



# The Right To Regulate The Right To Bear Arms

*It is difficult to overstate just how divisive the issue of guns has become. One can easily lose sight of how dramatically the laws have changed over the last 15 years. Though public opinion is sharply divided nationwide, Missouri's statutes have moved sharply in the direction of fewer restrictions. However, recent shootings in schools and other public places have galvanized opposition to firearms and prompted lawmakers to consider whether gun laws should be revised to protect the public.*

In 1999, an initiative to authorize concealed carry permits (CCW permits) narrowly failed, with strong opposition from urban areas edging strong outstate support.<sup>1</sup> In 2002, it was a felony to carry a concealed firearm anywhere.<sup>2</sup> A CCW permitting statute went into effect in 2003, after the Governor's veto was overridden.<sup>3</sup> The statutes regulating firearms have repeatedly undergone significant revisions since 2003.<sup>4</sup> In 2007, the legislature enacted § 44.101, RSMo prohibiting cities from restricting possession of firearms even when a state of emergency has been declared.<sup>5</sup> In 2008, the U.S. Supreme Court struck down Washington, D.C.'s handgun ban and held that the Second Amendment confers an individual right to bear arms.<sup>6</sup> In 2014, Missouri voters approved a constitutional amendment declaring that the right to bear arms "shall not be questioned."<sup>7</sup> In 2017, a new statute authorized carrying

concealed firearms most anywhere, even without a CCW permit, with few locations exempted.<sup>8</sup> Whether one regards these changes as a necessary rollback of unwarranted restrictions or a dangerous, ideologically-driven campaign, the changes have been indisputably far-reaching.

## Public Safety

What does this mean for police and city officials concerned about public safety?

A Missouri statute preempts any order, ordinance or regulation of a city or political subdivision that is inconsistent with state law, with few exceptions.<sup>9</sup> These recent changes create new challenges for cities. At an emotionally charged demonstration 20 years ago, police could assume the crowd was unarmed. Now, they can (and probably should) presume that

anyone could be armed. The possibility of a shouting match escalating into a deadly encounter cannot be ignored. Still, cities must take care not to infringe on the rights of law-abiding citizens carrying firearms in accordance with the law. When city officials are informed that a gun-rights demonstration will be held at a coffee shop (or a park, library or governmental building), or that a person is walking down the street with an AR-15, it is important that police and the public understand what is permissible.

While Missouri law now permits carrying concealed firearms in most places, the nuances can be confusing. State law does not prohibit openly carrying firearms, but a statute permits cities to do so. Though a permit is no longer necessary to carry concealed firearms, state law treats CCW permit holders quite differently from everyone

else. It is important to understand the interplay and overlap between § 571.030 RSMo defining unlawful use of weapons (UUW) and § 571.107 RSMo listing locations where a CCW permit does not authorize carrying concealed firearms to determine where firearms are permitted.

Prior to 2017, § 571.030.1 made it a crime of UUW to carry a concealed firearm *anywhere*, though CCW permit holders have been exempted since 2003.<sup>10</sup> CCW permit holders were (and still are) restricted from carrying concealed firearms in locations listed in § 571.107 (police stations, polling places, courthouses, airports, schools, and taverns, among others). Starting in 2017, § 571.030.1 made it a crime to carry a concealed firearm *only* in those locations listed in § 571.107.<sup>11</sup> Persons without a CCW permit may now carry concealed firearms most anywhere except the locations listed in § 571.107. Additionally, this 2017 change created two different penalties for CCW permit holders and non-CCW permit holders

for carrying concealed firearms in a restricted area. If a non-CCW permit holder carries a concealed firearm into a location listed in § 571.107, that person is guilty of UUW, a misdemeanor.<sup>12</sup> However, if a CCW permit holder carries a concealed firearm into such location, doing so is not “a criminal act but may subject the person to denial to the premises” and a \$100 fine.<sup>13</sup>

Section 571.107 is silent regarding *openly* carrying firearms.<sup>14</sup> Section 571.030.1 only criminalizes carrying *concealed* firearms into places listed in § 571.107. Section 571.107 states that no CCW permit “shall authorize any person to carry *concealed* firearms into” the listed locations. Subdivision (8) of § 571.030.1 prohibits carrying firearms (openly or concealed) into churches, election precincts, or buildings “owned or occupied by ... the federal government, state government, or political subdivision.” Similarly, § 571.030.1(10) prohibits carrying firearms (openly or concealed) into schools or school functions. However,

§ 571.030.4 provides that subdivisions (8) and (10) do not apply to CCW permit holders. While § 571.107 prohibits CCW permit holders from carrying concealed firearms into schools or police stations, § 571.107 does not address *openly* carrying firearms.

While cities may ban openly carrying firearms under § 21.750, this statute was amended in 2014 to authorize CCW permit holders to openly carry in cities banning open carrying, so long as they carry their permits.<sup>15</sup> If a city does not ban open carry, there is generally no prohibition on CCW permit holders openly carrying firearms *even in locations*<sup>16</sup> listed in § 571.107. Now that an open carry ban is unenforceable against CCW permit holders, does that mean a person could openly carry firearms into a location listed § 571.107, in spite of a city’s open carry ban? According to a recent case, the answer is no. However, some unanswered questions remain, and the decision does not address cities with no open carry ban.



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## Zoological Park Subdistrict v. Jeffrey Smith

In *Zoological Park Subdistrict v. Jeffrey Smith*<sup>17</sup>, St. Louis Zoo personnel were informed that a CCW permit holder intended to conduct an open carry demonstration at the Zoo.<sup>18</sup> The city of St. Louis bans open carrying.<sup>19</sup> Signs at the Zoo state that firearms are prohibited.<sup>20</sup> The Zoo obtained an injunction preventing the demonstration, asserting that, as an amusement park, firearms are prohibited in the Zoo by subsections (10), (11), and (13) of § 571.107.1.<sup>21</sup> Smith has appealed.<sup>22</sup> The court agreed that the Zoo is an amusement park/educational facility/daycare, and that concealed firearms are banned locations.<sup>23</sup> Further, the court found that openly carrying firearms was prohibited in the Zoo as well.

The Zoo argued that Missouri law “prohibits the open or concealed carrying of firearms onto its property based on the fact that it falls under several of the Gun Free Zone categories

identified in ... § 571.107.1....”<sup>24</sup> The court did not conclude that § 571.107 directly bans openly carrying firearms in places listed in § 571.107 (which the Zoo describes as Gun Free Zones). Rather, the court relied on St. Louis’s open carry ban. The Zoo contended that, because § 21.750.3 only exempts CCW permit holders like Smith from a city’s open carry ban *if he carries his CCW permit*, and § 571.107 prohibits CCW permit holders from carrying concealed firearms in places listed therein, St. Louis’s open carry ban is not preempted in such locations.<sup>25</sup> The Zoo argued that § 571.107 “sets forth *locations and facilities where concealed carry endorsements and permits are not valid and, therefore, do not authorize the concealed carrying of firearms.* Because §21.750.3 allowing the open carry of firearms, is premised on a valid CCW permit, in places where a CCW permit does not authorize the carrying of a concealed weapon, a person who holds an open carry endorsement/permit<sup>26</sup> cannot openly carry his or her firearm in those places either.”<sup>27</sup>

The court agreed, though it found “the statute may be somewhat ambiguous in this regard.”<sup>28</sup> Presumably then, if St. Louis did not ban open carry, there would be no restriction on open carrying in “Gun Free Zones.”

This raises the question of whether the locations in § 571.107 are Gun Free Zones if that status hinges on a city’s open carry ban. Section 21.750.3 does not apply in cities with no open carry ban. Furthermore, CCW permit holders must carry permits anytime they carry firearms, whether concealed or openly.<sup>29</sup> Failure to carry a permit is a non-criminal offense with a \$35 fine. An alternate construction to the Zoo’s theory is that, if a person carries a CCW permit, the ordinance banning open carry is preempted, without regard for any restriction in state law regarding concealed firearms. There is no explicit mention of the limitations of § 571.107 in § 21.750.3.

Did the legislature intend for § 571.107 to have one meaning in cities banning

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open carry and a different meaning in others? Under what statute or ordinance could a person be prosecuted for openly carrying in these locations? While the legislature is presumed to act with full awareness of the present state of the law, including judicial and legislative precedent, this presumption does not extend to municipal ordinances.<sup>30</sup> The characterization of places in § 571.107 as Gun Free Zones is undercut by the provisions authorizing carrying concealed firearms with consent of the chief (for police stations) or a school board/principal (for schools)<sup>31</sup>. Section 571.107.1(5) that bans carrying concealed firearms at a meeting of a local government, permits members of the governmental body with CCW permits to carry concealed firearms at meetings. It is difficult to argue that these places are Gun Free Zones where substantial exceptions are made.

## Firearms In Vehicles

For most of the locations in subdivisions (1) through (17) of § 571.107.1, the following statement appears: “Possession of a firearm in a vehicle on the premises of any of the areas listed in this subdivision shall not be a criminal offense so long as the firearm is not removed from the vehicle or brandished while the vehicle is on the premises.” Does this mean it *is a criminal offense* to remove a firearm from a vehicle and openly carry it? There are legal and practical problems with this construction. To prosecute someone for openly carrying (or for refusing to leave), prosecutors must prove the elements of the offense, including that the firearm was removed from a vehicle. There may not be a vehicle on the premises. Penal statutes are strictly construed against the state and the rule of lenity dictates that ambiguity be interpreted in a defendant’s favor.<sup>32</sup> The more reasonable interpretation is that, since § 571.107.1 states that CCW permits authorize persons to “carry concealed firearms on or about [a] his or her person or [b] vehicle throughout the state,” only [a] is prohibited at the locations listed in subdivisions (1) through (17).



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The *Zoo* case has important implications for cities across the state. If upheld, cities can prohibit firearms in sensitive areas via ordinance. If reversed, cities would be unable to restrict open carry in the locations listed in § 571.107, even though these locations have been deemed too sensitive for concealed firearms. Cities should give careful consideration to how their government buildings and other facilities listed in § 571.107 are protected. The public should be skeptical that any place is truly off limits to firearms, particularly in cities with no open carry ban.

## Conclusion

Is the public protected by a prohibition on carrying concealed firearms in sensitive locations if it is legal to openly carry firearms in such locations? Did the General Assembly intend, in 2014, to permit open carry in the places listed in § 571.107 when it preempted open carry bans as to CCW permit holders? The rationale for Missouri’s firearms laws is muddled at best. Until the legislature or the courts provide clarity, local officials should

work closely with their attorneys to determine which locations are sensitive and examine the appropriate steps to protect the public without infringing on the rights of their citizens. 🍃

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