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ATTORNEY GENERAL

December 2, 2019

The Hon. Ronnie W. Cromer
South Carolina Senate
410 Gressette Building
Columbia, SC 29201

The Hon. Bill Hixon
South Carolina House of Representatives
416A Blatt Building
Columbia, SC 29201

Dear Senator Cromer and Representative Hixon:

We received your request for an opinion regarding a City of Columbia ordinance which purports to prohibit carrying a firearm within 1,000 feet of any public or private school. This opinion sets out our Office's understanding of your question and our response.

Issue:

On September 17, 2019, the City of Columbia adopted ordinance number 2019-063, which we refer to in this opinion as the "Ordinance." The substance of the Ordinance criminalizes the possession of a firearm "at a place that the individual knows, or has reasonable cause to believe, is a school zone," which is defined by the ordinance as "on the grounds of, a public, parochial or private school or within a distance of 1,000 feet from the grounds of a public, parochial or private school." City of Columbia Ordinance § 14-403 (emphasis added). Your request attaches a citizen's letter which takes the position that this Ordinance violates state law for reasons discussed in prior opinions of this Office. *See, e.g., Op. S.C. Att'y Gen., 2015 WL 4596713 (July 20, 2015).*

In the course of preparing this opinion, our Office sought and received a response from the City of Columbia. The letter from the City disagreed with the position that the Ordinance is contrary to State law, and argued that the Ordinance was valid. The City offered several pages of legal analysis in support of this position. We summarize the main arguments by the City as follows:

1. The Federal Gun-Free School Zones Act of 1997 as amended "gives local governments the authority to enact gun-free school zones and is a right that cannot be pre-empted by state law."
2. "The ordinance as it stands is actually less restrictive than current state law when taking all exceptions into account. There is no conflict. . . . If someone is in compliance with S.C. Code § 16-23-420, they are in compliance with the City's

ordinance. . . . No activity that would otherwise be legal under federal and state law is made illegal under the City's ordinance.”

3. The City asserts it is following a prior opinion of this Office which was reversed for clear error and precedent of the South Carolina Supreme Court.

Law/Analysis:

It is the opinion of this Office that a court most likely would conclude that at least that portion of Ordinance 2019-063 prohibiting possession of a firearm in a school zone is preempted by S.C. Code Ann. § 23-31-510. *See Op. S.C. Att'y Gen.*, 2017 WL 6940255 (December 29, 2017) (concluding that a municipal ordinance related to “possession of loaded rifle or shotgun on public property” was preempted by Section 23-31-510). We express no opinion on the remainder of the ordinance relating to the discharge of a firearm because we understand that question to be beyond the scope of the opinion request. A municipal ordinance “is a legislative enactment and is presumed to be constitutional.” *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)). However, several prior opinions of this Office have concluded that a local ordinance which expressly purports to criminalize or otherwise regulate possession of a firearm conflicts with Section 23-31-510 of the South Carolina Code of Laws which preempts all such local regulations. *Id.* We believe that same analysis controls here.

Section 23-31-510 of the South Carolina Code 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. 2019). 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).

Construction of S.C. Code Ann. § 23-31-510 (2007)

In order to be unmistakably clear, our Office consistently has construed Sections 23-31-510 and -520 to mean that the General Assembly intended that state law expressly occupy the entire field of South Carolina firearm regulation and preempt any local ordinance on the same subject, except where local regulation are expressly permitted by those same statutes. *See, e.g., Op. S.C. Att’y Gen.*, 2017 WL 6940255 (December 29, 2017); S.C. Code Ann. §§ 23-31-510 (Supp. 2019) & -520 (2007). The following discussion is largely verbatim of certain portions of other opinions of this Office, and this analysis in turn discusses still other prior opinions. *See Op. S.C. Att’y Gen.*, 2019 WL 4894126 (September 19, 2019). Although redundant, we set out this explanation in order to provide a thorough exposition of our understanding of Section 23-31-510 and because this issue continues to give rise to requests for published opinions.

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. However, our Office has set out the relevant law in construing Section 23-31-510 on several occasions before, and we do so again here. As this Office has opined previously:

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). As pointed out by the City:

“An 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). 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.

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.”).

Although 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, several prior opinions of this Office have addressed this statute at length. *See, e.g., Op. S.C. Att'y Gen.*, 2014 WL 5073495 (September 30, 2014) (summarizing several prior opinions construing Section 23-31-510). One recent opinion of this Office dated December 29, 2017 discusses several of these prior opinions thoroughly, and we need not repeat that entire

discussion here. *Op. S.C. Att’y Gen.*, 2017 WL 6940255 (December 29, 2017). For the purposes of this opinion we simply reiterate that these opinions “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).

“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").

Reversed Prior Opinion of this Office

In support of the Ordinance the City asserts it is following a prior opinion of this Office date March 5, 2009 which was reversed for clear error. The City additionally cites to several South Carolina Supreme Court cases for their statements of the rules of statutory construction, including several cited in this opinion. None of these cited cases directly address a challenge to a local ordinance on the basis that it contravened Section 23-31-510, consistent with our research. *See, e.g., Fishburne v. Fishburne*, 171 S.C. 408, 172 S.E. 426 (1934) (will contest); *Town of Hilton Head Island v. Fine Liquors, Ltd.*, 302 S.C. 550, 397 S.E.2d 662 (validity of an ordinance prohibiting “the use of internally illuminated signs”); *Foothills Brewing Concern, Inc. v. City of Greenville*; 377 S.C. 355, 660 S.E.2d 264 (2008) (validity of indoor smoking ban ordinance). Instead the City asserts essentially that our reversed opinion was decided correctly and should not have been reversed.

The March 5, 2009 opinion cited by the City addressed the power of a county to regulate possession of a concealed weapon in a county park. That opinion found the ordinance in that instance to be valid; however, that opinion was later superseded and replaced with an opinion dated December 7, 2010 addressing precisely the same ordinance. *See Op. S.C. Att’y Gen.*, 2010 WL 55789865 (December 7, 2010). As more fully explained in the 2010 opinion, it became clear on review that the rules of statutory construction had been applied erroneously in the 2009 opinion. *Id.* The 2010 opinion overruled the reasoning and reversed the conclusion of the 2009 opinion, and the superseded 2009 opinion no longer reflects the legal opinion of this Office. *Id.* Moreover, the 2009 opinion was an aberration, and should not detract from the otherwise-unbroken line of opinions of this Office which have concluded that local ordinances are

preempted as described in the 2010 opinion. *See id.*; *see also Op. S.C. Att'y Gen.*, 2017 WL 6940255 (December 29, 2017).

City of Columbia Ordinance 2019-063

We turn now to the text of Ordinance 2019-063. The Ordinance begins with a statement of findings and purpose, including the recognition that:

[G]enerally S.C. Code Section 23-31-510 restricts municipal regulation of transfer, ownership, possession, or transport of firearms, ammunition, or components of firearms, but under the Gun-Free School Zones Act of 1990, as amended by the adoption of Section 657 of the Omnibus Consolidated Appropriations Act of 1997, local governments are given the authority to put Gun-Free School Zones Ordinances into effect.

City of Columbia Code of Ordinances § 14-401. The Ordinance goes on to establish two definitions:

School means a school which provides elementary or secondary education, as determined under State law.

School zone means or on the grounds of, a public, parochial or private school or within a distance of 1,000 feet from the grounds of a public, parochial or private school.

City of Columbia Code of Ordinances § 14-403 (emphasis added). The substantive prohibitions of the Ordinance are found Section 14-404, which we quote here in relevant part:

(a) It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(b) Subparagraph (a) shall not apply to the possession of a firearm:

1. On private property not part of school grounds;
2. If the individual possessing the firearm is licensed to do so by the State or a political subdivision of the State;
3. Which is not loaded;

4. In a locked container, or a locked firearms rack which is in a motor vehicle;
5. By an individual for use in a program approved by a school in the school zone;
6. By an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;
7. By a law enforcement officer acting in his or her official capacity; or
8. That is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities or the individual is in compliance with S.C. Code §16-23-420, specifically subsection (E) of that statute.

City of Columbia Code of Ordinances § 14-404. The remainder of Section 14-404 addresses the discharge of a firearm, and we understand that this portion of the Ordinance is beyond the scope of the opinion request. We observe that this text facially regulates “firearms,” which is not defined in the Ordinance but presumably includes rifles and shotguns in addition to pistols and revolvers. *See, e.g., Op. S.C. Att’y Gen.*, 2008 WL 903969 (March 17, 2008) (discussing the meaning of “firearm”).

The Ordinance further establishes that violation is a criminal misdemeanor, and that it “shall be interpreted to be consistent with any legislation enacted by the South Carolina General Assembly addressing the same subject matter.” City of Columbia Code of Ordinances § 14-405 & 14-406.

In summary, the Ordinance purports to establish that possession of a firearm in certain circumstance constitutes a criminal offense. Conversely, Section 23-31-510 expressly prohibits local ordinances that attempt to regulate “transfer, ownership, [or] possession of firearms.” S.C. Code Ann. § 23-31-510. We believe that a court most likely would conclude that the Ordinance is impermissible for this reason alone. *See also Op. S.C. Att’y Gen.*, 2017 WL 6940255 (December 29, 2017).

Federal Gun-Free School Zones Act of 1997

Finally, we address the City’s argument that the Federal Gun-Free School Zones Act of 1997 “gives local governments the authority to enact gun-free school zones and is a right that cannot be pre-empted by state law.” The Ordinance expressly recognizes that such an ordinance

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generally is prohibited under State law, but posits that the Federal Gun-Free School Zones Act of 1997 affirmatively gives the City the power to enact this particular regulation. This appears to be a reference to 18 U.S.C. § 922(q), and indeed some portions of the Ordinance appear to be modeled on this Federal statute. 18 U.S.C. § 922(q) attempts to establish a gun free zone around schools by criminalizing possession of a firearm by most persons within 1,000 feet of a primary or secondary school. This provision was held unconstitutional by the United States Supreme Court in *U.S. v. Lopez*, 514 U.S. 549 (1995), was subsequently amended by Congress, and thereafter has been the subject of challenges in reported opinions in various federal Courts of Appeals.

Our Office generally does not opine on questions of federal law. For the purposes of this opinion, however, we observe that the City is relying upon the Federal non-preemption language found in 18 U.S.C. 922(q)(4): “Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun free school zones as provided in this subsection.” This language in the Federal statute plainly does not prohibit local regulation of the kind at issue here. However, the same language cannot fairly be read so as to create an affirmative right for a political subdivision to pass an ordinance which they otherwise are powerless to enact under State law. As this Office has explained in numerous prior opinions, the General Assembly has reserved to itself the entire field of firearm regulation for purposes of state law, subject to certain enumerated exceptions. *See Op. S.C. Att’y Gen.*, 2019 WL 4894126 (September 19, 2019).

Conclusion:

In conclusion, we reiterate that Ordinance 2019-063 is presumed constitutional and may only be set aside by a court. *See Op. S.C. Att’y Gen.*, 2015 WL 4596713 (July 20, 2015). However, it is the opinion of this Office that a court most likely would conclude that at least that portion of Ordinance 2019-063 prohibiting possession of a firearm in a school zone is preempted by S.C. Code Ann. § 23-31-510. *See Op. S.C. Att’y Gen.*, 2017 WL 6940255 (December 29, 2017) (“[I]ndependent of these policy considerations, we believe that a court would conclude that an ordinance which facially conflicts with state law is invalid.”) (citing *Bugsy’s, Inc. v. City of Myrtle Beach*, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000)). We express no opinion on the remainder of the ordinance relating to the discharge of a firearm because we understand that question to be beyond the scope of the opinion request.

We note that the legality of any individual act is a fact-specific question which would have to be determined on a case-by-case basis. In the event that possession of a particular firearm violates a State statute, then a law enforcement officer with jurisdiction could enforce those State

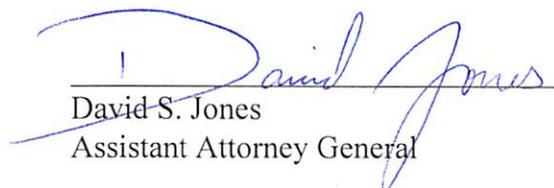
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laws. *See, e.g.*, S.C. Code Ann. § 16-23-420(A) (2015) (“It is unlawful for a person to possess a firearm of any kind on any premises [of] a private or public school . . .”).

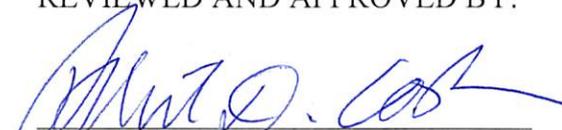
In order to be unmistakably clear, our Office consistently has construed Sections 23-31-510 and -520 to mean that the General Assembly intended that State law expressly occupy the entire field of South Carolina firearm regulation and preempt any local ordinance on the same subject, except where local regulation are expressly permitted by those same statutes. *See, e.g., Op. S.C. Att’y Gen.*, 2017 WL 6940255 (December 29, 2017); *see also* S.C. Code Ann. §§ 23-31-510 (Supp. 2019) & -520 (2007). Unless Section 23-31-510 is substantially revised in the future, a firearm policy decision like that sought by the City is a matter for the State Legislature exclusively and cannot be set at the local level. Furthermore, we will continue to so conclude until the General Assembly amends the law or a precedential decision of a South Carolina court holds otherwise.

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); *see also D.C. v. Heller*, 554 U.S. 570 (2008); *see also McDonald v. Chicago*, 561 U.S. 742 (2010). Thus, the Columbia ordinance not only undermines state law, but undercuts the Second Amendment.

Sincerely,


David S. Jones
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REVIEWED AND APPROVED BY:


Robert D. Cook
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