

Opinion No. 75-32

May 22, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

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

QUESTIONS

QUESTIONS

If no physical structure exists at the proposed site for a liquor license application, would it be legally proper to grant a license to the applicant on a tentative or contingent basis and withhold the final approval for a maximum of 120 days after a physical structure exists?

CONCLUSION

No.

OPINION

{*95} ANALYSIS

A public officer, such as the Director of the Department of Alcoholic Beverage Control, who has the power to issue liquor {*96} licenses (Section 46-5-19, NMSA, 1953 Comp.), has no powers or duties to issue liquor licenses other than those created by statute, and the Director must administer licensing statutes according to their provisions. **Swift & Co. v. State Tax Comm'n**, 105 Ariz. 226, 462 P.2d 775 (1969); **Dal Roth Inc. v. Division of Alcoholic Beverage Control**, 28 N.J. Super. 246, 100 A.2d 507 (1953). There is presently no statute, ordinance or regulation allowing tentative or contingent granting of a liquor license or allowing the Director of the Department of Alcoholic Beverage Control to withhold final approval for a maximum of 120 days after a physical structure exists. The Director consequently cannot exceed his lawful authority by issuing tentative or contingent liquor licenses.

Section 46-5-16(C) establishes a legislative intent that liquor licenses may be issued for a site where no physical structure exists:

C. Before any license may be transferred to use at a new location, and before any new retailer's or dispenser's license is issued for a location where alcoholic liquors are not now being sold, the chief of division shall cause a notice of the application therefor to be posted conspicuously on a sign not smaller than thirty [30] inches by forty [40] inches on the outside of the front wall or front entrance of the immediate premises for which the

liquor license or transfer is sought or, **if no building or improvements exist on the premises**, the notice shall be posted at the front entrance of the immediate premises for which the license or transfer is sought, on a billboard not smaller than five [5] feet by five [5] feet. (Emphasis added.)

Section 46-6-1 provides for cancellation of a license if the holder fails to commence operation of his business in a commercial establishment within 120 days after the license is issued:

46-6-1. CANCELLATION OF LICENSE FOR FAILURE TO ENGAGE IN BUSINESS. --

A. Any license or renewal thereof hereinafter issued under the provisions of the Liquor Control Act shall be canceled if the holder thereof fails to commence operation of the licensed business **in a commercial establishment**, within one hundred twenty [120] days after the license is issued, and to continuously operate thereafter, during customary hours and days of operation for that type of business.

B. If after the one-hundred-twenty-day period specified in subsection A, the licensee ceases to operate the licensed business during customary hours and days for that type of business, for more than ten [10] days, he shall immediately notify the chief of division in writing of the cessation.

C. The chief of division may grant temporary suspensions in the operation of the licensed business upon receipt of the notice provided in subsection B of this section. No licensee, however, shall be granted a single temporary suspension in the operation of the licensed business for any period in excess of ninety [90] days, and no more than two [2] such ninety-day temporary suspensions in any one [1] license year. If a ninety-day suspension has been granted by the chief of division during the last ninety-day period of the license year, then suspension may be granted for the {^{*97}} first sixty [60] days of the new license year.

D. The license of any person failing to comply with any provision of this section shall be canceled. (Emphasis added.)

The provisions of this section are mandatory. Report of the Attorney General, 1967-68, Opinion No. 67-140. Consequently, the Director may issue a license for a location where no physical structure exists, but if the operation of the licensed business is not commenced in a commercial establishment within 120 days thereafter, the license must be cancelled. Actual operation must be commenced in the commercial establishment, but temporary suspensions may be granted after the commencement in accordance with Section 46-6-1.

By: F. Scott MacGillivray

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