

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2015-031

**TO:** City Council; Mayor John Engen; Dale Bickell; Marty Rehbein; Mike Brady; Scott Hoffman; Mike Colyer; Chris Odlin; Richard Stepper; and Ginny Merriam

**CC:** Legal Department Staff

**FROM:** Jim Nugent, City Attorney

**DATE** October 27, 2015

**RE:** Moms Demand Action for Gun Sense in America's request for Municipal ordinance requiring background checks for private firearms ownership transfers in order to check and determine if prospective transferee is an ineligible convicted felon, adjudicated mentally incompetent person, illegal alien or a minor.

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### **FACTS:**

On Monday evening October 19, 2015 Missoula City Council held a public hearing on a proposed City of Missoula ordinance petitioned for by Moms Demand Action for Gun Sense in America and other City of Missoula citizens seeking to require background checks for private firearm ownership transfers in order to check and determine if the prospective transferee is an ineligible transferee because they are (1) a convicted felon, (2) adjudicated mentally incompetent, (3) illegal alien or (4) a minor. At the conclusion of the October 19, 2015 public hearing, city council member Adam Hertz requested that the city attorney issue a legal opinion concerning the legality of the proposed ordinance. Ultimately only the courts may determine the legality of a proposed ordinance. The city attorney does not have legal authority to make final decisions determining the legality of any ordinance or law. It is not possible for anyone to guarantee whether an ordinance is legal or unlawful.

Provisions of Montana law that are potentially applicable to this proposed ordinance are being identified and provided for the City Council's information and consideration.

### **ISSUE:**

Is there legal basis in Montana law that empowers Montana local governments to, for public safety purposes, take action to prevent and suppress possession of firearms by convicted felons, adjudicated mental incompetents, illegal aliens and minors?

## **CONCLUSION:**

Pursuant to §45-8-351(2)(a) MCA the Montana State Legislature has explicitly empowered Montana local governments to, for public safety purposes, prevent and suppress the possession of firearms by (1) convicted felons, (2) adjudicated mentally incompetent persons, (3) illegal aliens and (4) minors.

## **LEGAL DISCUSSION:**

The proposed city ordinance merely attempts to generally ensure that background checks are performed for private, non-dealer, firearm transfer transactions in an effort to detect ineligible transferees pursuant to existing established laws. No new limitation on the right to bear arms is proposed. The ordinance that is proposed is procedural providing a process to better ensure that a background check for ineligible transferees occurs.

No Constitutional right creates an absolute right. For example the constitutional right to freedom of speech does not allow a person to falsely yell fire in a crowded theater or assembly of people and not potentially incur legal repercussions as a result of their conduct. Likewise there are a multitude of examples of limitations on the Constitutional right to bear arms.

There are numerous factual circumstances addressed by State or Federal laws that limit, restrict, or prohibit the right to bear arms. Several examples of limitations or restrictions on a person's right to bear arms include; but are not limited to the following examples: (1) flying on airplanes; (2) incarceration of persons in prisons and detention centers, (3) detention of persons in public mental health, alcohol and drug treatment facilities as well as public hospitals, (4) carry or transport firearms on a train. See §45-8-339 MCA; (5) schools and school classrooms (§§45-8-351 and 45-8-361 MCA), (6) public buildings (§45-8-351 MCA), (7) public assemblies and/or public parks (§45-8-351 MCA), (8) carrying a concealed weapon (firearm) without a permit (§§45-8-316, 45-8-317 and 45-8-351 MCA); (9) use of firearms by children under 14 years of age (§45-8-344 MCA); (10) convicted felons (§45-8-313 MCA); (11) Judicial sentences imposed on an offender that prohibit offender's owning or carrying a dangerous weapon; (12) Prohibition on carrying concealed weapons in government office buildings, banks, credit unions, savings and loan institutions, rooms in which alcoholic beverages are sold, dispensed and consumed under a license for on premises consumption §45-8-328 MCA, (13) The United States Gun Control Act of 1968 18 USC Chapter 44 which pursuant to 18 USC Section 922 makes it unlawful to sell firearms or ammunition to several categories of people including, but not limited to persons adjudicated as a mental defective or committed to any mental institution, convicted felons, aliens illegally or unlawfully in the United States, etc... (14) Montana Constitution Article II, Section 12 Right to Bear Arms itself contains limitations. (15) It is noteworthy that fourteen (14) states as well as Washington D.C. require a permit in order to purchase a hand gun. (16) Eight (8) states as well as Washington D.C. require some form of handgun registration. (17) The Montana Legislature has found that conspiracies and training activities in the furtherance of unlawful acts pose a threat to public order and safety, and are subject to criminal penalties. (§§45-8-107 through 45-8-109, MCA). (18) Pursuant to § 45-8-351(2) MCA for public safety purposes, local government has the power to prevent and suppress possession of firearms by

convicted felons, adjudicated mentally incompetent persons, illegal aliens, and minors. The above identified examples are but a few of the numerous legal restrictions and limitations on the right to bear arms.

As noted earlier herein there are numerous instances where the State of Montana has adopted statutes which create a restriction or limitation on the right to bear arms. Section 45-8-351 MCA is one such statute. Section 45-8-351 MCA expressly empowers Montana local governments to prevent and suppress possession of firearms by (1) convicted felons, (2) adjudicated mentally incompetent persons; (3) illegal aliens; and (4) minors. Section 45-8-351 MCA states in its entirety as follows:

**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.

(b) Nothing contained in this section allows any government to prohibit the legitimate display of firearms at shows or other public occasions by collectors and others or to prohibit the legitimate transportation of firearms through any jurisdiction, whether in airports or otherwise.

(c) A local ordinance enacted pursuant to this section may not prohibit a legislative security officer who has been issued a concealed weapon permit from carrying a concealed weapon in the state capitol as provided in 45-8-317. (emphasis added)

It is important to note and emphasize that the initial language of §45-8-351(1) MCA quoted above commences by stating “EXCEPT AS PROVIDED IN SUBSECTION (2)” §45-8-351(2) MCA is the statutory language that explicitly empowers Montana local governments to, for public safety purposes, prevent and suppress possession of firearms by (1) convicted felons, (2) adjudicated mentally incompetent persons, (3) illegal aliens, and (4) minors. Thus, §45-8-351(1) MCA potential limitations or restrictions on Montana local governments do not apply to Montana local government exercise of power to prevent and suppress possession of firearms by (1) convicted felons, (2) adjudicated mentally incompetent persons, (3) illegal aliens and (4) minors or any of the other statutory authorizations set forth in §45-8-351(2) MCA.

Practically, logically and reasonably, §45-8-351(2) MCA must be able to be implemented. It is a maxim of jurisprudence that “the law neither does nor requires idle acts”; “the law never requires impossibilities” as well as “interpretation must be reasonable.” See §§1-3-223, 1-3-222 and 1-3-233 MCA. It must also be noted that the Montana Constitution established a constitutional mandate that “the powers of incorporated cities and towns and

counties shall be liberally construed.” (emphasis added) Several Montana Supreme Court decisions have recognized this Montana Constitutional right.” See Article XI, Section 4 (2) Montana Constitution.

The term minor is defined pursuant to §41-1-101 MCA as males and females under 18 years of age.

Opponents to the proposed ordinance petitioned for by Moms Demand Action for Gun Sense in America will of course attempt to assert and rely on United States and Montana Constitutional provisions pertaining to the right to bear arms. The Second Amendment to the United States Constitution states:

**“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.”

Article II of the Montana Constitution is entitled “Declaration of Rights”. Article II, Section 12 of the Montana Constitution entitled “Right to Bear Arms” provides:

**“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 the 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)

Section 7-1-111 MCA pertains to the powers denied Montana local governments with self-government powers. Subsection 7-1-111(9) MCA states as follows:

**“7-1-111(9). Powers denied.** A local government unit with self-government powers is prohibited from exercising the following:

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

Other provisions of Montana state law and/or United States Code provide limits or restrictions on this right to bear arms. It has already been noted and emphasized earlier herein that no constitutional right is an absolute right. There are numerous statutory or judicial legal limitations or restrictions that exist on the right to bear arms. In addition it is a maxim of jurisprudence that limits exist on rights. Section 1-3-306 MCA states:

**“Limits on rights.** A person shall so use that person’s own rights as not to infringe upon the rights of another.”

Article II, Section 3 of Montana’s Constitution entitled “Inalienable rights” establishes an inalienable right for all persons to seek their safety, health and happiness in all lawful ways. Section 45-8-351 MCA quoted earlier herein is a Montana State law. Thus, Moms Demand Action for Gun Sense in America are merely exercising their constitutional and statutory right to

petition local government elected officials as they seek their inalienable right to exercise their safety, health and happiness rights in lawful ways.

It should also be noted that with respect to §7-1-111 (9) MCA and 45-8-351 MCA, §7-1-111(9) MCA is the general statutory provision and §45-8-351, MCA is the more specific statutory provision with respect to the proposed city ordinance. Pursuant to the rules of statutory construction (interpretation) the more particular or more specific statutory provision should prevail over a more general statutory provision. See §1-2-102 MCA as well as several Montana Supreme Court cases recognizing this legal principle of statutory construction. Also, within §45-8-351 MCA §45-8-351(2) MCA is the more particular specific provision and §45-8-351(1) MCA is the more general provision. In addition, the final sentence of §1-2-101 MCA pertaining to the role of the judge with respect to statutory construction provides that a judge shall not insert language into a statute and concludes by stating “where there are several provisions or particulars, such a construction is, if possible to be adopted that will give effect to all.” See §1-2-101 MCA.

While not really necessary for the exercise of local government powers pursuant to §45-8-351 MCA, it should still be noted that the City of Missoula is a self-government charter form of government. Decades ago Judge Jeffrey Sherlock of the First Judicial District, Lewis and Clark County, State of Montana held that the doctrine of implied pre-emption by definition cannot apply to local governments with self-government powers. In a case involving a City of Helena ordinance that prohibited the possession of a loaded firearm in the City of Helena. In City of Helena v. Jeremy Wilbert Yetter October 5, 1993 at page 2, District Court Judge Sherlock explained when discussing §45-8-351 MCA:

“The motion is denied. Pursuant to Article XI. Section 5 of the Montana Constitution the city of Helena has adopted a self-governing charter. Pursuant to Article XI. Section 6 of the Montana Constitution a local government [2] unit adopting a self-government charter may exercise any power not prohibited by law. Section 45-8-351, MCA is not such a law as would restrict the power of a self-governing city. As stated by the Montana Supreme Court:

The only way the doctrine of adoption of pre-emption by the state can co-exist with self-government powers of a municipality is if there is an express prohibition by statute which forbids local governments with self-government powers from acting in a certain area. The doctrine of implied pre-emption by definition cannot apply to local governments with self-government powers.

D&F Sanitation v. City of Billings. 219 Mont. 437.445. 713 P.2d 977, 982 (1986).

This is precisely the situation here. There can be no implied preemption as to the City of Helena since it has self-government powers. Section 45-8-351, MCA in order to nullify Helena City Code 5-1-32 would have to specifically state that it applies to local governments with self-government powers. It does not. Therefore Section 5-1-32 of the Helena City Code is valid.

Therefore, Defendant's motion to dismiss is denied."

Pursuant to §45-8-351 MCA and other Montana law identified in this opinion there is ample adequate legal basis in Montana law to allow for the Missoula City Council to consider the petitioned for ordinance requested by Moms Demand Action for Gun Sense in America. Ultimately, if there is any litigation the Courts will determine the legality of any ordinance adopted by the City Council.

**CONCLUSION:**

Pursuant to §45-8-351(2)(a) MCA the Montana State Legislature has explicitly empowered Montana local governments to, for public safety purposes, prevent and suppress the possession of firearms by (1) convicted felons, (2) adjudicated mentally incompetent persons, (3) illegal aliens and (4) minors.

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