

March 16, 2011 Advisory Letter---Election on Restaurant Licenses

J. Dee Dennis, Jr., Superintendent
Regulation and Licensing Department
Alcohol and Gaming Division
P.O. Box 25101
Santa Fe, NM 87504-5101

Re: Opinion Request – Election on Restaurant Licenses

Dear Mr. Dennis:

Your predecessor in office requested our advice regarding the procedures a local option district must follow to approve the issuance of restaurant licenses for the sale of beer and wine under the Liquor Control Act.[1] Specifically, we were asked:

1. May an election for restaurant licenses be held in conjunction with a primary, general, municipal or school election?
2. If so, does the election need to be conducted so that the votes from the various local option districts are separated to ensure that only the votes in the local option district affected are counted in the canvass of results?

As discussed below, we conclude that an election for restaurant licenses may not be held in conjunction with a primary, general, municipal or school election. Because we have answered the first question in the negative, it is not necessary for us to address the second question.

We understand that this issue stems from a question Rio Arriba County placed on the 2010 general election ballot asking voters whether they wished to approve the issuance of restaurant licenses in the unincorporated areas of the County. Rio Arriba County is a local option district, which the Liquor Control Act defines, in pertinent part, as “a county that has voted to approve the sale, serving or public consumption of alcoholic beverages....” NMSA 1978, § 60-3A-3(N) (2009). Restaurant licenses permit restaurants to sell beer and wine for consumption on their premises. *Id.* § 60-6A-4 (2003). According to the request, Rio Arriba County officials believe that a loophole exists in the language of the applicable statute that allowed them to place the question on the ballot on the day of a general election.

Under the Liquor Control Act, “a local option district may approve the issuance of restaurant licenses for the sale of beer and wine by holding an election on that question pursuant to the procedures set out in Section 60-5A-1 NMSA 1978.” NMSA 1978, § 60-6A-4 (2003). Elections held under Section 60-5A-1, including those for the issuance of restaurant licenses, are “called, conducted, counted and canvassed substantially in the manner provided by law for general elections....” NMSA 1978, § 60-5A-1(B) (1987). However, “no election held pursuant to [Section 60-5A-1] shall be held within forty-two

days of any primary, general, municipal or school district election.” Id. § 60-5A-1(F). If the election is held as a result of a petition by registered voters[2] and, “within sixty days of the verification of [the] petition ... a primary, general, municipal or school election is held, the governing body may call an election for a day not less than sixty days after the primary, general, municipal or school election.” Id.

Under the applicable rules of statutory construction, “the plain language of the statute [is] the primary indicator of legislative intent.” Wilson v. Denver, 1998 NMSC 16, ¶ 16, 125 N.M. 308, 314, 961 P.2d 153 (citations omitted). The words of a statute “are construed according to their ordinary meaning absent evidence of legislative intent to the contrary.” Id. The legislature’s intent is given effect by adopting an interpretation that “will not render the statute’s application absurd or unreasonable and will not lead to injustice or contradiction.” Reule Sun Corp. v. Valles, 2010 NMSC 4, ¶ 14, 147 N.M. 512, 516, 226 P.3d 611 (citations omitted). In addition to its language, a statutory provision is read “in reference to the statute as a whole ... so that all parts are given effect.” Id. at ¶ 15 (citations omitted).

The loophole Rio Arriba County purportedly relied on when it put the question of restaurant licenses before voters on the general election ballot is not obvious from the plain language of Section 60-5A-1(F). From your request, it appears that the County may have focused on the word “within” in the first sentence of the provision, which precludes elections “within forty-two days of any primary, general, municipal or school district election,” and is contending that the provision does not prohibit elections held on the actual day of a primary, general, municipal or school district election.[3] For several reasons, we disagree with the County’s interpretation and conclude that Section 60-5A-1 prohibits elections for the approval of restaurant licenses on the day of as well as within 42 days of a general election.

First, the Attorney General’s Office has consistently interpreted Section 60-5A-1 and its predecessors to bar local option and other elections covered by that provision from being held on the same day as a general election. In 1944, this Office reviewed a prior law governing local option elections, which provided that “[n]o election held hereunder shall be held within thirty (30) days of any general or city election.” N.M. Att’y Gen. Op. No. 4477 (1944). According to the opinion, the legislature’s “evident intention” was “to provide that local option elections should be held at a time different from the date fixed by law for general municipal elections, as well as general state elections.” See also N.M. Att’y Gen. Op. No. 81-9 (1981) (prohibition against holding an election under Section 60-5A-1 “within forty-two days of any primary, general, municipal or school district election” meant that such an election “could not be held with a municipal or school bond election, or with a bond election held in conjunction with the primary or general elections”); N.M. Att’y Gen. Advisory Letter to the Honorable Joseph Cervantes from Assistant Attorney General Elaine Lujan (Feb. 9, 2009) (same). The legislature has not reacted to the opinions by amending the statute or otherwise indicating that our interpretation is contrary to its purposes.

Second, we believe that the language of Section 60-5A-1(F) plainly shows the legislature's intent to preclude an election for the issuance of restaurant licenses on the day of a general election. The ordinary meaning of the word "within" includes "on the inside or on the inner side" and "not longer in time than: before the end or since the beginning of." Webster's Third New Internat'l Dictionary 2627 (1986 unabridged). See also The American Heritage Dictionary of the English Language 2051 (3rd ed. 1992) (defining "within" to include: "[i]nside the limits or extent of in time"). Applying these definitions in the context of Section 60-5A-1, we believe the day of a general election (or a primary, municipal or school district election) should be considered inside of or "within" the specified 42-day period. See also State v. Wertheimer, 781 N.W.2d 158, 163 (Minn. 2010) (determining that the ten-year period in a law penalizing a violation committed "within ten years" of a previous violation began on the day of the first violation).

Third, the legislative intent becomes more clear when Section 60-5A-1(F) is read in the context of the Liquor Control Act as a whole. Other provisions of the Act make it apparent that the legislature is capable of clearly stating its intention when it authorizes a local option district to hold an election on the same day as another election. Accordingly, in contrast to Section 60-5A-1(F), the Act allows elections on Christmas Day and Sunday sales of alcoholic beverages "in conjunction with a regular election of the governing body." NMSA 1978, § 60-7A-1(F), (I) (2002).

Lastly, an interpretation of Section 60-5A-1(F) allowing an election to issue restaurant licenses on the day of a general election would "render the statute's application absurd or unreasonable," contrary to the principles of statutory construction discussed above. We can conceive of no apparent, logical or reasonable rationale for prohibiting an election under Section 60-5A-1(F) for 42 days before or after a general election, but permitting it on the actual day of the general election. Consequently, we believe it unlikely that this interpretation is consistent with the legislature's intent.

If we may be of further assistance, please let us know. The request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

Elizabeth A. Glenn
Deputy Attorney General

[1] See letter from Kelly O'Donnell, Superintendent, Regulation and Licensing Department to Gary King, Attorney General (Nov. 9, 2010).

[2] An election for the issuance of restaurant licenses may be initiated by petition of registered qualified electors under Section 60-5A-1 of the Liquor Control Act or "may be

initiated by a resolution adopted by the governing body of the local option district without a petition ... having been submitted.” NMSA 1978, § 60-6A-4(A). See also N.M. Att’y Gen. Advisory Letter to the Honorable Joseph Cervantes from Assistant Attorney General Elaine Lujan (Feb. 9, 2009) (concluding that the sixty-day limitation on elections held as the result of a petition under Section 60-5A-1(F) does not apply to elections initiated by a resolution of the local option district’s governing body).

[3] We assume that the County is not relying on the second sentence of Section 60-5A-1(F), which requires an election resulting from a petition to be held on “a day not less than sixty days after the primary, general, municipal or school election” if the primary, general, municipal or school election occurs within 60 days of the petition’s verification (emphasis added). We believe this language unambiguously forecloses the County from holding an election that was initiated by a petition of registered voters on the same day as the general election.