



ALAN WILSON
ATTORNEY GENERAL

November 19, 2020

Mr. W. Brent Taylor
City Administrator, City of Walhalla
PO Box 1099
Walhalla, SC 29691

Dear Mr. Taylor:

We received your request seeking an opinion on a draft emergency curfew ordinance that includes a restriction on possession of firearms in public. This opinion sets out our Office's understanding of your question and our response.

Issue:

The City of Walhalla is considering a draft emergency curfew ordinance. One portion of this ordinance, if enacted, would purport to restrict the possession of firearms in public places during such a curfew. We understand that the City of Walhalla created this draft after reviewing the emergency ordinance of another municipality in South Carolina.

You have enclosed a copy of the draft ordinance. The relevant paragraph reads:

To improve the safety of public streets and prevent confrontations from escalating into violence, no person shall possess any explosives, firearms or ammunition of any kind, or any dangerous weapons of any kind or nature, while upon any public street, alley, park or other place within the City of Walhalla. This shall not prohibit a person from having in his home or on his private premises any of these items.

While the draft contains other emergency restrictions, we understand that this firearm restriction is the focus of your request.

Law/Analysis:

Our Office has published numerous opinions in recent years on the subject of local firearm ordinances. *See discussion infra*. In this case, we appreciate the opportunity to offer our opinion at the draft stage, before the ordinance is enacted. We do believe that the draft ordinance, if passed as written, may well violate South Carolina law prohibiting local gun regulation. *See*

Mr. W. Brent Taylor
City Administrator, City of Walhalla
Page 2
November 19, 2020

S.C. Code Ann. § 23-31-510 (2007); *see also Op. S.C. Att’y Gen.*, 2020 WL 4730385 (August 6, 2020). Much of our discussion here is verbatim of a prior opinion of this Office addressing a Saluda County Emergency Declaration. *See id.* However, we reproduce it much of it here in order to be as responsive as possible to your question.

We begin by setting out general law relating to Home Rule and emergency powers. “Article VIII of the South Carolina Constitution mandates ‘home rule’ for local governments and requires all laws concerning local government to be liberally construed in their favor.” *South Carolina State Ports Auth. v. Jasper County*, 368 S.C. 388, 402, 629 S.E.2d 624, 631 (2006) (citing S.C. Const Art. VIII, § 17); *see also Quality Towing Inc. v. City of Myrtle Beach*, 340 S.C. 29, 37, 530 S.E.2d 369, 373 (2000).

Moreover, South Carolina law expressly charges local governments with a duty to prepare for emergencies in section 25-1-450:

State, county, and municipal governments shall cooperate in developing and maintaining a plan for mutual assistance in emergencies.

...

(2) County and municipal governments shall be responsible for:

(a) Organizing, planning, and otherwise preparing for prompt, effective employment of available resources of the county or municipality to support emergency operations of the municipalities of the county or to conduct emergency operations in areas where no municipal capability exists.

(b) Coordinating support to municipal emergency operations from other sources including state and federal assistance as well as support made available from other municipalities of the county.

(c) Developing and implementing a shelter/relocation plan to protect the populace from the hazards of a nuclear emergency and to provide for the congregate housing and care of persons displaced or rendered homeless as a result of a natural or man-made emergency.

S.C. Code Ann. § 25-1-450 (Supp. 2019).

Mr. W. Brent Taylor
City Administrator, City of Walhalla
Page 3
November 19, 2020

As to the validity of a local ordinance, the South Carolina Supreme Court has held 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 and must be proven beyond reasonable doubt. *Id.*

Determining if a local ordinance is valid is essentially a two-step process. The first step is to ascertain whether the county or municipality that enacted the ordinance had the power to do so. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the local government had the power to enact the ordinance, the next step is to ascertain whether the ordinance is inconsistent with the Constitution or general law of this State.

Hospitality Assn. of S.C. v. County of Charleston, 320 S.C. 219, 223, 464 S.E.2d 113, 116 (1995). For the purposes of this opinion, we presume without opining that a court would find that the City generally has the power to pass an emergency curfew ordinance as an exercise of their responsibilities to prepare for and meet an emergency in sections 25-1-450 and 4-9-130. *Id.* With this first step satisfied, this opinion will focus on the question of whether any of these are “inconsistent with the Constitution or general law of this State.” *Id.*

Finally,

[W]hile this Office may comment upon constitutional problems or a potential conflict with general law, only a court may declare an ordinance void as unconstitutional, or preempted by or in conflict with state law. Accordingly, an ordinance must continue to be enforced unless and until set aside by a court of competent jurisdiction.

Op. S.C. Att’y Gen., 2003 WL 21043502 (March 21, 2003) (internal citations omitted).

We now consider whether there is any conflict between the draft ordinance and state law. We do believe a court would find such a conflict, because any local move to criminalize possession of any “firearms or ammunition of any kind . . . while upon any public street, alley, park or other place within the City of Walhalla” would be preempted by sections 23-31-510 of the South Carolina Code. Section 23-31-510 provides in relevant part that:

Mr. W. Brent Taylor
City Administrator, City of Walhalla
Page 4
November 19, 2020

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).

Our Office has issued several prior opinions addressing this firearm preemption. An opinion issued on December 2, 2019 set out a succinct summary of our consistent conclusions:

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.”

Op. S.C. Att’y Gen., 2019 WL 6794777 (December 2, 2019) (emphasis in original). A more recent opinion of this Office applied this preemption in the context of a local government emergency powers ordinance. *Op. S.C. Att’y Gen.*, 2020 WL 4730385 (August 6, 2020).

Applying this language to the draft ordinance sent to us, we do not believe the purported prohibition on the possession of “any . . . firearms or ammunition of any kind” can reasonably be characterized as a regulation of merely the “careless or negligent discharge or public brandishment of firearms” as permitted in in section 23-31-520. Therefore we believe section 23-31-510 would preempt this purported local power, if the draft ordinance were enacted as written. *See* S.C. Code Ann. § 23-31-510. We refer the reader to our cited 2019 and 2020 opinions and

Mr. W. Brent Taylor
City Administrator, City of Walhalla
Page 5
November 19, 2020


these other prior opinions for a much fuller discussion of the applicable law: *Ops. 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), 2019 WL 4894126 (September 19, 2019) (concluding that a municipal ordinance attempting to regulate homemade firearms was preempted by Section 23-31-510).

Conclusion:

In conclusion, it is the opinion of this Office that a court may well conclude that the City of Walhalla’s draft emergency curfew ordinance, if passed as written, would violate South Carolina law. In particular, we believe that any local move to criminalize possession of any “firearms or ammunition of any kind . . . while upon any public street, alley, park or other place within the City of Walhalla” would be preempted by section 23-31-510 of the South Carolina Code. *See* S.C. Code Ann. § 23-31-510 (2007); *see also Op. S.C. Att’y Gen.*, 2020 WL 4730385 (August 6, 2020). Furthermore, we do not believe that such a sweeping prohibition can reasonably be characterized as a regulation of merely the “careless or negligent discharge or public brandishment of firearms” as permitted in S.C. Code Ann. § 23-31-520 (2007). We appreciate the opportunity to offer this opinion at the draft stage, before any ordinance is enacted.

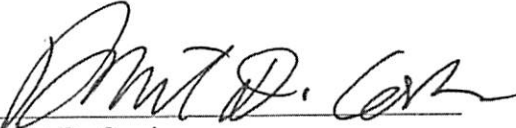
This Office has reiterated in numerous opinions that it strongly supports the Second Amendment and the right of citizens to keep and bear arms. *See, e.g., Op S.C. Att’y Gen.*, 2015 WL 4596713 (July 20, 2015).

Sincerely,



David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General