MISSOULA
THE GARDEN CITY
HUB OF FIVE VALLEYS

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Legal Opinion 2009-016

TO: Mayor John Engen; City Council; Bruce Bender; Chief Mark Muir; Mike Brady; Chris Odlin; Greg Willoughby; Scott Hoffman; Casey Richardson; Rob Scheben; Ellen Buchanan; Anne Guest; Steve King; Kevin Slovarp; Doug Harby; Mike Painter; Jason Diehl; Donna Gaukler; Rob Thames; Brentt Ramharter; Dept. Mayor; Dept. MRA; Dept. Atty

FROM: Jim Nugent, City Attorney

DATE May 5, 2009

RE: Montana State Statutory Limitations on Local Municipal Government Power to Address Various Conduct of Homeless Street People such as Montana Laws Prohibiting Local Ordinances Making it a Crime for a Person to be a Vagrant, a Common Drunkard, Intoxicated, or Drinking as One of the Elements of the Offense Giving Rise to a Criminal Penalty.

FACTS:

Some conduct of various homeless street people continues to be a community concern. Some recommended revisions to the Missoula City Council's previously enacted comprehensive "Pedestrian Interference Act" ordinance are likely to be referred to the City Council within several weeks. Current Chapter 9.34 entitled "Pedestrian Interference", §§9.34.010 through 9.34.050 Missoula Municipal Code (MMC) is attached. The primary purposes of this legal opinion are to identify some of the Montana statutory limitations that exist with respect to: (i) attempting to address various aspects of certain conduct of Montana homeless street people; and (ii) pursuant to the Montana state law disorderly conduct criminal offense, the focus is to be on law enforcement applying applicable statutory language to the individual's conduct, not on the number of people purportedly disturbed.

ISSUES:

1. Do some provisions of Montana State law limit a Montana municipal government's ability to fully address some conduct issues associated with some conduct of homeless street people?

2. Pursuant to Montana's Disorderly Conduct statute §45-8-101MCA, should law enforcement's focus be on the offender's conduct without the necessity to focus on a numerical requirement respecting how many people need to be affected by the conduct?

CONCLUSIONS:

1. Yes. For example, subsections 7-1-111(8) and (14) MCA statutorily denies a municipality the power to enact ordinances defining as an offense conduct made criminal by state statute or ordinances prohibiting or penalizing vagrancy. Section 53-24-106 MCA provides that a municipality may not adopt or enforce a local law, ordinance, resolution, or rule having the force of law that includes drinking, being a common drunkard, or being found in an intoxicated condition as one of the elements of the offense. Also, §53-24-107 MCA provides that public intoxication is not a criminal offense.

2. Yes. Law enforcement's focus should be on the individual conduct engaged in that is subject to the actual statutory language of the disorderly conduct statute 45-8-101 MCA. While the number of individuals affected by the conduct may play a role in whether the peace has been disturbed, it is not necessarily a dispositive factor. The actual statutory language is what determines if an offense has been committed as it is applied on a case-by-case basis.

LEGAL DISCUSSION:

Section 7-1-111 MCA of Montana's municipal self-government laws is entitled "powers denied." Subsections 7-1-111(8) and (14) MCA deny a municipality any power to enact ordinances that define as an offense conduct made criminal by state statute or prohibiting or penalizing vagrancy. Section 7-1-111 MCA provides in part:

> **7-1-111. Powers denied.** A local government unit with self-government powers is prohibited from exercising the following:
> (8) any power that defines as an offense conduct made criminal by state statute …";
> (14) subject to 7-32-4304, any power to enact ordinances prohibiting or penalizing vagrancy. (Emphasis added.)

Black's Law Dictionary, Eighth Edition, at page 1585 defines the word "vagrancy" as "the state or condition of wandering from place to place without a home, job, or means of support. Vagrancy is generally considered a course of conduct or a manner of living rather than a single act."

Montana state law pursuant to subsection 7-1-111(14) MCA, prohibits a municipal government from enacting ordinances that either prohibit or penalize vagrancy.

Subsection 7-1-111(14) MCA cross-references to section 7-32-4304 MCA pertaining to control of disorderly conduct, which provides:

> **7-32-4304. Control of disorderly conduct.** The city or town council has power to restrain and punish persons guilty of disorderly conduct and aggressive

solicitation, as defined by ordinance, that is included in the offense of disorderly conduct. (Emphasis added.)

Pursuant to §7-32-4304 MCA, a local municipal government disorderly conduct ordinance may address "aggressive solicitation" within the local government's disorderly conduct ordinance. Pursuant to subsection 7-1-111(8) MCA, local government may not define as an offense conduct already made criminal by state statute.

With respect to alcohol or alcohol intoxication, Montana state law Title 53, chapter 24 MCA is entitled "Alcoholism and Drug Dependence." Montana statutory provisions set forth in this chapter provide that public intoxication is not a criminal offense. A Montana municipality "may not adopt or enforce a local law, ordinance, resolution, or rule having the force of law that included drinking, being a common drunkard, or being found in an intoxicated condition as one of the elements of the offense giving rise to a criminal or civil penalty or sanction." Sections 53-24-102, 53-24-106, and 53-24-107 MCA provide as follows:

53-24-102. Declaration of policy. It is the policy of the state of Montana to recognize alcoholism as an illness and that alcoholics and intoxicated persons may not be subjected to criminal prosecution because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society. (Emphasis added.)

53-24-106. Criminal laws limitation. (1) A county, municipality, or other political subdivision may not adopt or enforce a local law, ordinance, resolution, or rule having the force of law that includes drinking, being a common drunkard, or being found in an intoxicated condition as one of the elements of the offense giving rise to a criminal or civil penalty or sanction.

(2) This section does not affect any law, ordinance, resolution, or rule against drunken driving, driving under the influence of alcohol, or other similar offense involving the operation of a vehicle, an aircraft, a boat, machinery, or other equipment or regarding the sale, purchase, dispensing, possessing, or use of alcoholic beverages at stated times and places or by a particular class of persons.

(3) This section does not prevent the department from imposing a sanction on or denying eligibility to applicants for or recipients of public assistance who fail or refuse to comply with all eligibility criteria and program requirements. (Emphasis added.)

53-24-107. Public intoxication not criminal offense. (1) A person who appears to be intoxicated in public does not commit a criminal offense solely by reason of being in an intoxicated condition but may be detained by a peace officer for the person's own protection. A peace officer who detains a person who appears to be intoxicated in public shall proceed in the manner provided in 53-24-303 and subsection (3) of this section.

(2) If none of the alternatives in 53-24-303 are reasonably available, a peace officer may detain a person who appears to be intoxicated until the person is no

longer creating a risk to self or others.

(3) A peace officer, in detaining the person, shall make every reasonable effort to protect the person's health and safety. The peace officer may take reasonable steps for the officer's own protection. An entry or other record may not be made to indicate that the person detained under this section has been arrested or charged with a crime.

(4) A peace officer, acting within the scope of the officer's authority under this chapter, is not personally liable for the officer's actions. (Emphasis added.)

Section 53-24-303 MCA, which is cross-referenced to within section 53-24-107 MCA provides:

53-24-303. Treatment and services for intoxicated persons. (1) A person who appears to be intoxicated in a public place and to be in need of help may be assisted to the person's home, an approved private treatment facility, or other health care facility by the police.

(2) A peace officer acting within the scope of the officer's authority under this chapter is not personally liable for the officer's actions. (Emphasis added.)

Montana Attorney General Mike Greely indicated in 38 A.G. Op. 93 (1980) that city ordinances punishing public intoxication whether as an element of an offense or as an offense in itself are in contravention of state statutes. Therefore, City of Glasgow's ordinances were held to violate the policy of the State of Montana treating alcoholism as a disease not as a crime.

All of the violations contained within the (Glasgow) ordinances punish public intoxication, whether as an element of the offense, e.g., trespassing while intoxicated, or by itself, in contravention of the state statutes. (Emphasis added.)

The City of Glasgow ordinances were held to violate §§53-24-106 and 53-24-107 MCA. Montana's disorderly conduct statute addresses some of the conduct some homeless street people might engage in. Disorderly conduct Sections 45-8-101 MCA and 45-8-102 MCA pertaining to failure of disorderly persons to disperse may be available to use. These two statutes provide:

45-8-101. Disorderly conduct. (1) A person commits the offense of disorderly conduct if he knowingly disturbs the peace by:

(a) quarreling, challenging to fight, or fighting;

(b) making loud or unusual noises;

(c) using threatening, profane, or abusive language;

(d) discharging firearms, except at a shooting range during established hours of operation;

(e) rendering vehicular or pedestrian traffic impassable;

(f) rendering the free ingress or egress to public or private places impassable;

(g) disturbing or disrupting any lawful assembly or public meeting;

(h) transmitting a false report or warning of a fire or other catastrophe in such a place that its occurrence would endanger human life;

(i) creating a hazardous or physically offensive condition by any act that serves

no legitimate purpose; or

(j) transmitting a false report or warning of an impending explosion in such a place that its occurrence would endanger human life.

(2) Except as provided in subsection (3), a person convicted of the offense of disorderly conduct shall be fined not to exceed $100 or be imprisoned in the county jail for a term not to exceed 10 days, or both.

(3) A person convicted of a violation of subsection (1)(j) shall be fined not to exceed $1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both. (Emphasis added.)

45-8-102. Failure of disorderly persons to disperse. (1) Where two or more persons are engaged in disorderly conduct, a peace officer, judge, or mayor may order the participants to disperse. A person who purposely refuses or knowingly fails to obey such an order commits the offense of failure to disperse.

(2) A person convicted of the offense of failure to disperse shall be fined not to exceed $100 or be imprisoned in the county jail for a term not to exceed 10 days, or both. (Emphasis added.)

The Montana Supreme Court in State v. Ashmore, 2008 MT 14, 341 M 131, 176 P.2nd 1022, 2009 Mont. LEXIS 16 indicated that the number of persons disturbed is not dispositive of whether peace is disturbed. Rather, the question to focus on is whether the defendant engaged in disorderly conduct based on the actual statutory language, not the compiler's comments set forth in the MCA Annotations.

The Montana Supreme Court in State v. Ashmore, involved a lady honking her horn near Johnsrud recreational area of the Blackfoot River as she drove by a sheriff deputy completing a routine traffic stop. The lady became angry, belligerent, quarrelsome and profane when stopped by Missoula County Sheriff's Reserve Deputies. The Montana Supreme Court stated as follows in paragraphs 12 and 13:

As the State correctly notes, our task in interpreting statutes is "simply to ascertain and declare what is in terms or in substance contained [in the statute], not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA. Here, however, there is a disparity between the plain language of the statute and the Criminal Law Commission Comments which provide guidance on how this statute is to be applied. The relevant portions of the Comments read as follows:

The intent of the provision is to use somewhat broad, general terms to establish a foundation for the offense and leave the application to the facts of a particular case. Two important qualifications are specified in making the application, however. First, the offender must knowingly make a disturbance of the enumerated kind, and second, the behavior must disturb "others." It is not sufficient that a single person or a very few persons have grounds for complaint.

The statute, on the other hand, does not specify that conduct must disturb

> "others," or otherwise indicate that conduct affecting "a single person or a very few persons" is insufficient to give rise to a violation of the statute. In fact, the statute only requires that a defendant "knowingly disturb the peace" by committing one of the acts enumerated in subsections (a) through (j) of the statute, none of which contains a numerical requirement. (Emphasis added.)

After analyzing some of its earlier Montana Supreme Court decisions, the Montana Supreme Court stated in ¶15 and ¶17:

> A review of our prior decisions under this statute shows that, in spite of the language in the Comments, we have never adopted a strict numerical requirement respecting how many people need be affected by conduct before it "disturbs the peace." As we noted in *Lowery,*
>
> . . . .
>
> As these cases demonstrate, we have focused our analysis not upon numbers of persons affected, but rather upon whether the defendant knowingly disturbed the peace by committing one of the acts enumerated in the statute. While the number of individuals affected by the conduct may play a role in whether the peace has been disturbed, it is not necessarily a dispositive factor. Instead, determination of whether the peace has been disturbed should turn on "the application [of the statute] to the facts of a particular case."

Further, the Montana Supreme Court indicated that the defendant's conduct did not have to be deemed "offensive", it only had to meet the requirements listed in the disorderly conduct statute itself. The Montana Supreme Court stated in ¶23 and ¶24 that:

> We conclude that Ashmore's conduct falls under the proscriptions set forth in the acts enumerated in subsections (a) through (c) of the Disorderly Conduct statute. Consequently, Ashmore's conduct does not need to be deemed "offensive," as was required under subsection (i) in *Kleinsasser*, but only needs to meet the requirements listed in subsections (a) through (c) of the statute--namely that Ashmore "quarrel[l], challeng[e] to fight, or fight[] . . . mak[e] loud or unusual noises . . . [or] us[e] threatening, profane, or abusive language . . . ." Sections 45-8-101(1)(a) through (c), MCA. Ashmore's conduct more than satisfies these requirements.
>
> Accordingly, the only question is whether these proscribed actions, when directed solely at police officers, could be found by a trier of fact to "disturb the peace," and thus give rise to a violation of § 45-8-101, MCA. We hold that they can, and that nothing in our prior precedent under the Disorderly Conduct statute, including *Kleinsasser*, is inconsistent with this conclusion. Thus, we affirm the District Court's denial of Ashmore's motion to dismiss.

CONCLUSIONS:

1. Yes. For example, subsections 7-1-111(8) and (14) MCA statutorily denies a municipality the power to enact ordinances defining as an offense conduct made criminal by state statute or ordinances prohibiting or penalizing vagrancy. Section 53-24-106 MCA provides that a municipality may not adopt or enforce a local law, ordinance, resolution, or rule having the force of law that includes drinking, being a common drunkard, or being found in an intoxicated condition as one of the elements of the offense. Also, §53-24-107 MCA provides that public intoxication is not a criminal offense.

2. Yes. Law enforcement's focus should be on the individual conduct engaged in that is subject to the actual statutory language of the disorderly conduct statute 45-8-101 MCA. While the number of individuals affected by the conduct may play a role in whether the peace has been disturbed, it is not necessarily a dispositive factor. The actual statutory language is what determines if an offense has been committed as it is applied on a case-by-case basis.

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Jim Nugent, City Attorney

JN: jlw

Chapter 9.34

PEDESTRIAN INTERFERENCE

Sections:

9.34.010 Title. This chapter shall be known as the city of Missoula Pedestrian Interference Act. (Ord. 2861 §1, 1993; Ord. 2853 §1, 1993).

9.34.020 Purposes. The purpose of this chapter is to protect the health, safety and welfare of the citizens of and visitors to the city by prohibiting pedestrian interference involving actions that intentionally obstruct pedestrian passage on public bridges, streets, sidewalks, parks and other publicly held or owned lands. The city council declares that such prohibitions are necessary and desirable for the following reasons:

A. There has been an alarming increase in the number of persons interfering with and obstructing other pedestrians on city streets in recent years, many of whom are wearing or carrying weapons or who are more aggressive or intimidating in their conduct;

B. The police department and other city offices have received complaints from citizens complaining that they are afraid to walk, or as business people are afraid to allow their customers to walk on downtown city streets and riverfront walkways as a result of the aggressive, intimidating conduct of persons interfering with, obstructing or accosting pedestrians or people in public places;

C. The city deems it necessary to protect the rights of its citizens and visitors to move openly and freely on the city streets, sidewalks, walkways, parks and other public places without fear of being interfered with, obstructed, accosted, intimidated, injured or robbed by aggressive individuals interfering with their passage; and

D. The city deems it necessary to protect pedestrians, in public places on public property from obstruction, interference, intimidation, harassment, damage or injury caused or partially attributable to being accosted, harassed, interfered with or obstructed by any person, especially someone with a weapon. (Ord. 2861 §2, 1993; Ord. 2853 §2, 1993).

9.34.030 Definitions. The following definitions shall apply to the provisions of this chapter.

A. "Accost" means physically approaching or, when in close proximity to an individual, speaking to that individual in such a manner as would cause a reasonable person to fear imminent bodily harm or fear endangerment that the commission of a criminal act upon his or her person, or upon property in his or her immediate possession, may be about to be committed by the accoster. "Accost" does not include passive, nonobstructive speech or conduct while standing or sitting along the side of a sidewalk or walkway if it does not physically obstruct pedestrians.

B. "Forcing oneself upon the company of another" means:

1. Continuing to request or demand something while interfering with or obstructing the passage of the individual(s) addressed, after the person addressed has made a negative response, either verbally or by physical sign;

2.Otherwise engaging in any conduct that could reasonably be construed as intended to compel or force a person to accede to demands as a result of fear for their safety, imminent bodily harm or the commission of a crime against them.

C. "Knowingly" means a person acts knowingly with respect to conduct or to a circumstance described by an ordinance defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by an ordinance defining an offence when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

D. "Obstruct" means to walk, stand, sit, lie or place an object in such a manner as to impair, hinder or block passage by another person or to require another person to take evasive action to avoid physical contact. Acts authorized as an exercise of one's constitutional right to picket or to legally protest shall not constitute obstruction of or interference with pedestrian traffic.

E. "Purposely" means a person acts purposely with respect to a result or to conduct described by an ordinance defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as "purpose" and "with the purpose" have the same meaning.

F. "Weapon" means any firearm, knife, sword, club or any other object used as a weapon by the offender when
violating the provisions of this chapter. (Ord. 2861 §3, 1993; Ord. 2853 §3, 1993).

9.34.40 Prohibited conduct. The following conduct or action is prohibited pursuant to the city of Missoula "Pedestrian Interference Act" and is considered to be a violation of this chapter.

A. It is unlawful for any person to purposely or knowingly obstruct or hinder passage of pedestrians or motorists on any street, sidewalk or other public place with the city limits.

B. It is unlawful for any person on a public bridge, sidewalk, walkway, park or any other publicly held or owned land to purposely or knowingly accost another person(s) in such a manner as would cause a reasonable person to fear imminent bodily harm or fear that the commission of a criminal act upon his or her person or property in his or her immediate possession may be about to be committed by the accoster.

C. It is unlawful for any person on a public bridge, sidewalk, walkway, park or any other publicly held or owned land while openly and visibly and in a threatening manner carrying a weapon to purposely or knowingly approach any person with intent to engage in actions or conduct that would obstruct pedestrian passage.

D. It is unlawful for any person on a public bridge, sidewalk, walkway, park or any other publicly held or owned land to purposely or knowingly force oneself upon the company of another as defined herein. (Ord. 2861 §4, 1993; Ord. 2853 §4, 1993).

9.34.050 Violation--Penalty. A person convicted of a violation of this chapter shall be guilty of a misdemeanor and shall be fined not to exceed one hundred dollars or imprisoned for any term not to exceed ten days, or both. (Ord. 2861 §5, 1993; Ord. 2861 §5, 1993).