

**LETTER OPINION
2001-L-28**

July 20, 2001

Mr. Fritz Fremgen
Stutsman County State's Attorney
511 2nd Ave SE
Jamestown, ND 58401

RE: N.D.C.C. § 5-01-07

Dear Mr. Fremgen:

I have received your June 22, 2001, letter in which you posed several questions concerning the application of N.D.C.C. § 5-01-07 to retail alcoholic beverage license renewals, the criteria to be followed by a township when exercising its authority under the section, and whether a county commission can overrule the township board's decision made pursuant to N.D.C.C. § 5-01-07.

Your first inquiry questions whether N.D.C.C. § 5-01-07 is limited to the initial issuance of a retail alcoholic beverage license and to an application for a renewal of an existing license. Section 5 of N.D.C.C. ch. 1-07, currently provides:

No retail beer or liquor license may be issued in any organized township without the written consent of the board of township supervisors.

In particular you questioned whether the word "issue" is associated with the issuance of the initial license as opposed to a renewal license.

Ascertaining the intent of the Legislature is subject to certain definitive rules of statutory interpretation. When a statute's language is ambiguous or of doubtful meaning, extrinsic aids (including legislative history and the language of the statute) may be reviewed to ascertain the legislature's intent. A statute is ambiguous if it is susceptible to differing but rational meanings. State v. Rambousek, 479 N.W.2d 832 (N.D. 1992). In this instance it is

reasonable to conclude that the use of the word “issue” presumes the initial issuance of a license as opposed to a renewal of a license, and thus, the statute is ambiguous.

The legislative history of the statute indicates the legislature has struggled with where to draw the line when it comes to a township board’s authority to approve the renewal of an alcoholic beverage license. When the section was initially adopted in 1967, the Legislative Assembly specifically excluded renewals of alcoholic beverage licenses from the consent requirement. The section read:

No retail beer or liquor license shall be issued in any organized township without the written consent of board of township supervisors. This section shall not apply to renewals of such licenses.

N.D.C.C. § 5-01-07 (1967). With the inclusion of the second sentence, the first sentence dealing with the “issuance” of a license clearly was intended to apply only to the issuance of the initial license.

In 1969 the section was amended to require written consent of the board of township supervisors for every third renewal of an alcoholic beverage license. With the new amendment the section read as follows:

No retail beer or liquor license shall be issued in any organized township without the written consent of the board of township supervisors. Every third renewal of such license shall be reviewed and subject to approval by the board of township supervisors.

N.D.C.C. § 05-01-07 (1969). Again, the second sentence dealt with renewal and the first sentence dealt with the issuance of the initial license.

House Bill 1551 was presented to the 1987 Legislative Assembly to repeal the entire section. During hearings before the House Political Subdivisions Committee, representatives of the North Dakota Beverage Dealer’s Association testified in favor of this repeal asserting the requirement of consent was an unnecessary hurdle, and townships should not have the right to “pull” a liquor license approved by the county and state. The North Dakota Township Officers Association disagreed, testifying in opposition to the bill. Minutes of the House Committee on Political Subdivisions (Feb. 5, 1987).

Ultimately, the legislation was amended by the House committee to retain § 5-01-07, but to delete the last sentence relating to the township consent of alcoholic beverage license applications for every third renewal. There was no opposition to the bill from either party

during the Senate hearing, and the bill was passed as amended. The section has not been changed since 1987.

It is presumed that a legislative enactment is intended to change existing law. Scott v. North Dakota Workers Compensation Bureau, 1998 N.D. 221, 587 N.W.2d 153. House Bill 1551 removed the board's consent authority for every third license renewal, leaving only the first sentence of the section. The question becomes whether the legislature intended to change the historical meaning of the first sentence to include the renewal of a license. There is nothing in the legislative history to suggest such an intent. It is reasonable to conclude that since its adoption in 1967, the legislative intent of the first sentence was clearly directed at the issuance of an initial license and not to renewals. In fact, it is the question of a township's authority over renewals that consistently has been at issue, while a township's authority over the issuance of an initial license has warranted little, if any, consideration. The legislative history of the 1987 change is clear; the legislature wanted to limit the authority of a township board, not expand that authority. The amendment was meant to remove a township board's ability to approve renewals, not to vest a blanket authority in a township board to approve initial licensures and renewals. In light of this history, I conclude that N.D.C.C. § 05-01-07 does not apply to the renewal of a retail beer or liquor license.

This interpretation is not inconsistent with the holding in Lamplighter Lounge, Inc. v. State ex rel. Heitkamp, 510 N.W.2d 585 (N.D. 1994), dealing with the renewal of an existing retail alcoholic beverage license. In Lamplighter the Court states that Chapter 5-02, N.D.C.C., does not distinguish between a renewal of an existing license and a first-time license, citing a prior case interpreting the Liquor Control Act (codified in Chapter 5-02). The Court interpreted the licensure requirements of Chapter 05-02, not the authority of townships to approve licenses as discussed in Chapter 05-01. Further the Court's statement in Lamplighter was limited to clarifying that a holder of a license does not acquire any right to have another license issued because of his having held or then holding a license. Id. at 591. As such, the case does not deal with the intricacies of the legislative history of section 5-01-07 which clearly indicates there is a difference between initial licensure and renewals as applied to a township board's consent authority. In fact, the court in Lamplighter went to great lengths to limit its holding, stating:

We hold only that where the licensing authority has attempted to revoke an existing license for specific conduct and fails on the merits to do so, it has no jurisdiction under the principle of res judicata to subsequently use that same conduct as reason to deny a renewal of the license.

Id. at 592.

Your second question relates to the criteria that a township must follow when exercising its authority under N.D.C.C. § 5-01-07. The North Dakota Supreme Court in Smith v. City of LaMoure, 77 ND 658, 44 N.W.2d 789 (1950), recognized that issuance of alcoholic beverage licenses calls for the exercise of judgment and discretion on the part of the governing body. This is an administrative function not to be exercised in an arbitrary or capricious manner.

The Court also address the authority of a city to deny an alcoholic beverage license application in Mini Mart Inc. v. City of Minot, 347 N.W.2d 131 (N.D. 1994). The Court concluded that a municipality must exercise its legislative grant of discretion through the use of written criteria that adequately informs applicants of the standards and policies to be contemplated by the municipality and adequately guides the licensing authority in arriving at its decision. Although the North Dakota Supreme Court has not discussed the township board consent requirement of N.D.C.C. § 5-01-07 in relation to the Mini Mart Inc. holding, this question was raised and answered in 1986 N.D. Att'y Gen. 9. In that opinion this office applied the requirements of Mini Mart Inc. to a township board reviewing a request for license under to N.D.C.C. § 5-01-07. Concluding that a township's granting or withholding a consent for a beer or liquor license is equivalent to the issuance of a license, the board of township supervisors may establish guidelines for consent similar to those adopted by cities and counties for licensure. Implicit within the authority of a township to grant or withhold consent is the power to establish reasonable guidelines for determining whether or not to give approval for the issuance or renewal of a beer or liquor license. The opinion states:

The board's guidelines must be uniformly applied and reasonably intended to promote the health, safety, morals, or general welfare of the people of the township. Reasonable licensing standards include, but are not limited to, restricting the number of licenses to be approved or prohibiting liquor licenses in the township altogether by denying consent to all applicants. By enumerating certain types of guidelines which may be enacted, this opinion is not intended to prohibit or restrict other permissible regulatory criteria which may be established by a township board of supervisors.

1986 N.D. Op. Att'y Gen. 9, at pp. 59-60.

If a board of township supervisors desires to exercise the power and authority granted to it pursuant to N.D.C.C. § 5-01-07 and other attendant regulatory provisions, written criteria regarding the exercise of that authority must be adopted by that board.

Your remaining questions pertain to a county commission's actions on a retail alcoholic beverage license application when a township board exercises, or fails to exercise, its

consent authority under N.D.C.C. § 5-01-07. Although the authority granted to the township board is somewhat analogous to that granted to the county commission in the issuance of a retail alcoholic beverage license, the consent itself is not a license. The section requires any person engaging in the sale of alcoholic beverages at retail to obtain a state alcoholic beverage license from the Attorney General and a local alcoholic beverage license from the governing body of any city or the board of county commissioners if the business is located outside the corporate limits of the city. If N.D.C.C. § 5-01-07 applies to a specific alcoholic beverage license applicant, neither the state nor the county may issue a retail alcoholic beverage permit license to the applicant if the board of township supervisors does not consent in writing to the issuance of a license. This section is mandatory in its application to all beer and liquor licenses to be issued in an organized township. 1986 N.D. Op. Att'y Gen. 9.

Since the board of county commissioners is the entity that issues the required local retail alcoholic beverage license, a written consent of the board of township supervisors to the issuance of that license does not require the county commission to authorize the issuance of the county license. The board of county commissioners, applying its own written criteria for the issuance of alcoholic beverage licenses, can deny an application for a license even though the written consent has been obtained from the township board. However, if the board of township supervisors does not give this consent, the applicant, by the clear language of N.D.C.C. § 5-01-07 cannot receive a license to sell, at retail, alcoholic beverages.

North Dakota state law has not vested a board of county commissioners with the authority to override or overrule the board of township supervisors' decision to refuse to provide consent under N.D.C.C. § 5-01-07. Rather, the legislature has provided remedies available to a person aggrieved by a township board decision. Not only may that person sue the township (N.D.C.C. § 58-14-01) but, also, an appeal from any rule, restriction, or decision of the board of township supervisors may be made to the district court of the county of which the township lies. N.D.C.C. § 58-03-15. Upon a showing that any rule, restriction, or decision of the board of township supervisors is "unreasonable under the circumstances," that rule, restriction, or decision may be set aside or reversed. Whether the board of township supervisors properly exercised its authority and discretion in the denial of a written consent under N.D.C.C. § 5-01-07 will be a question for the courts, rather than county commission, to resolve after factual hearing and application of the relevant laws.

Sincerely,

LETTER OPINION 2001-L-28
July 20, 2001
Page 6

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Attorney General

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