



OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2008-009

TO: Mayor John Engen; City Council; Bruce Bender; Chief Mark Muir; Mike Brady; Chris Odlin; Greg Willoughby; Rob Scheben; Marty Ludemann; Ellen Buchanan; Anne Guest; Steve King; Kevin Slovarp; Doug Harby; Tom Steenberg; Mike Painter; Jason Diehl; Donna Gaukler; Rob Thames; Brentt Ramharter; Dept. Mayor; Dept. MRA; Dept. Atty

FROM: Jim Nugent, City Attorney

DATE June 19, 2008

RE: Panhandling issues somewhat affected by Montana laws prohibiting local ordinances making it a crime for a person to be a vagrant, a common drunkard, intoxicated, or drinking as one of the elements of the offense giving rise to a criminal penalty.

FACTS:

Panhandling concerns have once again drawn the attention of City of Missoula officials. Panhandling issues were discussed at the City Council public safety and health committee Wednesday, June 18, 2008. The Missoula City Council has previously enacted a comprehensive "Pedestrian Interference Act" ordinance to in part address some of the concerns complained about. See chapter 9.34 entitled "Pedestrian Interference," sections 9.34.010 through 9.34.050 Missoula Municipal Code (MMC), a copy of which is attached.

ISSUES:

Are there provisions of Montana State law that somewhat limit or restrict a local government's ability to fully address some panhandling issues?

CONCLUSIONS:

Yes, subsection 7-1-111(14) MCA statutorily denies a municipality the power to enact ordinances prohibiting or penalizing vagrancy. Also, section 53-24-106 MCA provides that a municipality may not adopt or enforce a local law, ordinance, resolution, or rule having the force of law that includes drinking, being a common drunkard, or being found in an intoxicated condition as one of the elements of the offense. Also, section 53-24-107 MCA provides that public intoxication is not a criminal offense.

LEGAL DISCUSSION:

Section 7-1-111 MCA of Montana's municipal self-government laws is entitled "powers denied." Subsection 7-1-111(14) MCA denies a municipality any power to enact ordinances prohibiting or penalizing vagrancy. Section 7-1-111 MCA provides:

7-1-111. Powers denied. A local government unit with self-government powers is prohibited from exercising the following:

(14) subject to 7-32-4304, any power to enact ordinances prohibiting or penalizing vagrancy. (Emphasis added.)

Subsection 7-1-111(14) MCA cross-references to section 7-32-4304 MCA pertaining to control of disorderly conduct, which provides:

7-32-4304. Control of disorderly conduct. The city or town council has power to restrain and punish persons guilty of disorderly conduct and aggressive solicitation, as defined by ordinance, that is included in the offense of disorderly conduct. (Emphasis added.)

Title 53, chapter 24 MCA is entitled "Alcoholism and Drug Dependence." Montana statutory provisions set forth in this chapter provide that public intoxication is not a criminal offense and that a municipality "may not adopt or enforce a local law, ordinance, resolution, or rule having the force of law that included drinking, being a common drunkard, or being found in an intoxicated condition as one of the elements of the offense giving rise to a criminal or civil penalty or sanction." Sections 53-24-102, 53-24-106, and 53-24-107 MCA provide as follows:

53-24-102. Declaration of policy. It is the policy of the state of Montana to recognize alcoholism as an illness and that alcoholics and intoxicated persons may not be subjected to criminal prosecution because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society. (Emphasis added.)

53-24-106. Criminal laws limitation. (1) A county, municipality, or other political subdivision may not adopt or enforce a local law, ordinance, resolution, or rule having the force of law that includes drinking, being a common drunkard, or being found in an intoxicated condition as one of the elements of the offense giving rise to a criminal or civil penalty or sanction.

(2) This section does not affect any law, ordinance, resolution, or rule against drunken driving, driving under the influence of alcohol, or other similar offense involving the operation of a vehicle, an aircraft, a boat, machinery, or other equipment or regarding the sale, purchase, dispensing, possessing, or use of alcoholic beverages at stated times and places or by a particular class of persons.

(3) This section does not prevent the department from imposing a sanction on or denying eligibility to applicants for or recipients of public assistance who fail or refuse to comply with all eligibility criteria and program requirements. (Emphasis added.)

53-24-107. Public intoxication not criminal offense. (1) A person who appears to be intoxicated in public does not commit a criminal offense solely by reason of being in an intoxicated condition but may be detained by a peace officer for the person's own protection. A peace officer who detains a person who appears to be intoxicated in public shall proceed in the manner provided in 53-24-303 and subsection (3) of this section.

(2) If none of the alternatives in 53-24-303 are reasonably available, a peace officer may detain a person who appears to be intoxicated until the person is no longer creating a risk to self or others.

(3) A peace officer, in detaining the person, shall make every reasonable effort to protect the person's health and safety. The peace officer may take reasonable steps for the officer's own protection. An entry or other record may not be made to indicate that the person detained under this section has been arrested or charged with a crime.

(4) A peace officer, acting within the scope of the officer's authority under this chapter, is not personally liable for the officer's actions. (Emphasis added.)

Section 53-24-303 MCA, which is cross-referenced to within section 53-24-107 MCA provides:

53-24-303. Treatment and services for intoxicated persons. (1) A person who appears to be intoxicated in a public place and to be in need of help may be assisted to the person's home, an approved private treatment facility, or other health care facility by the police.

(2) A peace officer acting within the scope of the officer's authority under this chapter is not personally liable for the officer's actions.

The Missoula City Council has enacted a "Pedestrian Interference Act" set forth in chapter 9.34, sections 9.34.010 through 9.34.050 Missoula Municipal Code, intended to address "aggressive solicitation." A copy is attached.

In some factual circumstances, Montana's disorderly conduct statute may be helpful for addressing some aspects of some panhandling problems. Sections 45-8-101 MCA and 45-8-102 MCA pertaining to failure of disorderly persons to disperse may be available to use. These two statutes provide:

45-8-101. Disorderly conduct. (1) A person commits the offense of disorderly conduct if he knowingly disturbs the peace by:

- (a) quarreling, challenging to fight, or fighting;
- (b) making loud or unusual noises;
- (c) using threatening, profane, or abusive language;
- (d) discharging firearms, except at a shooting range during established hours of operation;
- (e) rendering vehicular or pedestrian traffic impassable;
- (f) rendering the free ingress or egress to public or private places impassable;
- (g) disturbing or disrupting any lawful assembly or public meeting;
- (h) transmitting a false report or warning of a fire or other catastrophe in such a place that its occurrence would endanger human life;
- (i) creating a hazardous or physically offensive condition by any act that serves no legitimate purpose; or

(j) transmitting a false report or warning of an impending explosion in such a place that its occurrence would endanger human life.

(2) Except as provided in subsection (3), a person convicted of the offense of disorderly conduct shall be fined not to exceed \$100 or be imprisoned in the county jail for a term not to exceed 10 days, or both.

(3) A person convicted of a violation of subsection (1)(j) shall be fined not to exceed

\$1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both.
(Emphasis added.)

45-8-102. Failure of disorderly persons to disperse. (1) Where two or more persons are engaged in disorderly conduct, a peace officer, judge, or mayor may order the participants to disperse. A person who purposely refuses or knowingly fails to obey such an order commits the offense of failure to disperse.

(2) A person convicted of the offense of failure to disperse shall be fined not to exceed \$100 or be imprisoned in the county jail for a term not to exceed 10 days, or both. (Emphasis added.)

The Missoula City Council enacted section 9.24.010 MMC, entitled "Disturbances," basically restating subsection 45-8-101(1) MCA in City ordinance.

Also, a business person may revoke the privilege of an individual to enter a private business that is not posted denying entry onto private property by giving the individual notice that he/she is no longer allowed or permitted to be on the private business property and must leave. If the individual refuses to leave or returns after having been provided with notice that he/she is no longer allowed or permitted on the private property, the specific factual circumstances may allow law enforcement to charge the individual with criminal trespass to private property pursuant to section 45-6-203 MCA.

CONCLUSIONS:

Yes, subsection 7-1-111(14) MCA statutorily denies a municipality the power to enact ordinances prohibiting or penalizing vagrancy. Also, section 53-24-106 MCA provides that a municipality may not adopt or enforce a local law, ordinance, resolution, or rule having the force of law that includes drinking, being a common drunkard, or being found in an intoxicated condition as one of the elements of the offense. Also, section 53-24-107 MCA provides that public intoxication is not a criminal offense.

OFFICE OF THE CITY ATTORNEY

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Chapter 9.34

PEDESTRIAN INTERFERENCE

Sections:

- 9.34.010 Title.
- 9.34.020 Purposes.
- 9.34.030 Definitions.
- 9.34.040 Prohibited conduct.
- 9.34.050 Violation--Penalty.

9.34.010 Title. This chapter shall be known as the city of Missoula Pedestrian Interference Act. (Ord. 2861 §1, 1993; Ord. 2853 §1, 1993).

9.34.020 Purposes. The purpose of this chapter is to protect the health, safety and welfare of the citizens of and visitors to the city by prohibiting pedestrian interference involving actions that intentionally obstruct pedestrian passage on public bridges, streets, sidewalks, parks and other publicly held or owned lands. The city council declares that such prohibitions are necessary and desirable for the following reasons:

- A. There has been an alarming increase in the number of persons interfering with and obstructing other pedestrians on city streets in recent years, many of whom are wearing or carrying weapons or who are more aggressive or intimidating in their conduct;
- B. The police department and other city offices have received complaints from citizens complaining that they are afraid to walk, or as business people are afraid to allow their customers to walk on downtown city streets and riverfront walkways as a result of the aggressive, intimidating conduct of persons interfering with, obstructing or accosting pedestrians or people in public places;
- C. The city deems it necessary to protect the rights of its citizens and visitors to move openly and freely on the city streets, sidewalks, walkways, parks and other public places without fear of being interfered with, obstructed, accosted, intimidated, injured or robbed by aggressive individuals interfering with their passage; and
- D. The city deems it necessary to protect pedestrians, in public places on public property from obstruction, interference, intimidation, harassment, damage or injury caused or partially attributable to being accosted, harassed, interfered with or obstructed by any person, especially someone with a weapon. (Ord. 2861 §2, 1993; Ord. 2853 §2, 1993).

9.34.030 Definitions. The following definitions shall apply to the provisions of this chapter.

A. "Accost" means physically approaching or, when in close proximity to an individual, speaking to that individual in such a manner as would cause a reasonable person to fear imminent bodily harm or fear endangerment that the commission of a criminal act upon his or her person, or upon property in his or her immediate possession, may be about to be committed by the accoster. "Accost" does not include passive, nonobstructive speech or conduct while standing or sitting along the side of a sidewalk or walkway if it does not physically obstruct pedestrians.

B. "Forcing oneself upon the company of another" means:

1. Continuing to request or demand something while interfering with or obstructing the passage of the individual(s) addressed, after the person addressed has made a negative response, either verbally or by physical sign;

2. Otherwise engaging in any conduct that could reasonably be construed as intended to compel or force a person to accede to demands as a result of fear for their safety, imminent bodily harm or the commission of a crime against them.

C. "Knowingly" means a person acts knowingly with respect to conduct or to a circumstance described by an ordinance defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by an ordinance defining an offence when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

D. "Obstruct" means to walk, stand, sit, lie or place an object in such a manner as to impair, hinder or block passage by another person or to require another person to take evasive action to avoid physical contact. Acts authorized as an exercise of one's constitutional right to picket or to legally protest shall not constitute obstruction of or interference with pedestrian traffic.

E. "Purposely" means a person acts purposely with respect to a result or to conduct described by an ordinance defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as "purpose" and "with the purpose" have the same meaning.

F. "Weapon" means any firearm, knife, sword, club or any other object used as a weapon by the offender when violating the provisions of this chapter. (Ord. 2861 §3, 1993; Ord. 2853 §3, 1993).

9.34.40 Prohibited conduct. The following conduct or action is prohibited pursuant to the city of Missoula "Pedestrian Interference Act" and is considered to be a violation of this chapter.

A. It is unlawful for any person to purposely or knowingly obstruct or hinder passage of pedestrians or motorists on any street, sidewalk or other public place with the city limits.

B. It is unlawful for any person on a public bridge, sidewalk, walkway, park or any other publicly held or owned land to purposely or knowingly accost another person(s) in such a manner as would cause a reasonable person to fear imminent bodily harm or fear that the commission of a criminal act upon his or her person or property in his or her immediate possession may be about to be committed by the accoster.

C. It is unlawful for any person on a public bridge, sidewalk, walkway, park or any other publicly held or owned land while openly and visibly and in a threatening manner carrying a weapon to purposely or knowingly approach any person with intent to engage in actions or conduct that would obstruct pedestrian passage.

D. It is unlawful for any person on a public bridge, sidewalk, walkway, park or any other publicly held or owned land to purposely or knowingly force oneself upon the company of another as defined herein. (Ord. 2861 §4, 1993; Ord. 2853 §4, 1993).

9.34.050 Violation--Penalty. A person convicted of a violation of this chapter shall be guilty of a misdemeanor and shall be fined not to exceed one hundred dollars or imprisoned for any term not to exceed ten days, or both. (Ord. 2861 §5, 1993; Ord. 2861 §5, 1993).