 58-137

June 24, 1958

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr.,  
Assistant Attorney General

**TO:** W. P. Kearns, Jr., Chief, Division of Liquor Control, Bureau of Revenue, Santa Fe,  
New Mexico

### QUESTION

#### QUESTIONS

1. Should an application for transfer of location of an existing dispenser's, retailer's or club license from a location within a municipality to a location within the five mile zone of said municipality be referred for recommendation to the local Board of County Commissioners of the county concerned, or the local governing board of the municipality concerned, or both?
2. Should an application for transfer of location of an existing dispenser's, retailer's or club license from one location within the five mile zone of a municipality to another location within the five mile zone of the same municipality be referred for recommendation to the local Board of County Commissioners of the county concerned, or the local governing board of the municipality concerned, or both?
3. May an existing dispenser's, retailer's or club license located within the five mile zone of a municipality be transferred to a location within the municipal limits of said municipality?
4. If the answer to Question No. 3 above is in the affirmative, should an application for transfer of location of an existing dispenser's, retailer's or club license from a location within the five mile zone of a municipality be referred for recommendation to the local Board of County Commissioners of the county concerned, or the local governing board of the municipality concerned, or both?
5. May an existing dispenser's retailer's or club license, located in an unincorporated area more than five miles from the municipal limits of the nearest municipality be transferred to a location within the five mile zone of said municipality?
6. If Question No. 5 is answered in the affirmative, should an application for transfer of location of an existing dispenser's, retailer's or club license from a location in an unincorporated area more than five miles from the municipal limits of the nearest municipality to a location within the five mile zone of the municipality be referred for recommendation to the local Board of County Commissioners of the county concerned, or the local governing board of the municipality concerned, or both?

7. In the event of the condemnation of the real estate on which is located an existing dispenser's, retailer's or club license for highway purposes in connection with a non-access highway project, thereby rendering the licensed location unavailable for use by the licensee, must the license be transferred only in strict compliance with the zoning transfer limitation set forth in Section 46-5-24 (as amended), New Mexico Statutes Annotated? Or, is there any relaxation of the strict zoning limitations in such hardship cases?

8. In the event an application is made for transfer of ownership or location, or both of an existing dispenser's, retailer's or club license involving a location which is within the five mile zone of two or more municipalities (where the five mile zone of two or more municipalities overlap), should the application be referred for recommendation only to the local Board of County Commissioners of the county concerned or only to the local governing board of the closet municipality, or to the local governing boards of all municipalities concerned, or to a combination of the boards concerned?

## CONCLUSIONS

1. To Board of County Commissioners.
2. To Board of County Commissioners.
3. Yes.
4. To the local municipal government only.
5. No.
6. No answer required.
7. No. See Opinion.
8. County Board having jurisdiction.

## OPINION

### ANALYSIS

The controlling statutory provisions relating to transfer of liquor licenses are compiled as §§ 46-4-7, 46-5-15 and 46-5-16. Since the first two sections apply only to assignments, commonly designated as ownership transfers, we may restrict our attention in answer to the questions above put, in part to the last section cited.

Specifically, § 46-5-16 requires, with reference to changes in locations of licensed premises that:

"Prior to passing on the issuance or rejection of any such additional retail, club, or dispenser license the chief of division shall notify the local board of county commissioners of the county, or the local governing board of the municipality, in which such new license is sought, that such an application has been filed and allow such local board twenty (20) days in which to file its recommendation, if any, on such application. If a hearing is requested in writing by such local board the chief of division shall hold such a hearing at a convenient time and place in the local option district involved for the purpose of determining whether or not such new additional license should be granted. The foregoing procedure shall also be followed in the case of the transfer or assignment of any then existing retail, club or dispensed license."

From the language quoted we find the notice requirement mandatory, but directed disjunctively to the board of county commissioners **or** to the local governing board. There is no suggestion that both the county as well as the municipal governments need be noticed.

A wider search of existing laws may well be considered in bolstering the afore-stated conclusion. First, by § 46-4-1 there is found an expressed grant of authority by the Legislature to municipalities

". . . to regulate the sale of alcoholic liquors by retailers, dispensers and clubs **within the limits of such municipality** in any manner consistent with, but not inconsistent with, the provisions of this act; . . ." (Emphasis ours)

and, further,

". . . the board of county commissioners of any county . . ., shall have the power to regulate the sale of alcoholic liquors by retailers, dispensers and clubs in any manner consistent with, and not inconsistent with, its provisions of this act, **and such counties outside** of the limits of the municipalities in such counties." (Emphasis ours)

Likewise, §§ 46-4-2 and 46-4-3 respectively, authorize municipalities and counties to impose nonprohibitive local license taxes on licensed premises located within the exclusive confines of each local governing area.

With reference to the question first above stated, it may be further reasoned that an application for a transfer of location of a licensed premise from within a municipality to a site lying outside the fixed limits of such municipality is, in part at least, a request for a change of local governing authority as regards the named licensee. Also, we find no law or implication thereof as would establish any vested or retaining interest in any municipal, town or village government in a license as issued by the Division of Liquor Control. On the contrary, it is generally recognized that:

"The jurisdiction of a municipality, in the absence of express provisions of statute to the contrary, is limited by its territorial boundaries, and an ordinance cannot prohibit the doing of an act outside such boundaries. . . ." 55 A.L.R. 1183

In the case of **Strauss v. Pontiac**, 40 Ill. 301, it was held that a city charter authorizing the prohibition of tippling houses and dramshops in the town, or within five (5) miles thereof, did not give the city power to pass an ordinance prohibiting the sale of beer within three (3) miles of the town. (Sum. 55 A. L. R 1186)

Accordingly, it is our opinion that, in the processing of an application for transfer of location, as stated in Question No. 1 above, only the board of county commissioners having jurisdiction over the area need be notified in keeping with § 46-5-16.

In response to your second question it is our opinion, as supported by the analysis of our foregoing conclusion, that only the local governing body having jurisdiction over the area, or the board of county commissioners need be given notice.

Your third question is specifically answered in the affirmative by Attorney General's Opinion No. 5649, which in turn relies on Opinion No. 5396 in both of which we presently concur.

Question No. 4 is directed to a situation opposite in factual result to your first question, but may be resolved by reference to the same law and reasoning relied on in the analysis thereof. Again, only the local governing body, having jurisdiction over the area or location, to which the applied for transfer is to be made need be considered.

Answer to Question No. 5, while being the subject to pending litigation at the present time is given in the negative. Specifically this opinion is founded in the proviso of § 46-5-24 (6) (p.s.)

"provided no new or additional license shall be issued in unincorporated areas or transfers approved for locations or premises situate within five (5) miles of the corporate limits of any municipality, except that transfer of a license already within the five (5) mile zone may be made:

- (1) to another location within the zone and
- (2) from the municipality to a location within the zone.

Question No. 6 is not answered in view of our negative response to the foregoing inquiry.

Question No. 7 poses potential hardship situations as are or may arise from present Bureau of Public Roads requirements of taking access along newly aligned and widened interstate highways. Specifically, you request the opinion of this office as to whether existing transfer restrictions may be relaxed in instances where access to a licensed premise is acquired by condemnation, and for the sake of discussion here, it is assumed that any other means of access acquisition may also be considered. In reply to this request our opinion must be rendered in the negative and is responsive to the alternative question stated.

A review of the existing statutes which permit or prohibit approval of location transfers may generally be summarized by the following permissive moves. Licenses presently located in county areas and lying more than five (5) miles from the incorporation limits of any city, town or village may be moved to any other location in said area, but not to locations situated within the so-called five (5) mile zone. Licenses located within the "five mile" zone may be moved to other locations within said zone. Licenses located within the "five mile" zone may also be moved to locations lying within the adjacent city, town or village limits. And, licenses located in unincorporated areas and more than five miles from incorporated areas and which were issued subsequent to 1951 may be transferred to other locations more than ten (10) miles from existing licensed premises, but not to locations lying within the "five mile" zone. Other theoretical transfers, as changes of location may be possible, but such could be approved only upon a population basis or as the establishment of new and additional licenses.

In keeping with the pronouncements of **Yarbrough v. Montoya** 54 N.M. 91, 214 P. 2d 769 there are no inherent privileges attending the license to deal in and sell alcoholic beverages and accordingly the business thereof may be entirely prohibited or regulated so as to limit "its evil propensities" to the utmost degree."

It must finally be pointed out that condemnation and right of way purchase procedures, by which controlled access is also acquired, both provide for a fair appraisal of the business loss sustained by any licensee thereby offsetting "hardship" cases as may apply for transfers not provided for by law.

Based upon the analysis hereinbefore presented with reference to question one and the conclusion drawn therefrom it is our opinion that in the case of overlapping "five mile" zones, that only the board of county commissioners having local government power in the area need be given notice of a pending transfer.