



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

September 18, 2007

Randall D. Fife
Moscow City Attorney
P.O. Box 9203
Moscow, Idaho 83843

Re: Request for Opinion Letter - Local Regulation of the Possession and Transportation of Firearms.

Dear Mr. Fife:

Your letter of July 24, 2007, requesting a legal analysis of seven questions relating to local regulation of the possession and/or transportation of firearms was referred to me for response. This letter is provided to assist you. The response is an informal and unofficial expression of the views of this office based upon the research of this author and others in this division.

Questions Presented

1. May the City (of Moscow) pass a City Ordinance prohibiting possession and/or transportation of firearms in City-owned buildings?
2. May the City pass a City Ordinance prohibiting possession and/or transportation of firearms in City-owned buildings during City sponsored events?
3. May the City pass a City Ordinance prohibiting possession and/or transportation of firearms during City sponsored events?
4. May the City pass a City Ordinance prohibiting possession and/or transportation of firearms in City-owned parks?
5. May the City pass a City Ordinance prohibiting possession and/or transportation of firearms during City Council and/or other publicly noticed City meetings (such as Administrative Committee meetings, Zoning Board of Adjustment meetings, Transportation Committee meetings, etc.)?
6. Does a Board of County Commissioners have the ability to control the possession and/or transportation of a firearm within a courthouse, in light of Idaho Code § 31-872?
7. Are there inherent powers vested in an Idaho State district or magistrate judge, which allows the regulation of possession and/or transportation of firearms within either the County Courthouse and/or the courtroom proper?

Summary of Conclusions Reached

As to questions 1-6 the Idaho Legislature has preempted by specific statute regulation of "lawful" firearms possession and/or transportation by cities and counties in the state of Idaho. The specific language of the preemption statutes appears to permit local regulation of "unlawful" uses of firearms, however since any attempted local regulation of such uses which exceeds the restrictions imposed by state law would necessarily impinge upon "lawful" uses, the local regulations would have to mirror precisely the restrictions established by state law, to successfully avoid a preemption challenge.

As to question 7 it appears likely that the regulation by an administrative district judge of the possession and/or transportation of firearms within a courthouse, though not clearly addressed by Idaho statute, would be held to be a constitutional function of the judiciary, as an exercise of the delegated authority of the Idaho Supreme Court. However, the potential effect, if any, on the constitutional authority of the judiciary to regulate in this arena as a result of the language of the 1978 amendment by the people of Idaho to Art. I, § 11 of the Idaho Constitution have yet to be reviewed by our courts.

Analysis

The constitutional grant under Art. XII, § 2 of the Idaho Constitution of police power authority to counties and cities has been interpreted by the Idaho Supreme Court as:

a direct grant of police power from the people to the municipalities of the state, subject only to the limitation that such regulations shall not conflict with the general laws. Comprehended in the term, 'general laws,' are other provisions of the constitution, acts of the state legislature, and, of course, the constitution and laws of the United States. Under this constitutional provision the cities of this state are in a notably different position than are cities in jurisdictions where their police power is strictly limited to that found in charter or legislative grant.

Rowe v. City of Pocatello, 70 Idaho 343, 348-349, 218 P.2d 695 (1950). The police power is "broad" in scope. 70 Idaho at 348. It is "widely accepted" that the police power of the state, and of a municipality under a constitutional grant of police power authority,

in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with the like enjoyment of the rights of others.

(70 Idaho at 349.)

But Art. XII, § 2 imposes an express limitation on exercise of the police power by a county or city, restricting local regulatory authority to regulations "as are not in conflict with its charter or with the general laws." Absent a "general law" to the contrary the

grant of police power authority is broad enough to include authority to regulate the "carrying of concealed dangerous or deadly weapons." State v. Hart, 66 Idaho 217, 157 P.2d 72 (1945). However, the Idaho Supreme Court has also ruled that a local ordinance that conflicts with a state law, or is expressly or impliedly preempted by state regulation of the subject matter, is void. Envirosafe Serv. of Idaho v. County of Owyhee, 112 Idaho 687, 689, 735 P.2d 998 (1987).

As it pertains to the exercise by counties or cities of police power regarding firearms, the current statutory framework expressly restricts any authority that counties and cities otherwise might have. The legislature in 1984 passed two statutes restricting the authority of local governments to regulate the lawful uses of firearms, one aimed at counties and the other at cities. Idaho Code § 31-872 (counties), as added by 1984 Sess. Laws, ch. 243, § 1, p. 590; and Idaho Code § 50-343 (cities), as added by 1984 Sess. Laws, ch. 243, § 2, p. 590.

Idaho Code § 31-872 provides that:

No board of county commissioners of any county may in any manner regulate the lawful ownership, possession or transportation of firearms when carried or transported for purposes not prohibited by the laws of the state of Idaho.

Idaho Code § 50-343 provides that:

No city may in any manner regulate the lawful ownership, possession or transportation of firearms when carried or transported for purposes not prohibited by the laws of the state of Idaho.

Although your questions are not presented in terms of open or concealed carry, it appears that the Idaho Legislature has preempted by statute, the regulation of "lawful" firearm possession in both categories by counties and cities in the state of Idaho. The use of the phrase "not prohibited by the laws of the state of Idaho" in each of these sections seems to express a clear legislative intent to preempt cities and counties from exercising their police powers to prohibit uses (ownership, possession, or transportation) of firearms that the legislature has chosen to make "lawful." By the same token the express language of these sections does not appear to indicate a legislative intent to preempt local regulation of the ownership, possession, or transportation of firearms in ways the legislature has determined to be "unlawful."¹

Idaho law prohibiting the possession of concealed weapons is codified in Chapter 33, Title 18, Idaho Code. Idaho Code § 18-3302 establishes a system for the issuance of concealed weapons licenses. This statutory system is structured in such a way that it is "lawful" to carry a concealed weapon for which a license has been issued in any public place in Idaho that has not been expressly restricted by the concealed weapons statute. Subsection (7) of § 18-3302 prohibits the carrying of a concealed

¹ Logically however, since any attempt at local regulation of "unlawful" uses of firearms that varied in the slightest from state law, would necessarily impinge upon the "lawful" universe of firearm uses, such local regulations, to avoid a preemption challenge, would have to mirror state law precisely, and thus would lack substantive legal significance.

weapon without a license, except in “the person’s place of abode or fixed place of business, or on property in which the person has any ownership or leasehold interest.”²

Idaho Code § 18-3302C expressly restricts the locations in which a person who has obtained a concealed weapons license can carry a concealed weapon. Subsection (1) of that statute prohibits the carrying of such “a concealed weapon in a courthouse, juvenile detention facility or jail, public or private school, except as provided in subsection (4)(f) of section 18-3302D, Idaho Code.”³ (Emphasis added.)

It appears clear from the above statutory language, that the legislature has preempted the field of regulation of lawful firearm possession and transportation.⁴ Thus, it is our view that any ordinance passed by either a city or county under the scenarios contemplated in your first six questions that regulates the possession or transportation of firearms within their respective jurisdictions, will be susceptible to legal challenge on the basis of preemption, unless it regulates the unlawful possession or transportation of firearms in terms identical to those used by current state statutes.

As to question Seven, Article V, § 2 of the Idaho Constitution grants broad powers to the Idaho Supreme Court to administer and supervise the operation of Idaho’s court system. “The judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, district courts, and such other courts inferior to the Supreme Court as established by the legislature. The courts shall constitute a unified and integrated judicial system for administration and supervision by the Supreme Court...” (Emphasis added.) Article V, §13 provides that “The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; but the legislature shall provide...and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this Constitution. . . .”

I have found no case law in the state of Idaho defining the scope of the regulatory authority of the Supreme Court under this grant of administrative powers over the judiciary as it relates to the control of the possession or transportation of firearms in the state’s courthouses and courtrooms. A 1995 case in the state of Colorado held that a chief judge (a position comparable to an administrative district judge in Idaho) had the authority to issue a standing order to restrict the possession of weapons by those coming into a secured area of the courthouse pursuant to a general delegation of administrative authority from the Colorado Supreme Court. People ex rel. Sullivan vs. Swihart, 897 P.2d 822 (1995). The court in Swihart reasoned that “the chief judge must

² Weapons subject to the requirement of a license in order to be lawfully carried concealed are “any dirk, dirk knife, bowie knife, dagger, pistol, revolver, or any other deadly or dangerous weapon.” But the concealed weapons law does “not apply to any lawfully possessed shotgun or rifle.”

³ The referenced exception relates to “a person or an employee of the school or school district who is authorized to carry a firearm with the permission of the board of trustees of the school district or the governing board.” A “school” for purposes of Idaho Code § 18-3302C and 18-3302D “means a private or public elementary or secondary school.” Idaho Code § 18-3302D.

⁴ This is a policy decision made by the legislature in 1984. It also appears that the current legislature could, within constitutional limitations, open up the field of local regulation of firearm possession and/or transportation in public facilities if it chose to do so.

have the ability to assure that order is maintained and to control security as it relates to the district court courtrooms,” and based its finding upon the public policy that either “violence or the threat of violence may interfere with the operation of the courts and would pose the greatest threat to the administration of justice.” The Swihart court did not however analyze the scope or source of its authority to regulate firearms in the first instance.

Perhaps an idea of how the Idaho Supreme Court views its powers in this regard can be obtained from an Order issued by the Court establishing a “weapon-free zone” for the Supreme Court building and adjoining premises, dated March 15, 2004. In relevant part this order provides:

...WHEREAS, the Idaho Supreme Court possesses the inherent power and authority to control weapons in state court facilities in order to carry out its proper constitutional function of administering and supervising the state judicial system;

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. Unless expressly exempted below, possession of a weapon in the Supreme Court building and adjoining premises by any individual, at any time, is expressly prohibited...

(Emphasis added.)

On August 4, 2005 the Supreme Court issued an order outlining the delegated power and authority of the administrative district judges in Idaho. That order states in relevant part “The administrative judge, subject to the rules of the Supreme Court, has administrative supervision and authority over the operation of the district courts and magistrate division in the district. The powers and duties of the administrative judge include, but are not limited to, all those powers and duties set forth in statute or in other rules of the Supreme Court, as well as the following: ... (14) in cooperation with local and state officials, develop plans and procedures for insuring the security of courthouses and courtrooms, and address security concerns identified by the district judges, magistrate judges or other court personnel. ...”

If the Idaho Supreme Court found the reasoning of the Swihart court persuasive in an appropriate challenge it would likely find that the appropriate administrative district judge would have the authority to regulate the possession and/or transportation of firearms within either the County Courthouse and/or the courtroom proper.

One caveat that must be mentioned however is the potential effect of the specific language of Art. I, §11 of the Idaho state constitution. In 1978, the people of Idaho amended Art. I, § 11 of the Idaho Constitution to provide that:

The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon,

nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.

(Emphasis added.)

The Idaho Supreme Court has not construed the 1978 amendment in the context of the regulation of the possession or transportation of weapons by the legislature, the judiciary, or otherwise. What remains unknown therefore is the extent to which, if any, this constitutional provision, and the specific delineation by the people of the limited areas in which abridgment of the right to bear arms may occur, impinges upon other constitutional provisions granting the Supreme Court the authority to supervise and administer the operation of the state judicial system.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. A. Bywater', written in a cursive style.

STEPHEN A. BYWATER
Deputy Attorney General
Chief, Criminal Law Division

SAB/fn