

**LETTER OPINION  
2015-L-02**

April 1, 2015

Mr. Richard J. Riha  
Burleigh County State's Attorney  
514 E Thayer Ave  
Bismarck, ND 58501-4413

Dear Mr. Riha:

Thank you for your letter asking whether a home rule county may license a domestic winery where that domestic winery is not required to have a local retail license under N.D.C.C. § 5-01-17. For the reasons stated below, it is my opinion that a home rule county may not license a domestic winery except as permitted under N.D.C.C. § 5-01-17.

**ANALYSIS**

Domestic wineries are regulated under N.D.C.C. § 5-01-17. The Tax Commissioner has authority to issue a domestic winery license to persons owning or operating a winery located within North Dakota for the purposes of producing wine.<sup>1</sup> Once licensed, a domestic winery may sell its wine at retail both on-sale and off-sale, may sell or direct-ship its wine to persons both inside and outside of North Dakota, may provide free samples of the wines offered for sale, and may sell wine to other retail licensees through a licensed North Dakota wholesaler.<sup>2</sup>

There are two instances where local governments are given authority over domestic wineries under N.D.C.C. § 5-01-17. The Tax Commissioner may issue special event permits allowing the domestic winery to give or sell its wine at off-premise events, which are also subject to local ordinance. In addition, a domestic winery may obtain a retailer license allowing the on-premises sale of alcoholic beverages at a restaurant owned by the

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<sup>1</sup> N.D.C.C. § 5-01-17(1).

<sup>2</sup> N.D.C.C. § 5-01-17(2).

licensee and located on property contiguous to the winery.<sup>3</sup> This retail licensing is subject to both a state license and a local license.<sup>4</sup>

A county's general powers, when it acts without home rule authority, are limited to instances where a specific statute grants authority to the county or as necessarily implied from the grant.<sup>5</sup> "Counties are creatures of the North Dakota Constitution and may act only in the manner and on the matters prescribed by the Legislature in statutes enacted pursuant to constitutional authority. As a political subdivision of the State, its rights and powers are determined and defined by law."<sup>6</sup> The general powers of a board of county commissioners are contained in N.D.C.C. § 11-11-14. This section does not contain any reference to regulating the manufacture, distribution, or sale of alcoholic beverages. Further, neither N.D.C.C. § 11-11-14 nor the other statutes defining the general powers and duties of counties authorize counties to adopt regulations for the public health, safety, morals, and welfare.<sup>7</sup> Therefore, in order to regulate the manufacture, distribution at wholesale, or retail sale of alcoholic beverages, a county must be acting under some other duty prescribed by law.<sup>8</sup> Thus, a county which is not acting under home rule powers may only regulate a domestic winery as permitted under N.D.C.C. § 5-01-17, or through some other statutory authority that may apply but which is not directly involved with the regulation of alcoholic beverages, such as local zoning regulations.<sup>9</sup>

The Legislature has enabled home rule in counties, whereby counties may acquire certain powers of self government if those powers are included in an approved home rule charter and are implemented through ordinances.<sup>10</sup> Although the statutes authorizing home rule do not specifically speak of alcoholic beverages, a home rule county has broad general authority under N.D.C.C. § 11-09.1-05(5) to:

Provide for the adoption, amendment, repeal, initiative, referral, enforcement, and civil and criminal penalties for violation of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare. However, this subsection does not confer any authority to regulate any

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<sup>3</sup> N.D.C.C. § 5-01-17(3).

<sup>4</sup> N.D.C.C. § 5-02-01.

<sup>5</sup> City of Fargo v. Cass County, 286 N.W.2d 494, 500 (N.D. 1979).

<sup>6</sup> McKenzie Cty. v. Hodel, 467 N.W.2d 701, 707-08 (N.D. 1991) (Vande Walle, J. concurring) (citations omitted); see also Stutsman Cty. v. State Historical Soc'y, 371 N.W.2d 321 (N.D. 1985); Hart v. Bye, 76 N.W.2d 139 (N.D. 1956).

<sup>7</sup> N.D.A.G. 97-F-05.

<sup>8</sup> See N.D.C.C. § 11-11-14(17).

<sup>9</sup> N.D.A.G. 2007-L-06.

<sup>10</sup> N.D.A.G. 97-F-05.

industry or activity which is regulated by state law or by rules adopted by a state agency.<sup>11</sup>

Arguably, regulations governing the manufacture, wholesale and retail sales of alcoholic beverages would be for the purpose of protecting public health, safety, morals, and welfare as provided by N.D.C.C. § 11-09.1-05(5).

But this power is not available to a home rule county where the regulation would “regulate any industry or activity which is regulated by state law or by rules adopted by a state agency.”<sup>12</sup> North Dakota state law provides for domestic wineries to be licensed by the State Tax Commissioner<sup>13</sup> and extensively regulates the manufacture, and wholesale or retail sale, of alcoholic beverages, including wines produced by a domestic winery.<sup>14</sup> Accordingly, the limiting language found in N.D.C.C. § 11-09.1-05(5) precludes a home rule county from adopting ordinances licensing or otherwise regulating the manufacture, wholesale or retail sale of alcoholic beverages under its home rule authority.

Therefore, it is my opinion that because state law regulates and licenses the manufacture of wine by a domestic winery, and the sale at retail or wholesale by a domestic winery, a home rule county is precluded from doing so except where specifically allowed by statutes such as N.D.C.C. § 5-01-17.<sup>15</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>16</sup>

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<sup>11</sup> N.D.C.C. § 11-09.1-05(5) (emphasis added).

<sup>12</sup> N.D.C.C. § 11-09.1-05(5).

<sup>13</sup> N.D.C.C. § 5-01-17.

<sup>14</sup> See generally, N.D.C.C. title 5.

<sup>15</sup> Compare, N.D.A.G. 97-F-05 (home rule county may regulate marketing of tobacco products but, under then-existing law, may not regulate state-regulated activities such as the sale or use of tobacco products, nor may it license tobacco merchants).

<sup>16</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).