

Opinion No. 90-07

March 28, 1990

OPINION OF: HAL STRATTON, Attorney General

BY: Elizabeth A. Glenn, Assistant Attorney General

TO: Honorable Stephen D. Stoddard, State Senator, 326 Kimberly Lane, Los Alamos, New Mexico 87544

QUESTIONS

(1) Does the last sentence of N.M. Const. art. II, § 6 prohibiting a municipality or county from regulating "in any way, an incident of the right to keep and bear arms" include buying and selling firearms?

(2) Does the State Constitution give the Legislature sole and exclusive authority within the state to enact laws governing, in any way, the right to keep and bear arms?

CONCLUSIONS

(1) Yes.

(2) See analysis.

ANALYSIS

Article II, Section 6 of the State Constitution provides:

No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.

N.M. Const. art. II, § 6 (Cum. Supp. 1989). In our opinion, buying and selling firearms is an "incident" of the right to bear arms which the Constitution prohibits a county or municipality from regulating in any way.¹

The last sentence of N.M. Const. art. II, § 6 was adopted in 1986. Before then, local governments had the authority to enact reasonable restrictions affecting the right to bear arms under their police powers. See *City of Las Vegas v. Moberg*, 82 N.M. 626, 485 P.2d 737 (Ct.App. 1971). See also *Hyde v. City of Birmingham*, 392 So.2d 1226 (Ala. Crim. App. 1980) (upholding municipal regulation restricting possession of firearm in certain circumstances as valid exercise of police power). Under their police power,

counties and municipalities are authorized to enact ordinances "providing for the safety, preserving the health, promoting the prosperity and improving the morals, order, comfort and convenience" of their inhabitants. NMSA 1978, § 3-17-1(B) (Cum.Supp. 1989) (municipalities), id. § 4-37-1 (Repl. Pamp. 1984) (counties).

N.M. Const. art. II, § 6 does not specify or define what constitutes an "incident" of the right to bear arms. The rules of statutory construction provide that, in the absence of a specific definition, terms used in a statute are given their ordinary meaning. *Flaska v. State*, 51 N.M. 13, 22, 177 P.2d 174, 179 (1947) (the people are presumed to know the meaning of words they use in constitutional provisions and they use them according to their plain, natural and usual signification and import).

According to one dictionary definition, the term "incident" is:

used both substantively and adjectively of a thing which, either usually or naturally and inseparably, depends upon, appertains to, or follows another that is more worthy. Used as a noun, it denotes anything which inseparably belongs to, or is connected with, or inherent in, another thing, called the "principal." Also, less strictly, it denotes anything which is usually connected with another, or connected for some purposes, though not inseparably.

Black's Law Dictionary 686 (5th ed. 1979). Courts have applied similar definitions of the term "incident" in other contexts. See, e.g., *Gross v. Zoning Bd. of Adjustment*, 424 Pa. 603, 606 n.4, 227 A.2d 824, 826 n.4. (1967) (defining use of public facility that is customarily "incidental" or "incident" to main use); *State v. McCollum*, 17 Wash.2d 85, 89, 136 P.2d 165, 167 (1943) (search "incident" to an arrest). See also *Velkovitz v. Penasco Indep. School Dist.*, 96 N.M. 587, 590, 633 P.2d 695, 698 (Ct. App. 1980) (for purposes of workers compensation benefits, "[a] risk is incidental to the employment only where the risk belongs to or is connected with what an employee must do in fulfilling her contract"), reversed on other grounds, 96 N.M. 577, 633 P.2d 685 (1981).

Based on the usual meaning of the term "incident," the ability to buy and sell firearms can fairly be described as an incident of the right to bear and keep arms. The ability to obtain weapons is inherent in and connected with the right to bear and keep arms. Limitations on purchases or sales of weapons naturally affect a person's prerogative to possess a weapon, and sales and purchases of weapons are dependent upon the ability of state citizens to bear and keep arms. Also, regulations affecting the transfer of firearms, like any form of gun control, amounts to regulation of the weapons themselves, and weapons certainly inseparably belong to or are connected with the right to bear and keep them.

There is authority for the position that a state may completely prohibit sales of weapons without conflicting with the right to bear arms. *Biffer v. City of Chicago*, 278 Ill. 562, 570, 116 N.E. 182, 185 (1917); *Caswell & Smith v. State*, 148 S.W. 1159, 1163 (Tex. Civ. App. 1912). However, although this kind of regulation may not intrude upon the actual right to bear arms, see *State v. Dees*, 100 N.M. 252, 255, 669 P.2d 261, 264 (Ct. App.

1983) (statute prohibiting carrying a firearm in a licensed liquor establishment was not an "infringement" on right to bear arms), it still amounts to regulation of an incident of that right. Moreover, the prohibition in the Constitution is quite broad, preventing a municipality or county from regulating incidents of the right to bear arms "in any way." Given this, we do not think that local governments may, consistently with the State Constitution, regulate firearm sales. Restrictions on sales at least would constitute indirect regulation of firearms and the ability to obtain them, and we conclude that this form of gun control falls within the constitutional prohibition.

Your second question concerns the effect of the last sentence in N.M. Const. art. II, § 6. If a provision of the Constitution makes sense as written, courts generally will not read words into it which are not present. In re Generic Investigation Into Cable Television Services, 103 N.M. 345, 349, 707 P.2d 1155, 1159 (1985). The language used in the last sentence of Article II, Section 6 simply takes from municipalities and counties the authority they otherwise would have under their police powers to regulate matters which are incidents of right to bear arms. It does not, by its terms, restrict such regulation to the Legislature, although the practical result of the prohibition is to allow firearm regulation only by the State and state agencies with the requisite statutory authority. See, e.g., New Mexico State Fair Rule 82-1 (1982) (State Fair Commission rule prohibiting possession of deadly weapons, concealed or otherwise, on New Mexico State Fairgrounds).

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GENERAL FOOTNOTES

[n1](#) We address only those regulations seeking to control firearms as such, i.e., because they are dangerous, are used as weapons or have other unique characteristics. We do not express any opinion about local regulations like gross receipts taxes that arguably affect firearm sales but apply equally to sales of any commodity.