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Legal Opinion 2014-020

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

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE May 29, 2014

RE: Montana state law generally denies Montana self-government local governments the power to prohibit or penalize vagrancy.

ISSUE:

Does Montana state law deny a Montana Municipality power to enact ordinances that prohibit or penalize vagrancy?

CONCLUSION(S):

Generally, yes. 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.

LEGAL DISCUSSION:

Blacks 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.

In Papachristou v. Jacksonville, 405 US 156 (1972), the United States Supreme Court reversed convictions pursuant to a city ordinance prohibiting vagrancy and loitering. The United States Supreme Court held that the city ordinance prohibiting vagrancy and loitering was void due to vagueness, in that it failed to give notice of the prohibited conduct and thereby invited arbitrary

law enforcement. Since then vagrancy laws have been successfully challenged on the grounds that they are vague, violate the requirements of due process or exceed the proper scope of police power. “Loitering ordinances have frequently been held invalid on the ground that they were vague and overbroad with respect to the constitutional requirement of certainty and that they failed to provide standards or criteria by which prohibited conduct could be tested.” The Law of Local Government Operations” by Charles S. Rhyne.

Also, some loitering or vagrancy ordinances have been declared unconstitutional on the grounds that they exceed the grant of power to the Municipality. This could be a basis for declaring Montana municipal vagrancy ordinances invalid.

Generally Montana state law denies a municipality the power to enact an ordinance that prohibits or penalizes vagrancy. 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)

Montana state law expressly denies a Montana municipality power to prohibit or penalize vagrancy, Montana state law does not define the meaning of the term “vagrancy”.

Since alcohol and/or other intoxicants are often associated with persons who might be considered to be loitering or vagrant, 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 which 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.(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)

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.

CONCLUSION(S):

Generally, yes. 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.

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/s/

Jim Nugent, City Attorney

JN:tfa