

DA 18-0672

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 250

CITY OF MISSOULA,

Plaintiff and Appellee,

v.

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

Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DV-32-2018-429
Honorable Robert L. Deschamps, III, Presiding Judge

COUNSEL OF RECORD:

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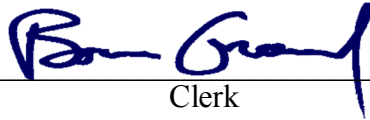
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David H. Thompson, Cooper & Kirk, PLLC, Washington, District of
Columbia

Submitted on Briefs: September 11, 2019

Decided: October 22, 2019

Filed:



Handwritten signature in blue ink, appearing to read "Ben Grand".

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Timothy C. Fox, Attorney General for the State of Montana, appeals from the entry of summary judgment in favor of the City of Missoula (City or Missoula), by the Fourth Judicial District Court, Missoula County. The judgment declared that City Ordinance 3581, City of Missoula, Mont., Municipal Code § 9.60 (2016), was not prohibited under Montana law, overturning an opinion issued by the Attorney General, 57 Op. Att’y Gen. No. 1 (2017). We reverse and remand for entry of judgment in favor of the Attorney General, and restate the issues as follows:

1. Is the City’s declaratory judgment action justiciable, given the ordinance has not been enforced?

2. Did the District Court err by holding that Missoula, a self-governing municipality, may require background checks on firearm transfers without violating the statutory prohibition upon local government regulation of the “purchase, sale or other transfer” of firearms?

PROCEDURAL AND FACTUAL BACKGROUND

¶2 On September 26, 2016, the City adopted Ordinance 3581 (Ordinance), which imposed a requirement upon persons purchasing or otherwise receiving a firearm in the City, including from private unlicensed dealers, to pass a national instant background check. The Ordinance provided some exceptions for certain transfers, such as those involving immediate family members, antique firearms, law enforcement, and temporary transfers “necessary to prevent imminent death or great bodily harm to the transferee.” City of Missoula, Mont., Municipal Code § 9.60.050 (2016). As the City explains, its purpose in enacting the Ordinance was “to close a loophole in federal law” that permits

firearm transfers involving private unlicensed dealers to be completed without a background check, thus facilitating the transfer of guns to convicted felons and other people otherwise barred from owning firearms. Any transferor or transferee violating the Ordinance would 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.” City of Missoula, Mont., Municipal Code § 9.60.060 (2016). A charge has not yet been brought under the Ordinance.

¶3 Shortly after the Ordinance’s enactment, then-Speaker of the Montana House of Representatives, Austin Knudsen, requested an attorney general’s opinion regarding the validity of the Ordinance. The Attorney General issued an Opinion that concluded that cities with self-government powers were “prohibited by Montana state law from enforcing a local regulation or ordinance requiring background checks on firearm sales or transfers,” and reasoning that cities could not exercise “any power that applies to or affects the right to keep or bear arms” pursuant to § 7-1-111(9), MCA. 57 Op. Att’y Gen. No. 1, 9 (2017). The Attorney General also cited § 45-8-351(1), MCA, which generally provides a city “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,” and concluded that the Ordinance was not permissible under the statutory exception to this prohibition.

¶4 The City filed this action challenging the Attorney General’s Opinion and seeking a declaration that the Ordinance was a lawful exercise of its self-governing powers, and moved for summary judgment. The Attorney General sought dismissal of the action, arguing there was no justiciable controversy and that, alternatively, if the court found a justiciable controversy existed, that “established rules of statutory construction demonstrate that Missoula’s claim of authority to mandate background checks as a self-governing city is error.” The parties agreed there were no material factual disputes and that the case involved purely legal issues. The District Court concluded a justiciable controversy existed, that the Attorney General had failed “to recognize the law’s presumption in favor of the power of local governments like Missoula’s,” and that the Ordinance was authorized under the statutory exception in § 45-8-351(2), MCA. It entered summary judgment for the City.

¶5 The Attorney General appeals.

STANDARD OF REVIEW

¶6 “This Court reviews a district court’s grant or denial of summary judgment de novo using the same M. R. Civ. P. 56(c) criteria applied by the district court.” *Somers v. Cherry Creek Dev., Inc.*, 2019 MT 101, ¶ 6, 395 Mont. 389, 439 P.3d 1281 (internal citations omitted). “If the district court determines that no genuine issue of material fact exists, the court then determines whether the moving party is entitled to judgment as a matter of law. This determination is a conclusion of law, which we review for correctness.” *Corp. Air v. Edwards Jet Ctr. Mont. Inc.*, 2008 MT 283, ¶ 25, 345 Mont. 336, 190 P.3d 1111 (internal

citations omitted). “Our standard of review pertaining to a declaratory judgment is to determine if the court’s interpretation of law is correct.” *Roe v. City of Missoula*, 2009 MT 417, ¶ 15, 354 Mont. 1, 221 P.3d 1200 (citation omitted).

¶7 “Issues of justiciability, such as standing, and ripeness, also are questions of law, for which our review is de novo.” *Weems v. State*, 2019 MT 98, ¶ 7, 395 Mont. 350, 440 P.3d 4 (citation omitted).

¶8 “The interpretation of a statute is a question of law that we review for correctness.” *Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶ 18, 384 Mont. 503, 380 P.3d 771 (citation omitted).

DISCUSSION

¶9 *1. Is the City’s declaratory judgment action justiciable, given the ordinance has not been enforced?*

¶10 The Attorney General moved to dismiss Missoula’s declaratory judgment action because Missoula had not attempted to enforce the Ordinance. The Attorney General argued that the lawsuit was an unauthorized appeal of his office’s Opinion, and merely sought an advisory opinion from the courts. The District Court acknowledged that a difference in opinion on the effect of the statutes “does not result in an actual controversy,” but noted that the Attorney General’s Opinion had resulted in the Ordinance being “essentially unenforced for over a year,” and reasoned that dismissing the case would just be “kicking the case down the road” because a case would inevitably arise upon enforcement of the Ordinance.

¶11 Justiciability is a threshold determination for all actions, including under the Uniform Declaratory Judgment Act, § 27-8-101, et. seq., MCA. *Northfield Ins. Co. v. Mont. Ass’n of Ctys.*, 2000 MT 256, ¶ 12, 301 Mont. 472, 10 P.3d 813 (“We apply the justiciable controversy test to actions for declaratory judgment to prevent courts from determining purely speculative or academic matters, entering anticipatory judgments, providing for contingencies which may arise later, declaring social status, dealing with theoretical problems, answering moot questions, or giving abstract or advisory opinions”); *see also Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶ 19, 366 Mont. 450, 288 P.3d 193. “The controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion.” *Chipman*, ¶ 19. “In contrast to a ‘purely political, administrative, philosophical or academic’ issue, an issue is justiciable if within the constitutional power of a court to decide, an issue in which the asserting party has an actual, non-theoretical interest, and an issue upon which a judgment can ‘effectively operate’ and provide meaningful relief.” *Larson v. State*, 2019 MT 28, ¶ 18, 394 Mont. 167, 434 P.3d 241 (internal citations omitted).

¶12 In *Hardy v. Krutzfeldt*, 206 Mont. 521, 672 P.2d 274 (1983), parties to a contract sought a judgment declaring that a “right of first refusal” provision within the contract was void as an unlawful restraint of trade. *Hardy*, 206 Mont. at 522, 672 P.2d at 274. However, there was no evidence that any transaction had been “affected” by the contract provision. *Hardy*, 206 Mont. at 524, 672 P.2d at 275. We concluded that a justiciable controversy

was not presented, reasoning that, despite the remedial purposes of the Uniform Declaratory Judgments Act, “[t]he only thing before this Court in this case is a difference of opinion among lawyers on the legal effect of the pre-emptive first refusal clause. We do not have before us any litigants involved in an actual controversy who are deprived of a property right No concrete controversy is here.” *Hardy*, 206 Mont. at 525, 672 P.2d at 276.

¶13 Unlike the private difference of opinion in *Hardy*, the dispute here involves an Attorney General’s Opinion that concluded Missoula was without authority to enact the Ordinance. In *Bullock v. Fox*, 2019 MT 50, 395 Mont. 35, 435 P.3d 1187, the Attorney General issued an opinion that concluded, under governing statutes, the Governor and Director of Montana Fish, Wildlife and Parks could not acquire a conservation easement on behalf of the State without approval of the Board of Land Commissioners. *Bullock*, ¶¶ 8-10. Although the justiciability issue involved standing, we concluded in *Bullock* that “[t]he injury alleged in this proceeding, that the A.G. Opinion blocks the Governor and FWP Director from effectuating the duties of their respective offices, is a concrete injury” *Bullock*, ¶ 39. In support, we noted the general proposition that an attorney general’s opinion “is controlling unless overruled by a state district court or the supreme court,” citing *O’Shaughnessy v. Wolfe*, 212 Mont. 12, 16, 685 P.2d 361, 363 (1984), and § 2-15-501(7), MCA.

¶14 The injury asserted here is not a theoretical one dependent upon a possible future transaction or possible future violation of the Ordinance. To enforce the Ordinance at all,

Missoula would need to proceed in contravention to the Attorney General’s Opinion, which, as explained above, carries the imprimatur of legal authority “unless overruled by a state district court or the supreme court,” *Bullock*, ¶ 9, and Missoula would thus risk whatever liabilities could result from such action. In light of the Attorney General’s determination, a judgment by the courts regarding the City’s authority to enact the Ordinance would effectively operate on an actual, non-theoretical controversy, grant meaningful relief, and not constitute a mere advisory opinion. *Larson*, ¶ 18. As in *Bullock*, we conclude the issuance of the Attorney General’s Opinion has presented a justiciable controversy, for which the only meaningful relief available to Missoula is to challenge the Opinion in the courts.

¶15 Provided the controversy is justiciable, the purpose of a declaratory judgment is “to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.” Section 27-8-102, MCA; *see also Larson*, ¶ 33. We concur with the District Court that this matter is properly before the courts.

¶16 2. *Did the District Court err by holding that Missoula, a self-governing municipality, may require background checks on firearm transfers without violating the statutory prohibition upon local government regulation of the “purchase, sale or other transfer” of firearms?*

¶17 The Attorney General argues that the District Court’s determination that the Ordinance is authorized under § 45-8-351(2)(a), MCA, the exception to the general prohibition upon local government regulation of firearms set forth in § 45-8-351(1), MCA, is an erroneous, expansive application of the exception that would swallow the statute. The

Attorney General argues § 45-8-351, MCA, must be read and harmonized with § 7-1-111(9), MCA, which provides that a local government with self-governing powers “is prohibited from exercising . . . any power that applies to or affects the right to keep or bear arms” Missoula answers that the District Court correctly determined the Ordinance was validly enacted pursuant to the language within § 45-8-351(2)(a), MCA, which authorizes cities to “prevent and suppress . . . the possession of firearms by convicted felons, adjudicated mental incompetents, illegal aliens, and minors.”

¶18 This appeal presents a question of statutory interpretation. “In the construction of a statute, the office of the judge is simply 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. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.” Section 1-2-101, MCA. “We interpret a statute first by looking to its plain language. We construe a statute by reading and interpreting the statute as a whole, ‘without isolating specific terms from the context in which they are used by the Legislature.’ . . . Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it.” *Mont. Sports Shooting Ass’n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003 (internal citations omitted). “Statutory construction is a ‘holistic endeavor’ and must account for the statute’s text, language, structure, and object.” *State v. Heath*, 2004 MT 126, ¶ 24, 321 Mont. 280, 90 P.3d 426 (internal citation omitted). The duty of this Court is to “read and construe each statute as

a whole” so that we may “give effect to the purpose of the statute.” *State v. Triplett*, 2008 MT 360, ¶ 25, 346 Mont. 383, 195 P.3d 819 (internal citations omitted).

¶19 Section 45-8-351, MCA, provides, in pertinent part:

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 an 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.

¶20 Subsection (1) of the statute provides a list of specific actions local governments are prohibited from taking in regard to firearm regulation. A local government may not “prohibit, register, tax, license, or regulate” any of the following: the “purchase,” “sale,” “other transfer,” “ownership,” “possession,” “transportation,” and “use” of a firearm. Subsection (2) provides an exception to the prohibitions in subsection (1), and is the premise upon which Missoula enacted the Ordinance. As the Ordinance states:

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. . . as a prevention mechanism to serve as a deterrent to convicted felons, adjudicated mental incompetents[,] illegal aliens[,] and minors unlawfully obtaining possession of firearms.

Thus, as the Ordinance itself explains, the entirety of its regulatory scheme is premised upon, in isolation, the wording in subsection (2) of the statute that grants cities the power “to prevent and suppress . . . the *possession* of firearms by convicted felons, adjudicated mental incompetents, illegal aliens, and minors.” (Emphasis added.)

¶21 However, the Ordinance, as well as the City’s arguments and the District Court’s order, fails to account for the remaining language within § 45-8-351, MCA, and thus fails to properly apply the standards of statutory interpretation. “Possession” of firearms is only one of multiple functions the statute explicitly prohibits cities from regulating under subsection (1); the others are “purchase,” “sale,” “other transfer,” “ownership,” “transportation,” and “use.” Nothing within the language of subsection (2) permits cities to regulate these other functions in any manner, yet the Ordinance does so. Although purporting to merely suppress the “possession” of firearms by convicted felons, adjudicated mental incompetents, illegal aliens, and minors, the scheme of the Ordinance goes much further. It requires that “every firearm transfer . . . in the City of Missoula, shall be subject to background check.” City of Missoula, Mont., Municipal Code § 9.60.030 (2016). Thus, at a minimum, it regulates, in violation of subsection (1), the “purchase,” “sale,” and “other transfer” of firearms; and not merely by those who are convicted felons, adjudicated mental incompetents, illegal aliens, and minors, but by *everyone* who engages in a transaction with a private, unlicensed dealer and who does not qualify for an exception under the Ordinance.

¶22 As the Attorney General notes, the District Court’s interpretation of the exception in subsection (2) is overbroad. As the Ordinance offers, its background check requirements for firearm transactions is intended to be a “prevention mechanism to serve as a deterrent” to the possession of firearms. City of Missoula, Mont., Municipal Code § 9.60.010 (2016). Under such a rationale, virtually any kind of regulation could be justified as being a “deterrent” to possessing firearms and would permit the exception within subsection (2) to swallow the rule in subsection (1), an absurd result. Harmonizing and reading the statute holistically does not permit such a rendering. Statutory interpretation cannot divest the authority of other provisions, or render other provisions, superfluous. *Hendershott v. Westphal*, 2011 MT 73, ¶ 20, 360 Mont. 66, 253 P.3d 806; *see also Mont. Trout Unlimited v. Mont. Dep’t of Nat. Res. & Conservation*, 2006 MT 72, ¶ 23, 331 Mont. 483, 133 P.3d 224. This proper reading of § 45-8-351, MCA, is also consistent with § 7-1-111(9), MCA.

¶23 As the District Court noted, the powers of self-governing local governments must be liberally construed, but this presumption cannot override specific legislative preemption, as here. *See City of Missoula v. Franklin*, 2018 MT 218, ¶¶ 13-15, 392 Mont. 440, 425 P.3d 1285; § 7-1-106, MCA. The express statutory prohibition upon cities in § 45-8-351(1), MCA, is a limitation on Missoula’s self-governing powers.

¶24 The judgment entered by the District Court is reversed. We remand this matter for entry of judgment in favor of the Attorney General.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH

/S/ DIRK M. SANDEFUR

/S/ LAURIE McKINNON

/S/ JAMES JEREMIAH SHEA