

Opinion No. 75-68

December 5, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Carlos L. Jaramillo, Director Department of Alcoholic Beverage Control
Wallace Building Santa Fe, New Mexico 87503

QUESTIONS

FACTS

On October 18, 1971, the Director of the Department of Alcoholic Beverage Control approved a transfer of ownership and location for New Mexico Liquor Dispenser's license No. 1220 from Santa Cruz, Santa Fe County, New Mexico, to Lamy Junction, Santa Fe County, New Mexico. At that time both of these sites were outside a five mile buffer zone surrounding any incorporated municipality. In November of 1971 the Director approved an additional transfer of location from Lamy Junction, Santa Fe County, New Mexico to the Bobcat Bite Restaurant, Santa Fe County, New Mexico after complications prevented the licensee from leasing the proposed transfer location at Lamy Junction. Although the licensee represented in good faith to the Director that the Bobcat Bite was not within a five mile buffer zone of any incorporated municipality and although the Director approved the transfer believing the Bobcat Bite not to be within the five mile buffer zone of any incorporated municipality due to the licensee's representation and a New Mexico State Highway Department mileage sign so indicating, the Bobcat Bite was in fact within the five mile buffer zone of the incorporated municipality of Santa Fe, New Mexico at that time. The transfer was consequently prohibited under Section 46-5-24, NMSA, 1953 Comp. See **City of Santa Rosa v. Jaramillo**, 85 N.M. 747, 517 P.2d 69 (1974). The ownership of Dispenser's license No. 1220 was later transferred to a new partnership, and on January 17, 1974, the Director approved a transfer of location applied for by the partnership to a new site also within the five mile buffer zone. The second transfer application stated the then existing location of the license to be "4.6 miles Las Vegas Highway (Bobcat Bite), Santa Fe [County]." In early October, 1975 the Director first learned that the Bobcat Bite location was within the five mile buffer zone of Santa Fe, and on October 16, 1975 ordered the licensees to show cause why the November, 1971 transfer of location to the Bobcat Bite and subsequent transfer should not be cancelled and the license ordered to be transferred within Santa Fe County outside the five mile buffer zone of any incorporated municipality. The licensees have made substantial business investments at the present buffer zone location.

QUESTIONS

1. Is the Director equitably estopped by laches from cancelling the illegal transfers and ordering a relocation of the license outside the buffer zone?

2. Does Section 23-1-4, NMSA, 1953 Comp. bar the Director from cancelling the illegal transfers and ordering a relocation of the license outside the buffer zone?

CONCLUSIONS

1. No.

2. No.

OPINION

{*181} ANALYSIS

"The administrator granting a liquor license has inherent power to cancel the same upon a hearing if he finds from substantial evidence that the license was issued without legal authority or contrary to the express provisions of the statute prescribing and limiting the power in the manner of the issuance of such licenses. If this were not the rule the Chief of the Division of Liquor Control could issue licenses at will and promiscuously without regard to the statutes granting, governing and limiting his power in that regard. In view of the nature of the liquor business as it has heretofore been described by the various opinions of this court any practice of allowing the issuance of liquor licenses without regard to the statutes governing the issuance thereof might lead to intolerable danger and chaos. The Chief of the Division of Liquor Control having power to grant licenses under the provisions of the statute has likewise inherent power to cancel and revoke any license which he finds has been, for any reason, issued without authority or issued in conflict with the statutes governing and limiting the issuance thereof." **Baca v. Grisolano**, 57 N.M. 176, 256 P.2d 792 (1953).

We believe the same reasoning applies to the Director's power to cancel transfers of licenses made without authority or made in conflict with statutes governing and limiting transfers.

"The New Mexico Liquor Control Act is an exercise of the police power of the state, for the welfare, health, peace, temperance and safety of its people. * * *" **Floeck v. Bureau of Revenue**, 44 N.M. 194, 100 P.2d 225, 228 (1940).

In Chiordi v. Jernigan, 46 N.M. 396, 129 P.2d 640, 642 (1942) the Supreme Court held as follows: "The liquor control act is a police regulation and its purpose is, as stated therein, 'to protect the public health, safety and morals of every community in this State.' * * *" See also Section 46-5-1, NMSA, 1953 Comp.

The doctrine of laches cannot be raised against the Director because cancellation of an illegal transfer is an action to protect the public interest under the Liquor Control Act and cases noted above. The tardiness of public officers in performing a statutory duty cannot be entertained {*182} as a defense to an action by the state to enforce a public right or to protect the public interest which underlines the Liquor Control Act. See **Ross**

v. Daniel, 53 N.M. 70, 201 P.2d 993 (1949). See also Section 46-5-15(F), NMSA, 1953 Comp. (1975 Interim Supp.).

But assuming arguendo that laches may be asserted against the Director, it cannot be asserted under the facts and circumstances you have presented. An essential element of laches is a showing that the Director has invaded an actionable "right" of the licensee. **Morris v. Ross**, 58 N.M. 379, 271 P.2d 823 (1954). No such invasion has yet occurred. Assuming, however, that a cancellation of the transfers occurs, the privilege invaded will not be actionable because no appeal lies from the cancellation and because mandamus lies only to enforce a licensee's **clear legal right** and to compel the Director to perform a **clear legal duty** necessary to the enjoyment of that right. **Petroleum Club Inn Co. v. Franklin**, 72 N.M. 347, 383 P.2d 824 (1963). **City of Truth or Consequences v. State Department of Alcoholic Beverage Control**, 84 N.M. 589, 506 P.2d 333 (1973); **Crowe v. State ex rel. McCulloch**, 82 N.M. 296, 480 P.2d 691 (1971); **Taggader v. Montoya**, 54 N.M. 18, 212 P.2d 1049 (1949); **Laumbach v. San Miguel County Commission**, 60 N.M. 226, 290 P.2d 1067 (1956); see also Section 46-5-15 (F), **supra**. Neither the clear legal right nor the clear legal duty exist in this case to warrant mandamus. Thus, laches would not prohibit the Director from cancelling the transfers.

Another essential element for establishing laches here is unreasonable delay by the Director in cancelling the transfers after learning that the Bobcat Bite transfer was in fact illegal and after being afforded an opportunity to cancel. See **Morris v. Ross, supra**; **Locke v. Murdoch**, 20 N.M. 522, 151 P. 298 (1915). The illegality of the Bobcat Bite transfer was discovered in early October, 1975 by the Director and on October 16, 1975 he issued an order to show cause. Equitable importance attaches to the fact that the licensee represented facts of legality to the Director concerning the transfer and noted on the subsequent location transfer application that it was presently located within the buffer zone. **Baca v. Grisolano, supra**; **Bennett v. Anson Bank Trust Company**, 265 N.C. 148, 143 S.E.2d 312, 318 (1965). There was no unreasonable delay as necessary to establish laches. Finally, it is likewise an essential element of laches to establish lack of knowledge by or notice to the licensee that the Director would cancel the transfers if its illegality were discovered. See **Morris v. Ross, supra**. Liquor licensees are required to comply with and thus be familiar with the provisions of the Liquor Control Act. See Section 46-6-2 (A), NMSA, 1953 Comp. (1973 P.S.). The transfer was illegal at the time it was approved which imposed a mandatory cancellation duty on the Director. See Section 46-5-24 (b), **supra**, and **City of Santa Rosa v. Jaramillo, supra**. The licensee must be charged with knowledge and notice that the Director would cancel the transfer under these facts and circumstances. Consequently, the first question must be answered negatively for any of the reasons discussed above.

The statutory four year limitation period for "all other actions" provided in Section 23-1-4, **supra**, does not limit the Director's administrative duty to cancel the illegal transfer involved here because the proceeding is not an {"*183} "action" under the statute.

Latreille v. Michigan Board of Chiropractic Examiners, 357 Mich. 440, 98 N.W.2d 611 (1959). See also **Bonfils v. Public Utilities Commission**, 67 Colo. 563, 189 P.

775 (1920); **Hodge v. Hodge**, 191 Kan. 393, 381 P.2d 329 (1963). Consequently, there is no statutory limitation period covering a special proceeding by the Director to cancel an illegal transfer. See **Latreille v. Michigan Board of Chiropractic Examiners, supra**. In addition, statutes of limitation do not apply to the facts and circumstances considered here because sovereign state governmental authority is being exercised for the public interest. **In re Bogert's Will**, 64, N.M. 438, 329 P.2d 1023 (1958); **State v. Roy**, 41 N.M. 308, 68 P.2d 162 (1937); See also **Guaranty Trust Company of New York v. United States**, 304 U.S. 126 (1958); **U. S. v. 93 Court Corp.** 350 F.2d 386 (2nd Cir. 1965), cert. denied, 382 U.S. 984. Thus the second question must also be answered in the negative.

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