

Opinion No. 61-48

June 9, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

TO: Albert I. Cornell, Attorney at Law, Bureau of Revenue, State Capitol Building, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Is an incorporated municipality with a population of less than a major fraction of 2000 eligible for the issuance of one liquor license?
2. In a situation where the five-mile zone surrounding two incorporated municipalities overlap, are the present licenses in the overlapping area to be charged against both municipalities in determining the maximum number of licenses that can be issued in each municipality?
3. How is the population count determined in an unincorporated area?
4. What is the definition of rural area and how is it to be distinguished from unincorporated area?

CONCLUSIONS

1. Yes, subject to the limitations mentioned in the answer to question 2.
2. Yes.
3. See analysis
4. See analysis.

OPINION

ANALYSIS

Your first inquiry is whether an incorporated municipality is eligible for the issuance of one liquor license if the population is less than a major fraction of 2000.

This office had occasion to answer this identical question in Opinion No. 5491 (1952). We there concluded that each incorporated municipality is eligible for one license even

though the population of the municipality is less than a major fraction of 2000. We held that to interpret Section 46-5-24 (a), N.M.S.A., 1953 Compilation (PS) in any other manner "would be only compatible with an intent to impose in practical effect a state of prohibition upon small communities." We herewith re-affirm our earlier opinion, but we hasten to point out that no "five-mile zone" problem was presented in that case.

As we understand it, the factual background prompting your second inquiry is as follows:

The five-mile zone surrounding the corporate limits of the City of Albuquerque partially overlaps the five-mile zone surrounding the corporate limits of Ranchos de Albuquerque, a community of some seven hundred inhabitants. Further, there are at least two presently licensed premises lying within the overlapping portion of the two five-mile zones. Your question then is whether these particular licenses, already charged against the City of Albuquerque in determining the maximum number of licenses for that municipality, must also be charged against the incorporated municipality of Ranchos de Albuquerque. If so, then the incorporated municipality of Ranchos de Albuquerque is not eligible for any license since there are at least two present licenses within the five-mile zone of this seven-hundred population municipality.

Section 46-5-24 (a), *supra*, sets forth the maximum number of licenses than can be issued in incorporated municipalities as "not more than one . . . license for each two thousand or major fraction thereof population in such municipality."

Standing alone, the above provision creates few difficulties. But this provision must be read in conjunction with Section 46-5-25, N.M.S.A., 1953 Compilation, which provides that:

"For the purposes of this Act (46-5-24, 46-5-25), all presently licensed locations or premises lying within five 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 . . ." (Emphasis added)

We pointed out in Opinion No. 5396 (1951) that this statute is anomalous in that it charges the licenses in the five-mile zone against the municipality, but that the population of the zone is not included in the formula to determine the maximum number of licenses that can be issued in the municipality. This has the effect of increasing the actual population figure per license in the municipality to above the 2000 figure. Again, in Opinion No. 61-41, dated May 19, 1961, this unusual working of the formula was mentioned.

Here we are faced with an even more unusual working of the formula. These two or more licenses in the overlapping portion of the two five-mile zones have already been charged against the City of Albuquerque. Yet in our view they must also be charged against Ranchos de Albuquerque since they also lie within five miles of its corporate limits. Section 46-5-25, *supra*. Not only does any other result appear to the contrary to

the statute, it also would be unworkable. The Chief of the Division of Liquor Control would not know which license or licenses should be charged against such municipality.

It is also significant to note the use of the words "any municipality" in Section 46-5-25, supra. In construing statutes the word "any" is equivalent to "every" and "all". **Branham v. Minear**, Tex., 199 S.W. 2d. 841; **Motor Cargo, Inc. v. Board of Trustees of Richfield Township**, Ohio, 117 N.E. 2d. 224. Substituting the word "every" for the word "any" in Section 46-5-25, supra, the conclusion becomes inescapable that presently licensed premises lying within five miles of the corporate limits of the two municipalities must be deemed as lying within each of the municipalities for purposes of determining the maximum number of licenses to be issued in each municipality.

If such a result is thought to be unfair, it is a matter for the legislative body to correct.

One further clarification of Section 46-5-25, supra, is deemed necessary. The use of the words "all **presently** licensed locations" means all locations licensed when, from time to time, the act is read and applied, not just all locations licensed when the statute was passed. **Larson v. American Title & Insurance Co.**, Fla., 52 So. 2d. 816. In other words, the statute speaks as of the time it is read and applied.

Your next inquiry relates to the method by which the population count is determined in an unincorporated area. It is necessary first to understand that in the context of the maximum license provisions (Section 46-5-24 (b), supra), a specific unincorporated community is not an unincorporated area as such. Actually, for the purposes of Section 46-5-24 (b), supra, the entire area in a county, other than that encompassed within the limits of incorporated municipalities in the county, is the unincorporated area. The conclusion becomes inescapable that the population count for the unincorporated area of that particular county. In determining the population count in the county's unincorporated area it is necessary to subtract the population of all the incorporated municipalities in the county from the **total** population in that county. The figure obtained is the population count for the unincorporated area in that county. No other construction is possible in view of the following language in Section 46-5-24 (b), supra:

"In unincorporated areas, not more than one . . . license for each two thousand or major fraction thereof population in any county excluding the population of incorporated municipalities within the county . . ."

The net result is that no specific unincorporated community in a county has any better right to a license than does any other unincorporated community in that county -- this regardless of the present geographic distribution of licenses in the unincorporated area. For example, let us assume that the total population in the county is 30,000 and that the total population in the incorporated municipalities of that county is 20,000. Thus, the unincorporated area in that county has 10,000 inhabitants. Consequently, five new licenses may be issued for the unincorporated area, and, subject to the limitation that none of these can be approved for locations situated within five miles of the corporate

limits of any municipality in the county, these five licenses could be approved by the Chief of Division of Liquor Control for any location in the county's unincorporated area.

Your final question relates to the definition of rural area as opposed to unincorporated area. Section 46-5-24 (c), supra, provides that:

"In rural areas new or additional licenses may be issued regardless of population if the proposed location or premises are not within ten miles of any existing licensed premises . . ."

From the standpoint of geography an area may be both rural and unincorporated. But from the aspect of limiting the number of licenses in accordance with Section 46-5-24, supra, this causes no difficulty. Paragraph (b) of this section bases the maximum number of licenses that may be issued in unincorporated areas on population, while paragraph (c) thereof bases the issuance of licenses in rural areas on distance. As a practical matter then, for purposes of administering Section 46-5-24, supra, a rural area is simply an area or location that is located ten miles or more from any existing licensed premises.

To summarize briefly, (1) an incorporated municipality of less than 1001 inhabitants is eligible for one liquor license so long as there is no licensed location within five miles of the corporate limits thereof, (2) where the five-mile zones surrounding two incorporated municipalities overlap, any licenses in this overlapping area must be charged against both municipalities in determining the maximum number of licenses that can be issued in each such municipality, (3) the population count in a county's unincorporated area is determined by subtracting the population of all incorporated municipalities in the county from the total county population, (4) for purposes of administering the limitation on the number of licenses that may be issued, a rural area is simply a location ten miles or more from an existing licensed location.