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Legal Opinion 2014-019

TO: Mayor John Engen, City Council, Bruce Bender, Ginny Merriam, Dale Bickell, Mike Brady, Scott Hoffman, Chris Odlin, Mike Colyer, Rich Stepper, Andy Roy, Rob Scheben, Ellen Buchanan, Anne Guest, Kevin Slovarp, Doug Harby, Mike Haynes, Jason Diehl, Donna Gaukler, Kathy Mehring

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE May 28, 2014

RE: Montana laws prohibit local ordinances from making it a crime for a person to be a vagrant, a common drunkard, or intoxicated as one of the elements of a criminal offense giving rise to a criminal penalty.

FACTS:

Some conduct of various members of the transient population continues to be a community concern. The primary purpose of this legal opinion is to identify the Montana statutory limitations that exist with respect to these certain aspects of the conduct of the Montana transient population.

ISSUE:

Do some provisions of Montana State law limit a Montana municipal government's ability to fully address various issues associated with conduct of some of the transient population?

CONCLUSIONS:

Yes. For example, subsections 7-1-111(8) and (14) MCA statutorily deny a municipality the power to enact ordinances defining as an offense conduct made criminal by state statute or ordinances prohibiting or penalizing vagrancy. 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 criminal offense. Also, §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 law is entitled "Powers Denied." Subsections 7-1-111(8) and (14) MCA deny a municipality any power to enact ordinances that define as an offense, conduct made criminal by state statute or prohibiting or penalizing vagrancy. Section 7-1-111 MCA provides in part:

> **7-1-111. Powers denied.** A local government unit with self-government powers is prohibited from exercising the following: (8) any power that defines as an offense conduct made criminal by state statute …"; (14) subject to 7-32-4304, any power to enact ordinances prohibiting or penalizing vagrancy. (Emphasis added.)

Black's Law Dictionary, Eighth Edition, at page 1585 defines the word "vagrancy" as "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."

Montana state law pursuant to subsection 7-1-111(14) MCA, prohibits a municipal government from enacting ordinances that either prohibit or penalize vagrancy.

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.)

Pursuant to §7-32-4304 MCA, a local municipal government disorderly conduct ordinance may address "aggressive solicitation" within the local government's disorderly conduct ordinance.

With respect to alcohol or alcohol intoxication, Montana state law 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. A Montana 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. (Emphasis added.)

Montana Attorney General Mike Greely indicated in 38 A.G. Op. 93 (1980) that city ordinances punishing public intoxication whether as an element of an offense or as an offense in itself are in contravention of state statutes. Therefore, City of Glasgow's ordinances were held to violate the policy of the State of Montana treating alcoholism as a disease not as a crime.

All of the violations contained within the (Glasgow) ordinances punish public intoxication, whether as an element of the offense, e.g., trespassing while intoxicated, or by itself, in contravention of the state statutes. (Emphasis added.)

The City of Glasgow ordinances were held to violate §§53-24-106 and 53-24-107 MCA. Montana's disorderly conduct statute addresses some of the conduct that some of the transient population may engage in depending on the specific factual circumstances that may be present. Also, depending on the factual circumstances. Disorderly conduct Sections 45-8-101 MCA and 45-8-102 MCA pertaining to failure of disorderly persons to disperse may be available to use as well. These two statutes provide:

> **45-8-101. Disorderly conduct.** (1) A person commits the offense of disorderly conduct if the person 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) rendering vehicular or pedestrian traffic impassable;
> (e) rendering the free ingress or egress to public or private places impassable;
> (f) disturbing or disrupting any lawful assembly or public meeting;
> (g) transmitting a false report or warning of a fire or other catastrophe in a place where its occurrence would endanger human life;
> (h) creating a hazardous or physically offensive condition by any act that serves no legitimate purpose; or
> (i) transmitting a false report or warning of an impending explosion in a place where 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 an amount 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)(i) shall be fined an amount not to exceed $1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both.
>
> **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 Montana Supreme Court in State v. Ashmore, 2008 MT 14, 341 M 131, 176 P.2nd 1022, 2009 Mont. LEXIS 16 indicated that the number of persons disturbed is not dispositive of whether peace is disturbed. Rather, the question to focus on is whether the defendant engaged in disorderly conduct based on the actual statutory language, not the compiler's comments set forth in the MCA Annotations.

The Montana Supreme Court in State v. Ashmore, involved a lady honking her horn near Johnsrud recreational area of the Blackfoot River as she drove by a sheriff deputy completing a routine traffic stop. The lady became angry, belligerent, quarrelsome and profane when stopped

by Missoula County Sheriff's Reserve Deputies. The Montana Supreme Court stated as follows in paragraphs 12 and 13:

> As the State correctly notes, our task in interpreting statutes is "simply to ascertain and declare what is in terms or in substance contained [in the statute], not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA. Here, however, there is a disparity between the plain language of the statute and the Criminal Law Commission Comments which provide guidance on how this statute is to be applied. The relevant portions of the Comments read as follows:
>
> The intent of the provision is to use somewhat broad, general terms to establish a foundation for the offense and leave the application to the facts of a particular case. Two important qualifications are specified in making the application, however. First, the offender must knowingly make a disturbance of the enumerated kind, and second, the behavior must disturb "others." It is not sufficient that a single person or a very few persons have grounds for complaint.
>
> The statute, on the other hand, does not specify that conduct must disturb "others," or otherwise indicate that conduct affecting "a single person or a very few persons" is insufficient to give rise to a violation of the statute. In fact, the statute only requires that a defendant "knowingly disturb the peace" by committing one of the acts enumerated in subsections (a) through (j) of the statute, none of which contains a numerical requirement. (Emphasis added.)

After analyzing some of its earlier Montana Supreme Court decisions, the Montana Supreme Court stated in ¶15 and ¶17:

> A review of our prior decisions under this statute shows that, in spite of the language in the Comments, we have never adopted a strict numerical requirement respecting how many people need be affected by conduct before it "disturbs the peace." As we noted in *Lowery*,
> . . . .
> As these cases demonstrate, we have focused our analysis not upon numbers of persons affected, but rather upon whether the defendant knowingly disturbed the peace by committing one of the acts enumerated in the statute. While the number of individuals affected by the conduct may play a role in whether the peace has been disturbed, it is not necessarily a dispositive factor. Instead, determination of whether the peace has been disturbed should turn on "the application [of the statute] to the facts of a particular case."

Further, the Montana Supreme Court indicated that the defendant's conduct did not have to be deemed "offensive", it only had to meet the requirements listed in the disorderly conduct statute itself. The Montana Supreme Court stated in ¶23 and ¶24 that:

> We conclude that Ashmore's conduct falls under the proscriptions set forth in the acts enumerated in subsections (a) through (c) of the Disorderly Conduct statute. Consequently, Ashmore's conduct does not need to be deemed "offensive," as was required under subsection (i) in *Kleinsasser*, but only needs to meet the requirements listed in subsections (a) through (c) of the statute--namely that Ashmore "quarrel[l], challeng[e] to fight, or fight[] . . . mak[e] loud or unusual noises . . . [or] us[e] threatening, profane, or abusive language . . . ." Sections 45-8-101(1)(a) through (c), MCA. Ashmore's conduct more than satisfies these requirements.
>
> Accordingly, the only question is whether these proscribed actions, when directed solely at police officers, could be found by a trier of fact to "disturb the peace," and thus give rise to a violation of § 45-8-101, MCA. We hold that they can, and that nothing in our prior precedent under the Disorderly Conduct statute, including *Kleinsasser*, is inconsistent with this conclusion. Thus, we affirm the District Court's denial of Ashmore's motion to dismiss.

CONCLUSIONS:

Yes. For example, subsections 7-1-111(8) and (14) MCA statutorily deny a municipality the power to enact ordinances defining as an offense conduct made criminal by state statute or ordinances prohibiting or penalizing vagrancy. 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 criminal offense. Also, §53-24-107 MCA provides that public intoxication is not a criminal offense.

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/s/
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