ALAN WILSON
ATTORNEY GENERAL

July 20, 2015

The Honorable Ronnie W. Cromer
Senator, District No. 18
311 Gressette Building
Columbia, SC 29201

Dear Senator Cromer:

You seek an opinion regarding the power of the City of Columbia to adopt an "Emergency Ordinance for the Temporary Ban of Weapons Within a Two Hundred Fifty (250) foot Area Surrounding The South Carolina State House Grounds." Columbia Ordinance No. 2015-066 was adopted in the wake of "the tragic events at Emmanuel A.M.E. Church in Charleston, South Carolina. . . ." It recites the "continued debate about the South Carolina Infantry Battle Flag" and notes that there are "planned demonstrations in the next few weeks by groups which are identified as 'hate groups' by the Southern Poverty Law Center including the White Knights of the Ku Klux Klan and the new Black Panther Party. . . ."

Also recited in the Ordinance are certain provisions of State law regarding the State House grounds, as follows:

> Whereas, Code of Laws Section 10-11-320 (1976 as enacted) states:
>
> (A) It is unlawful for any person or group of persons to:
>
> (1) carry or have readily accessible to the persons upon the capitol grounds or within the capitol building any firearm or dangerous weapon. . . .

The Ordinance further notes that the Legislature has not defined the term "readily accessible" for the "purpose of enforcing Section 10-11-320 (1976). . . ." According to the Ordinance, " . . . The city of Columbia, by and through its Police Department and its Public Works Department has determined concealed weapons are 'readily accessible' to the person if the weapon is on the person of someone within the area of vehicular traveled surfaces of Gervais, Sumter, Pendleton and Assembly Streets in the City of Columbia (Capitol complex) or within 250 feet of the borders of the Capitol Complex. . . ."

Through adoption of the Ordinance, the City takes the position that § 5-7-30 permits it to enact ordinances which preserve "health, peace, order and good government" and that § 5-7-250(d) permits emergency ordinances to protect health and safety. Thus, argues the City, "during this period of extraordinary circumstances . . . the City of Columbia believes it is in the best interests of public safety, free speech and freedom of peaceable assembly to temporarily extend the existing ban against weapons as enacted by the General Assembly within 250 feet of the borders of the Capitol Complex. . . ." The area

regulated by the Ordinance begins at the boundaries of the Capitol grounds, as defined by Section 10-11-210 of the Code. Accordingly, the Ordinance makes it unlawful for "any person or group of person while on public property to carry or brandish a firearm or dangerous weapon within two hundred fifty (250) to the borders of the Capitol Complex . . . unless that person is a licensed law enforcement officer or the provisions of South Carolina Code Section 10-11-320(B) (1976 as amended) are applicable." Violation is a misdemeanor, punishable by a fine not more than $500 dollars or imprisonment of not more than 30 days, or both. The life of the Ordinance is a period of thirty days.

We also note that, since your request was received, the media has carried stories of a lawsuit filed in the Richland County Court of Common Pleas, challenging the validity of the Ordinance. We have not received or seen a copy of this lawsuit, but according to media stories the basis of the lawsuit is that the Ordinance puts greater restrictions on the carrying of firearms than does State law. This Office has consistently deferred to the courts in terms of resolution of a question raised in an opinion request and we, of course, do so here.

Law/Analysis

An ordinance "is a legislative enactment and is presumed to be constitutional." Southern Bell Tel. and Tel. Co. v. City of Spartanburg, 285 S.C. 495, 497, 331 S.E.2d 333, 334 (1985). Our Supreme Court employs "a two-step analysis to determine the validity of a local ordinance." Sandlands C and D, LLC v. County of Horry, 394 S.C. 451, 460, 716 S.E.2d 280, 284 (2011). According to the Sandlands Court,

> [f]irst a court must determine whether the county [or municipality] had the power to enact the ordinance. . . . "If the State has preempted a particular area of legislation, then the ordinance is invalid," and, "[i]f no such power existed, the ordinance is invalid and the inquiry ends." . . . Where a court finds the county did "ha[ve] the power to enact the ordinance, then it must ascertain [ ] whether the ordinance is inconsistent with the Constitution or general law of this State."

Id., citing S.C. State Ports Auth. v. Jasper County, 368 S.C. 388, 629 S.E.2d 624 (2006). Thus, the first issue under the foregoing test, is whether State law permits the City of Columbia to adopt its ordinance. See also Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008). We conclude it does not.

In Foothills, 377 S.C. at 361, 660 S.E.2d at 267, our Supreme Court summarized the law of preemption in South Carolina as follows:

> [t]o preempt an entire field, "an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way." Bugsy's [v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000)] . . . 340 S.C. at 94, 530 S.E.2d at 893 (citing Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1992)). Furthermore, "for there to be a conflict between a state statute and a municipal ordinance" both must contain either express or implied conditions which are inconsistent or irreconcilable with each other . . . If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand.'" Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. at

> 553, 397 S.E.2d at 664 (quoting McAbee v. Southern Rwy. Co., 166 S.C. 166, 169-170, 164 S.E. 444-445 (1932).

The Home Rule Amendment of the State Constitution provides as follows in Art. VIII, § 14:

> [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; and
> >
> > (6) the structure and administration of any governmental service or function, responsibility for which rests with the State government or which requires uniformity.

Our Supreme Court, in City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569, 570 (1991), summarized Art. VIII, § 14 as follows:

> Article VIII of the South Carolina Constitution deals generally with the creation of local government. Article VIII, § 14 limits the powers local governments may be granted by State law by providing that, among other things, local governments may not attempt to set aside state "criminal laws and the penalties and sanctions in the transgression thereof. . . ." The question is whether City Code § 13-3, in denying offenders, under the ordinance the possibility of paying a fine after being found guilty of simple possession of marijuana, sets aside a criminal penalty established by state law. We hold that it does.

City of North Charleston, referencing Art. VIII, § 14(5), held that local governments may not enact ordinances that impose greater or lesser penalties than those established by state law. Nor may "local governments . . . criminalize conduct that is legal under a statewide criminal law." Foothills Brewing, 377 S.C. at 365, 660 S.E.2d at 269, quoting Martin v. Condon, 324 S.C. 183, 474 S.E.2d 272, 274 (1996). Thus, "[w]here there is a conflict between a state statute and a city ordinance, the ordinance is void." City of North Charleston, 306 S.C. at 157, 410 S.E.2d at 571.

Moreover, with respect to Art. VIII, § 14(6), the Court, in Brashier v. S.C. Dept. of Transp., 327 S.C. 179, 185, 490 S.E.2d 8,11 (1997), overruled on other grounds, I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) further explained the purpose of Art. VIII, § 14(6), by noting that this provision of the Constitution:

> "precludes the legislature from delegating to counties (or cities) the responsibility for enacting legislation relating to the subjects encompassed by that section." Robinson v. Richland County Council, 293 S.C. 27, 30, 358 S.E.2d 392, 395 (1987). When construing Article VIII, Section 14, this Court has consistently held a subject requiring statewide uniformity is effectively withdrawn from the field of local concern."

(citations omitted).

In Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 456, 415 S.E.2d 801, 805 (1992), the Court applied Art. VIII, § 14(6) to municipalities. The Court there advised:

> [m]unicipalities have no authority to set aside the structure and administration of any governmental service of function, the responsibility for which rests with the state government or which requires statewide uniformity. S.C. Const. art. VIII, § 14. The planning, construction, and financing of state roads is a governmental service which requires statewide uniformity. S.C. Code Ann. 57-3-10 to -30 (1976 and Supp. 1991). The legislature has declared that collecting tolls is an appropriate method of financing highways and appurtenant facilities. See S.C. Code Ann. § 12-27-1290 (Supp. 1991); see also S.C. Code Ann. §§ 57-5-1310 to -1490 (1991). We find that the initiated ordinance is facially defective in its entirety because it sets aside the structure and administration of the statewide highway scheme by attempting to limit the authority granted to SCDHPT to consider the collection of tolls as a method of financing the construction of state roads. When a municipality enacts an ordinance which conflicts with state law, the ordinance is invalid.

307 S.C. at 456, 415 S.E.2d at 805.

It is obvious that the regulation of the Statehouse and Statehouse grounds is a state function belonging exclusively to the General Assembly. For example, in German Evangelical Luth. Church v. Chas. v. City of Chas., 352 S.C. 600, 606, 576 S.E.2d 150, 153 (2003) the Court noted that § 5-7-20(3) "specifically exempts the State House grounds from inclusion in [a local] improvement district."

In addition, the General Assembly has enacted a comprehensive statutory scheme relating to regulation of the Statehouse and Statehouse grounds. See §§ 10-11-10 et seq. Section 10-1-10 gives the Budget and Control Board "full authority" in "protecting and caring for the State House and State House grounds...." A State House Committee is created by § 7-1-40 whose duties are to "review all proposals for altering and/or renovations to the State House." In an Opinion, dated September 17, 1963 (1963 WL 11961), the authority of the State over State House grounds was emphasized, as former Attorney General McLeod noted that "the ultimate authority over the State House Grounds, in my view, is vested in the Purchasing and Property Division, subject to the direction of the Budget and Control Board."

Offenses involving Statehouse property are set forth at § 10-11-10 et seq. Section 10-11-315 prohibits defacing monuments on Capitol grounds and provides a penalty therefor. Other criminal offenses are provided for throughout these sections. Section 10-11-320 deals with carrying or discharging a firearm on capitol grounds. Such provision states:

> (A) It is unlawful for any person or group of persons to:
>
> (1) carry or have readily accessible to the person upon the capitol grounds or within the capital building any firearm or dangerous weapon;
>
> (2) discharge any firearm or to use any dangerous weapon upon the capitol grounds or within the capitol building.

> (B) This section does not apply to a person who possesses a concealable weapons permit pursuant to Article 4, Chapter 31, Title 23 and is authorized to park on the capitol grounds or in the parking garage below the capitol grounds. The firearm must remain locked in the person's vehicle while on or below the capitol grounds and must be stored in a place in the vehicle, that is readily accessible to any person upon entry to or below the capitol grounds.

Section 10-11-310 defines 'capitol grounds" for purposes of Article 3 as "that area inward from the vehicular traveled surfaces of Gervais, Sumter, Senate and Assembly Streets in the City of Columbia." Section 10-11-360 sets forth the penalties for violation of Article 3 (except § 10-11-325, not applicable here), as "not more than five thousand dollars or imprisoned not more than three years, or both." It is evident, based upon the foregoing authorities, that the City of Columbia could not regulate firearms within the boundaries of the Capitol grounds, as defined in § 10-11-310. The issue thus is the power of the City, with regard to firearms, immediately outside that boundary.

Section 16-23-20 makes it "unlawful for anyone to carry about the person any handgun, whether concealed or not. . . . ." The statute contains numerous exceptions in which carrying a firearm is legal under State law. Among those exceptions in which it is legal to carry a handgun, is subsection (12) of § 16-23-20, which provides:

> A person who is granted a permit under provision of law by the State Law Enforcement Division to carry a handgun about his person, under conditions set forth in the permit, and while transferring the handgun between the permittee's person and a location specified in item (a) [person's vehicle].

Section 16-23-50(A)(2) defines the penalties for violation of § 16-23-20. Subsection (A)(2) states:

> (2) [a] person violating the provisions of Section 16-23-20 is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

In addition, § 16-23-30 provides:

> (A) It is unlawful for a person to knowingly sell, offer to sell, deliver, lease, rent, barter, exchange, or transport for sale, into this State any handgun to:
>
> (1) a person who has been convicted of a crime of violence in any court of the United States, the several states, commonwealths, territories, possessions, or the District of Columbia or who is a fugitive from justice or a habitual drunkard or a drug addict or who has been adjudicated mentally incompetent;
>
> (2) a person who is a member of a subversive organization;
>
> (3) a person under the age of eighteen, but this shall not apply to the issue of handguns to members of the Armed Forces of the United States, active or

> reserve, National Guard, State Militia, or R.O.T.C., when on duty or training or the temporary loan of handguns for instruction under the immediate supervision of a parent or adult instructor; or
>
> (4) a person who by order of a circuit judge or county court judge of this State has been adjudged unfit to carry or possess a firearm, such adjudication to be made upon application by any police officer, or by any prosecuting officer of this State, or sua sponte, by the court, but a person who is the subject of such an application is entitled to reasonable notice and a proper hearing prior to any such adjudication.
>
> (B) It is unlawful for a person enumerated in subsection (A) to possess or acquire handguns within this State.
>
> (C) A person shall not knowingly buy, sell, transport, pawn, receive, or possess any stolen handgun or one from which the original serial number has been removed or obliterated.

A concealed weapons permit (CWP) is issued by SLED pursuant to the "Law Abiding Citizens Self-Defense Act of 1996", which is codified at § 23-31-205 et seq. We have described the interrelationship between § 16-23-20 and the CWP Act as follows:

> . . . included in the § 16-23-20 exceptions is the authorization for a concealed weapons permit pursuant to § 23-31-210 et seq. However, there are certain areas such as courthouses, churches, law enforcement facilities and other locations which are off-limits to the carrying of a concealable weapon, even with a valid concealed weapons permit.

Op. S.C. Att'y Gen., 2012 WL 1385562 (April 12, 2012). The permit is "valid statewide unless revoked . . ." Section 23-31-215(J). Thus, absent an applicable exception, a CWP permit holder can lawfully carry a firearm anywhere in South Carolina.

We turn now to Emergency Ordinance No. 2015-066 recently adopted. While we appreciate the purpose behind the Ordinance – to protect public safety – we believe a court would likely conclude that this particular Ordinance is preempted in toto by State law and that such Ordinance is unconstitutional. Moreover, in prohibiting persons from carrying a firearm or dangerous weapon in the designated area, the Ordinance makes illegal that conduct which is otherwise legal under State law: This is particularly true with respect to persons having CWP permits, who may "carry" a firearm, pursuant to the requirements of the CWP law. Yet, under the Ordinance, a person or group of persons may not, while on public property, carry or brandish a firearm or dangerous weapon within 250' of the borders of the Capitol Complex. Such a broad sweep would encompass any number of situations which are, ordinarily lawful. This is particularly true with respect to CWP holders. The Ordinance thus attempts to extend the Capitol grounds requirement that CWP holders must keep his or her firearm locked in the vehicle while on Capitol grounds by requiring those holders to follow these same State law requirements in the prohibited area. Moreover, the Ordinance only allows as an exception to it that the "person is a licensed law enforcement officer or the provisions of . . . Section 10-11-320(B) . . . are applicable." The ordinance does not account for the many other exceptions in § 16-23-20. For example, § 16-23-20(2) exempts members of the

Armed Forces of the United States, but the Ordinance contains no such exception. In short, a person may not carry a firearm or dangerous weapon in the 250' zone, even though State law may, and in fact does, permit such carrying in a variety of circumstances.

Further, there is no state crime in South Carolina known as 'brandishment" of a firearm. Thus, the Ordinance could be deemed to contravene State law in this regard as well. Moreover, even if the brandishment prohibitions are not expressly preempted, brandishment is subsumed under the carrying provision and thus is also preempted. One cannot brandish a firearm without possessing or carrying it. We explain below.

First, and foremost, state law expressly preempts the regulation of possession and carrying of a firearm. Section 23-31-510 provides in pertinent part as follows:

> [n]o 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;

Section 23-31-520 further states:

> [t]his article does not affect the authority of any county, municipality, or political subdivision to regulate the careless or negligent discharge or public brandishment of firearms during the times of or a demonstrated potential for insurrection, invasions, riots, or natural disasters. This article denies any comity to any county, municipality, or political subdivision the power to confiscate a firearm or ammunition unless incident to an arrest.

We have consistently construed § 23-31-510(1) as preempting the regulation of possession and carrying a firearm by political subdivisions. Only recently in Op. S.C. Att'y Gen., 2014 WL 5073495 (September 30, 2014), we concluded that the City of Traveler's Rest was precluded from banning all firearms from Trailblazer Park. There, we stated:

> [i]n 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. As a result, we believe Section 23-31-510(1) prohibits the City from enacting an ordinance regulating the carrying of concealed weapons at Trailblazer Park.

This Opinion thus concluded that "the city lacks authority to pass local legislation concerning this subject matter. (emphasis added).

Thus, the regulation by a political subdivision of the possession and carrying of firearms, even beyond the boundaries of the "Capitol grounds," as defined by § 10-11-310, is expressly preempted by § 23-31-510. This is an instance where "'the General Assembly declares in express terms its intention to preclude local action in a given area.'" Sandlands, 394 S.C. at 462, 716 S.E.2d at 285, quoting Ports Auth., 368 S.C. at 397, 629 S.E.2d at 628. State law has made "manifest a legislative intent that no other enactment may touch upon the subject in any way." Hosp. Ass'n. of S.C., Inc. v. County of Chas., 320 S.C. 219, 228, n. 9, 464 S.E.2d 113, 119, n. 9 (1995).

In addition to the express preemption intended by § 23-31-510, the Ordinance clearly conflicts with State law. As discussed above, there are numerous exceptions to § 16-23-20, including the exception for CWP permit holders. However, the Ordinance bans the carrying of firearms within the 250' zone with the exception only of law enforcement officers and the exception contained in § 10-11-320(B). Thus, the Ordinance attempts to modify the CWP law and other provisions of State law by making illegal what State law makes legal. This it cannot do. Indeed, the Ordinance seeks to extend the requirement that on Capitol grounds, CWP holders must keep their firearms locked in their vehicles when parked on those grounds. A municipality possesses no such power to set aside the structure and the administration of a governmental function the responsibility for which rests with the State government. See Art. VIII, § 14(6) of the South Carolina Constitution. In effect, the Ordinance has extended the Capitol grounds another 250' with respect to CWP permit holders. And, even where State law and the Ordinance overlap, such that both make the carrying of a firearm illegal, the penalties imposed by the Ordinance are much less than State law, creating another conflict between the two.

The remaining question is the applicability of § 23-31-520, which permits municipalities to regulate negligent discharge as well as the brandishment of firearms or dangerous weapons. The Columbia Ordinance proscribes brandishment as well as the carrying of firearms in the restricted area. It is our opinion that this offense is preempted as well and that the entire ordinance is thus preempted.

First of all, there is no crime in South Carolina of "brandishing" a firearm. Thus, the prohibition in the Ordinance of brandishing a firearm in the 250' zone could be deemed preempted as in conflict with State law which does not prohibit it. See Diamonds v. Greenville County, 325 S.C. 154, 480 S.E.2d 718 (1997) [conduct not made illegal by State law is deemed legal and cannot be made illegal by ordinance].

Further, the decision, In The Interest of Spencer R., 387 S.C. 517, 692 S.E.2d 569 (2010), and the case which Spencer R. relied upon, State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d (2004) are instructive here. In Spencer R., our Court of Appeals concluded that § 16-23-410, making it a crime to present a firearm, is closely analogous to the offense of "brandishment" in other jurisdictions. In other words, the Court of Appeals concluded that the words "to present", as used in § 16-23-410, means "to offer to view in a threatening manner or to show in a threatening manner." Both the words "offer" and "show", as employed in Spencer R., require possession (active or constructive) in order to commit the offense. As the United States Supreme Court has explained, the word "'carry' implies personal agency and some degree of possession. . . ." Muscarello v. U.S., 524 U.S. 125, 134 (1988). Moreover, Cabrera-Pena, relied upon the Court of Appeals in Spencer R., strongly implies that there must be possession of a firearm to violate § 16-23-410. As the Court concluded in City of North Charleston v. Harper, "[w]here there is a conflict between a state statute and a city ordinance, the ordinance is void." 306 S.C. at 157, 410 S.E.2d at 571.

Examination of the Ordinance's text also demonstrates that possession and carrying of a firearm is the principal intent of the regulation designed by the City of Columbia. The title of the Ordinance clearly sets forth its main purpose: the "Temporary Ban of Weapons within a two hundred fifty (250') foot area surrounding the South Carolina State house Grounds." Such "Ban" undoubtedly regulates possession and carrying of a firearm, first and foremost. Moreover, one of the recitals in the Ordinance expressly predicts "that many of the protestors would be "carrying weapons with them." (emphasis added). Further, the Ordinance cites § 10-11-320, which makes it unlawful for any person or group to "carry of have readily accessible" a firearm on Capitol grounds. Additionally, the Ordinance seeks to "extend the existing ban [under State law] against weapons as enacted by the General Assembly within 250 feet of the borders of the Capitol Complex...." Thus, there can be no doubt that the City's temporary "ban" of firearms within the restricted area is principally aimed at the possession and carrying of a firearm. Brandishment, as explained above, is but a subset of possession and carrying of the firearm.

While a severability clause is not absolutely legally required in South Carolina, see, Cox v. Bates, 237 S.C. 198, 116 S.E.2d 828 (1950), we note that the ordinance in question here does not contain a savings clause. Moreover, our Supreme Court has recognized that

> [t]he rule is that where a part of a statute is unconstitutional, if such part is so connected with the other parts as that they mutually depend, upon each other as considerations for each other, so as to warrant the belief that the Legislature intended them as a whole, and if they cannot be carried into effect, the Legislature would not have passed the residue independently of that which is void, the whole act is void. On the other hand, where a part of the statute is unconstitutional, and that which remains is complete in itself, capable of being executed, wholly independent of that which is rejected, and is of such character as that it may fairly be presumed that the Legislature would have passed it independently of that which is in conflict with the Constitution, then the courts will reject that which is void and enforce the remainder.

Fairway Ford, Inc. v. Timmons, 281 S.C. 57, 59, 314 S.E.2d 322, 324 (1984), quoting Townshend v. Richland Co., 190 S.C. 270, 280-81, 2 S.E.2d 777, 781 (1939). In our view, the brandishment portion of the Ordinance "is so connected" to the part relating to the carrying, which is expressly preempted, that the entire Ordinance would be deemed by a Court to be preempted.

Likewise, courts in other jurisdictions have held ordinances to be preempted in their entirety based upon the preemption of a key or core provision. For example, in Protection and Advocacy System v. City of Albuquerque, 195 P.3d 1, 23 (N.M. 2008), the New Mexico Court concluded that an ordinance is "effectively preempted" where the "invalidation of the relief available in the ordinance in effect guts the entire ordinance." So too, here. We believe that the express preemption of the Columbia Ordinance by § 23-31-510 with respect to carrying a firearm effectively preempts provisions relative to "brandishing" a firearm as well. There can be no brandishing of a firearm without the possession and carrying thereof. Thus, we believe state law supersedes this Ordinance.

Conclusion

The Columbia Emergency Ordinance in question is presumed constitutional and may only be set aside by a court. It is our understanding that a suit was filed after your request was received, but we have not seen it. Nevertheless, it is our opinion that a court would conclude that the Ordinance, which bans the carrying and brandishment of firearms and dangerous weapons on public property in a 250' foot zone extending from the boundaries of the Capitol grounds, is preempted by State law, and thus unconstitutional.

The Ordinance is inconsistent with state law for a number of reasons. First of all, local governments are prohibited by state statute from any regulation of the carrying or possession of firearms. Yet, the Ordinance does precisely that, banning the carrying of firearms in the designated zone with certain exceptions. Section 23-31-510 is clear that such regulation by a municipality is not permitted. The designation of the Ordinance as "Emergency" in nature is not an exception.

Secondly, the Ordinance purports to make conduct which is lawful under state law illegal in the 250 foot zone. This is particularly true for holders of CWP permits who are authorized to carry firearms on their persons anywhere in South Carolina not excepted by the CWP Act. But not according to the Ordinance. The effect of the Ordinance is to revoke the CWP permit in the 250 foot zone and instead to impose the same requirements upon a CWP permittee as if he or she is on the Capitol grounds. A municipality possesses no such power to alter state law. Only the General Assembly may do so.

Also preempted is the Ordinance's prohibition of brandishing a firearm or dangerous weapon. There is no state statute creating the offense of brandishing. Cases in South Carolina hold that where state law does not make conduct illegal, a municipality cannot do so. Moreover, our Supreme Court has concluded on numerous occasions that where there is a conflict between a state statute and a city ordinance – as there clearly is here – the entire ordinance is void.

Finally, the brandishment offense is supposed by State law along with the carrying proscription. One cannot "brandish" a firearm or dangerous weapon without possessing or carrying it. Thus, the brandishment prohibition must fall along with the proscription against carrying a firearm.

In this instance, we understand certainly the motive of the Columbia City Council in adopting the Ordinance – to prevent violence. However, where the conduct being regulated by the Ordinance is also prohibited by State law, the punishment under state law is much more severe. Our Supreme Court has concluded that such conflicts are unconstitutional. On the other hand, where the Ordinance makes illegal conduct which is lawful under State law, that too is preempted and unconstitutional. Here, the General

Assembly has enacted a comprehensive set of laws punishing the unlawful carrying of firearms, yet protecting the rights of law abiding gun owners and others such as military personnel.

This Office strongly supports the Second Amendment. Based upon the foregoing, we believe a court would conclude the Columbia Ordinance contravenes State law as well as the Second Amendment of the United States Constitution. See McDonald v. City of Chicago, 561 U.S. 742 (2010).

Sincerely,

Robert D. Cook
Solicitor General