Opinion No. 58-24

January 31, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Assistant Attorney General

TO: Mr. Charles A. Feezer, Assistant District Attorney, Carlsbad, New Mexico

QUESTION

QUESTION

May a board of County Commissioners, acting under the authority of § 46-4-3, establish liquor license tax zones, wherein are provided different rates for the same class of licenses issued by the Division of Liquor Control?

CONCLUSION

No.

OPINION

ANALYSIS

From the information furnished with the inquiry here considered, it appears that the board of County Commissioners of Eddy County adopted the following resolution, the provisions of which are presently being relied on for the collection of county liquor license taxes:

" **RESOLUTION**

NOW, THEREFORE, BE IT RESOLVED by the Board of County Commissioners of Eddy County, State of New Mexico, that the following ZONES and LICENSE FEES for liquor licenses for operating outside of municipalities in the County of Eddy, State of New Mexico shall be in effect from the 1st day of July, 1953 to the 30th day of June, 1954.

FIRST ZONE: All territory within a distance of ten miles from the limits of any incorporated city, town or village in Eddy County within this area, shall be the same as the license fee charged by the city, town or village within this area, to wit: Dispenser's License, Retailer's License and Club License within ten miles of Artesia shall be $ 1,500.00, and Dispenser's License, Retailer's License and Club License within ten miles of Carlsbad shall be $ 2,000.00.

SECOND ZONE: Any part of Eddy County situated more than ten miles from the limits of any incorporated city, town or village: Dispenser's License, Retailer's License and Club License, $ 750.00.

THIRD ZONE: Any part of Eddy County situated within the limits of a National Park where the license is required to comply with the rules of the National Park Service in selling liquors: Dispenser's License, Retailer's License and Club License shall be $ 500.00.

BE IT FURTHER RESOLVED that the liquor license for the Riverside Country Club at Carlsbad and the Country Club at Artesia and the American Legion Clubs be set at $ 250.00 per year."

In responding to the above question it immediately becomes apparent that some understanding is required concerning the history of present alcoholic beverage privileges in New Mexico, with particular attention given local regulatory authority. In **Sprunk v. Ward,** 51 N.M. 403, 186 P. 2d 382, the Court was confronted with the proposition that municipalities, by resolution duly enacted, could effect a limitation on the number of licenses permitted to operate locally; in this case, within the municipal limits of Silver City. By way of denying the aforesaid proposition the Court pointed out that under the first liquor control act, Chapter 159, Laws of 1933, adopted following repeal of federal prohibition, local licensing authority was vested in the several Boards of County Commissioners and City Councils, subject to final approval by the then existing State Board of Liquor Control. The superseding act of 1935, Chapter 112, provided in part:

"In addition to retailer's dispenser's and club's licenses herein required to be secured from and provided to be issued by the State Board of Liquor Control, municipal corporations within local option districts are hereby vested with power and authority to provide by ordinance for the **full and complete regulation of the sale by retailer's, dispenser's and club's of alcoholic liquors, with full power and authority to prescribe the terms under which such licenses may be issued, the amounts of license fees to be paid to such municipalities by each class of licensee, . . ."** (Emphasis added)

and as the Court further points out:

"Somewhat similar powers are conferred by the act on Boards of County Commissioners in respect of retail licenses to operate in counties where local option prevailed, outside the corporate limits of towns and cities. See L. 1935, c. 112, § 1003."

The Act of 1937, Chapter 130, placed liquor control under the Bureau of Revenue, but continued local regulatory and licensing authority in the county, city or town, on as broad a plane as had been known under the earlier acts.

Again in 1939, the liquor code was revised, Chapter 236, and there were brought forth the provisions on which the Court's determination must be made. Specifically there was provided by Section 1102; this section appearing unchanged today as § 46-4-1:

"Any municipality which has, or any municipality within any county which has adopted the local option provisions of this act, or of chapter 159, Laws of 1933, or of chapter 112, Laws of 1937, shall have the power by ordinance duly adopted, to regulate the sale of alcoholic liquors by retailers, dispensers and clubs within the limits of such municipality **in any manner consistent with, but not inconsistent with, the provisions of this act;** and the board of county commissioners of any county which has adopted the local option provisions of this act or of chapter 159, Laws of 1933, or of chapter 112, Laws of 1935, or of chapter 130, Laws of 1937, by resolution duly adopted and published in a newspaper of general circulation in the county, shall have the power to regulate the sale of alcoholic liquors by retailers, dispensers and clubs in any manner consistent with, and not inconsistent with, the provisions of this act, in such counties outside of the limits of the municipalities situated in such counties." (Emphasis supplied)

Also enacted were § 1103 (46-4-2) and § 1104 (46-4-3), the latter providing:

"The boards of county commissioners of counties composing local option districts are hereby empowered, by resolution duly adopted, on or before the first day of June of each year to impose an annual, nonprohibitive license tax upon the privileges of persons holding state licenses under the provisions of this act to operate within such counties (outside of the municipalities contemplated by section 1102 (46-4-1) hereof as retailers, dispensers or clubs. The amount of such license tax and the dates and manner of the payment thereof shall be fixed by the resolution imposing the same: Provided, that in case such county permits the payment thereof in installments, no bond shall be required to secure the payment of the deferred installments, but that the remedy for the collection thereof shall be that provided in section 1105 (46-4-4) of this act."

And of final consideration here the Fourteenth Legislature also declared the public policy in New Mexico regarding sales of alcoholic liquors by Section 301 (46-5-1) as follows:

"It is hereby declared to be the policy of this act that the sale of all alcoholic liquors in the state of New Mexico shall be licensed, regulated and controlled so as to protect the public health, safety and morals of every community in this state; and it is hereby made the responsibility of the chief of division to investigate into the legal qualifications of all applicants for licenses under this act, and to investigate into the conditions existing in the community wherein are located the premises for which any license is sought, before such license is issued, to the end that licenses shall not be issued to unqualified or disqualified persons or for prohibited places or locations."

The Court in disposing of the case in favor of the Appellee pointedly states the following regarding "home rule" in the control and regulation of liquor:

"Not only does the 1939 act fail to confer "full and complete" powers of regulation, as did the previous acts, but it omits granting authority to towns and cities "to prescribe the terms" under which retail licenses shall be issued. Indeed, it makes no specific provision for exacting licenses by municipalities at all, although authorizing them "to impose an annual, nonprohibitive municipal license tax upon the privilege of persons holding state licenses to operate within such municipalities as retailers, dispensers or clubs." As said in Brackman's Inc., v. City of Huntington, infra: "The distinction may not be important but it exists."

"(2) We are forced to conclude that the ordinance relied upon by defendants as defeating power in the Chief of Division of Liquor Control to grant the license in question is ineffective for such purpose under L. 1939, c. 236, as amended by L. 1941, c. 80, § 1. The wisdom of the policy which would take from municipalities and counties in the state the element of home rule so long associated with control of the liquor traffic is not ours to determine. Wide diversity of opinion on the subject prevails. The legislature alone possesses power to fix the policy. It has done so in unmistakable language to which we must give effect in interpreting the same. We are supported in the conclusion reached by the courts of several sister states where like questions have been presented and determined under liquor control acts much like our own. Brackman's Inc., v. City of Huntington, 126 W. Va. 21, 27 S. E. 2d 71, 76; Singer v. Scarborough, 155 Fla. 357, 20 So. 2d 126; City of Miami v. Kichinko, 156 Fla. 128, 22 So. 2d 627; Stephens v. City of Great Falls, Mont., 175 P. 2d 408; Spisak v. Village of Solon 68 Ohio App. 290, 39 N.E. 2d 531."

Considering further the question instantly put, in light of the resolution stated, we find that within ten miles of the Carlsbad city limits a zone is established in which all three provided for classes of licensees, to wit, dispenser, retail and club, shall be charged a flat amount fee of $ 2000.00 and similarly, if located near other communities within the county a $ 1500.00 license fee shall prevail. Immediately, however, our attention is called to the final paragraph of the resolution which provides a smaller fee specifically for "Riverside Country Club at Carlsbad", the "Country Club at Artesia" and the American Legion Clubs"; these license fees being stated as $ 250.00 each. This specific situation was earlier questioned and response made thereto in Attorney General's Opinion No. 5899. We are in full agreement with that opinion wherein it was pointed out that:

"It is clear from the reading of the two sections that different type licenses are recognized within the state and § 61-403 indicates that a different tax may be imposed against each of these types of licenses. That is to say, that a license tax against a retailer may be prohibitive against a dispenser or vice versa. We believe that the Board of County Commissioners may fix a license tax in varying amounts by resolution against any one of the designated types of licenses, **but no individual license holder may be exempted or have his license reduced as such a provision, say a country club or Elks Lodge, would be discriminatory against members of the same class and would be unconstitutional."** (Emphasis supplied)

Under existing provisions of the state liquor code three consumer liquor licenses are provided; dispensers (§ 46-5-2), retailers (§ 46-5-3) and club (§ 46-1-1 and § 46-5-11). In keeping with § 46-5-18, each of the aforesaid licenses is subjected to the same state license fee; $ 25.00 annually with application for renewal. The privileges afforded each of these licenses are generally provided in § 46-1-1, § 46-5-2, § 46-5-3. § 46-5-11, § 46-10-9, § 46-10-10, § 46-10-12, § 46-10-14 and 46-10-16. In keeping with **Sprunk v.** Ward, supra, neither the Board of County Commissioners nor City Councils have authority to enlarge or restrict the privileges provided. Similarly, we find no authority vested in County Commissions to treat one licensee within a given statutory classification differently from another within the same classification.

In Board of Council or Harrodsburg v. Renfro, 22 Ky. 806, 58 S. W. 795, the Kentucky Court held:

"The sole question presented for our consideration is the validity of the provision of the ordinance fixing the license fee at $ 900 when the business is to be conducted on Main Street, when at the same time the license fee for the same business conducted elsewhere than on Main Street is only $ 600. The ordinance in question was passed under authority of subsection 27, § 3490, Ky. St. (charter of cities of the fourth class). That subsection permits a division into three classes of license fees to sell spirituous liquors, viz.: By retail, to be drunk on the premises, or the ordinary saloon; the retail druggist, for medical purposes; and to sell in not less than a quart. There is no provision in that subsection, or indeed, in the entire act, that authorizes the council to discriminate in License fees according to locality or street, or number of the house on the street. . . The whole spirit of the constitution is that all laws shall be uniform within the limit of the lawmaking power, and especially that all taxation shall be equal and uniform within the territorial limits of the authority levying the tax. The state legislature is prohibited from enacting local and special legislation. It cannot be that the council of one of our cities can enact local or special legislation to apply to a part of the territory, or to a special person within the limits of such city. All persons are guaranteed the equal protection of the laws, and no grant of exclusive privileges can be made to any person, except in consideration of public services."

And also, in the case of **Howland v. State of Florida Ex Rel.,** John Zieklebach, et al., 47 So. 963, the Florida Court stated:

"The power to impose this discriminating license tax or permit must come, if at all, from certain general powers conferred by the legislature upon the city of Pensacola. There is no specific legislative authority to charge different amounts of licenses for the same kind of occupation or businesses to be conducted in different portions of the city. These general grants are "to pass, for the government of the city, any ordinance not in conflict with the Constitution of the United States, the Constitution of Florida, and statutes thereof; . . . to regulate and restrain all tippling, barrooms, and all places where beer, wines or spirituous liquors of any kind is sold at retail, or to be drunk on the premises . . . Licenses shall be fixed at not exceeding 50 per cent of the state licenses fixed by the legislature, except for purposes of restraint."

Accordingly, it is our opinion that the Board of County Commissioners of Eddy County is without authority to establish liquor license taxing zones, wherein different fees are provided for county licenses and further that the Board is without authority to fix different license tax rates for licensees holding the same class of licenses as issued by the State Bureau of Revenue, Division of Liquor Control.

This opinion specifically does not contemplate response to any question relative to maximum tax rates and is limited in answer to the inquiry made.

Enclosed herewith, please find a copy of Attorney General's Opinion No. 5899, as requested.