

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 8

CITIES AND TOWNS - Extraterritorial authority to regulate discharge of firearms;
HEALTH - Authority of city to enact ordinance regulating discharge of firearms as a health ordinance;
LOCAL GOVERNMENT - Extraterritorial authority of city to regulate discharge of firearms;
MUNICIPAL CORPORATIONS - Mayor's extraterritorial power to enforce firearm discharge ordinance as health ordinance;
MONTANA CODE ANNOTATED - Sections 7-1-4123, 7-4-4306, 7-32-4302, 45-8-101(1)(d), 45-8-343, 45-8-351, 50-2-116;
MONTANA CONSTITUTION - Article XI, section 4(2).

- HELD: 1. A city ordinance regulating the discharge of firearms outside the city limits may not be enacted as a health ordinance and enforced pursuant to the extraterritorial powers granted to the mayor by section 7-4-4306, MCA.
2. A city may adopt an ordinance prohibiting disorderly conduct resulting from the discharge of firearms and enforce the ordinance within three miles of the city limits pursuant to section 7-32-4302, MCA.

27 February 1987

Jim Nugent
Missoula City Attorney
201 West Spruce
Missoula MT 59802-4297

Dear Mr. Nugent:

You have requested my opinion concerning whether a city ordinance regulating the discharge of firearms outside the city limits may be enacted as a health ordinance and enforced pursuant to the extraterritorial powers granted

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to the mayor by section 7-4-4306, MCA. That section provides:

Extraterritorial powers. The mayor has power to exercise such power as may be vested in the mayor by ordinance of the city or town, in and over all places within 5 miles of the boundaries of the city or town for the purpose of enforcing the health and quarantine ordinances and regulations thereof.

The Missoula City Council has adopted an ordinance prohibiting, with certain exceptions, the discharge of firearms within designated areas which lie outside the city limits but within five miles of the boundaries of the city. The ordinance was enacted in response to concern that hunting and shooting with firearms in developed residential and commercial areas outside the city can endanger persons who reside or recreate within or near those developed areas. The ordinance provides that the city council may designate an area to be included within the geographic scope of the ordinance upon written request of the county commissioners. Your letter states that three areas adjacent to the city have thus far been designated by the council as areas within which the discharge restriction applies.

The City of Missoula is a municipality with general powers and therefore has the legislative power, subject to the provisions of state law, to adopt ordinances required to preserve peace and order and secure freedom from dangerous activities, secure and promote the general public health and welfare, and exercise any power granted by state law. § 7-1-4123, MCA. Powers of incorporated cities such as Missoula are to be liberally construed. Mont. Const., art. XI, § 4(2); Stevens v. City of Missoula, 40 St. Rptr. 1267, 667 P.2d 440 (1983). However, since Missoula has chosen to retain general governmental powers rather than to adopt a self-government charter, the city has only those powers expressly given to it by the Legislature. See D&F Sanitation Service v. City of Billings, 43 St. Rptr. 74, 713 P.2d 977 (1986).

In 1985 the Legislature enacted section 45-8-351, MCA, which provides as follows:

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

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other transfer (including delay in purchase, sale, or other transfer), ownership, possession, transportation, use, or unconcealed carrying of any rifle, shotgun, or 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 weapons, the carrying of 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.

Subsection (2)(a) of this statute grants the city the express power to regulate the discharge of firearms for public safety purposes. The city's authority to prevent and punish the discharge of firearms is also found in section 45-8-343, MCA, which permits the city to impose a fine in excess of \$25 or a term of imprisonment upon any person who "willfully shoots or fires off a gun, pistol, or any other firearm" within its limits. In addition, the city has the power to adopt an ordinance prohibiting disorderly conduct, which by statutory definition includes disturbing the peace by discharging firearms. §§ 45-8-101(1)(d), 7-32-4302, MCA; see City of Billings v. Batten, 42 St. Rptr. 1398, 705 P.2d 1120 (1985); City of Whitefish v. O'Shaughnessy, 42 St. Rptr. 928, 704 P.2d 1021 (1985).

I conclude from a reading of these statutes that the Legislature has granted the City of Missoula the authority to adopt ordinances regulating the discharge of firearms. However, as discussed below, I also conclude that an ordinance prohibiting the discharge of firearms may not be adopted as a health ordinance and enforced pursuant to the extraterritorial powers of the mayor as provided in section 7-4-4306, MCA.

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There is no doubt that section 7-4-4306, MCA, allows the city to extend its police power five miles beyond the city limits in matters relating to health and quarantine. While the police power jurisdiction of a municipal corporation is generally limited by the territorial boundaries of the municipality, the Legislature may confer on a municipal corporation the right to exercise police power beyond and within a prescribed distance of the municipal limits. However, statutes authorizing the exercise of municipal power beyond the municipal boundaries are strictly construed. See 62 C.J.S. Municipal Corporations § 141; 56 Am. Jur. 2d Municipal Corporations § 436.

Since the Missoula ordinance is obviously not a quarantine ordinance, the question is whether it may be viewed as a health ordinance. While the ordinance does not refer to its purpose, your letter indicates that the city council members have determined that the discharge of firearms is both a public health and a public safety matter and want the ordinance enforced as a health ordinance pursuant to the mayor's extraterritorial powers provided in section 7-4-4306, MCA.

It is well settled that under the guise of police power the state and its municipal subdivisions have the power and duty to do all things necessary to fully protect the public in the preservation of its health and well-being. Ruona v. City of Billings, 136 Mont. 554, 323 P.2d 29 (1958). However, neither the Legislature nor the Montana Supreme Court has addressed the definition and scope of the term "health" as it concerns the ordinance authority of a municipality.

While it is true that to the victim of a gunshot wound the discharge of the offending firearm is a "health" matter of utmost concern, I am not persuaded that regulation of the discharge of firearms should be viewed as within the scope of the health ordinance authority of the city. By enacting section 45-8-351(2)(a), MCA, the Legislature has indicated that such regulation is authorized for the purpose of promoting public safety. Municipal power relative to the public safety has been distinguished from municipal power relative to the public health. In general the distinction is between control of causes of personal injury and property damage and control of the causes of disease. Power as to public health will not justify measures as to public safety. See McQuillin, Municipal Corporations § 24.220 (3d ed. 1981); Vincon v. Howe Builders Association of Atlanta, 213 S.E.2d 890 (Ga. 1975).

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The terms "health" and "safety" are often used together in statutes and judicial decisions. See, e.g., § 82-4-203(14), MCA; Mont. Const., art. II, § 3; Ruona v. City of Billings, supra. However, the terms should be construed as coordinate words when determining either a power of government or a reservation of power. State v. Clausen, 148 P. 28, 33 (Wash. 1915). The terms are not interchangeable even though they may refer to similar concerns for the public well-being. The provisions of section 50-2-116, MCA, which set forth the powers and duties of local boards of health, further support the view that the term "public health" relates to matters such as sanitation and the control of communicable diseases rather than the prevention of traumatic personal injury resulting from the discharge of firearms. Because the mayor's extraterritorial power under section 7-4-4306, MCA, does not extend to matters of safety as distinguished from health, I conclude that the ordinance in question may not be enforced as a health ordinance beyond the city limits.

This opinion should not be read to mean that the city is without authority to regulate the discharge of firearms outside the city limits. Section 7-32-4302, MCA, gives the city council the express power to prevent and punish disorderly conduct within three miles of the city limits. As mentioned above, discharging a firearm is one of the statutorily enumerated acts which may disturb the peace and constitute the offense of disorderly conduct. § 45-8-101(1)(d), MCA. Although the extraterritorial reach of the city's police power under section 7-32-4302, MCA, is not as extensive as its five-mile jurisdiction under section 7-4-4306, MCA, the Legislature has clearly granted the city the authority to prevent disturbances of the peace which result from the discharge of firearms in developed areas within three miles of the city limits.

THEREFORE, IT IS MY OPINION:

1. A city ordinance regulating the discharge of firearms outside the city limits may not be enacted as a health ordinance and enforced pursuant to the extraterritorial powers granted to the mayor by section 7-4-4306, MCA.
2. A city may adopt an ordinance prohibiting disorderly conduct resulting from the discharge of firearms and enforce the ordinance within three miles of the city limits pursuant to section 7-32-4302, MCA.

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Very truly yours,

MIKE GREELY
Attorney General