

LETTER OPINION
93-L-210

June 25, 1993

Mr. Charles Whitman
Bismarck City Attorney
P.O. Box 5503
Bismarck, ND 58502-5503

Dear Mr. Whitman:

Thank you for your May 17, 1993, letter asking several questions concerning Senate Bill 2265, regarding Sunday alcoholic beverage permits.

Under current law, N.D.C.C. ? 40-57.3-01.1 authorizes a city to impose a city lodging and restaurant 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 . . . and upon the gross receipts of a restaurant from any sales of prepared food or beverages." N.D.C.C. ? 40-57.3-01.1. For purposes of this section, "restaurant" is defined as "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." N.D.C.C. ? 40-57.3-01.1. The scope of the tax is determined by the ordinance imposing the tax. The city therefore possesses discretion in determining the extent of the tax by taxing accommodations, food, and beverages in their entirety, individually, or in any combination, so long as all items in any category taxable under state law are taxed. This law was not altered or amended by the 1993 Legislative Assembly.

Under the current special Sunday alcoholic beverage permit law, N.D.C.C. ? 5-02-05.1, a restaurant licensed to engage in sale of alcoholic beverages is only eligible to receive a Sunday alcoholic beverage permit if it derives 50% or more of its annual gross receipts from the sale of prepared meals or if it has paid the appropriate city food and lodging taxes for a

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continuous six-month period before application for the permit. Thus, alcoholic beverage establishments not required by the city ordinance to pay the lodging and restaurant tax are given the option of paying the tax and thereby qualifying to obtain a special Sunday alcoholic beverage permit. If the alcoholic beverage establishment chooses to voluntarily pay the tax, the establishment qualifies as a "restaurant" as that term is defined in N.D.C.C. ? 5-02-05.1(5) and is authorized to obtain the Sunday alcoholic beverage permit even though that establishment did not derive 50% or more of its annual gross receipts from the sale of prepared meals and not alcoholic beverages.

Senate Bill 2265 in essence repeals the special permit law contained in N.D.C.C. ? 5-02-05.1 and the definition of restaurant contained in N.D.C.C. ? 5-02-05.1(5). As of August 1, 1993, the city may grant a Sunday license to any "qualified alcoholic beverage licensee." Senate Bill 2265 defines the term "qualified alcoholic beverage licensee" as:

a licensee in a city that imposed a city lodging and restaurant tax on July 31, 1993, who paid such tax and who continues to pay any such tax imposed by the city or a licensee in a county or a licensee in a city that did not impose a city lodging and restaurant tax on July 31, 1993.

Under this definition, alcoholic beverage licensees fall within one of two groups of licensees: those licensees in a city that imposed a city lodging and restaurant tax on July 31, 1993, and those licensees in a county or a city that did not impose a city lodging and restaurant tax on that date.

It is my opinion that Senate Bill 2265 allows a licensee, which would not otherwise be required to pay the tax, to elect to pay the tax to become qualified for a Sunday permit. The fact that this voluntary choice to pay a city lodging and restaurant tax has been retained to permit a licensee to qualify to obtain a Sunday alcoholic beverage permit is important in responding to your specific inquiries.

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The definition of a "qualified alcoholic beverage licensee" set forth in Senate Bill 2265 shows the Legislative Assembly's intent that all alcoholic beverage licensees in cities which imposed a city lodging and restaurant tax on July 31, 1993, pay the city tax to be authorized to obtain a Sunday alcoholic beverage permit. However, this definition does not require that the alcoholic beverage licensee actually pay the tax prior to July 31, 1993. If this would be the case, an alcoholic beverage licensee which commences business operations after July 31, 1993, could never obtain a Sunday alcoholic beverage permit in a city that imposed a lodging and restaurant tax on July 31, 1993. Interpretation of this provision in this manner would lead to an absurd and unreasonable result which should be avoided. It being presumed that a just and reasonable result is intended in a legislative enactment (N.D.C.C. ? 1-02-38), I must conclude that the July 31, 1993, date set forth in Senate Bill 2265 makes reference only to the date on which a city lodging and restaurant tax must be effective to require all alcoholic beverage licensees within that city to pay the tax to qualify to obtain a Sunday alcoholic beverage permit.

To qualify to obtain a Sunday alcoholic beverage permit, even those alcoholic beverage licensees not required by the ordinance to pay the city lodging and restaurant tax, must have paid the tax prior to application for the permit and must continue to pay the tax to remain qualified to obtain the city permit. Therefore, the licensees which are not otherwise required to pay the tax under city ordinance will have the same option they had prior to adoption of Senate Bill 2265 to qualify to obtain the Sunday permit. Pursuant to the law prior to the 1993 amendment, the licensee must have paid for a period of at least six months. The new law does not specify the time period.

In specific response to questions raised in your letter, a licensee in a city which imposes a city lodging and restaurant tax on July 31, 1993, must have paid the tax before receiving the Sunday permit and must continue to pay the tax to be authorized to engage in business on a Sunday pursuant to the city permit. A business that opens after July 31, 1993, would not be excluded from Sunday liquor sales but

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must have paid the tax prior to receiving the permit and continue to pay the tax as all other qualified licensees. If a licensee qualifies for the permit but chooses to stop paying the tax, that licensee will not be qualified to obtain a Sunday alcoholic beverage permit because that licensee is not continuously paying the tax. A city may address in its ordinance the specific issue of a licensee which initially pays the tax and then stops paying the tax.

You have also asked whether a successor business to an otherwise qualified alcoholic beverage licensee could obtain a permit if there is some gap in operations and tax payment as a result of the sale or closure of the prior business. The conclusion reached earlier applies here. If the new business has paid the tax prior to obtaining the permit and continues to pay the tax, that new business would be a qualified alcoholic beverage licensee. The time period for paying the tax may, however, be a matter which the city wishes to specifically address in its ordinances setting forth the procedures and requirements for the Sunday alcoholic beverage permit.

You have also asked whether an off-sale alcoholic beverage establishment would be prohibited from applying for a Sunday alcoholic beverage permit. There is nothing in the language of Senate Bill 2265 which would restrict an off-sale alcoholic beverage establishment from obtaining a Sunday alcoholic beverage permit. However, as noted previously, the off-sale of alcoholic beverages is not required to pay a city lodging and restaurant tax proposed pursuant to N.D.C.C. ? 40-57.3-01.1. In cities in which a lodging and restaurant tax is in place as of July 31, 1993, the off-sale establishment would be required to make the choice as to whether it will pay the city tax. If the off-sale licensee chooses to pay the tax and to continuously pay the tax, it would qualify to obtain a Sunday alcoholic beverage permit if authorized by municipal ordinance. If the off-sale licensee decides not to pay the tax, that licensee would not be qualified to obtain the permit.

I trust this responds to your concerns. Should you have further questions, please contact Assistant Attorney General Bob Bennett.

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Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

rpb/krb

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