Opinion No. 59-137

September 10, 1959

BY: HILTON A. DICKSON, JR., Attorney General

TO: Mr. William W. Osborn State Senator, Chaves County Roswell, New Mexico Mr. Patrick F. Hanagan District Attorney Fifth Judicial District Roswell, New Mexico

*{*209}* This is in reply to your recent inquiries regarding the applicability of Chapter 159, § 1, Laws 1957, to the issuance and transfer of liquor licenses. Since your separate inquiries involve the same general matters, we shall answer each of them in this opinion.

Mr. Osborn has asked whether Chapter 159, § 1, Laws 1957, (reenacted, as pertains to this question, by Chapter 287, § 1, Laws 1959) invalidates our Opinion No. 5396, dated August 7, 1951, insofar as said opinion relates to the issuance or transfer of a liquor license by the Chief of the Liquor Control Division within a five mile zone surrounding incorporated municipalities.

Mr. Hanagan has asked whether an existing license may be transferred from a location outside a five mile zone surrounding Roswell to a location within such five mile zone.

The answer to Mr. Osborn's inquiry is that since the 1957 Legislature amended Chapter 30, § 1, Laws 1951, Opinion No. 5396 is no longer controlling insofar as it relates to your question.

The answer to Mr. Hanagan's inquiry is that a liquor license cannot be transferred from a location outside the five mile zone to a location within such five mile zone.

Chapter 30, § 1, Laws 1951, compiled in § 46-5-24, N.M.S.A., 1953 Compilation, read as follows:

"46-5-24. Limitation on number of licenses that can be issued. -- The maximum number of licenses to be issued under the provisions of chapter 61, New Mexico Statutes 1941, Annotated, as amended, shall be as follows:

(a) In incorporated municipalities, not more than one (1) dispensers or one (1) retailers or one (1) club license for each fifteen hundred (1500) or major fraction thereof population in such municipality.

(b) In unincorporated areas, not more than one (1) dispenser's or one (1) retailer's or one (1) club license for each fifteen hundred (1500) or major fraction thereof population in any county excluding the population of incorporated municipalities within the county. Provided further no new or additional license shall be issued in unincorporated areas or transfers approved for locations or premises situated *{*210}* within five (5) miles of the

corporate limits of any municipality. Excepting that in rural areas, new or additional licenses may be issued regardless of population if the proposed location or premises are not within ten (10) miles of any existing licensed premises."

Opinion No. 5396, interpreting this section, ruled that the Chief of the Liquor Control Division, Bureau of Revenue, while having broad discretionary powers to approve the issuance or transfer of licenses, could not approve a transfer of a license into or within the five mile strip surrounding incorporated municipalities. This conclusion was based on the language of the proviso in subsection (b) cited above.

Parenthetically, the powers of the Chief of the Liquor Control Division over the issuance and transfer of licenses are subject to the veto power of governing bodies of municipalities or counties over such issuance and transfer as spelled out in § 46-4-8, N.M.S.A., 1953 Compilation (P.S.).

The 1957 amendment added to the proviso in the 1951 Act the following language:

"(b) . . . 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 a municipality to a location within the zone."

In our opinion, this added language extended the discretionary powers of the Chief of the Liquor Control Division to approve transfers (subject to § 46-4-8) of the kind spelled out in (b) (1) and (2) above. Therefore, applying the well known maxim of statutory construction of **expressio unius exclusio alterious,** all license transfers into or within the five mile zone not made subject to approval by (b)(1) and (2) cannot be approved. In effect, this means that a transfer from a location outside the five mile zone to a location within such zone is prohibited, since the Chief of the Liquor Control Division has no power to approve such a transfer. Opinion No. 5396 is modified insofar as it holds that no transfers into or within the five mile zone may be approved.

Parenthetically, it is our opinion that a license may be transferred from the five mile zone to a municipality or a rural area. The statutory language "for locations or premises situated within five (5) miles of the corporate limits of any municipality", in our opinion, refers to the location to which the transfer is to be made and not from which it is to be made. The statutory proviso is, therefore, a prohibition against certain transfers into the five mile zone and not out of such zone. In regard to the transfer of a license from the five mile zone to a municipality, we have so ruled in Opinion No. 58-137, dated June 24, 1958. We now extend our opinion to allow a transfer from the five mile zone to the rural area.

Both of you gentlemen have referred to the dictum in Opinion No. 5396 to the effect that the 1951 Act created a classification so unreasonable as to raise serious doubts as to

constitutionality. The 1957 amendment, while changing the prohibitions as to kinds of licenses which may be transferred, retains the basic classifications of zones in which liquor licenses may be issued or transferred. While the 1951 Act may have been unconstitutional, we are of the opinion that § 46-5-24 as now constituted is clearly constitutional. The police power of the State to regulate and/or prohibit the possession, sale and dispensing of alcoholic beverages has been upheld against constitutional attack so many times that it is unnecessary to cite authority so holding. See **Yarbrough v. Montoya,** 54 N.M. 91, 214 P. 2d 769 (1950), which ruled that there is no inherent privilege attending the license to deal in and sell alcoholic *{*211}* beverages and, accordingly, the business thereof may be entirely prohibited or regulated so as to limit "its evil propensities" to the utmost degree. It is our opinion that the Act, as now compiled in § 46-5-24, supra, clearly will stand up under an attack that it is unconstitutional.

By Philip R. Ashby

Assistant Attorney General