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FILED APR 11 2018

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**MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY**

CITY OF MISSOULA,

Plaintiff,

v.

TIMOTHY C. FOX, in his official
capacity as the Attorney General for
the State of Montana,

Defendant.

Cause No. DV-18-429

Dept. No. 2

Judge Robert L. Deschamps, III

**CITY OF MISSOULA'S
COMPLAINT FOR DECLARATORY
JUDGMENT**

Plaintiff City of Missoula, for its Complaint for Declaratory Judgment,
alleges as follows:

INTRODUCTION

1. The City of Missoula enacted an ordinance on September 26, 2016 (Ordinance #3581), requiring background checks prior to most gun purchases from private unlicensed sellers, just like the background checks already required by federal law for traditional gun store purchases (“the Background Check Ordinance” or “the Ordinance”).

2. Like similar legislation in many states, the City of Missoula’s Ordinance closed a loophole in federal law that allowed convicted felons and other categories of people prohibited from owning firearms to obtain guns without a background check.

3. A State Representative from Culbertson, Montana, requested a formal opinion from Attorney General Timothy C. Fox (“the Attorney General”) regarding the enforceability of the Ordinance under state law.

4. On January 26, 2017, the Attorney General issued an opinion (AG Opinion #1, Volume No. 57) that the Background Check Ordinance is not enforceable under Montana law.

5. The Attorney General’s opinion is erroneous, because the Ordinance was properly enacted and within the authority of the City of Missoula under Montana law.

6. The City of Missoula seeks a declaratory judgment overturning the erroneous Attorney General opinion, so the Background Check Ordinance can be enforced within the borders of the City of Missoula, as a means of preventing individuals who cannot legally possess firearms from obtaining them through private purchases.

PARTIES

7. Plaintiff, the City of Missoula, is a duly-organized local government unit with self-governing powers as defined by Article XI, § 6 of the Montana State Constitution and Title 7, Chapter 1 of the Montana Code Annotated.

8. Defendant, Attorney General Timothy C. Fox, is the Attorney General of the State of Montana, exercising powers defined by Article VI of the Montana State Constitution and Title 2, Chapter 15 of the Montana Code Annotated. Defendant is a party to this case solely in his official capacity.

JURISDICTION AND VENUE

9. This Court has jurisdiction of this matter pursuant to the Uniform Declaratory Judgments Act (Mont. Code Ann. § 27-8-101, *et seq.*). An actual controversy exists between the parties as to the authority of the

City of Missoula to implement and enforce a duly-enacted ordinance under state constitutional and statutory law.

10. Venue is proper in Missoula County because Defendant is a public officer who was acting in the course of the duties of his office, and the cause of action, or some part of the cause of action, arose in Missoula County, as the Ordinance was enacted and is applicable in the City of Missoula, which is located in Missoula County, and the direct effect of the Attorney General's opinion is within Missoula County. Mont. Code Ann. §§ 25-2-125 and 25-2-126.

CLAIM FOR DECLARATORY RELIEF

11. Plaintiff re-alleges and incorporates the allegations of paragraphs 1 through 10, above, as if fully set forth herein.

12. There is a real, substantial, and justiciable controversy between the parties concerning the authority of the City of Missoula, as a local government unit with self-governing powers, to implement and enforce a duly-enacted ordinance requiring individuals who wish to receive a firearm within city limits to pass a background check prior to the transfer.

The Background Check Loophole

13. Under federal law, anyone purchasing a firearm from a federally licensed firearms dealer must complete a background check through the

National Instant Criminal Background Check System prior to receiving a firearm. Federal law does not require individuals who purchase a firearm from an unlicensed private party to complete a background check.

14. Nineteen states and the District of Columbia have closed this loophole by requiring those purchasing firearms in private sales from unlicensed individuals to complete a background check prior to receiving the firearm.

15. Between 1994 and 2015, nearly 197 million applications for firearm transfers or permits were subject to background checks, and more than 3 million applications were denied nationwide. Bureau of Justice Statistics, *Background Checks for Firearm Transfers, 2015 - Statistical Tables, 2017*.¹

16. According to a national survey, 22% of gun owners who acquired a gun during a recent two-year window did so without a background check. Matthew Miller, *et al.*, *Firearm Acquisition Without Background Checks: Results of a National Survey*, 166 *Annals Internal Med.* 233 (2017). The survey also showed that in states that required background checks for private purchases, fewer than half as many private firearm transactions were completed without a background check during

¹See <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6126>

that same time period (26%, compared to 57% in states without the requirement). *Id.* at 238.

17. The United States Department of Justice, through the Bureau of Alcohol, Tobacco, Firearms and Explosives, encourages background checks on firearms sold in private unlicensed sales, and has long recognized that such private-sale checks “can enhance public safety, assist law enforcement, and help ensure that firearms end up only in the hands of those who are legally allowed to possess them.” Bureau of Alcohol, Tobacco, Firearms and Explosives, *Facilitating Private Sales: A Federal Firearm Licensee Guide*, at 2.

18. The State of Montana – which has one of the highest gun death rates in the country² – does not require background checks on private, unlicensed firearm transfers.

Constitutional and Statutory Framework

19. As a local government unit that has adopted a self-government charter, Missoula is empowered to “exercise any power not prohibited by th[e] constitution, law or charter.” Mont. Const. art. XI, § 6; Mont. Code Ann. § 7-1-101. These powers are “liberally construed” and “[e]very reasonable doubt as to the existence of a local government power or

² See https://www.cdc.gov/nchs/pressroom/sosmap/firearm_mortality/firearm.htm

authority shall be resolved in favor of the existence of that power or authority." Mont. Const. art. XI, § 4; Mont. Code Ann. § 7-1-106.

20. A local government with self-government powers may provide any services or perform any functions not expressly prohibited, including, but not limited to, services or functions that general power government units are authorized to provide or perform. Mont. Code Ann. § 7-1-102. A self-government unit that performs a function that can also be performed by a general government unit is only restricted in the performance of that function by limitations in its charter or state laws that specifically apply to self-government units. *Id.* § 7-1-103.

The Current Controversy

21. On September 26, 2016, the City of Missoula enacted Ordinance 3581, requiring (with certain exceptions, including for family, hunting, and self defense) a party wishing to receive a firearm in the City of Missoula to successfully complete a background check conducted through a federally licensed firearms dealer. A true and correct copy of the Ordinance is attached hereto as **Exhibit A**. The Ordinance went into effect on October 26, 2016.

22. Shortly after the City of Missoula enacted the Background Check Ordinance, the Speaker of the Montana House of Representatives

requested that Defendant issue an Attorney General's opinion on the validity of the Ordinance under state law.

23. The Attorney General issued Opinion #1, Vol. #57, on January 26, 2017, asserting: "A city, town, or other local government entity with self-governing powers is prohibited by Montana state law from enforcing a local regulation or ordinance requiring background checks on firearm sales or transfers within its borders." A true and accurate copy of the Attorney General's opinion is attached hereto as **Exhibit B**.

24. The Attorney General concluded that the Background Check Ordinance is preempted by state law, focusing on two statutory provisions: Mont. Code. Ann. § 7-1-111(9), which prohibits self-governing cities from exercising "any power that applies to or affects the right to keep or bear arms," and Mont. Code Ann. § 45-8-351, which restricts certain local governments' ability to regulate firearms, with several significant exceptions.

25. By issuing an opinion finding the City of Missoula's Ordinance invalid, the Attorney General prevented the City of Missoula from enforcing the Background Check Ordinance. Mont. Code Ann. § 2-15-501(7) ("[T]he attorney general's opinion is controlling unless overruled by a state district court or the Supreme Court.").

26. The Attorney General's opinion is erroneous, because the Ordinance was properly enacted under the authority granted to the City of Missoula by the Montana Constitution and the Montana Code Annotated, directly and indirectly, to promote public safety by preventing and suppressing the possession of firearms by convicted felons, adjudicated mental incompetents, illegal aliens, and minors.

27. The City of Missoula, as a local government unit with self-governing powers, is not subject to the prohibitions in Mont. Code Ann. § 45-8-351 because the statute does not specifically and expressly apply to cities with self-governing powers. Even if the City of Missoula were subject to the prohibitions in Mont. Code Ann. § 45-8-351, the City would not be preempted from enacting the Background Check Ordinance because § 45-8-351(2) expressly authorizes such an ordinance, “[f]or public safety purposes,” in order “to prevent and suppress . . . the possession of firearms” by those prohibited by law from possessing them.

28. By issuing the opinion that Montana law prohibits local governments from enacting ordinances to prevent convicted felons and the mentally incompetent from obtaining firearms, the Attorney General substantially invalidated a statutory provision – § 45-8-351(2) – enacted by the Legislature for the protection of the public.

29. Mont. Code. Ann. § 7-1-111(9), which prohibits local ordinances that apply to or affect the right to keep or bear arms, is not violated by the Background Check Ordinance. The Background Check Ordinance prevents possession of firearms by people already prohibited by law from possessing firearms. It does not apply to or affect the right to keep or bear arms, much like the federal background check requirement does not implicate the right to keep and bear arms guaranteed in U.S. Const. amend. II.

WHEREFORE, the City of Missoula prays for relief as follows:

1. For a declaration that the Attorney General's opinion referenced above is overruled, that the Background Check Ordinance is a valid and enforceable enactment under the City of Missoula's constitutional and statutory powers as a local government unit with self-governing powers, and that it is not preempted by Mont. Code Ann. § 7-1-111(9), Mont. Code § 45-8-351, Mont. Code Ann. § 7-1-113, or any other provision of state law; and
2. For such other and further relief which this Court deems just and proper.

Dated this 11th day of April, 2018.

BOONE KARLBERG P.C.



Scott M. Stearns

Zach A. Franz

Attorneys for Plaintiff

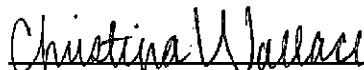
CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true copy of the foregoing document was served upon the following individuals by the means designated below:

<input checked="" type="checkbox"/> U.S. Mail	Timothy C. Fox, Attorney General
<input type="checkbox"/> Certified Mail	Office of the Attorney General
<input type="checkbox"/> FedEx/UPS	Justice Building, Third Floor
<input type="checkbox"/> Hand-Delivery	215 North Sanders
<input type="checkbox"/> Fax	P.O. Box 201401
<input type="checkbox"/> E-Mail	Helena, MT 59620-1401

DATED this 11th day of April, 2018.

BOONE KARLBERG P.C.



Christina Wallace
Paralegal

EXHIBIT A

ORDINANCE 3581

An ordinance amending Missoula Municipal Code Title 9, establishing Chapter 9.60 entitled "Firearm Sales," Sections 9.60.010 through 9.60.060 requiring criminal background checks on all gun sales and transfers, with certain exceptions, including for family, hunting, and emergency self-defense to prevent possession of firearms by certain ineligible persons pursuant to Montana Code Annotated (MCA) 45-8-351(2)(a).

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 that Chapter 9.60 Missoula Municipal Code is hereby established:

Chapter 9.60

FIREARM SALES

9.60.010	Purpose and Intent
9.60.020	Definitions
9.60.030	Background checks required for sales and transfers
9.60.040	Background check by dealer
9.60.050	Exceptions from the background check requirement
9.60.060	Violation – Penalties

9.60.010 Purpose and Intent.

This ordinance is adopted pursuant to the statutory powers explicitly granted to Montana local governments pursuant to subsection 45-8-351(2) MCA for public safety purposes to prevent and suppress the possession of firearms by convicted felons, adjudicated mental incompetents, illegal aliens, and minors in order to ensure that background checks generally occur with respect to firearm ownership transfers as a prevention mechanism to serve as a deterrent to

convicted felons, adjudicated mental incompetents illegal aliens and minors unlawfully obtaining possession of firearms.

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.

Furthermore, the City of Missoula recognizes the opportunity that all Federal firearm licensees (FFLs) have to enhance public safety and assist law enforcement by facilitating transfers of firearms between private individuals through their businesses, as noted in a 2013 "Open Letter to All Federal Firearms Licensees" from the U.S. Dept. of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives that states the following:

"As background, millions of transactions involving the private sale of firearms between the residents of the same state occur each year in the United States at gun shows, and through classified and online advertisements. These private sellers, who are not Federal firearms licensees, do not have the ability to use the National Instant Criminal Background Check System (NICS) to conduct background checks on prospective private purchasers and, consequently, have no comprehensive way to confirm whether or not the private individual to whom they are selling a firearm is prohibited from possessing a firearm.

Many FFLs throughout the United States have routinely facilitated firearms transfers between private individuals, and FFLs may charge administrative fees to do so consistent with any state law requirements. ATF encourages FFLs to facilitate firearms sales between private individuals through FFL businesses. This service provides both customers and the community assurance that individuals who want to purchase firearms undergo a comprehensive background check. FFL facilitation of private firearm transfers will also improve law enforcement's ability to trace firearms if they are later recovered in a crime."

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 with a licensed dealer, where the buyer or transferee will pass a background check before the sale or transfer may be completed.

In particular in enacting this ordinance, the City of Missoula relies on the statutory authority for local governments for public safety purposes to prevent possession of firearms by certain

ineligible persons as authorized in MCA 45-8-351(2)(a) which provides in part that: "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." The background checks required by this ordinance are adopted as the means to prevent and suppress the possession of firearms by certain ineligible persons as provided by MCA 45-8-351(2)(a).

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. "Gun show or event" shall have the same meaning attributed to that term under 27 Code of Federal Regulations 478.100(b)
- D. "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.
- E. "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.
- F. "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.
- G. "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. It shall be unlawful for any transferor or transferee to knowingly make any material false oral or written statement or to furnish or exhibit any false identification likely to deceive a dealer or law enforcement officer concerning information necessary to perform a background check..

9.60.040 Background check by dealer.

A. All steps detailed in this section are intended to be consistent with the U.S. Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives ATF Procedure 2013-1 which sets forth the record keeping and National Instant Criminal Background Check System (NICS) procedures for Federal firearm licensees (FFLs) who facilitate the transfer of firearms between private unlicensed individuals.

B. The transferor and transferee shall meet jointly with 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.

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

D. 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 or gun show or event.

E. 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 their 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 their 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:

1. At an established shooting range authorized by the governing body of the jurisdiction in which such range is located; or
2. At a lawful organized competition involving the use of a firearm, or while participating in or practicing for a performance by an organized group that uses firearms as a part of the performance; or
3. While en route to and from hunting or trapping where the transferee possesses the firearm and the transferee holds any license or permit required for the hunting or trapping activity; or
4. In the actual presence of the transferor; provided that any transfer allowed by this subsection is permitted only if the transferor has no reason to believe that the transferee is prohibited from possessing firearms under state or federal law or, if the transferee is under eighteen years of age and is receiving the firearm under direct supervision and control of an adult, that the transferor has no reason to believe such adult is prohibited from possessing firearms under state or federal law; or

H. The transfer occurs by operation of law upon the death of a person for whom the transferee is an executor, administrator, trustee, or personal representative of an estate or a trust created in a will.

I. The transferee holds either a valid Montana concealed weapons permit or a valid concealed weapons permit from a state recognized under Montana law as determined by Montana's Attorney General, and the transferee presents the permit to the transferor prior to the transaction.

9.60.060 Violation – Penalties. Any transferee or transferor who transfers a firearm in violation of this chapter shall be guilty of a misdemeanor punishable by a fine of up to five hundred dollars on the first offense, and thereafter for subsequent violations by a fine of up to five hundred dollars or by imprisonment for not more than six months, or by both such fine and imprisonment.

Effective date: This ordinance shall be effective 30 days after adoption and passage.

Severability If any section, subsection, sentence, clause, phrase or word of this ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this ordinance. The council hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, phrase, and words thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases or words have been declared invalid or unconstitutional, and if for any reason this ordinance should be declared invalid or unconstitutional, then the remaining ordinance provisions will be in full force and effect.

First reading and preliminary adoption on the 12th day of September 2016, by a vote of 9 ayes, 2 nays and 1 absent.

Second and final reading and adoption on the 26th day of September 2016, by a vote of 8 ayes, 4 nays.

ATTEST:

/s/ Martha L. Rehbein

Martha L. Rehbein, CMC
City Clerk

APPROVED:

/s/ John Engen

John Engen
Mayor

(S E A L)

EXHIBIT B

ATTORNEY GENERAL
STATE OF MONTANA

Tim Fox
Attorney General



Department of Justice
Joseph P. Mazurek Justice Bldg.
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

VOLUME NO. 57

OPINION NO. 1

CITIES AND TOWNS - Authority of city with self-government powers to enact an ordinance requiring background checks before firearm sales or transfers;
FIREARMS - Authority of city with self-government powers to enact an ordinance requiring background checks before firearm sales or transfers;
LOCAL GOVERNMENT - Authority of city with self-government powers to enact an ordinance requiring background checks before firearm sales or transfers;
CITY OF MISSOULA CHARTER - Article 1, section 1;
MISSOULA MUNICIPAL CODE - Chapter 9.60;
MONTANA CODE ANNOTATED - Title 7, chapter 1, part 1; sections 1-2-101, 7-1-111, -111(9), -113, 7-4-4306, 7-32-4305, 45-8-351, -351(1) -351(2), -351(2)(a), 53-21-166;
MONTANA CONSTITUTION OF 1972 - Article II, section 12; article X, section 6;
OPINIONS OF THE ATTORNEY GENERAL - 46 Op. Att'y Gen. No.13 (1996), 44 Op. Att'y Gen. No. 34 (1992), 42 Op. Att'y Gen. No. 8, 37 Op. Att'y Gen. No. 68 (1977);
UNITED STATES CONSTITUTION - Amendment II.

HELD: A city, town, or other local government entity with self-governing powers is prohibited by Montana state law from enforcing a local regulation or ordinance requiring background checks on firearm sales or transfers within its borders.

January 26, 2017

Speaker Austin Knudsen
P.O. Box 200400
Helena, MT 59620-0400

Dear Speaker Knudsen:

[PI] You have requested my opinion on a question which I have restated below:

Does Montana state law prohibit a city, town, or other local government entity with self-governing powers from enforcing a local regulation or

TELEPHONE: (406) 444-2026 FAX: (406) 444-3549 E-MAIL: contactdoj@mt.gov WEB: mtdoj.gov

MONTANA DEPARTMENT OF JUSTICE

Legal Services Division * Division of Criminal Investigation * Highway Patrol Division * Forensic Science Division
Gaming Control Division * Motor Vehicle Division * Information Technology Services Division * Central Services Division

ordinance requiring background checks on firearm sales and transfers within its boundaries?

[P2] On September 26, 2016, the Missoula City Council adopted an ordinance requiring that a transferee to any firearm transfer conducted within the city limits of Missoula submit to a background check, subject to certain exceptions. See Missoula Municipal Code Chapter 9.60. As Speaker of the House, you have asked for an Attorney General Opinion regarding whether a local government, including one with self-governing powers, can pass such an ordinance based on exceptions contained within Mont. Code Ann. § 45-8-351(2)(a). You believe it is important to resolve this question of state law before the end of the 2017 Legislative Session because there is considerable interest in new legislation on this issue depending on my interpretation of the statute.

[P3] As stated in the purpose and intent section of the ordinance, the City of Missoula enacted the ordinance based on its belief that § 45-8-351(2) allows it to regulate the sale and transfer of firearms within its borders through mandatory background checks in order to prevent the possession of firearms by "convicted felons, adjudicated mental incompetents, illegal aliens and minors." It concluded that there is "broad consensus that felons, minors, and people adjudicated as mentally ill by a court should not possess firearms." The City's understanding is that this exception in subsection (2)(a) is sufficient to bypass any prohibition in subsection (1) that presumably restricts the City's authority on this issue.

[P4] The effect of the ordinance is that every firearm transfer, including the sale, gift or loan of a firearm, be subject to a background check. Exceptions are made for transfers involving immediate family members, transfers between collectors as defined in federal law, for antique firearms as defined in federal law, "temporary transfers" to prevent imminent death or great bodily harm, other "temporary transfers" taking place at shooting ranges, organized competitions, en route to hunting or trapping, and for transferees who hold a valid concealed weapons permit under Montana law. Any person violating the transfer regulations, including those classes not mentioned in Mont. Code Ann. § 45-8-351(2), would be guilty of a misdemeanor punishable by a fine of up to five hundred dollars and/or by imprisonment for not more than six months.

[P5] Your question can be answered through a straightforward statutory construction analysis. A primary rule of statutory interpretation requires courts to apply plain and unambiguous statutes according to their express terms. Mont. Code Ann. § 1-2-101. A court cannot amend, omit or insert terms of the statute. *Id.* "When the statute is plain, unambiguous, direct and certain, the statute speaks for itself and there is no need to resort to extrinsic means of interpretation." *In re Marriage of Christian*, 295 Mont. 352, 356,

983 P.2d 966, 968 (1999); *State ex rel. Cobbs v. Montana Dep't of Social and Rehabilitation Servs.*, 274 Mont. 157, 162, 906 P.2d 204, 207 (1995) ("The Court is to effectuate the intent of the Legislature, and if the Legislature's intent can be determined from the plain meaning of the words used in a statute, the courts may not go further and apply any other means of interpretation."); *Ravalli County v. Erickson*, 2004 MT 35, ¶ 11, 320 Mont. 31, 85 P.3d 772 ("This Court has repeatedly held that the role of courts in applying a statute has always been to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted")

[P6] Two statutes answer your question. The first deals with restrictions on a self-governing local government's ability to exercise any power that applies to or affects the right to keep and bear arms. The second statute generally preempts any form of local government from regulating the sale or transfer of firearms.

[P7] First, Mont. Code Ann. § 7-1-111 denies certain powers to local government with self-governing powers. A charter form of government (like Missoula) possesses self-government powers and may exercise any power not prohibited by the constitution, law, or charter. Mont. Const. Art. X, § 6 (1972). Simply stated, a local government with self-government powers possesses the power, unless the power has been specifically denied. *D & F Sanitation Serv. v. City of Billings*, 219 Mont. 437, 444-45, 713 P.2d 977, 981-82 (1986); 46 Op. Att'y Gen. No. 13 (1996).

[P8] In determining whether a particular self-government power is authorized, numerous previous Attorney General's Opinions have engaged in a three-part analysis:

- (1) consult the local government's charter and consider constitutional ramifications;
- (2) determine whether the exercise is prohibited under the various provisions of Mont. Code Ann. title 7, chapter 1, part 1 or other statute specifically applicable to self-government units;
- (3) decide whether it is inconsistent with state provisions in an area affirmatively subjected to state control as defined by Mont. Code Ann. § 7-1-113.

See, e.g., 46 Op. Att'y Gen. No. 13 (1996); 44 Op. Att'y Gen. No. 34 at 140, 142 (1992); 37 Op. Att'y Gen. No. 68 at 272, 274 (1977).

[P9] The first level of analysis reveals no limitation on Missoula's authority to regulate firearm sales or transfers pursuant to its charter. The City of Missoula adopted its charter

form of government in 1996, and amended it once in 2006. The charter itself does not mention any limitations relevant to the issue at hand, but it does state it “shall exercise all powers conferred upon Montana cities with self-government powers and shall have all powers not prohibited by the Constitution of the United States of America, the Montana Constitution, and the laws of the State of Montana or this Charter.” See *City of Missoula Charter*, Article I, section 1. This is consistent with Article X, section 6 of the Montana Constitution.

[P10] The second level of analysis applies directly to your question. The powers of self-governing local government are specifically limited in Mont. Code Ann. § 7-1-111, which denies a local government:

(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;

[P12] The expression “to keep or bear arms” as used in Mont. Code Ann. § 7-1-111(9) originates with the Second Amendment to the U.S. Constitution, which has been interpreted as an individual constitutional right. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The drafters of Montana’s Constitution used the phrase “to keep or bear arms” in article II, section 12, and added more explicit language to guarantee this fundamental right to individuals “in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned.” The Montana Supreme Court has pointed out that much like other state constitutional rights, the right to keep and bear arms is not without its limits. *State v. Fadness*, 2012 MT 12, ¶ 31, 363 Mont. 322, 268 P.3d 17. However, those circumstances where this state right was limited were instances involving convicted felons, not law-abiding citizens looking to purchase, sell or transfer a firearm. See *id.*; *State v. Stroud*, 210 Mont. 58, 683 P.2d 459 (1984).

[P13] The next step is to determine whether a regulation on the sale or transfer of firearms “applies to or affects the right to keep or bear arms” as stated in Mont. Code Ann. § 7-1-111(9).¹ It is clear on its face that an ordinance requiring background checks for firearm sales or transfers within its borders “applies to or affects the right to keep and bear arms.” Several cases from other states and federal courts clearly state that it does as

¹ The question answered in this Opinion is not whether any restrictions on firearm sales or transfers would be upheld as constitutional, but rather whether restrictions on firearm sales or transfers “appl[y] to or affect[] the right to keep or bear arms” in a way to trigger the prohibition in Mont. Code Ann. § 7-1-111(9).

well. *Andrews v. State*, 50 Tenn. 165, 178 (1871) (“The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair.”); *Luis v. United States*, 136 S. Cl. 1086, 1098-99 (2016) (“Constitutional rights thus implicitly protect those closely related acts necessary to their exercise. . . . Without protection for these closely related rights, the Second Amendment would be toothless.”). See also *Hill v. Colorado*, 530 U.S. 703, 745 (2000) (Scalia, J., dissenting) (“There comes a point . . . at which the regulation of action intimately and unavoidably connected with [a right] is a regulation of [the right] itself.” The right to keep and bear arms, for example, “implies a corresponding right to obtain bullets necessary to use them,” *Jackson v. City and County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014), and “to acquire and maintain proficiency in their use,” *Ezell v. Chicago*, 651 F. 3d 684, 704 (7th Cir. 2011).

[P14] In other words, one cannot try to regulate the ability to acquire firearms (sale or transfer) without exercising power that applies to or affects the right to keep or bear arms. Therefore, the general prohibition in Mont. Code Ann. § 7-1-111(9) clearly places a broad limitation on the power of self-governing cities to enact any ordinance that regulates the sale and transfer of firearms. Based on this conclusion, the Missoula ordinance cannot be enforced.

[P15] To avoid the general prohibition on self-governing local governments exercising any power that applies to or affects the right to keep or bear arms, the City of Missoula looked elsewhere in Montana Code for authority to adopt the firearm transfer restrictions. As stated in its purpose and intent statement for the ordinance, the City of Missoula used the limited exceptions listed in Mont. Code Ann. § 45-8-351(2)(a).² These listed exceptions apply to a broad limitation on a local government’s ability to pass or enforce ordinances regarding the sale or transfer of firearms:

² *The City of Helena v. Yetter* (decided in the First Judicial District and not in Missoula County) 1993 Mont. Dist. LEXIS 172, raises serious concerns about whether a city with self-governing powers can rely on the exceptions within Mont. Code Ann. § 45-8-351(2). However, the City of Missoula acknowledges that the limitations in Mont. Code Ann. § 45-8-351(1) apply to its own authority as a self-governing local government because it looked toward the exceptions to the general prohibitions on local government ordinance on firearms listed in Mont. Code Ann. § 45-8-351(2). In order to provide a thorough analysis, this Opinion shows how the ordinance is unenforceable based on two separate sections of the Montana Code Annotated.

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.

[P16] The Montana Legislature passed HB 643 (Rep. Bob Thoft - Stevensville) in 1985, codified as Mont. Code Ann. § 45-8-351. This statute was slightly modified in the 1991 and 2011 Legislative Sessions, but the relevant portions of the law for purposes of this Attorney General Opinion have remained unchanged since 1985. There is only one previous Attorney General Opinion regarding this statute, which is not instructive on your question.³

[P17] Plainly interpreted, the Montana Legislature has prohibited all forms of local government from exercising any regulatory power over the purchase, sale or transfer of firearms. The narrow exceptions to this general rule in (2)(a) do not allow the regulation of purchases, sales or transfers of firearms; rather, the exceptions clearly pertain only to specific situations involving the use and possession of firearms.

³ In 1987, the Missoula City Attorney received an Attorney General Opinion on whether it could enforce a recently passed ordinance prohibiting the discharge of firearms within designated areas which lie outside the city limits but within five miles of the boundaries of the city. 42 Op. Att'y Gen. No. 8. The Opinion concluded that the City of Missoula could not enforce an ordinance prohibiting the discharge of weapons five miles outside of its borders as a health ordinance and enforced pursuant to the extraterritorial powers of the mayor as provided in Mont. Code Ann. § 7-4-4306. The Opinion did, however, sustain the City of Missoula's authority to enforce the ordinance within its own borders as provided by the narrow exceptions in Mont. Code Ann. § 45-8-351(2)(a).

[P18] Yet the City of Missoula expanded § 45-8-351(2)(a) to allow the city to regulate all sales and transfers within the city boundaries so as to prevent the possession of firearms by felons, people adjudicated as mentally ill⁴, minors and illegal aliens⁵. This dragnet approach on all gun sales or transfers within the City of Missoula's borders ignores the long-standing statutory prohibitions previously discussed.

[P19] To interpret subsection (2)(a) in such a way would allow the narrow exceptions to completely swallow the general prohibition—rendering subsection (1) meaningless and nullifying Mont. Code Ann. § 7-1-111(9)'s limitation of cities with self-governing powers. In order to give “effect to all” parts of the statute, a plain meaning interpretation of the statute as a whole could never support the City of Missoula's reasoning. See Mont. Code Ann. § 1-2-101. Even more troubling, the City of Missoula's interpretation of Mont. Code Ann. § 45-8-351 would allow a city to require registration of firearms within its boundaries if the stated intent of the regulation was to prevent the prohibited individuals from possessing firearms.

[P20] In the construction of a statute, the intention of the legislature is to be pursued if possible. Mont. Code Ann. § 1-2-102. The legislative record in this case likewise shows that the Legislature passed Mont. Code Ann. § 45-8-351 to specifically preempt all Montana local jurisdictions from passing regulations or ordinances addressing the sale or transfer of firearms.

[P21] HB 643 marked a dramatic reversal of state policy on local government involvement in firearm issues. It repealed Mont. Code Ann. § 7-32-4305, a long-standing state law that *authorized* cities and towns to regulate firearm sales. (“Control of firearms. The city or town council has power to prevent and suppress the sale of firearms and carrying of concealed weapons.”) In its place, § 45-8-351 put a general *prohibition* on

⁴ Montana does not report people who are adjudicated as mentally ill in our state courts to NICS because mental health records are confidential pursuant to Mont. Code Ann. § 53-21-166. No exception within the state law is made to provide for reporting these confidential records to the federal government. Therefore, a background check is unlikely to accurately give information regarding a mental health adjudication for people adjudicated within Montana.

⁵ In *Montana Immigrant Justice Alliance v. Bullock*, 2016 MT 104, the Montana Supreme Court struck down a law denying state services to individuals defined as “illegal aliens,” because that term is unknown in federal law and unconstitutionally places in the hands of state agents immigration status decisions. The only other place in Montana Code where the term “illegal aliens” is used is in Mont. Code Ann. § 45-8-351(2)(a), which calls into question its enforceability.

ordinances from any local government aimed at sales and transfers of firearms. The Legislature included only narrow exceptions to this new state preemption policy, and none of those specifically override subsection (1) or § 7-1-111(9).

[P22] The proponents left no ambiguity in their reasons for supporting HB 643. They had seen efforts around the country to ban handguns, register firearms, and place restrictions or taxes on the sale of firearms in several larger cities around the country. HB 643 reversed state law authorizing local regulation of firearms and created Montana state preemption of firearm regulation to ensure there were consistent laws within the state's borders. ("This bill provides for a standardization of firearm laws throughout the State of Montana based upon current and future statutes enacted in the Legislature. It makes null and void local ordinances that are more or less restrictive than current state law (such as a Morton Grove, Illinois Handgun Ban). A state firearms preemption law will prevent a hodgepodge effect of firearms laws within the state and create uniformity of firearm laws within Montana." - Louis J. Brune, NRA NW State Liaison). Hr'g on HB 634 House Judiciary, Feb. 14, 1985.

[P23] Most of the examples cited during the legislative debate on HB 643 focused on out-of-state efforts to regulate firearms, but there was one local example cited. In 1984, the City of Missoula considered passing a local ordinance regulating the possession of firearms on public property. While this specific issue of firearms in public places was addressed through the amendment process to HB 643, it was clear that the Legislature sought to apply these new restrictions to all cities in towns in Montana, including Missoula, to ensure state law preempted any local efforts at firearm sales and transfers. The purpose of HB 643 was clear--only the state should decide how firearm purchases, sales and transfers should be regulated, if at all. In other words, the regulation of the sale and transfer of firearms is an area affirmatively subjected to state control as defined by Mont. Code Ann. § 7-1-113, which means Missoula's ordinance also is barred by the third step in the three-part test to determine whether a particular self-government power is authorized.

[P24] Nothing in this opinion should be construed to limit a local government's authority to regulate firearms as expressly authorized in (2)(a), including ordinances regulating the discharge of firearms, preventing and suppressing 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. But to extend those exceptions into areas where the Legislature sought to prohibit local government interference with a fundamental right is not an appropriate use of any local government's authority.

Speaker Austin Knudsen

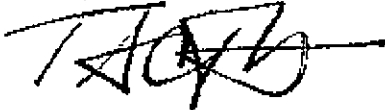
January 26, 2017

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THEREFORE, IT IS MY OPINION:

A city, town, or other local government entity with self-governing powers is prohibited by Montana state law from enforcing a local regulation or ordinance requiring background checks on firearm sales or transfers within its borders.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Fox', with a horizontal line extending to the right.

TIMOTHY C. FOX
Attorney General

tcf/jb/jym