

Opinion No. 62-144

December 7, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Norman S Thayer, Assistant Attorney General

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

QUESTION

QUESTIONS

1. May the Chief of the Division of Liquor Control permit transfer of a liquor license:

(a) from a location within a municipality to a location within the 5 mile zone?

(b) from a location within the 5 mile zone to a location within the municipality?

2. If a liquor license is situated in an unincorporated area outside the 5 mile zone, but municipal limits are extended so that the license becomes located in the 5 mile zone, does the license become a municipal license that should be counted against the municipality's statutory quota?

CONCLUSIONS

1. (a) Yes.

(b) Yes.

2. Yes.

OPINION

ANALYSIS

In answer to your first question, the controlling statute is Section 46-5-24, N.M.S.A., 1953 Compilation which reads:

"The maximum number of licenses to be issued under the provisions of sections 46-5-2, 46-5-3 and 46-5-11, New Mexico Statutes Annotated, 1953 Compilation, shall be as follows:

(a) In incorporated municipalities, not more than one (1) dispenser's or one (1) retailer's or one (1) club licenses for each two thousand (2.000) 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 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, 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.

(c) 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, Provided that such new or additional license and any renewal thereof, issued in such rural areas, either before or after the effective date of Laws of 1957, chapter 159, section 1 (this section) shall not be transferred to any other location or premises within ten (10) miles of another licensed premises."

You will note that subsection (b) (2) above, though ungrammatical, expressly authorizes a transfer from a location within the municipality to a location within the 5 mile zone.

As to transfers from locations within the 5 mile zone to locations within the municipality, this office has consistently held that such transfers are within the power of the Chief of the Division of Liquor Control to permit. See Attorney General's Opinions No. 5396 (1951), 5649 (1953), 58-137 (1958), and 59-137 (1959). The latter two opinions were rendered after the effective date of the present Section 46-5-24, (with the exception of a 1959 amendment to the population figures). It has been our consistent opinion that the words "for locations or premises situate within five (5) miles of the corporate limits" refers only to transfers **to** a location within the 5 mile zone, and not to transfers **from** the five mile zone. This interpretation has been in effect for 11 years; liquor licensees and the Division of Liquor Control have governed themselves by it, and the legislature has not amended the statute to alter the interpretation. Accordingly, it remains our opinion that liquor licenses located within the 5 mile zone may be transferred to locations within the municipality.

Your second question does not involve either the issuance or transfer of a license. Because of an act outside the control of the Division, a county licensee suddenly finds that his license is located within the 5 mile zone surrounding a municipality. Our statutes do not deal with this situation. Apparently, in this situation, a county license becomes a 5 mile zone license by operation of law. Our statutes certainly do not provide for cancelling such a license or for limiting it in any way. As a legal and geographical fact, the license is now located within the 5 mile zone.

Section 46-5-25, N.M.S.A., reads 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."

Under the foregoing statute, it is apparent that the license in question must be counted against the quota of available licenses within the municipality. We realize that this might result in a total number of licenses that exceeds the statutory quota. In that event, we advise that all licenses remain valid, for there is no authority for cancelling a license in the situation you pose.