

N.D.A.G. Letter to Lee (Dec. 26, 1991)

December 26, 1991

Mr. Robert N. Lee
City Attorney
PO Box B
Cavalier, ND 58220

Dear Mr. Lee:

Thank you for your December 11, 1991, letter in which you have inquired whether a special Sunday alcoholic beverage permit must be restricted to "on sale" purchases or may cover "off sale" purchases as well.

N.D.C.C. § 5-02-05.1 authorizes a city or county to issue a special Sunday alcoholic beverage permit to a publicly owned or operated facility or to a private club, lodge, restaurant, motel, or hotel licensed as a retail alcoholic beverage establishment. Unlike N.D.C.C. § 5-02-05.2, which authorizes the issuance of a Sunday beer and wine permit to certain "on sale" alcoholic beverage licensees, N.D.C.C. § 5-02-05.1 does not limit the special Sunday alcoholic beverage permit issued under that section to only "on sale" licensees.

However, as you are aware, an alcoholic beverage licensee must meet the requirements of N.D.C.C. § 5-02-05.1 to qualify for a Sunday alcoholic beverage permit. Unless the applicant is a publicly owned or operated facility, the applicant for the permit must be a private club, lodge, restaurant, motel, or hotel licensed as a retail alcoholic beverage establishment.

The 1991 Legislative Assembly defined "restaurant" as a commercial establishment that meets three requirements. It must have a retail alcoholic beverage license and a city, county, or state restaurant license. The third requirement can be met in either of two ways. Either the applicant must pay the appropriate city food and lodging taxes for a continuous six month period before application for the permit or the applicant must derive 50 percent or more of its annual gross receipts from the sale of prepared meals and not alcoholic beverages. The food and lodging tax referred to in N.D.C.C. § 5-02-05.1 is the tax authorized by N.D.C.C. § 40-57.3-01.1.

If a retail alcoholic beverage licensee does not meet the requirements of N.D.C.C. § 5-02-05.1, that licensee cannot obtain a special Sunday alcoholic beverage permit regardless of whether that licensee engages in "on sale" or a combination of "on sale" and "off sale" alcoholic beverage sales.

It is therefore my opinion that a special Sunday alcoholic beverage permit may be issued for either "on sale" or "off sale" purchase of alcoholic beverages under N.D.C.C.

§ 5-02-05.1. Although N.D.C.C. § 5-02-05.1 does not limit the special Sunday alcoholic beverage permit to only "on sale" dispensing or purchases of alcoholic beverages as does N.D.C.C. § 5-02-05.2, the local governing body may restrict permits issued under N.D.C.C. § 5-02-05.1 to only "on sale" purposes under the governing body's general authority to regulate the licensing and use of alcoholic beverages. See, N.D.C.C. §§ 5-02-09 and 40-05-01(29).

I hope that I have adequately responded to your inquiry.

Sincerely,

Nicholas J. Spaeth

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