

## OAG 99-10

December 17, 1999

*Subject:* Authority of the City of Louisville to enact an ordinance regulating concealable firearms.

*Requested by:* Representative Perry B. Clark

*Written by:* Janet M. Graham

*Syllabus:* Louisville Ordinance 135.05 is invalid under KRS 82.082, because KRS 65.870 expressly prohibits this legislation.

*Statutes construed:* KRS 65.870, 82.082, 237.110, 237.115, and 527.020.

*OAGs cited:* 83-361, 92-68, 92-163, 93-1, 93-45, 96-39, 96-40, 93-71, 97-9 and 98-12.

### *Opinion of the Attorney General*

This Office has been asked to opine on whether Louisville Ordinance 135.05 regulating concealable firearms (the "Ordinance") conflicts with KRS 65.870. The ordinance does conflict with KRS 65.870 and is therefore invalid under the Home Rule Statute passed by the General Assembly in 1980. The Home Rule Statute, KRS 82.082, delegates to cities the broad power to govern, but it also bars cities from legislating in certain areas. Specifically, the General Assembly prohibits a city from enacting an ordinance that is expressly prohibited by statute. In this case, KRS 65.870 expressly prohibits a city from enacting legislation in the area of the ownership, possession and carrying of firearms. Nor does the General Assembly provide any exception in KRS 65.870 that would permit a city to regulate "concealable firearms." Because the General Assembly bars municipalities from legislating in this area, the Louisville Ordinance is invalid.

#### HOME RULE

In 1980, the General Assembly reformed Kentucky municipal law by enacting "Home Rule." This enactment changed the way that the General Assembly delegated power to cities, giving them more flexibility to handle local affairs. *See* J. David Morris, *Municipal Law*, 70 Ky.L.J. 287 (1981-82). Before the Home Rule Statute (KRS 82.082) was enacted, cities required specific and discrete grants of power from the Commonwealth before

they could individually address local problems. Thus, Kentucky's municipal law consisted of a piecemeal aggregation of statutes housed in a number of different municipal codes. However, when the General Assembly instituted Home Rule, it made a broad delegation of powers to cities, excepting only certain specific powers to the Commonwealth. *Id.* at 293-296. Under Home Rule, "KRS 82.082(1) delegates all possible municipal powers to cities except those specifically denied to them." *Dannheiser v. City of Henderson*, No. 98-SC-0474-DG, 1999 WL 743453, \* 6 (Ky. Sept. 23, 1999).

Although the Home Rule Statute represents a broad delegation of power, KRS 82.082 maintains the long-standing principle that municipal ordinances are still inferior to state statutes. As noted in *Morris*, "[t]he significant limitation on the exercise of municipal powers is the requirement that an exercise not be in conflict with a constitutional provision or statute." *Morris, supra* at 298. Since local legislation is always inferior to a state statute, the General Assembly retains primary control over municipalities, and it may repeal a local action by enacting a contrary statute. *Id.*, citing *Boyle v. Campbell, Ky.*, 450 S.W.2d 265, 268 (1970).

Most evaluations of municipal legislation under the Home Rule Statute begin with the question of whether the ordinance is in conflict with a statute. Although this Opinion and others have evaluated firearms legislation, this Office also receives requests to evaluate other types of local ordinances in light of the Home Rule Statute. These requests have involved widely varying enactments: towing ordinances (OAG 83-361), musselling ordinances (OAG 93-1), fairness ordinances (92-68), lawn chemical applications ordinances (93-45), and anti-mask ordinances (OAG 92-163). Although the subjects of the ordinances may vary, all of the ordinances must be evaluated in the same fashion to assure compliance with the Home Rule Statute.

In order to comply with KRS 82.082, the ordinance must be in furtherance of a public purpose. The Kentucky Supreme Court has recently reaffirmed a broad view of "public purpose." *Dannheiser*, 1999 WL 743453 \*3. See generally *Valla v. Preston Street Road District No. 1, Ky.*, 395 S.W.2d 772 (1965); *City of Owensboro v. McCormick, Ky.*, 581 S.W.2d 3 (1979). Secondly, the ordinance must not conflict with a constitutional provision or statute. An ordinance is in conflict with a statute "if it is expressly prohibited by a statute or there is a comprehensive scheme of legislation on the same general subject. . ." KRS 82.082(2). See *Pierce v. Commonwealth, Ky.*, 777 S.W.2d 926 (1989). With respect to the issue of a comprehensive scheme, the Kentucky Supreme Court has noted, "[i]n order to rise to the level of a comprehensive system or scheme, the General Assembly must establish a definite system that explicitly directs the actions of a city." *Dannheiser*, 1999 WL 743453 \* 6. In light of these standards, the Louisville Ordinance fails to comply with the Home Rule Statute because it is expressly prohibited by KRS 65.870.

#### KRS 65.870

The Ordinance is invalid under the Home Rule Statute because it broadly attempts to regulate the ownership, possession and carrying of firearms in private homes, which is

expressly prohibited by KRS 65.870. To date, there are no cases interpreting KRS 65.870, but, as noted in OAG 93-71, its language is unambiguous. KRS 65.870 expressly prohibits any city from "occupy[ing] any part of the field of regulation of the transfer, ownership, possession, carrying or transportation of firearms, ammunition or components of firearms or combination thereof." Although the Ordinance specifically regulates "concealable firearms," there is no exception in KRS 65.870 that excepts concealable firearms from its general prohibition on municipal firearm legislation. If the statute does not contain any exceptions, then no exceptions can be read into it, and its plain and unambiguous language must be given effect. *See Commonwealth v. Shivley, Ky., 814 S.W.2d 572, 573-74 (1991).*

Another reason for employing the plain meaning of the statute's terms is due to the lack of specific definitions in KRS 65.870. KRS 65.870 does not define the terms "ownership," "possession" or "carrying." Courts have noted that "[w]here there is no specific definition, we must construe the words of the statute within their common usage." *Alliant Health System v. Kentucky Unemployment Insurance Commission, Ky.App., 912 S.W.2d 452, 454 (1995)*, citing *Kentucky Unemployment Insurance Commission v. Jones, Ky.App., 809 S.W.2d 715 (1991)*. Additionally, KRS 446.080 mandates that words and phrases in a statute "shall be construed according to the common and approved usage of language." *See Withers v. University of Kentucky, Ky., 939 S.W.2d 340 (1997).*

The common and approved usage of the words in KRS 65.870 highlights the conflict between the statute and the Ordinance. KRS 65.870 prohibits a city from legislating regarding the "ownership" and "possession" of firearms. Webster's II New Riverside University Dictionary, 1984, defines "own" as "To have or possess." It defines "possess," as "1. To have as property: own . . . 5. To control or maintain in a given condition." The Ordinance conflicts with the statute by mandating that firearms must be kept in a securely locked box, thus limiting citizens' full rights of ownership and possession of firearms.

Not only does the Ordinance attempt to regulate the ownership and possession of firearms, it may also indirectly regulate the "carrying" of them. The dictionary definition of "carry" is "To have or keep on one's person." *Id.* The Ordinance exempts from its restrictions the actual "carrying" of a firearm on a person's body or the "constructive carrying" when a firearm can be easily retrieved. However, the Ordinance may still be deemed to indirectly regulate the "carrying" of firearms because it uses a different standard for constructive carrying than that used in other statutes. Unlike the Ordinance, other statutes use the phraseology "on or about his person" to describe a "constructive carrying" situation. *See KRS 237.110 (1)* (authorizing a person to obtain a license to carry a concealed deadly weapon "on or about his person"); *KRS 527.020* (holding that a person carries a concealed deadly weapon when "he carries concealed a firearm. . . on or about his person." ); *see also Phillips v. Commonwealth, Ky., 473 S.W.2d 135, 139 (1971)* (holding that a gun over the sun visor of a car could constitute carrying a concealed deadly weapon under *KRS 435.020*, predecessor to *KRS 527.020*); *Houston v. Commonwealth, Ky., 975 S.W.2d 925 (1998)*. To the extent that the Ordinance may

impermissibly regulate in the field of "carrying" firearms it also is invalid. In conclusion, because the General Assembly passed KRS 65.870 which expressly prohibits cities from legislating regarding the ownership, possession or carrying of firearms, the Ordinance is invalid under the Home Rule Statute.

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