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November 6, 2008

The Honorable James G. Taylor
New Mexico State Senator
3909 Camino Del Valle SW
Albuquerque, NM 87105

Re: Request for Opinion - Regulation of Fireworks

Dear Senator Taylor:

You requested our advice regarding what type of regulatory powers a municipality or county ("local government") has over aerial and ground audible devices under Section 60-2C-7(C) of the Fireworks Licensing and Safety Act, NMSA 1978, ch. 60, art. 2C (1989, as amended through 2007) ("Act"). Specifically, you asked:

1. Does the limitation in Section 60-2C-7(C), which prohibits a local government from regulating permissible fireworks other than aerial devices and ground audible devices, require a local government to regulate all or none of the aerial or ground devices or may a local government choose to regulate some but not all of the devices?
2. Does the phrase "regulate and prohibit" in Section 60-2C-7(C) limit a local government to prohibiting the sale or use of aerial and ground audible devices or may a local government choose to regulate the devices in some way short of prohibiting their sale or use?
3. May a local government choose to impose different regulations regarding the sale of aerial and ground audible devices on different vendors? For example, may a local government prohibit the sale of the devices except at the permanent retail stores whose primary business is tourism referenced in Section 60-2C-8(L)?

Based on our examination of the relevant statutory and case law authorities, and on the information available to us at this time, we conclude that Section 60-2C-7(C) gives a local

government broad authority to regulate aerial and ground audible devices as it deems appropriate.

Section 60-2C-7 of the Act describes "permissible fireworks" and provides in Subsection C that local governments "shall not by ordinance **regulate and prohibit** the sale or use of any permissible firework except aerial and ground audible devices" (emphasis added). While it authorizes a local government to regulate and prohibit aerial and ground audible devices, Section 60-2C-7(C) does not define "regulate and prohibit" or otherwise explain the grant of authority to local governments.

In these circumstances, several rules of statutory construction apply. First, statutes are interpreted "in order to facilitate their operation and the achievement of their goals." Mutz v. Municipal Boundary Comm'n, 101 N.M. 694, 698, 688 P.2d 12 (1984). Second, "when a power is conferred by statute everything necessary to carry out the power and make it effective and complete will be implied." Kennecott Copper Corp. v. Employment Security Comm'n, 78 N.M. 398, 402, 432 P.2d 109 (1967). Third, courts "will not blindly apply a conjunctive meaning to 'and' or a disjunctive meaning to 'or'...." California First Bank v. State, 111 N.M. 64, 72, 801 P.2d 646 (1990). Finally, the courts have consistently held that "we cannot add a requirement that is not provided for in the statute or read into it language that is not there." Security Escrow v. Tax & Revenue Dep't., 107 N.M. 540, 543, 760 P.2d 1306 (Ct. App. 1988).

Under Section 60-2C-7(C), local governments generally have no regulatory authority over the sale and use of permissible fireworks. Notwithstanding this general prohibition, the legislature expressly has allowed local governments to "regulate and prohibit" aerial and ground audible devices. We do not believe that the legislature's use of the word "and" in the above-quoted phrase was intended to limit a local government to imposing an absolute bar to the sale and use of the covered devices. The better interpretation, and one that gives effect to statutory language, is that the legislature intended to give a local government discretion to prohibit the covered devices or to regulate them in the manner and to the extent the local government deems appropriate.

Consequently, Section 60-2C-7(C) permits local government to determine: (1) which aerial and ground audible devices it will regulate; (2) whether it will regulate the sale and use of the devices short of completely prohibiting them; and: (3) whether it will impose different regulations for the sale of the devices on different vendors. To use the example posed in your request, Section 60-2C-7(C) would authorize a local government to limit the sale of aerial and ground audible devices to permanent retail stores whose primary business is tourism, as described in Section 60-2C-8(L) of the Act. Of course, any regulation adopted by a local government under Section 60-2C-7(C), including distinctions made among vendors or devices, would have to be consistent with applicable law, reasonable and fair. See State ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque, 119 N.M. 150, 889 P.2d 185 (1995) (courts will intervene "to prevent municipal action that is ultra vires by reason of constitutional provisions or lack of authority, or by reason of clear abuse of discretion or power") (citations omitted); New Mexicans for Free Enterprise v. City of Santa Fe, 2006-NMCA-007, ¶¶ 51, 126 P.3d 1149, 1168 (small

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business exception in municipality's minimum wage regulation did not violate constitutional equal protection guarantee because exception was rationally related to a legitimate government purpose).

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,



LESLEY J. LOWE

Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General