

OFFICIAL OPINION NO. 90-46, Municipal Beverage Ordinance to Preclude Individuals from Having Video Lottery Machines

December 11, 1990

Alan F. Glover
City Attorney
418 Fourth Street
Brookings, SD 57006

OFFICIAL OPINION NO. 90-46

Municipal beverage ordinance to preclude individuals from having video lottery machines

Dear Mr. Glover:

You have requested an official opinion from this office with regard to the following factual situation.

FACTS:

The city of Brookings has given first reading to the following proposed ordinance: No malt beverage retail dealer license shall be issued to any establishment which derives less than seventy-five (75%) percent of its gross business income, excluding video lottery income, from the sale of beverages and/or food which is prepared and/or consumed on the premises. Bona fide congressionally chartered veterans organizations, religious, charitable, educational, or fraternal organizations, and local or civic clubs, which exist under the laws of the State of South Dakota, are excluded from the requirements of this paragraph.

The assumed purpose of the adoption of this ordinance is to preclude issuance of retail malt beverage licenses to convenience stores and thereby necessarily preclude convenience from qualifying to have video lottery machines in them.

Based upon the above facts, you have asked the following question:

QUESTION:

Does the city of Brookings have the power by the adoption of the above ordinance to introduce additional criteria relative to the issuance of malt beverage retail dealer licenses to preclude establishments from having video lottery machines?

It is my opinion that the city of Brookings has the authority to adopt ordinances concerning the issuance of retail malt beverage licenses. The proposed ordinance cited in your opinion request, however, appears to be deficient.

Under SDCL 35-2-1.2, any individual who intends to apply for a retail alcoholic beverage license for an establishment located within the corporate limits of a municipality must submit the application to the municipality for review. The governing board of the municipality has the statutory discretion to approve or disapprove the application "depending on whether it deems the applicant a suitable person to hold such license and whether it considers the proposed location suitable." SDCL 35-2-2 through 35-2-5.3 provide the process for review and approving or disapproving applications. The South Dakota Supreme Court in *Randall's-Yankton, Inc. v. Ranney*, 134 N.W.2d 297 (S.D. 1965) broadly construed a municipality's discretion under SDCL 35-2-1.2. The factors a municipality may consider include:

The type of business which applicant proposed to operate; the manner in which the business is operated; the extent to which minors frequent or are employed in such a place of business; the adequacy of the police facilities to properly police the proposed location; as well as other factors which are inherently associated with the sale of alcoholic beverages. (Emphasis supplied.)

Randall's-Yankton, Inc. v. Ranney, 134 N.W.2d at 300 (emphasis added).

Based upon the review of the relevant statutory scheme and case history, it is my opinion that a municipality may adopt ordinances concerning the issuance of retail licenses to facilitate its review process under SDCL ch. 35-2. Such an ordinance, however, must augment and not preclude the application review process prescribed by the state legislature.

Though the city of Brookings does have the inherent power to adopt an ordinance relative to the issuance of a malt beverage retail dealer license, I am troubled by the ordinance as proposed. First, I have severe reservations as to whether the nature of an establishment's income stream prior to seeking the retail beverage license is relevant in the review process. In my opinion, it would be hard to prove that certain types of revenue streams are

dispositive of the licensing determination. Income streams in and of themselves do not provide any relevant information concerning the manner in which the business is operated, the extent minors frequent or are employed, the type of business which the applicant is proposed to operate or any other factor which is inherently associated with the sale of alcoholic beverages. See *Randall's-Yankton, Inc. v. Ranney*, supra.

In addition, the proposed ordinance appears defective from the standpoint that there is no determination of how the income percentages are calculated. Questions that immediately come to mind include: What period of time must revenue projections be derived; what happens when a new business is applying for a malt beverage retail dealer license; and, how does the governing body prove the income percentages are accurate. Finally, the ordinance does not consider whether an applicant can modify how income is generated by receipt of the malt beverage retail license.

If the concern of the city of Brookings as indicated in your request is to preclude the issuance of retail malt beverage licenses to convenience stores, it is my opinion that an ordinance could be adopted that directly addresses this concern. This is especially true if the type of beverage license is an on-sale rather than an off-sale beverage license. The ability of minors to frequent the establishment, the other items that are sold, as well as the hours that business is conducted are far more relevant factors that directly address the city's concerns and, of course, are clearly allowable factors which a municipality may consider under *Randall's-Yankton, Inc.*, supra. Income revenue streams appear at most a tenuous basis to preclude alcoholic beverage license issuance.

Finally, your opinion request indicates at least part of the city's basis for the proposed ordinance is to restrict entities qualifying for video lottery machines. The South Dakota Legislature in enacting the video lottery provisions under SDCL ch. 42-7B restricted the ability of the State Lottery Commission to issue licenses to business establishments. The Legislature determined that only establishments that have an on-sale liquor license are eligible for a video lottery license. Based upon a review of this legislative scheme, it appears that the Legislature assumed that the municipalities through their license application review would issue on-sale licenses only to establishments that meet the city's objective concerns about on-sale alcohol sales. See generally, SDCL 9-29-5; AGO 89-37. The Legislature presumed that municipalities would issue on-sale liquor licenses based on the criteria for such a liquor license and not merely allow (or preclude) a business to generate income through the video lottery.

Respectfully submitted,

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL

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