

ALCOHOLIC BEVERAGES - Authority of town to prohibit presence of persons under age 19 on premises where alcoholic beverages are sold and consumed and provide fine for conviction of illegal possession of alcoholic beverages;

CITIES AND TOWNS - Authority of town to prohibit presence of persons under age 19 on premises where alcoholic beverages are sold and consumed and provide fine for conviction of illegal possession of alcoholic beverages;

CRIMINAL LAW AND PROCEDURE - Authority of town to prohibit presence of persons under age 19 on premises where alcoholic beverages are sold and consumed and provide fine for conviction of illegal possession of alcoholic beverages;

JUVENILES - Authority of town to prohibit presence of persons under age 19 on premises where alcoholic beverages are sold and consumed and provide fine for conviction of illegal possession of alcoholic beverages;

MUNICIPAL GOVERNMENT - Authority of town to prohibit presence of persons under age 19 on premises where alcoholic beverages are sold and consumed and provide fine for conviction of illegal possession of alcoholic beverages;

MONTANA CODE ANNOTATED - Sections 7-1-4123, 7-32-4302, 16-1-101 to 16-1-104, 16-1-303(2)(n), 16-3-304, 16-3-309, 16-4-503, 45-5-624, 53-24-106;

MONTANA CONSTITUTION - Article XI, sections 4(1)(a) and (2);

OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 93 (1980), 40 Op. Att'y Gen. No. 48 (1984), 41 Op. Att'y Gen. No. 75 (1986).

HELD: 1. An incorporated town may not enact an ordinance prohibiting persons under the age of 19 years from being on licensed premises where alcoholic beverages are sold and consumed.

2. An incorporated town may not enact an ordinance which provides a minimum fine of \$300 for a person under the age of 19 years who is convicted of possession of alcoholic beverages.

10 September 1986

R. W. Heineman
Town Attorney
P.O. Box 313
Wibaux MT 59353

Dear Mr. Heineman:

You have asked my opinion on the following questions:

1. May an incorporated town enact an ordinance prohibiting persons under the age of 19 years from being on licensed premises where alcoholic beverages are sold and consumed?
2. May the town enact an ordinance which provides a minimum fine of \$300 for anyone under the age of 19 years who is convicted of possession of alcoholic beverages?

Your letter states that the Wibaux Town Council is considering the ordinances in response to public concern over the presence of persons under the legal drinking age in places where alcoholic beverages are sold for on-premises consumption. The council wishes to reduce the risk that such persons may come into possession of alcoholic beverages.

These questions require a determination of the limits of the town's legislative power to adopt ordinances regulating the sale and use of alcoholic beverages. I have previously discussed these limits in 41 Op. Att'y Gen. No. 75 (1986) and 40 Op. Att'y Gen. No. 48 at 197 (1984).

Wibaux is an incorporated town without self-government powers and therefore has the legislative powers of a municipal corporation and such other powers provided or implied by law. Mont. Const. art. XI, § 4(1)(a). The legislative powers of a municipality with general powers

are set forth in section 7-1-4123, MCA, and include the power, subject to state law, to adopt ordinances required to preserve peace and order, secure and promote the general public health and welfare, and exercise any powers granted by state law. The Legislature has expressly granted the town council the power to prevent and punish intoxication (subject to the limits established in section 53-24-106, MCA) and acts or conduct offensive to public morals. § 7-32-4302, MCA.

The Montana Supreme Court has recognized that a local government with general powers is entitled to have its express and implied powers liberally construed. Stevens v. City of Missoula, 40 St. Rptr. 1267, 667 P.2d 440 (1983); see Mont. Const. art. XI, § 4(2). However, the Court has also determined that the State has preempted the field of liquor regulation and that a local government does not have authority or jurisdiction to enact ordinances dealing with the control of the sale of beer and liquor. State ex rel. Libby v. Haswell, 147 Mont. 492, 414 P.2d 652 (1966). The Court has reaffirmed its holding in Haswell with respect to local governments which choose to retain general government powers rather than adopt self-government powers. D&F Sanitation Service v. City of Billings, 43 St. Rptr. 74, 713 P.2d 977 (1986).

In Haswell the City of Libby sought by city ordinance to prevent and punish the sale of liquor to minors. Noting that the Legislature in 1947 had expressly deleted the statutory provision permitting towns to enforce liquor laws and regulate places of business where alcoholic beverages are sold, the Montana Supreme Court held that the entire control of the sale of liquor and beer reposes in the Liquor Control Board (now the Department of Revenue) and not with local municipalities. See §§ 16-1-101 to 104, MCA.

The Legislature has created certain exceptions to state preemption (see §§ 16-3-304, 16-3-309, 16-4-503, MCA), but has given local governments no express authority to prohibit classes of persons from entering or remaining upon the premises of state liquor licensees. While I have held that section 53-24-106(2), MCA, permits a city to enact an open container ordinance (38 Op. Att'y Gen. No. 93 at 318 (1980)), I do not find in that statute an independent grant of authority to local governments to enact ordinances regulating the conduct and management of licensed premises. Cf. § 16-1-303(2)(n), MCA. Nor

do I find section 7-32-4302, MCA, to be such a grant of authority in view of the Montana Supreme Court's broad holding in Haswell.

The proposed ordinance's prohibition against the presence of minors where alcoholic beverages are sold and consumed could be enacted as a statute by the Legislature or established in a rule promulgated by the Department of Revenue. In other jurisdictions similar regulations have been found to constitute a valid exercise of state police power. See 45 Am. Jur. 2d Intoxicating Liquor § 291. However, in Montana a local government with general powers does not have the authority to enact and enforce such a prohibition; this authority rests solely with the state.

The town is also without authority to enhance the punishment for a violation of section 45-5-624, MCA, which prohibits a person under the age of 19 from knowingly having an alcoholic beverage in his possession. The proposed ordinance establishing a minimum fine of \$300 would conflict with section 45-5-624(2)(a), MCA, which sets a maximum fine of \$50 for violation of the statute. A municipal ordinance must be in harmony with the general laws of the state; whenever an ordinance comes into conflict with a statute, the ordinance must give way. See State ex rel. Libby v. Haswell, supra. Although the Montana Supreme Court has not determined whether state preemption applies to the regulation of the possession (as opposed to the sale) of alcoholic beverages, it is nevertheless generally accepted that a penalty provided for the violation of an ordinance is invalid if it exceeds the maximum limitation on the penalty fixed by statute for the same offense. See 56 Am. Jur. 2d Municipal Corporations § 376.

THEREFORE, IT IS MY OPINION:

1. An incorporated town may not enact an ordinance prohibiting persons under the age of 19 years from being on licensed premises where alcoholic beverages are sold and consumed.
2. An incorporated town may not enact an ordinance which provides a minimum fine of \$300 for a person under the age of 19 years who is convicted of possession of alcoholic beverages.

Very truly yours,

MIKE GREELY
Attorney General