

**LETTER OPINION
93-L-178**

June 8, 1993

Richard J. Riha
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514 E Thayer Avenue
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Dear Mr. Riha:

Thank you for your letter asking whether the term "private premises" as used in N.D.C.C. § 12.1-28-02 includes areas that are open to the general public and whether engaging in nonlicensed gambling in areas open to the general public constitutes a criminal offense.

N.D.C.C. § 12.1-28-02 provides that it "is an infraction to engage in gambling on private premises where the total amount wagered by an individual play exceeds twenty-five dollars per individual hand, game, or event" and a class A misdemeanor to "engage in gambling on private premises where the total amount wagered by an individual player exceeds five hundred dollars per individual hand, game, or event." N.D.C.C. § 12.1-28-02(1), (2)(c). Prior to the 1991 legislative changes, section 12.1-28-02 provided that it was an infraction to engage in gambling regardless of the amount wagered or the place it occurred.

The term "private premises" is not defined in the North Dakota Century Code. The term "premises" has been said to be "an elastic and inclusive term without one definite and fixed meaning" which "may mean a room, shop, building, or any definite area," depending on the circumstances in which it is used. BLACK'S LAW DICTIONARY 1180-1181 (6th ed. 1990). The term "private" has been defined as "of, belonging to, or concerning a particular person or group; not common or general . . . ; not open to, intended for, or controlled by the public . . . ; away from public view; secluded." Webster's New World Dictionary 1131 (2nd College ed. 1982). Taken together, the term "private premises" can mean all areas without public ownership

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or right to access. The term can also take on a morerestrictive meaning referring simply to those areas where members of the general public do not routinely come or within which they are not generally invited. Given that the term "private premises" is seemingly susceptible to varying interpretations, resort to the legislative history is appropriate. North American Coal Corp. v. Huber, 268 N.W.2d 593 (N.D. 1978).

In the 1991 legislative session, two bills, Senate Bill 2503 and Senate Bill 2560, were introduced to amend N.D.C.C. ? 12.1-28-02 in substantially the same manner. Testimony on these bills reveals the term "premises" was used instead of the term "residence" to include private offices and businesses. However, testimony was also given that the term did not include licensed liquor establishments and placed normally open to the public such as hotel lobbies and the reception areas of most businesses.

Therefore, it is my opinion that the term "private premises" as used in N.D.C.C. ? 12.1-28-02 does not include areas that are open to the general public. Whether a given area is open to the general public is a question of fact.

In response to your second question, it is my opinion that engaging in nonlicensed gambling in areas open to the general public may constitute a criminal offense. Article XI, Section 25, of the North Dakota Constitution generally prohibits the Legislative Assembly from authorizing any game of chance, under any pretense, or for any purpose. However, as the result of a 1976 amendment to this constitutional provision, the Legislative Assembly does have limited authority to authorize "bona fide nonprofit veterans', charitable, educational, religious, or fraternal organizations, civic and service clubs, or such other public-spirited organizations as it may recognize, to conduct games of chance when the entire net proceeds of such games of chance are to be devoted to educational, charitable, patriotic, fraternal, religious, or other public-spirited uses." N.D. Const. art. XI, ? 25; 1976 N.D. Sess. Laws ch. 600.

In response to this limited constitutional authorization, the North Dakota Legislative Assembly adopted N.D.C.C. ch. 53-06.1 authorizing limited forms of gambling within the constitutional mandate.

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N.D.C.C. ch. 53-06.1 sets forth the games of chance which are authorized for play in the state, the persons or organizations authorized to conduct or assist in the holding of such games of chance, and a regulatory structure to ensure that the games of chance are both fair and that proceeds from the games are devoted to the purposes required by Article XI, Section 25.

Except in cases of a volunteer of an organization selling raffle tickets or an employee of a licensed alcoholic beverage establishment providing limited assistance to authorized Class B gaming license holders, no person, except a member or employee of an eligible organization or a member of an organization auxiliary to an eligible organization, may assist in the holding, operating, or conducting of any game of chance under N.D.C.C. ch. 53-06.1. N.D.C.C. ? 53-06.1-06(1).

N.D.C.C. ? 53-06.1-07 authorizes eligible organizations licensed by the Attorney General to conduct specific games of chance as well as allowing college fraternities or sororities to conduct raffles, sports pools, and bingo. In accordance with Article XI, Section 25, of the North Dakota Constitution, N.D.C.C. ? 53-06.1-02 specifically lists the entities eligible to conduct games of chance under the conditions of N.D.C.C. ch. 53-06.1 and requires the entire net proceeds to be devoted to specified uses.

N.D.C.C. ? 53-06.1-16 imposes a class A misdemeanor penalty for violating any of the provisions of N.D.C.C. ch. 53-06.1 or any rule adopted under that chapter. Subject to the previously mentioned exceptions to N.D.C.C. ? 53-06.1-06(1), any person, except a member or employee of an eligible organization or a member of an organization auxiliary to an eligible organization, who assists in the holding, operating, or conducting of any game of chance under N.D.C.C. ch. 53-06.1 would be subject to the penalty of N.D.C.C. ? 53-06.1-16.

N.D.C.C. ? 12.1-28-02, which was amended by the 1991 Legislative Assembly provides engaging "in gambling on private premises where the total amount wagered by an

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individual player exceeds twenty-five dollars per individual hand, game, or event" is an infraction. The effect of the 1991 amendment was to remove the criminal penalty for engaging in gambling on private premises when the individual total amount wagered per hand, game, or event, is equal to or less than \$25. This amendment to N.D.C.C. ? 12.1-28-02(1) does not act to invalidate the provisions of N.D.C.C. ch. 53-06.1, but, rather, is an exception to the general criminal penalties as set forth in N.D.C.C. ? 53-06.1-16. Construction of N.D.C.C. ? 12.1-28-02(1) as an exception to the general penalty provision of N.D.C.C. ? 53-06.1-16, is in accordance with established statutory rule of interpretation to give effect to both statutory provisions. N.D.C.C. ? 1-01-07. Subject to the exceptions of N.D.C.C. ? 12.1-28-01(1), persons who conduct or assist in the conducting of games of chance in violation of N.D.C.C. ch. 53-06.1 may be subject to the criminal penalties of N.D.C.C. ? 53-06.1-16. In addition, other provisions of law may also impose criminal liability depending upon the specific facts and circumstances disclosed by the particular conduct in question. N.D.C.C. ? 12.1-28-02(4) imposes a class C felony penalty if a person engages in or participates in the business of gambling. The business of gambling includes knowingly leasing or otherwise permitting a place to regularly be used to carry on a gambling business or maintain a gambling house. N.D.C.C. ? 12.1-28-02(4)(d). The term "gambling house" includes any stationary or moveable location or structure wherein gambling is permitted or promoted or where a lottery is conducted or managed. N.D.C.C. ? 12.1-28-01(4). The determination of the extent of a person's liability and the degree of penalty to be imposed for such conduct would be a question of fact as disclosed by that person's specific conduct.

Sincerely,

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