Opinion No. 59-37

April 21, 1959

BY: FRANK B. ZINN, Attorney General

TO: Honorable Earl Hartley State Senator Clovis, New Mexico

A "dry" municipality may adopt and enforce an ordinance prohibiting maintenance of bar and liquor storage facilities after June 12, 1959.

OPINION

*{*56}* This is written in reply to your recent request for an opinion on the following question:

May a municipality, which has not adopted the provisions of local option or, as is more commonly stated, voted the *{*57}* area "dry", adopt and enforce an ordinance which prohibits private clubs from maintaining bar and liquor storage facilities?

It is my opinion that municipalities, which are located in "dry" counties or, as the case may be, which have separately failed to adopt the provisions of local option, may enforce validity adopted ordinances which prohibit private clubs and similar type associations from maintaining bar and liquor storage facilities.

As a matter of fundamental law governing the analysis of this opinion, Section 14-25-1, N.M.S.A., 1953 Compilation, provides in part that:

"Municipal corporations shall have power to make and publish, from time to time, ordinances not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by law, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporation and the inhabitants thereof, . . ."

With reference to this law, our Supreme Court held in City of Clovis v. Dendy, 35 N.M. 347, 297 P. 141, that the municipality had sufficient power on the subject of prohibiting the sale of intoxicating liquors. The Court went on to point out that such authority was ". . . in accord with the state constitutional prohibition amendment and prohibitory statutes," and "would seem to leave no doubt that the ordinance was properly intended for the general welfare.

This writer well appreciates that a distinction exists between the bases for the holding in the Dendy case and the facts giving rise to the question being instantly considered. In the Dendy case the Court was confronted with the fact of a sale or sales and the underlying law found to support the ordinance was the general prohibition applicable to

the entire state. A comparable situation, however, exists in connection with the matter presently being considered.

The basic policy relative to control over trafficking in intoxicating liquors in this state is provided in Section 46-5-1, N.M.S.A., 1953 Compilation:

"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."

There is also provided by the liquor code, Section 46-3-1, N.M.S.A., 1953 Compilation, that, "Any county . . ., or any city containing over five thousand (5,000) population, . . . may adopt local option in said county or city . . ." A failure to adopt the provisions of this section effects a "dry" status of the county or municipality as the case may be.

And by Section 46-10-11, N.M.S.A., 1953 Compilation (P.P.):

"It shall be unlawful to drink or consume alcoholic liquors, or for any person who is the owner or proprietor to . . ., serve, furnish or permit the drinking or consumption of alcoholic liquors . . . in any other public place except establishments *{*58}* having a license to dispense alcoholic liquors. . . . Provided, further, that in any county where the sale of alcoholic liquor is otherwise prohibited by law it shall be unlawful for any person who is the owner or proprietor to . . ., serve, furnish or permit the drinking or consumption of alcoholic liquors in any club operated for profit . . ."

As this last quoted section presently stands, it might well be argued that the prohibition against serving, furnishing or permitting the drinking or consumption of alcoholic liquors ran only against establishments operated legally or actually for profit. And relying on this construction, it must be logically concluded that an ordinance which prohibits all clubs and premises from maintaining bar and liquor storage and service facilities would be unenforceable by reason of not being supported by a sufficient legislative or constitutional authority.

There is, however, a need to go further in the present analysis by reason of recently approved legislation which decidedly changes and clarifies the existing law.

Firstly, by Chapter 38, Laws of 1959, it is provided in part that:

"Section 1. PUBLIC NUISANCE -- ANY PLACE WHERE STATE LIQUOR LAWS ARE VIOLATED. -- Any room, building, structure, or place of any kind and all property contained therein used for the illegal purpose of sale, manufacture, storage, possession

or consumption of alcoholic liquors in violation of local option law in those districts which have elected to bar the sale of alcoholic liquors is declared to be a public nuisance."

Secondly, Chapter 39, Laws of 1959, repealed the proviso of Section 46-10-11 as earlier quoted, which restricted the prohibition of sales, service and permitting the consumption of alcoholic liquors on any but those licensed by the division of liquor control.

With reference to these last two laws, it must finally be concluded that an ordinance prohibiting the maintenance of bar liquor storage facilities in "dry" municipalities will be valid and enforceable on and after June 12, 1959, the effective date of these new enactments.

Hilton A. Dickson, Jr.