Opinion No. 39-3180

June 20, 1939

BY: FILO M. SEDILLO, Attorney General

TO: Mr. S. T. Jernigan, Chief, Division of Liquor Control, Bureau of Revenue, Santa Fe, New Mexico.

*{*66}* This will acknowledge receipt of your letter dated June 10th requesting an interpretation of the word "establishment" as used in Section 1201, Chapter 236, Session Laws of 1939, the Liquor Control Act. You inquire in effect as to just where alcoholic liquors may be sold, etc., and whether alcoholic liquor may be served to persons sitting in cars, and in your letter you express an ardent desire to strictly enforce the law in order to forestall any unfavorable reaction that might be had in connection with curb service, etc.

This new Liquor Control Law presents an unusual problem in the matter about which you make inquiry. As you know, this new law repeals and supercedes the old 1937 Act (Chapter 130, Session Laws of 1937). The law of 1937 was plain and specific on this point. Section 1301 thereof provided as follows:

"Drinking in Public Places Prohibited. It shall be unlawful to drink or to use alcoholic liquors, or for any person who is owner or operator to sell, serve or furnish, or permit the drinking or use of any alcoholic liquors in any public dance hall, pool room, bowling alley, street or State or Federal Building, or in any other public place, excepting establishments having a license to dispense alcoholic liquor. **It shall also be unlawful for any establishment having a license to dispense alcoholic liquors, to give "Curb Service" or to serve or sell liquor in any manner outside of the building on the premises at which such business is operated, except to customers seated at tables."**

It will be noted that the 1937 Act in the underscored portions above quoted specifically prohibited "curb service," and specifically prohibited sales of alcoholic liquors outside of the "building" on the premises at which the business was operated.

The 1939 Legislature in restating the law, for some reason or other, specifically saw fit to re-write Section 1301 of the 1937 Act as Section 1201 of the 1939 Act and specifically re-wrote the law practically as it was in Section 1301 of the old Act except that there was omitted that portion of the 1937 Act above underscored, which specifically prohibited curb service and sales outside the building on the licensed premises.

In short, the 1939 Law now reads as follows:

"Drinking in Public Places Prohibited. It shall be unlawful to drink or consume alcoholic liquors, or for any person who is the owner or proprietor to sell, serve, furnish or permit the drinking or consumption of alcoholic liquors in any public dance hall, pool room, bowling alley, street, State or Federal Building, or in any other public place *{*67}* except establishments having a license to dispense alcoholic liquors."

It will be noted that the underscored portion found in the 1937 Act was expressly omitted and the law now reads as it read originally under the 1935 Act. See Section 1201, Chapter 112, Session Laws of 1935.

Why the Legislature saw fit to strike from Section 1201 of the 1939 Act that portion of the 1937 Act prohibiting curb service and sales outside of the building, I do not know and it is not for this office to pass on the wisdom thereof. However, under every rule of statutory construction whenever a legislative act specifically prohibits a certain conduct, and a subsequent legislature comes along and re-writes the Act and expressly and deliberately strikes from the new law the prohibition found in the old law, the courts universally hold, or at least presume, that this means that the subsequent legislature did not approve of the prior prohibition and by striking it from the new law the conclusion is unescapable that the legislature must have wanted to either sanction the practice which prior thereto was prohibited, or at least change to some extent the original meaning of the law.

This rule of law was aptly stated by our own Supreme Court speaking through Justice Bratton in the case of Wright vs. Closson, 29 N.M. 546, Justice Bratton, speaking for the Court, said:

"A Legislature is presumed to know the language used in former legislation, as well as the construction placed thereon, and, when a subsequent act embodies different phraseology from that found in the former act, courts must presume that a departure from the old law was intended. A change of language in a material respect is always held to show an intent on the part of the Legislature to change the meaning of the law."

Obviously, therefore, we start out with the underlying idea that the 1939 Legislature must have intended a departure from the old law on this point. The question remaining is as to the extent of the departure intended.

Certainly, curb service in the sense of serving patrons while seated in automobiles parked on the curb of any street is still prohibited for the reason that Section 1201 of the 1939 Act still specifically prohibits the drinking, consuming, selling, serving, etc., of alcoholic liquor on any street. The same section of the Act also prohibits the consumption, sale, serving, etc., of alcoholic liquors in any other public place except "establishment" having a license to dispense alcoholic liquors.

The answer to your inquiry may only be found in connection with the meaning of the word "establishment" as used in Section 1201 of the new Act.

As already stated above, the 1939 Act in this respect reads the same as the 1935 Act and, for your information, may I say that under the 1935 Act this office ruled that it was not necessary to have a partition between the bar or restaurant and a space reserved for dancing. See Attorney General's Opinion No. 1181 dated September 28, 1935. See also Attorney General's Opinion No. 1595 dated April 13, 1937, construing the 1937 Act.

From the foregoing, all I may safely say to you is that under the present law sales and service of alcoholic liquors on streets are prohibited, and to that extent curb service is prohibited, that is to say, sale or service to patrons sitting in parked automobiles on any street is prohibited.

Furthermore, I may safely say that this office has, under the 1935 Act, ruled, as already stated, that space reserved for dancing and tables in connection with a liquor dispensing unit is a part of the licensed "establishment."

What is or is not a part of an "establishment' within the meaning of the Act is difficult of ascertainment, and only on specific fact situations could we attempt to rule definitely.

However, since the Act does not itself define an "establishment," and since the Act does in Section 301 vest the Bureau, Division, and Chief of the Division, with the powers enumerated in the Act and "with such additional powers as may be necessary to effectuate the same," and since the Act does in Section 302 authorize you as Chief of the Division to establish and promulgate rules and regulations, any we say, that this matter may perhaps be worked out and taken care of by reasonable rules and regulations adopted by you and mailed to your licensees at least ten *{*68}* days prior to the effective date of such rules and regulations as you may see fit to adopt.

In other words, in the absence of a statutory definition it strikes me that you may be able to elaborate on the word "establishment," and by rule and regulation reasonably specify what shall constitute an "establishment" within the meaning of Section 1201 of the Act.

Of course, your definition of the word must be reasonable and not arbitrary, discriminatory, or palpably contrary to the Act or the intention of the Legislature therein expressed.

For your information and guidance, the courts have defined an establishment as hereinafter set out.

The Georgia Court in the case of Trustee Academy of Richmond County vs. Bohler, 80 Ga. 159 S.E. 633, defined the word "establishment" as follows:

"The place in which one is permanently fixed for residence or business; residence with grounds, furniture, equipage, etc., with which one is fitted out; also, any office or place of business with its fixtures."

The Colorado Court in the case of Routt County Development Company vs. Johnson, 54 Colo. 272, 130 Pac. 1076, defined the word "establishment" as follows:

"One meaning of this word is the place of business, including grounds, furniture, equipage, etc., with which one is fitted out; also, that which serves for the carrying on of a business."

The Missouri Court in the case of Lilly vs. Eberharbt, Mo. 37 S.W. 2d 599, held as follows:

"The word 'establishment' as ordinarily used means a permanent place where business is conducted."

Trusting that the foregoing will be of some information to you, I am,

By: FRED J. FEDERICI,

Asst. Atty. Gen.