Opinion No. 79-03

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OPINION OF: Jeff Bingaman, Attorney General

BY: Arthur J. Waskey, Assistant Attorney General

TO: James Baca, Director, Department of Alcoholic Beverage Control, Lew Wallace Building, State Capitol, Santa Fe, New Mexico 87503

ALCOHOLIC BEVERAGES

Once a liquor license has been transferred from its original location within the five-mile zone of a municipality to another location within the same zone, if it also falls in the overlapping area of another municipality's five-mile zone, it may not thereafter be transferred to another location within the other five-mile zone.

QUESTIONS

May the transfer of a liquor license be approved from a location within the five mile zone of a municipality to a new location within the same zone when the new location or premises would in fact also fall within the overlapping five mile zone of another municipality?

CONCLUSIONS

See Analysis.

ANALYSIS

The transfer of a liquor license from one location within five miles of the corporate limits of a municipality (five mile zone) to a second location within the same zone is expressly authorized by Section 60-7-29.B(1) of the Liquor Control Act [Sections 7-17-1 through 7-17-11, 7-24-1 through 7-24-7 and 60-3-1 through 60-11-4 NMSA 1978], hereinafter, the Act. Such a transfer could, however, be questioned when the second location also falls within the five mile zone of another municipality and there is a subsequent attempt to transfer that license from the second overlap location to another location within the five mile zone of the other municipality. That procedure would essentially effect a transfer from the five mile zone of one municipality to the five mile zone of another.

In order to determine if such a procedure is valid, it is important to note that the purpose of the Act is "to restrain and not to promote" the issuance and use of liquor licenses in New Mexico. **State ex rel. Maloney v. Sierra,** 82 N.M. 125, 135, 477 P.2d 301 (1970). The quota provisions of the Act, Section 60-7-29, supra, are intended to limit the number of liquor licenses allowed in the state. See **DiGesu v. Weingardt,** 91 N.M. 441,

575 P.2d 950 (1978). Thus, the provisions of the Act applicable to this inquiry must be interpreted in a manner that restrains and limits license use.

The quota provisions create two separate ration systems for the granting of liquor licenses; one for incorporated municipalities and one for unincorporated areas outside corporate limits. Within this framework the legislature has also created five mile zones around incorporated municipalities. No new or additional licenses may be issued, or transfers of licenses approved, for use in these five mile zones, except that licenses already existing in the zone may be transferred *{*6}* to another location in the zone or from the municipality to the zone. Section 60-7-29, **supra.**

These five mile zones operate as buffers between incorporated municipalities and unincorporated areas for the purpose of maintaining the integrity of the municipal quota scheme. In creating these buffer zones, the legislature evidently determined that liquor licenses at locations close to, but outside, a city's limits could upset the city's quota system since city dwellers could easily travel short distances out of the city to patronize a liquor outlet. Thus, more liquor licenses than allowed under the quota system for cities would have access to city patronage. Thus legislative intent is evidenced by Section 60-7-30, **supra,** which provides, in part, that all presently licensed locations or premises lying within the five mile zone of a city shall be considered as lying within that city for purposes of determining that city's liquor license quota. Therefore, by not allowing the issuance or transfer of new licenses into a five mile zone, the legislature protected the quota system created for cities and also reinforced the overriding restraining philosophy of the Act.

Of the two exceptions to the prohibition against transfers of licenses in five mile zones, we are here concerned only with the exception that allows the transfer of a license already within the five mile zone to another location within the same zone. Section 60-7-29.B(1), **supra.** That exception, however, is not inconsistent with the purposes of the Act. A license existing within the five mile zone at the time of the zone's creation will be counted under the municipality's quota, and allowing the license to transfer within the zone will not affect or upset that quota in any manner. On the face of it, this exception would allow approval by the Director of the Department of Alcoholic Beverage Control of the transfer of a license from within a five mile zone to another location within the same zone even through it coincidentally overlapped the five mile zone of one or more other municipalities.

Nevertheless, under the statutory scheme of the Act, a transfer into an overlap area would not, thereafter, permit the license to be transferred to another location within the five mile zone of one of these other municipalities. In other words, a license cannot be "two-stepped" from one five mile zone to another by first transferring to an overlap area. To allow such movement of licenses between zones would completely circumvent the purpose of such zones as buffers between incorporated and unincorporated areas, and would destroy the integrity of the municipal liquor license quota system.

Additionally, because the transfer of a liquor license from one zone to another is not provided for in the Act, such a transfer would be beyond the power of the Director of the Department of Alcoholic Beverage Control to approve. **Baca v. Grisolano,** 57 N.M. 176, 185, 256 P.2d 792, 798 (1953). A similar transfer problem, involving Section 60-7-29 NMSA 1978, **supra,** was raised in **City of Santa Rosa v. Jaramillo,** 85 N.M. 747, 517 P.2d 69 (1974), where an attempt was made to transfer a liquor license from a location within the five mile zone to a location within the city limits. The Supreme Court found nothing in the language of the quota statute which either directly or indirectly allowed a license within the five mile zone to be transferred *{*7}* to a location within the municipality, and therefore held that the Director lacked the authority to approve such a transfer. The Court's reasoning in reaching that conclusion is equally applicable to the present question:

"The age-old Latin phrase **inclusio unius est exclusion alterius** is applicable here. It means the inclusion of one thing is the exclusion of the other. The legislature did not see fit to include it in the statute, therefore it is excluded. As stated in **State ex rel. Barela v. New Mexico State Bd. of Ed.,** 80 N.M. 220, 222, 453 P.2d 583, 585 (1969), 'We are not permitted to read into a statute language which is not there, particularly if it makes sense as written.'" 85 N.M. at 749-750.

Finally, a subsequent transfer of a liquor license from an overlap area to another location in a zone different from the zone where the license originated, would, in our opinion, be contrary to the provisions of Section 60-7-29.B, **supra,** which prohibit **new** or **additional** licenses to be issued or transfers approved for locations in the five mile zone of any municipality.

To summarize, it is our opinion that once a liquor license has been transferred from its original location within the five mile zone of a municipality to another location within the same zone, if it also falls in the overlapping area of another municipality's five mile zone, it may not thereafter be transferred to another location within the other five mile zone.

ATTORNEY GENERAL

Jeff Bingaman, Attorney General