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Legal Opinion 2015-011

TO: Mayor John Engen; City Council; Mike Haynes; Denise Alexander; Laval Means; Drew Larson; Ben Brewer; Mike Brady; Scott Hoffman; Mike Colyer; Chris Odlin; Richard Stepper; Laurie Clark; Bruce Bender; Dale Bickell; Leigh Griffing; and Marty Rehbein

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE April 14, 2015

RE: Montana municipalities may not restrict the number of alcohol licenses that the Montana Department of Revenue may issue; but may define certain areas within city limits where alcoholic beverages may or may not be sold.

FACTS:

Midtown Casino has applied for a conditional use zoning designation for a casino use in an existing portion of a building currently with a laundromat business operation at 1610 Russell Street. Pursuant to City of Missoula zoning the real property is specifically zoned to allow casino or tavern uses as a conditional use. The City of Missoula development services staff report indicates that all adjacent land uses are commercial land uses. The City of Missoula development services staff report also states “This is a very busy intersection and this use will most likely be the same number of customers as the laundromat, therefore noise issues and traffic will be the same/not change.”

ISSUE(S):

- (1) May a city in Montana restrict the number of alcoholic beverage licenses that the State of Montana Department of Revenue may issue?
- (2) May a city in Montana define certain areas within a city where alcoholic beverages may or may not be sold.

CONCLUSION(S):

- (1) Pursuant to subsection 16-3-309(4) MCA no Montana city may by ordinance restrict the number of alcoholic beverages that the State of Montana Department of Revenue may issue.

(2) Pursuant to subsection 16-3-309(1) MCA an incorporated Montana city may enact an ordinance defining certain areas within the city limits where alcoholic beverages may or may not be sold.

LEGAL DISCUSSION:

Title 16 Montana Code annotated is entitled “ALCOHOL AND TOBACCO”. Title 16, chapter 1, MCA is entitled “ADMINISTRATION AND TAXATION”. Section 16-1-106 MCA sets forth the definitions for the title. Key statutory definitions set forth in section 16-1-106 MCA to be aware of are as follows: “(4) ‘Alcoholic beverages’ means a compound produced and sold for human consumption as a drink that contains more than 0.5% of alcohol by volume. “ . . . (10) ‘Department’ means the department of revenue, unless otherwise specified and includes the department of justice with respect to receiving and processing, but not granting or denying, an application under a contract entered into under 16-1-302.” . . .

Title 16, chapter 3, Montana Code Annotated (MCA) is entitled “CONTROL OF LIQUOR, BEER AND WINE”. Section 16-3-309 MCA addresses both issues addressed in this legal opinion. Subsection 16-3-309(1) MCA provides that an incorporated city may enact an ordinance defining certain areas where alcoholic beverages may or may not be sold. Subsection 16-3-309(4) MCA provides that no incorporated city may by ordinance restrict the number of alcoholic beverage licenses that the State of Montana Department of Revenue may issue.

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 to subsection 16-3-306(1) MCA that is set forth in subsection 16-3-309(3) MCA is a cross reference to the 600 foot distance proximity to churches and schools restriction that is set forth in subsection 16-3-306(1) MCA. Subsection 16-3-309(3) MCA is an authorization for a city to by ordinance provide that the 600 foot proximity restriction in subsection 16-3-306(1) MCA not apply.

CONCLUSION(S):

(1) Pursuant to subsection 16-3-309(4) MCA no Montana city may by ordinance restrict the number of alcoholic beverages that the State of Montana Department of Revenue may issue.

(2) Pursuant to subsection 16-3-309(1) MCA an incorporated Montana city may enact an ordinance defining certain areas within the city limits where alcoholic beverages may or may not be sold.

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/s/

Jim Nugent, City Attorney

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