



ALAN WILSON
ATTORNEY GENERAL

August 3, 2021

Gary Bunker
Chairman
Aiken County Council
1930 University Parkway
Aiken, South Carolina 29211-1549

Dear Chairman Bunker:

We received your request for an Attorney General's opinion concerning issues surrounding the adoption of county firearms ordinances. Specifically, you ask us to address the following two questions:

- 1) Given the concepts of federal supremacy (and state law supremacy as to local government enactments), and of preemption, and in particular, S.C. Code Ann. Section 23-31-510, would an ordinance adopted by a county in South Carolina that contained the provisions of the Newton County, Missouri "Act" be considered legal under South Carolina law?
- 2) And second, we also have enclosed a DRAFT ordinance Aiken County may consider that reaffirms rights already afforded United States and South Carolina citizens, and does not appear to conflict with any federal or State provision touching or concerning firearms. In your opinion, would the attached proposed Aiken County ordinance violate any South Carolina laws, or raise any legal concerns from your prospective?

Law/Analysis

I. Newton County Missouri Second Amendment Preservation Act

Your first question essentially asks could a local governing body in South Carolina adopt an ordinance similar to the one adopted by the Newton County Commission. We found a copy of the ordinance you reference online and will attempt to summarize it for purposes of addressing your question. Newton County Missouri Second Amendment Preservation Act (Feb. 3, 2021) *available at:*

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https://www.newtoncountymo.com/uploads/1/1/0/3/11036008/newton_county_missouri_second_amendment_preservation_act.pdf.

The “Act,” as you refer to it in your letter, first states any federal law which infringes upon “the people’s right to keep and bear arms as guaranteed by the Second Amendment to the United State Constitution and Article I, Section 23 of the Missouri Constitution shall be invalid in the county, shall not be recognized by this county, and specifically rejected by this county, and shall be considered null and void and of no effect in this county.” *Id.* The Act then continues on to list several possible federal laws or regulations the Act prohibits pertaining to such things as taxes or fees specifically imposed on firearms, ammunition, and accessories; rules requiring firearm registration; confiscation of firearms; and other such rules and regulations that may infringe on the right to keep and bear arms. *Id.* The Act states no person, including public officers and employees of the county, may enforce such rules. *Id.* It declares any official agent, employee or deputy of the federal government who enforces or attempts to enforce such rules is “permanently ineligible to be hired as a law enforcement officer or to supervise law enforcement officers in the county or exceeds the authority of the Newton County Missouri Commission” *Id.* The Act also provides:

Any and all federal agents trying to enforce the regulations listed in Section (1) shall be subject to arrest by the Newton County Missouri Sheriff’s Department.

- (a) The Newton County Missouri Sheriff’s Department shall be given the full authority to arrest any and all federal agents that violate state laws and enforce the regulations listed in Section (1)

You inquire as to whether the adoption of an ordinance similar to the Act is legal under federal and South Carolina law. In regard to federal law, this Office has declared “questions regarding the interpretation or application of federal law are beyond the scope of an opinion of this Office.” *Op. Att’y Gen.*, 2014 WL 7505274 (S.C.A.G. Dec. 23, 2014). While federal law is generally supreme, it would be up to a court to determine the validity of the ordinance under federal law.

In regard to state law, our courts consistently recognize local ordinances are presumed valid unless and until a court declares them to be invalid. *U.S. Fid. & Guar. Co. v. City of Newberry*, 257 S.C. 433, 438, 186 S.E.2d 239, 241 (1972). Therefore, any ordinance passed by the Aiken County Council is presumed valid unless and until a court rules otherwise. Nonetheless, we question whether an ordinance similar to the Act adopted by the Newton County Commission is preempted under South Carolina law.

As our Supreme Court explained in *Foothills Brewing Concern, Inc. v. City of Greenville*, 377 S.C. 355, 361, 660 S.E.2d 264, 267 (2008):

A two-step process is used to determine whether a local ordinance is valid. Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002); Bugsy's v. City of Myrtle Beach, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000). First, the Court must consider whether the municipality had the power to enact the ordinance. If the State has preempted a particular area of legislation, a municipality lacks power to regulate the field, and the ordinance is invalid. Id. If, however, the municipality had the power to enact the ordinance, the Court must then determine whether the ordinance is consistent with the Constitution and the general law of the State. Id.

Section 4-9-25 of the South Carolina Code (2021) grants counties the authority, in addition to the powers conferred to their specific form of government,

to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them.

Section 4-9-25 and section 17 of article VIII of the South Carolina Constitution (2009) both require liberal construction of these powers in favor of the county. While we are not privy as to the specific need of Aiken County to enact an ordinance such as the one adopted by the Newton County Missouri Commission, we speculate Aiken County seeks to protect its citizens' Second Amendment rights, which a court very well may find is within Aiken County's scope of authority given to it by our Constitution and the powers afforded to it by the Legislature.

However, Section 23-31-510 of the South Carolina Code (Supp. 2020) states:

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; or
- (2) a landowner discharging a firearm on the landowner's property to protect the landowner's family, employees, the general public, or the landowner's property from animals that the landowner reasonably believes pose a direct threat or danger to the landowner's property, people on the landowner's property, or the general public. For purposes of this item, the landowner's property must be a parcel of land

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comprised of at least twenty-five contiguous acres. Any ordinance regulating the discharge of firearms that does not specifically provide for an exclusion pursuant to this item is unenforceable as it pertains to an incident described in this item; otherwise, the ordinance is enforceable.

Section 23-31-520 of the South Carolina Code (Supp. 2020) also states “[t]his article denies any county, municipality, or political subdivision the power to confiscate a firearm or ammunition unless incident to an arrest.” In numerous opinions, this Office found through sections 23-31-510 and 23-31-520, the Legislature expressly occupied the entire field of South Carolina firearm regulation and preempted any local ordinance attempting to regulate the same. Op. Att’y Gen., 2019 WL 6794777 (S.C.A.G. Dec. 2, 2019) (citing Ops. Att’y Gen., 2017 WL 6940255 (S.C.A.G. Dec. 29, 2017); 2014WL 5073495 (S.C.A.G. Sept. 30, 2014)). In 2014, citing to numerous prior opinions, we summarized our position in regard to these provisions as follows: “[B]ecause 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. Att’y Gen., 2014 WL 5073495 (S.C.A.G. Sept. 30, 2014).

To date, these opinions addressed restrictions on the ability to possess and carry firearms. Ops. Att’y Gen., 2019 WL 6794777 (S.C.A.G. Dec. 2, 2019) (prohibiting the carrying of a firearm within 1,000 feet of a school); 2017 WL 6940255 (S.C.A.G. Dec. 29, 2017) (regulating the possession of rifles and shotguns on public property); 2016 WL 963706 (S.C.A.G. Mar. 16, 2016) (involving a special purpose district’s attempt to regulate the carrying of firearms in a public arena); 2014WL 5073495 (S.C.A.G. Sept. 30, 2014) (prohibiting concealed weapons in a city park). Nonetheless, because the Legislature occupied the field in regard to the regulation of firearms, we believe the same reasoning prevents a local government from passing an ordinance regulating firearms regardless of whether the aim is to protect or restrict individual rights. As such, we are of the opinion that if a local government in South Carolina attempted to pass an ordinance similar to the one adopted by the Newton County Missouri County Commission, a court would likely find it is preempted under state law.

II. Proposed Aiken County Ordinance

In addition to considering the legality of an ordinance similar to the Newton County Missouri Act, you also provided us with a draft ordinance for Aiken County (the “Draft Ordinance”) and ask whether it would violate any South Carolina law or raise legal concerns. The Draft Ordinance initially reaffirms rights provided under the Second Amendment of the United States Constitution and section 20 of article I of the South Carolina Constitution (2009), which similarly provides: “A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.” The Draft Ordinance goes on to list activities which are

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lawful and unlawful in Aiken County, including the ability of its residents to purchase firearms and transport them to Aiken County, the ability of out of state residents to purchase firearms in Aiken County, the ability to carry concealed weapons in accordance with state law, when permits issued under state law will be invalid, circumstances under which a concealed weapons cannot be carried, when a permit is not required, where concealed weapons can and cannot be carried, and types of weapons that are prohibited from use. These provisions appear to track current state law in South Carolina. As such, we understand Aiken County views these provisions as not preempted under state law because they do not directly conflict with state law, but instead amplify it at the county level.¹

Nonetheless, “[a]n ordinance is preempted under implied field preemption when the state statutory scheme so thoroughly and pervasively covers the subject as to occupy the field or when the subject mandates statewide uniformity.” Aakier v. City of Myrtle Beach, 388 S.C. 129, 133, 694 S.E.2d 213, 215 (2010). As we explained above, through the enactment of state law, our Legislature has sought to occupy the field in regard to firearm regulations. Accordingly, despite the fact that the provisions of the Draft Ordinance currently echo state law, creating no direct conflict, we believe the Legislature’s intent to occupy the field of gun regulation would preempt Aiken County from enacting such an ordinance.

Conclusion

As we stated in a recent opinion issued by this Office, “[t]his Office has reiterated in numerous opinions that it strongly supports the Second Amendment and the right of citizens to keep and bear arms.” Op. Att’y Gen., 2019 WL 6794777 (S.C.A.G. Dec. 2, 2019) (citing Op S.C. Att’y Gen., 2015 WL 4596713 (July 20, 2015); D.C. v. Heller, 554 U.S. 570 (2008); McDonald v. Chicago, 561 U.S. 742 (2010)). However, political subdivisions are subject to the mandate of the Legislature. This Office consistently construes sections 23-31-510 and 23-31-520 of the South Carolina Code as expressly occupying the field of South Carolina firearm regulation and any local ordinance attempting to encroach on the state’s authority in this regard is preempted. Recently, a South Carolina circuit court, quoting extensively to our 2019 opinion finding that a local ordinance prohibiting possession of a firearm in a school zone is preempted pursuant to section 23-31-510, agreed with this interpretation. S.C. v. City of Columbia, No. 2020-CP-4001996 (May 4, 2021) (citing Op. Att’y Gen., 2019 WL 6794777 (S.C.A.G. Dec. 2, 2019)).


With respect to your question concerning federal law, as we have stated many times, questions of federal law are not within the scope of opinions issued by this Office. Furthermore, while the provisions of the Act are aimed at ensuring the Second Amendment right of citizens of Newton County, we are concerned that if adopted by a local government in South Carolina, such an ordinance would be viewed as regulating the possession and carrying of firearms, which we believe

¹ While the Draft Ordinance currently tracks state law, this may not always be the case. State law regarding firearm regulation is not static. For example, the Legislature recently passed legislation allowing for the open carry of firearms by those holding concealed weapons permits. 2021 S.C. Acts 66. Unless a county simultaneously amends its ordinances to reflect changing state law, conflicts are likely to occur.

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is preempted under state law. While the Draft Ordinance you provided does not appear to directly conflict with South Carolina law, it nonetheless attempts to regulate firearms, an area of the law in which the Legislature expressly occupied the entire field. As such, we similarly believe a court would find the Draft Ordinance is preempted by state law. However, as we explained above, all ordinances are presumptively valid unless and until ruled otherwise by a court.

Sincerely,

A handwritten signature in blue ink that reads "Cydney Milling". The signature is written in a cursive, flowing style.

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

A handwritten signature in blue ink that reads "Robert D. Cook". The signature is written in a cursive, flowing style.

Robert D. Cook
Solicitor General