

Opinion No. 80-23

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OPINION OF: Jeff Bingaman, Attorney General

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TO: Mr. James R. Baca, Director, Dept. of Alcoholic Beverage Control, Lew Wallace Building, Santa Fe, New Mexico 87503

ALCOHOLIC BEVERAGES

Local governments may not impose additional conditions when granting a waiver from the requirement that a licensed liquor establishment be no closer than three hundred feet from any church or school.

QUESTIONS

May a city council or board of county commissioners impose or enforce a limitation or restriction on the hours or mode of operation of a New Mexico liquor license as a condition to granting the licensee a waiver from the requirement contained in Section 60-7-31 NMSA 1978 that a licensed establishment be no closer than three hundred feet from any church or school?

CONCLUSIONS

No, but see analysis for conclusion affecting home rule municipalities.

ANALYSIS

The power to control the distribution, sale and consumption of alcoholic liquors is vested in the New Mexico Legislature. **Drink, Inc. v. Babcock**, 77 N.M. 277, 421 P.2d 798 (1966). In exercising its power, the legislature has enacted laws providing a uniform, comprehensive regulatory scheme governing those areas where the state's interest is preeminent. See, Liquor Control Act, Section 60-3-1 through 60-11-4 NMSA 1978; **Safeway Stores, Inc. v. City of Las Cruces**, 82 N.M. 499, 484 P.2d 341 (1971). The authority to enforce and administer the Liquor Control Act is vested in the Director of the Department of Alcoholic Beverage Control. Section 60-4-4 NMSA 1978.

OPINION

Nevertheless, notwithstanding the preemption by the state and the power vested in the Director, the legislature has delegated certain liquor law functions to local governing bodies. These include local option (Section 60-5-1 NMSA 1978), local approval of the issuance or transfer of liquor licenses (Section 60-7-20.1 NMSA 1978), the power to

regulate sales (Section 60-6-1 NMSA 1978), and the function at issue here, the waiver of distance requirements (Section 60-7-31 NMSA 1978). Although there is no present question concerning the propriety of the statutes delegating these functions to local governments, such statutes must be "strictly construed against any greater delegation of legislative power than clearly appears in the language used." **Stout v. City of Clovis**, 37 N.M. 30, 34, 16 P.2d 936 (1932).

Section 60-7-31 NMSA 1978, provides that:

"No license for the sale of alcoholic liquors at a location, where {**157*} alcoholic liquors are not already being sold, which is within 300 feet of any church or school shall be granted by the [Department of Alcoholic Beverage Control] 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."

This provision imposes a necessary condition on the Director's authority to issue liquor licenses where the licensed premises are less than 300 feet from a church or school. It does not, however, in granting the local governing body the power to approve or disapprove a license, authorize a non-home rule municipality or a county to regulate in any manner the operation of the license. As the Court stated in **Safeway Stores, Inc. v. City of Las Cruces**, 82 N.M. 499, 500, 484 P.2d 341 (1971), with respect to a prior law granting local approval of license transfers,

"There is nothing within the scope of the applicable statutory material which would indicate that the legislature intended to give local governing bodies discretion well beyond that exercised by the state liquor director or otherwise set forth as statutory guidelines. To give such interpretation to the section quoted by the defendants would result in an unmistakably ambiguous application of liquor law requirements, belying any legislative intent as to uniform, statewide regulation of the affected subject matter."

A county is a political subdivision of the state and possesses only such powers as are expressly granted by law or can be necessarily implied therefrom. **El Dorado at Santa Fe, Inc. v. Board of County Commissioners of Santa Fe County**, 89 N.M. 313, 551 P.2d 1360 (1976). Similarly, non-home rule municipalities exist only by virtue of statute and have only such power as are defined by law. **Sanchez v. City of Santa Fe**, 82 N.M. 322, 481 P.2d 401 (1971). Section 60-7-31 NMSA 1978 confers no express authority on local government to limit or restrict the operation of a licensee as a condition for approving the waiver of the distance requirement nor can such authority be inferred in view of the state's preemptive role in the regulation of liquor establishments.

The same analysis is applicable to Section 60-7-20.1 NMSA 1978, which grants power to local governments to approve or disapprove the issuance, transfer or reclassification of a license if:

"F. (1) the proposed location is within an area where the sale of alcoholic liquor is prohibited by the laws of the New Mexico;

(2) the issuance, transfer or reclassification would be in violation of a zoning or other ordinance of the governing body; or

(3) the issuance, transfer or reclassification would be detrimental to the public health, safety or morals of the residents of the political subdivision."

As with Section 60-7-31 NMSA 1978 concerning the distance waiver, this local approval statute contains no standards or policy statement regarding the restriction of privileges associated with a license before approval is granted. The express standards quoted are directed only to the approval or non-approval of a normal, full privileged license.

Therefore, Section 60-7-20.1 NMSA 1978 does not grant any power to impose the conditions {^{*158}} and restrictions at question here. See, **Stout v. City of Clovis, supra, Hernandez v. Frohmler**, 204 P.2d 854 (Az. 1949).

Further, the authority granted local governments under Section 60-6-1 NMSA 1978 to regulate the sale of alcoholic liquors "in any manner consistent with, but not inconsistent with" the Liquor Control Act, may not be extended to authorize local governments to grant a conditional waiver. In **Sprunk v. Ward**, 51 N.M. 403, 186 P.2d 382 (1947), the Court found that this provision of the Liquor Control Act did not permit the local governments to impose restrictions on licensees regarding the operation of a licensed business in areas where the legislature had already acted.

A home rule municipality, chartered pursuant to Article X, Section 6 of the New Mexico Constitution "may exercise all legislative powers and functions not expressly denied by general law or charter," and is therefore authorized to regulate the sale of alcoholic liquors by ordinance except where there is an "express statement" in a statute prohibiting such regulation. **Apodaca v. Wilson**, 86 N.M. 516, 525 P.2d 876 (1974). Section 60-6-1 NMSA 1978 contains an express statement prohibiting a municipality from adopting an ordinance to regulate the sale of alcoholic liquor which is inconsistent with the Liquor Control Act. Thus, for example, although a home rule municipality could not pass an ordinance expanding hours and days of liquor license operation, it may be authorized to enact an ordinance setting hours and days more restrictive than those set in the Liquor Control Act without being necessarily inconsistent with the general law. To that extent, a home rule municipality may impose conditions on the licensee when granting a waiver of the 300 foot rule.

We must be careful to point out, however, that as a general rule any ordinance passed by a municipality must have general and uniform application to all persons in a similar situation. See **Standard Oil Co. v. City of Charlottesville**, 42 F.2d 88 (1930). Considering the question posed here, any action taken by a home rule municipality to condition its consent to waive the distance requirement of Section 60-7-31 NMSA 1978, must have uniform application to all persons requesting the waiver and must contain

definable standards for the imposition of those conditions. **City of Santa Fe v. Gamble-Skogmo, Inc.**, 73 N.M. 410, 389 P.2d 13 (1964).

Should a licensee, in good faith, be willing to give up some rights in order to receive a waiver of the distance requirement, there is no authority under the Liquor Control Act for any person or agency to compel the licensee to abide by his voluntary relinquishment. The Director's powers are specifically prescribed and he cannot take action not provided for by statute. **Baca v. Grisolano**, 57 N.M. 176, 256 P.2d 792 (1953). Whether or not a municipality could enforce such a voluntary arrangement would depend upon whether failure to comply would be in violation of a valid municipal ordinance.

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