

VOLUME NO. 35**Opinion No. 86**

CITIES AND TOWNS—Gambling, police powers; gambling, interlocal agreements; COUNTIES—Gambling, county attorney to prosecute; gambling, police powers; gambling, interlocal agreements; gambling, distribution of license fees; COUNTY ATTORNEY—Gambling, duty to prosecute; gambling, city ordinances; BINGO—Definition of, includes keno; COURTS—Gambling, jurisdiction; CRIMES AND CRIMINAL PROCEDURE—Gambling, penalty; gambling, jurisdiction; gambling, duty to prosecute; FEES—Gambling, pro-rated; gambling, annual; gambling, permissive; gambling, distribution of; GAMBLING—Counties, regulation of; cities and towns, regulation of; poker, games authorized; chips, authorized for cash; fees, annual, pro-rated; offenses, jurisdiction; rake-off, definition of; INTERLOCAL AGREEMENTS—Counties, gambling regulations; cities and towns, gambling regulations; LICENSES—Gambling, regulation of; gambling, distribution of fees; gambling, annual, pro-rated; gambling, interlocal agreements; JURISDICTION—Gambling violations, district court; MONTANA ADMINI-

STRATIVE PROCEDURE ACT—Gambling, applicability to; ORDINANCES—Gambling, police power; gambling, violations, county attorney to prosecute. Article V, section 11, Constitution of Montana, 1972; Article XI, sections 4 and 7, Constitution of Montana, 1972; sections 11-102, 11-103, 11-901, 11-1602, 11-1603, 11-1702, 16-801, 16-3101, 16-3105, 16-4901, et seq., 62-701 through 62-736, 82-4201, 82-4225, 84-2702, 82-2708, 94-8-401 through 94-8-431, 95-301, 95-302 and 95-303, R.C.M. 1947.

HELD: 1 (a) Legalized forms of gambling can be conducted on premises not licensed for the sale of liquor, beer, food, cigarettes or any other consumable products.

1 (b) Cities, towns and counties have the power to license allowable gambling on premises other than those already licensed to sell liquor, beer, food, cigarettes or any other consumable products.

2. Cities, towns and counties have the power to establish, by ordinance or resolution, regulations pertaining to the conduct of authorized gambling games regardless of the premises on which such games are conducted.

3. Pursuant to an interlocal agreement, cities, towns and counties may adopt licensing procedures and regulations on a county-wide basis.

4. Section 84-2708, allowing the county to retain only fifty percent of all license monies collected and transferring the remaining license monies to the state treasurer, does apply to licenses for gambling game issued pursuant to sections 62-707 and 62-719, R.C.M. 1947.

5. The term "poker," as used in section 62-703, R.C.M. 1947, means studhorse poker and draw-poker.

6. The definition of "bingo," as used in section 62-716, R.C.M. 1947, includes the game of "keno."

7. Chips can be used in authorized card games if such chips are purchased with cash.

8 (a) Selling chips to participants at more than the face value of the chips is not statutorily authorized.

8 (b) Selling chips to participants at more than the face value of the chips is not an authorized rake-off as provided by section 62-705, R.C.M. 1947.

9. The licensee establishes the rules governing the conduct of each game that is carried on pursuant to his license.

10. The term "venue" as used in sections 62-713 and 62-735, R.C.M. 1947, means "jurisdiction."

11 and 12. In regard to these questions, the district courts have exclusive jurisdiction over violations of the Montana Card Games Act, the Bingo and Raffles Law, and the Sports Pool Act.

13. The county attorney must prosecute, in the district court, all violations of the gaming acts, including ordinances enacted by cities and towns pursuant to these acts.

14. Licenses to conduct allowable gambling on premises licensed to sell liquor, beer, food, cigarettes or any other consumable products shall not be effective for more than one year.

15. The notice and hearing requirements of the Administrative Procedure Act, set out in section 82-4209, R.C.M. 1947, do not apply to cities, towns and counties for the issuance, denial, revocation or suspension of gambling licenses.

June 4, 1974

Mr. Rae V. Kalbfleisch, President
Montana County Attorney's Association
Toole County Courthouse
Shelby, Montana 59474

Dear Mr. Kalbfleisch:

I am in receipt of your opinion request dated April 16, 1974, and received in my office on April 18, 1974. On behalf of the Montana County Attorney's Association you have requested my opinion on the following questions:

1. (a) Whether, under section 62-707, R.C.M. 1947 (section 7, Chapter 293, Montana Session Laws, 1974, House Bill 703), and section 62-719, R.C.M. 1947 (section 5, Chapter 294, Montana Session Laws, 1974, House Bill 705), if a city, town or county requires a license for gambling games to be conducted on premises which have been licensed for the sale of liquor, beer, food, cigarettes or any other consumable product, the only premises on which gambling games can then be conducted are those which are licensed for the sale of liquor, beer, food, cigarettes or any other consumable products; or can gambling games also be conducted on premises not licensed for the sale of liquor, beer, food, cigarettes or any other consumable products, e.g., a church?

(b) If gambling games can be conducted on premises not licensed for the sale of liquor, beer, food, cigarettes or any other consumable products, can a city, town or county require that such premises be licensed for the conduct of gambling games?

2. Under the provisions of Chapters 293 and 294, Montana Session Laws, 1974 (House Bills 703 and 705), with specific reference to section 62-708, R.C.M. 1947 (section 8, Chapter 293, Montana Session Laws,

1974, House Bill 703), and section 62-720, R.C.M. 1947 (section 6, Chapter 294, Montana Session Laws, 1974, House Bill 705), may a local governing body, i.e., a city, town or county, establish by ordinance or resolution, regulations pertaining to the conduct of all authorized gambling games regardless of the premises on which such gambling games are conducted; or do regulations adopted by a local governing body apply only to gambling games conducted on premises which the local governing body can license for the conduct of gambling games?

3. Whether, under sections 62-707 and 62-708, R.C.M. 1947 (sections 7 and 8, Chapter 293, Montana Session Laws, 1974, House Bill 703), and sections 62-719 and 62-720, R.C.M. 1947 (sections 5 and 6, Chapter 294, Montana Session Laws, 1974, House Bill 705), cities, towns and counties, through interlocal government agreements, can adopt licensing procedures and regulations on a countywide basis; or must each unit of local government adopt its own licensing procedures and regulations?

4. Whether section 84-2708, R.C.M. 1947, which provides that the county treasurer shall retain only 50 percent of all monies collected for licenses for the use of the county and further provides that the county treasurer shall pay over 45 percent of the monies collected for licenses to the state treasurer for use in the general fund, and pay over 5 percent of the monies collected for licenses to the state treasurer for the earmarked revenue fund to be used by the Livestock Commission for predatory animal control, applies to licenses for gambling games issued pursuant to section 62-707, R.C.M. 1947 (section 7, Chapter 293, Montana Session Laws, 1974, House Bill 703), and section 62-719, R.C.M. 1947 (section 5, Chapter 294, Montana Session Laws, 1974, House Bill 705)?

5. What is the definition of "poker" as used in section 62-703, R.C.M. 1947 (section 3, Chapter 293, Montana Session Laws, 1974, House Bill 703)?

6. Does the definition of "bingo" as used in section 62-716, R.C.M. 1947 (section 2, Chapter 294, Montana Session Laws, 1974, House Bill 705), include "keno"?

7. Whether, under section 62-705, R.C.M. 1947 (section 5, Chapter 293, Montana Session Laws, 1974, House Bill 703), chips can be utilized in authorized card games if such chips are purchased with cash?

8. (a) If chips can be used, does section 62-705, R.C.M. 1947 (section 5, Chapter 293, Montana Session Laws, 1974, House Bill 703), preclude an establishment conducting gambling games from selling chips to participants at more than the face value of the chips, e.g., selling \$90 worth of chips for \$100?

(b) Does such a practice constitute a "rake-off", and, if so, must the person selling the chips announce the terms of the practice at the

conclusion of each game when the winner of each individual pot has been determined?

9. Under the provisions of section 62-705, R.C.M. 1947 (section 5, Chapter 293, Montana Session Laws, 1974, House Bill 703), who establishes the rules governing the conduct of each game?

10. What is the meaning of "venue" as used in section 62-713, R.C.M. 1947 (section 13, Chapter 293, Montana Session Laws, 1974, House Bill 703), and section 62-735, R.C.M. 1947 (section 9, Chapter 290, Montana Session Laws, 1974, House Bill 507)?

11. Does the justice court have jurisdiction over violations of the Bingo and Raffles Act, Chapter 294, Montana Session Laws, 1974, House Bill 705?

12. (a) Does a police court have jurisdiction over violations of the Bingo and Raffles Act, Chapter 294, Montana Session Laws, 1974, House Bill 705, which occur within a city or town?

(b) If police courts do have jurisdiction over such violations, must the city attorney of the respective city or town prosecute them?

13. If, under the provisions of Chapters 293 and 294, Montana Session Laws, 1974, House Bills 703 and 705, a city or town by ordinance establishes regulations governing gambling licenses and the conduct of gambling games, is the county attorney of the county required to prosecute violations of those ordinances?

14. Under the provisions of Chapters 293 and 294, Montana Session Laws, 1974, House Bills 703 and 705, with specific reference to section 62-707, R.C.M. 1947 (section 7, Chapter 293, Montana Session Laws, 1974, House Bill 703), and section 62-719, R.C.M. 1947 (section 5, Chapter 294, Montana Session Laws, 1974, House Bill 705), are local governing bodies limited to charging an annual license fee for licenses issued pursuant to the respective acts, or can they charge license fees on a quarterly basis?

15. Whether cities, towns and counties must adopt regulations regarding notice requirements and hearing procedures for issuing, denying, revoking, or suspending licenses, in accordance with the Montana Administrative Procedure Act; or can they adopt different regulations concerning notice requirements and hearing procedures for issuing, denying, revoking or suspending licenses?

Your first question is divided into two parts. I previously gave you a verbal opinion in regard to the question presented in part (a); however, I have never responded to the question presented in part (b). My formal opinion in both of these questions is as follows.

Section 62-707, Revised Codes of Montana, 1947, is the licensing provision of the Montana Card Games Act. Section 62-719, R.C.M. 1947, is the licensing

provision of the Bingo and Raffles Law. The above sections contain identical language. Sections 62-707 and 62-719, *supra*, provide:

- (1) Any city, town or county may issue licenses for the gambling games provided for in this act to be conducted on premises which have been licensed for the sale of liquor, beer, food, cigarettes or any other consumable products. Within the cities or towns, such licenses may be issued by the city or town council or commission. Licenses for games conducted on premises outside the limits of any city or town may be issued by the county commissioners of the respective counties. When a license has been required by any city, town or county, no gambling game as provided for in this act shall be conducted on any premises which have been licensed for the sale of liquor, beer, food, cigarettes or any other consumable product without such license having first been obtained.
- (2) Any governing body may charge an annual license fee for each license so issued under this act, which license fee, if any, shall expire on June 30 of each year, and such fee shall be prorated.
- (3) Any license issued pursuant to this act shall be deemed to be a revocable privilege, and no holder thereof shall acquire any vested rights therein or thereunder.

The question presented in part (a) is whether the above statutory language limits the extent of legalized gambling to only those premises which have been licensed for the sale of liquor, beer, food, cigarettes or any other consumable products. Article V, section 11, Constitution of Montana, 1972, provides in pertinent part:

- (3) Each bill, except general appropriation bills and bills for the codification and general revision of the laws, shall contain only one subject, **clearly expressed in its title**. If any subject is embraced in any act and is not expressed in the title, only so much of the act not so expressed is void. (Emphasis supplied)

The title of the Montana Card Games Act provides:

An Act **Legalizing Certain Card Games**; Defining Terms; Permitting Local Licensing And Regulation; Providing Penalties And Providing An Effective Date. (Emphasis supplied)

The title of the Bingo and Raffles Law provides:

An Act **Making Lawful The Conducting Of Games Of Chance Commonly Known As Bingo And Raffles**; Defining Terms; Permitting Local Licensing And Regulations; Providing Penalties; And Providing An Effective Date. (Emphasis supplied)

The title of the Sports Pools Act provides:

An Act **Legalizing Sports Pools**; Providing Penalties; And Providing An Effective Date. (Emphasis supplied)

In construing legislative enactments, to determine the legislative intent, such intention must be gathered from the language employed by the lawmakers. **Green v. City of Roundup**, 117 Mont. 249, 252, 157 P.2d 1010 (1945). The title of the act is indicative of legislative intent and purpose. **Barney v. Board of Railroad Commissioners**, 93 Mont. 115, 17 P.2d 82 (1932). The clear and plain meaning of the language in the above titles indicates an intent by the legislature to legalize certain card games, bingo, raffles and sports pools. Furthermore, the Montana Card Games Act, the Bingo and Raffles Law and the Sports Pools Act were all enacted into laws by the legislature at the same time. Each of these acts was placed in Title 62, chapter 7, and the provisions of each act are numbered such that the provisions are continuous from section 67-701 to section 67-736. These gambling acts encompass a single subject and must be read together to determine the intent of the legislature.

As previously stated, both the Montana Card Games Act and the Bingo and Raffles Law contain the licensing provisions quoted supra. However, the Sports Pools Act does not contain this licensing provision. Therefore, if the legislative grant of the privilege to conduct allowable gambling were only available to those premises licensed to sell liquor, beer, food, cigarettes or other consumable products, and since the Sports Pools Act does not contain this provision, then it could be said that the legislature **legalized** sports pools (see the title to the act) but that no one could conduct a sports pool because the legislators failed to state who could conduct this **legal** activity. Such an interpretation would be absurd. It is plain that it was the legislative intent that all adults in Montana could conduct and participate in a sports pool. As the court held in **State ex rel. Ronish v. School District No. 1**, 136 Mont. 453, 460, 348 P.2d 797 (1960):

Statutory or constitutional construction should not lead to absurd results if a reasonable construction will avoid it.

Just as it was intended that all adults could conduct and participate in sports pools, so also it was intended that all adults could conduct and participate in bingo, raffles and card games.

Therefore, I would conclude that legalized forms of gambling can be conducted on premises not licensed for the sale of liquor, beer, food, cigarettes or any other consumable products whether or not the city, town, or county has required a license of those premises that are licensed to sell the above consumable products.

Questions 1 (b) and 2:

Since the allowable gambling can be conducted on premises not licensed for the sale of liquor, beer, food, cigarettes or any other consumable products, you ask in part (b) of question 1 whether a city, town or county may require that such premises be licensed in order to conduct gambling.

The purpose of the license is to regulate the allowable gambling. See sections 62-708 and 62-720, R.C.M. 1947. The purpose of providing that the city, town or county shall decide if there is to be licensing was to allow the local government to determine the type and magnitude of regulations that must be

complied with in order to acquire a license. (See sections 62-708 and 62-720, supra.) Thus, question 2 is an integral part of part (b) of question 1: that is, question 2 asks whether the local government has the power to regulate those premises that are not licensed to sell consumable products.

If the local government has the power to issue a license to a premise that is not licensed to sell consumable products, then the local government also has the power to establish regulations governing the qualifications for and the issuing, suspension and revocation of gambling licenses to such premises.

A reading of sections 62-707 and 62-719, supra, reveals that the legislature granted local governments permissive licensing authority:

(1) Any city, town or county may issue licenses for the gambling games provided for in this act to be conducted on premises which have been licensed for the sale of liquor, beer, food, cigarettes or any other consumable products. ... (Emphasis supplied)

However, the legislature went on to provide that if the local government did require licensing, then such local government **must** license those premises which have been licensed to sell liquor, beer, food, cigarettes or any other consumable products.

... When a license has been required by any city, town or county, **no gambling game** as provided for in this act **shall be conducted on any premises which have been licensed for the sale of liquor, beer, food, cigarettes or any other consumable product without such license having first been obtained.** (Emphasis supplied)

Thus, there was a legislative grant of power to the local governments to license and regulate. That grant provides that if the local government should decide to license and regulate, it **must** license and regulate those premises that are licensed to sell consumable products.

Although there is no specific provision in the gambling legislation which provides that local governments can license and regulate other premises on which gambling is conducted, both cities and counties have legislative power as provided by law.

Viewing first the situation of cities and towns, sections 11-102 and 11-103, R.C.M. 1947, provide that every city and town has legislative power. Pursuant to this legislative power, section 11-901, supra, provides:

The city or town council has the power: To make and pass all bylaws, ordinances, orders, and resolutions, not repugnant to the constitution of the United States or of the state of Montana, or of the provisions of this title, necessary for the government or management of the affairs of a city or town, for the execution of the powers vested in the body corporate, and for carrying into effect the provisions of this title.

Section 11-901, supra, has been interpreted by the courts to be the "General Welfare Clause." **State ex rel. Altop v. City of Billings**, 79 Mont. 25, 32, 255 P. 11 (1927). Under this section the Montana Supreme Court has

held that when an activity or business is greatly concerned with the health, morals and welfare of the public, then it is within the police power of a city or town to regulate it. Unquestionably, gambling affects the health, morals and welfare of the public. Therefore, it is clear that all gambling can be regulated through the legislative police power that is bestowed generally on the cities and towns through section 11-901, supra, but more specifically, through sections 62-707 and 62-719, supra, of the new gambling provisions. As was stated by the supreme court in the case of **Ruona v. City of Billings**, 136 Mont. 554, 557, 323 P.2d 29 (1959):

It is so well-settled as to hardly need citation of authority that under the guise of police power the state and the municipal subdivisions thereof have not only the power, but the duty to do all things necessary to fully protect the public in matters of the preservations, among other things, of the health and well-being of the community.

Hence, the cities and towns, through their legislative police power, if they decide to license, **must** license those premises which have a license to sell liquor, beer, food, cigarettes or any other consumable products, sections 62-707 and 62-719, supra. However, cities and towns **may**, for the protection of public health, safety, morals and welfare, go further and regulate all gambling within their jurisdictional limits, so long as such regulations are not repugnant to the constitution of the United States, the constitution of the state of Montana, or the laws of Montana. Section 11-901, supra.

In regard to the counties, Article XI, section 4, Constitution of Montana, 1972, provides that a county that does not have self-government powers, has **legislative, administrative and other powers provided or implied by law**. This is a new provision that was not contained in the 1889 Montana Constitution, and provides that the legislature can bestow upon a county legislative powers. Section 16-801, R.C.M. 1947, provides:

Every county is a body politic and corporate, and as such has the power specified in this code, or in special statutes, and such powers as are **necessarily implied from those expressed**. (Emphasis Supplied)

As has been stated, sections 62-707 and 62-719, supra, bestow legislative power upon the counties to license and to regulate premises that are licensd to sell liquor, beer, food, cigarettes or any other consumable product. Thus, there has been a grant of legislative power to the counties. Inherent in any legislative power is the police power to protect the public safety, morals and welfare. It has been held that a city has the power to license and regulate those premises that are not licensd to sell consumable produts. **Ruona**, supra.

So, for the protection of the public health, safety, morals and welfare of those citizens that live in the county, it is implicit in sections 62-707 and 62-719, that the county also has the power to license and regulate premises that have not been licensd to sell consumable goods. As provided in 51 Am.Jur.2d, **Municipal Corporations**, §14:

... police power with regard to the protection of health, morals, and welfare of the public includes the right to regulate, by requiring a license as a prerequisite to the carrying on of certain activities ...

As a justification for a licensing requirement as a proper exercise of the police power, the courts generally require a showing that the requirement at least tends to promote the public health, morals, safety or welfare.”

The state has not provided that these premises cannot be licensed and regulated and, thus, it would not be repugnant to any law of the state for the county to use its police power and require such licensing and regulation.

Therefore, in regard to questions 1 (a), 1 (b), and 2, I would conclude that:

1(a) allowable gambling can be conducted on premises not licensed for the sale of liquor, beer, food, cigarettes or any other consumable products; and

1(b) cities, towns and counties do have the power to license premises other than those already licensed to sell liquor, beer, food, cigarettes or any other consumable products.

2. cities, towns and counties also have the power to establish, by ordinance or resolution, regulations pertaining to the conduct of authorized gambling games, regardless of the premises on which such games are conducted.

Question 3:

In response to question 3, regarding whether cities, towns and counties may adopt licensing procedures and regulations on a countywide basis through interlocal agreements, the laws of the state of Montana grant broad authority to local government units for intergovernmental cooperation.

The Montana Constitution, 1972, provides for intergovernmental cooperation at Article XI, section 7:

- (1) Unless prohibited by law or charter, a local governmental unit may
 - (a) cooperate in the exercise of any function, power, or responsibility with,
 - (b) share the services of any officer or facilities with,
 - (c) transfer or delegate any function, power, responsibility, or duty of any officer to one or more other local government units, school districts, the state, or the United States.

(2) The qualified electors of a local government unit may, by initiative or referendum, require it to do so.

Sections 62-707 and 62-708 of the Montana Card Games Act and sections 62-719 and 62-720 of the Bingo and Raffles Law grant licensing and regulatory authority to cities, towns and counties. Therefore, pursuant to the constitutional authority in Article XI, section 7, cities, towns and counties may cooperate in adopting uniform licensing procedures and regulations. Cities, towns and counties may cooperate in the exercise of their powers, duties and responsibili-

ties in regard to licensing and regulation, or may transfer or delegate such duties, powers and responsibilities to a local governing unit.

Intergovernmental cooperation and the implementation of Article XI, section 7, *supra*, is accomplished through the adoption of interlocal cooperation agreements executed in accordance with section 16-4901, et seq., R.C.M. 1947.

The procedure and requirements for interlocal agreements are set out in section 16-4904, providing in pertinent part:

Any one or more public agencies may contract with any one or more other public agencies to perform any administrative service, activity or undertaking which any of said public agencies entering into the contract is authorized by law to perform provided that such contract shall be authorized and approved by the governing body of each party to said contract. Such contract shall set forth fully the purposes, powers, rights, obligations and responsibilities of the contracting parties ...

Pursuant to an interlocal agreement, cities, towns and counties, therefore, may adopt licensing procedures and regulations on a countywide basis.

Question 4:

In question 4 you have asked whether section 84-2708, R.C.M. 1947, applies to licenses for gambling games issued pursuant to sections 62-707 and 62-719, R.C.M. 1947.

The general provisions concerning county licenses are contained in Title 84, chapter 27, Revised Codes of Montana, 1947. Section 84-2708 of that act provides:

All moneys collected for licenses must be paid into the treasury of the county in which the same are collected. The county treasurer shall retain fifty per cent thereof for the use of the county, he shall pay over forty-five per cent thereof to the state treasurer for the use of the general fund of the state and he shall pay over five per cent thereof to the state treasurer for deposit in the earmarked revenue fund to be used by the livestock commission for predatory animal control.

Section 84-2702 of the county licensing act provides in pertinent part:

A license must be procured immediately **before the commencement of any business or occupation liable to a license tax** from the county treasurer of the county where the applicant desires to transact the same, ... (Emphasis supplied)

Any county which licenses business or occupations, including gambling, is subject to the provisions contained in section 84-2708, *supra*, and consequently may retain only fifty percent of the license monies for the county use.

A business has been defined as any activity or enterprise for gain, benefit, advantage or livelihood. **Union League Club v. Johnson**, ___ Cal. App. ___, 108 P.2d 487, 490 (1941). Clearly, gambling is an activity or enterprise for gain,

benefit or advantage, and a gambling license fits within the general licensing provisions of Title 84, chapter 27, *supra*.

Although section 84-2702, *supra*, refers to a license "tax" whereas the gambling legislation refers to a license "fee", the two terms are interchangeable. Local government units may issue licenses under sections 62-707 and 62-719 as a condition precedent to the right to engage in gambling as provided for in the respective acts. These provisions have identical subsections (2) authorizing a license fee:

(2) Any governing body may charge an annual license fee for each license so issued under this act, which license fee, if any, shall expire on June 30 of each year, and such fee shall be prorated.

The Montana Supreme Court has held that there is no distinction between a license tax or occupation tax and a license fee exacted for regulation purposes. A license may be imposed for revenue, for regulation, or for both purposes. **State ex rel. Carter v. Kall**, 53 Mont. 162, 162 P. 385 (1916); **State v. Camp Sing**, 18 Mont. 128, 44 P. 516 (1896).

Hence, section 84-2708, allowing the county to retain only fifty percent of all license monies collected and transferring the remaining license monies to the state treasurer, does apply to licenses for gambling games issued pursuant to sections 62-707 and 62-719, R.C.M. 1947.

Question 5:

In question 5, you ask what is the definition of poker as that term is used in section 62-703, R.C.M. 1947. Section 62-703 provides:

- (1) It is unlawful for any person to conduct or participate in any card game or make any tables available for the playing of card games except those card games authorized by this act.
- (2) The card games authorized by this act are and are limited to the card games known as bridge, cribbage, hearts, panguingue, pinochle, pitch, rummy, whist, solo, and **poker**. (Emphasis supplied)

Section 62-714, R.C.M. 1947, provides that, to the extent they are not **specifically** superseded by provisions of this act (the Montana Card Games Act) or any other gambling law, the provisions of sections 94-8-401 through 94-8-431, R.C.M. 1947, remain in effect. Section 94-8-401 prohibits certain gambling. Thus, relying on section 62-714, unless the card games in section 94-8-401 are specifically legalized in the new gambling provisions, they are still prohibited. Section 94-8-401 provides in part:

Every person who deals, or carries on, opens or causes to be opened, or who conducts, ... any game of monte, dondo, fan-tan, tan, **studhorse poker**, craps, seven and a half, twenty-one, faro, roulette, pangeni or pangene, hokey-pokey, **draw-poker**, or **the game commonly known as round-the-table poker**, or any banking or percentage game, or any game commonly known as sure-thing game, or any game of chance played with cards, dice or any device whatsoever, ... and every person

who plays or bets at or against said prohibited games or devices, except as hereinafter provided, is guilty of a misdemeanor ...

The above section indicates what games are considered to be games of poker in Montana. They are: studhorse poker and draw-poker, also known as round-the-table poker. Since the legislature has provided that only those card games specifically authorized can be played in Montana, and since the legislature has provided that section 94-8-401 is still in effect unless specifically superseded, clearly it was the intention of the legislature to remove only the games of studhorse poker and draw-poker, as well as the other authorized card games, from the list of prohibited card games. While there are numerous variations of studhorse poker and draw-poker, it is clear that twenty-one, also known as blackjack, is not a form of either studhorse or draw-poker and is thus prohibited.

Thus, the card games that are allowable under the definition of poker as provided in section 62-703, R.C.M. 1947, are studhorse poker and draw-poker.

Question 6:

In question 6, you ask whether the definition of bingo, as used in section 62-716, R.C.M. 1947, includes the game of keno.

Section 62-715, R.C.M. 1947, provides:

This act shall be known and may be cited and referred to as the **Bingo and Raffles Law**. (Emphasis supplied)

Section 62-716, *supra*, provides in part:

As used in this act, unless the context otherwise requires, the following terms or phrases shall have the following meanings:

(1) "Game of chance" means the specific kind of game of chance commonly known as:

(a) "bingo," in which prizes are awarded on the basis of designated numbers or symbols on a card which conform to numbers or symbols selected at random; and such prizes must be in tangible personal property only and not in money, cash, stocks, bonds, evidences of indebtedness, or other intangible personal property and must not exceed the value of one hundred dollars (\$100) for each individual bingo award. ...

(2) "Equipment" means:

(a) with respect to bingo, the receptacle and numbered objects drawn from it, the master board upon which such objects are placed as drawn, the cards or sheets bearing numbers or other designations to be covered and the objects used to cover them, the boards or signs, however operated, used to announce or display the numbers or designations as they are drawn, public address system, and all other articles essential to the operation, conduct and playing of bingo; ...

John Scarne, the world's foremost gambling authority, in his book, **Scarne's Complete Guide to Gambling**, Simon and Schuster (1961), states at page 185 that keno and bingo are both derivatives of the Italian gambling game known as "lotto." Although the actual mechanics of each game are somewhat different, the end result is that in each game, prizes are awarded on the basis of designated numbers or symbols on a card which conform to numbers or symbols selected at random. (Scarne, at 185, 432, 433.) See definition of bingo, section 62-716, supra, and definition of keno, **State v. O'Rourke**, 116 Mont. 502, 503, 146 P.2d 168 (1944). Further, the equipment that is used in keno is identical to that equipment listed in section 62-716 (2) (a) as being the equipment necessary for the game of bingo (Scarne, at 432, 433).

Therefore, the game of keno does fit within the definition of bingo as provided in section 62-716, R.C.M. 1947, and such a game would be allowable **bingo** in Montana.

Question 7

In question 7 you ask whether chips can be utilized in authorized card games if such chips are purchased with cash. Section 62-706, R.C.M. 1947, provides:

(1) In every gambling game conducted pursuant to any gambling law of the state the consideration paid for the chance to play shall be strictly cash. Every participant must present the money with which he intends to play the gambling game at the time the game is played. **No check, credit card, note, I.O.U. or other evidence of indebtedness shall be offered or accepted as part of the price of participating in a gambling game or as payment of a gambling debt.** (Emphasis supplied)

In determining legislative intent, one must first resort to the plain meaning of the words used. **State ex rel. Cashmore v. Anderson**, ___ Mont. ___, 500, P.2d 921, 924 (1972). Section 62-706, supra, provides that no **check, credit card, note, I.O.U. or other evidence of indebtedness** shall be offered or accepted as part of the **price of participating** in a gambling game. It is evident from the language in the above provision that the legislative purpose was to prevent the extension of any form of credit for the purpose of gambling. It was the legislative intent that in order for a person to gamble, he must have money in hand to pay all gambling debts that accrue, as they accrue. No evidence of indebtedness can be offered as the price to participate.

Chips, however, if utilized solely as the means of exchange in the card games authorized, would not be an evidence of indebtedness. A prospective player would have to present **cash** that he has in hand as the price of participating and this cash would then be substituted for chips. Hence, there would be compliance with the requirement that the consideration paid for the chance to play must be strictly cash, and thus chips may be utilized in authorized card games, if such chips are purchased with cash.

Question 8:

Question 8 consists of two parts: First, whether it is allowable under section 62-705, *supra*, for an establishment conducting allowable card games to sell chips to participants at more than the face value of the chips, and, secondly, if such a practice constitutes a **rake-off** as provided in section 62-705, *supra*.

Section 62-705, *supra*, provides:

Rules governing the conduct of each game shall be prominently posted on the premises of any licensed establishment where such game is conducted. Such rules shall include notice of the **maximum percentage rake-off** if any, and shall require that the **person taking the rake-off** do so in an obvious manner and only after **announcing the amount of each rake-off**, which shall **only be taken at the conclusion of each game when the winner of each individual pot has been determined**. (Emphasis supplied)

From the above provision it is clear that a rake-off by the establishment conducting the allowable card games is the only authorized way to take a percentage of the action. Thus, the definition of a rake-off, which is encompassed within the above definition, must be determined. Section 62-705 provides that the establishment conducting the games can take a percentage, which shall only be taken at the conclusion of each game when the winner of each individual pot has been determined. Hence, a rake-off is the taking of a percentage of the pot, by the establishment, at the conclusion of each game.

Thus, the practice of selling chips to participants at more than face value of the chips is obviously not a rake-off as contemplated by section 62-705. Such a practice would not be the taking of a percentage of each pot at the conclusion of each game when the winner of each pot has been determined.

Hence, since a rake-off as defined by section 62-705, *supra*, is the only statutorily authorized way for the establishment conducting card games to take a percentage of the action, and since selling chips to participants at more than face value is not a rake-off, then selling chips to participants at more than face value is not an authorized rake-off and, thus, not permitted.

Question 9:

In question 9 you have asked who may establish the rules governing the conduct of each game as provided for in section 62-705, *supra*.

These rules, which must be posted as required by section 62-705, are the house rules governing the manner in which each game is to be conducted. Section 62-705 mandates what some of these rules will be. It requires that if there be a rake-off, the posted rules must include a notice of the maximum amount of such rake-off, the manner in which the rake-off is taken, and the time when the rake-off is taken. Local licensing authorities may adopt further regulations which would have to be posted with the house rules.

With the above in mind, the burden of complying with these regulations falls squarely upon the shoulders of the licensee. He is the person statutorily

responsible to the licensing authority. Section 62-708, *supra*. He therefore must be the person who has the authority and duty to adopt and post the rules governing the conduct of each game not inconsistent with any rules and regulations of the local licensing authority and sections 62-701 through 62-736, R.C.M. 1947.

Question 10:

In question 10 you have asked what is the meaning of "venue" as used in sections 62-713 and 62-735, R.C.M. 1947. It is readily apparent that the word "venue" as used in these two sections means "jurisdiction."

Questions 11 and 12:

In questions 11 and 12, your requests may be phrased as follows:

What court has jurisdiction over violations of the Montana Card Games Act, the Bingo and Raffles Law, and the Sports Pools Act?

Section 95-301, R.C.M. 1947, provides that the district courts have jurisdiction of all public offenses not otherwise provided for. Section 95-302, R.C.M. 1947, provides in part:

The justices' courts have:

- (a) Jurisdiction of all misdemeanors punishable by a **fine not exceeding five hundred dollars (\$500.00) or imprisonment not exceeding six (6) months, or both such fine and imprisonment; ...** (Emphasis supplied)

Section 95-303, R.C.M. 1947, provides that police courts have criminal jurisdiction as authorized by sections 11-1602, 11-1603 and 11-1702, *supra*. Section 11-1602, R.C.M. 1947, provides in pertinent part:

The police court has concurrent jurisdiction with the justice of the peace of the following public offenses committed within the county:

- (3) Breaches of the peace, riots, affrays, committing willful injury to property, and **all misdemeanors punishable by fine not exceeding five hundred dollars (\$500), or by imprisonment not exceeding six (6) months, or by both fine and imprisonment.** (Emphasis supplied)

Section 62-712, R.C.M. 1947, of the Montana Card Games Act, provides:

Every person who willfully violates or who procures, aids or abets in the **willful violation of this act or any ordinance, resolution or regulation adopted pursuant thereto shall be deemed guilty of a misdemeanor and upon conviction, shall be punished by a fine of not more than one thousand dollars (\$1,000) or imprisonment in the county jail for not more than three (3) months, or both.** (Emphasis supplied)

The penalty provision of the Bingo and Raffles Law, section 62-723, R.C.M. 1947, and the penalty provision of the Sports Pools Act, section 62-733, R.C.M. 1947, are identical to the above-quoted provision.

As previously noted, justice courts and police courts have jurisdiction of all misdemeanors punishable by a **fine not exceeding five hundred dollars**

(\$500) or imprisonment not exceeding six (6) months, or both such fine and imprisonment. Section 95-302, supra, and section 11-1602, supra. The gambling acts, however, provide for a **fine of not more than one thousand dollars (\$1,000)** or imprisonment in the county jail for not more than three months, or both. Therefore, the violations of the above gambling acts are not within the jurisdiction of the justice courts and police courts. Thus, pursuant to section 95-301, supra, district courts have exclusive jurisdiction over violations of the gambling acts.

Question 13:

In question 13 you have asked whether, under the provisions of the Montana Card Games Act and the Bingo and Raffles Law, a county attorney of a county is required to prosecute violations of city or town ordinances established to regulate and control the licensing and conduct of gambling within such towns and cities.

The powers and duties of the county attorney are set forth in Title 16, chapter 16. Section 16-3101, R.C.M. 1947, provides in pertinent part:

The county attorney is the public prosecutor, and must: 1. **Attend the district court and conduct, on behalf of the state, all prosecutions for public offenses** and represent the state in all matters and proceedings to which it is a party, or in which it may be beneficially interested, at all times and in all places within the limits of his county ... (Emphasis supplied)

Section 16-3105, R.C.M. 1947, provides:

The county attorney must perform such **other duties as are provided by law.** (Emphasis supplied)

Under the new gambling provisions, sections 62-711, 62-722 and 62-732 provide:

It shall be the duty of all peace officers to enforce the provisions of this act and to arrest and complain against any person violating any provision of this act. It shall be the **duty of the county attorney of the respective county to prosecute all violations of this act in the manner and form as is provided by law** and it shall be a misdemeanor for any such person or persons to knowingly fail to perform his or her duty under this section. (Emphasis supplied)

Hence, the county attorney must prosecute **all violations** of the gambling acts.

The penalty provisions of the three gambling acts provide that it is a violation of the act if there is a violation of any **ordinance, resolution or regulation adopted pursuant to the acts.** See sections 62-712, 62-723 and 62-733, R.C.M. 1947. As has previously been stated, all prosecutions must be in the district court. The Montana Supreme Court has recently held that when there is a comprehensive piece of legislation, it should be considered in its entirety to determine the effect of any one section. **State v. Bush**, 31 St. Rptr. 188, 189,

____ Mont. ____ (1974). Thus, reading each act in its entirety, it is evident the legislature intended that the county attorney must prosecute, in the district court, all violations of the gaming acts, including ordinances enacted by cities and towns pursuant to these acts.

Question 14:

In question 14 you ask whether, under sections 62-707 and 62-719, *supra*, local governing bodies are limited to charging an annual license fee for licenses issued pursuant to the respective acts, or can they charge license fees on a quarterly basis?

As previously stated, the language in sections 62-707 and 62-719, *supra*, is identical. A portion of this language has been viewed in regard to prior questions that you asked. Thus, my opinion concerning these questions must be borne in mind. In my answer to questions 1 and 2, I held that sections 62-707 and 62-719, *supra*, provided that if a local government does license, it **must** license those premises which have been licensed to sell liquor, beer, food, cigarettes or any other consumable products. I further held that it was only those establishments that are licensed to sell consumable products to which the specific licensing provisions of sections 62-707 and 62-719 apply. Accordingly, it is evident that the provisions of subsection (2) of sections 62-707 and 62-719 apply only to those establishments.

Section 62-707 (2) and section 62-719 (2) provide:

Any governing body **may** charge an **annual license fee** for each license so issued under this act, which license fee, if any, shall expire on June 30 of each year, and such fee shall be prorated. (Emphasis supplied)

Looking to the plain meaning of the language used, it is clear that if the local governing unit does license gambling on those premises which are licensed to sell liquor, beer, food, cigarettes or any other consumable products, the license shall not be effective for more than one year. Since the local licensing authorities must decide whether to license allowable gambling, they must also decide in which manner and for what time periods such licenses shall be issued consistent with sections 62-707 (2) and 62-719 (2), R.C.M. 1947. The decision of whether to issue only annual licenses or licenses on a quarterly basis rests with the sound discretion of the local licensing authority. Therefore, I see no prohibition against a local licensing authority issuing gambling licenses on a quarterly or some other time period basis.

In regard to premises not licensed to sell liquor, beer, food, cigarettes or any other consumable products, I held in question 2 that local units of government, through their legislative police power, also have the authority to license and regulate these premises. Therefore, the licensing of these establishments, as well as the type and extent of any regulations governing these establishments, is within the power of the local authority. Thus, any regulation promulgated by the local authority that is consistent with the principles of equal protection and due process would be proper.

Question 15:

In question 15 you have asked whether cities, towns, and counties are required to adopt notice requirements and hearing procedures for the issuance, denial, revocation or suspension of gambling licenses in accordance with the Montana Administrative Procedure Act; or whether notice requirements and hearing procedures different from those in the Administrative Procedure Act may be adopted concerning the issuance, denial, revocation or suspension of gambling licenses.

The purpose of the Montana Administrative Procedure Act, sections 82-4201, R.C.M. 1947, et seq., is to provide uniform rule making and contested case procedures for the various administrative agencies of state government. The only agencies subject to the provisions of this act are defined in section 82-4202, R.C.M. 1947, which provides in pertinent part:

For purposes of this act:

- (1) Agency means any board, bureau, commission, department, authority or officer of the state government authorized by law to make rules and to determine contested cases, ... (Emphasis supplied)

Since cities, towns and counties do not fall within the above definition of "agency," it is my opinion that the Administrative Procedure Act, as set out in section 82-4201, et seq., R.C.M. 1947, does not apply to local licensing authorities. Hence, cities, towns and counties may adopt their own notice requirements and hearing procedures in regard to the issuance, denial, revocation or suspension of gambling licenses.

**ADDITIONAL COMMENTS RELATIVE
TO GAMBLING IN MONTANA**

While you have not raised any questions concerning the following items, I am taking the liberty of commenting upon them briefly because of their relevance to this opinion.

Coin-operated Machines:

Coin-operated machines labeled "Montana Raffle," "Instant Bingo," "Bingo," "Poker," or some similar designation operated by depositing a coin, token or some other form of consideration, pulling a lever, spinning a dial or manipulating some other mechanical device, and receiving a "pull-tab," "break-open card" or similar evidence of one's score with numbers, letters or symbols on them have made their appearance within the borders of Montana within recent weeks.

The above-described games of chance are illegal in Montana because they do not constitute either bingo, raffles or poker as contemplated by sections 62-702, 62-703, 62-716, 62-717 and 62-718, R.C.M. 1947.

Federal Law:

While this office will not attempt to define or interpret federal law, I am of the opinion that the legalization of certain forms of gambling in Montana will

invoke the jurisdiction of the Internal Revenue Service in several instances. Persons interested in the ramifications of federal law on legalized gambling are urged to consult the Internal Revenue Code and regulations promulgated thereunder.

On April 8, 1974, the Helena District Office of the Internal Revenue Service issued a news release which stated, in part:

The Internal Revenue Service reminded taxpayers today that Federal Excise Tax Laws require that anyone accepting money as payment for wagers must first obtain a \$50 federal wagering stamp.

In addition, the owner-operator of a sports pool or raffle is liable for a tax of ten percent of the gross wager.

It appears that the above-quoted news release was referring to IRS Code, sections 4401 and 4411 (26 U.S.C.A. §§ 4401 and 4411).

In any event, all persons interested in their present or anticipated legal obligation and duties relevant to participating in offering or promoting games of chance in Montana are urged to contact their nearest Internal Revenue Service office.

CONCLUSION

THEREFORE, IT IS MY OPINION, based upon the above considerations:

1 (a) Legalized forms of gambling can be conducted on premises not licensed for the sale of liquor, beer, food, cigarettes or any other consumable products.

1 (b) Cities, towns and counties have the power to license allowable gambling on premises other than those already licensed to sell liquor, beer, food, cigarettes or any other consumable products.

2. Cities, towns and counties have the power to establish, by ordinance or resolution, regulations pertaining to the conduct of authorized gambling games regardless of the premises on which such games are conducted.

3. Pursuant to an interlocal agreement, cities, towns and counties may adopt licensing procedures and regulations on a countywide basis.

4. Section 84-2708, allowing the county to retain only fifty percent of all license monies collected and transferring the remaining license monies to the state treasurer, does apply to licenses for gambling games issued pursuant to sections 62-707 and 62-719, R.C.M. 1947.

5. The term "poker," as used in section 62-703, R.C.M. 1947, means studhorse poker and draw-poker.

6. The definition of "bingo," as used in section 62-716, R.C.M. 1947, includes the game of "keno."

7. Chips can be used in authorized card games if such chips are purchased with cash.

8 (a) Selling chips to participants at more than the face value of the chips is not statutorily authorized.

8 (b) Selling chips to participants at more than the face value of the chips is not an authorized rake-off as provided by section 62-705, R.C.M. 1947.

9. The licensee establishes the rules governing the conduct of each game that is carried on pursuant to his license.

10. The term "venue" as used in sections 62-713 and 62-735, R.C.M. 1947, means "jurisdiction."

11 & 12. In regard to questions 11 and 12, the district courts have exclusive jurisdiction over violations of the Montana Card Games Act, the Bingo and Raffles Law, and the Sports Pools Act.

13. The county attorney must prosecute, in the district court, all violations of the gaming acts, including ordinances enacted by cities and towns pursuant to these acts.

14. Licenses to conduct allowable gambling on premises licensed to sell liquor, beer, food, cigarettes or any other consumable products shall not be effective for more than one year.

15. The notice and hearing requirements of the Administrative Procedure Act, set out in section 82-4209, R.C.M. 1947, do not apply to cities, towns and counties for the issuance, denial, revocation or suspension of gambling licenses.

Very truly yours,

ROBERT L. WOODAHL
Attorney General