

## Opinion No. 51-5396

August 7, 1951

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** Mr. Chester A. Hunker Legal Department Bureau of Revenue Santa Fe, New Mexico

{\*88} This is in reply to your letter of June 13 asking my opinion relative to the effect of HB 129, now Chap. 30, Laws of 1951, relating to limitations on the issuance of liquor licenses.

Basically, this statute is a negative one setting up certain provisions in relation to the issuance of new liquor licenses and the transfer of licenses in some cases. In order to reach a satisfactory, workable answer as to what the effect of the statute is, I believe that our approach should be to determine affirmatively just what the Chief of the Liquor Control Division can do under this new law.

Sec. 1(a) of the Act sets up a basic rule for licenses within municipalities by limiting them to one retailer, dispenser or club license for each 1500 population, based on population as last determined by the Bureau of the Census.

Sec. 2 of the Act provides that all presently licensed locations or premises within the area reaching five miles beyond the corporate limits of any municipality shall be deemed as lying within the municipality in determining the maximum number of licenses to be issued in said municipality.

Sec. 1(b) of the Act provides for the application of the 1500 population per license standard to the unincorporated rural area of each county. The population is to be based on the Federal census figure for each county with the population of the incorporated municipality excluded in calculating the true population of the unincorporated area. By the implications of Sec. 1(b), the number of presently licensed locations on premises within the 5-mile strip surrounding any incorporated municipality is excluded from the unincorporated area of the county for the purpose of determining the number of licenses, but by this Sec. 1(b) is included for determining the population of the county area. This same statutory section also permits the population formula to be ignored altogether when any proposed license location is more than ten miles from any other existing licensed location in the unincorporated rural area.

The treatment of the 5-mile area surrounding the incorporated municipalities is anomalous in that it has the effect of increasing the true population figure per license in the municipalities and reducing the population figure per license in the rural areas outside the 5-mile strip. The 5-mile strip, usually the most heavily populated portion of a rural area, is included for determining population of the rural area. However, the number of liquor licenses in that 5-mile strip is excluded from the total figure for the rural area in

determining the number to be allowed. In the {\*89} municipalities, the reverse is true. The licenses in the 5-mile strip are included but the population of the strip excluded in the formula to determine the limit on licenses to be issued.

The second sentence of Sec. 1(b) says: "Provided further, no new or additional license shall be issued in unincorporated areas or transfers approved for locations or premises situate within five miles of the corporate limits of any municipality." This sentence, in my opinion, explicitly prohibits the issuance of any new license or any transfer of a license into or within the 5-mile strip surrounding an incorporated municipality.

In interpreting a statute such as this one, which is negative in form, establishing definite prohibitions and limitations of the power of an administrative agency or officer, the pre-existing powers and duties of the agency or officer not taken away or controverted must be considered to remain in force. The Chief of the Division has had, under existing law, broad discretionary power to approve license transfers and this new act specifically controverts that power only with respect to the 5-mile strip surrounding any incorporated municipality.

The power of the Chief of the Division of Liquor Control to transfer licenses is unchanged or uncontroverted by this Act except as to transfers within the 5-mile strip surrounding incorporated municipalities. No other language in the measure indicates an intent to curtail the existing power of the Chief of the Division of Liquor Control other than as to the issuance of new licenses.

In 50 C. J. 958, under 'Construction of Statutes', it is stated that:

"The Court cannot attribute to the Legislature an intent which is not in any way expressed in the statute."

From the foregoing, I must necessarily conclude that the affirmative duties of the Chief of the Division of Liquor Control under the license limitation statute are:

1. He may issue a new retailer, dispenser, or club license within an incorporated municipality, when the population of the municipality, based on a Federal census, indicates that there is less than one retailer, dispenser or club license within an area extending up to five miles beyond the corporate limits of the municipality for each 1500 population or major fraction thereof.

2. He may issue a license within the unincorporated area of a county exclusive of the 5-mile area surrounding an incorporated municipality;

- (a) When the license is to be issued for a location not within ten miles of an existing location;

- (b) When the Federal census shows that there is less than one retailer, dispenser or club license for each 1500 population or major fraction thereof. The population figure in

this instance must be determined by taking the Federal census figure for the whole county and subtracting the total figure for all unincorporated municipalities of the county from the total census figure, with the difference being the population of the unincorporated area.

3. His power to transfer a license is limited only with respect to the transfer of a retailer, dispenser or club license into or within the unincorporated 5-mile strip surrounding any incorporated municipality.

Specifically answering the questions that you raised:

1. The new act does not prevent the transfer of locations with respect to existing licenses within a municipality.

2. The new act does not prevent {\*90} the transfer of locations of existing licenses within a county subject to the prohibition against the transfer for locations or premises situate within five miles of the corporate limits of any municipality.

3. Under the new act it is possible to transfer an existing license from a municipality to a point in the county, subject to the prohibition against transfer for location or premises situate within the five miles of the corporate limits of any municipality.

While you have not raised the question, I deem it advisable to inform you that the legislative directive prohibiting the issuance of new and additional licenses or transfer for locations or premises situate within five miles of the corporate limits of any municipality is, in my opinion, so unreasonable as to create serious doubt as to the constitutionality of this particular provision. Moreover, there appear to be other aspects of the act that can be challenged as being unreasonable. It is, therefore, my thought that court action to determine the constitutionality of Chapter 30 of the Laws of 1951 should be sought as quickly as possible.