



ALAN WILSON
ATTORNEY GENERAL

September 19, 2019

The Hon. Jonathon Hill
South Carolina House of Representatives
434-C Blatt Building
Columbia, SC 29201

Dear Representative Hill:

We received your request for an opinion regarding the power of the City of Columbia to enact an ordinance that attempts to regulate homemade firearms created without serial numbers, commonly known as “ghost guns.” This opinion sets out our Office's understanding of your question and our response.

Issue:

On July 16, 2019, the City of Columbia adopted ordinance number 2019-046, which we refer to in this opinion as the “Ordinance.” This Ordinance amended the City of Columbia Code Chapter 8, Article II, Section 8-31 by adding the definition of the term “ghost gun,” which “means a homemade firearm which was created or assembled without a serial number.” The Ordinance further added to the list of nuisances affecting public health “[a]ny act, structure, device, or location which is used for the manufacture, assembly, storage, warehousing, transfer, distribution or sale of one or more ghost guns.”

Your letter states: “Ordinance 2019-046 is a clear attempt to regulate the ownership and possession of a firearm through a creative use of the nuisance ordinance. By making any structure that stores these firearms a nuisance, the City of Columbia is regulating the ownership and possession of firearms.” Your letter further recounts that “[a]fter the ordinance was passed, Mayor Steve Benjamin tweeted, ‘Today @CityofColumbia Council voted unanimously to . . . [make] ghost guns a nuisance’”

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

1. The Ordinance is a land use regulation which is a permissible exercise of home rule, and is entitled to a presumption of constitutionality. S.C. Code Ann. §§ 5-7-30, 6-29-340.
2. “The ordinance does not in itself regulate the non-serial numbered firearm, but deems the location that manufactured, assembled, stored, warehoused, transferred, distributed, or sold the non-serial numbered firearm a nuisance.”
3. Section 23-31-510 is not a blanket preemption of all regulation of firearms. The statute lists the specific areas of preemption, and “[t]here is no preemption regarding manufacture or assembly.”
4. “It seems to be the intent of the State Legislature that firearms should have serial numbers and that anyone who knowingly buys, sells, transports, pawns, receives, or possesses any such firearm without such a serial number is in violation of state law.” 18 U.S.C. §§ 921(a)(21)(C), 923; S.C. Code Ann. § 16-23-30(C).

Law/Analysis:

It is the opinion of this Office that a court most likely would conclude that Ordinance 2019-046 is invalid because it 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). While a municipal ordinance “is a legislative enactment and is presumed to be constitutional,” 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. *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)). We believe that same analysis controls here. However, the question presented here is, perhaps, a closer one than many of the questions considered in our previous opinions on Section 23-31-510.

As referenced in your letter, 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).

Construction of S.C. Code Ann. § 23-31-510 (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. 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 on many previous occasions:

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").

City of Columbia Ordinance 2019-046

Turning to the text of Ordinance 2019-046, the term "ghost gun" is defined to mean "a homemade firearm which was created or assembled without a serial number." City of Columbia Ordinance 2019-046. The Ordinance further declares "Any act, structure, device, or location which is used for the manufacture, assembly, storage, warehousing, transfer, distribution or sale of one or more ghost guns" to be a "nuisance[] affecting public health." City of Columbia Ordinance 2019-046. A person causing a public nuisance may be prosecuted, and "[e]ach day of violation constitutes a separate misdemeanor offense." City of Columbia Code of Ordinances § 8-35. The City also has the power to abate a nuisance and "repair, replace, remove, destroy or otherwise remedy the condition in question by such means, in such time, in such a manner and to such an extent as the enforcement officer or hearing committee shall determine to be in the best interest of the public." City of Columbia Code of Ordinances § 8-31.

On its face, the Ordinance imposes a regulatory scheme, with potential civil and criminal consequences, targeting the "storage, warehousing, transfer, distribution or sale" of a class of firearms. 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 note that the term "transfer" appears in both the Ordinance and the State statute, and that possession and ownership of a firearm necessarily involves "storage" of that firearm in some structure at some time. *Id.* Furthermore, the State statute expressly prohibits local ordinances that attempt to regulate "components of firearms," which necessarily are an indispensable part of the "manufacture [and] assembly" described in the Ordinance. *Id.*

In summary, the Ordinance predicates its regulatory scheme on the transfer, ownership, and possession of a particular class of firearms, as expressly prohibited by S.C. Code Ann. § 23-31-510. We do not undertake to explore the limits of the preemption in Section 23-31-510 with respect to, e.g., manufacturing because this Ordinance facially targets conduct which falls squarely within the unambiguous terms of the State law. *Id.* 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).

However, this question is, perhaps, a closer one than some of the questions considered in our previous opinions on the topic. In general, municipalities do possess the power to identify

and abate nuisances. *See, e.g., Op. S.C. Att'y Gen.*, 2018 WL 1324038 (March 9, 2018). As this Office has opined previously, “[c]ities and counties in South Carolina are also empowered to adopt public nuisance ordinances. This authority generally falls within the police power of these political subdivisions.” *Id.* (citing S.C. Code Ann. § 5-7-30 (2004)). As discussed above, a municipal nuisance ordinance is entitled to a presumption of constitutionality. *See Op. S.C. Att'y Gen.*, 2017 WL 4707545 (October 11, 2017); *see also* S.C. Const, art. VIII, § 17. However, this authority may be preempted by other applicable law. *Id.* (citing *City of Cayce v. Norfolk Southern Ry.*, 391 S.C. 395, 706 S.E.2d 6 (2011)).

Nevertheless, the substance of Ordinance 2019-046 makes clear that a particular class of firearms is the clear object of this municipal ordinance. To illustrate this point, consider if the ordinance replaced “ghost gun” with “pistol.” The practical effect would be that no person could keep an otherwise-lawful pistol in their home without that home being deemed a nuisance and the owner subject to prosecution. The obvious target of such a hypothetical ordinance would not be the home, but the firearm possessed by the homeowner. Furthermore, the sweeping breadth of the Ordinance effectively proscribes all possession of the firearms falling within that class. The range of prohibited conduct in the Ordinance is so great that lawful ownership of a pistol would be impossible. Under these circumstances, distinguishing between the structure and the firearm it contains is a distinction without a difference.

Next, we address the argument by the City that the General Assembly “intended that firearms should have serial numbers and that anyone who knowingly buys, sells, transports, pawns, receives, or possesses any such firearm without such a serial number is in violation of state law.” In support of this argument the City cites S.C. Code Ann. § 16-23-30(C) which provides that “[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.” However, the plain language of the Ordinance does not target handguns from which the serial numbers have been removed as described in the State law. No serial number was removed from a “ghost gun” as defined by the Ordinance – by definition the firearm was created without a serial number at all. *See City of Columbia Ordinance 2019-046* (defining a “ghost gun” to mean “a homemade firearm which was created or assembled without a serial number”). We believe that a court would find this to be a crucial distinction. *Cf., e.g., Op. S.C. Att'y Gen.*, 1983 WL 182044 (November 2, 1983) (“The rules of statutory construction developed by our Supreme Court establish that a criminal statute must be strictly construed against the state and any ambiguity or doubt or uncertainty must be resolved in favor of the defendant.”). For that reason, we believe that a court would conclude that Section 16-23-30(C) does not address the firearms targeted by the Ordinance as written. Of course, the legality of any individual firearm is a fact-specific question which would have to be determined on a case-by-case basis.

Finally, the City also points out that pursuant to 18 U.S.C. § 921(a)(21)(C) and 18 U.S.C. § 923 “it is illegal for an unlicensed person to make a firearm for sale or distribution.” Our Office generally does not opine on questions of federal law; however, we observe that the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives provides this summary of the law to the public: “a license is not required to make a firearm solely for personal use. However, a license is required to manufacture firearms for sale or distribution.”¹ We observe without opining that the “transfer, distribution or sale of one or more ghost guns” (as described in the ordinance) apparently would be in violation of federal law and therefore inconsistent with State law. *See* S.C. Code Ann. § 23-31-20 (2007) (A resident of any state may purchase rifles and shotguns in this State if the resident conforms to applicable provisions of statutes and regulations of . . . the United States . . .”). As discussed above, however, the sweeping scope of the Ordinance is not restricted to the sale or distribution of homemade firearms, and effectively prohibits the mere possession of a homemade firearm made for personal use, which generally does not require a license under federal law.

Conclusion:

In conclusion, we reiterate that Ordinance 24-264 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 such an ordinance constitutes regulation of possession and carrying of a firearm by a political subdivision, and therefore is prohibited by S.C. Code Ann. § 23-31-510(1) (2007). *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)).

While the form of the ordinance purports to target any “act, structure, device, or location” which is characterized as a nuisance, the substance of the ordinance patently targets a particular class of firearms for regulation by the City. To say that this ordinance does not regulate a class of firearms, but instead the act of storing those firearms or the structure in which it is stored, is a distinction without a difference. Instead, we believe that a court probably would find that the purpose and effect of the ordinance is to regulate “the transfer, ownership, possession, carrying, or transportation of [certain] firearms” in a manner prohibited by State law. *See* S.C. Code Ann. § 23-31-510(1) (2007).

¹ *Does an individual need a license to make a firearm for personal use?*, Bureau of Alcohol, Tobacco, Firearms, and Explosives, www.atf.gov/firearms/qa/does-individual-need-license-make-firearm-personal-use (last visited September 12, 2019) (citing 18 U.S.C. 922(o), (p) and (r); 26 U.S.C. 5822; 27 CFR 478.39, 479.62 and 479.105).

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We note that the legality of any individual firearm 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 laws. *See, e.g.*, S.C. Code Ann. § 16-23-30(C) (possession of a handgun “from which the original serial number has been removed or obliterated”).

This opinion expressly does not undertake to explore the limits of the preemption in Section 23-31-510 with respect to, e.g., manufacturing. The question presented here is, perhaps, a closer one than many of the questions considered in our previous opinions on Section 23-31-510 for the reasons discussed above. Nevertheless, we believe this Ordinance facially targets conduct which falls squarely within the unambiguous terms of the State law preempting local regulation of the possession and transfer of firearms.

Thus while we understand and appreciate the City’s desire to protect public safety, the General Assembly has unambiguously reserved for itself the power to regulate firearm possession in this State. S.C. Code Ann. § 23-31-510 (2007). State law would have to be amended in order for the City to accomplish its purpose here. 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.

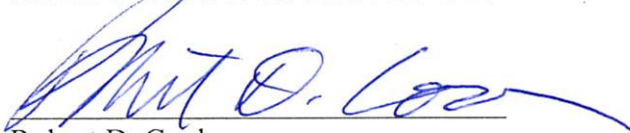
This Office has reiterated in numerous opinions that it strongly supports the Second Amendment and the right of citizens to keep and bear arms. *See, e.g., Op S.C. Att’y Gen.*, 2015 WL 4596713 (July 20, 2015); *see also D.C. v. Heller*, 554 U.S. 570 (2008); *see also McDonald v. Chicago*, 561 U.S. 742 (2010).

Sincerely,



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Assistant Attorney General

REVIEWED AND APPROVED BY:



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