

## **N.D.A.G. Letter to Solberg (Jan. 12, 1988)**

January 12, 1988

Mr. Wayne O. Solberg  
Fargo City Attorney  
P.O. Box 1897  
Fargo, ND 58107-1897

Dear Mr. Solberg:

Thank you for your letter of September 16, 1987, requesting any suggestions or proposals I may have as to the definition of "prepared meal" for the purposes of the provision of N.D.C.C. § 5-02-05.2 allowing the Sunday sale of beer and wine. I apologize for the lengthy delay in responding to your letter, but the issue you have raised is a difficult one.

As I pointed out to Senator Holmberg in my August 21, 1987 letter, the Legislature did not define the scope and extent of the phrase "prepared meal" with respect to N.D.C.C. § 5-02-05.2. Instead, the legislative history indicates a desire to leave this determination to local licensing bodies. Thus, the city of Fargo has considerable discretion in making rules to govern this issue.

However, my review of the legislative history leads me to make some observations which may be of some assistance or help to you and other governing bodies attempting to wrestle with this issue. I believe that the Legislature intended the sale of beer and wine in conjunction with the sale of a prepared meal in a normal restaurant setting. The overall desire of the proponents of this bill as expressed to the committees which heard testimony on the bill was to give an option to restaurants to provide their customers with beer or wine to be consumed as part of a meal. This appeared to be in recognition of the fact that many people desired to drink beer and/or wine with their meals and would prefer to dine at home or across the border in Minnesota (where such sales are permitted on Sunday) if not allowed to consume beer or wine with their meal in a North Dakota restaurant.

This [Senate Bill 2380] would just allow restaurants to provide their customers with what they want with their meals.

Hearing on S.2380 before the Senate Committee on Industry, Business, and Labor, 50th Leg., (February 4, 1987) (Statement of Senator Holmberg).

Within the available legislative history, there are indications that the intent of the bill was not to allow bars and lounges to open up on Sundays. Instead, the thrust of the arguments of the legislation's proponents were directed toward allowance of consumption of a desired beverage as part of the consumption of a prepared meal which was already occurring.

Thus, the intent of the Legislature was not to give a green light to establishments to find some contrived method whereby a food item would be prepared and delivered to a customer simply to allow that customer to drink beer or wine on a Sunday. Instead, the Legislature intended to allow the consumption of beer or wine as part of the consumption of meals in a regular and customary restaurant setting.

Within that general framework, I think there are at least six factors that a governing body should consider. First, the location where the meal is served is significant. The Legislature clearly intended that the beer and wine be served in a traditional restaurant setting. That would appear to rule out opening of the bar area and simply providing food as a sideline to serving beer or wine. This would tend to limit beer and wine sales on Sundays to traditional restaurant settings as opposed to bar areas where food is not served on other days of the week.

Second, the physical layout of the table where the food is served must be considered. Generally, a restaurant serves food at a table where patrons are seated and tableware is placed. Serving a pack of peanuts or a half a sandwich at a bar stool in order to enable someone to buy beer and wine on Sunday was not what the Legislature had in mind in enacting this law.

A third factor to be considered is the quantity of service other than bar service. In other words, are there waiters, waitresses, or servers employed to serve food as opposed to alcoholic beverages? I can conceive of situations where someone will be open on Sunday and have servers supply a steady stream of alcoholic beverages to patrons with a few hors d'oeuvre in the center of an area for patrons to help themselves. Again, I do not think this is what the Legislature intended to permit.

A fourth and obviously important factor is the food itself, both the variety and quantity served. A pack of peanuts served with beer or wine does not strike me as good faith compliance with the law. Instead, traditional restaurant settings entail many different menu items and service of sufficient quantities of food to each patron to constitute a meal. While different individuals tend to have different eating habits, the pattern and practice established at that particular establishment will provide some guidance to the city as to whether or not it truly is a restaurant setting or a sham attempt to serve beer or wine on Sunday in violation of the letter or spirit of this law.

The fifth factor that seems significant is the average duration of food service. In other words, how much time are patrons spending at the establishment and, of that time, how much time is spent actually eating as opposed to simply drinking beer or wine either before or after the consumption of food? While individual habits may vary on this issue, the pattern and practice set at a particular establishment will provide some guidance to the city governing body as to whether or not there is actual compliance with the law.

Finally, and perhaps most significantly, the revenue derived from Sunday food sales over time ought to prove very enlightening. If an establishment is deriving a disproportionate amount of its revenue on Sunday from the sale of beer or wine as opposed to the sale of

food, that should tell the city a lot about whether or not this establishment is complying with the spirit and letter of state law.

Consideration of all these factors will provide a city with a pretty good view of whether or not compliance with Sunday opening legislation has occurred. Because the law appears to give the cities great discretion in this regard, I would recommend that the city enunciate in advance the criteria that it will consider in determining how to enforce this law. Once it has done so, establishments that open on Sunday will have fair warning of the kinds of standards that will be applied to them. Over time, I think the city will be able to sort out those establishments that are complying with the letter and spirit of the law from those that are not.

I hope this information has been of use to you. I know that you recognize that this is a difficult area of interpretation, but I believe the cities' considerable discretion in enforcement of the law will be of considerable benefit in preventing abuses.

Sincerely,

Nicholas J. Spaeth

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