Opinion No. 61-41

May 19, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas O. Olson, First Assistant Attorney General

TO: Mr. George A. Franklin, Chief, Division of Liquor Control, Bureau of Revenue, Santa Fe, New Mexico

QUESTION

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Are present liquor licensees (dispensers and retailers) situate within five miles of the corporate limits of any municipality counted in determining the maximum number of licenses to be issued outside the zone in unincorporated areas?

CONCLUSION

No.

OPINION

ANALYSIS

The response to your question necessitates an interpretation of two sections of the Liquor Code, specifically, Section 46-5-24, 1953 Compilation (P.S.) and Section 46-5-25, 1953 Compilation. Section 46-5-24, subsection (b), provides in part that the maximum number of licenses to be issued

"In unincorporated areas, not more than one (1) dispenser's or one (1) retailer's or one (1) club license for each two thousand (2,000) or major fraction thereof population in any county excluding the population of incorporated municipalities within the county. 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, * * *."

The remainder of subsection (b) relates to transfers within the 5-mile zone and is not germane to the problem at hand.

Section 46-5-25 provides as follows:

"For the purposes of this act (46-5-24, 46-5-25), all presently licensed locations or premises lying within five (5) miles of the corporate limits of any municipality **shall be deemed as lying within the municipality** in determining the maximum number of

licenses to be issued in said municipality under the provisions hereof and Provided further that the population of any incorporated municipality or county shall, for the purposes of this act, be deemed to be the population thereof as last determined by the Bureau of Census." (Emphasis supplied)

These sections were the subject of interpretation by a previous Attorney General in Opinion No. 5396, dated August 7, 1951. In that opinion, he stated as follows:

"* * * By the implications of Sec. 1 (b), [Sec. 46-5-24, supra.] the number of presently licensed locations on premises within the 5-mile strip surrounding any incorporated municipality is excluded from the unincorporated area of the county for the purpose of determining the number of licenses, but by this Sec. 1 (b) is included for determining the population of the county area. * * *

The treatment of the 5-mile area surrounding the incorporated municipalities is anomalous in that it has the effect of increasing the true population figure per license in the municipalities and reducing the population figure per license in the rural area outside the 5-mile strip. The 5-mile strip, usually the most heavily populated portion of a rural area, is included for determining population of the rural area. **However, the number of liquor licenses in that 5-mile strip is excluded from the total figure for the rural area in determining the number to be allowed.** In the municipalities, the reverse is true. The licenses in the 5-mile strip are included but the population of the strip excluded in the formula to determine the limit on licenses to be issued." (Emphasis supplied)

This conclusion is emphasized in response No. 2 (b) of this same opinion.

We recognize that the Legislature has twice amended Section 46-5-24 since the date of that opinion. However, the Legislature in amending the section resolved certain questions relating to the matter of transfers of licenses within the 5-mile zone but did not make any change in the language germane to your question except to increase the population count per license from 1,500 to 2,000. It must be presumed that when the Legislature amended the section in question they were aware of the construction which had been placed upon the same. When a statute has been construed and the Legislature in amending the same substantially sets forth the section in language identical with that which has theretofore been construed, the Legislature may be regarded as adopting the construction theretofore made. **Granito v. Grace,** 56 N.M. 652, 248 P. 2d 210. Furthermore, an interpretation of a statutory provision by an executive or administrative officer is persuasive and will not be lightly overturned. **Valley Country Club, Inc. v. Mender,** 64 N.M. 59, 323 P. 2d 1099. **State ex rel. Dickson v. Aldridge,** 66 N.M. 390, 348 P. 2d 1002.

We believe that the proper construction of Section 46-5-24 as amended is that set forth in the quoted portion of Opinion No. 5396 enunciated above. Any other construction would require the same licenses to be counted twice; without language to support such a construction, this would be a most unreasonable interpretation of the law. This is the construction which has been followed since that date by the several Chiefs of the

Division of Liquor Control. Likewise, this construction has the apparent blessing of our Legislature in that it has failed to amend the relevant clauses even though it has twice amended the section in question.

In view of these considerations, we reaffirm Opinion No. 5396 insofar as it is applicable to the question at hand and hold that those licenses situate within the 5-mile zone abutting on incorporated municipalities are not counted in determining the maximum number of licenses to be issued outside the zone in unincorporated areas.