VOLUME NO. 41 OPINION NO. 75

ALCOHOLIC BEVERAGES - Authority of city to regulate sale of liquor through enactment of obscenity ordinance;
CITIES AND TOWNS - Authority of city to enact obscenity ordinance regulating live performances in premises licensed to sell liquor;
CRIMINAL LAW AND PROCEDURE - Authority of city to enact obscenity ordinance regulating live performances in premises licensed to sell liquor;
LICENSES - Authority of city to suspend or revoke liquor license for violation of obscenity ordinance;
MUNICIPAL GOVERNMENT - Authority of city to enact obscenity ordinance regulating live performances in premises licensed to sell liquor;
ADMINISTRATIVE RULES OF MONTANA - Sections 42.12.222, 42.13.101;
MONTANA CODE ANNOTATED - Sections 7-1-4123(2), (4), 16-1-103, 16-1-303(2)(n), 16-3-304, 16-3-309, 16-4-406, 16-4-408, 16-4-503, 45-5-504, 45-5-505, 45-8-201;
1889 MONTANA CONSTITUTION - Article III, section 10;

1972 MONTANA CONSTITUTION - Article II, section 7; article XI, section 4;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 100 (1977), 40 Op. Att'y Gen. No. 48 (1984);
UNITED STATES CONSTITUTION - Amendments I, XXI.

HELD: 1. The State's authority under the Twenty-first Amendment to regulate the sale of liquor has not been delegated to municipalities with general powers.

2. A municipality with general powers may not punish a violation of its obscenity ordinance by suspending or revoking the liquor license of the offender.

3. The validity of a city ordinance regulating activities such as live dance performances in establishments licensed to serve liquor must be measured against free expression standards imposed by the United States and Montana constitutions.

4. A proposed city ordinance prohibiting any live performance involving dance or the removal of clothing in establishments licensed to serve liquor would be an unconstitutional abridgment of free expression because (1) it fails to distinguish carefully between protected and unprotected conduct and (2) the requisite governmental interest in regulating such conduct has not been sufficiently established.

5. A proposed city ordinance prohibiting live entertainment containing the performance of specified sexual acts in establishments licensed to serve liquor may, if carefully drafted and supported by sufficient evidence, be shown to further an important and substantial governmental interest unrelated to the suppression of free expression and may be upheld as the least restrictive means of furthering that interest.

16 July 1986

Russell L. Culver
City Attorney
City of Baker
Baker MT 59313

Dear Mr. Culver:

You have requested my opinion on the validity of a proposed city ordinance which would prohibit certain live performances and entertainment on licensed premises within the city of Baker.

The proposed ordinance contains the following provisions:

1. No live performances are permitted on a licensed premise which contain any form of dancing. Such prohibition on dancing does not include the incidental movement or choreography of singers or musicians which are made in connection with their singing or playing of a musical instrument. This restriction applies to all licensed premises.

2. No live performances are permitted on a licensed premise which involve the removal of clothing, garments or any other costume. Such prohibition does not include the removal of head wear or foot wear or the incidental removal of a tie, suit coat, sport coat, jacket, sweater or similar outer garments. Incidental removal for purposes of this section shall mean the removal of a garment or article of clothing which is not a pa[illegible] of the act for performance.

3. No entertainment on a licensed premise shall contain

   (a) The performance of acts, or simulated acts, of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;

(b) The actual or simulated touching, caressing or fondling of the breasts, buttocks, anus or genitals;

(c) The actual or simulated displaying of the pubic hair, anus, vulva or genitals; or the areola of a female.

The term "licensed premises" would be defined to mean any establishment for which a state retail all-beverages liquor license and a city liquor license have been issued. The owner or manager of the establishment would have the duty to ensure compliance with the ordinance and would be subject to certain penalties for failure to comply. Each day a person or entity permits or participates in prohibited activity would be considered a separate offense. Each offense would subject the owner or manager to a maximum term of 30 days in jail, a maximum fine of $500, or both, as well as revocation or suspension of the city license; a person who is guilty of participating in a prohibited performance would also be subject to a 30-day jail sentence, a $500 fine, or both.

Your letter indicates that a local group of citizens has expressed concern about "go-go" dancing at certain bars in Baker and would like the city council to pass an ordinance prohibiting sexually-oriented live performances. The council wishes to know whether the proposed ordinance would be valid or constitutional.

An analysis of the proposed ordinance's validity must begin with a determination of the city's authority to enact regulatory ordinances which apply only to establishments licensed to serve liquor and located within the city.

Baker is a municipality with general powers and thus has legislative power, subject to the provisions of state law, to adopt ordinances required to secure and promote the general public health and welfare. In addition to this general police power, the city also has the authority to exercise any power granted by state law. § 7-1-4123(2), (4), MCA. The powers of an incorporated city are to be liberally construed. Mont. Const. art. XI, § 4.

Baker has not adopted a self-government charter under the 1972 Montana Constitution; consequently, the city

has only those powers expressly given to it by the Legislature. See D & F Sanitation Service v. City of Billings, 43 St. Rptr. 74, 713 P.2d 977 (1986). If the power of Baker to enact an ordinance on a subject exists, it must be found in some statute, conferred in express terms or by necessary implication. State ex rel. City of Butte v. Police Court, 65 Mont. 94, 210 P. 1059 (1922).

The proposed ordinance would regulate live performances and entertainment only in places where liquor is sold. The city's authority to enact such an ordinance depends upon whether the ordinance is viewed as an effort to control obscenity or an attempt to regulate the sale of liquor. The city has express statutory authority to adopt an obscenity ordinance; on the other hand, the State has preempted the field with respect to the control of the sale of liquor, and a city with general powers does not have authority or jurisdiction to enact ordinances dealing with control of liquor sales. I have concluded that the proposed ordinance should be viewed as an exercise of the city's power to regulate obscenity and would not be invalid merely because it proscribes the performances only in establishments licensed to sell liquor. I have further concluded, however, that the city and its proposed ordinance may not be given the latitude accorded to a state agency which is the repository of the state's power, under the Twenty-first Amendment to the United States Constitution, to regulate intoxicating liquors and that the proposed ordinance must be reviewed under the stricter standards applied to general police power infringements of protected constitutional interests.

I.

The proposed ordinance does not refer to the term "obscenity." Nevertheless, your inquiry makes it clear that the proposed ordinance is directed toward nude or partially nude "go-go" or striptease dancing, which may come within the reach of Montana's obscenity law.

Section 45-8-201, MCA, defines the offense of obscenity. Subsection (1)(b) prohibits a person from presenting, directing, or participating in an obscene play, dance, or other performance to anyone under the age of 18. Subsection (1)(d) prohibits a person from performing an obscene act or otherwise presenting an obscene exhibition of his body to anyone under the age of 18.

The statute requires proof that the person acted purposely or knowingly with knowledge of the obscene nature of the performance. Subsection (2), which defines the term "obscene," was rewritten in 1975 to comply with the federal constitutional requirements enunciated in Miller v. California, 413 U.S. 13 (1973). Conviction of the offense of obscenity may result in a fine of at least $500 but not more than $1,000, imprisonment in the county jail for a term of not to exceed six months, or both.

Prior to 1979, a city could not adopt an ordinance more restrictive as to obscenity than the provisions of section 45-8-201, MCA. See, e.g., U.S. Mfg. & Distrib. Corp. v. Great Falls, 169 Mont. 298, 546 P.2d 522 (1976). Former subsection (2) of section 45-8-201, MCA, expressly prohibited more restrictive community ordinances. However, on November 7, 1978, Montana voters approved Initiative 79, which completely changed subsection (5) to allow a city to adopt an ordinance more restrictive as to obscenity than the state statutes. This amendment became effective January 1, 1979, and now empowers a city to enact an ordinance concerning obscenity, even if the ordinance is more restrictive than state law.

Regarding the city's power to regulate liquor, however, the Montana Supreme Court has held that cities do not have authority or jurisdiction to enact ordinances dealing with control of sales of liquor. State ex rel. Libby v. Haswell, 147 Mont. 492, 414 P.2d 652 (1966). The Court in Libby found that the State has preempted liquor control as a matter of statewide concern and that the city had no implied power to legislate with respect to this subject. The entire control of the sale of liquor reposes in the State Department of Revenue and not with local municipalities. See §§ 16-1-103, 16-1-303(2)(n), MCA; 40 Op. Att'y Gen. No. 48 (1984). Under the 1972 Constitution, state preemption still applies to local governments with general powers. See D & F Sanitation Service v. City of Billings, supra. Although a city may provide for the issuance of city liquor licenses (§ 16-4-503, MCA), and may enact ordinances defining the areas in which alcoholic beverages may be sold (§ 16-3-309, MCA) and restricting the hours of sale (§ 16-3-304, MCA), these exceptions to state preemption of liquor regulation do not confer upon a municipality the power to regulate liquor sales or

nullify a state liquor license. See 37 Op. Att'y Gen. No. 100 (1977).

To the extent that the penalty provisions in the proposed ordinance would confer upon Baker the power to nullify, in effect, a state liquor license by permitting the suspension or revocation of a city liquor license, the proposed ordinance exceeds the authority of the city to legislate in this preempted field. While Baker may obtain additional city revenues by issuing city liquor licenses for a fee as provided in section 16-4-503, MCA, it may not regulate state liquor licensees by suspending or revoking their privilege to engage in business for failure to comply with a city obscenity ordinance. Suspension and revocation are matters for the Department of Revenue. See §§ 16-4-406, 16-4-408, MCA; §§ 42.12.222, 42.13.101, ARM.

Baker's highly restricted role in liquor regulation is also relevant to the free expression issues presented here. In California v. LaRue, 409 U.S 109 (1972), and New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981), the United States Supreme Court upheld state regulations prohibiting performances of specified sexual acts and topless dancing in establishments granted a license to serve liquor. The Supreme Court in these cases has construed the Twenty-first Amendment as a source of power which permits a state to prohibit expressive activities in the context of its liquor licensing and regulatory authority, even if some of those activities are within the limits of the constitutional protection of freedom of expression. The proposed ordinance under consideration by the Baker city council uses, in paragraph three, portions of California's state liquor regulations which were held to be constitutional in LaRue.

However, this broad power under the Twenty-first Amendment has not been delegated by Montana to local municipalities such as Baker. Although I must conclude that the city has authority, pursuant to section 45-8-201(5), MCA, to enact an obscenity ordinance which applies to establishments with liquor licenses, I must also conclude that the city would have to justify any such ordinance under the stricter standards typically used to review infringements on constitutionally protected interests which result from the exercise of the city's general police power.

II.

The proposed ordinance contains three substantive provisions. The first prohibits live performances which contain any form of dancing, with a limited exception for singers and musicians. The second provision forbids any live performance which involves the removal of clothing, again with limited exceptions. Finally, the proposed ordinance would prohibit entertainment which contains specified sexual acts, touching, or nudity.

It is apparent that this proposed ordinance is more restrictive than section 45-8-201, MCA. It does not require a determination that the prohibited activities are obscene. It applies to performances for adults as well as for persons under the age of 18. It provides for strict criminal liability of owners, managers, and participants. While it is limited to establishments licensed to sell liquor, it extends the police power of the city to prohibit all forms of nightclub or barroom entertainment which involve dancing, whether or not the dancing is sexually oriented or nude, as well as those forms which involve nudity, whether or not the nudity is associated with sexual conduct.

In Olson v. City of West Fargo, 305 N.W.2d 821 (N.D. 1981), the North Dakota Supreme Court determined that a municipal ordinance with virtually identical provisions did not unconstitutionally infringe on free speech or expression under the city's normal police power, coupled with the additional authority conferred by the Twenty-first Amendment to regulate the use and license the sale of liquor. In North Dakota, however, cities are a repository of the state power under the Twenty-first Amendment and are statutorily authorized to regulate and restrict the operation of liquor licenses; they are expressly permitted to pass ordinances which prohibit dancing or various forms of entertainment on licensed premises. The fact that Montana municipalities with general powers have not been delegated and do not share this additional regulatory authority leads me to conclude that Olson is distinguishable and that a different analysis must be applied in order to determine the constitutionality of Baker's proposed ordinance.

The First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, prohibits a state or local government from enacting any law which abridges the freedom of speech.

The 1972 Montana Constitution also contains a protective provision regarding free speech. Article II, section 7 states that "[n]o law shall be passed impairing the freedom of speech or expression." I emphasize the final phrase of this provision to point out that the 1972 Constitution revised the 1889 Constitution by enlarging a citizen's freedom to express himself. See 1889 Mont. Const. art. III, § 10; Bill of Rights Committee Proposal, Montana Constitutional Convention Transcript, Vol. II, p. 630. The comments of the Bill of Rights Committee at the constitutional convention indicate that the convention delegates intended a substantive change with the addition of this phrase:

> The committee unanimously proposes the adoption of former Article III, section 10 with one substantive change. The freedom of speech is extended, in line with federal decisions under the First Amendment, to cover the freedom of expression. Hopefully, this extension will provide impetus to the courts in Montana to rule on various forms of expression similar to the spoken word and ways in which one expresses his unique personality in an effort to re-balance the general backseat status of states in the safeguarding of civil liberties. The committee wishes to stress the primacy of these guarantees in the hope that their enforcement will not continue merely in the wake of the federal case law.

Quite clearly, therefore, article II, section 7, of the 1972 Montana Constitution provides at least as much protection of expression as does the First Amendment to the United States Constitution. See, e.g., Mickens v. City of Kodiak, 640 P.2d 818 (Alaska 1982).

The threshold issue involved in evaluating the constitutionality of the proposed ordinance is whether or not the prohibited activities come within these constitutional guarantees of freedom of speech and expression. Although the Montana Supreme Court has not addressed this issue, the United States Supreme Court has afforded First Amendment protection to live entertainment and nonobscene nude dancing. See Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981). The Court has not spoken dispositively on the amount of constitutional protection that is warranted for such activities in the absence of an assertion of a state's

Twenty-first Amendment authority, but it has consistently noted that the potential artistic or communicative value of nude or partially nude dancing requires that its regulation be evaluated under First Amendment standards.

Exactly what the standards are, and what considerations are relevant in determining the extent to which live performances may be regulated, remain to be answered. The Court has stated that each medium of expression must be assessed for First Amendment purposes by standards suited to it. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). The standards suited to live performances are not necessarily identical to the strict obscenity standards set forth in Miller v. California, supra, and section 45-8-201, MCA, and may vary depending upon where a particular type of performance falls along the continuum between pure speech and gross sexual conduct.

I realize that the ordinance under discussion here is merely a proposal and that the city has not held hearings, made findings, or initiated prosecutions with respect to this ordinance. I also realize that courts in other jurisdictions have utilized varying analytical approaches in determining the constitutionality of local efforts to make nude or partially nude dancing a criminal offense. See Annot., Nude Entertainment as Public Offense, 49 A.L.R.3d 1084 (1973). Because performances with dancing or nudity may involve both speech and conduct, I conclude that the appropriate constitutional analysis of Baker's proposed ordinance requires a review of the governmental interests which the ordinance attempts to further. Government regulation of conduct which embodies both speech and nonspeech elements may be sufficiently justified (1) if it furthers an important or substantial governmental interest; (2) if the governmental interest is unrelated to the suppression of free expression; and (3) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. See Miller v. California, 413 U.S. at 26 n.8, citing United States v. O'Brien, 391 U.S. 367 (1968).

Live performances have traditionally received a lesser degree of First Amendment protection than written or pictorial "speech." See, e.g., Doran v. Salem Inn, 422 U.S. 922, 932 (1975) (noting that "the customary

'barroom' type of nude dancing may involve only the barest minimum of protected expression"). As the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulation significantly increases. See California v. LaRue, 409 U.S. at 117. An initial inquiry must be made as to whether the particular activity at issue has a significant speech component. If the activity is primarily speech, it must be evaluated in accordance with the standards set forth in Miller v. California, supra. If the activity has so few communicative elements as to be primarily conduct, regulation of that conduct is valid as long as any incidental restriction on the speech elements is by the least restrictive alternative. See F. Schauer, The Law of Obscenity at 200 (1976).

While the nature of the communication involved in most barroom dancing may be such that "few of us would march our sons and daughters off to war" to protect that form of expression, the Supreme Court has nonetheless recognized that the proscription of nude dancing infringes on some forms of visual presentation which would not fall within the Court's definition of obscenity. See Krueger v. City of Pensacola, 759 F.2d 851 (1985), citing Young v. American Mini Theaters, 427 U.S. 50 (1976). Consequently, the city's interest in regulating such activities must be based upon something other than a desire to censor the form of the communication because of the community's dislike of its content.

Viewed on its face rather than as applied to a specific course of conduct, section 1 of the proposed ordinance (prohibiting live performances which contain any form of dancing) is probably overbroad and unconstitutional. By definition, dancing is rhythmical movement which is expressive of emotions or ideas and, therefore, has a significant communicative element. See In re Giannini, 446 P.2d 535 (Cal. 1968); Morris v. Municipal Court, 652 P.2d 51 (Cal. 1982); Yauch v. State, 505 P.2d 1066 (Ariz. Ct. App. 1973). The ordinance would apply not only to obscene dances, which fall outside the ambit of First Amendment protection, but also to nonobscene forms of dance such as folk dancing or ballet, which clearly come within that ambit. Other than Olson v. City of West Fargo, supra, I have found no authority supporting

an ordinance which sweeps as broadly as section 1 of the proposed ordinance.

Your inquiry does not indicate the governmental interest which would be served by the proposed ordinance against dance performances. If the proponents of the ordinance are primarily concerned with the propriety of barroom dancing, it would be difficult to show either that the governmental interest was unrelated to the suppression of free expression or that the incidental restriction of First Amendment freedoms was no greater than necessary. While such legitimate and significant governmental interests as crime prevention, health, safety, and the protection of children may justify some regulation of otherwise protected free expression, the city would have to show that the articulated concern had more than merely speculative factual grounds and was actually a motivating factor in the passage of the ordinance. See Krueger v. City of Pensacola, supra. Without more, I cannot say that this provision of the proposed ordinance is substantially related to a legitimate governmental interest and is drawn in a sufficiently narrow and clear manner so that it applies only to the particular conduct it seeks to regulate.

I call your attention to the Supreme Court's discussion of the legitimate concerns of the State of California which led to the regulations upheld in LaRue, 409 U.S. at 111. In justifying the promulgation of its rules, the state presented evidence connecting nude entertainment with prostitution, rape, assault, and sexual contact between customers and entertainers. While such explicit legislative findings may not be required where a state exercises its broad power under the Twenty-first Amendment (see Bellanca, 452 U.S. at 717), Baker must rely on the exercise of its less extensive police power and its authority under section 45-8-201(5), MCA, and must identify, articulate, and substantiate those governmental interests which are to be furthered by the ordinance. In the absence of factual findings supporting a legitimate need for the dance prohibition, for example, a reviewing court would have no basis for upholding any restriction whatsoever on this form of expression.

Section 2 of the proposed ordinance (prohibiting live performances which involve the removal of clothing) presents similar concerns. Although the conduct of removing one's clothing may contain less of a

communicative or expressive element than dancing, as part of a live performance it may still possess this element; however, it is entirely prohibited by this section regardless of the context in which it occurs. The section does not distinguish between obscene and nonobscene conduct. Again, the governmental interest is not identified. If the section is intended only to prevent striptease acts, it has not been drawn narrowly or specifically enough to withstand the constitutional challenge that it is overbroad in its proscription.

Although it does not require nudity as an element of the offense, section 2 is related to section 3(c) of the proposed ordinance, which prohibits the actual or simulated displaying of various parts of the body. The sections combine to prohibit any live nude or partially nude performances or entertainment which involve removal of clothing or exposure of the specified body parts.

However, an entertainment program may not be prohibited solely because it displays the nude human figure; nudity alone does not place otherwise protected material outside the mantle of the First Amendment. Shad v. Borough of Mount Ephraim, supra. Clearly all nudity cannot be deemed obscene and cannot be suppressed, irrespective of its context or degree, solely to protect persons from ideas or images that a legislative body thinks unsuitable for them. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

Nudity in entertainment which is performed in licensed premises before a willing audience may be distinguished from the kind of public nudity traditionally subject to indecent-exposure laws. See § 45-5-504, MCA. Where the nudity unreasonably intrudes upon the privacy interests of unwilling viewers, a state or a municipality may protect individual privacy by enacting reasonable time, place, and manner regulations. Erznoznik v. City of Jacksonville, supra. Montana law punishes lewd public exposure of genitals under circumstances in which a person knows that his conduct is likely to cause affront or alarm, and the First Amendment provides no protection to such conduct. See, e.g., State v. Price, 37 St. Rptr. 1926, 622 P.2d 160 (1980). However, the First Amendment limits the power of the government, acting as censor, to selectively shield the public from some kinds of expression which the government determines to be more offensive than other kinds. The nudity provisions of the proposed ordinance, no less than the dancing

provisions, discriminate among forms of entertainment based upon their content and must be justified under the O'Brien standards discussed above.

Sections 3(a) and (b) of the proposed ordinance (prohibiting entertainment which contains the performance of specified sexual acts) appear to be directed at performances that partake more of "gross sexuality" than of communication--the sort of "bacchanalian revelries" which fall within the permissible limits of regulation as set forth in LaRue and Miller. Montana sexual crimes statutes prohibit some of the conduct to which these provisions are addressed. See, e.g., § 45-5-505, MCA. Other conduct may come within the prohibitions of the State's obscenity law. See § 45-8-201(2)(a), MCA. While a particular performance containing such conduct may have communicative or expressive aspects, a local government has greater power to regulate expression which is directed to the accomplishment of an illegal act when such expression consists, in part, of conduct or action. California v. LaRue, supra. I conclude that a carefully drawn obscenity ordinance prohibiting live performances which contain sexual conduct constituting gross sexuality would be a valid exercise of the city's authority under section 45-8-201(5), MCA, and could be justified under the O'Brien analysis as the least restrictive alternative insofar as otherwise protected expression may be incidentally affected.

The United States Supreme Court has emphasized that precision of drafting and clarity of purpose are essential where First Amendment freedoms are at stake. Any ordinance enacted under section 45-8-201(5), MCA, or the city's general police power which implicates the freedom of expression must be narrowly and specifically drawn so that it does not sweep far beyond the permissible restraints on obscenity and reach forms of expression protected by our state and federal constitutions.

THEREFORE, IT IS MY OPINION:

1. The State's authority under the Twenty-first Amendment to regulate the sale of liquor has not been delegated to municipalities with general powers.

2. A municipality with general powers may not punish a violation of its obscenity ordinance by suspending or revoking the liquor license of the offender.

3. The validity of a city ordinance regulating activities such as live dance performances in establishments licensed to serve liquor must be measured against free expression standards imposed by the United States and Montana constitutions.

4. A proposed city ordinance prohibiting any live performance involving dance or the removal of clothing in establishments licensed to serve liquor would be an unconstitutional abridgment of free expression because (1) it fails to distinguish carefully between protected and unprotected conduct and (2) the requisite governmental interest in regulating such conduct has not been sufficiently established.

5. A proposed city ordinance prohibiting live entertainment containing the performance of specified sexual acts in establishments licensed to serve liquor may, if carefully drafted and supported by sufficient evidence, be shown to further an important and substantial governmental interest unrelated to the suppression of free expression and may be upheld as the least restrictive means of furthering that interest.

Very truly yours,

MIKE GREELY
Attorney General