

Opinion No. 17-2032

July 30, 1917

BY: HARRY L. PATTON, Attorney General

TO: Mr. C. A. Perkins, Village Attorney, Carrizozo, New Mexico.

A Village Does Not Have the Power by Ordinance to Make the Carrying of a Deadly Weapon a Misdemeanor and Provide a Punishment Therefor.

OPINION

I have your letter in which you enclose a copy of Ordinance No. 11, passed by the Village of Carrizozo. The ordinance makes the carrying of a deadly weapon, concealed or otherwise, within the limits of Carrizozo, a misdemeanor and provides that, upon conviction before a Justice of the Peace, a punishment by a fine of not less than \$ 50.00 nor more than \$ 100.00, or by imprisonment in the county jail for not less than thirty days nor more than ninety days, may be imposed, or both such fine and imprisonment may be inflicted.

Section 1701, Codification of 1915, in substantially the same language makes this an offense under the State law. Upon trial before the District Court, a fine of not less than \$ 50.00 nor more than \$ 300.00, or imprisonment of not less than sixty days nor more than six months, or both such fine and imprisonment, may be imposed. The section further confers jurisdiction upon a Justice of the Peace to try the offense and upon trial before such officer, a fine of not more than \$ 100.00 or imprisonment of not less than three months, or both such fine and imprisonment, is made the penalty. You may note that the penalty imposed under the ordinance and that authorized to be imposed under the statute by a Justice of the Peace, is substantially the same.

I have heretofore had information that your village was incorporated under authority of the Act of 1909, embraced under Sections 3764 to 3777, Codification of 1915. The question presented involves the right of a municipality of this class by ordinance to define certain acts as a public offense, in a case where the State statutes have declared the same act to be a public offense. A similar question was presented to Honorable Frank W. Clancy while he was Attorney General. In a letter to Mr. H. C. Baron, of Hagerman, New Mexico, written February 27, 1915, (Opinions of the Attorney General No. 1445), Mr. Clancy held that when the legislature acted, the subject was thereafter excluded from the legislative power of incorporated cities and towns. The question arose over the right of a town or village to pass an ordinance forbidding the proprietor of a pool hall from allowing minors under the age of twenty-one years to enter or remain therein. I cannot fully agree with Mr. Clancy as to the conclusion reached in this instance. As to whether or not an act may be made a penal offense under the statutes of the State, and further penalties may be imposed for its commission or omission by municipal authorities, is a question upon which the courts are divided. I believe that the

weight of authority supports such double legislation. The Supreme Court of our State has never passed upon this question. In the following states it has been declared by the courts that both state and municipal legislation may penalize the same act: Alabama, Arkansas, Colorado, Dakota, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Utah, Washington and Wisconsin. *McQuillin, Mun. Corp. Section 878*. This same doctrine has also been sustained by the United States Courts. A different rule has been applied in California, Georgia, North Carolina, Rhode Island and Texas. *McQuillan Mun. Corp. Section 849*.

But to authorize municipal legislation, making an act a misdemeanor where State legislation has done the same thing, the local corporation must possess sufficient charter power and such power must be exercised in the manner conferred. The question of power seems to be the chief source of conflict. While, under the statutes at the present time, the power is not conferred by charter, but is imposed by legislation conferring power upon municipal corporations of the respective classes. The term "charter" though has been made to extend to grants under general statutes.

The identical question to be determined is as to the powers conferred upon villages. The general powers conferred upon villages organized under the Act of 1909 are found in Section 3771, Codification of 1915. You suggest that the following language contained in said section authorizes the passage of such ordinance:

"to prevent the presence within their limits of anything dangerous, offensive, unhealthy or indecent and to cause any nuisance to be abated;"

I cannot agree with you that the carrying of deadly weapons can be a thing dangerous, offensive, unhealthy, etc. If it is anything, it is an act to be prohibited and not a thing to be prevented, which covers the authority of the municipality. Under our statutes there is not general grant of powers, such as are conferred by the legislatures of a number of states. It has been held that the usual grant of municipal powers, which, in general terms include the authority to enact all necessary ordinances and preserve the peace to advance local government of a community, is insufficient to authorize the passage of an ordinance for the punishment of an act constituting a misdemeanor or crime by State statute. In *Van Buren v. Wells*, 53 Ark. 368, 14 S. W. 28, 22 Am. St. Rep. 214, and *Opelousas v. Giron*, 46 La. Ann. 1364, 16 So. 190, it was held that a municipal corporation has power to pass an ordinance making the carrying of concealed weapons a misdemeanor, but in those states the power granted to municipal corporations was much broader than that of our State. But the right of the municipal corporation to legislate upon such subject was denied in *State v. Rosenthal*, 75 Vt. 295, 55 Atl. 610.

My conclusion is that a municipal corporation has only such power or authority as is delegated to it by the State statute and my further opinion is that the grant of power from this State to villages is not broad enough to authorize the passage of the ordinance referred to.