

**LETTER OPINION  
2006-L-06**

February 9, 2006

The Honorable Randy Schobinger  
State Senate  
PO Box 1215  
Minot, ND 58702-1215

Mr. Howard Swanson  
City Attorney  
City of Grand Forks  
PO Box 12909  
Grand Forks, ND 58208-2909

Dear Senator Schobinger and Mr. Swanson:

Thank you for your letters asking my opinion on several related issues involving statutes created and amended by S.B. 2300, which provide new restrictions on smoking in public places.<sup>1</sup> It is my opinion that smoking would be allowed in a separately enclosed bar area such as the one described in your letters; a municipality, regardless of its home-rule status, has the authority to require a retail alcoholic beverage establishment to construct opaque walls and doors in order to reduce the view into the interior of that establishment provided there is a rational basis for doing so; if a separately enclosed bar area meets the statutory definition of a bar, a municipality may not determine that the bar is a bingo facility; if an alcohol establishment is not a part of the site authorization for a bingo facility, bingo players cannot take their bingo cards from the bingo facility into the alcohol establishment and still participate in the bingo being played in the bingo facility; and, if an adjacent alcohol establishment is part of the site authorization for a bingo facility, the establishment may allow bingo play to be broadcast from the bingo facility into the alcohol establishment, but doing so may invoke the prohibition against smoking within the alcoholic establishment if the bingo play overtakes the serving of alcoholic beverages as the alcohol establishment's specific purpose. Whether an establishment is actually a "bar" or a "bingo facility" under the no-smoking laws is a factual determination on which this office cannot opine.

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<sup>1</sup> 2005 N.D. Sess. Laws ch. 239.

## ANALYSIS

Subsection 1 of N.D.C.C. § 23-12-10 prohibits smoking in all enclosed areas of public places and places of employment. Subsection 9 of N.D.C.C. § 23-12-09 defines “public place” to specifically include bingo facilities. Thus, smoking is prohibited in bingo facilities. Smoking is generally allowed in bars.<sup>2</sup> Bar is defined as:

a retail alcoholic beverage establishment licensed under chapter 5-02 that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of those beverages. The term includes a bar located within a hotel, bowling center, or restaurant that is not licensed primarily or exclusively to sell alcoholic beverages if the bar is in a separately enclosed area.

You ask whether a bingo facility could split into two areas, one of which would become a bar where smoking would be allowed and the other would remain a bingo facility in which smoking would not be allowed. The two areas would be separated by a clear glass wall and a clear glass doorway. The bar area would be leased to a for-profit corporation for the purpose of operating a retail alcoholic beverage establishment (alcohol establishment). The alcohol establishment would allow bingo patrons to bring their bingo cards from the bingo facility into the establishment, and would allow the bingo call to be broadcast within the establishment. The desired effect of this effort is that the alcohol establishment would be considered a “bar,” in which smoking may be permitted, and bingo patrons who move from the bingo facility into the bar would then be permitted to smoke while playing bingo.

“In order to be a ‘bar’, the establishment must be (1) licensed under N.D.C.C. chapter 5-02, and (2) ‘devoted’ to serving alcoholic beverages.”<sup>3</sup> And if a bar offers food service, that food service must be “only incidental to the consumption” of alcoholic beverages.<sup>4</sup> If the separate bar area meets this definition, it is a “bar” under N.D.C.C. § 23-12-10 and smoking may be allowed. It does not matter whether the bar is a “free standing” bar or a bar within a bingo hall or some other facility, such as a mall.

The next question asks whether a municipality could require an alcohol establishment such as the one in the hypothetical to “construct opaque walls and doors so as to substantially eliminate the interior view of a licensed retail alcoholic beverage premise from

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<sup>2</sup> N.D.C.C. § 23-12-10(2)(f).

<sup>3</sup> N.D.A.G. 2005-L-26.

<sup>4</sup> N.D.C.C. § 23-12-09(1).

the bingo facility".<sup>5</sup> All cities may regulate or restrict local retail alcohol licenses, including establishing health and safety standards.<sup>6</sup> Further, the North Dakota Supreme Court held:

Section 40-05-01(29), N.D.C.C., authorizes the City to "regulate and license the sale of alcoholic beverages." The power to regulate a business includes the authority to prescribe reasonable rules, regulations, and conditions under which the business may be conducted or permitted. Thielen v. Kostelecky, 69 N.D. 410, 287 N.W. 513, 516 (1939). "Leaving the manner and means of exercising municipal powers to the discretion of municipal authorities implies a range of reasonableness within which a municipality's exercise of discretion will not be interfered with or upset by the judiciary." Haugland v. City of Bismarck, 429 N.W.2d 449, 454 (N.D. 1988).<sup>7</sup>

The city's governing body has broad jurisdiction concerning local alcoholic beverages retail licensing regulations. The breadth of a home-rule city's ability to regulate alcohol sales is even greater:

In addition to the specific grant of regulatory authority to a municipality in N.D.C.C. § 40-05-01, home rule cities are granted the power to fix the fees, number, terms, conditions, duration, and manner of issuing and revoking licenses in the exercise of its governmental police powers and to adopt, amend, and repeal ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare with corresponding offenses and penalties for violation of those provisions. N.D.C.C. § 40-05.1-06(3), (7), (9).<sup>8</sup>

Given the breadth of even a non-home-rule city's ability to regulate alcohol sales, it is my opinion a municipality, regardless of its home-rule status, has the authority to require an alcoholic beverage establishment to construct opaque walls and doors in order to reduce the view into the interior of that establishment provided there is a rational basis for doing so.<sup>9</sup>

The next question is whether a municipality could determine that the above-described retail alcoholic beverage establishment is not a "bar" under the no-smoking laws, but is instead an extension of the bingo facility in which smoking should be prohibited. "In order to be a 'bar', the establishment must be (1) licensed under N.D.C.C. chapter 5-02, and (2)

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<sup>5</sup> Letter from Howard D. Swanson, City Attorney, Grand Forks, to Wayne K. Stenehjem, Attorney General, North Dakota (Dec. 1, 2005).

<sup>6</sup> N.D.C.C. § 5-02-09.

<sup>7</sup> Fargo Beverage Co. v. City of Fargo, 459 N.W.2d 770, 773 (N.D. 1990).

<sup>8</sup> N.D.A.G. 93-L-12.

<sup>9</sup> See infra footnotes 13 and 14 and accompanying text.

'devoted' to serving alcoholic beverages."<sup>10</sup> And if a bar offers food service, that food service must be "only incidental to the consumption" of alcoholic beverages.<sup>11</sup>

If the bar area meets this definition, it is a bar under N.D.C.C. § 23-12-09(1) where smoking may be allowed and a municipality may not determine that it is a bingo facility where smoking is not allowed. The municipality may, however, adopt by ordinance more stringent standards than those found in N.D.C.C. ch. 23-12,<sup>12</sup> and by this means could prohibit smoking in bars. Any ordinance to prohibit smoking in only bars adjacent to bingo facilities, however, must have a rational basis for singling them out from other bars.<sup>13</sup> In exercising its powers, a city may not act arbitrarily, capriciously, or unreasonably.<sup>14</sup>

The next question is whether an alcohol establishment may, without obtaining a separate site authorization, receive audio or video broadcasts of bingo games into its facility and allow its patrons to play bingo in the establishment using bingo cards obtained from the bingo facility broadcasting the games. Since you indicate the establishment would not be obtaining a separate site authorization, your question is not clear regarding whether the alcohol establishment is part of the site authorization for the adjacent bingo facility or merely has no site authorization for gaming at all. If the alcohol establishment has no site authorization at all, it cannot allow gaming on its premises.<sup>15</sup> Further, a "bingo card is void if it is taken outside the gaming area."<sup>16</sup> Therefore, if the alcohol establishment is not a part of the site authorization for the bingo facility, it is my opinion bingo players cannot take their bingo cards from the bingo facility into the alcohol establishment in order to participate in the bingo being played in the bingo facility.

Your final question is whether an alcohol establishment can allow the playing of bingo on its premises if the game originates and is broadcast from a separate bingo facility. I assume your question relates to a situation where the alcohol establishment and the adjoining bingo facility are authorized as one site.

An alcohol establishment may, of course, be the location of a site authorization. Numerous games of chance take place in alcohol establishments across the state. Further, there is nothing preventing bingo from being played in an establishment when the bingo call is broadcast into that establishment from another location. Cities and counties

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<sup>10</sup> N.D.A.G. 2005-L-26.

<sup>11</sup> N.D.C.C. § 23-12-09(1).

<sup>12</sup> N.D.C.C. § 23-12-10.2(2); N.D.A.G. 2005-L-31; N.D.A.G. 2005-L-17.

<sup>13</sup> Cf. Olson v. City of West Fargo, 305 N.W.2d 821 (N.D. 1981); Lindteigen v. City of Bismarck, 565 N.W.2d 47, 49 (N.D. 1997).

<sup>14</sup> Lindteigen v. City of Bismarck, 565 N.W.2d 47, 49 (N.D. 1997).

<sup>15</sup> N.D.A.C. § 99-01.3-01-03(1).

<sup>16</sup> N.D.A.C. § 99-01.3-04-03(1)(f).

are responsible for issuing site authorizations.<sup>17</sup> While a city or county could refuse to issue a single site authorization covering the two areas, there is nothing in the law prohibiting them from doing so. Bingo cards are void if removed from a gaming site. Therefore, if the city issued a site authorization covering the two areas as one site, bingo could be played in the bar if the game originates and is broadcast from the bingo area and bingo cards taken from the bingo area to the bar area would not be void.

If the two areas were issued separate site authorizations, the entity conducting the games would need to sell bingo cards and award prizes at both locations,<sup>18</sup> and the size of the prizes would be limited by the sales at each location.<sup>19</sup> Bingo cards taken from the bingo area to the bar area would be void.<sup>20</sup>

The underlying question, however, is whether the alcohol establishment can continue to allow smoking if it also provides the opportunity to play bingo in the establishment. Consistent with previous opinions of this office, if bingo play overtakes serving alcoholic beverages as the alcohol establishment's "specific purpose, then the establishment will cease being a 'bar' under this [the no-smoking] law and smoking will be prohibited in that establishment unless the establishment falls under another exemption. Determining an establishment's specific purpose is a factual question on which this office cannot opine."<sup>21</sup> The Legislature did not provide guidance on how to make this factual determination. Thus, the determination is one which will need to be made by the city, through an ordinance, or by the local authorities through an enforcement action. And local entities may adopt ordinances that are more stringent than those provided in N.D.C.C. ch. 23-12 to address this issue.<sup>22</sup>

Sincerely,

Wayne Stenehjem  
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.<sup>23</sup>

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<sup>17</sup> N.D.C.C. § 53-06.1-03(2).

<sup>18</sup> See N.D.A.C. § 99-01.3-04-03(1)(f) (voiding bingo cards removed from a game site).

<sup>19</sup> N.D.C.C. § 53-06.1-06(6).

<sup>20</sup> N.D.A.C. § 99-01.3-04-03(1)(f).

<sup>21</sup> N.D.A.G. 2005-L-26.

<sup>22</sup> N.D.A.G. 2005-L-31; N.D.A.G. 2005-L-17.

<sup>23</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).