

N.D.A.G. Letter to Reichert (May 17, 1990)

May 17, 1990

Mr. Ronald A. Reichert
Medora City Attorney
P.O. Drawer K
Dickinson, ND 58602-8305

RE: N.D.C.C. § 5-02-05.1

Dear Mr. Reichert:

Thank you for your May 8, 1990, letter in which you have presented several questions concerning the application of N.D.C.C. § 5-02-05.1 which authorizes the issuance of a special Sunday event alcoholic beverage permit.

You have stated that a Medora bar owner has requested the issuance of a permit to allow his bar to remain open for all Sundays during the summertime season. You have inquired as to the standards to be used by the city of Medora to determine what kind of Sunday event is entitled to the permit, whether the permit may be issued absent some designation of a special Sunday event, and if the decision of the city to grant a permit is final on that issue.

Subject to the specific restrictions set forth in N.D.C.C. § 5-02-05.1, a city has broad authority in the granting or denying of special event alcoholic beverage permits. These restrictions include the type of alcoholic beverage establishment which would be permitted to receive a special event permit for a Sunday opening. N.D.C.C. § 5-02-05.1(1) limits the issuance of a permit other than to a publicly owned or operated facility serving as headquarters for a state, multistate, or national event of a bona fide organization, to private clubs, lodges, restaurants, motels, or hotels. That section provides, in part:

1. Any city or county may issue a special Sunday event alcoholic beverage permit to a private club, lodge, restaurant, motel, or hotel, as defined under city ordinances or county resolutions and licensed as a retail alcoholic beverage establishment under chapter 5-02;

A city may not issue a special Sunday event alcoholic beverage permit to a "bar". A "bar" is not an establishment authorized by the North Dakota Legislative Assembly to engage in Sunday business under N.D.C.C. § 5-02-05.1. A city has been granted authority by the Legislative Assembly to issue such a permit only to a private club, lodge, restaurant, motel, or hotel "as defined under city ordinances." If the alcoholic beverage establishment is not defined by city ordinances and determined by the governing board to be a private club, lodge, restaurant, motel, or hotel, that establishment may not receive the permit.

If the alcoholic beverage establishment is qualified to receive a permit under N.D.C.C. § 5-02-05.1(1), the governing board must then determine that a special Sunday event will be occurring. Had the legislature intended to permit unrestricted opening of liquor establishments on Sunday, it could clearly have done so by enacting appropriate legislation. The Legislative Assembly, in the most recent amendments of N.D.C.C. § 5-02-05.1, has broadened the application of this section but has expressed a clear intent that a permit will be issued only for a special Sunday event.

Once the governing board has determined that a "special Sunday event" is present, the board must then determine whether the event is "primarily local in nature." N.D.C.C. § 5-02-05.1(4) provides:

4. The special Sunday event alcoholic beverage permit may not be granted to allow the distribution of alcoholic beverages at gatherings or meetings which, in the opinion of the governing body of the city or county, are primarily local in nature.

If the governing board determines that the event is primarily local in nature, no special event permit may be issued.

The determination as to whether an event is "primarily local in nature" is within the sole authority of the governing board. I have enclosed with this letter a copy of 1989 N.D. Op. Att'y. Gen. 13 to Senator John Olson dated August 21, 1989, which presented a similar question.

Once the governing board has determined that the applicant for the permit is authorized to engage in business on the Sunday, that a special Sunday event will be occurring, and that the event is not primarily local in nature, the board then has the sole authority to issue the special permit to the applicant.

Any permit issued will only be effective, however, for one Sunday. N.D.C.C. § 5-02-05.1(2) provides:

2. The authority for issuing such special permit rests solely with the governing body of the city or county. A special permit may be granted only upon proper application to and approval by the governing body, and must include payment of a fee determined by the governing body. A special permit granted by the city or county is effective for one Sunday only.

Based upon the express language of this section, a permit may not be issued which encompasses more than one Sunday. Rather, separate permits must be issued for each individual Sunday on which a special event which is not primarily local in nature will occur. Each permit would then require action by the governing board to make the determinations required by N.D.C.C. § 5-02-05.1. In addition, the individual permits would permit the governing board to impose such conditions as the board may deem necessary.

If the board decides to issue the special Sunday event permit, you have also inquired as to whether or not that decision of the board is final. As I have previously stated, the sole authority to issue the permit and to determine whether an event is primarily local in nature is with the governing board. However, this decision of the governing board may be subject to the same proceedings or review as other similar actions. If allegations are made that the decision was beyond the authority granted to it by the Legislative Assembly or the jurisdiction of the governing board, it is possible that a citizen-initiated legal action could be filed to contest the board's actions. See, e.g. Danzl v. City of Bismarck, 451 N.W.2d 127 (N.D. 1990) (action by individual to enjoin city from taking action). Cities are agencies of the state and have only powers expressly conferred upon them by the legislature or such powers as may be necessarily implied from powers expressly granted. Dakota Land Co. v. City of Fargo, 224 N.W.2d 810 (N.D. 1974). Actions in excess of the express or implied powers of a city may be subject to judicial review through an appropriate legal proceeding. In addition, although not contesting the specific permit issuance, city ordinances authorizing or denying such special event permits may also be subject to the initiative and referendum process as authorized by N.D.C.C. ch. 40-12.

Your final inquiry pertains to the standards to be followed by a governing board in determining whether an activity is a "special event" or whether that event is "primarily local in nature." I am unable to provide to you standards to guide the governing board in its decision. The governing board is granted the sole authority to issue the permit and to determine whether an event is a "special Sunday event" or if it is "primarily local in nature." Further refinement of the standards to be applied by a governing board must come from the legislature. At this time, the legislature has placed the burden upon the governing boards to determine the applicability of N.D.C.C. § 5-02-05.1 to the special Sunday permit application and applicant. Assuming that an applicant is qualified to obtain a permit under N.D.C.C. § 5-02-05.1(1), the board possesses considerable discretion and authority in the issuance or denial of these permits.

I am sorry that I could not provide more guidance to you and the city of Medora but I hope that I have given you some assistance in resolving the issues presented in this permit process.

Sincerely,

Nicholas J. Spaeth

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Enclosure