

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2013-026

**TO:** Mayor John Engen, City Council, Bruce Bender, Ginny Merriam, Mark Muir, Mike Brady, Chris Odlin, Mike Colyer, Scott Hoffman, Marty Rehbein, Nikki Rogers, Ellen Buchanan, Anne Guest, Jason Diehl, Jeff Brandt, Chad Nicholson

**CC:** Legal Department Staff

**FROM:** Jim Nugent, City Attorney

**DATE** November 26, 2013

**RE:** Limited power of Montana Municipalities to prohibit or penalize vagrancy by ordinance.

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### **FACTS:**

After the November 25, 2013 Monday night City council meeting there was city council member inquiry concerning the definition of “vagrancy” in Montana law, with respect to the Montana statutory limits on a Montana municipality’s power to prohibit or penalize vagrancy by ordinance. Montana’s state law limiting or restricting a Montana municipality’s powers with respect to vagrancy was also previously addressed in part in City Attorney Legal Opinion 2009-016, issued May 5, 2009.

### **ISSUE(S):**

- (1) To what extent does Montana state law limit or restrict a Montana Municipality’s power to prohibit or penalize vagrancy by ordinance?
- (2) Does Montana state law define the meaning of “vagrancy”?

### **CONCLUSION(S):**

- (1) Subject to a statutory authorization in section 7-32-4302 MCA, empowering a Montana municipality to restrain and punish aggressive solicitation that is defined by ordinance and is included in the offense of disorderly conduct, Montana municipalities are otherwise pursuant to subsection 7-1-111(14) MCA expressly denied any ordinance power that prohibits or penalizes vagrancy.
- (2) While Montana state law significantly denies a Montana municipality ordinance power to prohibit or penalize vagrancy, Montana state law does not define the meaning of “vagrancy”.

Black's Law Dictionary, Ninth Edition at page 1689 defines the term "vagrancy" in part as meaning "the state or condition of wandering from place to place without a home, job, or means of support. Vagrancy is generally considered a course of conduct or a manner of living rather than a single act.

### **LEGAL DISCUSSION:**

Title 7 MCA is entitled "LOCAL GOVERNMENT". Title 7, Chapter 1 MCA extensively sets forth general provisions of Montana state law pertaining to Montana local governments. Section 7-1-111 MCA is entitled "POWERS DENIED" and sets forth seventeen subsections that identify powers that are denied to Montana local governments exercising self-government powers. Subsection 7-1-111(14) MCA provides as follows:

"7-1-111. POWERS DENIED". A local government 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)

Section 7-32-4304 MCA which is cross referenced to within subsection 7-1-111(14) MCA provides as follows:

"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)

While Montana state law expressly limits or restricts a Montana municipality's power to prohibit or penalize vagrancy, Montana state law does not define the meaning of the term "vagrancy". Black's Law Dictionary, Ninth Edition, page 1689 provides a legal definition of vagrancy that might be able to be relied on for legal guidance as to the definition of "vagrancy". This definition of "Vagrancy" provides in pertinent part:

"VAGRANCY. 1. The state or condition of wandering from place to place without a home, job, or means of support. \* Vagrancy is generally considered a course of conduct or a manner of living rather than a single act. ....".

Since alcohol and/or other intoxicants are often associated with persons who might be considered to be inclined to vagrancy, it is also important to be aware of the following Montana state laws that are set forth in Montana's "ALCOHOLISM AND DRUG DEPENDENCE" laws set forth in title 53, chapter 24, MCA. These sections are 53-24-102, 53-24-106. 53-24-107 and 53-24-303 MCA and they 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.

**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.

**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.

**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.

Ultimately it is up to the courts to define “vagrancy” as well as ultimately up to the courts to determine whether any municipal ordinance adopted by a city council complies with or violates Montana state law subsection 7-1-111 (14) MCA; providing that subject to section 7-32-4304 MCA, Montana municipalities are denied the ordinance adoption power to prohibit or penalize vagrancy.

## **CONCLUSION(S):**

(1) Subject to a statutory authorization in section 7-32-4302 MCA, empowering a Montana municipality to restrain and punish aggressive solicitation that is defined by ordinance that is included in the offense of disorderly conduct, Montana municipalities are otherwise pursuant to

subsection 7-1-111(14) MCA expressly denied any ordinance power that prohibits or penalizes vagrancy.

(2) While Montana state law significantly denies a Montana municipality ordinance power to prohibit or penalize vagrancy, Montana state law does not define the meaning of “vagrancy”. Black’s Law Dictionary, Ninth Edition at page 1689 defines the term “vagrancy” in part as meaning “the state or condition of wandering from place to place without a home, job, or means of support. Vagrancy is generally considered a course of conduct or a manner of living rather than a single act.

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/s/

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Jim Nugent, City Attorney

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