

## LEGAL REVIEW NOTE

**Bill No.:** HB 102

**LC#:** LC804 To Legal Review Copy, as of  
December 30, 2020

**Short Title:** Generally revise gun laws

**Attorney Reviewer:** Todd Everts/Julianne  
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**Date:** December 31, 2020

### CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

*As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills." The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.*

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review **IS NOT** dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).*

#### Legal Reviewer Comments:

House Bill 102, as drafted, may raise potential constitutional conformity issues associated with Article X, section 9(2)(a), of the Montana Constitution. Section 9(2)(a) provides: "The government and control of the Montana University System is vested in a board of regents of higher education which shall *have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system* and shall supervise and coordinate other public educational institutions assigned by law" (emphasis added).

According to the Montana Supreme Court, this constitutional provision grants a high degree of independence and autonomy to the Board of Regents, subject only to the Legislature's power of appropriation. *Board of Regents v. Judge*, 168 Mont. 433 (1975). The Court in *Judge* further noted that "[i]nherent in the constitutional provision granting the Regents their power is the realization that the Board of Regents is the competent body for determining priorities in higher education." *Id.* at 454. In that case, the Court evaluated a number of statutory restrictions imposed on the university system, including a provision that limited salary increases for certain university officials. The Court held that this statute "specifically [denied] the Regents the power to function effectively by setting its own personnel policies and determining its own priorities" and held that limitation to be unconstitutional. *Id.*

As drafted, section 6 of HB 102 provides for the regulation of firearms on or in units of the Montana University System and limits the authority of the Board of Regents and units of the Montana University System for adopting policies or regulations on these issues. This provision in HB 102 may raise potential questions about whether this bill conforms with Article X, section (9)(2)(a), of the Montana Constitution.

This legal review note does not address whether the requirements of Amendment II of the U.S. Constitution or Article II, section 12, of the Montana Constitution apply to the Board of Regents and units of the university system in the context of specific firearm policies and regulations adopted or not adopted by the Board of Regents. Only a complaint brought before a court of competent jurisdiction with a resulting opinion can make that determination. The potential constitutional conformity issue raised in this legal review note only addresses whether under the Montana Constitution the Legislature can limit the authority of the Board of Regents and units of the university system by requiring or prohibiting certain firearm policies and regulations.

### **Requester Comments:**

The legal review note for HB102 points out that one sub-sub-subsection of the Montana Constitution, Article X, section 9(2)(a) provides that "The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system and shall supervise and coordinate other public educational institutions assigned by law."

It should be noted that the Montana Constitution creates the Board of Regents (board) and the university system, meaning that both the board and system are creatures of the Constitution, therefore subservient to it, and without separate authority or existence. "The board consists of seven members appointed by the governor and confirmed by the senate ..." M.C, Art. X, Sec. 9(2)(b). The board and university system are clearly government entities.

The language from Section 9(2)(a) that is most relevant to this discussion is: "... full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system ..."

It is important to note that this language is silent, as is all of Article X, about any authority whatsoever for the board to amend, alter, abolish, suspend, ignore, or exempt itself from any other part of the Constitution. Barring any direct authority and given other carefully defined provisions in the Constitution about how the Constitution may be revised, it is safe to assume that the board is offered no such authority. Given our constitutional scheme, this must be true regardless of whatever authority the board may have been granted over the academic affairs of the university system.

The LSD bases its concerns about HB 102 on *Board of Regents v. Judge*, 168 Mont. 433 (1975) (hereinafter *Judge*).

Section 5 of HB 102 is simply the Legislature announcing that the board is subject to restrictions on its actions by powers the people have reserved to themselves in Article II, specifically Section 12. It is not regulating the board. The expressed opinion that the board is subject to the constraints of Article II may not be agreeable to the board, but that does not make it wrong. Section 6 of HB 102 is restrictions on individuals within the university environment and a set of permissions about what the board may impose within the constraints imposed by Article II, Section 12. The Legislature is certainly empowered, also within the limits of the Constitution, to impose restrictions on individuals anywhere within the borders of Montana.

Based on *Judge*, the LSD legal review note declares, "According to the Montana Supreme Court, this constitutional provision grants a high degree of independence and autonomy to the Board of Regents, subject only to the Legislature's power of appropriation."

That case did NOT hold that the board is "subject only to the Legislature's power of appropriation."

First, *Judge* was a very narrow. It was only about the Legislature's attempt to manage the university system by placing conditions on appropriations, more specifically conditions for spending appropriated funds. In *Judge*, the Court declared that when it said, "Our task then is to harmonize in a practical manner the constitutional power of the legislature to appropriate with the constitutional power of the Regents to supervise, coordinate, manage and control the university system. *At the outset we note that there is not always a clear distinction between these powers and therefore limit our ruling here to these specific legislative enactments.*"

Thus, *Judge* declared itself to be a narrow decision and only about legislative control of the board regarding spending conditions. It did not address the relationship between the board and Article II, Section 12, as HB 102 does. Therefore, for the LSD to say that the board is "subject only to the Legislature's power of appropriation" is a conclusion of LSD and not the *Judge* opinion since the Court declined to state a position outside of the Legislature placing controls on appropriations.

Second, in *Judge*, the Court admitted that the board is subject to constraints other than from the Legislature when it said, "At this point we observe that if Article X, Section 9, 1972 Montana Constitution, was read literally without reference to the rest of the Constitution, the Regents'

argument and position would be correct; but, as will be hereinafter developed, the Constitution is not so read." The Court also stated that even if Article X contains broad language, "it must not be read or construed in isolation."

Thus, the power of the board is also constrained by and "subject to" other restrictions the people have imposed on all government entities in the Constitution, including a government entity such as the board, notably those restrictions contained in Article II. As *Judge* was applied, consideration of any conflict between the board and the people as they have expressed themselves in Article II is left unaddressed and unresolved by *Judge*, a vacuum that fails to support or justify the legal review note for HB 102.

Once having admitted that the board is subject to the constraints imposed by the people in the Constitution on all government entities, including those in Article II, the discussion of any possible legal note is entirely moot. The legal note for HB 102 offers no further rationale for any supposed constitutional conflict. However, there is more to be said in this discussion.

**Micromanagement?** What about, an interested reader may ask, the Section of HB 102 that details the restrictions the board or university system may impose on exercise of the right to keep or bear arms on campus? Aren't such detailed restrictions a micro-management of university affairs that is reserved to the board and the university system? No, on two counts.

The first count is that this is about a constitutionally reserved right that has nothing directly to do with education, just as a jury trial for capital offenses is not the business of the university system, no matter where the offense may happen - on or off campus. We have already demonstrated above that this topical area is beyond the authority and reach of the board under our constitutional scheme.

Second, the restrictions listed are not restrictions on the board, but upon individuals. They are a set of permissions wherein the law would say to the board, "You may go this far and no further." This set of conditions is a restriction by law on individuals who are in the university environment, but not on the board or university system. These are rational restrictions on the right of individuals to keep or bear arms that are designed to survive appropriate judicial scrutiny.

This is very similar to the relationship between the Constitution and local governments being enabled and controlled by state law. For example, a state law prohibiting the discharge of a firearm within city limits except in self-defense (45-8-343, M.C.A.) is not a restriction on cities. It is a restriction on individuals. Cities cannot claim, under Montana's constitutional scheme, that this statute offends their constitutional prerogatives. This is in part because cities are given no authority to regulate rights except insofar as a properly justified statute may permit, and in part because this law regulates individuals, not cities.

**Private property.** It has been argued, concerning university system prohibition on firearms, that university grounds are private property, and as a private property owner university system manager may prohibit whatever they wish. I do not agree for several reasons.

University grounds are deeded in the name of the State of Montana, as are school trust lands; The university system is created by the Constitution, is largely operated with taxpayer funds, the appropriations for university operation are made by the Legislature, and does not pay property taxes on the grounds it occupies. For these and other reasons, the grounds and facilities of the university system are clearly not private property.

**Conflict with the U.S. Constitution.** Any interpretation of Article X, Section 9(2)(a), that would permit the board to suspend or revoke rights the people have reserved to themselves from government interference in Article II may well conflict with the guarantee that every state must have a republican form of government contained in Article IV, Section 4 of the United States Constitution. If so, such an interpretation would be unconstitutional, yet another reason why I believe the legal review note for HB 102 is a reach.