

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 97-F-10

Date Issued: October 24, 1997

Requested by: Laurie A. Fontaine, Pembina County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether a city has jurisdiction to grant a license for, or otherwise regulate, the retail sale of alcoholic beverages on property outside the corporate limits but within the city's one-half mile extraterritorial police power jurisdiction under N.D.C.C. § 40-06-01(2).

II.

Whether a city's zoning provisions apply to locations within the city's extraterritorial zoning jurisdiction under N.D.C.C. § 40-47-01 which may be licensed by the county for the retail sale of alcoholic beverages.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that a city's authority to **issue** a license for the retail sale of alcoholic beverages extends only to the corporate limits of the city, and that authority to license the retail sale of alcoholic beverages is granted to the county for all parts of the county outside the corporate limits of a city notwithstanding a city's extraterritorial police power jurisdiction granted by N.D.C.C. § 40-06-01(2). It is my further opinion that a city may **regulate** alcoholic beverage licensees within the extraterritorial jurisdiction for those purposes authorized in N.D.C.C. § 40-06-01 only to the extent the regulation does not infringe upon the county's regulatory authority under N.D.C.C. § 5-02-09.

II.

It is my opinion that a city's zoning provisions apply to locations within the city's extraterritorial zoning jurisdiction under N.D.C.C. § 40-47-01.1 which may be licensed by the county for the retail sale of alcoholic beverages.

- ANALYSES -

I.

Before a person may engage in the sale of alcoholic beverages at retail, the person must first secure a license from the Office of Attorney General and the appropriate local governing body:

Except as otherwise provided in section 5-02-01.1, any person engaging in the sale of alcoholic beverages at retail without first securing an appropriate license from the attorney general and the governing body of any city, or board of county commissioners if said business is located outside the corporate limits of a city, is guilty of a class A misdemeanor. . . .

N.D.C.C. § 5-02-01 (emphasis supplied.) Therefore, in addition to the license from the Office of Attorney General, it is my opinion that a person seeking a retail alcoholic beverage license must obtain a license from either the governing body of the city if within the city limits or from the board of county commissioners when the business is located outside the corporate limits of the city.

N.D.C.C. § 40-06-01 provides:

Except as otherwise provided by law, a governing body of a municipality has jurisdiction . . .

[i]n and over all places within one-half mile [804.67 meters] of the municipal limits for the purpose of enforcing health and quarantine ordinances and regulations, subject to chapter 23-07.6 [the communicable disease confinement procedure], and police regulations and ordinances adopted to promote the peace, order, safety, and general welfare of the municipality.

(Emphasis supplied.) A law that "provides otherwise" is N.D.C.C. § 5-02-09, relating to the retail sale of alcoholic beverages:

The local governing body by ordinance or resolution may regulate or restrict the operation of licensees including among other things determining the number of licenses to be granted, establishing health and safety standards for licensed premises, setting of hours and regulation of open

door policies by fraternal organizations or private clubs, and regulation of dancing or various forms of entertainment on the premises.

The local governing body referred to in N.D.C.C. § 5-02-09 is the local governing body granting the license to sell alcoholic beverages at retail under N.D.C.C. § 5-02-01 because the regulatory authority granted by N.D.C.C. § 5-02-09 relates to the license for the retail sale of alcoholic beverages.

In conclusion, it is my opinion that a county which has granted a license to sell alcoholic beverages at retail may regulate or restrict the operation of alcoholic beverage licensees to the extent authorized by N.D.C.C. § 5-02-09, including determining the number of licenses to be granted, establishing health and safety standards for licensed premises, the setting of hours, and regulation of open door policies by fraternal organizations or private clubs, and the regulation of dancing or various forms of entertainment on the premises. See 1947 N.D. Op. Att'y Gen. 150. It is my further opinion that a city may regulate alcoholic beverage licensees within the one-half mile extraterritorial jurisdiction for those purposes authorized in N.D.C.C. § 40-06-01 only to the extent the regulation does not infringe upon the county's regulatory authority under N.D.C.C. § 5-02-09. See Id.

II.

A city is permitted to extend its zoning regulations to unincorporated territory outside its corporate limits to varying distances based upon the city's population. N.D.C.C. § 40-47-01.1(1). A city's zoning under this law is controlling over the zoning authority of townships. Apple Creek Township v. City of Bismarck, 271 N.W.2d 583 (N.D. 1978). Also, a city's extraterritorial zoning supersedes that of counties except where the city has by resolution relinquished its authority or a portion thereof to the county. N.D.C.C. § 11-33-20.

A city has authority to provide for extraterritorial zoning under N.D.C.C. ch. 40-47 and a county has authority to issue liquor licenses and provide for certain regulations relating to the conduct of the licensee within unincorporated areas under N.D.C.C. ch. 5-02. The responsibilities under N.D.C.C. ch. 40-47 and 5-02 are distinct and each chapter may be applied concurrently. See Haugland v. Spaeth, 476 N.W.2d 692, 694-5 (N.D. 1991).

A city's zoning authority includes the power to regulate and restrict the location and use of buildings and land. N.D.C.C. § 40-47-01. Thus, despite the fact that a county has the authority to license the retail sale of alcoholic beverages within the extraterritorial zoning jurisdiction of a city, the city's zoning regulations may effectively prohibit a person from engaging in the sale of alcoholic beverages at a particular location. See Leonard v. Medlang, 264 N.W.2d 481 (N.D. 1978).

In conclusion, it is my opinion that a city's zoning provisions apply to locations within its extraterritorial zoning jurisdiction which may be granted a county license for the retail sale of alcoholic beverages.

- EFFECT -

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 questions presented are decided by the courts.

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