Opinion No. 90-11

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OPINION OF: HAL STRATTON, Attorney General

BY: Elizabeth A. Glenn, Assistant Attorney General

TO: Honorable Daniel Silva, New Mexico State Representative, 1323 Canyon Tr. SW, Albuquerque, New Mexico 87105. Honorable Don Silva, New Mexico State Representative, 8328 Cherry Hills Dr. N.E., Albuquerque, New Mexico 87111

QUESTIONS

1. Does the Fireworks Licensing and Safety Act, NMSA 1978, §§ 60-2C-1 to -11 (Supp. 1989) ("Fireworks Act"), preclude municipalities from regulating fireworks other than aerial devices and ground audible devices?

2. Can municipalities add to or detract from the express requirements of the Fireworks Act, such as those specifying the dates for retail fireworks sales?

3. Do counties have the same authority as municipalities to enact ordinances permitted by the Fireworks Act?

4. Are municipal ordinances prohibiting all fireworks devices rendered null and void by the Fireworks Act, requiring new ordinances to restrict the type of fireworks sold?

CONCLUSIONS

1. Yes.

2. To the extent a municipality has concurrent authority with the state to regulate fireworks, it may enact ordinances that complement the statutory requirements.

3. Yes.

4. Yes.

ANALYSIS

The Fireworks Act was enacted in 1989, effective February 1, 1990. 1989 N.M. Laws, ch. 346. Its provisions cover licensing of fireworks distributors, retail permits, permissible fireworks, activities related to fireworks sales and storage and public fireworks displays. Violations of the Fireworks Act are punishable by criminal and civil penalties. NMSA 1978, §§ 60-2C-10 to -11. The Fireworks Act also repealed statutory provisions that made possession of fireworks a misdemeanor and that authorized

municipalities to regulate and prohibit the use of fireworks and other pyrotechnic displays. 1989 N.M. Laws, ch. 346, § 12 (amending NMSA 1978, § 3-18-11), § 13 (repealing NMSA 1978, § 30-17-4).

The questions presented essentially concern a local government's authority to regulate fireworks after the effective date of the Fireworks Act. As discussed in more detail below, we generally conclude that the Fireworks Act preempts local regulation except as it expressly permits.

1. The Fireworks Act provides that "[n]o individual, firm, partnership, corporation or association shall possess for retail sale in this state, sell or offer for sale at retail or use any fireworks other than permissible fireworks." NMSA 1978, § 60-2C-5. "Permissible fireworks" are "common fireworks except stick-type rockets having a tube less than one-quarter inch inside diameter." Id. § 60-2C-7. "Common fireworks" are "any fireworks device suitable for use by the public that complies with the construction, performance, composition and labeling requirements promulgated by the United States consumer product safety commission . . . and that is classified as a class C explosive by the United States department of transportation." Id. § 60-2C-2(C). Of the permissible fireworks contemplated by the statute, municipalities have specific authority "by ordinance to regulate and prohibit the use of aerial devices and ground audible devices." NMSA 1978, § 60-2C-7. Both aerial devices and ground audible devices are defined terms. Id. § 60-2C-2(A), (G).

New Mexico courts generally construe statutes to give effect to the intent of the legislature. They "look primarily to the language used, yet may also consider the history and background of the subject statute." State ex rel. Klineline v. Blackhurst, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). Based on these principles, we think the specific grant of authority to municipalities in the Fireworks Act, combined with the repeal, noted above, of municipalities' general authority to regulate and prohibit the use of fireworks, strongly suggest that the state legislature intended to limit municipalities to regulating only the specified devices.

The Fireworks Act does not, however, explicitly foreclose municipal regulation of other fireworks. This may lead to arguments that the statute does not affect the ability of home rule municipalities to enact broader restrictions. The New Mexico Constitution provides that home rule municipalities "may exercise all legislative powers and perform all functions not expressly denied by general law or charter." N.M. Const. art. X, § 6(D). See also NMSA 1978, §§ 4-37-10 to -13 (Cum. Supp. 1989) (conferring on counties the same home rule powers accorded to municipalities under the constitution). A home rule municipality "no longer has to look to the legislature for a grant of power to act, but only looks to legislative enactments to see if any express limitations have been placed on their power to act." Apodaca v. Wilson, 86 N.M. 516, 521, 525 P.2d 876, 881 (1974).

New Mexico courts have construed the phrase "not expressly denied by general law" as used in N.M. Const. art. X, § 6(D). A "general law" is "one that effects [sic] the community at large, as opposed to a local law that deals with a particular locality."

Casuse v. City of Gallup, 106 N.M. 571, 572, 746 P.2d 1103, 1104 (1987) (quoting Black's Law Dictionary 616 (5th ed. 1979)). See also City of Albuquerque v. New Mexico State Corp. Comm'n, 93 N.M. 719, 721, 605 P.2d 227, 229 (1979) (general law means "a law that applies generally throughout the state, or is of statewide concern, as contrasted to a "local' or "municipal' law"). An early judicial opinion interpreted "not expressly denied" to require that "some express statement of the authority or power denied . . . be contained in such general law . . . or otherwise no limitation exists." Apodaca, 86 N.M. at 521-22, 525 P.2d at 881-82. Later cases, however, do not interpret the phrase as literally. According to the New Mexico Supreme Court, "any New Mexico law that clearly intends to preempt a governmental area should be sufficient without necessarily stating that affected municipalities must comply and cannot operate to the contrary." Casuse, 106 N.M. at 573, 746 P.2d at 1105. See also Westgate Families v. County Clerk, 100 N.M. 146, 667 P.2d 453 (1983) (home rule county precluded from zoning by referendum because enabling statute expressly provided for zoning by representative bodies). In a recent opinion, this office analyzed the pertinent caselaw and reached these conclusions regarding the effect of general law on a city's home rule authority:

(1) at least in the case of governmental action, general law need not contain an "express denial statement" to deny municipal authority;

(2) general law may operate to preempt certain governmental activity;

(3) an authorizing statute that sets forth substantive and procedural requirements to take governmental action does not permit the local government to take action in a different manner;

(4) a city's proprietary activity is within home rule authority unless clearly prohibited by general state law.[1] AG Op. No. 89-04 (1989) (determining that a municipality did not have home rule authority to pay public retirees' health insurance costs contrary to authorizing legislation).

We believe the state legislature has preempted the field of fireworks regulation by enacting the Fireworks Act. The Fireworks Act is a general law affecting the entire state and does not deal with a particular locality. Cf. Casuse, 106 N.M. at 572, 746 P.2d at 1104 (election law that applied to all municipalities throughout the state with populations over 10,000 was a general law). It is a comprehensive law, addressing both wholesale and retail fireworks sales and regulating specific details of how fireworks are sold and stored. In addition, the legislature expressly repealed the authority to regulate fireworks previously held by municipalities and replaced those provisions with the Fireworks Act, and has specified what activities connected with the sale and use of fireworks remain subject to municipal control. Cf. City of Hobbs v. Biswell, 81 N.M. 778, 473 P.2d 917 (Ct.App.), cert. denied, 81 N.M. 772, 472 P.2d 729 (1970) (municipality retained authority to regulate pawnbrokers where legislature did not expressly withdraw the municipality's authority when it enacted the Used Merchandise Act). Accordingly, the

Fireworks Act denies all municipalities, including those with home rule charters, from regulating fireworks other than as provided by the statute.

2. If a municipality has concurrent regulatory authority with the state, the municipality may enact ordinances pursuant to its authority that are consistent with the state statute. City of Hobbs v. Biswell, 81 N.M. 778, 473 P.2d 917 (Ct.App.), cert. denied, 81 N.M. 772, 473 P.2d 729 (1970). See also NMSA 1978, § 3-17-1 (Cum. Supp. 1989) (municipal governing body may adopt ordinances for specified purposes not inconsistent with the laws of New Mexico). In Biswell, the New Mexico Court of Appeals held that a municipality's pawnbroker regulations promulgated under its statutory police powers were not preempted by a subsequent statute also regulating pawnbrokers. The statute did not explicitly withdraw the municipality's authority, and, because the later statute and the municipality's authority to regulate were reconcilable, the court found no repeal by implication. Under those circumstances, double regulation was permissible as long as the municipality's regulations did not conflict with the statute: "[a]n ordinance may duplicate or complement statutory regulations." 81 N.M. at 781, 473 P.2d at 920. See also Mares v. Kool, 51 N.M. 36, 40, 177 P.2d 532, 534 (1946) (an ordinance may duplicate or complement statutory regulations, when authorized by the legislature); Mitchell v. City of Roswell, 45 N.M. 92, 111 P.2d 41 (1941) (municipality and State Board of Public Health had concurrent authority to issue health regulations). Based on this premise, the court upheld the municipality's ordinance which imposed stricter requirements than the statute in four instances. The court also approved a provision in the ordinance that required a pawnbroker's records to be open for inspection to parties in addition to the law enforcement officers specified by statute. Nothing that the ordinance was broader than the statute in this respect, the court found it permissible because "nothing in the State statute prohibits inspection by other than police officers. Thus, there is no conflict." Id. at 783, 473 P.2d at 922.

The Fireworks Act differs from the statute in Biswell. It expressly removed from municipalities their general authority to regulate fireworks and replaced it with limited authority to regulate the use of aerial and ground audible devices. It would be inconsistent with these provisions to conclude that municipalities retained the same authority they had before the Fireworks Act was enacted. Further, if the Fireworks Act was not intended to change municipal authority to regulate fireworks, then there is no clear reason why the legislature would have gone to the trouble of amending the former statutory power. Cf. Incorporated County of Los Alamos v. Johnson, 108 N.M. 633, 634, 776 P.2d 1252, 1253 (1989) (in interpreting statutes, the Supreme Court presumes that the legislature is well informed as to existing statutory and common law, does not intend to enact a nullity and intends to change existing law when it enacts a new statute).

To the extent that municipalities have regulatory authority over specified devices, those devices are subject to double regulation as long as municipal regulations do not conflict with the Fireworks Act's requirements.[2] For example, Section 60-2C-8(J) states that "[f]ireworks may be sold at retail" on specified days. According to the rule in Biswell, a municipality exercising its concurrent authority to regulate or ban aerial and ground audible devices may permit sales of fireworks subject to its authority on all or fewer of

the days specified in the statute, or may prohibit sales altogether, but cannot allow sales on days in addition to those specified.

3. The Fireworks Act expressly permits only municipalities to enact ordinances regulating and prohibiting aerial devices and ground audible devices. The statute's terms do not extend to counties. The statutes applying to counties, however, provide:

All counties are granted the same powers that are granted municipalities except for those powers that are inconsistent with statutory or constitutional limitations placed on counties. Included in this grant of powers to the counties are those powers necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants. The board of county commissioners may make and publish any ordinance to discharge these powers not inconsistent with statutory or constitutional limitations placed on counties.

NMSA 1978, § 4-37-1 (Repl. Pamp. 1984). This office consistently has relied on this provision to support a county's exercise of powers expressly conferred only on municipalities. See, e.g., AG Op. No. 87-55 (1987) (where no specific statute governed consolidation of counties, NMSA 1978, § 4-37-1 conferred authority to consolidate under statutes applying to municipality consolidations); AG Op. No. 81-29 (1981) (county commission had authority to enact ordinance adopting a merit system for county employees under NMSA 1978, § 4-37-1 and statute authorizing municipalities to enact merit systems); AG Op. No. 78-15 (1978) (county had authority to acquire and maintain sewage facilities under statute specifically conferring such powers on municipalities).

We are not aware of any statutory or constitutional provisions that limit a county's ability to regulate fireworks. Accordingly, we conclude that NMSA 1978, § 4-37-1 gives counties the same authority to enact ordinances under the Fireworks Act as is specifically conferred on municipalities.

4. As stated in our response to question two, a municipality may not enact ordinances that are inconsistent with a state statute. See also State ex rel. Black v. Aztec Ditch Co., 25 N.M. 590, 598, 185 P. 549, 552 (1919) ("an ordinance adopted by a municipal corporation, in order to be valid must be consistent with the law of the land, and [an] . . . ordinance in contravention of a statute of the state is invalid"). A municipal ordinance that purports to prohibit all fireworks is contrary to the limited authority granted to municipalities under the Fireworks Act and, therefore, is void and without effect.

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GENERAL FOOTNOTES

n1 In City of Albuquerque v. New Mexico State Corp. Comm'n, 93 N.M. 719, 722, 605 P.2d 227, 230 (1979), the New Mexico Supreme Court stated that "[a] test that may be applied to determine whether an activity is of general concern or merely of local or municipal concern is whether it is proprietary or governmental in character." According to the Court, the distinction between governmental and proprietary activities is that the former are undertakings in which only a governmental agency may engage and the latter may be engaged in by any corporation, individual or group of individuals. Id. (quoting Britt v. City of Wilmington, 236 N.C. 446, 451, 73 S.E.2d 289, 293 (1952)).

n2 We note that municipalities also retain the authority they had prior to the Fireworks Act to "regulate and prevent the carrying on of manufactories dangerous in causing and promoting fires," and to "regulate and prevent the storage and transportation of any combustible or explosive material." NMSA 1978, § 3-18-11(A)(2), (5) (Cum. Supp. 1989).