

September 23, 2015

VIA EMAIL AND HAND DELIVERY

Mayor John Engen
and
Missoula City Council
435 Ryman
Missoula, MT 59802
council@ci.missoula.mt.us

RE: Proposed Gun Sales Ordinance

Greetings,

We represent the Montana Shooting Sports Association. Please find enclosed MSSA's written testimony regarding the recently proposed ordinance regulating Background Checks on Gun Sales and Transfers, sponsored by Bryan von Lossberg, Marilyn Marler & Emily Bentley. (See City Council Agenda of today's date.)

If you have any questions comments, please do not hesitate to contact me.

Sincerely,

RHOADES & SIEFERT, PLLC



Quentin M. Rhoades

Encl. as stated
cc: Client
City Attorney

MONTANA SHOOTING SPORTS ASSOCIATION

WRITTEN TESTIMONY REGARDING PROPOSED MISSOULA CITY GUN SALES ORDINANCE

September 23, 2015

Statement of the issue: Missoula City Council members have proposed that the Missoula City Council consider adopting an ordinance that would require a federal background check to be done for every private sale of a firearm within the boundaries of the City of Missoula. (See Ex. A, attached.)

This written testimony will address three components of the subject, legal problems, practical problems, and general comment.

Legal problems. If adopted, this ordinance would violate MONT. CODE ANN. § 45-8-351(1), which reads: "a county, city, town, consolidated local government, or other local government unit may **not ... regulate** the purchase, sale or other transfer (including delay in purchase, sale, or other transfer), ... of any weapon, including a rifle, shotgun, handgun, or concealed handgun." (Emphasis added.)

MSSA is mindful of City Attorney Nugent's Legal Opinion 2015-030, which concludes: "Pursuant to subsection 45-8-351(2) MCA for public safety purposes a Montana local government has the power to prevent and suppress the possession of firearms by convicted felons, adjudicated mental incompetents, illegal aliens, and minors." His supporting memo, however, does not address the expressed intent of the proposed ordinance, namely to regulate "Firearms Sales" within the City limits by imposing prior background checks "for sales and transfers."

The statute does include, as the Legal Opinion notes, in subparagraph (2)(a) the following narrow exception: "A county, city, town, consolidated local government, or other local government unit has power to prevent and suppress ... the possession of firearms by convicted felons, adjudicated mental incompetents, illegal aliens, and minors." This general exception, however, does not extend to the regulation of, specifically, "the purchase, sale or other transfer (including delay in purchase, sale, or other transfer)" of firearms. Under Montana law, it has long been held that specific statutory provision trump general ones covering the same subject matter. "In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it." MONT. CODE ANN. § 1-2-102.

In short, while the City can regulate the possession of firearms by convicted felons and

the like, it cannot regulate the purchase, sale and transfer of firearms – actions at which the proposed ordinance is directly targeted. Adoption of the ordinance will doubtless result in a legal challenge in district court, as well as the attendant attorney fees and costs.

Practical problems. The ordinance, as proposed, would require a private seller of a firearm to take his prospective buyer to a “dealer” with a Federal Firearms License, during business hours, and get the dealer to run the buyer through the dealer's access to the National Instant Criminal Background Check System (NICS). One insurmountable obstacle to that idea is that FFLs simply are not allowed to run anyone through the NICS. A dealer is only allowed to run the purchaser for a firearm in the dealer's inventory.

Yes, the dealer could take the firearm proposed for sale into inventory and then run the purchaser, as if the purchaser were buying the dealer's property. However, that sets up an additional problem that if the purchaser is not deemed eligible by NICS to purchase (perhaps because the purchaser is “John Smith” and there are 247 other “John Smith”s with criminal records in the U.S.), then since the firearm is officially in the dealer's inventory the dealer may not be able to return the firearm to the would-be seller without more forms filled out and an additional background check to surrender the firearm to the intended seller.

This complexity and likely expense would offer any private seller plenty of motive to simply drive a mile to outside the city limits to conduct his transaction with the purchaser, which would be much simpler and less expensive than waiting for a dealer to be open, waiting in line for dealer assistance, filling out long forms, officially transferring the firearm to the dealer, and waiting for a NICS check to clear. It would only take five minutes for seller and buyer to drive past the city limits to conduct the transaction legally there, compared to an hour with the licensed dealer inside city limits.

Further, such an ordinance would effectively end the historic gun shows that are held multiple times in Missoula every year, gun shows at which hundreds or thousands of private firearm transfers are conducted, and which bring millions of dollars into Missoula from people traveling from across Montana, and from other states, to these regional events, people who spend money on lodgings, meals, fuel, and shopping in Missoula. Such an ordinance would constitute substantial economic loss for Missoula.

General comment. While the proposed ordinance may spring from good intentions, it is fraught with numerous and serious, real problems, both legal and practical. Good intentions are not a sufficient excuse for bad or misconceived policy. That the proponents are unaware of or so willing to overlook these problems is not a credit to

them.

It is already illegal under federal and Montana law for the target groups – convicted felons, those adjudicated as mentally incompetent, minors and aliens – to purchase firearms. It is already illegal under federal or state law for a person to knowingly sell a firearm to one of those people. Further, people who obtain firearms for crime do not buy them through legitimate channels of commerce. They steal firearms, or buy them from other criminals who also ignore the laws.

DRAFT ORDINANCE NO. (TBD)

AN ORDINANCE REQUIRING CRIMINAL BACKGROUND CHECKS ON ALL GUN SALES AND TRANSFERS, WITH CERTAIN EXCEPTIONS, INCLUDING FOR FAMILY, HUNTING, AND EMERGENCY SELF-DEFENSE

Whereas, an average of 88 Americans are killed every day by gun violence; and

Whereas, according to the U.S. Centers for Disease Control, Montana has the 6th-highest gun death rate in the country; and

Whereas, in Montana nearly three times as many women are shot to death by intimate partners, and nearly three times as many gun suicides take place, as the national average; and

Whereas, federally licensed firearms dealers are required to run a background check on buyers and transferees, but no federal or state law requires a background check on sales and transfers made by other persons; and

Whereas, local governments with self-governing powers are authorized under state law to prevent the possession of firearms by convicted felons, adjudicated mental incompetents, illegal aliens, and minors; and

Whereas, in states that require background checks on all handgun sales, 46 percent fewer women are shot to death by intimate partners, 48 percent fewer law enforcement officers are killed with handguns, and 48 percent fewer people kill themselves with guns.

NOW, THEREFORE, BE IT ORDAINED BY THE MISSOULA CITY COUNCIL OF MISSOULA, MONTANA:

Chapter 9.60

FIREARM SALES

9.60.010 Purpose and Intent.

It is the intent of the City of Missoula that no sale or transfer of a firearm shall take place within the city limits unless and until the person purchasing or otherwise receiving the firearm passes a national instant criminal background check. There is broad consensus that felons, minors, and people adjudicated as mentally ill by a court should not possess firearms. In fact, federal law has long prohibited these people from possessing firearms. However, no federal or state law requires background checks for sales and transfers made by persons who are not licensed firearms dealers—meaning that criminals, minors, and people adjudicated as mentally ill are able to purchase and receive firearms despite their legal prohibition.

Background checks shall not be required for transfers between immediate family members, for transfers of curio and relic firearms between collectors or for transfers of antique firearms, for temporary transfers while hunting or target-shooting or for competitions, or for temporary transfers for emergency self-defense or while in the presence of the transferee.

Parties to a transfer made by any person who is not a licensed firearm dealer will meet at a licensed dealer, where the buyer or transferee will pass a background check before the sale or transfer may be completed.

In enacting this ordinance, the City of Missoula relies on authority provided to localities with self-government powers under MCA 7-1-101 and provided otherwise under state law.

9.60.020 Definitions.

- A. "Dealer" means a person who holds a federal firearms license under 18 United States Code 923(a).
- B. "Firearm" shall have the same meaning attributed to that term under 18 United States Code 921(a)(3).
- C. "Immediate family members" means spouses, domestic partners, parents, children, siblings, grandparents, grandchildren, nieces, nephews, aunts, uncles, and first cousins. The relationships referred to include relationships by half blood, by adoption, or by step-relation.
- D. "Transfer" means any delivery or receipt of a firearm, regardless of whether the firearm is purchased with consideration or payment or else is delivered or received as a gift, a loan, or otherwise without consideration or payment.
- E. "Transferee" means a person who receives or intends to receive a firearm, regardless of whether the person purchases the firearm with consideration or payment or else whether the person receives the firearm as a gift, a loan, or otherwise without consideration or payment.
- F. "Transferor" means a person who delivers or intends to deliver a firearm, regardless of whether the person sells the firearm with consideration or payment or else whether the person delivers the firearm as a gift, a loan, or otherwise without consideration or payment.

9.60.030 Background checks required for sales and transfers.

- A. Except as otherwise provided in this chapter, every firearm transfer between a transferor and a transferee, in whole or in part in the City of Missoula, shall be subject to a background check. Except as otherwise provided in this chapter, no person shall transfer a firearm, and no person shall receive a firearm, without complying with this chapter, including that the parties must comply with the process described in section 9.60.040.
- B. The transferor and transferee must each complete, sign, and submit all federal, state, and local forms necessary to process the background check and otherwise complete the transfer.
- C. Neither the transferor nor the transferee shall knowingly make any material false oral or written statement or knowingly furnish or exhibit any false identification likely to deceive a dealer or the police department.

9.60.040 Background check by dealer.

A. The transferor and transferee shall meet jointly at a dealer and request that the dealer facilitate the transfer. A dealer who agrees to facilitate a firearms transfer under this section shall process the transfer as though the dealer is transferring the firearm from its own inventory to the transferee, complying with all requirements of federal and state law that would apply if it were making such a transfer.

B. The transferor may remove the firearm from the premises of the dealer while a background check is being conducted, but the transferor must subsequently deliver the firearm to the dealer to complete the transfer.

C. Neither the dealer nor the transferor may deliver any firearm to the transferee if the results of the background check indicate that the transferee may not possess the firearm. If the results of the background check indicate that the transferee may not possess a firearm, the transferor may remove the firearm from the premises of the dealer.

D. A dealer who agrees to facilitate a transfer pursuant to this section may charge a reasonable fee to cover costs for services rendered.

9.60.050 Exceptions from the background check requirement. The provisions of Section 9.60.030 do not apply if:

A. Either the transferee or transferor is a dealer; or

B. The transfer is between immediate family members; or

C. The transfer is of a curio or relic, as defined in 27 Code of Federal Regulations 478.11, and is between collectors of firearms as curios or relics as defined by 18 United States Code 921(a)(13) who each have in their possession a valid Collector of Curios and Relics License issued by the Bureau of Alcohol, Tobacco, Firearms & Explosives; or

D. The transfer is of an antique firearm, as defined in 18 United States Code 921(a)(16); or

E. The transfer is temporary and is necessary to prevent imminent death or great bodily harm to the transferee, and

1. The transfer lasts only as long as necessary to prevent such threat; and

2. The transferor has no reason to believe that the transferee is prohibited from possessing firearms under state or federal law and has no reason to believe that the transferee intends to use the firearm in the commission of a crime; or

F. Either the transferor or the transferee is a law enforcement or corrections agency or is, to the extent the person is acting within the course of his or her employment or official duties, a peace officer, a law enforcement or corrections officer, a member of the armed forces of the United States or the national guard, a private security guard who possesses a firearm in performance of his duties, or any officer of the United States government; or

G. The transfer is temporary, the transferor has no reason to believe that the transferee intends to use the firearm in the commission of a crime, and the transferee's possession of the firearm takes place exclusively: