

**LETTER OPINION  
2005-L-26**

September 27, 2005

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

Dear Senator Schobinger:

Thank you for requesting my opinion on several issues relating to 2005 S.B. 2300, which enacted new restrictions on smoking in public places. 2005 N.D. Sess. Laws ch. 239. Smoking is allowed in bars and retail tobacco stores under an exception to this law. Whether a bar or a retail tobacco store will lose its exemption from the general ban on smoking by leasing space to a nonprofit charitable gaming organization depends on the facts of each case.

ANALYSIS

Senate Bill 2300, 2005 N.D. Sess. Laws ch. 239, created significant new restrictions on smoking in public places in North Dakota. Section 23-12-10(1), N.D.C.C., now prohibits smoking in all enclosed areas in public places and places of employment. A public place is defined as “an enclosed area to which the public has access . . . including bars; bingo facilities; . . . [and] retail stores.” N.D.C.C. § 23-12-09(9). Section 23-12-10(2), N.D.C.C., provides several exceptions to that general prohibition, including exempting bars and retail tobacco stores from the non-smoking requirement. N.D.C.C. § 23-12-10(2)(c), (f).

“[A]lthough exceptions in statutes are to be strictly, but reasonably, construed, they extend only so far as their language fairly warrants and all doubts are to be resolved in favor of the general provisions rather than the exception.” State v. Grenz, 437 N.W.2d 851, 854 (N.D. 1989). Under the new smoking laws, the general provisions are the prohibitions against smoking in public places such as bars, bingo facilities, and retail stores. The exceptions for certain bars and retail tobacco stores must be reasonably construed, but any doubtful language must be resolved in favor of the general prohibition against smoking.

Your first question is whether smoking is legal in a bar that leases space to a non-profit corporation that conducts charitable gaming, including bingo, on those premises. Section 23-12-09(1), N.D.C.C., defines “bar” 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.

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. N.D.C.C. § 23-12-09(1). A “bar” may offer food service that is “only incidental to the consumption” of alcoholic beverages. Id.

Words used in statutes must be given their plain meaning. N.D.C.C. § 1-02-02. A dictionary may supply the plain meaning of a term. Baity v. Workforce Safety & Ins., 687 N.W.2d 714, 718 (N.D. 2004). “Devote” means “[t]o give or apply . . . entirely to a particular activity, pursuit, cause, or person” or “[t]o set apart for a specific purpose or use”. The American Heritage Dictionary 390 (2d coll. ed. 1991). Thus, in order to be a “bar,” an establishment must serve alcoholic beverages as its specific purpose. If any activity, including leasing space to a nonprofit charitable gaming organization, replaces serving alcoholic beverages as the establishment’s specific purpose, then the establishment will cease being a “bar” under this law and smoking will be prohibited in that establishment unless the establishment falls under another exemption. However, determining an establishment’s specific purpose is a factual question on which this office cannot opine. N.D.A.G. 2005-L-18.

Your second question is similar to the first. You ask whether smoking is legal in a retail tobacco store that leases space within its premises to a non-profit corporation that conducts charitable gaming, including bingo. Section 23-12-09(12), N.D.C.C., defines a “retail tobacco store” as “a retail store utilized primarily for the sale of tobacco products and accessories and in which the sale of other products is merely incidental.” If a retail tobacco store leases space to a charitable gaming organization, whether it may allow smoking depends on whether the location’s primary function is selling tobacco products and accessories, and whether selling other products is “merely incidental.” See N.D.C.C. § 23-12-09(12), N.D.A.G. 2005-L-21 (discussing “only incidental” as pertaining to food service in a bar). Your second question presupposes that an establishment leasing space to a charitable gaming organization is a “retail tobacco store.” If that is, in fact, the case, then smoking would be legal in that establishment. If charitable gaming or bingo is the establishment’s primary purpose, and tobacco sales are not the primary purpose, then the

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establishment will not be a "retail tobacco store" under this law and smoking will be prohibited. As with the above question, however, that determination requires a factual analysis on which this office cannot opine.

In either instance, a proprietor may change the purpose of his or her establishment. If an establishment previously was one that must be smoke-free, such as a bingo facility, but its proprietor becomes licensed to serve alcoholic beverages or to sell tobacco, the establishment may not allow smoking unless and until it meets the legal definition of a bar or a retail tobacco store. That is, to be a bar, a former bingo facility must now be devoted to selling alcoholic beverages and bingo may only be incidental or of a clear secondary purpose. And to be a retail tobacco store, a former bingo facility must now be utilized primarily for selling tobacco products and accessories and bingo must be merely incidental. The determination of this factual issue may depend on evidence such as sales comparisons, the establishment's name and advertising, or the establishment's reputation in the community. If the establishment continues to be, in truth, a bingo facility, then the general law will be applied and smoking will not be allowed.

Your final question is whether there is a distinction between a 'bar' and a 'retail tobacco store' with respect to the prior questions, and if so what is the basis for that distinction. My answers to the above questions obviate the need to address your final question.

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).