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Legal Opinion 2018-008

TO: Mayor John Engen; City Council; Dale Bickell; Leigh Griffing; Mike Haynes; Denise Alexander; Mary McCrea; Laval Means; Mike Brady; Scott Hoffman; Steve Johnson; Marty Rehbein

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE March 20, 2018

RE: A Montana city may not, by ordinance, restrict the number of alcohol, liquor, beer and wine licenses that the Montana Department of Revenue may issue.

FACTS:

Monday evening, March 19, 2018, there was interest expressed by city council in knowing whether the City of Missoula could limit the number of alcohol, liquor, beer and/or wine licenses that the Montana Department of Revenue may issue within the Missoula city limits.

ISSUE(S):

May a Montana city limit the number of alcohol, liquor, beer and/or wine licenses that the Montana Department of Revenue issues for locations within a city's limits?

CONCLUSION(S):

No. A Montana city may not, by ordinance, restrict the number of licenses that the Montana Department of Revenue may issue.

LEGAL DISCUSSION:

Montana Code Annotated title 16, is entitled, "ALCOHOL AND TOBACCO" Chapters 1 through 4 and 6 of title 16 are known as the MONTANA ALCOHOLIC BEVERAGE CODE. See MONT. CODE ANN. § 16-1-101. Pursuant to the definitions set forth in section 16-1-106(10), MCA, the term "Department" generally means the Montana Department of Revenue and in some instances may also include the Montana Department of Justice with respect to the receiving and processing, but not granting or denying an application under a contract entered into under 16-1-302, MCA, pertaining to sale by a retailer for consumption on premises. See MONT. CODE ANN. § 16-1-106(10).

Pursuant to section 7-1-113, MCA, entitled, "CONSISTENCY WITH STATE REGULATION REQUIRED", a Montana local government with self-government powers is prohibited the exercise of any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation and control. See MONT. CODE ANN. § 7-1-113(1). The provisions of the MONTANA ALCOHOLIC BEVERAGE CODE affirmatively subject alcohol to Montana state regulation.

Pursuant to subsection 16-3-309(1), MCA, a city is authorized to enact an ordinance defining certain areas in its incorporated city limits where alcoholic beverages may or may not be sold. These regulations are commonly referred to as zoning regulations. Section 16-3-309(4), MCA, goes on to state that no county or incorporated city may by ordinance restrict the number of alcohol licenses that the Montana Department of Revenue may issue.

Section 16-3-309, MCA, states as follows:

16-3-309. Sales prohibited by ordinance. (1) An incorporated city may enact an ordinance defining certain areas in its incorporated limits where alcoholic beverages may or may not be sold.
(2) A county may enact an ordinance or resolution defining certain areas in the county, not within the incorporated limits of a city, where alcoholic beverages may or may not be sold.
(3) In enacting such an ordinance or resolution, the county or city may provide that the provisions of **16-3-306(1)** do not apply within the jurisdictional area of the ordinance or resolution. If a county or city has supplanted the provisions of **16-3-306(1)**, upon request of the department the governing body of the county or city must certify to the department whether or not the person or individual identified in the request may lawfully sell alcoholic beverages under the terms of the ordinance or resolution. The department is bound by the determination set forth in the certification.
(4) No county or incorporated city may by ordinance restrict the number of licenses that the department may issue. (*Emphasis added.*)

The cross reference in subsection 16-3-309(3) to subsection 16-3-306(1), MCA, is a cross reference to the state of Montana state law distance restrictions from entrances to a church, synagogue, other place of worship or school located on the same street and allows a Montana local government to provide the Montana state law distance restrictions do not apply in that specific Montana local government jurisdiction. Section 16-3-306 MCA. states as follows:

16-3-306. Proximity to churches and schools restricted. (1) Except as provided in subsections (2) through (4), a retail license may not be issued pursuant to this code to any business or enterprise whose premises are within 600 feet of and on the same street as a building used exclusively as a church, synagogue, or other place of worship or as a school other than a commercially operated or postsecondary school. This distance must be

measured in a straight line from the center of the nearest entrance of the place of worship or school to the nearest entrance of the licensee's premises. This section is a limitation upon the department's licensing authority.

(2) However, the department may renew a license for any establishment located in violation of this section if the licensee does not relocate an entrance any closer than the existing entrances and if the establishment:

(a) was located on the site before the place of worship or school opened; or

(b) was located in a bona fide hotel, restaurant, or fraternal organization building at the site since January 1, 1937.

(3) Subsection (1) does not apply to licenses for the sale of beer, table wine, or both in the original package for off-premises consumption.

(4) Subsection (1) does not apply within the applicable jurisdiction of a local government that has supplanted the provisions of subsection (1) as provided in **16-3-309**.

As noted earlier, subsection 16-3-309(4), MCA, provides that no Montana city may, by ordinance, restrict the number of alcohol licenses that the Montana Department of Revenue may issue. Montana cities may, through zoning, regulate the location where alcoholic beverages may or may not be sold.

CONCLUSION(S):

No. A Montana city may not, by ordinance, restrict the number of licenses that the Montana Department of Revenue may issue.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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