

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2021-008

**TO:** Mayor, City Council, Dale Bickell, Judge Kathleen Jenks, Tina Reinicke, Jaeson White, Scott Hoffman, Angela Simonson, Matt Lawson, Ellen Buchanan, Donna Gaukler, Eran Pehan, Jeremy Keene, Brian Hensel, Marty Rehbein, Mike Brady, Ginny Merriam, Tiffany Brander, Jeff Brandt, Gordy Hughes, Brad Davis, Aaron Bowman, Kevin Slovarp, Troy Monroe, Mary Mccrea, Carl Horton, Mayor's Office

**CC:** Department Attorney

**FROM:** Jim Nugent, City Attorney

**DATE** May 13, 2021

**RE:** Montana State Legislature general revision of gun laws pursuant to HB-102(2021)

### FACTS:

HB-102(2021) was signed into law by the Governor with an immediate effective date on February 18, 2021.

With respect to state and local government office buildings, the 2021 Montana State Legislature pursuant to HB-102(2021) in part generally revised Montana state law gun laws with respect to concealed weapons by no longer making carrying a concealed weapon by a person with a valid concealed weapon permit at state and local government offices a Montana state law section 45-8-328 MCA criminal offense. HB-102(2021) does have an exception relevant to city local governments that provides that a person with a valid concealed weapon permit may be prohibited or restricted from exercising their concealed weapon permit "within a courtroom or an area of a courthouse in use by court personnel pursuant to an order of a judge. February 24, 2021 City of Missoula Municipal Court Judge Kathleen Jenks issued such a judicial order prohibiting persons with concealed weapons permits from having a weapon in possession at the first floor of city hall and Thursday trials held in the city council chambers.

In addition, HB-102(2021) also continues a limited explicit grant of power to Montana local governments pursuant to subsection 45-8-351(2) MCA.; to exercise "power to prevent and suppress the carrying of unpermitted concealed weapons or the carrying of unconcealed weapons to a publicly owned and occupied building under its jurisdiction.

HB-102(2021) does not prohibit a local government from having a policy and/or printed posted notice signage stating no firearms or weapons at local government owned and occupied buildings. However, if a person with a valid concealed weapon permit possesses a weapon at a

state or local government building, generally, except for court areas subject to judicial order, it no longer is a state criminal law violation of section 45-8-328 MCA. In addition, section 45-8-351(2) MCA does not explicitly recognize a power for a Montana local government to make it a criminal offense for a person with a valid concealed weapon permit to possess a firearm at local government offices. Thus, if a local government building is generally posted with notices of no firearms allowed; except in court areas subject to a judicial order, a person with a valid concealed weapon permit may not be cited for violation of state law or city ordinance merely for being present in the government building with a weapon and a valid concealed weapon permit; no criminal charges may be brought against the person pursuant to sections 45-8-328 and 45-8-351(2) MCA.

The precise codification of HB-102(2021) is not yet known. HB-102(2021) codification instructions are to codify new law sections 1 through 7 of HB-102(2021) “as an integral part of Title 45, chapter 8, part 3, which has not yet been issued in codified form.

**ISSUE:**

Does legal ability still exist for Montana City governments to a limited extent prevent or suppress firearms or weapons at publicly owned and occupied properties within city jurisdiction?

**CONCLUSION:**

Yes, after adoption of HB-102(2021) generally revising Montana gun laws; Montana state law does still allow limited ability for city government to prevent and suppress the carrying of weapons at publicly owned and occupied buildings within city jurisdiction with respect to persons who do not have a valid concealed weapon permit. Montana state law also authorizes a judge to order that there be no weapons in court or court personnel areas.

**LEGAL DISCUSSION:**

A primary purpose of HB-102(2021) is to permit a person possessing a valid concealed weapon permit to carry a concealed weapon in a state or local government office and related areas in the building; except for several statutorily identified exceptions, one of which pertains to local government court operations.

Generally, sections 45-8-321 “PERMIT TO CARRY CONCEALED WEAPON” and section 45-8-329 MCA CONCEALED WEAPON PERMITS FROM OTHER STATES RECOGNIZED” must be complied with in respect to valid concealed weapon permits. Some of the Montana statutory criteria for being able to legally possess a concealed weapon permit include that a person

- (1) Is a United States citizen or permanent lawful resident;
- (2) Is 18 years of age or older;
- (3) Holds a valid Montana driver’s license or other form of identification issued by the state that has a picture of the person identified.
- (4) Must have been a resident of the state for at least 6 months;

- (5) Is not ineligible under Montana or federal law to own, possess, or receive a firearm;
- (6) There is no outstanding arrest warrant for the person.
- (7) Is not charged and awaiting judgment in any state or federal crime punishable by incarceration for more than one year;
- (8) Has not been adjudicated in a criminal or civil proceeding in state or federal court to be an unlawful user of an intoxicating substance and is under a court order of incarceration or probation, suspended or deferred imposition of sentence treatment or education or other conditions;
- (9) Has not been adjudicated in a criminal or civil proceeding in any state or federal court to be mentally ill, mentally disordered, or mentally disabled and is still subject to a disposition order of that court.
- (10) Etc..

Pursuant to Montana state law a valid concealed weapon permit is valid for four (4) years.

Basically in summary fashion HB-102(2021) affects Montana local governments in the following ways:

**I. COURT EXCEPTION TO ABILITY OF A PERSON WITH A VALID CONCEALED WEAPON PERMIT TO POSSESS CONCEALED WEAPON IN GOVERNMENT COURTS OR BUILDING AREAS IN USE BY COURT PERSONNEL.**

Section 4 of HB-102(2021) is all new law. The section is entitled “WHERE CONCEALED WEAPON MAY BE CARRIED-EXCEPTIONS”. Basically new law in section 4 states that a person with a current and valid permit may not be prohibited or restricted from exercising that permit anywhere in the state, except:

“ . . . . .

(6) on private property where the owner of the property or the person who possesses or is in control of the property, including a tenant or lessee of the property, expressly prohibits firearms:

(7) within a courtroom or an area of a courthouse in use by court personnel pursuant to an order of a justice of the peace or judge; or . . . .”

Subsection (6), quoted above is potentially relevant, in factual circumstances where a local government may be leasing private property for government office building purposes or any other government purpose.

The only Montana statutory definition of “private property” is set forth in Montana’s PRIVATE PROPERTY ASSESSMENT ACT”, in subsection 2-10-103(2) MCA where it is defined as meaning:

“(2) ‘Private property’ means all real property, including but not limited to water rights”.

## II. MONTANA STATE CRIMINAL LAW NO LONGER MAKES IT A CRIMINAL OFFENSE FOR A PERSON WITH A VALID CONCEALED WEAPON PERMIT TO CARRY A CONCEALED WEAPON IN STATE OR LOCAL GOVERNMENT OFFICES AND RELATED AREAS IN THE BUILDING.

Section 45-8-328 MCA of Montana's state criminal law is entitled "CARRYING CONCEALED WEAPON IN PROHIBITED PLACE---PENALTY. Section 45-8-328 was extensively revised and mostly repealed pursuant to HB-102(2021) section 10.

For thirty (30) years; since 1991 when originally enacted into law, Montana state criminal law section 45-8-328 MCA made it a state law criminal offense for a person to purposely or knowingly carry a concealed weapon in a prohibited place. One of the several expressly statutorily identified prohibited places included portions of a building used for state or local government offices and related areas in the building that have been restricted. In addition, for thirty (30) years; since original enactment in 1991, Montana state criminal law section 45-8-328 MCA had also provided in pertinent part that: "it is not a defense that the person had a valid permit to carry a concealed weapon."

For the past thirty (30) years there had been several prohibited places for the carrying of concealed weapons, including banks, credit unions savings and loans and their drive-up and walk-up facilities as well as any room in which alcoholic beverages are sold, dispensed and consumed under a license issued pursuant to Montana state law for sale of alcoholic beverages on the premises; in addition to a provision in state and local government offices.

HB-102(2021) so extensively revised Montana state criminal law section 45-8-328 MCA that as of February 18, 2021, only a prohibition of concealed weapons in government offices in factual circumstances where the person does not possess a valid concealed weapon permit remains in effect. The Montana State Legislature HB-102(2021) revision inserted a statutory cite cross reference exception allowing for valid concealed weapon permits in state and local government offices as well as deleted all the other previously statutorily identified prohibited places.

## III. MONTANA STATE LAW SECTION 45-8-351 MCA ALLOWS A CITY THE POWER TO PREVENT AND SUPPRESS CARRYING OF UNPERMITTED CONCEALED WEAPONS OR CARRYING OF UNCONCEALED WEAPONS TO A PUBLICLY OWNED AND OCCUPIED BUILDING UNDER ITS JURISDICTION.

Section 11 of HB-102(2021) amends Montana state criminal law section 45-8-351 MCA as well. However, subsection 45-8-351(2) MCA continues to authorize a city government the power to prevent and suppress the carrying of (1) unpermitted concealed weapons meaning that the person with the concealed weapon does not possess a valid concealed weapon permit; and (2) the carrying of unconcealed weapons to a publicly owned and occupied building under its jurisdiction. Also, as noted earlier new law enacted pursuant to HB-102(2021) authorizes judges to prohibit any and all firearms or weapons in court areas, including those persons with valid concealed weapon permits from being in court or areas of building that court personnel are using.

With respect to defining or determining what constitutes a “building”; title 50, chapter 60 MCA is entitled BUILDING CONSTRUCTION STANDARDS. Pursuant to section 50-60-101 MCA setting forth general definitions for Montana’s “BUILDING CONSTRUCTION STANDARDS” laws, subsection 50-60-101(2) MCA defines the term “building” as follows:

“(2) “Building means a combination of any materials, whether mobile, portable, or fixed, to form a structure and the related facilities for the use and occupancy by persons or property. The term must be constructed as though followed by the words ‘or part or parts of a building’”.

In addition, the International Building Code defines the term building” in pertinent part as meaning:

“Building . Any structure utilized for supporting or sheltering any occupancy.”

Black’s Law Dictionary, Eighth Edition, defines the term “structure” at page 1464 as meaning:

“structure” 1. Any construction, production, or piece of work artificially built up or composed of parts, purposely joined together. A building is a structure.”

“Under its jurisdiction”, in the phrase in subsection 45-8-351(2) MCA “a publicly owned and occupied under its jurisdiction”; should mean within the city limits. The city has jurisdiction to adopt ordinances to regulate matters within the city limits.

**CONCLUSION:**

Yes, after adoption of HB-102(2021) generally revising Montana gun laws; Montana state law does still allow limited ability for city government to prevent and suppress the carrying of weapons at publicly owned and occupied buildings within city jurisdiction with respect to persons who do not have a valid concealed weapon permit. Montana state law also authorizes a judge to order that there be no weapons in court or court personnel areas.

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/s/ Jim Nugent

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