

STATE OF MICHIGAN

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CONST 1963, ART 1, § 6:

Restrictions on right to bear arms under
Const 1963, art 1, § 6

FIREARMS:

NATURAL RESOURCES
COMMISSION:

Const 1963, art 1, § 6 provides a constitutional right in Michigan to bear firearms for self defense, subject to reasonable regulation by the State.

The firearm and ammunition restrictions set forth in Wildlife Conservation Order section 2.1(3) dealing with the possession of a rifle or shotgun in areas frequented by deer during the five-day period immediately preceding the beginning of firearm deer season are a reasonable exercise of the State's police power, and do not violate the right to bear arms established by Const 1963, art 1, § 6.

The Legislature may, by statute, amend or repeal the firearm and ammunition restrictions set forth in Wildlife Conservation Order section 2.1(3).

Opinion No. 7254

October 26, 2010

Honorable Michael Prusi
State Senator
The Capitol
Lansing, MI 48909

You have asked two questions regarding a provision within the Wildlife Conservation Order (WCO)¹ that restricts possession of certain firearms and types of ammunition during the five days preceding opening day of Michigan's firearm deer season on November 15.

¹ The Wildlife Conservation Order is actually made up of numerous orders that have been issued and amended over the course of many decades. It may be viewed by accessing the Michigan Department of Natural Resources and Environment website at: <http://michigan.gov/documents/Wcao_134367_7.html> (accessed August 19, 2010).

The WCO is issued under Part 401, Wildlife Conservation, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, MCL 324.40101 *et seq.* Part 401 vests the authority for managing wild birds and mammals in the Department of Natural Resources and Environment (Department),² and the Natural Resources Commission (Commission). Section 40113a of the NREPA, MCL 324.40113a, shifted primary responsibility for one aspect of wildlife management, regulating the taking of game, to the Commission from the Department:

The commission of natural resources shall have the exclusive authority to regulate the taking of game as defined in section 40103 in this state. The commission of natural resources shall, to the greatest extent practicable, utilize principles of sound scientific management in making decisions regarding the taking of game. Issuance of orders by the commission of natural resources regarding the taking of game shall be made following a public meeting and an opportunity for public input. [MCL 324.40113a(2).]³

The particular provision of the WCO identified in your request is found in Chapter II, section 2.1, which states:

(1) Unless otherwise specified in this order, a person shall not do any of the following:

* * *

(3) During the five days immediately preceding November 15, transport or possess in an area frequented by deer a rifle or shotgun with buckshot, slug load, ball load, or cut shell. A person may transport a rifle or shotgun to or from a hunting camp if the rifle or shotgun is unloaded and securely encased or carried in the trunk of a vehicle. This section shall not prohibit a resident who holds a fur harvester's license from carrying a rimfire firearm .22 caliber or smaller while hunting or checking a trap line during the open season for hunting or trapping fur-bearing animals.

² All statutory functions and authorities of the former Department of Natural Resources were transferred to the new Michigan Department of Natural Resources and Environment by Executive Order 2009-45, effective January 17, 2010.

³ Section 40113a was added to Part 401 by 1996 PA 377. In the past, the Department's and the Commission's authority were indistinguishable because the Commission was the head of the Department. But through a series of Executive Orders, beginning in 1991, the Commission's role has changed, and it now only retains certain authority including authority over the taking of game.

The origins of this provision can be found in an amendment to the Game Law, 1929 PA 286, by 1947 PA 326, which stated, in part, in Chapter IV, section 6, 1948 CL 314.6:

Provided further, That during the 5 days immediately preceding the opening of the season for the taking of deer with firearms it shall be unlawful to transport or possess in any area frequented by deer a rifle larger than .22 caliber rim fire, or shotgun with buckshot, or slug load or ball load or cut shell. [Emphasis in original.]

This statutory provision and other sections of the Game Law were repealed by 1980 PA 86, the Hunting and Fishing License Act. That Act, however, included a prohibition similar to 1948 CL 314.6 at Article 8, section 805, MCL 316.805:

During the 5 days immediately preceding the opening of the earliest season for the taking of deer with firearms, a person shall not transport or possess in any area frequented by deer a rifle or shotgun with buckshot, slug load, ball load, or cut shell. A person may transport a rifle or shotgun to or from a hunting camp if the rifle or shotgun is unloaded and locked in the trunk of a motor vehicle or otherwise inaccessible to an occupant of the motor vehicle from the interior of the vehicle.

The authority of the Commission was later expanded by 1988 PA 256, the Wildlife Conservation Act, which stated that the Commission "shall manage animals in this state," and authorized the Commission to "issue orders" to do so, including orders establishing the lawful time, place, and method of hunting. The Act also required the Commission to issue orders that would take the place of the remaining sections of the Game Law, effectively repealing those sections. These changes consolidated the various game regulations under the Commission, and were intended to provide for the more consistent and efficient management of the State's wildlife resources. Senate Fiscal Analysis, SB 374, July 12, 1988, p 1.

Subsequently, many of the regulations in the Hunting and Fishing License Act, 1980 PA 86, were repealed by 1993 PA 144. This included MCL 316.805, which was described as having been superseded by the earlier Wildlife Conservation Act, 1988 PA 256. Senate Fiscal Analysis, SB 147, August 8, 1994, pp 2-3. 1993 PA 144 was signed by the Governor on August 13, 1993, and took immediate effect. On September 9, 1993, the Department issued amendment 19 to the WCO, adding section 2.1(3).

This history reveals that the ammunition and firearm restrictions set forth in section 2.1(3), or at least similar provisions, have been in force since 1947. As your letter acknowledges, the Department's position is that section 2.1(3) was intended to, and does, help prevent the poaching of deer during the five days preceding opening day. This intent is demonstrated by the fact that the types of ammunition and firearms subject to the five-day period are those typically used when hunting deer. Furthermore, embedded within the protection against poaching immediately before the season opens are the concepts of fair play and a level playing field for hunters. The restriction helps ensure that all hunters enter the season with an equal opportunity for the taking of game.

You first ask whether this provision of the WCO violates an individual's right to bear arms as established by Const 1963, art 1, § 6.

Section 6 states: "Every person has a right to keep and bear arms for the defense of himself and the state." Const 1963, art 1, § 6. It was preceded by Const 1908, art 2, § 5, which provided: "Every person has a right to bear arms for the defense of himself and the state."

Because of the similarity of the provisions and since the Convention Comment to Const 1963, art 1, § 6 indicates no intent to reduce the protection of the right to bear arms granted by the 1908 Constitution, the rights guaranteed under both provisions have been viewed as identical. *People v Swint*, 225 Mich App 353, 359, n 2; 572 NW 2d 666 (1997).

Const 1963, art 1, § 6 is similar to the Second Amendment of the United States Constitution, which provides that "the right of the people to keep and bear Arms, shall not be infringed." In *McDonald v Chicago*, 561 US ____; 130 S Ct 3020, 3042; 177 L Ed 2d 894, 921 (2010), the United States Supreme Court confirmed that this provision provides a "fundamental" and "basic" right of self defense, and that it is applicable to the States by virtue of the Fourteenth Amendment of the United States Constitution:

In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.

In reaching that conclusion, however, the Supreme Court recognized that the right was not without limits. Quoting from its decision in *District of Columbia v Heller*, 554 US ____; 128 S Ct 2783; 171 L Ed 2d 637 (2008), the *McDonald* Court stated:

It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 US, at ____; 128 S Ct 2783; 171 L Ed 2d at 678. We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.*, at ____; 128 S Ct 2783; 171 L Ed 2d at 678. We repeat those assurances here.

Consistent with *McDonald*, the Michigan Supreme Court construed former Const 1908, art 2, § 5, which created a right to bear arms for specific purposes, as being subject to the reasonable exercise of the State's police power. In *People v Brown*, 253 Mich 537, 539-541; 235 NW 245 (1931) (citations omitted), the Court observed:

It is generally recognized that the constitutional declaration, in both Federal and State constitutions, of the right to bear arms had its origin in the fear of the American colonists of a standing army and its use to oppress the people, and in their attachment to a militia composed of all able-bodied men. Probably the necessity of self-protection in a frontier society also was a factor.

* * *

The protection of the Constitution is not limited to militiamen nor military purposes, in terms, but extends to "every person" to bear arms for the "defense of himself" as well as of the State. This includes the right of a foreigner to possess a revolver for the legitimate defense of his person and property, subject, however, to the valid exercise of the police power of the State to regulate the carrying of firearms. [Emphasis added.]

More recently, the Court of Appeals in *People v Swint*, recognizing the State's police power, upheld as constitutional under Const 1963, art 1, § 6, a statute that restricted the right of felons to possess firearms.

Applying the *Brown* and *Swint* Courts' reasoning to the WCO's prohibition on possessing certain types of firearms and ammunition in the field before the opening day of deer season, the restriction does not violate Const 1963, art 1, § 6. The WCO imposes a restriction of short duration that only applies to a limited number of specifically described firearms and ammunition, which are typically used to hunt deer. A person subject to section 2.1(3) may otherwise possess a handgun for self defense. Consequently, the WCO would not violate the Second Amendment as interpreted by the United States Supreme Court in *Heller* and *McDonald*. As there is a

legitimate police power justification for the WCO – the prevention of poaching and the assurance of a level playing field for all hunters awaiting opening day – and it only places reasonable limits on the right to carry firearms, it is not unconstitutional.

It is my opinion, therefore, that Const 1963, art 1, § 6 provides a constitutional right in Michigan to bear firearms for self defense, subject to reasonable regulation by the State. The firearm and ammunition restrictions set forth in Wildlife Conservation Order section 2.1(3) dealing with the possession of a rifle or shotgun in areas frequented by deer during the five-day period immediately preceding the beginning of firearm deer season are a reasonable exercise of the State's police power, and do not violate the right to bear arms established by Const 1963, art 1 § 6.

You next ask whether the Legislature may "rescind" section 2.1(3) of the WCO by legislation. It is a general rule of law that: "An agency has no inherent power. Any authority it may have is vested by the Legislature, in statutes, or by the Constitution." *Deleeuw v Bd of State Canvassers*, 263 Mich App 497, 500; 688 NW2d 847 (2004), quoting *Belanger & Sons, Inc v Dep't of State*, 176 Mich App 59, 62-63; 438 NW2d 885 (1989).

The Commission's authority to adopt section 2.1(3) is not derived from the Michigan Constitution. The Commission was vested with exclusive authority to regulate the taking of game by the enactment of 1996 PA 377, which was submitted by the Legislature to the electors for vote under the referendum process provided for in Const 1963, art 4, § 34. It was approved by a majority of the electors on November 5, 1996. While a citizen initiated law under art 2, § 9

of the Constitution expressly requires the votes of three-fourths of the members of each house of the legislature to amend or repeal it, art 4, § 34 lacks that requirement and thus laws adopted through referendum may be amended at any time by a simple majority vote of the Legislature:

No law initiated or adopted by the people shall be subject to the veto power of the governor, and no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors unless otherwise provided in the initiative measure or by three-fourths of the members elected to and serving in each house of the legislature. Laws approved by the people under the referendum provision of this section may be amended by the legislature at any subsequent session thereof. [Const 1963, art 2, § 9.]

OAG, 1997-1998, No 6990, p 161 (August 10, 1998), addressed the Legislature's power to make, amend or repeal a law:

Const 1963, art 4, § 1, provides that: "The legislative power of the State of Michigan is vested in a senate and a house of representatives." This legislative power has been described as plenary and equivalent to the legislative powers asserted by the Parliament of the United Kingdom, except so far as the people of this state have limited it. *Harsha v Detroit*, 261 Mich 586, 590; 246 NW 849 (1933); *Advisory Opinion on Constitutionality of 1976 PA 240*, 400 Mich 311; 254 NW2d 544 (1977); and *Sessa v State Treasurer*, 117 Mich App 46, 54; 323 NW2d 586 (1982).

The Legislature has plenary authority, except where specifically limited by the Constitution. The WCO was issued by the Commission under authority granted it by the Legislature and the voters through the referendum process. That authority can be altered or repealed entirely by the Legislature and the Governor through the process for passage of a bill.⁴

⁴ For example, the Legislature previously used its authority to override a firearms rule promulgated by the then Department of Natural Resources when it enacted 2004 PA 129 and 130. That law exempted persons licensed to carry concealed pistols or otherwise exempt from licensure under 1927 PA 372 from a rule that prohibited the possession of firearms while hunting deer during "bow and arrow" season. Editors Note, OAG, 2003-2004, No 7123, p 4, 7 (February 11, 2003).

It is my opinion, therefore, that the Legislature may, by statute, amend or repeal the firearm and ammunition restrictions set forth in Wildlife Conservation Order section 2.1 (3).

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