ALAN WILSON
ATTORNEY GENERAL

December 29, 2017

The Hon. Josiah Magnuson
South Carolina House of Representatives
304-D Blatt Building
Columbia, SC 29201

Dear Representative Magnuson:

We received your request seeking an opinion on the validity of a municipal ordinance which purports to regulate the possession of rifles or shotguns on certain public property. The following opinion sets out our understanding of your question and our response.

Issue:

Your opinion request refers us to Greenville City Ordinance Sec. 24-264 which is titled "Possession of loaded rifle or shotgun on public property" and reads:

> It shall be unlawful for any person to have any rifle or shotgun in his possession while on or in any public street, alley or other way or any other public property unless the rifle or shotgun is unloaded, broken down and separated; provided, however, this section shall not apply to duly authorized law enforcement officers or members of the active armed forces of the United States, including the reserve and the National Guard.

City of Greenville, SC, Code of Ordinances § 24-264 (2017) (hereinafter referred to as "Ordinance 24-264"). You ask for our opinion on the validity of this ordinance in light of S.C. Code Ann. § 23-31-510 (Supp. 2016) and prior opinions of this Office.

Law/Analysis:

While a municipal ordinance "is a legislative enactment and is presumed to be constitutional," several prior opinions of this Office have conclude that a local ordinances which expressly purports to criminalize or otherwise regulate possession of a firearm facially conflicts with Section 23-31-510 of the South Carolina Code of Laws which preempts all such local regulations. *See Op. S.C. Att'y Gen.*, 2015 WL 4596713 (July 20, 2015) (quoting *Southern Bell Tel. & Tel. Co. v. City of Spartanburg*, 285 S.C. 495, 597, 331 S.E.2d 333, 334 (1985)). Consistent with those prior opinions, we opine here that a court most likely would conclude that

Ordinance 24-264 is invalid because it is preempted by state law. *See id.* Section 23-31-510 provides in relevant part that:

> No governing body of any county, municipality, or other political subdivision in the State may enact or promulgate any regulation or ordinance that regulates or attempts to regulate:
>
> (1) the transfer, ownership, possession, carrying, or transportation of firearms, ammunition, components of firearms, or any combination of these things . . . .

S.C. Code Ann. § 23-31-510 (Supp. 2016). Further, Section 23-31-520 of the Code provides that:

> This article [including Section 23-31-510] does not affect the authority of any county, municipality, or political subdivision to regulate the careless or negligent discharge or public brandishment of firearms, nor does it prevent the regulation of public brandishment of firearms during the times of or a demonstrated potential for insurrection, invasions, riots, or natural disasters. This article denies any county, municipality, or political subdivision the power to confiscate a firearm or ammunition unless incident to an arrest.

S.C. Code Ann. § 23-31-520 (2007).

Our research has not revealed any reported case where an appellate court of this state considered a challenge to a local ordinance on the basis that it contravened Section 23-31-510. Therefore, a court faced with this question most likely would resort to the rules of statutory construction to resolve it. *See discussion, infra.* As this Office has previously opined:

> The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S., E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999)."

Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005). Because a municipal ordinance is at issue here, we note also that municipalities have broad powers under the Home Rule Amendment to the South Carolina Constitution to regulate local activity, but that power is not unlimited. *See*

Op. S.C. Att'y Gen., 2017 WL 4707545 (October 11, 2017); *see also* S.C. Const. art. VIII, § 17. As this Office has opined previously:

> When determining the validity of a local ordinance, we begin with the principle that "[a]n ordinance is a legislative enactment and is presumed to be constitutional." *Southern Bell Tel. & Tel. Co. v. City of Spartanburg*, 285 S.C. 495, 497, 331 S.E.2d 333, 334 (1985). The burden of proving the invalidity of a local ordinance rests with the party attacking the ordinance. *Id.* "Determining whether a local ordinance is valid is a two-step process." *Bugsy's, Inc. v. City of Myrtle Beach*, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000). The first step is to determine whether the local governmental body at issue had the power to adopt the ordinance. *Id.* As stated most recently in *Sandlands C&D, LLC v. Horry County*, 394 S.C. 451, 716 S.E.2d 280 (2011), our Supreme Court now evaluates this question on two fronts: (1) whether local government possesses the authority to enact the ordinance; and (2) whether state law preempts the area of legislation. 394 S.C. at 460, 716 S.E.2d at 284. "If no such power existed, the ordinance is invalid and the inquiry ends." *Bugsy's Inc. v. City of Myrtle Beach*, 340 S.C. at 93, 530 S.E.2d at 893. If, on the other hand, local government had the power to enact the ordinance, the second step of the analysis is to determine whether the ordinance is consistent with the Constitution and general law of the State. *Id.*

Op. S.C. Att'y Gen., 2014 WL 5303044 (October 1, 2014) (internal citation omitted). Additionally, the South Carolina Constitution provides that "[i]n enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside: . . . (5) criminal laws and the penalties and sanctions for the transgression thereof." S.C. Const. art VIII § 14. Our state Supreme Court interpreted this subsection in *Foothills Brewing Concern, Inc. v. City of Greenville*, opining that the Court in previous opinions "[had] observed that this subsection of the Constitution requires 'statewide uniformity' regarding the criminal law of this State, and therefore, 'local governments may not criminalize conduct that is legal under a statewide criminal law.'" *Foothills Brewing Concern, Inc. v. City of Greenville*, 377 S.C. 355, 365, 660 S.E.2d 264, 269 (2008) (quoting *Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272, 274 (1996)); *see also Connor v. Town of Hilton Head Island*, 314 S.C. 251, 254, 442 S.E.2d 608, 610 (1994) ("Since Town has criminalized conduct that is not unlawful under relevant State law, we conclude Town exceeded its power in enacting the ordinance in question.").

While our state's Supreme Court has not yet opined on Section 23-31-510, our Office has "consistently construed § 23-31-510(1) as preempting the regulation of possession and carrying a firearm by political subdivisions." *Op. S.C. Att'y Gen.*, 2015 WL 4596713 (July 20, 2015). A

partial summary of these prior opinions is set out in a 2014 opinion of this Office, wherein we stated:

> In a 1991 opinion, this Office explained that a local ordinance regulating the sale of firearms was clearly preempted from local control pursuant to Section 23-31-510(1) of the South Carolina Code and therefore the locality at issue lacked authority to pass legislation concerning the sale of firearms. *Op. S.C. Att'y Gen.*, 1991 WL 633056 (October 3, 1991). This conclusion was reiterated in our December 7, 2010 opinion where we found Section 22-31-220's "public or private employer" language could not be read as providing a local governing body with the authority to craft an ordinance prohibiting the possession of a concealed weapon in a local park in light of Section 23-31-510's clear expression to the contrary. *See Op. S.C. Att'y Gen.*, 2010 WL 5578965 (December 7, 2010) ("[A] local governing body, such as a county, may not enact any regulation dealing with the carrying of concealed weapons, such as in a county park."). More recently, we restated this in a 2012 opinion concluding, "it is clear to us § 23-31-510 expressly indicates that the Legislature intended to preclude any local regulation regarding the carrying of concealable weapons." *Op. S.C. Att'y Gen.*, 2012 WL 1260182 (April 2, 2012). Thus, because our prior opinions have already addressed this issue and our research indicates there have been no amendments modifying Section 23-31-510's wholesale reservation of regulatory authority to the Legislature concerning the subject matter of "transfer, ownership, possession, carrying, or transportation of firearms, ammunition, components of firearms, or any combinations of the things," we reaffirm our prior opinions on this issue.

Op. S.C. Att'y Gen., 2014 WL 5073495 (September 30, 2014) (opining that the City of Traveler's Rest did not have authority to restrict concealed weapons from a city-owned park).

"Traditionally, this Office does not overrule a prior opinion unless there has been a change in the law or where there is clear error." *Op. S.C. Att'y Gen.*, 2017 WL 1528200 (April 13, 2017) (internal citations omitted). Our research indicates no amendments or reported decisions which give us cause to revise our construction of this section. *See also Op. S.C. Att'y Gen.*, 2015 WL 4596713 (July 20, 2015) (opining that a court would conclude that a municipal ordinance which outlawed carrying a firearm in circumstances where State law permitted such carrying in a variety of circumstances was "preempted by State law, and thus unconstitutional"). Therefore, we affirm these prior opinions of our Office. *See Op. S.C. Att'y Gen.*, 2017 WL 1528200 (April 13, 2017).

Turning to the text of Ordinance 24-264, we observe that the ordinance expressly prohibits "possession" of "any rifle or shotgun" unless certain conditions are met. The ordinance makes no reference to "discharging" or "brandishing" a firearm; nor does it contain any other language which appears to be calculated to bring the ordinance within the exception found in Section 23-31-520 to the blanket prohibition of local gun regulation found in Section 23-31-510. Moreover, it appears that the ordinance criminalizes possession of firearms in circumstances where possession is otherwise legal under state law. *Cf. Op. S.C. Att'y Gen.*, 2015 WL 4596713 (July 20, 2015) (concluding that a municipal ordinance which outlawed carrying a firearm in circumstances where State law permitted such carrying in a variety of circumstances was "preempted by State law, and thus unconstitutional"). Therefore, because Ordinance 24-264 patently regulates possession and transportation of certain firearms as preempted by Section 23-31-510, and because the ordinance cannot reasonably come under the narrow exception of Section 23-31-520, we opine here that a court would conclude that Ordinance 24-264 is invalid because it is preempted by state law. *See* S.C. Code Ann. § 23-31-510 (Supp. 2016); *see also Op. S.C. Att'y Gen.*, 2014 WL 5073495 (September 30, 2014).

It might be said that one legislative purpose of Section 23-31-510 is to promote uniform gun laws statewide, in part to avoid the scenario where an otherwise law-abiding citizen who crosses from unincorporated portions of a county in a municipality, or from county to county, must face a patchwork of varying local regulations at the risk of criminal prosecution and concomitant collateral consequences. However, even independent of these policy considerations, we believe that a court would conclude that an ordinance which facially conflicts with state law is invalid. *See Bugsy's, Inc. v. City of Myrtle Beach*, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000). Finally we note that to the extent that any of the proscribed behavior violates a state statute, then a law enforcement officer with jurisdiction could enforce those state laws. *See, e.g.*, S.C. Code Ann. § 16-23-420 (2015) (felony possession of a firearm in public buildings or adjacent areas); *see also* S.C. Code Ann. § 16-23-430 (2015) (felony possession of a weapon on elementary or secondary school property). This Office has reiterated in numerous opinions that it strongly supports the Second Amendment and the right of citizens to keep and bear arms. *See, e.g., Op S.C. Att'y Gen.*, 2015 WL 4596713 (July 20, 2015). That right is subject, however, to the constitutionally-limited power of the state and the federal governments to regulate and prohibit the possession of firearms in certain instances, as the state has done in these particular code sections. *See D.C. v. Heller*, 554 U.S. 570 (2008); *see also McDonald v. Chicago*, 561 U.S. 742 (2010).

Conclusion:

In conclusion, we reiterate that Ordinance 24-264 is presumed constitutional and may only set aside by a court. *See Op. S.C. Att'y Gen.*, 2015 WL 4596713 (July 20, 2015). However,

for the reasons set out above, it is the opinion of this Office that a court would conclude that Ordinance 24-264 is invalid because it is preempted by S.C. Code Ann. § 23-31-510 (Supp. 2016). *See id.*

Sincerely,

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Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General