

VOLUME NO. 37

OPINION NO. 67

GAMBLING - Cities and towns, regulation of hours, police powers; CITIES AND TOWNS - Gambling, regulation of hours, police powers; ORDINANCES - Gambling, police power, regulation of hours; REVISED CODES OF MONTANA, 1947 - Sections 11-901, 62-701 through 62-708, 62-714, 62-719, 62-736.

HELD: The City of Great Falls may restrict by ordinance the hours of licensed gambling between 2:00 a.m. and 1:00 p.m. on Sunday and between 2:00 a.m. and 8:00 a.m. on any other day.

21 September 1977

David W. Gliko, Esq.
Great Falls City Attorney
P.O. Box 1609
Great Falls, Montana 59403

Dear Mr. Gliko:

You have requested my opinion on the following question:

May the City of Great Falls restrict by ordinance the hours of licensed gambling between 2:00 a.m. and 1:00 p.m. on Sunday and between 2:00 a.m. and 8:00 a.m. on any other day?

Section 5.28.380 of the Great Falls gaming ordinance provides:

No game of chance or authorized card game may be operated in any premises, licensed under this chapter, during the following hours:

- A. Sunday from two a.m. to one p.m.;
- B. On any other day between two a.m. and eight a.m.

Article III, § 9 of the Montana Constitution empowers the Legislature to authorize gambling. Otherwise all forms of gambling are prohibited. The Montana Card Games Act, the Bingo and Raffles Law, and the authorization for sports pools were enacted in 1974, as sections 62-701 through 62-736, R.C.M. 1947. The Card Games Act is found at sections 62-701 through 62-714.

While that Act prescribes several rules for authorized card games (see, e.g., sections 62-703, 62-704, 72-705 and 62-706) the primary regulatory authority is vested in local governing bodies. Sections 62-707 and 62-708 provide, respectively:

62-707. Local governing bodies may issue licenses. (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.

62-708. Governing body may establish regulations. The governing body authorized to issue gambling licenses pursuant to this act shall have the authority to establish by ordinance or resolution, regulations governing the qualifications for and the issuing, suspension and revocation of such gambling licenses. These regulations, in addition to any other requirements, shall provide that no license shall be issued to:

1. A person who has been convicted of being the keeper or is keeping a house of ill fame.

2. A person who has been convicted of pandering or other crime or misdemeanor opposed to decency and morality, under the laws of the federal government or any state of the United States.

3. A person whose license issued under this act has been revoked for cause.

4. A person who at the time of application for renewal of any license issued hereunder would not be eligible for such license upon a first application.

5. A person who is not a citizen of the United States and who has not been a resident of the state of Montana for at least one (1) year immediately preceding the filing of the application for license.

6. A person who is not the owner and operator of the business. Additional regulations may also be adopted for the purpose of the protection of the public health, welfare and safety of the citizens of the state of Montana and to assure compliance with the intent of this act.

The question, therefore, is whether these two sections authorize the City of Great Falls, as a local governing body to regulate the hours of gambling.

A local government unit without self-government powers, such as the City of Great Falls, has the "powers of a municipal corporation and legislative, administrative, and other powers provided or implied by law." Montana Constitution, Article XI, section 4; section 11-102, R.C.M. 1947. These powers must be liberally construed. *Id.* Pursuant to the "general welfare clause" of section 11-901, a city can legislate as necessary for the government and management of its affairs, the maintenance of peace and order, the preservation of health, the convenient transaction of business, etc. *State v. Libby*, 107 Mont. 216, 230 (1938). This power of legislation may not, however, contravene constitutional or statutory provisions (*Id.*) and the state can preempt the regulation of an area so as to prohibit local control. *State v. Haswell*, 147 Mont. 492 (1966). Besides the specific licensing and regulatory powers in the Card Games Act quoted above, a city has general powers to "license all industries, pursuits, professions, and occupations" (section 11-903) and may "fix the amount, terms and manner of issuing and revoking licenses...." (section 11-904).

These statutory powers construed together, and construed liberally, empower a city to regulate the hours of a licensed card game.

Section 62-707 empowers a city to license gambling games and to collect fees therefor. Section 62-708 empowers a city to adopt "regulations governing the qualifications for and the issuing, suspension and revocation" of gambling licenses. In addition to "any other requirements," licenses may not be issued to certain persons listed in subsections one through six of section 62-708. The last sentence of subsection six provides:

Additional regulations may also be adopted for the purpose of the protection of the public health, welfare and safety of the citizens of the state of Montana and to assure compliance with the intent of this act.

A city's powers must be construed liberally. Article XI, section 4, Constitution of Montana. The power in section 62-708 to regulate the suspension or revocation of licenses would be essentially meaningless if the city could only regulate the initial personal qualifications for licensure. To regulate means "to adjust; to govern by rule, to direct or manage according to certain standards or laws; to subject to rules, restrictions or governing principles." City of Butte v. Paltrovich, 30 Mont. 18, 22 (1903). Further, a city must adopt the statutory list of persons not entitled to a license in addition to "any other requirements" it may enact (emphasis added). Finally, the last sentence of section 62-708 broadly empowers the city to regulate in the interest of public health, welfare and safety. The intent that the city have broad regulatory powers is patent upon the face of the Act. A city may not regulate or prohibit conduct in an area, preempted by state law, State v. Haswell, supra, but may clearly regulate gambling where authorized to do so by state law. Woolverton v. Denver, 361 P.2d 982 (Colo. 1961). There is nothing in the Card Games Act to indicate an intent to preempt the question of gambling hours.

The conclusion that the city is empowered to regulate the hours of gambling is not necessarily determinative, and a large body of law has been developed on the question of local regulation of business and their hours of operation. It has been said that:

No generalization can safely be stated as to the validity and reasonableness of municipal regulations of the time during which businesses may be conducted. The result depends largely upon the nature of the business sought to be regulated.

56 Am.Jur.2d Municipal Corporations, § 474. While the Constitution protects the right to engage in lawful business, the government is not deprived of the power to regulate "useful occupations" in those special situations in which their nature or location may prove injurious to the public. Neither is a municipality restrained from prohibiting a business which is "inherently vicious and harmful," and between these extremes lie many "non-useful" occupations which may or may not be harmful to the public. Murphy v. California, 225 U.S. 623 (1912). (Municipal regulation of the location pool halls). Thus, courts have stricken municipal ordinances restricting the hours of barber shops (see 98 A.L.R. 1093) and ordinances prohibiting selling cars on Sunday (Courtsey Motor Sales v. Ward, 179 N.E.2d 692 (Ill. 1962)). However, an ordinance closing dance halls on Sunday has been upheld as reasonable and not arbitrary. State v. Loomis, 75 Mont. 88 (1925). In City of Butte v. Paltrovich, *supra*, the municipality prohibited operation of licensed pawn shops between 6:00 p.m. and 7:00 a.m., pursuant to state authorization to "license, tax and regulate" certain businesses. The defendant pawn shop operator made a series of arguments which were rejected by the Court:

1. The power to regulate did not encompass the power to prohibit his business during a portion of every day. The Court responded that every police regulation operates to some extent as an interference with the free exercise of business, and that the factor alone is not determinative. If the regulation affords "reasonable facilities" for the conduct of the business it will be sustained (30 Mont. at 22).

2. Possession of city and state licenses which did not limit his hours precluded city regulation. The Court responded that the licenses were "mere permits" which the defendant took charged with the knowledge that the city could impose regulations necessary to preserve "peace and good order." (30 Mont. at 22); See section 62-707(3).

3. Unlawful discrimination was alleged, since only pawn shops, of all the businesses listed in the state statute, were subjected to regulation by the city. The Court rejected this argument by holding that only where persons in the same business are subjected to different regulations or are granted different privileges under the same conditions is discrimination open to challenge (30 Mont. at 22-23). See also City of Bozeman v. Nelson, 73 Mont. 147, 154 (1925); People v. Raub, 155 N.W.2d 878, 881 (Mich.1967).

4. The ordinance was unreasonable. The Court replied (30 Mont. at 23-24):

The only remaining question is, is the regulation provided by this ordinance a reasonable one? The mere fact that appellant's business is legitimate, and specifically recognized as such by legislative enactment, does not render ineffectual the power conferred by Subdivision 16 above. The police power is not confined to the regulation of those classes of business which are essentially legal, for, if illegal, in the sense that they are prohibited by law, it is not easily understood how they could be regulated at all.

It is of the very essence of the exercise of police powers that citizens may, for the public good, be constrained in the conduct with reference to matters in themselves lawful and right. It is not a material inquiry to attempt to ascertain the reason which impelled the legislature to designate the business of pawnbrokers as subject to police regulations. It is sufficient for us to know that it has done so, and deal with the law as we find it. The fact that appellant cannot prosecute his business whenever he may desire to do so is hardly a sufficient reason for saying that the restrictions imposed are unreasonable. However comprehensive the terms "individual liberty," so frequently made use of, are, and however broad the claim which may be advanced that every one may employ his time in a lawful undertaking as may best serve his own interests, still the liberty referred to is a relative term, and, at most, means liberty regulated by just and impartial laws, while all sorts of reasonable restrictions are imposed upon the actions of men for the common welfare and good for society.

However, the question of the reasonableness of the regulation is one of fact, of which the city council is the best judge, and in the absence of a clear showing to the contrary its reasonableness will be presumed. (Citations omitted, emphasis added.)

See also City of Bozeman v. Nelson, supra, 73 Mont. at 155; Betty v. City of Sidney, 79 Mont. 314, 319 (1927).

While courts recognize that private business may be regulated for the common good and welfare, a recent case concluded that the majority of jurisdictions considering ordinances restricting business hours have stricken the ordinances. Fasino v. Mayor, 300 A.2d 195, 198 (N.J. 1973). These cases often involve broad ordinances requiring all businesses to close, which are found to be broad, sweeping, arbitrary and unrelated to the municipality's legitimate goals. Fasino, supra; Dyess v. Williams, 444 W.2d 701, 702 (Ark. 1969); Goodin v. City of Philadelphia, 75 So.2d 279, 280 (Miss. 1954). However, an ordinance which is narrowly drawn, which has a substantial relation to the public health, safety or welfare, and which is not unreasonable, arbitrary or capricious will be upheld. Fasino, supra; City of Butte v. Paltrovich, supra.

Thus, ordinances narrowly drawn to apply to only certain classes of business, the regulation of which is reasonably necessary to promote the public health, safety, or welfare, have been upheld. Township of Little Falls v. Husni, 352 A.2d 595 (N.J. 1976) (laundromat hours); People v. Raub, 155 N.W.2d 878 (Mich. 1967) (carwash hours); Ratliff v. Hill, 168 S.W.3d 336 (Ky. 1943) ("roadhouse" hours). See also State v. Loomis, supra, (dance hall hours); City of Butte v. Paltrovich, supra (pawn shop hours).

The regulation of gambling hours is the type of matter touching upon the public health, safety and welfare. In 35 OP. ATT'Y GEN. NO. 86, it was said, speaking of the "general welfare" powers of section 11-901, noted above:

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. (Emphasis added.)

Since municipal ordinances possess a strong presumption of validity, Township of Little Falls v. Husni, *supra*, courts will not interfere unless there has been a strong showing of invalidity. State v. Loomis, *supra*; City of Bozeman v. Nelson, *supra*. The reasonableness and necessity for a particular regulation are matters, in the first instance, for local determination, Betty v. City of Sidney, *supra*, based upon local knowledge of conditions and needs, City of Butte v. Paltrovich, *supra*.

Under these principles, it cannot be said that the present ordinance of the City of Great Falls is invalid. Local regulation is sanctioned by state law in order to allow for local variations to regulate gambling. Gambling is the type of subject matter traditionally the object of reasonable regulation for the protection of the public health, safety and welfare as determined by the local governing body. The regulation is specific and narrowly drawn, and is thus not void as being overbroad.

THEREFORE, IT IS MY OPINION:

The City of Great Falls may restrict by ordinance the hours of licensed gambling between 2:00 a.m. and 1:00 p.m. on Sunday and between 2:00 a.m. and 8:00 a.m. on any other day.

Very truly yours,

MIKE GREELY
Attorney General