

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 55

CITIES AND TOWNS - Authority to license poker, bingo, and keno games and poker and keno machines, as well as the premises on which these games are conducted;

GAMBLING - Authority to license poker, bingo, and keno games and poker and keno machines, as well as the premises on which these games are conducted;

LICENSES - Authority to license poker, bingo, and keno games and poker and keno machines, as well as the premises on which these games are conducted;

MONTANA CODE ANNOTATED - Title 23, chapter 5, parts 3, 4, 6; sections 7-1-112(5), 23-5-321, 23-5-322, 23-5-421, 23-5-422, 23-5-615;

OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 6 (1987), 37 Op. Att'y Gen. No. 67 (1977), 35 Op. Att'y Gen. No. 86 (1974).

- HELD: 1. The authority granted cities and towns in Montana to license card games, bingo or keno games, and video draw poker or keno machines extends only to licensing individual games, tables, and machines; it does not extend to licensing the premises on which these games of chance are conducted. Pursuant to sections 23-5-322 and 23-5-422, MCA, cities and towns may regulate the premises on which gambling occurs by means other than licensing of premises. The amounts of the license fees for card games, bingo or keno games, and keno machines are within the sound discretion of the city or town. The license fee for each video draw poker machine may not exceed \$100.
2. 35 Op. Att'y Gen. No. 86 (1974) is overruled insofar as it conflicts with the holding of this opinion.

12 January 1988

Robert G. Dwyer  
Dillon City Attorney  
125 North Idaho Street  
Dillon MT 59725

Dear Mr. Dwyer:

You have requested an opinion concerning:

The nature and extent of the authority granted to cities and towns to establish and collect

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license fees under the Montana Card Games Act (Tit. 23, ch. 5, pt. 3, MCA), the Bingo and Raffles Law (Tit. 23, ch. 5, pt. 4, MCA), and the Video Draw Poker Machine Control Law of 1985 (Tit. 23, ch. 5, pt. 6, MCA). This question relates to both licenses for gaming establishments and licenses for individual games or machines.

The Montana Supreme Court set the parameters for answering questions such as yours in 1978.

[T]he Montana Legislature expressly chose to regard the question of gambling as a matter of statewide, as contrasted with local, concern. In effect, the legislature has preempted the field with regard to the authorization of certain forms of gambling and card games. In State ex rel. City of Libby v. Haswell, 147 Mont. 492, 414 P.2d 652 (1966), a case concerning a conflict, such as the instant one, in the area of liquor control, this Court recognized the applicable principle:

"[W]hen the state has exercised a power through its statutes which clearly show that the state legislature deems the subject matter of the legislation to be a matter of general statewide concern rather than a purely local municipal problem, the city is then without the essential authority or power to pass or adopt any ordinance dealing with that subject matter." 147 Mont. 495, 414 P.2d 654.

See also: City of Billings v. Herold, 130 Mont. 138, 296 P.2d 263 (1956); State ex rel. Wiley v. District Court, 118 Mont. 50, 164 P.2d 358 (1945).

....

It is axiomatic that legislative intent is first to be ascertained from the language of the lawmakers. Green v. City of Roundup, 117 Mont. 249, 157 P.2d 1010 (1945). We conclude, from the plain language of the gambling acts, that the legislature intended to grant minimal power to the local governments regarding regulation of gambling, such power being confined to a discretionary licensing power.

DeLong v. Downes, 175 Mont. 152, 156-57, 573 P.2d 160, 162, 163 (1977).

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Examining the statutes granting this discretionary licensing power (§§ 23-5-321, 23-5-322, 23-5-421, 23-5-422, 23-5-615, MCA), I find that they do not grant cities and towns authority to license the premises on which these types of gambling are conducted. I am aware that an opinion of my predecessor, 35 Op. Att'y Gen. No. 86 at 219 (1974), holds the contrary. I overrule that portion of the opinion, based on the Montana Supreme Court's holding in DeLong v. Downes, supra. The discussion in my recent opinion, 37 Op. Att'y Gen. No. 67 at 271A (1977), should also be read in light of that case. See also 42 Op. Att'y Gen. No. 6 (1987).

The discretionary licensing powers referred to above are identical for the Montana Card Games Act and the Bingo and Raffles Law, which also covers keno machines. The pertinent language from these laws is:

Issuance of licenses by local governing bodies. (1) Any city, town, or county may issue licenses for games of chance provided for in this part 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. ... When a license has been required by any city, town, or county, no game of chance as provided for in this part may 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 part, which license fee, if any, shall expire on June 30 of each year, and such fee shall be prorated.

§§ 23-5-321, 23-5-421, MCA.

Regulations of governing body. (1) The governing body authorized to issue gambling licenses pursuant to this part may establish by ordinance or resolution regulations governing the qualifications for the issuance, suspension, and revocation of such gambling licenses.

....

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(2) 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 part.

§§ 23-5-322, 23-5-422, MCA.

I find no indication that the Legislature intended to authorize both premises licensing and individual game licensing. First, looking to the words of the statute as the prime indicator of legislative intent (Thiel v. Taurus Drilling, Ltd. 1980-II, 42 St. Rptr. 1520, 1522, 710 P.2d 33, 35 (1985)), I find that the only premises license contemplated is for "the sale of liquor, beer, food, cigarettes, or any other consumable products." If the Legislature had intended that cities and towns be authorized to establish a further level of licensing for these establishments, they would have indicated this. They did not, and I find no indication in the legislative history of these laws of that intent. I have also examined sections 23-5-322 and 23-5-422, MCA, which authorize cities and towns to adopt additional regulations for the purposes of protecting the public health, welfare, and safety. I find none of these purposes would be advanced by the addition of another level of premises licensing beyond the licensing of individual games or machines. However, the statutes clearly contemplate other methods of regulation. See below. Thus, the holding in my opinion, 37 Op. Att'y Gen. No. 67 at 217A (1977), wherein I concluded that a city may restrict by ordinance the hours of licensed gambling, remains valid.

It should be noted that the grants of authority to local governments to regulate gambling contained in sections 23-5-322 and 23-5-422, MCA, permit local governments to establish regulations for premises on which such gambling occurs. This regulation may not take the form of restrictions on licenses for premises, but it may take any other form allowed by law.

The following statute dealing with video draw poker machines states more unequivocally:

(1) Any city, town, or county governing body may issue to a person who meets the qualifications of 23-5-611 a license for each video draw poker machine to be used on the premises of a licensed establishment. A machine may be licensed by a city or town if located in the city or town or by the county

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if the machine is not located in a city or town.

(2) In addition to the license fee paid under 23-5-612, a governing body may charge an annual license fee for each license issued under this section. ...

(3) Such license fee may not exceed \$100.

§ 23-5-615, MCA. This statute clearly grants cities and towns the authority to issue licenses only for individual games and machines. The only financial limitation imposed on local governments issuing licenses for these games or machines is that video draw poker machine license fees may not exceed \$100, § 23-5-615(3), MCA.

Questions have arisen as to whether cities and towns with self-government powers possess any additional authority to regulate gambling. These questions have been answered both by statute (§ 7-1-112(5), MCA) and by case law (Tipco Corp. Inc. v. City of Billings, 39 St. Rptr. 600, 603, 642 P.2d 1074, 1077 (1982)). Cities and towns with self-government powers possess no additional power to regulate gambling. See also 42 Op. Att'y Gen. No. 6 (1987).

THEREFORE, IT IS MY OPINION:

1. The authority granted cities and towns in Montana to license card games, bingo or keno games, and video draw poker or keno machines extends only to licensing individual games, tables, and machines; it does not extend to licensing the premises on which these games of chance are conducted. Pursuant to sections 23-5-322 and 23-5-422, MCA, cities and towns may regulate the premises on which gambling occurs by means other than licensing of premises. The amounts of the license fees for card games, bingo or keno games, and keno machines are within the sound discretion of the city or town. The license fee for each video draw poker machine may not exceed \$100.
2. 35 Op. Att'y Gen. No. 86 (1974) is overruled insofar as it conflicts with the holding of this opinion.

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Very truly yours,

MIKE CREELY  
Attorney General