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LAW DEPARTMENT**

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CONFIDENTIAL AND ATTORNEY-CLIENT PRIVILEGED¹

June 12, 2023

Megan E. Green, Board of Aldermen President
City Hall, Room 230
1200 Market Street
Saint Louis, Missouri 63103

RE: Follow Up Questions re BB29 and Open Carrying of Firearms

President Green,

You requested a legal opinion regarding three distinct questions born out of a Board of Alderman Public Safety Committee meeting. It first bears noting that based on the nature of the public legal discussions regarding BB29, if the Bill becomes law, I am near certain that the City will face a legal challenge. While it is imperative that aldermanic debate take place, it is also important to maintain the City's attorney-client privilege. As should become apparent upon review of this Opinion, many of the legal statements made during the Committee meeting at issue were inaccurate under the law.

I must also note that I opine only as to, after examining the facts and law, what a Missouri court might hold if it reviewed the matter. I am not a member of the Board of Alderman, and I do not opine on whether a piece of legislation should be the City's policy. Occasionally, I also opine on operational issues; however, I am not a member of law enforcement. As one of the City's risk managers, I strongly recommend consideration of, not simply whether BB29 would be upheld in a court of law, but also whether it is wise, the manner in which it will be implemented, and the operational risk associated with its implementation.

¹ I provide this Opinion pursuant to Article X, Section 2 of the City of St. Louis Charter and in connection with your official role as President of the Board of Aldermen. The advice and privilege over the advice belong to the City. Waiver of attorney-client privilege is a legal matter. In my view, sharing this advice could open the City to legal risk.

The City Counselor *directs* the management of all the litigation in which the City is a party, *represents* the City in all legal matters and proceedings in which the city is a party or interested, *advises* the City's leadership, and *approves* as to form all contracts, deeds, bonds and other documents to be signed in the name of or made to or with the City. See St. Louis City Charter, Article X, § 2. In other words, I manage legal matters and litigation, provide legal advice, and approve contractual documents. My legal advice or approval of a contract does not necessarily mean that I concur with the policy decisions at issue.

As just one example to illustrate the nature of my role, I have been previously asked whether a member of the Board of Aldermen is legally able to place a speed hump on a public street without engaging with any member of the Board of Public Service, including, the Director of Streets. Regardless of the answer to the legal question, it may be wise to consult operationally with those charged with maintaining our streets as to whether it is sound policy to make alterations to those streets. I typically try to limit my comments to legal advice. Also, in connection with this example, I would have little to no frame of reference for whether adding a speed hump to a public street was sound policy. I feel compelled to go further by providing an exemplar outside the context of the Board of Alderman to illustrate more clearly the way in which I view my role in City government. Where the City enters a contract, I am required to approve contracts as to legal form. My signature does not, in any way, warrant or represent that it is wise for the City to go into business with the contractor, whether the City has negotiated a fair price, or whether the contractor is current on its taxes. The City departments entering into the contracts on behalf of the City conduct requests for proposals and the like to determine the qualifications of vendors and negotiate the deals. The City Counselor's Office typically has no role or vote in the procurement process unless the contract is made though an RFP or RFQ issued by the City Counselor's Office. The Comptroller's Office typically reviews the tax status of the contractor. In other words, I am just one of the City's many risk managers or, otherwise stated, checks and balances. A statement that the City Counselor has reviewed any matter means one thing – legal review – and said review starts and stops there with the expectation that all other City checks and balances will perform their functions.

I. Constitutional Carry Considerations

You wanted to know whether the constitutional carry provisions of Missouri law supersede a local permit allowance since the constitutional carry provisions were enacted after the local permit allowance. As I noted in my initial Opinion, Article I, Section 23 of the Missouri Constitution provides:

That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of

convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.

It is not clear if the Missouri right to bear arms was intended to be synonymous in scope and protection with the Second Amendment. As Second Amendment protections broaden, the Missouri right to bear arms may become irrelevant, but Missouri case law is currently helpful. The Missouri Supreme Court in 2015 stated that the Missouri right to bear arms was not violated by concealed carry restrictions. Dotson v. Kander, 464 S.W.3d 190, 198–99 (Mo. 2015). The Dotson court cited as support a statement in Heller recognizing that “historically, the Second Amendment has not prohibited states from regulating concealed weapons.” The Dotson case was before the stricter analysis imposed in New York State Pistol Ass’n. v. Bruen.

More recently, the Missouri Court of Appeals applied the strict scrutiny test mandated by the Missouri Constitution to a University of Missouri system rule prohibiting the possession of firearms in the vehicles of University employees on campus. State ex rel. Schmitt v. Choi, 627 S.W.3d 1 (Mo. Ct. App. 2021). To survive strict scrutiny, the regulation must serve a compelling governmental interest and be narrowly tailored to achieve such interest, i.e., a means-end test that the United States Supreme Court held invalid for the Second Amendment. The Missouri Court of Appeals said the University system’s rule was narrowly tailored to achieve a compelling governmental interest of promoting safety and reducing crime, and thus the rule survived strict scrutiny, where the University system’s statistical expert and two police chiefs testified about the link between increases in violent crime and the numbers of firearms on campus and expanded right to carry laws. Although it did not violate the Missouri Constitution, the Choi Court said the University system rule was preempted by statute.

The strict scrutiny standard in the Missouri Constitution allows room for regulation of open carry of firearms so long as it is narrowly tailored to promote a compelling governmental interest. *In other words, the Missouri Constitution does not, in and of itself, outlaw any and all gun regulation.* Dotson and Choi are the two most relevant Missouri cases to review in making this legal analysis. Again, in my view, it appears that statistical and expert evidence like that presented in the Choi case could support the validity of BB29, especially if open carrying of weapons is linked to escalation of conflicts and homicide rates.

For clarity, I am of the opinion that local governments retain the ability to require a concealed carry permit for persons who open carry in the City, as Section 21.750 of the Revised Statutes of Missouri states, despite the Missouri Legislature’s removal by SB656 enactment in 2016 (effective 2017) of the requirement for a permit to concealed carry in the State. When the latter bill was passed, the Legislature did not make any changes to 21.750, which leaves room for local governments to adopt ordinances to require permits for open carry. When interpreting a statute, a court will ascertain the General Assembly’s intent by reading the statute’s language according to its plain and ordinary meaning. Repeals of statutory provisions by implication are disfavored, and a court considering statutes relating to the same subject together will harmonize them if possible “to give meaning to all provisions of each.” Wille v. Curators of Univ. of Missouri, 627 S.W.3d 56, 64–65 (Mo. Ct. App. 2021). It is logical and possible for the Legislature to approve of concealed carry in most areas of the State without a permit while still reserving authority for local governments to restrict open carry. State laws continue to provide procedures for obtaining

concealed carry permits. Such permits are useful for reciprocity in other states, and according to the plain language of Section 21.750, they may be required in local jurisdictions that limit the right to open carry to permit holders. Without clearer intent from the Missouri Legislature, it should not be assumed that an important power of the City to regulate safety and wellbeing has been eliminated by implication.

II. Safe Harboring

You wanted to know whether there is a legal difference between safe harboring a weapon and confiscating a weapon, and whether, if confiscation appears to be preempted, whether safe harboring is allowable under BB29. Yes, there is a legal distinction between confiscation and safe harboring. I am of the opinion that confiscation is an imprecise term as used in BB29, and, ultimately, BB29 implies civil forfeiture which would allow one to keep, destroy, or even sell a firearm. As previously stated, Board Bill 29 – in its current form – creates an improper forfeiture provision after seizure of the firearm. Under the existing laws of Missouri, the phrase “safe harboring” as it relates to a firearm is not recognized as a legal concept. It is therefore unclear and should not be used for this reason. “Seizure”, if that is what “safe harboring” is meant to accomplish, applies when law enforcement takes a firearm from a citizen. In general, the Fourth Amendment of the United States Constitution governs searches and seizures for the purpose of criminal and municipal law enforcement. For example, search warrant requirements and exceptions apply to the search and seizure of evidence by law enforcement. Evidence is processed after it is seized by law enforcement. For municipal violations, such as that proposed in BB29, it is not necessary to retain the firearm as evidence for use at trial after the firearm is processed by law enforcement. Rather, if an individual is arrested for municipal offenses, return of a firearm to the lawful owner is handled according to the law enforcement agency’s policies and 18 U.S.C. § 922(g) after it is processed according to policy.

III. Stop and Frisk

You wanted to know whether the enforcement of this bill would require stop and frisk type policies to be in place. I am of the opinion that BB 29 would not require stop and frisk policies similar to the ones which were declared unconstitutional in New York. For clarity, the law does allow an officer who has reasonable suspicion that an individual recently committed a crime to perform a brief investigatory stop of that suspect. Terry v. Ohio, 392 U.S. 22–23 (1968). New York’s stop and frisk program involved a systematic effort to stop individuals without the reasonable suspicion required by Terry. The New York stop and frisk program was ruled unconstitutional by a federal district court in the Southern District of New York. Floyd v. City of New York, 959 F.Supp.2d 540, 659, 663 (S.D. N.Y. 2013). The Floyd Court found that not only had the New York City Police Department directed officers to stop individuals *without* reasonable suspicion, but the department also had impermissibly targeted young Black and Hispanic males for these stops in violation of the Equal Protection Clause. In other words, New York’s program was held unconstitutional based on the way in which it was implemented by law enforcement.

Terry stops remain constitutional. For determining compliance with the Fourth Amendment search and seizure requirement, Terry splits an investigative stop for reasonable suspicion that a crime has been committed into two parts. The first part is the stop. If an officer has reasonable suspicion

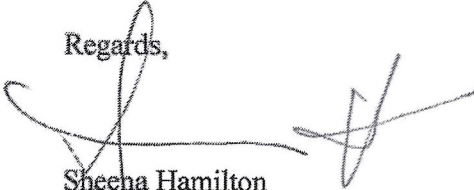
that a suspect is about to be, has recently, or is currently involved in criminal activity, the officer may briefly detain this individual for an investigatory stop. Id. at 22–23. If the officer then develops reasonable suspicion that the individual they are detaining is armed and dangerous, the officer may perform a frisk for weapons in order to assure officer safety. Id. at 25–26. In order to avoid the result in Floyd, the City of St. Louis should avoid adopting any program which directs police officers to target individuals based on anything other than the reasonable suspicion of criminal activity. St. Louis City could enforce BB 29 without resorting to unconstitutional stop and frisk policies.

Section 21.750 of the Revised Statutes of Missouri complicates the enforcement of BB 29. If the City adopts an ordinance governing open carry, Section 21.750(2)(b) gives officers the authority to inquire whether someone open carrying has a concealed carry permit. However, Section 21.750(2)(c) prevents an officer from disarming or physically restraining someone who is openly carrying absent reasonable and articulable suspicion of criminal activity. Merely openly carrying a firearm is unlikely to create reasonable suspicion of criminal activity, absent additional factors which give rise to suspicion that the individual in question does not have a concealed carry permit. For example, where there is a reasonable belief that the individual openly carrying is a juvenile a law enforcement office could argue reasonable suspicion since juveniles cannot obtain these types of permits.

IV. Conclusion

Again, I strongly recommend consideration of, not simply whether BB29 would be upheld in a court of law, but also whether it is wise, the manner in which it will be implemented, and the operational risk associated with its implementation. Should you have any additional legal questions regarding this piece of legislation, feel free to reach out to me.

Regards,



Sheena Hamilton
City Counselor