LETTER OPINION
2005-L-31

October 7, 2005

The Honorable April Fairfield
State Senator
312 Main Ave S
Eldridge, ND 58401-7427

Dear Senator Fairfield:

Thank you for requesting my opinion on several topics relating to Senate Bill 2300 (S.B. 2300), which restricts smoking in public places and places of employment. It is my opinion that the manner in which an establishment is licensed by its local alcohol licensing agency has no effect on whether the establishment is a "bar" for purposes of the no smoking laws; S.B. 2300 does not require a separate ventilation system for a bar within a hotel, bowling center, or restaurant; the smoking and non-smoking areas of hotels, bowling centers, and restaurants must be separated by solid walls or windows, and a solid door must occupy the entire area of any doorway between those areas; and a local agency cannot enforce a more stringent prohibition against smoking than that provided by S.B. 2300 without adopting an ordinance.

ANALYSES

Senate Bill 2300 was passed during the 2005 legislative session. 2005 N.D. Sess. Laws 239. Senate Bill 2300 made significant modifications to N.D.C.C. §§ 23-12-09, 23-12-10, 23-12-10.2, and 23-12-11, and enacted 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 and places of employment in North Dakota. 2005 N.D. Sess. Laws ch. 239. Subsection 23-12-10(1), N.D.C.C., now prohibits smoking in all enclosed areas of public places and places of employment except for those listed in N.D.C.C. § 23-12-10(2).

Your first question is whether the class of liquor license an establishment obtains from its local licensing agency affects whether the establishment is a "bar" or a "restaurant" under the new no smoking laws. That question is important because smoking can be permitted in a "bar," but is prohibited in every part of a "restaurant" except for "a bar located within a . . . restaurant that is not licensed primarily or exclusively to sell alcoholic beverages if the bar is in a separately enclosed area." N.D.C.C. §§ 23-12-10(1), (9), (11) and 23-12-10(1). See also N.D.A.G. 2005-L-21.

The class of liquor license an establishment obtains from its local licensing agency has no effect on whether the establishment is a "bar" or a "restaurant" under the no smoking laws. Section 23-12-09(1), N.D.C.C., defines what a "bar" is for purposes of those laws. In order to be a "bar," an establishment must have the following characteristics: (1) it must be a retail alcoholic beverage establishment licensed under N.D.C.C. ch. 5-02; (2) it must be devoted to the sale of alcoholic beverages; and (3) if it sells food, the sale of food must be "only incidental" to the sale of alcoholic beverages. N.D.C.C. § 23-12-09(1). A further requirement for a bar located in a hotel, bowling center, or restaurant that is not licensed primarily or exclusively to sell alcoholic beverages is that the bar must be in a separately enclosed area. Id.

If an establishment meets the above definition, it is a "bar" under the no smoking laws and may permit smoking on the premises. N.D.C.C. § 23-12-10(2)(f). If an establishment does not meet the above definition, it may not permit smoking on the premises unless it comes within one of the other exceptions. N.D.C.C. § 23-12-10; N.D.A.G. 2005-L-26. Even if an establishment comes within the definition of "bar" in the alcohol licensing law, it may not be a "bar" for purposes of the no smoking laws. N.D.A.G. 2005-L-21 n. 2. Nothing in the definition of "bar" or the remainder of the no smoking laws contains any reference to how an establishment is licensed by its local licensing agency.

Further, N.D.C.C. § 23-12-10.2(2) specifically prohibits a local governing body from enacting no smoking laws "less stringent" than those provided by S.B. 2300. That preemption against less stringent local no smoking laws would be meaningless if local alcohol licensing classes were interpreted to allow smoking in locations specifically prohibited by state law. Accordingly, it is my opinion the manner in which an establishment is licensed by its local alcohol licensing agency has no affect on whether the establishment is a "bar" for purposes of the no smoking laws.

Your second question involves an interpretation of the "separately enclosed area" requirement for a bar within a hotel, bowling center, or restaurant. As stated above, smoking is permitted in a bar within a hotel, bowling center, or restaurant if the bar is in a "separately enclosed area." N.D.C.C. § 23-12-09(1). "'Enclosed area' means all space between a floor and ceiling that is enclosed on all sides by solid walls or windows, exclusive of doorways, which extend from the floor to the ceiling." N.D.C.C. § 23-12-09(5). You question whether the law requires a separate ventilation system for that area, and "what type of partition is sufficient between the restaurant and separately enclosed 'bar.'"

An early version of S.B. 2300 required a separately enclosed bar in a hotel or restaurant to be "vented directly to the outdoors." First Engrossed S.B. 2300 with House Amendments, 2005 N.D. Leg. That requirement was later removed. As passed, S.B. 2300 contains no reference to ventilation for separately enclosed bars. Accordingly, it is my opinion S.B. 2300 does not require a separate ventilation system for a bar within a hotel, bowling center, or restaurant.

The type of partition necessary to constitute a "separately enclosed area" for a bar in a hotel, bowling center, or restaurant is provided by N.D.C.C. § 23-12-09(5): it must be composed of solid walls or windows which extend from the floor to the ceiling, and there may be a doorway to allow passage between the areas. Section 23-12-09(5), N.D.C.C., does not specifically mention that an actual door is required to be in the doorway, and is therefore ambiguous. But the Legislative Assembly clearly did not intend to allow the doorway to be open.

The very purpose of the no smoking laws is "to protect the public health and welfare and to recognize the need for individuals to breath smoke-free air." N.D.C.C. § 23-12-10(1). That purpose could not be fulfilled with an open doorway. Furthermore, the requirement of "solid walls or windows" indicates the intent that a solid structure be present between smoking and non-smoking areas. An interpretation that would require a solid structure to enclose the smoking area, and thereby prevent smoke from entering a non-smoking area, but that would allow an open doorway of indeterminate size to remain open, would produce an absurd result obviously contrary to legislative intent. "Statutes must be construed logically so as not to produce an absurd result." In interest of M.Z., 472 N.W.2d 222, 223 (N.D. 1991). When construing an ambiguous statute that affects a public interest, "'an interpretation is preferred which favors the public. A narrow construction should not be permitted to undermine the public policy sought to be served.'" Estate of Thompson, 586 N.W.2d 847, 849 (N.D. 1998) (quoting 2B Norman J. Singer, Sutherland Stat. Constr. § 56.01 (5th ed. 1992). Accordingly, it is my opinion the smoking and non-smoking areas of hotels, bowling centers, and restaurants must be separated by solid walls or windows, and that a solid door must occupy the entire area of any doorway between those areas.

Your third question asks for clarification on the meaning of "incidental" in the definition of "bar" in N.D.C.C. § 23-12-09(1). A "bar" can serve food and still allow smoking, but only if that food service is "incidental to the consumption of [alcoholic] beverages." I addressed that issue in a September 9, 2005, opinion. N.D.A.G. 2005-L-21. In that opinion, I concluded that "'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." Id. (quoting N.D.C.C. § 23-12-09(1)). The gross sales are to be compared on a yearly basis. Id. Accordingly, I opined "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." Id.

Your fourth question asks for confirmation that a local agency cannot enforce a more stringent prohibition against smoking than that provided by S.B. 2300 without adopting an ordinance. Local entities are permitted to adopt non-smoking ordinances that are more stringent than those provided by S.B. 2300. N.D.A.G. 2005-L-17. But prosecuting

individuals for violating smoking prohibitions that are not stated in federal, state or local law would be unconstitutional. "The due process clauses of the state and federal constitutions require definiteness of criminal statutes so that the language, when measured by common understanding and practice, gives adequate warning of the conduct proscribed and marks boundaries sufficiently distinct for judges and juries to fairly administer the law." State v. Mertz, 514 N.W.2d 662, 667 (N.D. 1994). Accordingly, it is my opinion a local agency cannot enforce a more stringent prohibition against smoking than that provided by S.B. 2300 without adopting an ordinance.

Sincerely,

Wayne Stenehjem
Attorney General

sam/vkk

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).