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VOLUME NO. 57

OPINION NO. 1

CITIES AND TOWNS - Authority of city with self-government powers to enact an ordinance requiring background checks before firearm sales or transfers;
FIREARMS - Authority of city with self-government powers to enact an ordinance requiring background checks before firearm sales or transfers;
LOCAL GOVERNMENT - Authority of city with self-government powers to enact an ordinance requiring background checks before firearm sales or transfers;
CITY OF MISSOULA CHARTER - Article 1, section 1;
MISSOULA MUNICIPAL CODE - Chapter 9.60;
MONTANA CODE ANNOTATED - Title 7, chapter 1, part 1; sections 1-2-101, 7-1-111, -111(9), -113, 7-4-4306, 7-32-4305, 45-8-351, -351(1) -351(2), -351(2)(a), 53-21-166;
MONTANA CONSTITUTION OF 1972 - Article II, section 12; article X, section 6;
OPINIONS OF THE ATTORNEY GENERAL - 46 Op. Att'y Gen. No.13 (1996), 44 Op. Att'y Gen. No. 34 (1992), 42 Op. Att'y Gen. No. 8, 37 Op. Att'y Gen. No. 68 (1977);
UNITED STATES CONSTITUTION - Amendment II.

HELD: A city, town, or other local government entity with self-governing powers is prohibited by Montana state law from enforcing a local regulation or ordinance requiring background checks on firearm sales or transfers within its borders.

January 26, 2017

Speaker Austin Knudsen
P.O. Box 200400
Helena, MT 59620-0400

Dear Speaker Knudsen:

[P1] You have requested my opinion on a question which I have restated below:

Does Montana state law prohibit a city, town, or other local government entity with self-governing powers from enforcing a local regulation or

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MONTANA DEPARTMENT OF JUSTICE

Legal Services Division ★ Division of Criminal Investigation ★ Highway Patrol Division ★ Forensic Science Division
Gambling Control Division ★ Motor Vehicle Division ★ Information Technology Services Division ★ Central Services Division

ordinance requiring background checks on firearm sales and transfers within its boundaries?

[P2] On September 26, 2016, the Missoula City Council adopted an ordinance requiring that a transferee to any firearm transfer conducted within the city limits of Missoula submit to a background check, subject to certain exceptions. See Missoula Municipal Code Chapter 9.60. As Speaker of the House, you have asked for an Attorney General Opinion regarding whether a local government, including one with self-governing powers, can pass such an ordinance based on exceptions contained within Mont. Code Ann. § 45-8-351(2)(a). You believe it is important to resolve this question of state law before the end of the 2017 Legislative Session because there is considerable interest in new legislation on this issue depending on my interpretation of the statute.

[P3] As stated in the purpose and intent section of the ordinance, the City of Missoula enacted the ordinance based on its belief that § 45-8-351(2) allows it to regulate the sale and transfer of firearms within its borders through mandatory background checks in order to prevent the possession of firearms by “convicted felons, adjudicated mental incompetents, illegal aliens and minors.” It concluded that there is “broad consensus that felons, minors, and people adjudicated as mentally ill by a court should not possess firearms.” The City’s understanding is that this exception in subsection (2)(a) is sufficient to bypass any prohibition in subsection (1) that presumably restricts the City’s authority on this issue.

[P4] The effect of the ordinance is that every firearm transfer, including the sale, gift or loan of a firearm, be subject to a background check. Exceptions are made for transfers involving immediate family members, transfers between collectors as defined in federal law, for antique firearms as defined in federal law, “temporary transfers” to prevent imminent death or great bodily harm, other “temporary transfers” taking place at shooting ranges, organized competitions, en route to hunting or trapping, and for transferees who hold a valid concealed weapons permit under Montana law. Any person violating the transfer regulations, including those classes not mentioned in Mont. Code Ann. § 45-8-351(2), would be guilty of a misdemeanor punishable by a fine of up to five hundred dollars and/or by imprisonment for not more than six months.

[P5] Your question can be answered through a straightforward statutory construction analysis. A primary rule of statutory interpretation requires courts to apply plain and unambiguous statutes according to their express terms. Mont. Code Ann. § 1-2-101. A court cannot amend, omit or insert terms of the statute. *Id.* “When the statute is plain, unambiguous, direct and certain, the statute speaks for itself and there is no need to resort to extrinsic means of interpretation.” *In re Marriage of Christian*, 295 Mont. 352, 356,

983 P.2d 966, 968 (1999); *State ex rel. Cobbs v. Montana Dep't of Social and Rehabilitation Servs.*, 274 Mont. 157, 162, 906 P.2d 204, 207 (1995) ("The Court is to effectuate the intent of the Legislature, and if the Legislature's intent can be determined from the plain meaning of the words used in a statute, the courts may not go further and apply any other means of interpretation."); *Ravalli County v. Erickson*, 2004 MT 35, ¶ 11, 320 Mont. 31, 85 P.3d 772 ("This Court has repeatedly held that the role of courts in applying a statute has always been to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted")

[P6] Two statutes answer your question. The first deals with restrictions on a self-governing local government's ability to exercise any power that applies to or affects the right to keep and bear arms. The second statute generally preempts any form of local government from regulating the sale or transfer of firearms.

[P7] First, Mont. Code Ann. § 7-1-111 denies certain powers to local government with self-governing powers. A charter form of government (like Missoula) possesses self-government powers and may exercise any power not prohibited by the constitution, law, or charter. Mont. Const. Art. X, § 6 (1972). Simply stated, a local government with self-government powers possesses the power, unless the power has been specifically denied. *D & F Sanitation Serv. v. City of Billings*, 219 Mont. 437, 444-45, 713 P.2d 977, 981-82 (1986); 46 Op. Att'y Gen. No. 13 (1996).

[P8] In determining whether a particular self-government power is authorized, numerous previous Attorney General's Opinions have engaged in a three-part analysis:

- (1) consult the local government's charter and consider constitutional ramifications;
- (2) determine whether the exercise is prohibited under the various provisions of Mont. Code Ann. title 7, chapter 1, part 1 or other statute specifically applicable to self-government units;
- (3) decide whether it is inconsistent with state provisions in an area affirmatively subjected to state control as defined by Mont. Code Ann. § 7-1-113.

See, e.g., 46 Op. Att'y Gen. No. 13 (1996); 44 Op. Att'y Gen. No. 34 at 140, 142 (1992); 37 Op. Att'y Gen. No. 68 at 272, 274 (1977).

[P9] The first level of analysis reveals no limitation on Missoula's authority to regulate firearm sales or transfers pursuant to its charter. The City of Missoula adopted its charter

form of government in 1996, and amended it once in 2006. The charter itself does not mention any limitations relevant to the issue at hand, but it does state it “shall exercise all powers conferred upon Montana cities with self-government powers and shall have all powers not prohibited by the Constitution of the United States of America, the Montana Constitution, and the laws of the State of Montana or this Charter.” See *City of Missoula Charter*, Article I, section 1. This is consistent with Article X, section 6 of the Montana Constitution.

[P10] The second level of analysis applies directly to your question. The powers of self-governing local government are specifically limited in Mont. Code Ann. § 7-1-111, which denies a local government:

(9) any power that applies to or affects the right to keep or bear arms, except that a local government has the power to regulate the carrying of concealed weapons;

[P12] The expression “to keep or bear arms” as used in Mont. Code Ann. § 7-1-111(9) originates with the Second Amendment to the U.S. Constitution, which has been interpreted as an individual constitutional right. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The drafters of Montana’s Constitution used the phrase “to keep or bear arms” in article II, section 12, and added more explicit language to guarantee this fundamental right to individuals “in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned.” The Montana Supreme Court has pointed out that much like other state constitutional rights, the right to keep and bear arms is not without its limits. *State v. Fadness*, 2012 MT 12, ¶ 31, 363 Mont. 322, 268 P.3d 17. However, those circumstances where this state right was limited were instances involving convicted felons, not law-abiding citizens looking to purchase, sell or transfer a firearm. See *id.*; *State v. Stroud*, 210 Mont. 58, 683 P.2d 459 (1984).

[P13] The next step is to determine whether a regulation on the sale or transfer of firearms “applies to or affects the right to keep or bear arms” as stated in Mont. Code Ann. § 7-1-111(9).¹ It is clear on its face that an ordinance requiring background checks for firearm sales or transfers within its borders “applies to or affects the right to keep and bear arms.” Several cases from other states and federal courts clearly state that it does as

¹ The question answered in this Opinion is not whether any restrictions on firearm sales or transfers would be upheld as constitutional, but rather whether restrictions on firearm sales or transfers “appl[y] to or affect[] the right to keep or bear arms” in a way to trigger the prohibition in Mont. Code Ann. § 7-1-111(9).

well. *Andrews v. State*, 50 Tenn. 165, 178 (1871) (“The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair.”); *Luis v. United States*, 136 S. Ct. 1086, 1098-99 (2016) (“Constitutional rights thus implicitly protect those closely related acts necessary to their exercise. . . . Without protection for these closely related rights, the Second Amendment would be toothless.”). See also *Hill v. Colorado*, 530 U.S. 703, 745 (2000) (Scalia, J., dissenting) (“There comes a point . . . at which the regulation of action intimately and unavoidably connected with [a right] is a regulation of [the right] itself.” The right to keep and bear arms, for example, “implies a corresponding right to obtain bullets necessary to use them,” *Jackson v. City and County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014), and “to acquire and maintain proficiency in their use,” *Ezell v. Chicago*, 651 F. 3d 684, 704 (7th Cir. 2011).

[P14] In other words, one cannot try to regulate the ability to acquire firearms (sale or transfer) without exercising power that applies to or affects the right to keep or bear arms. Therefore, the general prohibition in Mont. Code Ann. § 7-1-111(9) clearly places a broad limitation on the power of self-governing cities to enact any ordinance that regulates the sale and transfer of firearms. Based on this conclusion, the Missoula ordinance cannot be enforced.

[P15] To avoid the general prohibition on self-governing local governments exercising any power that applies to or affects the right to keep or bear arms, the City of Missoula looked elsewhere in Montana Code for authority to adopt the firearm transfer restrictions. As stated in its purpose and intent statement for the ordinance, the City of Missoula used the limited exceptions listed in Mont. Code Ann. § 45-8-351(2)(a).² These listed exceptions apply to a broad limitation on a local government’s ability to pass or enforce ordinances regarding the sale or transfer of firearms:

² *The City of Helena v. Yetter* (decided in the First Judicial District and not in Missoula County) 1993 Mont. Dist. LEXIS 172, raises serious concerns about whether a city with self-governing powers can rely on the exceptions within Mont. Code Ann. § 45-8-351(2). However, the City of Missoula acknowledges that the limitations in Mont. Code Ann. § 45-8-351(1) apply to its own authority as a self-governing local government because it looked toward the exceptions to the general prohibitions on local government ordinance on firearms listed in Mont. Code Ann. § 45-8-351(2). In order to provide a thorough analysis, this Opinion shows how the ordinance is unenforceable based on two separate sections of the Montana Code Annotated.

45-8-351. Restriction on local government regulation of firearms.

(1) Except as provided in subsection (2), a county, city, town, consolidated local government, or other local government unit may not prohibit, register, tax, license, or regulate the purchase, sale or other transfer (including delay in purchase, sale, or other transfer), ownership, possession, transportation, use, or unconcealed carrying of any weapon, including a rifle, shotgun, handgun, or concealed handgun.

(2) (a) For public safety purposes, a city or town may regulate the discharge of rifles, shotguns, and handguns. A county, city, town, consolidated local government, or other local government unit has power to prevent and suppress the carrying of concealed or unconcealed weapons to a public assembly, publicly owned building, park under its jurisdiction, or school, and the possession of firearms by convicted felons, adjudicated mental incompetents, illegal aliens, and minors.

[P16] The Montana Legislature passed HB 643 (Rep. Bob Thoft - Stevensville) in 1985, codified as Mont. Code Ann. § 45-8-351. This statute was slightly modified in the 1991 and 2011 Legislative Sessions, but the relevant portions of the law for purposes of this Attorney General Opinion have remained unchanged since 1985. There is only one previous Attorney General Opinion regarding this statute, which is not instructive on your question.³

[P17] Plainly interpreted, the Montana Legislature has prohibited all forms of local government from exercising any regulatory power over the purchase, sale or transfer of firearms. The narrow exceptions to this general rule in (2)(a) do not allow the regulation of purchases, sales or transfers of firearms; rather, the exceptions clearly pertain only to specific situations involving the use and possession of firearms.

³ In 1987, the Missoula City Attorney received an Attorney General Opinion on whether it could enforce a recently passed ordinance prohibiting the discharge of firearms within designated areas which lie outside the city limits but within five miles of the boundaries of the city. 42 Op. Att'y Gen. No. 8. The Opinion concluded that the City of Missoula could not enforce an ordinance prohibiting the discharge of weapons five miles outside of its borders as a health ordinance and enforced pursuant to the extraterritorial powers of the mayor as provided in Mont. Code Ann. § 7-4-4306. The Opinion did, however, sustain the City of Missoula's authority to enforce the ordinance within its own borders as provided by the narrow exceptions in Mont. Code Ann. § 45-8-351(2)(a).

[P18] Yet the City of Missoula expanded § 45-8-351(2)(a) to allow the city to regulate all sales and transfers within the city boundaries so as to prevent the possession of firearms by felons, people adjudicated as mentally ill⁴, minors and illegal aliens⁵. This dragnet approach on all gun sales or transfers within the City of Missoula's borders ignores the long-standing statutory prohibitions previously discussed.

[P19] To interpret subsection (2)(a) in such a way would allow the narrow exceptions to completely swallow the general prohibition--rendering subsection (1) meaningless and nullifying Mont. Code Ann. § 7-1-111(9)'s limitation of cities with self-governing powers. In order to give "effect to all" parts of the statute, a plain meaning interpretation of the statute as a whole could never support the City of Missoula's reasoning. See Mont. Code Ann. § 1-2-101. Even more troubling, the City of Missoula's interpretation of Mont. Code Ann. § 45-8-351 would allow a city to require registration of firearms within its boundaries if the stated intent of the regulation was to prevent the prohibited individuals from possessing firearms.

[P20] In the construction of a statute, the intention of the legislature is to be pursued if possible. Mont. Code Ann. § 1-2-102. The legislative record in this case likewise shows that the Legislature passed Mont. Code Ann. § 45-8-351 to specifically preempt all Montana local jurisdictions from passing regulations or ordinances addressing the sale or transfer of firearms.

[P21] HB 643 marked a dramatic reversal of state policy on local government involvement in firearm issues. It repealed Mont. Code Ann. § 7-32-4305, a long-standing state law that *authorized* cities and towns to regulate firearm sales. ("Control of firearms. The city or town council has power to prevent and suppress the sale of firearms and carrying of concealed weapons.") In its place, § 45-8-351 put a general *prohibition* on

⁴ Montana does not report people who are adjudicated as mentally ill in our state courts to NICS because mental health records are confidential pursuant to Mont. Code Ann § 53-21-166. No exception within the state law is made to provide for reporting these confidential records to the federal government. Therefore, a background check is unlikely to accurately give information regarding a mental health adjudication for people adjudicated within Montana.

⁵ In *Montana Immigrant Justice Alliance v. Bullock*, 2016 MT 104, the Montana Supreme Court struck down a law denying state services to individuals defined as "illegal aliens," because that term is unknown in federal law and unconstitutionally places in the hands of state agents immigration status decisions. The only other place in Montana Code where the term "illegal aliens" is used is in Mont. Code Ann. § 45-8-351(2)(a), which calls into question its enforceability.

ordinances from any local government aimed at sales and transfers of firearms. The Legislature included only narrow exceptions to this new state preemption policy, and none of those specifically override subsection (1) or § 7-1-111(9).

[P22] The proponents left no ambiguity in their reasons for supporting HB 643. They had seen efforts around the country to ban handguns, register firearms, and place restrictions or taxes on the sale of firearms in several larger cities around the country. HB 643 reversed state law authorizing local regulation of firearms and created Montana state preemption of firearm regulation to ensure there were consistent laws within the state's borders. ("This bill provides for a standardization of firearm laws throughout the State of Montana based upon current and future statutes enacted in the Legislature. It makes null and void local ordinances that are more or less restrictive than current state law (such as a Morton Grove, Illinois Handgun Ban). A state firearms preemption law will prevent a hodgepodge effect of firearms laws within the state and create uniformity of firearm laws within Montana." - Louis J. Brune, NRA NW State Liaison). Hr'g on HB 634 House Judiciary, Feb. 14, 1985.

[P23] Most of the examples cited during the legislative debate on HB 643 focused on out-of-state efforts to regulate firearms, but there was one local example cited. In 1984, the City of Missoula considered passing a local ordinance regulating the possession of firearms on public property. While this specific issue of firearms in public places was addressed through the amendment process to HB 643, it was clear that the Legislature sought to apply these new restrictions to all cities in towns in Montana, including Missoula, to ensure state law preempted any local efforts at firearm sales and transfers. The purpose of HB 643 was clear--only the state should decide how firearm purchases, sales and transfers should be regulated, if at all. In other words, the regulation of the sale and transfer of firearms is an area affirmatively subjected to state control as defined by Mont. Code Ann. § 7-1-113, which means Missoula's ordinance also is barred by the third step in the three-part test to determine whether a particular self-government power is authorized.

[P24] Nothing in this opinion should be construed to limit a local government's authority to regulate firearms as expressly authorized in (2)(a), including ordinances regulating the discharge of firearms, preventing and suppressing the carrying of concealed or unconcealed weapons to a public assembly, publicly owned building, park under its jurisdiction, or school, and the possession of firearms by convicted felons, adjudicated mental incompetents, illegal aliens, and minors. But to extend those exceptions into areas where the Legislature sought to prohibit local government interference with a fundamental right is not an appropriate use of any local government's authority.

Speaker Austin Knudsen

January 26, 2017

Page 9

THEREFORE, IT IS MY OPINION:

A city, town, or other local government entity with self-governing powers is prohibited by Montana state law from enforcing a local regulation or ordinance requiring background checks on firearm sales or transfers within its borders.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. C. Fox', with a horizontal line extending to the right from the end of the signature.

TIMOTHY C. FOX
Attorney General

tcf/jb/jym