

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 93-F-18

Date issued: October 28, 1993

Requested by: Timothy A. Priebe, Dickinson City Attorney

- QUESTIONS PRESENTED -

I.

Whether a city that has not adopted a home rule charter has the authority, pursuant to N.D.C.C. ? 40-57.3-01.1, to require all liquor licensees to pay the lodging and restaurant tax.

II.

Whether a city that has adopted a home rule charter containing the powers listed in N.D.C.C. ? 40-05.1-06, may require all liquor licensees, including off-sale liquor establishments, to pay the lodging and restaurant tax.

III.

Whether the city of Dickinson, pursuant to its home rule charter, may require all liquor licensees, including off-sale liquor establishments, to pay the lodging and restaurant tax, without approval of the electors.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that a city that has not adopted a home rule charter does not have the authority, pursuant to N.D.C.C. ? 40-57.3-01.1, to require all liquor licensees to pay the lodging and restaurant tax.

II.

It is my further opinion that a city that has adopted a home rule charter containing the powers listed in N.D.C.C. ? 40-05.1-06, may require all liquor licensees, including off-sale liquor establishments, to pay the lodging and restaurant tax, if such authority is properly implemented through an ordinance.

III.

It is my further opinion that whether the City of Dickinson, pursuant to its home rule charter, may require all liquor licensees, including off-sale liquor establishments, to pay the lodging and restaurant tax, without approval of the electors, is a question which relies on the interpretation of the city charter, does not involve state law, and does not have statewide significance and, therefore, I will refrain from issuing an opinion on this matter.

- ANALYSES -

I.

N.D.C.C. ? 40-57.3-01.1 provides, in part:

**40-57.3-01.1. City lodging and restaurant tax -
Imposition - Amount - Disposition - Referral. . . .**

[T]he governing body of any city may, by ordinance, impose a city tax, at a rate not to exceed one percent, upon the gross receipts of retailers on the leasing or renting of hotel, motel, or tourist court accommodations within the city for periods of less than thirty consecutive calendar days or one month and upon the gross receipts of a restaurant from any sales of prepared food or beverages, not including alcoholic beverages for consumption off the premises where purchased, which are subject to state sales taxes. For purposes of this section, "restaurant" means any place where food is prepared and intended for individual portion service for consumption on or off the premises and "prepared" includes heating prepackaged food. . . .

(Emphasis added.) This statute authorizes the city to require, by ordinance, only certain restaurants to pay the lodging and restaurant tax. It may impose the tax on any restaurant that meets the definition of a restaurant in N.D.C.C. ? 40-57.3-01.1, by applying the tax to the restaurant's gross receipts "from any sales of prepared food or beverages, not including alcoholic beverages for consumption off the premises where purchased, which are subject to state sales taxes." N.D.C.C. ? 40-57.3-01.1. "[R]estaurant" means any place where food is prepared and

intended for individual portion service for consumption on or off the premises" N.D.C.C. ? 40-57.3-01.1.

To determine whether a particular liquor licensee can be required to pay the lodging and restaurant tax pursuant to N.D.C.C. ? 40-57.3-01.1, it must first be determined whether the liquor licensee meets the definition of a restaurant in N.D.C.C. ? 40-57.3-01.1. If the liquor licensee meets the definition of a restaurant, then the liquor licensee can be required to pay the lodging and restaurant tax. Thus, the city may apply the tax to the liquor licensees' gross receipts from any sale of prepared food or beverages, not including alcoholic beverages for consumption off the premises.

Those liquor licensees that do not fall under the definition of a restaurant in N.D.C.C. ? 40-57.3-01.1 may choose to pay the tax to be eligible to receive a Sunday alcoholic beverage permit pursuant to N.D.C.C. ? 5-02-05.1 if authorized by the local governing board. Letter from Attorney General Heidi Heitkamp to Charles Whitman (June 25, 1993). Thus, a city may apply the tax to the liquor licensee's gross receipts described in N.D.C.C. ? 40-57.3-01.1 if the liquor licensee wishes to be eligible for a Sunday permit.

In conclusion, it is my opinion that a city that has not adopted a home rule charter does not have the authority, pursuant to N.D.C.C. ? 40-57.3-01.1, to require all liquor licensees to pay the lodging and restaurant tax. Only those liquor licensees meeting the definition of a restaurant in N.D.C.C. ? 40-57.3-01.1 can be required to pay the tax and the tax may be applied to only those gross receipts described in N.D.C.C. ? 40-57.3-01.1.

II.

A home rule city may, if included in the charter and implemented through an ordinance "levy and collect taxes . . . for its public and proprietary functions, activities, operations, undertakings, and improvements." N.D.C.C. ? 40-05.1-06(2). A home rule city may also, if included in the charter and implemented through an ordinance, "impose . . . sales and use taxes in addition to any other taxes imposed by law." N.D.C.C. ? 40-05.1-06(16).

If the foregoing language from subsections 2 and 16 of

N.D.C.C. ? 40-05.1-06 is included in the charter and the tax is properly implemented through an ordinance, a home rule city may require liquor licensees, even those that do not meet the definition of a restaurant in N.D.C.C. ? 40-57.3-01.1, to pay the lodging and restaurant tax. Also, the ordinance may authorize the tax to be applied to gross receipts beyond those described in N.D.C.C. ? 40-57.3-01.1, so that the tax could be applied to gross receipts from the sale of alcoholic beverages for consumption off the premises, for example. See 1993 N.D. Op. Att'y Gen. 40 for guidance on how to properly adopt an ordinance to implement a power in the home rule charter.

In conclusion, it is my opinion that a city that has adopted a home rule charter containing the powers listed in N.D.C.C. ? 40-05.1-06, may require all liquor licensees, including off-sale liquor establishments, to pay the lodging and restaurant tax, if such authority is properly implemented through an ordinance.

III.

The City of Dickinson's home rule charter lists the power provided in subsection 2 of N.D.C.C. ? 40-05.1-06 to "levy and collect taxes . . . for its public and proprietary functions, activities, operations, undertakings, and improvements." City of Dickinson Home Rule Charter, pages 1-2 (May 22, 1990). The City of Dickinson's home rule charter also contains the following authority:

16. To impose registration fees on motor vehicles, or sales and use taxes in addition to any other taxes imposed by law. Any sales and use tax not specifically authorized by statute created by the Board of City Commissioners through the powers stated herein must be approved by a majority vote of the qualified electors of the City of Dickinson before enactment.

City of Dickinson Home Rule Charter, page 3 (May 22, 1990). The first sentence in part 16 of the home rule charter is identical to that in subsection 16 of N.D.C.C. ? 40-05.1-06. The legislative history regarding the passage of subsection 16 indicates that subsection is referring to any sales and use taxes generally, and not just sales and use taxes on motor vehicles. See Legislative History of S. Bill No. 2431, 48th N.D. Leg. (1983).

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The second sentence in part 16, quoted above, is unique to the home rule charter of the City of Dickinson. This sentence would appear to mean that any sales and use tax not specifically authorized by statute must be approved by a majority vote of the electors of the City of Dickinson. However, in order to respond as to whether an election is required, it would be necessary to research the history involved relating to the inclusion of the second sentence in part 16 in the City of Dickinson's home rule charter. Was it intended to apply to any sales and use taxes, and not just motor vehicle sales and use taxes? Also relevant would be the reasonable understanding of the voters who approved the home rule charter. Was the meaning represented by the governing body to the voters preceding the vote?

As indicated above, this issue involves language that is unique to the City of Dickinson's home rule charter and involves factual questions that must be reviewed at the local level. Traditionally, the Attorney General's office has generally refrained from issuing opinions on questions of law solely pertaining to the meaning of language in home rule charters unless the question relates to the meaning of the particular statute authorizing the home rule powers, i.e., N.D.C.C. ? 40-05.1-06. Letter from Attorney General Heidi Heitkamp to Senator Jim Dotzenrod (May 26, 1993). "An attorney general's use of the authority to issue opinions on questions of law should be limited to those questions involving state law, or questions having statewide significance." Id. at 1-2.

It is, therefore, my opinion that whether the City of Dickinson, pursuant to its home rule charter, may require all liquor licensees, including off-sale liquor establishments, to pay the lodging and restaurant tax, without approval of the electors, is a question which involves an interpretation of the city charter which should be left to local interpretation.

Since the question does not involve state law and does not have statewide significance I will refrain from issuing an opinion on this matter.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It

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governs the actions of public officials until such time as the
question presented is decided by the courts.

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