

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2012-023

**TO:** Mayor John Engen, Donna Gaukler, Bruce Bender, City Council, Kathy Mehring, Betsy Willet, Jackie Corday, Alan White, Morgan Valiant, Mark Muir, Mike Brady, Chris Odlin, Mike Colyer, Scott Hoffman, Jason Diehl, Jeff Brandt

**CC:** Legal Staff

**FROM:** Jim Nugent, City Attorney

**DATE:** December 19, 2012

**RE:** Legal authority for municipalities for public safety purposes to prevent carrying of concealed or unconcealed weapons in publicly owned buildings and parks under the municipality's jurisdiction.

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### FACTS:

City parks and recreation director Donna Gaukler has inquired as to the city parks and recreation department's ability to prohibit weapons in public buildings and parks.

### ISSUE(S):

May the city parks and recreation department for public safety purposes generally prohibit the presence of weapons in city park public buildings and in parks under the jurisdiction of city parks and recreation?

### CONCLUSION(S):

Yes, pursuant to subsection 45-8-351(2) MCA of Montana's Criminal Code a city is for public safety purposes specifically authorized the "power to prevent the carrying of concealed or unconcealed weapons to a public assembly, publicly owned building, parks under its jurisdiction or schools".

### LEGAL DISCUSSION:

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, section 12 of Montana’s Constitution is entitled “RIGHT TO BEAR ARMS”. This Montana Constitutional provision states as follows:

“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.

Section 7-1-111 MCA entitled “POWERS DENIED”, pertains to Montana local governments possessing self-government powers, such as the City of Missoula does pursuant to its city charter. Subsection 7-1-111(9) MCA states as follows:

“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”.

Title 45, Montana Code Annotated is known and cited as the Montana “Criminal Code of 1973”. See section 45-1-101 MCA. Pursuant to section 45-8-343 MCA of the Montana Criminal Code it is unlawful to shoot a gun, pistol or firearm within the limits of any city except at approved shooting ranges or if the discharge of the firearm is justifiable pursuant to title 45, chapter 3, part 1 entitled “WHEN FORCE JUSTIFIED”. Section 45-8-343 MCA provides in its entirety as follows:

**45-8-343. Firing firearms.** (1) Except as provided in subsections (2) and (3), every person who willfully shoots or fires off a gun, pistol, or any other firearm within the limits of any town or city or of any private enclosure which contains a dwelling house is punishable by a fine not exceeding \$25 or such greater fine or a term of imprisonment, or both, as the town or city may impose.

(2) Firearms may be discharged at an indoor or outdoor rifle, pistol, or shotgun shooting range located within the limits of a town or city or in a private dwelling if the shooting range is approved by the local governing body.

(3) Subsection (1) does not apply if the discharge of a firearm is justifiable under Title 45, chapter 3, part 1.

Most importantly for purposes of answering the specific inquiry pertaining to the city’s ability to prevent weapons in city park buildings as well as in parks under the jurisdiction of the City of Missoula is section 45-8-351 MCA entitled “RESTRICTION ON LOCAL GOVERNMENT REGULATION OF FIREARMS”, which does empower a city for public safety purposes “to prevent and suppress the carrying of concealed or unconcealed weapons to a public assembly,

publicly owned building, park under its jurisdiction, or school”. Section 45-8-351 MCA provides 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)

Thus, pursuant to Montana state law, section 45-8-351 MCA, a Montana municipality for public safety purposes has power to prevent and suppress the carrying of concealed or unconcealed weapons to a:

- (1) a public assembly;
- (2) publicly owned building;
- (3) a park under the city’s jurisdiction; or
- (4) a school.

**CONCLUSION(S):**

Yes, pursuant to subsection 45-8-351(2) MCA of Montana’s Criminal Code a city is for public safety purposes specifically authorized the “power to prevent the carrying of concealed or unconcealed weapons to a public assembly, publicly owned building, parks under its jurisdiction or schools”.

OFFICE OF THE CITY ATTORNEY

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Jim Nugent, City Attorney

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