

Opinion No. 74-18

May 21, 1974

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Carlos L. Jaramillo Director Department of Alcoholic Beverage Control Lew Wallace Building Santa Fe, New Mexico 87501

QUESTIONS

FACTS

An applicant for a license to sell alcoholic liquors proposes to locate in a "shopping center" which is divided into numerous distinct shops sheltered under a common roof. While the "shopping center" structure is within 300 feet of a church or school, the portion of the structure in which the alcoholic liquor is proposed to be sold is beyond 300 feet of such church or school.

QUESTIONS

Should the distance between a church or school and the "location" of a license to sell alcoholic liquors be measured from the limits of the real property of the church or school and the nearest point of the structure in which the license is to be located or should the measurement be between the limits of the real property of the church or school and the portion of the structure in which the license is to be located?

CONCLUSION

See Analysis.

OPINION

{*35} ANALYSIS

Section 46-5-26, N.M.S.A., 1953 Comp. provides in pertinent part:

"No license for the sale of alcoholic liquors at a **location**. . . which is within three hundred feet of any church or school shall be granted by the division unless such application is accompanied by a resolution duly adopted by the municipal council or board of county commissioners approving of and consenting to the granting of a license to sell liquor at such location." (Emphasis added.)

The purpose for such a restriction on the permissible location of a premises licensed to sell alcoholic liquor is to protect the area occupied by a church or school, including its yards and grounds, from the inimical milieu commonly associated with establishments

selling alcoholic beverages. **State ex rel. Yung Sing v. Permenter**, 59 So.2d 773 (Fla. 1952); **Smith v. Ballas**, 335 Ill. App. 418, 82 N.E.2d 181 (1948); **Randolph v. Village of Turkey Creek**, 240 La. 996, 126 So.2d 341 (1961).

In explaining the rationale for a restriction {*36} similar to that specified in Section 46-5-26, **supra**, the court in **State ex rel. Yung Sing v. Permenter, supra**, stated:

"The purpose of legislation such as that under consideration herein is not simply to delay an errant communicant in carrying out a possible desire to leave the church and quickly arrive at a place where he might sip from the sparkling cup. Temptation is but one of the evils toward which this type of legislation is directed. The primary objective is to remove the atmosphere of an establishment wherein intoxicating beverages are sold a reasonable distance from a church . . . [or] school . . . because the milieu of such a place is considered inimical to the best interests and welfare of those who attend church . . . or . . . school . . ." **State ex rel. Yung Sing v. Permenter, supra, at 774.**

Accordingly, in order to serve the legislative purpose of protecting these institutions from such inimical influences, the point of measurement from a church or school in order to determine its proximity to a liquor establishment is usually held to be the outer boundary or property line within which the ordinary and usual activities incident to such institutions are conducted. **Smith v. Ballas, supra; Randolph v. Village of Turkey Creek, supra.**

While in the case of a church or school, it is the entire lot occupied by the institution which is sought to be protected from close proximity to a liquor establishment, in the case of the liquor establishment itself, it is only the building, structure or portion thereof in which alcoholic liquors are proposed to be sold which is the "location" whose proximity to the church or school is in question. **Harvey v. Schooley**, 152 Colo. 384, 382 P.2d 189 (1963); **Randolph v. Village of Turkey Creek, supra; Starks v. Presque Isle Circuit Judge**, 173 Mich. 464, 139 N.W. 29 (1912); **In re Macy**, 5 App. Div. 66, 38 N.Y.S. 903 (1896); **St. Thomas Church v. Board of Excise of City of New York**, 49 N.Y.S.R. 367, 20 N.Y.S. 831 (1892). As the court explained in **Randolph v. Village of Turkey Creek, supra** ;

". . . No possible reason occurs to us and none has been advanced such as exists in the case of a church, etc., to make the measurement from the property line or outer boundary of the land on which a building, structure or area selling alcoholic beverages is located merely because it is located thereon. Especially is this true when we consider, as in the case at bar, that there may be some appreciable distance intervening between the property line or outer boundary and the actual building, structure or area whereon the activity which is sought to be removed from the church, etc., is carried on. It is not necessarily true that the property line of the lot on which the building, structure or area selling alcoholic beverages is the location whose proximity is in question; rather, it is the building or structure where the alcoholic beverage is sold which is the location contemplated; whereas, in the case of a church or school the lot itself used by that institution is sought to be protected from proximity to the liquor establishment. The lot on which a building selling alcoholic beverages is located is not necessarily used in

connection with that activity, or, in other words, is not necessarily a portion of the 'premises to be licensed'." **Randolph v. Village of Turkey Creek, supra**, 126 So.2d at 349-350.

Thus the court held that the point of measurement from the "premises to be licensed" in order to determine its proximity to a church or school was the nearest point of the building, structure, area or, in the proper case, the portion thereof, in which alcoholic beverages were proposed to be sold. And see **Harvey v. Schooley, supra; Fleeman v. Vocelle**, 37 So. 2d 164 (Fla. 1948).

If the court's analysis in **Randolph v. Village of Turkey Creek, supra**, is applied to a structure or shopping center which includes numerous distinct shops unrelated to the activities of the liquor establishment {37} proposed to be located therein, it should be apparent that such distinct parts of the structure or shopping center should not be considered to be a portion of the "premises to be licensed." Rather, the "premises to be licensed" would be only that portion of the shopping center complex which is to be used in connection with the sale of alcoholic beverages. Thus the point of measurement from the "premises to be licensed" in order to determine its proximity to a church or school would be the nearest point of that portion of the structure or shopping center in which alcoholic beverages are proposed to be sold. Compare **Randolph v. Village of Turkey Creek, supra; In re Macy, supra; St. Thomas Church v. Board of Excise of City of New York, supra**.

Section 46-5-26, **supra**, does not, however, refer to a "premises to be licensed" as did the statute involved in **Randolph v. Village of Turkey Creek, supra**. Nevertheless, the language of Section 46-5-26, **supra**, does not suggest a different result than that reached in the **Randolph** case. Section 46-5-26, **supra**, prohibits the issuance of a license for the sale of intoxicating liquors at a "location" which is within the specified distance from a church or school. The term "location" must be accorded its ordinary and usual meaning. **State v. Marchiondo**, 85 N.M. 627, 515 P.2d 146 (Ct. App. 1973), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973); **Mwijage v. Kipkemei**, 85 N.M. 360, 512 P.2d 688 (Ct. App. 1973). The ordinary and usual meaning of the term "location" is "a position or site occupied or available for occupancy . . ." Webster's Third New International Dictionary (Unabridged). See **American Bank & Trust Co. v. Saxon**, 248 F. Supp. 324 (W.D. Mich. S.D. 1965). Thus, pursuant to Section 46-5-26, **supra**, just as in the **Randolph** case, it is only the position or site actually occupied or proposed to be occupied by a liquor establishment which is to be considered in calculating the proximity of the "Location" of such a facility to a church or school. Accordingly, the point of measurement from a "location" to be licensed, as in the case of a "premises" to be licensed, is the nearest point of the building, structure, area or, as in this case, the portion thereof, in which alcoholic beverages are actually to be sold.

In summary, in order to determine the proximity of a proposed liquor establishment to an established church or school, the measurement should be made between the limits of the real property of the church or school within which the ordinary and usual activities

incident to such institutions are conducted and that portion of the structure in which alcoholic beverages are actually to be sold.

By: Thomas L. Dunigan

Assistant Attorney General