

## **Opinion No. 80-34**

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**OPINION OF:** Jeff Bingaman, Attorney General

**BY:** Arthur J. Waskey, Assistant Attorney General

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

### **ALCOHOLIC BEVERAGES**

Dispenser and retailer licensees may store alcoholic liquors away from their licensed premises. Multiple licensees may also store alcoholic liquors for their various licenses at a common location, provided it is purchased and stored under the privilege of each individual license for which it is intended.

### **QUESTIONS**

1. Is storage of alcoholic liquors by a dispenser or retailer licensee away from the licensed premises permissible under the Liquor Control Act, Sections 60-3-1 through 60-11-4 NMSA 1978?
2. May a licensee holding more than one dispenser and/or retailer license purchase all the alcoholic liquors needed by his multiple operations under the privilege of only one license, store them unsegregated in a common facility, and then distribute them from the common facility, as needed, to the different licensed operations?

### **CONCLUSIONS**

1. Yes.
2. No.

### **ANALYSIS**

1. One purpose of the Liquor Control Act [Act], Sections 60-3-1 through 60-11-1 NMSA 1978, is to sanction persons and places for the sale of alcoholic liquors, either by the drink, by a dispenser's license or in unbroken packages, by a retailer's license. Sections 60-7-2 and 60-7-3 NMSA 1978.

### **OPINION**

The sale of alcoholic liquors at an unlicensed premises by a retailer is expressly prohibited by Section 60-10-10 NMSA 1978. The sale of alcoholic liquors at an

unlicensed premise by a dispenser is expressly prohibited by Section 60-10-11 NMSA 1978, which provides that it shall be a violation of the Act,

"D. to sell, or possess for the purpose of sale, any alcoholic liquors at any location or place except his licensed premises. . . ."

It is apparently the phrase "possess for the purpose of sale" which gives rise to this question concerning off-premises storage of alcoholic liquors. However, in the context of the Act, that phrase may not be construed to prohibit the storage of alcoholic liquors at an unlicensed location.

First, the phrase is used throughout the Act in conjunction with "sell" and is intended to cover the situation where if there is no actual sale, there could be one. See, for example, Sections 60-3-1(P) and (Q) NMSA 1978, the definitions of dispenser and retailer.

{\*186} Second, insofar as the phrase is ambiguous and in need of construction, statutory enactments are to be construed in accord with common sense and reason. **State ex rel. Newsome v. Alarid**, 90 N.M. 790, 568 P.2d 1236 (1977). Although the phrase, out of context, could be literally interpreted to mean storage, that is neither reasonable or necessary. The legislature has expressed an intent to impose a limitation on the sale of alcoholic liquors. As legislative intent should prevail over a literal meaning of the terms, **Martinez v. Research Park, Inc.**, 75 N.M. 672, 410 P.2d 200 (1965) (overruled on other grounds), Section 60-10-11(D) NMSA 1978 need not be extended to include **storage** of alcoholic liquors. The language in Section 60-10-11 NMSA 1978, in accord with the purpose of the Act, only prohibits the establishment by dispenser licensees of outlets other than the designated premises for the sale of alcoholic liquors. When there is no intent or attempt to sell alcoholic liquors directly from an off-premises storage location, there is no offense.

Third, the phrase in Section 60-11-11 NMSA 1978, which might sustain the prohibition of off-premises storage by dispensers, is not repeated in relation to retailers. Since there is no reasonable explanation for treating differently the storage of alcoholic liquors by dispensers and retailers, a reasonable interpretation of Section 60-10-11 NMSA 1978 would not support a prohibition of off-premises storage by dispensers alone.

Finally, although the State has full power to regulate most aspects of commerce involving alcoholic liquors, see **Drink, Inc. v. Babcock**, 77 N.M. 277, 421 P.2d 798 (1966), off-premises storage itself presents no inherent evil which must be eliminated. In fact, similar storage is specifically allowed to non-resident licensees and wholesalers by Section 60-10-6 NMSA 1978, which states:

"Nothing in this act shall be construed to prohibit the storage of alcoholic liquors in **bona fide** public warehouses or guardian warehouses by non-resident licensees and wholesalers for usual and ordinary commercial purposes."

In summary, the Act does not expressly prohibit either a retailer licensee or a dispenser licensee from **storing** alcoholic liquors at a location away from the licensed premises nor can it be extended to impose such a prohibition. At the same time, because Section 60-10-6 NMSA 1978 does evidence some legislative intent with respect to the protection of stored alcoholic liquors, off-premises storage by dispensers and retailers should closely adhere to that intent. That is, off-premises storage should occur in **bona fide** public warehouses or guardian warehouses or at other storage facilities given prior approval by the Department of Alcoholic Beverage Control.

2. The situation defined in the second question differs from that defined in the first in that a person owning and operating more than one dispenser or retailer license purchases all the alcoholic liquors needed for his various operations under the privilege of only one license, stores them at a common location, and then transfers stocks of alcoholic liquors to all his licensed locations as needed. The issue here is whether the status of a person as a multiple licensee permits him to purchase alcoholic liquors from a wholesaler for all his licensed premises in a manner which reflects that they are being {\*187} purchased and resold by only one of the licensed premises. Although this arrangement is not specifically covered by the Liquor Control Act, Sections 60-10-10 and 60-10-11 NMSA 1978 of the Act prohibit retailer and dispenser licensees from buying or receiving alcoholic liquors for the purpose of resale from any person other than a licensed New Mexico wholesaler. Under these provisions, one retailer or dispenser licensee may not legally transfer alcoholic liquors for resale to another retailer or dispenser licensee. Similarly, a person operating under one retailer or dispenser license may not legally transfer alcoholic liquors for resale under another of his licenses. In addition, the Liquor Control Act deliberately separates the functions of licensees at the wholesale and retail levels, making it illegal for a person to operate as both a wholesaler and a retailer or dispenser. Sections 60-10-10(E) and 60-10-11(C) NMSA 1978.

The privilege of dispensing or retailing alcoholic liquors, as those terms are defined at Section 60-3-1 NMSA 1978, and the correlative obligations adhering thereto, are granted by license in each case to a person for a particular location. The person/place relationship is the critical factor in the liquor licensing structure. For example, the Act is generally directed at ensuring that no license is issued to improper persons or for improper places. Section 60-7-1 NMSA 1978. Special provisions of the Act set out requirements for transfers of location of licenses even though ownership continues in the same person. Section 60-7-18 NMSA 1978. The revocation provisions of the Act are exercised only against the particular licensed premises where a violation has allegedly occurred, even though the licensee may own other licenses. Section 60-8-6 NMSA 1978. Records of sales from wholesalers to individual retailers, dispensers or clubs must be kept for each license not for each license holder. Section 60-9-1 NMSA 1978.

Thus, the Liquor Control Act evidences clear legislative intent that the privileges, duties and prohibitions granted or imposed by the Act apply to each individual license issued by the Department of Alcoholic Beverage Control. It is not therefore the status of a person as a licensee that permits him to conduct the activities authorized by the Act.

Rather, it is the license granted to a person for a particular location that permits him to carry on an alcoholic liquors business at that location only. A person owning more than one license must still exercise the rights and observe the obligations granted by each license independently of each and every other license.

Accordingly, we conclude that purchases of alcoholic liquors by a multiple licensee under the privilege of one license, but intended for use at several licensed premises, is contrary to the intent of the legislature to distinguish the activities of wholesalers from those of retailers and dispensers and the intent of the legislature to keep the privileges, obligations, and prohibitions associated with each retailer or dispenser license singular and independent. The practice described in this question is not permitted under the Act.

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