

Opinion No. 66-69

June 1, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Joel M. Carson, Assistant Attorney General

TO: Mr. Joe A. Armijo, Director, Liquor Control Division, Bureau of Revenue, State of New Mexico, Santa Fe, New Mexico

QUESTION

FACTS

A county liquor license in Bernalillo County was transferred to a location which was said to be approximately six miles east of the city limits of Albuquerque. The liquor license is now found to be within the five mile zone of Albuquerque at a location which is 4.8 miles from the city limits. There has been no annexation by the city which would have brought this license within the five mile zone.

QUESTIONS

1. Is the present location, being 4.8 miles from the city limits, valid?
2. If it is a valid location, may the liquor license be moved closer to the city, within the five mile zone?
3. If the location is ruled invalid, may the license remain at its present location or must it be made to move to a point over the five (5) mile zone?

CONCLUSIONS

1. No.
2. No.
3. See Analysis.

OPINION

{*85} ANALYSIS

From your letter we understand that prior to approving the transfer of this license to the point which is now 4.8 miles from the city limits the Liquor Control Division requested a better description of the location, but that this information was never produced. Based upon the information which had been submitted the County Commissioners and the

Chief of Division approved the transfer of location. While the local governing body and the Chief of Division are not to be commended on the procedures that were followed, we cannot see from the facts submitted in your letter that any of the parties to the transaction acted in bad faith or with actual knowledge that the new location of the license was within the five mile zone. Nevertheless, the transfer of the license to this location was contrary to law and void.

N.M.S.A. 46-5-24(B) provides:

The maximum number of licenses {*86} to be issued under the provisions of Sections 46-5-2, 46-5-3, and 46-5-11, New Mexico Statutes Annotated, 1953 Compilation, shall be as follows:

(B) In unincorporated areas, not more than one [1] dispenser's or one [1] retailer's or one [1] club license for each two thousand [2,000] or major fraction thereof population in any county excluding the population of incorporated municipalities within the county, Provided no new or additional licenses shall be issued in unincorporated areas **or transfers approved for locations or premises situate within five [5] miles of the corporate limits of any municipality, except that transfer of a license already within the five [5] mile zone may be made :**

(1) to another location within the zone; and

(2) from the municipality to a location within the zone. (Emphasis supplied)

It is thus apparent that the transfer of the license into the five mile zone was improper and not in accordance with the Liquor Control Act. Once we have determined that the transfer of the license into the five mile zone could not have been permitted had the Chief of Division and the local governing body known the actual location of the license, we must then determine whether the Chief of Division and the local governing body in approving the transfer of the license can thereby validate what would otherwise be an illegal transfer.

The leading case in the area of the law with which we are here dealing is **Baca v. Grisolano**, 57 N.M. 176, 256 P.2d 792 (1953) which we feel disposes of all three questions presented. In 1950 the Chief of the Liquor Division issued a liquor license in San Juan County. On January 1, 1951, this liquor director was replaced by the appellant in this case, Elfego Baca. Baca cancelled the license on the ground that the appellee (Grisolano) and his predecessor had not followed the statute in issuing the license. The Supreme Court reversed the lower Court, and upheld Baca's action in cancelling the license. The Court said:

The Chief of Liquor Control, an administrative officer, has only such powers as are granted by the legislature. His powers are specifically described and limited, and he is specifically prohibited from granting liquor licenses and has no power to do so until he had performed certain acts made mandatory by the statute. . . . It matters not what the

reason or occasion for his failure to carry out and perform the mandatory provisions of the statute before granting the liquor license. The fact that he violated the law and failed to carry out its express and mandatory provisions is the essential factor in this case. The cause of this failure is not material -- whether it was due to fraud, collusion, or honest mistake.

The Court then went on to say that the failure of appellant's (Baca's) predecessor to follow the statute rendered the issuance of the license void and that the appellant had therefore been correct in revoking the license. **Baca v. Grisolano** , supra, at page 189.

It thus follows that if the act of your predecessor in allowing the transfer of this license to within the five mile zone was contrary to law and void, that the license cannot be valid at its present location. The location where the license should be operated is at the point where it was located prior to the illegal transfer. Thus, the license cannot be moved to another point within the five mile zone. The answer to your second question is no.

As we have already pointed out, the transfer of the license into the five mile zone was contrary to the statute, and in accordance with the holding of **Baca v. Grisolano**, supra, a nullity. We do not believe that the action of your predecessor is such that you are required to cancel the license. However, since the original transfer was invalid, you should require the licensee to operate the license at the old location outside the five mile zone.