

1 ROBERT L. DESCHAMPS, III
2 District Court Judge
3 Department No. 2
4 Missoula County Courthouse
5 Missoula, Montana 59802
6 (406) 258-4772

FILED OCT 11 2018

SHIRLEY E. FAUST/CLERK
By *Donna M. Duffy*
Deputy

7 <MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY>

8 CITY OF MISSOULA,
9 Plaintiff,
10 vs.
11 TIMOTHY C. FOX, in his official
12 capacity as the Attorney General for
13 the State of Montana,
14 Defendant.

DEPT NO. 2

CAUSE NO: DV-18-429

ORDER

15 Before the Court is Plaintiff's Motion for Summary Judgment and
16 Defendant's Cross-Motion for Dismissal. The matter is briefed, including
17 Amici Curiae briefs filed on behalf of both Plaintiff and Defendant, and the
18 matter is ready for decision.

19 ORDER

20 Plaintiff's Motion is **GRANTED**. Defendant's Motion is **DENIED**.

21 DISCUSSION

22 Defendant's Motion to Dismiss – Given the rather late timing of the Attorney
23 General's motion to dismiss and the fact that the ordinance at issue has
24
25
26
27



1 remained silent and essentially unenforced for over a year persuades this
2 Court that a ruling is necessary. By granting the Attorney General's motion
3 and dismissing this case, the Court would be "kicking the can down the
4 road," only to have the action re-emerge once the ordinance is applied and
5 presumably violated. To re-file the same lawsuit at that point would be a
6 waste of taxpayer resources. An immediate ruling on this matter clearly
7 preserves the interests of the city's resources, the state's resources and
8 promotes judicial economy.

9
10
11 The Attorney General is correct that the present case merely involves a
12 claim that the City of Missoula's statutory analysis is correct and the Attorney
13 General's is not. A difference of opinion on the legal effect of statutes does
14 not result in an actual controversy, however neither party cites any Montana
15 law directly on point in support of their respective claims on this issue. It is
16 true that, "No litigant before [the Court] is in immediate danger of sustaining
17 direct injury... [and] we do not have a justiciable controversy over which the
18 judicial power to determine real controversies may be exercised," Hardy v.
19 Krutzfeldt, 206 Mont. 521, 525, 672 P.2d 274, 276 (Mont. 1983), however the
20 Montana Supreme Court has only, "*on occasion* refused to entertain a
21 declaratory judgment action on the ground that no controversy is pending
22 which the judgment would affect." Northfield Ins. Co. v. Mont. Ass'n of
23
24
25
26
27



1 Counties, 2000 MT 256, ¶ 10, 301 Mont. 472, 10 P.3d 813. (citing Hardy, 206
2 Mont. at 524, 672 P.2d at 275) (emphasis added). Again, while Missoula's
3 harm at this point may be deemed "speculative" and failing to result in a
4 justiciable controversy, Mont. Power Co. v. Mont. PSC, 2001 MT 102, ¶ 32,
5 26 P.3d 91, it is more than likely that there will be a justiciable case in the
6 future – and the Court's ruling would be, and is, as follows:
7

8 Plaintiff's Motion for Summary Judgment - M.R.Civ. P. 56(c) "provides
9 that the judgment sought shall be rendered forthwith if the pleadings,
10 depositions, answers to interrogatories, and admissions on file, together with
11 the affidavits, if any, show that there is no genuine issue as to any material
12 fact and that the moving party is entitled to a judgment as a matter of law."
13 Va. City v. Estate of Olsen, 2009 MT 3, ¶ 14, 348 Mont. 279, 201 P.3d 115.
14 "Thus, the party moving for summary judgment carries the initial burden to
15 establish the absence of genuine issues of material fact and entitlement to
16 judgment as a matter of law." Id. (citing Smith v. Burlington Northern and
17 Santa Fe Ry. Co., 2008 MT 225, ¶ 10, 344 Mont. 278, 187 P.3d 639). "If this
18 burden is met, the nonmoving party then must come forward with substantial
19 evidence raising a genuine issue of material fact essential to one or more
20 elements of the case." Id. (citing Smith, ¶ 10).
21
22
23
24
25
26
27

The Montana Supreme Court "will not insert into statutes something that



1 is not contained therein." Greens at Fort Missoula, LLC v. City of Missoula,
2 897 P.2d 1078, 1080 (1995) (citing Section 1-2-101, MCA). "The powers of
3 local self-governing units are to be liberally construed pursuant to Section 7-
4 1-106, MCA." Diefenderfer v. Billings, 223 Mont. 487, 490, 726 P.2d 1362,
5 1364 (1986).
6

7
8 On September 26, 2016, the City of Missoula adopted Ordinance 3581
9 which requires background checks prior to most gun purchases from private
10 unlicensed sellers. According to the City, the Ordinance mirrors a number of
11 similar ordinances across the country. Its intent is "to close a loophole in
12 federal law that allows convicted felons and other categories of people
13 prohibited from owning firearms to obtain guns without a background check."
14 Specifically, the Ordinance requires that parties to a sale or transfer made by
15 one who is not a licensed firearms dealer must meet with a licensed dealer
16 and successfully complete a background check conducted through that
17 dealer before the sale or transfer may be completed.
18
19
20

21 On January 26, 2017, a state representative from northeastern Montana
22 requested an opinion from the Attorney General regarding the enforceability
23 of the Ordinance. In his subsequent opinion, the Attorney General concludes
24 that the Ordinance is preempted by state law, focusing on two statutory
25 provisions: Mont. Code. Ann. § 7-1-111(9), which prohibits self-governing
26
27



1 cities like Missoula from exercising "any power that applies to or affects the
2 right to keep or bear arms," and Mont. Code Ann. § 45-8-351(1), which
3 provides:
4

5 45-8-351 Restriction on local government regulation of firearms.

6 (1) Except as provided in subsection (2), a county, city, town,
7 consolidated local government, or other local government unit
8 may not prohibit, register, tax, license, or regulate the purchase,
9 sale or other transfer (including delay in purchase, sale, or other
10 transfer), ownership, possession, transportation, use, or
unconcealed carrying of any weapon, including a rifle, shotgun,
handgun, or concealed handgun.

11 (2)

12 (a) For public safety purposes, a city or town may regulate the
13 discharge of rifles, shotguns, and handguns. A county, city, town,
14 consolidated local government, or other local government unit has
15 power to prevent and suppress the carrying of concealed or
16 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.*

17 (b) Nothing contained in this section allows any government to
18 prohibit the legitimate display of firearms at shows or other public
19 occasions by collectors and others or to prohibit the legitimate
20 transportation of firearms through any jurisdiction, whether in
airports or otherwise.

21 ...

22 (emphasis added).

23 The Attorney General further asserts that the Ordinance is also barred
24 by Mont. Code Ann. § 7-1-113, which "prohibits self-governing cities from
25 exercising any power in a manner inconsistent with state law or regulation in
26 any area affirmatively subjected by law to state regulation or control."
27



1 However, as noted, under Mont. Code Ann. § 7-1-106, Missoula's governing
2 authority must be "liberally construed," with "[e]very reasonable doubt as to
3 the existence of a local government power or authority . . . resolved in favor of
4 the existence of that power or authority." Mont. Code Ann. § 7-1-106; see
5 also Mont. Const. art. XI, § 4. The City points out that "the narrow, limited
6 interpretation" of § 45-8-351(2) set forth in the Attorney General's opinion
7 omits any mention of Mont. Code Ann. § 7-1-106. Pursuant to this Mont.
8 Code Ann. § 7-1-106, the City may "provide any services or perform any
9 functions not expressly prohibited by constitution, law or charter." Lechner v.
10 Billings, 244 Mont. 195, 197, 797 P.2d 191, 193 (1990). "Its power and
11 authority are to be liberally construed, with every reasonable doubt as to the
12 existence of a power or authority resolved in favor of the power or authority's
13 existence." Id.

14 The Court finds that, by invalidating the City of Missoula's Ordinance,
15 the Attorney General's opinion deprives Missoula of its own authority. It is
16 highly speculative for the National Rifle Association ("NRA") (amicus for the
17 A.G.) to suggest that, "Missoula's interpretation [of the statutes at issue]
18 would allow it to regulate the transfer of firearms to law-abiding, responsible
19 citizens under the guise of regulating the possession of firearms by felons,
20 mental incompetents, illegal aliens and minors." The NRA asserts "this fails
21
22
23
24
25
26
27



1 under basic principles of statutory construction.” Further,

2 “If Missoula’s argument were correct, it would be difficult to think
3 of a firearm regulation that Missoula could not enact. For
4 example, even if a background check requirement made it more
5 difficult for felons to get firearms, it would not make it impossible
6 for them to do so – they could, for instance, employ a straw
7 purchaser that could pass a background check to acquire a
firearm for them. How to address this problem? Well, one
solution could be to ban the sale of firearms entirely.”¹

8 According to the NRA, “To really keep guns out of the hands of felons,
9 then perhaps the solution is to ban possession of firearms by
10 everyone.” (emphasis included). The Court finds these premonitions
11 are dubious at best.
12

13 Amici for Plaintiff, Missoula citizens Tom Platt, Mark Grimes, Heidi
14 Kendall and John Moffatt assert that they “are not zealots who support
15 banning guns entirely or taking away anyone’s Second Amendment
16 rights.” These citizens state they, “believe that the Ordinance is a
17 reasonable, common-sense measure well within the City’s lawful
18 powers to ensure that firearms do not fall into the hands of people who
19
20
21
22

23 ¹ “[W]hile supporting improvements to the background check system after the Virginia Tech shootings, the
24 NRA repeatedly emphasized that in its view ‘no piece of legislation will stop a madman bent on committing
25 horrific crimes.’” Tulane Law Professor Stephen Griffin counters that, “the phrase ‘you can’t prevent
26 something like this’ is ‘surely one of the most demoralizing and misleading memes ever released into the
27 public sphere.’” “If it is reasonable to act to prevent terrorism,” Griffin wrote, “it is reasonable to make every
effort to make sure that nothing like this ever happens again.” Indeed, Americans surely would have reacted
with disgust if Congress had responded to the terrorist attacks on September 11, 2001, by announcing that it
would not be doing anything to try to make the nation safer because no piece of legislation will stop madmen
bent on committing horrific crimes against us. Allen Rostron, *Incrementalism, Comprehensive Rationality,
and the Future of Gun Control*, 67 MD. L. REV. 511, 568 (2008).



1 by law are not entitled to possess them.” Amici correctly assert that,
2 “background checks are a narrow and carefully targeted measure to
3 ensure that guns are not purchased by those who are not legally
4 entitled to possess them, and they impose at most a trivial burden—a
5 brief delay, often no more than 15 minutes.”
6

7
8 In their brief, these individuals point out that “firearms are an
9 important part of Montana’s rich culture.” The Ordinance was enacted
10 “specifically to further that goal in the interest of public safety and is a
11 lawful exercise of local government power expressly supported by the
12 plain language of Mont. Code Ann. §45-8-351(2)(a).” Moreover,
13 Montana communities that do not desire a background check ordinance
14 are free to continue without one.
15
16

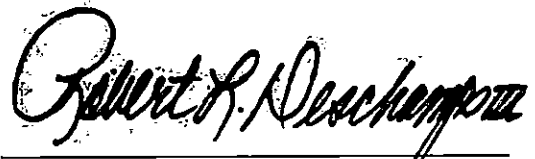
17 The Attorney General’s failure to recognize the law’s presumption
18 in favor of the power of local governments like Missoula’s is erroneous.
19 The Attorney General concludes in his opinion, without any statutory
20 basis, that the exceptions of Subsection (2)(a) “do not allow the
21 regulation of purchases, sales or transfers of firearms; rather, the
22 exceptions clearly pertain only to specific situations involving the use
23 and possession of firearms.” AG Op. ¶ 17. However, the best evidence
24 of the legislature’s intent, not addressed by the Attorney General, is the
25
26
27



1 statute's plain text which grants the City the express authority "to
2 prevent and suppress . . . the possession of firearms by convicted
3 felons" and others who are not entitled by the law to possess them.
4
5 Mont. Code Ann. § 45-8-351(2)(a). The power possessed by the City in
6 enacting the Ordinance, "is not an expansive reading of the statute, but
7 one that is taken from the clear meaning of the language used."
8
9 Diefenderfer v. Billings, 223 Mont. 487, 490, 726 P.2d 1362, 1364
10 (1986).

11
12 Based on the foregoing, Plaintiff's Motion for Summary Judgment
13 is **GRANTED**.

14
15 DATED this 11th day of October, 2018.

16
17 
18 ROBERT L. DESCHAMPS, III
19 DISTRICT JUDGE
20

21 cc: Office of the Montana Attorney General
22 Rhoades, Siefert & Erickson, PLLC
23 Boone Karlberg P.C.
24 Eric Tirschwell, Esq.
25 Goetz, Baldwin and Geddes, PC
26 Jim Nugent, Missoula City Attorney
27

