

## **N.D.A.G. Letter to Martinson (Feb. 5, 1991)**

February 5, 1991

Honorable Bob Martinson  
State Representative  
House of Representatives  
State Capitol  
600 East Boulevard Avenue  
Bismarck, ND 58505-0360

Dear Representative Martinson:

Thank you for your January 30, 1991, letter requesting my opinion concerning the interpretation of the special Sunday event alcohol beverage permit statute (N.D.C.C. § 5-02-05.1). In your letter you ask three questions concerning that section which I will address in the order you presented them.

Your first question is whether the governing body issuing a special event Sunday permit may grant the permit to one business and deny other eligible businesses a permit for the same event. Cities and counties may issue special Sunday event permits to "a private club, lodge, restaurant, motel, or hotel." N.D.C.C. § 5-02-05.1(1). The authority to issue a permit "rests solely" with the city or county governing body. N.D.C.C. § 5-02-05.1(2). Thus, permits may be issued individually to a club or other entity authorized to receive one under statute and ordinance. The ability to issue that permit and the discretion to grant or deny a permit, however, rests with the city's or county's governing body. Consequently, a city or county may issue a permit to one facility in the city and deny the permit to other businesses which would be eligible except for the fact that the city or county has denied them the permit.

Your second question concerns whether the governing body may condition the permit to limit attendance at an event to those who are involved in the event for which the special Sunday permit is granted. N.D.C.C. § 5-02-05.1(3) provides that the "general public may be permitted to participate in the consumption of alcoholic beverages distributed under the authority and conditions of the special permit." (Emphasis supplied.) The use of the word "may" in this subsection means that the city is not required to grant a permit which allows attendance by the general public and, in fact, may condition the permit to limit attendance to specific groups of people. Whether a limitation would give rise to an actionable claim is a question of fact which must be determined based upon the facts of each situation.

Your third question is whether the governing body may deny access to the general public if the sponsoring organization requests permission for the general public to be admitted to other establishments which have been authorized to be open under a special Sunday event alcoholic beverage permit.

As discussed above, N.D.C.C. § 5-02-05.1(3) provides that the general public may be admitted and that the governing body may place conditions upon permits which are issued. A governing body may condition a permit to allow admittance to other establishments to those attending the special event as well as to the sponsoring organization's event headquarters.

In conclusion, the underlying theme of N.D.C.C. § 5-02-05.1 is local control. Consequently, absent some constitutional question, the governing body may grant, condition, or deny a permit as it chooses. It may, therefore, under appropriate circumstances, grant a permit to one entity although it has denied a permit to another.

A decision to grant or deny a permit may be reviewed as other decisions are reviewed. If the decision is allegedly beyond the authority granted under the statute, a citizen-initiated legal action could be filed to contest the decision. See, e.g. Danzl v. City of Bismarck, 451 N.W.2d 127 (N.D. 1990) (action by individual to enjoin city from acting). Agencies of the state, such as cities and counties, have only those powers expressly conferred by the Legislature and those powers necessarily implied from the express powers. Dakota Land Co. v. City of Fargo, 224 N.W.2d 810 (N.D. 1974). Actions which exceed the express or implied powers may be challenged judicially in an appropriate legal proceeding. In addition, city ordinances requiring a result which is unfavorable may be subject to the initiative and referendum powers authorized by N.D.C.C. ch. 40-12.

I trust this answers your questions.

Sincerely,

Nicholas J. Spaeth