

OPINION NO. 70-095

Syllabus:

1. "Population" for purposes of Section 4303.29, Revised Code, is to be determined by relevant and competent evidence.
2. Preliminary or advanced census figures published under the authority of 13 U.S.C.A. Section 7, constitute relevant and competent evidence.
3. Each application for permit stands on its own and the availability of quota opening for such permit is to be determined by relevant and competent evidence.
4. A quota opening must exist, as determined by relevant and competent evidence, at the time a permit is issued.

To: Donald D. Cook, Director, Dept. of Liquor Control, Columbus, Ohio
By: Paul W. Brown, Attorney General, July 28, 1970

I have before me your request for my opinion on the following questions:

"1. Does the Director of Liquor Control have a legal obligation to issue on and after July 1, 1970 new permits on which there is a presently existing and available opening based upon the estimated population figures certified to us by the Ohio Department of Development, until release of the advanced federal census figures, or until release of the final census figures?

"2. Does the Director of Liquor Control have a legal obligation to issue new permits based upon the preliminary federal census figures released to this department on June 30, 1970?

"3. Does the Director of Liquor Control have a legal obligation to withhold processing of all new applications on and after July 1, 1970 with a currently available opening under the present quota system, and to await receipt of the advanced official federal census figures?

"4. Does the Director of Liquor Control have a legal obligation to withhold processing of all new applications on and after July 1, 1970 with a currently available opening under the present quota

system, and to await receipt of the final official federal census figures? It is estimated that the advanced federal census figures will be released in September 1970. The release date of the final official census figures is unknown.

"5. Does the Director of Liquor Control have a legal obligation to add to the quota of available openings as it exists on June 30, 1970, those additional openings which will result on and after July 1, 1970 as they occur from:

- (a) failure to renew an existing permit;
- (b) cancellation of an existing permit;
- (c) revocation of an existing permit;

or must this department wait until we receive (1) preliminary, or (2) advanced or (3) final federal census figures until we may add onto the quota those additional openings created by (a), (b), and (c)?

"6. What action should the Director of Liquor Control take upon applications currently in process when there is an existing opening now, but on which the opening may be taken away by a decrease in population due to release of (a) preliminary (b) advanced figures, and (c) final figures?"

Section 4303.29, Revised Code, establishes the quotas for the various permits. It is significant that the quotas established are in reference to a magnitude of "population" without specifying how the "population" is to be determined.

There is a dearth of Ohio case law as to the General Assembly's intent with respect to the method of determining "population" pursuant to Section 4303.29, supra. Indeed, there is but one reported decision to be found. In Toth v. Board of Liquor Control, 38 Ohio Op. 422 (1948), the Franklin County Common Pleas Court held, in part, as follows:

"The statute does not provide for the taking of a special census as do some statutes of a similar nature, nor does it make the last federal or any other census conclusive upon the question of population as do other statutes. * * * Undoubtedly the federal census is prima facie evidence of the population it discloses, and it, or any other census, might by statute be made conclusive upon the subject. But in the absence of any statutory declaration to that effect, no existing census can be held conclusive when the fact is challenged, as in this case. We find from the record in this case that the applicant introduced evidence which shows conclusively that the population of the City of Akron for the year

1947 to be substantially in excess of 280,000, but that said Board of Liquor Control did not offer any evidence to controvert that fact, having relied upon the federal census of 1940. The federal census is taken once every ten years. Hence a very good reason existed why the Legislature did not make the federal census the test of population. * * * In conclusion, the court holds that where the Legislature fails to provide, as in Section 6064-17, General Code [predecessor to Section 4303.29, supra], a specific census or other method of enumeration, population may be proved by relevant and competent evidence as any other fact, and that the record in this case shows conclusively that the quota for Akron was not filled."

It is apparent, from the foregoing, that "population" for purposes of Section 4303.29, supra, is to be proved by relevant and competent evidence and that federal census data may or may not constitute such relevant evidence, depending upon whether or not such data is controverted by other valid evidence. This decision is consistent with other state decisions on similar matters. See, for example, Application for Catering Club Liquor License by Noonday Club, 38 Del. Co. 92 (1950, Pa.).

It does seem clear that the federal census, if uncontroverted by relevant evidence, is conclusive and, indeed, it has been held that state courts will take judicial notice of the official, final census figures. People v. Wong Wang, 92 Cal. 277 (1891); Worcester National Bank v. Cheney, 94 Ill. 432 (1880). Uncontroverted final census figures would, therefore, constitute good evidence of "population" for purposes of Section 4303.29, supra.

Your questions, of course, are primarily concerned with federal census figures which are released prior to the publication of the final census figures. The approach and rationale, however, remains the same. While the issue has never been specifically decided by Ohio courts, it is noteworthy that provision does exist, under federal law, for the publication of preliminary census figures. (13 U.S.C.A. Section 7.) Numerous cases in other states have held that such preliminary publications are entitled to be admitted in evidence, notwithstanding the possibility of correction or change upon publication of the final census figures. Holcomb v. Spikes (Tex. Civ. App.) 232 S.W. 891 (1921); Herndon v. Excise Board of Garfield County, 147 Okl. 126 (1931), and other cases cited at 43 A.L.R. 2d 1361, Section 5.

In Application for Catering Club Liquor License by Noonday Club, supra, the court specifically held that under a statute establishing a quota for retail licenses based on population, but not prescribing how the population was to be determined, the Pennsylvania Liquor Control Board erred in refusing to issue a club license upon the single ground that the quota for retail licenses, as shown by the 1940 census, was

already exceeded, where the official preliminary census figures showed that the quota was not exceeded. The court held that the number of inhabitants in a municipality or political subdivision was a fact; that there was no logical reason why such a fact should not be proved by any competent and sufficient evidence; and that there was no statute or decision directing that the population must be established by a particular kind of evidence for the purpose of fixing the quota of liquor licenses.

In view of the Toth decision, supra, I conclude that Ohio courts would respond in like manner if the issue was presented to them. Therefore, it is my opinion, and you are so advised:

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