

LETTER OPINION
93-L-12

January 25, 1993

Senator James Maxson
State Capitol
Bismarck, ND 58505

RE: Senate Bill 2265

Dear Senator Maxson:

After a hearing before the Senate Political Subdivisions Committee on Senate Bill 2265 relating to the sale of alcoholic beverages on a Sunday, you made inquiry to this office concerning the effects Senate Bill 2265 may have on a city's authority to regulate the sale of alcoholic beverages through its ordinances. You state that Senate Bill 2265 will lower the fee a city may charge for a permit under N.D.C.C. ? 5-02-01.1, amends N.D.C.C. ? 5-02-05 to permit alcoholic beverage sales after 12 p.m. on a Sunday, and repeals N.D.C.C. ?? 5-02-05.1 and 5-02-05.2 regarding Sunday liquor permits and beer and wine permits.

A city has authority to enact ordinances based on either a specific legislative grant of power or authority which may be fairly implied in, or incident to, a specific grant of power. Ujka v. Sturdevant, 65 N.W.2d 292 (N.D. 1954).

Several provisions of North Dakota law grant a municipality power to regulate the use and sale of alcoholic beverages. N.D.C.C. ? 40-05-01(29) provides:

40-05-01. Powers of all municipalities. The governing body of a municipality shall have the power:

29. Alcoholic beverages. To regulate the use and to regulate and license the sale of alcoholic beverages subject to the provisions contained in title 5.

In construing this section, the North Dakota Supreme Court recognized that "[t]he power to regulate a business includes the authority to prescribe reasonable rules, regulations, and conditions under which the business may be conducted or permitted." Fargo Beverage Company v. City of Fargo, 459 N.W.2d 770, 773 (N.D. 1990). Citing Haugland v. City of Bismarck, 429 N.W.2d 449, 454 (N.D. 1988), the court stated:

Leaving the manner and means of exercising municipal powers to the discretion of municipal authorities implies a range of reasonableness within which a municipality's exercise of discretion will not be interfered with or

upset by the judiciary.

Fargo Beverage Company, 459 N.W.2d 770, 773 (N.D. 1990). In addition to the specific grant of regulatory authority to a municipality in N.D.C.C. ? 40-05-01, home rule cities are granted the power to fix the fees, number, terms, conditions, duration, and manner of issuing and revoking licenses in the exercise of its governmental police powers and to adopt, amend, and repeal ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare with corresponding offenses and penalties for violation of those provisions. N.D.C.C. ? 40-05.1-06(3), (7), (9).

N.D.C.C. ? 5-02-09 specifically permits a local governing body, by ordinance or resolution, to regulate or restrict the operation of alcoholic beverage licensees including the setting of hours when such licensee may engage in the sale of alcoholic beverages. This section provides:

Local regulations. The local governing body by ordinance or resolution may regulate or restrict the operation of licensees including among other things determining the number of licenses to be granted, establishing health and safety standards for licensed premises, setting of hours and prohibition of dancing or various forms of entertainment on the premises.

N.D.C.C. ? 5-02-09. Other than as noted in this letter, I do not believe that the adoption of Senate Bill 2265 in its present form will restrict the authority of local governing bodies, including municipalities, from continuing their regulation of alcoholic beverage licensees and the use or sale of alcoholic beverages as is now exercised by the local governing bodies.

Section 1 of Senate Bill 2265 will restrict the local governing body as to the fee that may be charged for a local permit issued pursuant to N.D.C.C. ? 5-02-01.1. As presently written, Senate Bill 2265 will limit the local governing body to a fee for the permit of not more than \$5. Section 2 of Senate Bill 2265 contains a similar license fee restriction.

Sections 3 and 4 of Senate Bill 2265 remove state criminal penalties for the sale of alcoholic beverages on Sunday so long as that sale did not occur between 1 a.m. and 12 p.m. on a Sunday.

Section 5 of Senate Bill 2265 repeals N.D.C.C. ?? 5-02-05.1 and 5-02-05.2 which establish qualifications for applicants for a Sunday alcoholic beverage permit and limitations on the dispensing of alcoholic beverages by a licensee on Sunday. The repeal of these two sections removes state mandated restrictions upon the sale and dispensing of alcoholic beverages on Sunday and the conditions upon which such activity may be conducted if approved by the local governing

body. The removal of these restrictions and conditions from state law will not restrict the general authority of local governing boards to regulate the use and sale of alcoholic beverages or the operation of alcoholic beverage licensees pursuant to valid ordinances or resolutions.

I hope that this letter adequately responds to your inquiry.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

rpb/vkk