

VOLUME NO. 40

OPINION NO. 75

CITIES AND TOWNS - Escalating fines for ordinance violations;  
CRIMES - Ordinances, escalating fines for violations;  
FINES - Municipal ordinance violations, escalating fines;  
PENALTIES - Civil or criminal, escalating fines for ordinance violations;  
MONTANA CODE ANNOTATED - Sections 3-10-301, 3-11-103, 7-1-4124, 7-5-4207;  
OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 31 (1984).

HELD: The Lewistown city ordinance which allows an escalating monthly penalty for failure to obtain a city business license is valid.

5 October 1984

Thomas P. Meissner  
City Attorney  
305 Watson  
Lewistown MT 59457

Dear Mr. Meissner:

You have requested my opinion on the following question:

Whether the Lewistown city ordinance which allows an escalating monthly penalty for failure to obtain a local business license is valid in view of the decision in City of Missoula v. Shea.

The decision of the Montana Supreme Court in City of Missoula v. Shea, 40 St. Rptr. 91, 661 P.2d 410 (1983), determined that the escalating penalties for the parking violations in question were criminal penalties, and as such were unconstitutional. The Court specifically declined to rule on escalating civil penalties. As the Court said at 40 St. Rptr. 99:

While such a scheme [escalating fines] may be acceptable in enforcing civil penalties, we hold that the escalating fine provisions of the Missoula ordinances violate Article II, section 28 of the Montana Constitution, which provides that laws for the punishment of crime shall be founded on principles of prevention and reformation.

On the other hand, in the case of State ex rel. Hardy v. Board of Equalization, 133 Mont. 43, 319 P.2d 1061 (1958), the Montana Supreme Court ruled that a statute establishing a civil penalty with an escalating clause was lawful. Furthermore, the clear implication of section 3-10-301(e), MCA, is that incorporated cities and towns are authorized to impose civil penalties. My previous opinion, 40 Op. Att'y Gen. No. 31 (1984), should not be taken beyond its holding:

A city with general government powers may not establish a civil penalty and collection system for motor vehicle parking offenses.

The initial determination to be made here, then, is whether the penalties that the City of Lewistown imposes for failure to obtain a business license are civil or criminal. Although the statutes of Montana are clear in their grant of authority to cities to adopt and enforce ordinances (§§ 7-1-4124(1), 7-5-4207, MCA), they do not establish clearly which penalties for the violation of municipal ordinances are civil and which are criminal (§§ 7-5-4207, 3-11-103(1), MCA). Referring to the case law on this question, I find that the Montana Supreme Court has ruled in a case with similar facts. State ex

rel. Marquette v. Police Court, 86 Mont. 297, 283 P. 430 (1929). That case held that under the laws in force at the time, an action for the violation of a city ordinance requiring a business license was a criminal proceeding. Nevertheless, I conclude that because of the substantial statutory changes since 1929, the rule in this case is no longer good law.

The method applied in the Marquette case is still a sound starting place, however:

We think that the nature of the action must be determined by the relief sought in the proceeding.

86 Mont. at 306. The City of Lewistown's business license ordinances speak clearly to this question:

PENALTY: Persons violating any provision of this Title shall be subject to the general penalty provided in Section 1-3-1. In addition, a civil judgment for the amount of the license fee due and unpaid, plus penalty may be entered against the defendant.

Ordinance 5-1-20.

Modern cases have also had to determine whether penalties were civil or criminal. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 nn.22-28, 372 U.S. 144 (1962). The best discussion I have found of the factors to consider in deciding a civil/criminal question is that by Linde, J., in the case of Brown v. Multnomah County District Court, 570 P.2d 52 (Or. 1977). I would commend the discussion at pages 57-60 to anyone seeking guidance on this question. Justice Linde set out five factors to consider when deciding if a penalty is civil or criminal:

1. Type of offense;
2. Penalty;
3. Collateral consequences;
4. Punitive significance; and
5. Arrest and detention.

Taking the first factor, history is of little help in classifying the offense of failure to obtain a city business license. This is because license requirements

have been enforced in many different ways. 51 Am. Jur. 2d Licenses and Permits § 70. Our other guide on this question is the intent of the Lewistown City Council as expressed in Ordinance 5-1-20, quoted above. Although this statement of intent is not determinative, we have no reason to doubt it. Passing on to the second factor, we again have no reason to doubt the City's denomination of the fine as a civil penalty. This view is reinforced by the absence of any sanction of imprisonment and the lack of severity of the fine imposed (Ordinance 5-1-21).

As for criterion No. 3, the absence of any collateral consequences implies a merely civil penalty. Criterion No. 4 is another factor that is judged from evidence of legislative intent. Again, we have no reason to believe that the Lewistown City Council or the community at large attaches any criminal significance to the fine assessed for failure to secure a city business license. Finally, the ordinances of the City of Lewistown do not authorize any arrest and detention for the offense, only the fine discussed above. In summary, I conclude that the City of Lewistown validly licenses businesses in order to promote the health, safety, and welfare of its residents. As part of its regulation of business the City has adopted a lawful escalating civil penalty for failure to obtain a business license.

THEREFORE, IT IS MY OPINION:

The Lewistown city ordinance which allows an escalating monthly penalty for failure to obtain a city business license is valid.

Very truly yours,

MIKE GREELY  
Attorney General