VOLUME NO. 37 OPINION NO. 100

MUNICIPAL GOVERNMENTS - Licensing, interstate commerce, beer distributors, professions and occupations; LICENSES - Municipal governments, interstate commerce, beer distributors, professions and occupations; REVISED CODES OF

MONTANA, 1947 - Sections 4-4-201, 11-901, et seq., 66-401, et seq., 93-2010.

HELD: 1. A city can license the local aspects of interstate comerce, but may not make a local license a condition to engaging in interstate commerce, nor impose direct burdens or impediments on interstate commerce.

2. A city can license a beer distributor pursuant to section 4-4-406, R.C.M. 1947, but may not thereby limit or make ineffective a state license.

3. A city is precluded from licensing an enterprise whose regulation has been preempted explicitly or impliedly by the state. If the state has not preempted the field, or has specifically allowed local licensure, then the city may act to that extent.

16 Decemberl977

Loren Tucker, Esq.
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Red Lodge, Montana 59068

Dear Mr. Tucker:

You have requested my opinion on the following questions regarding the application of Red Lodge City Ordinance No. 678:

1. May the city license persons engaged in interstate commerce?

2. May the city license beer distributors?

3. May the city license persons or occupations regulated by the state, especially barbers, attorneys and real estate agents?

Ordinance 678 requires an annual license from the city before any "occupation, industry, trade, pursuit, profession, vocation or business" may be conducted. An annual fee schedule is established for various classes of businesses. All licensed businesses are subject to "reasonable regulation, inspection, control and supervision as is necessary to insure the welfare, safety and health" of the city's residents. Section 8 provides:

> No provision of this ordinance shall be construed as an attempt to regulate any occupation, industry, trade, pursuit, profession, vocation or business which is exempted from regulation or control of local government by law of the State of Montana or the United States.

A municipality without self-government powers under Article XI, section 6 of the Montana Constitution has the powers of a municipal corporation, and such legislative, administrative and other powers as are provided by law. A municipality has subordinate powers of legislation to assest in the civil government of the state, and to regulate and administer local and internal affairs. Billings v. Herold, 130 Mont. 138, 141 (1956).

The "general welfare" provisions of section 11-901 et seq., R.C.M. 1947, "constitute a general grant of power to a city to pass all laws necessary for its government and management which do not contravene constitutional or statutory provisions." State v. City Council, 107 Mont. 216, 219 (1938).

Section 11-903 empowers a city to "license all industries, pursuits, professions, and occupations," and section 11-04 empowers the city to fix the amount, terms and manner of issuing and revoking licenses in the public interest.

No city can make general state laws inoperative by ordinance, Billings v. Herold, supra, 130 Mont. at 142, and a city can only exercise powers not in conflict with general law "unless the power to do so is plainly and specifically granted." Stephens v. City of Great Falls, 119 Mont. 368, 373 (1946). The regulatory power of a city was summarized in State ex rel. Libby v. Haswell, 147 Mont. 492, 494-95 (1966):

> It is fundamental that the power of a city to enact ordinances in only such power as has been given to it by the legislature of the state, and that the powers given to it are subordinate powers of legislation for the purpose of assisting in the civil power of the government of the local and internal affairs of the community. Municipal ordinances must also be in harmony with the general laws of the state, and with the provisions of the municipal charter. Whenever they come in conflict with either, the ordinance must give way. In addition, when the state has exercised a power

> through its statutes which clearly show the that state legislation deems the subject matter of general statewide concern rather than a purely local municipal problem, the city is then without the essential authority or power to pass or adopt any ordinance dealing with that subject matter.

These principles contribute the background for consideration of your questions. Your first question concerns the city's authority to license persons engaged in interstate commerce. Pursuant to Article I, section 8 of the United States Constitution, Congress is given the power to regulate interstate commerce. Therefore, state and local power to regulate interstate commerce is limited, particularly where Congress has acted to preempt a field. Interstate Transit Co. v. Derr, 71 Mont. 222, 228 (1924). A state may exercise reasonable, nondiscriminatory police power over one engaged in interstate commerce, even though that regulation may indirectly burden or interfere with interstate commerce. Welch v. Dean, 49 Mont. 263, 267 (1914); Butte v. Roberts, 94 Mont. 482, 488 (1933). Local regulation of the "purely local" aspect of interstate business is allowed, Minnehoma Finance Co. v. VanOosten, 198 F.Supp. 200, 208 (D.Mont. 1961), as is regulation of the local manufacture of a product which is destined for interstate commerce. Dunbar Stanley Studios v. Alabama, 393 U.S. 537, 541 (1969). As a basic premise, however, a state may not exact conditions upon the right to engage in interstate commerce, McNaughton v. McGirl, 20 Mont. 124 (1897); Union Interchange, Inc. v. Parker, 138 Mont. 348, 359-60 (1960), and may not impose regulations which directly burden interstate commece or discriminate against it. Minnehoma Finance Co. v. VanOosten, 198 F.Supp. 200, 207 (D.Mont. 1961). An unreasonable or undue burden in this sense is said to be one which "materially affects interstate commerce whre uniformity of regulation is necessary." Union Pac. R. Co. v. Woodahl, 308 F.Supp. 1002, 1007 (D.Mont. 1970).

Your first question must be answered on a case-by-case basis in reference to these legal principles, since no specific situation of interstate commerce was set out in your request for this opinion.

Your second question involves the licensing of beer distributors. Section 4-4-406 of the Alcoholic Beverage Code contains specific authority for local licensing.

> The city council of any incorporated town or city or the county commissioners outside of any incorporated town or city may provide for the issuance of licenses to persons to whom a retail license has been issued under the provisions of this code and may fix license fees, not to exceed a sum equal to five-eighths of the fee for an all-beverage license or 100% of the fee for a beer or beer-and-wine license collected by the department from such license under this code.

The city may act pursuant to this licensing authority to license beer distributors. Section 4-4-201(2) further empowers local government to define those areas in which alcoholic beverages may or may not be sold. This does not, however, grant the power to restrict the number of licenses authorized by state law.

While the Legislature has granted these exceptions to its preemption of liquor regulation (State ex rel. Libby v. Haswell, 147 Mont. 492, 499 (1966)), the power to require a local license does not confer the "power to make state licenses ineffective by refusing local ones." McCarter v. Sanderson, 111 Mont. 407 (1941). A city license must be consistent with state and federal law; it must be reasonable; and it must not "inhibit" the issuance of a license by the state nor "nullify" a state license. Stephens v. Great Falls, 119 Mont. 368, 379 (1946).

Your third auestion concerns city licensing of persons or enterprises already licensed by the state. As a general matter, state laws are superior to local laws, and if there is state preemption of a field, local regulation is ousted. State ex rel. Libby v. Haswell, 147 Mont. 492, 494-95 (1966). Thus, the statutes, if any, governing any given enterprise must be consulted to determine whether there has been state preemption. If not, local activities of these enterprises are subject to local police power.

Section 66-1934(4), governing real estate agents, specifically provides:

> No license fee or tax may be imposed on a real estate broker or salesman by a municipality or any other political subdivision of the state.

Almost identical language applicable to attorneys is found in section 93-2010. There is no comparable exclusion of local regulation in the barber statutes, section 66-401 et seq. However, these statutes construed as a whole evidence a comprehensive scheme of state regulation of that industry to such an extent as to preempt local regulation under the principles of State ex rel. Libby v. Haswell, supra. The only specific mention of local regulation is a requirement that barbershops comply with local sewer and water regulations. Section 66-403(11). Thus, the statutes on each state-regulated business or profession must be consulted as specific questions arise.

THEREFORE, IT IS MY OPINION:

1. A city can license the local aspects of interstate commerce, but may not make a local license a condition to engaging in interstate commerce, nor impose direct burdens or impediments on interstate commerce.

2. A city may license a beer distributor pursuant to section 4-4-406, R.C.M. 1947, but may not thereby limit or make ineffective a state license.

3. A city is precluded from licensing an enterprise whose regulation has been preempted explicitly or impliedly by the state. If the state has not preempted the field, or has specifically allowed local licensure, then the city may act to that extent.

Very truly yours,

MIKE GREELY
Attorney General