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Legal Opinion 2010-015

TO: Don Verrue, Building Official

CC: John Engen, Mayor; City Council; Bruce Bender, Chief Administrative Officer; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Mark Muir, Police Chief; Chris Odlin, Police Captain; Gregg Willoughby, Police Captain; Scott Hoffman, Police Captain; Laurie Clark, Administrative Services Manager; Donna Gaukler, Missoula Parks & Recreation Director; Legal Staff

FROM: Jim Nugent, City Attorney

DATE December 7, 2010

RE: Generally the city may prohibit the carrying of concealed weapons to a public assembly, public building, public park under its jurisdiction, or school

ISSUE:

Does the City of Missoula have legal authority to generally prohibit the carrying of concealed weapons within a public building?

CONCLUSION:

Pursuant to Mont. Code Ann. § 7-1-111(9) and § 45-8-351(2), for public safety purposes, a city has the power to prevent and suppress the carrying of concealed weapons to a public assembly, public building, public park under its jurisdiction or school.

LEGAL DISCUSSION:

State law empowers municipal governments to regulate the carrying of concealed weapons, including the power to prevent and suppress the carrying of concealed and unconcealed weapons to a public assembly, public building, public park under its jurisdiction or school.

Mont. Code Ann. § 7-1-111(9) creates an exception to powers denied providing:

7-1-111. 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 or bear arms, except that a local government has the power to regulate the carrying of concealed weapons; (Emphasis added.)

Mont. Code Ann. § 45-8-351 of Montana's criminal code provides:

45-8-351. Restriction on local government regulation of firearms. (1) Except as provided in subsection (2), no county, city, town, consolidated local government, or other local government unit may 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 herein shall allow any government to prohibit the legitimate display of firearms at shows or other public occasions by collectors and others, nor shall anything contained herein prohibit the legitimate transportation of firearms through any jurisdiction, whether in airports or otherwise. (Emphasis added.)

Further, it is not a defense to carrying a concealed weapon in a prohibited place if the person possesses a valid permit to carry a concealed weapon as set forth in (2) of Mont. Code Ann. § 45-8-328 which provides in its entirety:

45-8-328. Carrying concealed weapon in prohibited place -- penalty. (1) A person commits the offense of carrying a concealed weapon in a prohibited place if the person purposely or knowingly carries a concealed weapon in:

(a) portions of a building used for state or local government offices and related areas in the building that have been restricted;

(b) a bank, credit union, savings and loan institution, or similar institution during the institution's normal business hours. It is not an offense under this section to carry a concealed weapon while:

(i) using an institution's drive-up window, automatic teller machine, or unstaffed night depository; or

(ii) at or near a branch office of an institution in a mall, grocery store, or other place unless the person is inside the enclosure used for the institution's financial services or is using the institution's financial services.

(c) a room in which alcoholic beverages are sold, dispensed, and consumed under a license issued under Title 16 for the sale of alcoholic beverages for consumption on the premises.

(2) It is not a defense that the person had a valid permit to carry a concealed weapon. A person convicted of the offense shall be imprisoned in the county jail for a term not to exceed 6 months or fined an amount not to exceed \$500, or both. (Emphasis added.)

Generally, carrying a concealed weapon is a criminal offense pursuant to Mont. Code Ann. § 45-8-316, with statutory exceptions set forth in § 45-8-317. These statutes provide:

45-8-316. Carrying concealed weapons. (1) A person who carries or bears concealed upon the individual's person a dirk, dagger, pistol, revolver, slingshot, sword cane, billy, knuckles made of any metal or hard substance, knife having a blade 4 inches long or longer, razor, not including a safety razor, or other deadly weapon shall be punished by a fine not exceeding \$500 or by imprisonment in the county jail for a period not exceeding 6 months, or both.

(2) A person who has previously been convicted of an offense, committed on a different occasion than the offense under this section, in this state or any other jurisdiction for which a sentence to a term of imprisonment in excess of 1 year could have been imposed and who carries or bears concealed upon the individual's person any of the weapons described in subsection (1) shall be punished by a fine not exceeding \$1,000 or be imprisoned in the state prison for a period not exceeding 5 years, or both.

45-8-317. Exceptions. (1) Section 45-8-316 does not apply to:

- (a) any peace officer of the state of Montana or of another state who has the power to make arrests;
- (b) any officer of the United States government authorized to carry a concealed weapon;
- (c) a person in actual service as a member of the national guard;
- (d) a person summoned to the aid of any of the persons named in subsections (1)(a) through (1)(c);
- (e) a civil officer or the officer's deputy engaged in the discharge of official business;
- (f) a probation and parole officer authorized to carry a firearm under 46-23-1002;
- (g) a person issued a permit under 45-8-321 or a person with a permit recognized under 45-8-329;
- (h) an agent of the department of justice or a criminal investigator in a county attorney's office;

(i) a person who is outside the official boundaries of a city or town or the confines of a logging, lumbering, mining, or railroad camp or who is lawfully engaged in hunting, fishing, trapping, camping, hiking, backpacking, farming, ranching, or other outdoor activity in which weapons are often carried for recreation or protection; or

(j) the carrying of arms on one's own premises or at one's home or place of business.

(2) With regard to a person issued a permit under 45-8-321, the provisions of 45-8-328 do not apply to this section.

Sections 8.58.010 through 8.58.030 Missoula Municipal Code were enacted pursuant to the powers granted to local governments by state law. Currently these sections are not as broad in their regulatory scope as state law authorizes or permits. These sections currently provide:

8.58.010 Firearms prohibited in certain public buildings-Exceptions.

A. No person shall wear, bear, or otherwise carry into the Missoula city hall or public school building within the city, excluding the University of Montana, any firearm, whether concealed or unconcealed, or any explosive device as defined by Section 50-38-101, MCA.

B. This section shall not apply to:

1. Peace officers of the state or the United States government;
2. Persons participating or displaying guns and weapons at shows authorized by the city or school;
3. Persons participating in hunter or gun safety courses sanctioned by the Fish and Game Department and authorized by the city or school;
4. Persons specifically authorized by the city or school to carry firearms or demonstrate or use explosive devices on its premises.

8.58.020 Firearms prohibited in public meetings.

A. It is unlawful for any person, other than a peace officer of the state or the United States government, to attend a public meeting anywhere within the city wearing, bearing, or carrying a firearm or explosive device, unless specifically authorized by the agency conducting the public meeting.

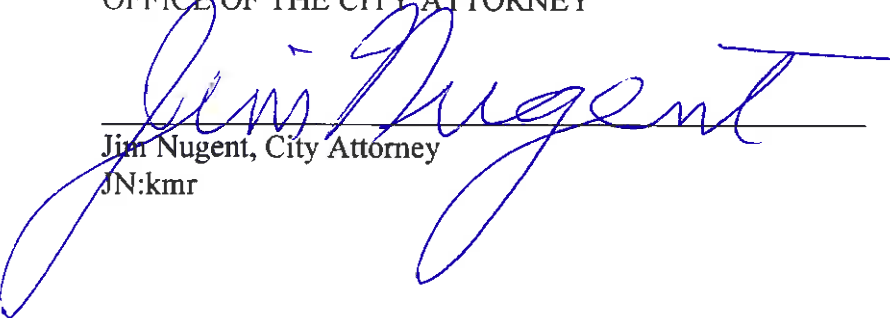
B. For the purposes of this chapter a public meeting means the convening of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state for the purpose of hearing, discussing or acting upon a matter over which the agency has supervision, control, jurisdiction, or advisory power.

8.58.030 Penalty. Any person convicted of a violation of this chapter shall be subject to a fine of five hundred dollars and six months in jail.

CONCLUSION:

Pursuant to Mont. Code Ann. § 7-1-111(9) and § 45-8-351(2), for public safety purposes, a city has the power to prevent and suppress the carrying of concealed weapons to a public assembly, public building, public park under its jurisdiction or school.

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