



ALAN WILSON
ATTORNEY GENERAL

December 2, 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 relating to Extreme Risk Protection Orders. This opinion sets out our Office's understanding of your question and our response.

Issue:

Your letter recounts that:

On September 17, 2019, at a scheduled city council meeting, the council unanimously passed ordinance number 2019-056.

Ordinance 2019-056 amended the City of Columbia code Chapter 14, to add Article XII Extreme Risk Protection Orders. In short, this ordinance allows law enforcement to seize the firearms of individuals who live within city limits.

Your letter also indicates that you believe that “the City of Columbia does not have the authority to pass or enforce this ordinance” because it violates Section 23-31-510 of the South Carolina Code. That Section reads in relevant part:

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(1) (Supp. 2019).

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. 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 does not give the municipality any new authority to regulate firearms.
2. The Ordinance complies with S.C. Code Ann. § 23-31-520 because a firearm is relinquished only pursuant to a court order.
3. “[I]f the Respondent chooses to turn the weapon over to a licensed gun dealer, law enforcement would never come in contact with the Respondent’s weapon.”
4. The Ordinance is a valid exercise of Home Rule which preserves “health, peace, order, and good government” pursuant to S.C. Code Ann. § 5-7-30.

The City also quotes at length from previous opinions of this Office.

Law/Analysis:

It is the opinion of this Office that a court most likely would conclude that Ordinance 2019-056 is invalid because it is preempted by S.C. Code Ann. § 23-31-510 (Supp. 2019). *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). 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. We further opine that a court may also find that the ordinance amounts to a firearm confiscation measure expressly prohibited by S.C. Code Ann. § 23-31-520 (2007).

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. 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) (emphasis added).

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); *see also* 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). 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 2019-056

We turn now to the text of Ordinance 2019-056. The Ordinance consists of over seven typed pages and cannot be set out in full in this opinion.¹ It begins with a statement of findings and purpose, including the recognition that:

13. S.C. Code §23-31-510 restricts municipal regulation of transfer, ownership, possession, or transportation of firearms, ammunition, or components of firearms, and that S.C. Code §23-31-520 denies a municipality the right to confiscate a firearm unless incident to an arrest; and . . .

23. This ordinance is hereby enacted, not to give law enforcement the authority to confiscate firearms, but to the give the Court the authority to order parties to relinquish firearms, to either licensed gun dealers or law enforcement, if the Court, given the extreme risk circumstance, deems the relinquishment appropriate for the safety and well-being of the individual, family members, or the public.

City of Columbia Code of Ordinances § 14-351. The Ordinance also establishes several definitions, including that of an “extreme risk protection order”:

¹ The full text of the ordinance is available at: https://www.columbiasc.net/depts/city-council/docs/2019/2019%20Ordinances/Ordinance_2019_056_Extreme_Risk_Protection_Orders.pdf.

[A] court order prohibiting a person from having in the person's possession or control, purchasing or receiving or attempting to purchase or receive, a firearm, based upon a finding that the person presents a risk of suicide or of causing the death of, or serious bodily injury to, another person.

City of Columbia Code of Ordinances § 14-353. The Ordinance goes on to develop a complex legislative scheme which purports to establish the criteria and process for a person to seek and a court to issue a protective order. For the purposes of this opinion, we focus on two provisions, the first of which is titled "Relinquishment of firearms":

(a) An extreme risk protection order issued under this article (relating to interim extreme risk protection order) or (relating to order after hearing) shall require the relinquishment of all firearms owned by the respondent or in the respondent's possession or control within 24 hours following service of the order, except for cause shown, in which case the court issuing the order shall specify the time for relinquishment of any or all of the respondent's firearms and notify the subject of the order that they can relinquish the firearms to a licensed gun dealer that is willing to take custody of the firearms or to local law enforcement.

(b) A law enforcement officer serving an extreme risk protection order shall request that all firearms and any firearms license in the respondent's possession or control be immediately relinquished into the custody of the law enforcement officer. A law enforcement officer taking custody of a firearm or firearms license under this article shall transfer the firearm or firearms license to the Columbia Police Department (CPD) Property and Evidence Facility for safekeeping.

(c) A respondent shall, within the time frame specified in the order, relinquish to a licensed gun dealer willing to take custody of the firearm or license or to a law enforcement officer any firearm or license remaining in the respondent's possession or control after the time of service.

....

City of Columbia Code of Ordinances § 14-363. The Ordinance also establishes criminal penalties for violations:

(a) A person who is the subject of an extreme risk protection order issued pursuant to this article (relating to interim extreme risk protection order) or (relating to order after hearing), if he intentionally or knowingly fails to relinquish

a firearm or firearms license as required by the order, constitutes a violation of this article, and shall be guilty of a misdemeanor and punished, upon conviction, in accordance with section 1-5 of this code.

....

City of Columbia Code of Ordinances § 14-367. We reiterate that these quoted sections contain only some of the many procedural and substantive provisions of the Ordinance. In summary, the Ordinance creates an elaborate legislative scheme including both substantive and procedural provisions, ranging from timing and burdens of proof to enumerated factors which “the court shall consider” in deciding the merits of the petition. The Ordinance seeks to be a complete “red-flag law” enacted at the municipal level. A legislative scheme of this kind is entirely foreign in nature to municipal corporations in South Carolina, even under Home Rule.

More particularly, the entire legislative scheme of the Ordinance focuses squarely on the transfer and possession of firearms, as expressly prohibited by S.C. Code Ann. § 23-31-510 (Supp. 2019). We believe that a court most likely would conclude that the Ordinance is impermissible for this reason alone. *See Op. S.C. Att’y Gen.*, 2017 WL 6940255 (December 29, 2017). Additionally, the Ordinance expressly authorizes the involuntary removal of firearms merely on a finding of extreme risk. City of Columbia Code of Ordinances § 14-353. The Ordinance list certain criminal behavior as factors to consider, but does not require that any crime be committed or any arrest be made prior to ordering relinquishment. *See City of Columbia Code of Ordinances § 14-355*. Therefore, a court may also conclude that the Ordinance is prohibited by S.C. Code Ann. § 23-31-520 (2007), which “denies any . . . municipality . . . the power to confiscate a firearm or ammunition unless incident to an arrest.”

The City contends that the Ordinance “does not give the municipality any new authority to regulate firearms.” Contrary to the City’s assertion, however, the Ordinance does in fact purport to create a detailed process whereby courts have authority to order the involuntary relinquishment of a firearm even where no crime is committed and no arrest has been made. City of Columbia Code of Ordinances § 14-363. It appears that the crux of this argument is that a firearm removal happens as a result of a court order, instead of being seized by a police officer without any process. *See id.* The City posits that courts now have the power to hear a petition that apparently did not exist prior to the Ordinance. If in fact the City has no additional power under the Ordinance, then officers of the City concerned for a citizen’s safety could proceed on state law grounds as appropriate. But the City cannot establish a firearm removal system by municipal ordinance, and then somehow disclaim responsibility for the removal of firearms pursuant to that ordinance. We believe a court would find this argument unconvincing.

Next, we address the argument by the City that “[I]f the Respondent chooses to turn the weapon over to a licensed gun dealer, law enforcement would never come in contact with the Respondent’s weapon.” The fact that an innocent owner might be able to choose the custodian of their firearm does not obviate the fact that they face a criminal misdemeanor charge and contempt of court if they do not comply. The issue here is not talismanic contact between a law enforcement officer and a firearm; the issue is that the owner is deprived of their otherwise-lawful firearm by municipal authority. We believe that such an involuntary relinquishment, merely under the authority of a municipal ordinance and not some other provision of state law, is a confiscation prohibited by the General Assembly in Section 23-31-520.

Finally, we observe in passing that while the City has sought to be thorough in its drafting, the Ordinance still creates several thorny questions aside from that presented in your request letter. For example, the Ordinance sets out numerous provisions relating to service and the timing of hearings, but often it is difficult to see how these provisions can be reconciled with the South Carolina Rules of Civil Procedure. Furthermore the Ordinance establishes that “[n]o filing fee may be charged for a petition under this article.” City of Columbia Code of Ordinances § 14-354. However, Section 8-21-310 of the South Carolina Code mandates the applicable filing fees to be collected by Clerks of Court. S.C. Code Ann. § 8-21-310 (Supp. 2019). The Ordinance states that the petition could be brought in any court of competent jurisdiction, yet it is not clear which courts exactly the City believes would have jurisdiction. We express no opinion on these questions because they are beyond the scope of the question, but these provisions underscore how foreign the legislative scheme purportedly created by this Ordinance is to the general law of this State.

Conclusion:

In conclusion, we reiterate that Ordinance 2019-056 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, the entire legislative scheme of the Ordinance focuses squarely on the transfer and possession of firearms, as expressly prohibited by S.C. Code Ann. § 23-31-510 (Supp. 2019). It is the opinion of this Office that a court most likely would conclude that such an ordinance constitutes a prohibited regulation of possession, carrying, and transfer of a firearm by a political subdivision. *See Op. S.C. Att’y Gen.*, 2017 WL 6940255 (December 29, 2017) (citing *Bugsy’s, Inc. v. City of Myrtle Beach*, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000)).

The Ordinance seeks to circumvent the prohibition in Section 23-31-510 by establishing a novel process to obtain a court order. However, the City cannot establish a firearm removal system by municipal ordinance, and then somehow disclaim responsibility for the removal of firearms pursuant to that ordinance.

Additionally, the Ordinance authorizes the involuntary removal of firearms merely on a finding of extreme risk, and does not require that any crime be committed or any arrest be made prior to ordering relinquishment. *See* City of Columbia Code of Ordinances § 14-355. Therefore, a court may also conclude that the Ordinance is an unlawful firearm confiscation prohibited by S.C. Code Ann. § 23-31-520 (2007). The fact that an innocent owner might be able to choose the third-party custodian of their firearms does not obviate the fact that they face a criminal misdemeanor charge and contempt of court if they do not relinquish them. The issue here is not talismanic contact between a law enforcement officer and a firearm; the issue is that an innocent owner may be deprived of their otherwise-lawful firearm pursuant to municipal authority without being arrested. We believe that such an involuntary relinquishment, merely under the authority of a municipal ordinance and not some other provision of state law, is a confiscation prohibited by the General Assembly in Section 23-31-520.

We further note that state law already establishes causes of action which empower the courts to prohibit the possession of firearms in certain instances.² *See, e.g.*, S.C. Code Ann. § 16-23-30 (2015) (unlawful for “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”). Any person with standing could seek to enforce those state laws. Yet the Ordinance here seeks to enact a complete “red-flag law” at the municipal level. A legislative scheme of this kind is entirely foreign in nature to municipal corporations in South Carolina, even under Home Rule.

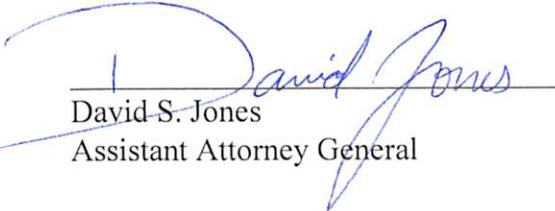
In order to be unmistakably clear, our Office consistently has construed Sections 23-31-510 and -520 to mean that the General Assembly intended that State law expressly occupy the entire field of South Carolina firearm regulation and preempt any local ordinance on the same subject, except where local 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.

² Nothing in this opinion should be misconstrued to detract from generally-applicable State law that prohibits certain persons from possessing a firearm.

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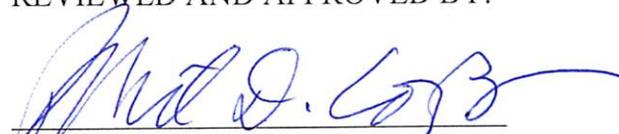
This Office has reiterated in numerous opinions that it strongly supports the Second Amendment and the right of citizens to keep and bear arms. *See, e.g., Op S.C. Att'y Gen.*, 2015 WL 4596713 (July 20, 2015); *see also D.C. v. Heller*, 554 U.S. 570 (2008); *see also McDonald v. Chicago*, 561 U.S. 742 (2010). Thus, the Columbia ordinance not only undermines state law, but undercuts the Second Amendment.

Sincerely,



David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General