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Legal Opinion 2015-009

TO: City Council; Mayor John Engen; Mike Brady; Scott Hoffman; Mike Colyer; Chris Odlin; Richard Stepper; Robert Scheben; Laurie Clark; Bruce Bender; Dale Bickell; and Marty Rehbein

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE February 9, 2015

RE: Montana Constitutional right to bear arms in Article II, Section 12, is the only Montana Constitutional provision specifically pertaining to persons and firearms or weapons.

FACTS:

Recently at a City Council committee meeting pertaining in part to the topic of pawnbrokers statutory requirements for keeping a register of items or articles pawned or purchased, there were some general citizen assertions made concerning Montana's Constitution, firearms and local government powers.

ISSUE(S):

What does the Montana Constitution specifically state with respect to persons and firearms or weapons?

CONCLUSION:

Article II, section 12, establishes the Montana Constitutional right of any person to keep or bear arms in defense of their home, person and property or in aid of civil power when legally summoned.

LEGAL DISCUSSION:

There is only one provision in the Montana Constitution that specifically addresses persons related to firearms or weapons. Article II, section 12, entitled "RIGHT TO BEAR ARMS" states as follows:

“ARTICLE II, DECLARATION OF RIGHTS

Section 12. RIGHT TO BEAR ARMS. THE RIGHT OF ANY PERSON TO KEEP OR BEAR ARMS IN DEFENSE OF HIS OWN HOME, PERSON, AND PROPERTY, OR IN AID OF CIVIL POWER WHEN THERETO LEGALLY SUMMONED, SHALL NOT BE CALLED IN QUESTION, BUT NOTHING HEREIN CONTAINED SHALL BE HELD TO PERMIT THE CARRYING OF CONCEALED WEAPONS. (emphasis added)

The United States Constitution also has a people's right to keep and bear arms set forth in Amendment 2 to the United States Constitution that states as follows:

AMENDMENT 2

A well regulated militia being necessary to the security of a free state, the RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS SHALL NOT BE INFRINGED. (emphasis added)

The two (2) most important or relevant Montana Constitutional provisions pertaining to local government powers are Article XI, sections 4 and 6. These two Montana Constitution provisions state:

Section 4. GENERAL POWERS. (1) A local government unit without self-government powers has the following general powers: (a) An incorporated city or town has the powers of a municipal corporation and legislative, administrative, and other powers provided or implied by law. (b) A county has legislative, administrative, and other powers provided or implied by law. (c) Other local government units have powers provided by law. (2) The powers of incorporated cities and towns and counties shall be liberally construed.

Section 6. SELF-GOVERNMENT POWERS. A local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter. This grant of self-government powers may be extended to other local government units through optional forms of government provided for in section 3.

Montana state pawnbroker law does require that the statutorily required pawnbroker register contain an entry and “description of every article pawned to or purchased by the pawnbroker” pursuant to section 31-1-402 MCA as well as section 7-21-4207 MCA empowers a city council to require the owners and keepers of pawn, secondhand and junk shops “to keep a record of all articles purchased or pawned to them.

Section 31-1-402 MCA entitled “PAWNBROKER TO KEEP REGISTER” states:

31-1-402. Pawnbroker to keep register. (1) Every pawnbroker or junk dealer shall keep a register, in which must be entered a description of every article pawned to or purchased by the pawnbroker or junk dealer, with:

(a) the date of the pawning or purchasing;
(b) date when the article must be redeemed;
(c) the name of the person by whom the article was pawned or by whom purchased;
and
(d) the amount loaned on or paid for the article.
(2) In case of the sale of any article pawned or pledged, the pawnbroker or junk dealer shall enter upon the register:
(a) the name of the purchaser;
(b) the time of the sale; and
(c) the price paid for the article.
(3) The register must always be open to inspection and examination of any peace officer or other persons.

Section 7-21-4207 MCA entitled “AUTHORITY TO REQUIRE RECORDS FOR PAWN, SECONDHAND, AND JUNK SHOPS” states:

7-21-4207. Authority to require records for pawn, secondhand, and junk shops. The city or town council has power to require the owners and keepers of pawn, secondhand, and junk shops to keep a record of all articles purchased or pawned to them. The record and the articles purchased or pawned are subject to the inspection of all police officers of the city or town.

Also, subsection 7-21-4201 MCA provides that a city council “may license, tax and regulate . . . pawnbrokers and secondhand and junk shops”. Section 45-8-351 MCA does establish some limitations or restrictions on local government regulation of firearms; but does not impose any specific restrictions or limitations pertaining to a pawnbroker, secondhand dealer or junk shop keeping a register of in which is entered a description of every article pawned or purchased by the pawnbroker or junk dealer.

CONCLUSION:

Article II, section 12, establishes the Montana Constitutional right of any person to keep or bear arms in defense of their home, person and property or in aid of civil power when legally summoned.

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/s/
Jim Nugent, City Attorney
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