

LETTER OPINION
2005-L-21

September 9, 2005

The Honorable Richard Brown
State Senator
5418 11th St S
Fargo, ND 58104-6452

Dear Senator Brown:

Thank you for requesting my opinion on several topics relating to Senate Bill 2300, which restricts smoking in public places. It is my opinion that a "bar," including a separately enclosed bar in a hotel, restaurant, or bowling center, is exempt from the non-smoking requirements as long as its annual gross food sales are less than its annual gross sales of alcoholic beverages. It is my further opinion that the Fargo ordinance is less stringent than state law and is, therefore, preempted to the extent it allows smoking in bars without regard to the amount of food served.

ANALYSIS

Senate Bill 2300 was passed during the 2005 legislative session. See 2005 N.D. Sess. Laws ch. 239. It made significant modifications to N.D.C.C. §§ 23-12-09, 23-12-10, 23-12-10.2, and 23-12-11, and created two new sections, N.D.C.C. §§ 23-12-10.3 and 34-06-03.2, all of which relate to new restrictions on smoking in public places in North Dakota.

Senate Bill 2300 prohibits smoking in all enclosed areas of "[p]ublic places" and "[p]laces of employment." N.D.C.C. § 23-12-10(1). "Public place" includes enclosed areas to which the public has access, including bars and restaurants. See N.D.C.C. § 23-12-09(9). The language defining "public place," to include bars and restaurants was in Senate Bill 2300 as first introduced. Later in the session, the Legislature amended the bill to exempt bars, but not restaurants, from the smoking prohibition. Subsections 23-12-09(1) and (11) define "[b]ar" and "[r]estaurant" as follows:

"Bar" means 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.

"Restaurant" includes every building or other structure, or any part thereof, and all buildings in connection therewith that are kept, used, maintained, advertised, or held out to the public as a place where food is served, including coffee shops, cafeterias, private and public school cafeterias, kitchens, and catering facilities in which food is prepared on the premises for serving elsewhere, and a bar area within a restaurant.

(Emphasis added.)

Even though the Legislature exempted bars from the smoking prohibition, it defined "bar" in a limited way. If an establishment does not meet this definition of "bar," smoking is prohibited even though the proprietor might call it a bar.

An establishment is a "bar" under Senate Bill 2300 if "the serving of food is only incidental to the consumption of [alcoholic] beverages."¹ N.D.C.C. § 23-12-09(1). Senate Bill 2300 does not define "incidental." When a word is not defined in the North Dakota Century Code, the plain meaning of that word generally controls. N.D.C.C. § 1-02-02. Thus, resorting to a dictionary definition of "incidental" is appropriate. See Baity v. Workforce Safety & Ins., 687 N.W.2d 714, 718 (N.D. 2004). "[I]ncidental" is defined as "[o]ccurring or likely to occur as an unpredictable or minor concomitant" or "[o]f a minor, casual, or subordinate nature." The American Heritage Dictionary 650 (2d coll. ed. 1991). "[M]inor" means "[l]esser or smaller in amount, extent, or size." Id. at 800. Accordingly, "the serving of food [that] is only incidental to the consumption" of alcoholic beverages in the definition of "bar" means the bar's gross sales of food must be less than the gross sales from alcoholic beverages. See N.D.C.C. § 23-12-09(1). This standard is the same as that established in N.D.C.C. § 5-02-06(2), which restricts when persons under twenty-one years of age may be in a facility in which alcoholic beverages are sold:

A person under twenty-one years of age may not remain in a restaurant where alcoholic beverages are being sold except if the restaurant is separated from the room in which alcoholic beverages are opened or mixed and gross sales of food are at least equal to gross sales of alcoholic beverages which are consumed in the dining area

¹ The term "incidental" is used in one other place in Senate Bill 2300. A "[r]etail tobacco store" is defined in Senate Bill 2300 to mean "a retail store utilized primarily for the sale of tobacco products and accessories and in which the sale of other products is merely incidental." N.D.C.C. § 23-12-09(12).

Section 5-02-06, N.D.C.C., was also provided to the House Human Services Committee during its consideration of Senate Bill 2300. Mar. 14, 2005, memo from Mangskau to Representative Price.

Under N.D.C.C. § 23-12-09(1), a stand-alone bar may allow smoking if its food service is incidental to sales of alcoholic beverages. Arguably, the second sentence in the definition of, "bar" could mean the requirement that food service be incidental to alcoholic beverage consumption does not apply to bars in hotels, restaurants, and bowling centers, if the bars are in separately enclosed areas. However, such an interpretation, which would allow a bar to permit smoking regardless of how much food is sold, is inconsistent with the broad goal of the bill, which was to protect the public health and welfare by prohibiting smoking in public places, including restaurants. N.D.C.C. § 23-12-10.

In addition, an interpretation that the incidental food service requirement applies to separately enclosed bars in hotels, restaurants, and bowling centers is supported by the legislative history. The North Dakota Hospitality Association (Association) offered amendments to the definition of "bar." Hearing on S.B. 2300 Before the House Human Servs. Comm., 2005 N.D. Leg. (Mar. 14) (Testimony of Bill Shalhoob). The Association was concerned that the definition of bar in the bill as introduced would restrict smoking to stand-alone bars whose sole business was to sell drinks. Id. The proposed amendments included separately enclosed bars located within hotels and restaurants in the definition of "bar."

Thus, smoking is prohibited in "a bar area within a restaurant." An exception applies if the bar is in an area separately enclosed from the restaurant, provided its food sales are less than its alcoholic beverages sales.

There is a further question about the time period over which sales are to be calculated. Section 5-02-06, N.D.C.C., does not contain a time period for calculating gross food and alcohol sales. In N.D.A.G. Letter to Sillers (Jan. 29, 1985) this office determined that gross sales calculations under section 5-02-06 should be made on an annual basis. Given that N.D.C.C. § 5-02-06 contains the same standard as "incidental" is defined in this opinion, it is reasonable to conclude that gross sales for determining whether a bar is exempt from the smoking ban should also be calculated annually. If gross sales of food are at least equal to alcoholic beverage sales, the establishment would be a restaurant for purposes of determining whether smoking is permitted.² Accordingly, it is my opinion that a

² For purposes of the alcoholic beverage licensing law, the amount of food sales in a bar is irrelevant. N.D.C.C. § 5-02-06. To be a "restaurant" under N.D.C.C. § 5-02-06, the dining area must be separated from the room in which alcoholic beverages are opened or mixed and gross sales of food must be at least equal to gross sales of alcoholic beverages consumed in the dining area. Therefore a bar may be a "restaurant" under the smoking law but not under the alcohol beverage licensing law.

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stand-alone bar or a separately enclosed bar located in a hotel, restaurant, or bowling center is a “[b]ar” as defined in N.D.C.C. § 23-12-09(1) and not a “restaurant” as long as its annual gross sales of food are less than its annual gross sales of alcoholic beverages.

Your final questions are whether the City of Fargo’s initiated ordinance allowing smoking “in all enclosed bar areas” regardless of the amount of food served is less stringent than state law, and, if so, then whether it is preempted. See Fargo, ND, Code § 10-1101 (2005). Section 23-12-10.2(2), N.D.C.C., states that a city ordinance “may not provide for less stringent provisions than those provided under sections 23-12-09 through 23-12-11.” Provisions that are more stringent, however, are permitted and are not preempted. N.D.C.C. § 23-12-10.2(2). This office has interpreted “less stringent” to mean providing less protection from environmental tobacco smoke. See N.D.A.G. 2005-L-17.

The Fargo ordinance allows smoking in enclosed bar areas regardless of the amount of food served. See Fargo, ND, Code §§ 10-1101, 10-1104(B) (2005). State law only allows a bar to permit smoking if its sales of food are less than its sales of alcoholic beverages. State law is, therefore, more stringent than the Fargo ordinance. Accordingly, it is my opinion that the Fargo ordinance is less stringent than state law, and is, therefore, preempted to the extent it allows smoking in bars without regard to the amount of food served.

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. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).