

IN THE  
**COMMONWEALTH COURT OF  
PENNSYLVANIA**

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1693 CD 2015

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**FIREARM OWNERS AGAINST CRIME, *et al.***  
**Appellants**

**v.**

**LOWER MERION TOWNSHIP,**  
**Appellee**

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**Appellants' Reply Brief**

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**APPEAL FROM THE ORDER OF AUGUST 27, 2015 OF COURT OF  
COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA,  
CIVIL DIVISION, DOCKET NO. 2015-06187.**

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## I. ARGUMENT

### A. Appellee Does Not Dispute That Its Ordinance Prohibits The Discharge Of A Firearm In Defense Of One's Life

As Appellants have raised since instituting this action, Ordinance 109-16 prohibits the *lawful* discharge of firearms; thereby, denying them their inalienable right to self defense,<sup>1</sup> as the Ordinance is devoid of any exception<sup>2</sup> and Appellee has admitted that anyone discharging a firearm would be prosecuted. *See*, Appellants' brief, pp. 6 – 8, fn. 3, 22, fn. 15.<sup>3</sup>

Pennsylvania Rule of Appellate Procedure 2112 provides, in part,

Unless ... the brief of the appellee otherwise challenges the matters set forth in the appellant's brief, it will be assumed the appellee is satisfied with them, or with such parts of them as remain unchallenged.

Nowhere within Appellee's brief do they mention Appellants' argument nor do

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<sup>1</sup> *Caba v. Weaknecht*, 64 A.3d 39, 58 (Pa. Cmwlth. Ct.), reconsideration denied (Mar. 27, 2013), appeal denied, 621 Pa. 697, 77 A.3d 1261 (2013)(*holding* "Though the United States Supreme Court has only recently recognized "that individual self-defense is 'the central component' of the Second Amendment right, *McDonald*, — U.S. at —, 130 S.Ct. at 3036 (emphasis omitted) (quoting *Heller*, 554 U.S. at 599, 128 S.Ct. 2783), *the right to bear arms in defense of self has never seriously been questioned in this Commonwealth.*") (emphasis added).

<sup>2</sup> Even if Appellee was to argue that there existed an inherent exception for self-defense, the U.S. Supreme Court found an identical argument, in relation to the District of Columbia's ordinance, to be "precluded by the unequivocal text" of the ordinance. *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008). This argument would additionally be dispelled by the Appellees knowledge of drafting explicit exceptions into the text of the ordinance, as reflected by the text of 109-16. (e.g. "No person *except authorized members of the Police Department...*") (emphasis added).

<sup>3</sup> *See also*, Joshua Prince, Esq. and Allen Thompson, Esq., *The Inalienable Right To Stand Your Ground*, 27 ST. THOMAS L. REV. 32 (2015), available at <http://stthomaslawreview.org/articles/v27/1/prince.pdf>



they respond to or dispute it. Accordingly, pursuant to Pa.R.A.P. 2112, Appellee must be deemed to agree with Appellants' argument and is not challenging Appellants' arguments in relation to Ordinance 109-16 prohibiting the lawful discharge of a firearm for purposes of self-defense.

B. Appellants Have Established The Preliminary Injunction Factors

For brevity, Appellants incorporate by reference their arguments in Section VII., B., of their primary brief, reviewing the factors necessary to establish a preliminary injunction and the evidence of record supporting that Appellants have met those factors. Nevertheless, Appellants respond to those specific issues raised by Appellee in its brief.

i. *Irreparable Harm*

Appellants respectfully point out that Appellee continues to ignore the binding precedent from this Court in *Stilp v. Com.*, 910 A.2d 775, 787 (Pa. Cmwlth. 2006) holding that violations of the State Constitution and express statutory provisions constitutes *per se* irreparable harm. *See also, Pleasant Hills Constr. Co. Inc. v. Pub. Auditorium Auth. of Pittsburgh*, 782 A.2d 68, 79 (Pa. Cmwlth. 2001), *rev'd on other grounds*, 567 Pa. 38, 784 A.2d 1277 (2001) (*citing, Council 13, Am. Fed'n of State, County and Mun. Employees, AFL-CIO v. Casey*, 595 A.2d 670 (Pa. Cmwlth. Ct. 1991)) (emphasis added). Furthermore, this Court

in *Dillon* declared that “when the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury.” *Dillon v. City of Erie*, 83 A.3d 467, 474 (Pa. Cmwlth. 2014)(*en banc*) (quoting, *Pennsylvania Public Utility Commission v. Israel*, 356 Pa. 400, 406 (1947)).

As Ordinance 109-16 violates both Article 1, Section 21 of the Pennsylvania Constitution and 18 Pa.C.S. § 6120, Appellants have established both irreparable harm and injury to the public.

*ii. Granting The Injunction Would Not Result In Any Harm to Appellee*

Although Appellee attempts to claim that no harm would be incurred by Appellants if enforcement of this Ordinance is not enjoined, this argument ignores this Court’s *en banc* holding in *Dillon* declaring that a municipality’s regulation of “firearms shows that a greater injury will occur by refusing to grant the injunction because [the ordinance] is unenforceable.” 83 A.3d at 474. Furthermore, as discussed *supra*, Appellee does not dispute an individual’s inability to discharge a firearm for purposes of self defense, pursuant to Ordinance 109-16. Given this absolute prohibition, Appellee could never suffer a greater harm than Appellants, as Appellants’ lives are jeopardized by the enforcement of this ordinance. Also, to the extent that Appellee argues its regulation is consistent with the UFA, it fails to

acknowledge that if true, it could suffer no harm in relation to an injunction relating to its Ordinance, as any violation of the UFA can be prosecuted by the district attorney.

Accordingly, granting the injunction would not result in any greater harm to Appellee.

*iii. An Injunction Will Restore The Parties To The Status Quo Ante*

Contrary to Appellee's contention that the status quo is "non-offensive," as discussed *supra* and declared by this Court in *Caba*, 64 A.3d at 58, Appellants, *inter alia*, are being denied their Constitutional Right to self defense. Furthermore, as held by this Court *en banc* in *Dillon* in relation to the City of Erie's unlawful firearm regulation in city parks, a preliminary injunction enjoining the enforcement of the ordinance is appropriate to restore the parties to the status quo ante. 83 A.3rd at 470, 474.

Accordingly, an injunction will properly restore the Parties to the status quo ante.

*iv. Appellants Have A Clear Right To Relief And Are Likely To Prevail*

As Appellants addressed, at length, the constitutional, statutory and case law

in support of their clear right to relief in their primary brief, Section VII., A., Appellants will only respond to new issues raised by Appellee.<sup>4</sup>

Although Appellee attempts to argue that Ordinance 109-16 is consistent with the UFA, Appellee has not responded to Appellants argument found in fn. 14, p. 21, of their primary brief. Specifically, Appellee contends that the language “unless exempted”<sup>5</sup> in the Ordinance means that those who comply with the UFA are exempted and therefore, the Ordinance is regulating consistently with the UFA. Appellee Brief at 15. This argument ignores two major issues.

First, the exemption for police officers undermines the Appellee’s argument that the “unless exempted” portion of the Ordinance was to relate to those exemptions provided by the UFA. Specifically, 18 Pa.C.S. § 6106(b)(1) already exempts police officers and therefore, if the “unless exempt” provision was intended to relate to the UFA, it would be duplicative and unnecessary. Therefore, when enacted, the language “unless exempted” was never intended to provide exemption to those who were complying with the UFA.

Second, if Appellee’s argument that “unless exempted” portion is to be

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<sup>4</sup> It must be noted that while Appellee has responded to Appellants’ arguments regarding the constitutional preemption of Article 1, Section 21 and the express preemption of 18 Pa.C.S. § 6120, Appellee has failed to responded to Appellants’ arguments regarding field preemption. *See*, Appellants’ Brief, Section VII., A., iii., 2. Therefore, Appellants, consistent with Pa.R.A.P. 2112, argue that Appellee is deemed to agree with the argument.

<sup>5</sup> It must be noted that Appellee in its brief at pg. 4 correctly states the language of Ordinance 109-16; however, at page 15, it changes the text of the Ordinance from “unless exempt” to “otherwise exempt.”

accepted as permitting the lawful possession of firearms in parks, the prior clause, relating to the issuance of a “special permit”, would mean that the Appellee has authorized the issuance of special permits to those who would be in *unlawful* possession of firearms in the park. Clearly, this would be in direct violation of the UFA and cannot be considered to be regulating consistently with the UFA.

Rather, Appellants contend that the proper reading and understanding of 109-16 as enacted is that unless 109-16 explicitly exempts the individual (*e.g.* members of the police department), an individual must obtain a “special permit” to even *lawfully* carry a firearm in a city park. This would clearly be inconsistent with the UFA and regulate the lawful carrying and transportation of firearms and ammunition.

In turning to Appellee’s contention that this case is analogous to *Minich v. County of Jefferson*, 869 A.2d 1141 (Pa. Cmwlth. 2005), Appellee’s brief is void of any citation to any constitutional or statutory provision permitting a county, municipality or township to regulate the possession and discharge of firearms in Pennsylvania. In *Minich*, the County instituted a regulation prohibiting firearms in the county courthouse, consistent with 18 Pa.C.S. § 913. Unlike in this matter, Appellee is unable to cite to any provision where the General Assembly has made

it unlawful to possess or discharge a firearm in a city park.<sup>6</sup> In fact, it is important to point out that the General Assembly is acutely aware of how to draft such restrictions, as it has enacted prohibitions in relation to the discharge of firearms in all cemeteries and burial grounds, pursuant to 34 Pa.C.S. § 2506 and has precluded possession in relation to specific locations – 18 Pa.C.S. § 912 (prohibiting possession of firearms on school property, unless exempt under subsection (c)); 18 Pa.C.S. § 913 (prohibiting possession of firearms in court facilities but mandating lockers be made available for the checking of firearms at court facilities); 18 Pa.C.S. § 6107 (prohibiting the carrying of firearms “upon the public streets or upon any public property during an emergency proclaimed by a State or municipal governmental executive” unless exempt under subsection (1) or (2)); “18 Pa.C.S. § 6108 (prohibiting the carrying of firearms “upon the public streets or upon any public property in a city of the first class,” unless exempt under subsection (1) or (2)); and 18 Pa.C.S. § 5122 and 61 Pa.C.S. § 5902 (prohibiting possession of firearms in detention facilities, correctional institutions and mental hospitals). Lastly, Appellee completely ignores the fact that Article 1, Section 21 and the

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<sup>6</sup> As cited to by Appellants in their primary brief, they acknowledge that the General Assembly has regulated discharge in relation to: discharge into occupied structures, per 18 Pa.C.S. § 2707.1 and discharge during hunting seasons, per 34 Pa.C.S. §§ 2505, 2506, 2507. Therefore, to the extent the Court finds that *Minich* is still binding precedent, any permitted regulation, at most, would be limited to being consistent with 18 Pa.C.S. § 2707.1 and 34 Pa.C.S. §§ 2505, 2506, 2507.

General Assembly have explicitly permitted the use of firearms for purposes of self defense. *See*, 18 Pa.C.S. §§ 505, 506.

Second, as acknowledged by Appellee, given this Court's *en banc* holding in *Nat'l Rifle Ass'n v. City of Philadelphia*, 977 A.2d 78, 82 (Pa. Cmwlth. 2009), *Minich*'s holding is questionable. Furthermore, Appellee's statement of the *Nat'l Rifle Ass'n* is extremely interesting, as it declares, "Therefore, while the City argued that it was restricting unlawful conduct, it was really restricting lawful conduct with the goal of preventing unlawful conduct." Appellee brief at 16. In this matter, it appears lost on Appellee that it is doing likewise by putatively restricting unlawful conduct, by restricting lawful conduct with the goal of preventing unlawful conduct.

Regardless, even if *Minich* is currently binding precedent, it is not analogous to this matter, as there does not exist any constitutional or statutory provision entitling Appellee to regulate the possession and discharge of firearms in township parks. To the contrary, as discussed at length in Appellants' primary brief, such regulation has been explicitly preempted by the General Assembly through express and field preemption.

Accordingly, Appellants have established a clear right to relief and are likely to prevail.

C. The Township Does Not Have The Right To Regulate Firearms On Its Property, Which Is Held For the Public Trust.

Appellee argues that it can regulate firearms on its property, without violating the UFA; yet again, fails to provide citation to any statutory law, where the General Assembly granted it the power to regulate the possession, transport or discharge of firearms in city parks.<sup>7</sup> To the contrary, the Pennsylvania Constitution and the General Assembly have explicitly precluded any regulation by counties, municipalities and townships through express preemption of Article 1, Section 21 and 18 Pa.C.S. § 6120 and field preemption, discussed in Appellants' primary

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<sup>7</sup> Appellee relies on the *dicta* of fn. 9 in *Dillon*. It must be pointed out, as acknowledged by fn. 9 in *Dillon*, that the issue was not before the Court. Furthermore, in relation to the citations found in fn. 9 of *Dillon*, 53 P.S. § 38710 was repealed by the General Assembly, 2014, March 19, P.L. 52, No. 22, § 355, and the regulations of the Commonwealth's Department of Conservation and Natural Resources, 11 Pa.Code. § 11.215, are unlawful, pursuant to 18 Pa.C.S. § 6109(m.3)(2). Attorney General Kathleen Kane previously acknowledged in an August 5, 2014 Opinion to the Chairman William Ryan of the Pennsylvania Gaming Control Board that the Board's enacted regulation, 58 Pa.Code § 465a.13, was invalid, pursuant to Section 6109(m.3), as it regulated the possession of firearms at casinos inconsistently with the UFA. A copy of the Opinion is available on the Attorney General's website, *available at* [https://www.attorneygeneral.gov/uploadedFiles/MainSite/Content/TheOffice/OfficialAttorneyGeneralOpinions/PA\\_Gaming\\_Control\\_Advice\\_Guns\\_Casino-signed.pdf](https://www.attorneygeneral.gov/uploadedFiles/MainSite/Content/TheOffice/OfficialAttorneyGeneralOpinions/PA_Gaming_Control_Advice_Guns_Casino-signed.pdf). Although opinions of the Attorney General are not binding on the Court, this Court has previously recognized in *Com. ex rel. Pappert v. Coy*, that "the courts customarily afford great weight to official opinions of the Attorney General." 860 A.2d 1201, 1208 (Pa. Cmwlth. 2004)(citing *Dep't of the Auditor Gen. v. State Employees' Ret. Sys.*, 836 A.2d 1053 (Pa. Cmwlth. 2003)(citations omitted)); *see also*, *Baird v. Twp. of New Britain*, 633 A.2d 225, 229 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 537 Pa. 635, 642 A.2d 488 (1994) ("While opinions of the Attorney General are not binding on this court, they are entitled to great weight.")

Similarly, *Amicus Curiae* cites to this Court's decision in *Perry v. State Civil Serv. Comm'n (Dep't of Labor & Indus.)*, 38 A.3d 942 (Pa. Cmwlth. 2011) for support of their position that Commonwealth agencies can regulate on their property. Due to the Commission's regulation and determination in that matter, the General Assembly enacted Section 6109(m.3)(2) as part of Act 2011-10 (H.B. 40), 2011, June 28, P.L. 48, No. 10, § 6, so to prevent Commonwealth agencies from regulating inconsistently with the UFA.



brief.

- i. Municipalities Only Have Those Powers Bestowed Upon Them By The General Assembly, Only Exist At The Discretion Of The General Assembly And Do Not Have Property Rights Where The General Assembly Has Regulated Contrary Thereto*

As set forth in the Solicitor's Handbook, Third Edition, pg. 1, in reviewing Dillon's Rule,<sup>8</sup>

Just as the municipalities are creatures of statute, their powers are limited by statute. Municipal governments possess no sovereign power or authority, and exist principally to act as trustees for the inhabitants of the territory they encompass. Their limited power and authority is wholly within the control of the legislature, which has the power to mold them, alter their powers or even abolish their individual corporate existences.

In fact, the Pennsylvania Supreme Court acknowledged that "[m]unicipal corporations are creatures of the State, created, governed and abolished at its will. They are subordinate governmental agencies established for local convenience and in pursuance of public policy." *Shirk v. Lancaster*, 313 Pa. 158, 162 (1933). The

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<sup>8</sup> As explained in the Solicitor's Handbook, Dillon's Rule is "[t]he clearest judicial statement of the limitations statutorily imposed on municipalities is known as Dillon's Rule, and is derived from an early municipal hornbook entitled *Dillon on Municipal Corporations*. The rule is often expressed as follows: Nothing is better settled than that a municipality does not possess and cannot exercise any other than the following powers: 1) those granted in express words; 2) those necessarily or fairly implied in or incident to the powers expressly granted; and 3) those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable. Any fair, reasonable doubt as to the existence of power is resolved by the courts against the corporation and therefore denied. *Solicitor's Handbook*, Governor's Center for Local Government Services, 3<sup>rd</sup> Ed. (April 2003) available at [http://community.newpa.com/download/local\\_government/handbooks\\_and\\_guides/handbooks-for-local-government-officials/solicitorshandbook.pdf](http://community.newpa.com/download/local_government/handbooks_and_guides/handbooks-for-local-government-officials/solicitorshandbook.pdf).

Court continued that “[t]he authority of the legislature over *all* their civil, political, or governmental powers is, in the nature of things, *supreme*, save as limited by the federal Constitution or that of the Commonwealth.” *Id.* (emphasis added); *see also*, *Commonwealth v. Moir*, 199 Pa. 534, 541 (1901).

More importantly and directly on point in relation to the regulation of property held by a municipality, the Court held that

But the protection of Amendment 14 of the federal Constitution prohibiting the deprivation of property without due process of law, does not limit the authority of the legislature to regulate and control ... *species of private property devoted to public use even though owned by a municipality*. This power of control is inherent in the state in its sovereign capacity, exercised for the public welfare under its police power.

*Shirk v. Lancaster*, 313 Pa. at 164 (emphasis added).

As the General Assembly has the power to not only regulate property owned by municipalities but to completely abolish them, Article 1, Section 21 and 18 Pa.C.S. § 6120 clearly prohibit the Appellee’s argument that it has a right to regulate firearms and ammunition in violation of thereof.

While Appellee relies on *Wolfe v. Township of Salisbury*, 880 A.2d 62, 66-68 (Pa. Cmwlth. 2005) for its proposition that it can regulate on its property, it fails to advise the Court that *Wolfe* dealt with field preemption,<sup>9</sup> unlike this matter which relies, mostly, on express preemption of Article 1, Section 21 and 18 Pa.C.S.

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<sup>9</sup> The Game Code does not expressly proscribe municipal activity, unlike Article 1, Section 21 and 18 Pa.C.S. § 6120.

§ 6120, and involved a regulation consistent with the Game Code, unlike Appellee's Ordinance in this matter, which is inconsistent with the UFA. Additionally, it does not appear that the appellants in *Wolfe* raised issue under Article 1, Section 21 nor did appellants raise the restrictions on municipal regulation, as discussed *supra* and *infra*. More importantly, this Court acknowledged that a

municipal ordinance cannot be sustained to the extent that it is contradictory or inconsistent with [a] state statute [operating in the same field or subject matter]. In other words, it cannot permit what a state statute or regulation forbids or prohibit what the state enactments allow.

*Wolfe*, 880 A.2d at 66 (quoting *Duff v. Northampton Twp.*, 532 A.2d 500, 504-505, (Pa. Cmwlth. 1987), *aff'd per curiam*, 520 Pa. 79 (1988)).

ii. *Statutory Construction Does Not Permit Appellee To Regulate Possession and Discharge of Firearms*

Pursuant the Statutory Construction Act, Appellee's argument additionally misses the mark, as the particular controls the general, pursuant to 1 Pa.C.S. § 1933, and when the language in a statute is clear and free from all ambiguity, it must be given its explicit meaning, pursuant to 1 Pa.C.S. § 1921. In relation to Article 1, Section 21 and 18 Pa.C.S. § 6120, it cannot be disputed that they are the particular, which control the general. Moreover, even as acknowledged by the

Pennsylvania Supreme Court in *Ortiz v. Commonwealth*, 545 Pa. 279, 283-284, 287 (1996) and this Court in *National Rifle Ass’n*, 977 at 82-83, Article 1, Section 21 and Section 6120 are exactly clear and free from ambiguity. Additionally, the Pennsylvania Supreme Court has declared that “[a]ny fair, reasonable doubt as to the existence of power [in a municipality] is resolved by the courts *against its existence*.” *Denbow v. Borough of Leetsdale*, 556 Pa. 567, 721 A.2d 1113, 1118 (1999)(emphasis added).

Hence, even to the extent that the General Assembly provided a municipality with the power to regulate property held by it for the public, discussed *infra*, the particular prohibitions of Article 1, Section 21 and 18 Pa.C.S. § 6120 on regulating firearms and ammunition in any manner would preclude or otherwise override any general provision entitling a municipality to regulate any such property held by it for the public. Furthermore, Appellee is unable to point to any provision of the law, where it is authorized to regulate firearms and ammunition and therefore, pursuant to *Denbow*, it not only is precluded to regulate but also lacks such power to so regulate.

iii. *The House Debate Reflects The General Assembly’s Intent To “Preempt The Entire Field Of Gun Control”*

The House debate regarding the concurrence vote of the Senate’s

amendments to House bill No. 861 is extremely informative and explicit that the General Assembly intended to preempt *all* firearm regulation by entities other than the General Assembly. Specifically, in relation to the House debate on October 2, 1974, the following colloquy occurred:

**Mr. FINEMAN.** Mr. Speaker, I am sorry; I apologize I was not aware we were on concurrence in House bill No. 861.

When House bill No. 861 passed the House, what it said was that *the state was preempting the entire field of gun control* except in the cities of the first class, and in the cities of the first class their regulation ordinance could not be applicable to someone who was legitimately carrying a gun through the city on his way to a hunting journey. This was a compromise that we had worked out with Mr. Shelhamer and others on the other side of the aisle.

Then the Senate amended the bill so as to have *the state completely preempt the field of gun control without any exceptions*, which means that the local gun control ordinance in the city of Philadelphia is now, if this should become law, abrogated.

...

**Mr. FINEMAN.** Mr. Speaker, the language of the bill as it reads now is quite clear. *It does preempt, on behalf of the state, all rules and laws dealing with gun control.*

...

**Mr. WILLIAMS.** Mr. Speaker, I would like to speak to the amendment. Before we went into caucus, Mr. Speaker, we were discussing the question of whether or not the amendment would affect Philadelphia and Pittsburgh legislation with regards to guns. After due discussion and deliberation, Mr. Speaker, it is my feeling that it is clear that this legislation, as amended, would do just that.

Commonwealth of Pennsylvania Legislative Journal, 158<sup>th</sup> General Assembly

Session of 1974, No. 166, Pgs. 6084, 6110. Thereafter, the Senate's amendments to

House bill No. 861 were concurred with by the House with a vote of 123 to 53. *Id.* at 6112.

Additionally, as held by the Pennsylvania Supreme Court, the General Assembly's failure to amend Article 1, Section 21 and 18 Pa.C.S. § 6120 after its decision in *Ortiz* creates a presumption that the Court's interpretation was consistent with the legislative intent. *Commonwealth v. Wanamaker*, 450 Pa. 77, 89 (1972) (*holding* that "the failure of the legislature, subsequent to a decision of this Court in construction of a statute, to change by legislative action the law as interpreted by this Court creates a presumption that our interpretation was in accord with the legislative intentment.")

*iv. The General Assembly Is Aware That All Firearm Regulation Is Preempted*

A review of bills presented over the past decade in the General Assembly reflects the clear understanding of the Legislature that the entire field of firearms regulation is preempted and that any changes require legislative action:

House Bill No. 739 of 2001 (seeking to exclude cities of the first, second, and third class from preemption);

House Bill No. 1036 of 2001 (seeking, *inter alia*, to exclude cities of the

first class from preemption and prohibit the sale of more than one handgun per month);

House Bill No. 1841 of 2001 (seeking to repeal preemption and permit municipalities to regulate firearms and ammunition, after an electoral vote in favor);

House Bill No. 1842 of 2001 (seeking to repeal preemption and permit municipalities to regulate firearms and ammunition);

House Bill No. 874 of 2005 (seeking to permit cities of the first class to regulate assault weapons and assault weapon ammunition);

House Bill No. 2483 of 2006 (seeking to allow counties, municipalities and townships (1) to regulate *discharge of firearms*, (2) to regulate locations where firearms are sold, (3) *to prohibit firearms on “publicly owned county, municipality or township grounds or buildings, including areas in municipal or county parks or recreation areas”*, (4) to prohibit minors from possessing firearms, (5) to regulate firing ranges, (6) *to regulate “possession by municipal employees while in the scope of their employment”*, (7) to prohibit the *“display of a firearm on public roads, sidewalks, alleys or other public property or places of public accommodation* or the manner in which a person may carry a firearm”, (8) to regulate firearms during times of insurrection or civil unrest, (9) to regulate storage of firearms, (10) *to regulate “possession of firearms by a person that contracts*

*with the municipality while in the performance of their duties specified in the contract*”, and (11) to regulate waiting periods and number of firearms that may be purchased within a specified time period) (emphasis added);

House Bill No. 2955 of 2006 (seeking to permit cities of the first class to regulate purchase and possession of firearms);

House Bill No. 18 of 2007 (seeking to allow counties, municipalities and townships to regulate (1) *discharge of firearms*, (2) locations where firearms are sold, (3) *to prohibit firearms on “publicly owned county, municipality or township grounds or buildings, including areas in municipal or county parks or recreation areas”*, (4) to prohibit minors from possessing firearms, (5) to regulate firing ranges, (6) *to regulate “possession by municipal employees while in the scope of their employment”*, (7) to prohibit the *“display of a firearm on public roads, sidewalks, alleys or other public property or places of public accommodation or the manner in which a person may carry a firearm”*, (8) to regulate firearms during times of insurrection or civil unrest, (9) to regulate storage of firearms, (10) *to regulate “possession of firearms by a person that contracts with the municipality while in the performance of their duties specified in the contract”*, and (11) to regulate waiting periods and number of firearms that may be purchased within a specified time period)(emphasis added);



House Bill No. 23 of 2007 (seeking to permit cities of the first class, after electoral ratification, to prohibit the sale of more than one handgun within a thirty day period);

House Bill No. 25 of 2007 (seeking to permit cities of the first class to regulate the ownership, possession, use and transfer of assault weapons and accessories and ammunition therefor);

House Bill No. 485 of 2007 (seeking to permit cities of the first class to establish a Municipal Firearms Enforcement Commission, whereby, it would have the power to enact ordinances relating to the ownership, possession, transfer and transportation of firearms and ammunition);

Senate Bill No. 1042 of 2007 (seeking to prohibit the sale of more than one handgun within thirty days in cities of the first class);

House Bill No. 1044 of 2009 (seeking to permit counties, municipalities and townships to regulate firearms and ammunition, where they have demonstrated a compelling reason and obtained approval from the PSP);

Senate Bill No. 176 of 2011 (seeking to prohibit the sale of more than one handgun within thirty days in cities of the first class *and giving municipalities the ability to regulate consistent therewith*); and

Senate Bill No. 192 of 2013 (identical to Senate Bill No. 176 of 2011).

Clearly, based on the bills submitted in the General Assembly over the past decade, the Legislature is acutely aware that only it can regulate, in any manner, firearms and ammunition. It is important to note, as reflected in House Bill No. 2483 of 2006 and House Bill No. 18 of 2007, that the General Assembly is acutely aware of and understands that municipalities are prohibited from regulating (1) firearms on their “grounds or buildings, including areas in municipal or county parks or recreation areas ... on public roads, sidewalks, alleys or other public property or places of public accommodation”, (2) the possession of firearms by municipal employees while in the scope of their employment, and (3) the discharge of firearms.

v.     *The General Assembly’s Grant Of Power Restricts Appellee*

In permitting Appellee’s existence, the General Assembly limited its powers, as reflected in 53 P.S. § 56552. Specifically, the Legislature only provided it with the power “[t]o make and adopt all such ordinances, by-laws, rules and regulations *not inconsistent with or restrained by the Constitution and laws of this Commonwealth.*” *Id.* (emphasis added). As discussed at length *supra*, Ordinance 109-16 violates Article 1, Section 21 and 18 Pa.C.S. § 6120 and thus violates Section 56552 making it unlawful.

vi. *The Pennsylvania Supreme Court Has Already Ruled That General Assembly Has Precluded A Municipality's Ability To So Regulate*

In *Ortiz*, the Court specifically held,

The sum of the case is that the Constitution of Pennsylvania requires that home rule municipalities may not perform any power denied by the General Assembly; the *General Assembly has denied all municipalities the power to regulate the ownership, possession, transfer or possession of firearms*; and the municipalities seek to regulate that which the General Assembly has said they may not regulate.

...

Because the ownership of firearms is constitutionally protected, its regulation is a matter of statewide concern. The constitution does not provide that the right to bear arms shall not be questioned in any part of the commonwealth except Philadelphia and Pittsburgh, where it may be abridged at will, but that it shall not be questioned in any part of the commonwealth. *Thus, regulation of firearms is a matter of concern in all of Pennsylvania, not merely in Philadelphia and Pittsburgh, and the General Assembly, not city councils, is the proper forum for the imposition of such regulation.*

545 Pa. at 283, 287 (emphasis added).

As Appellee's Ordinance regulates, *inter alia*, the possession and transport of firearms and ammunition and the lawful discharge of firearms in self defense, it is violative of Article 1, Section 21, 18 Pa.C.S. § 6120 and the Court's holding in *Ortiz*.

vii. *Appellee's Property Is Held In Public Trust*

If this Court believes that Appellee is not prohibited from enacting and enforcing Ordinance 109-16 for the aforementioned reasons, it must consider that any property in the possession of Appellee is held for *public*, not private, purposes, under the Public Trust doctrine; and therefore, it is precluded from regulating it as a private property owner.

In *Board of Trustees of Philadelphia Museums v. Trustees of Univ. of Pennsylvania*, 251 Pa. 115, 96 A. 123, 125 (1915), the Pennsylvania Supreme Court held that

A nation, state, or municipality which dedicates land that it owns in the site of a town to *public use for the purpose of a park is as conclusively estopped as a private proprietor from revoking that dedication*, from selling the park, and from appropriating the land which it occupies to other purposes, after lots have been sold, after the town has been settled, and after the park has been improved with moneys raised by the taxation of its residents and taxpayers in reliance upon the grant and covenant which the dedication evidences. (emphasis added).

The Pennsylvania Supreme Court has also held that *only* if a municipal park is held for public purposes, is it immune from taxation. *City of New Castle v. Lawrence Cnty.*, 353 Pa. 175, 44 A.2d 589, 594 (1945)(holding that “[a] taxing authority must declare exempt any property within its taxing district *if it is public property used for public purposes* because the legislature has exempted such property, not because the city has selected the site for a public park.) As there is no evidence of

record to the contrary that Appellee does not pay taxes in relation to its parks, it is estopped from arguing that the property is held privately, instead of publicly and used for public purposes.

It is therefore clear that Appellee does not have the power to regulate, in any manner, the possession, carrying, or transporting of firearms or ammunition.

*viii. Appellee's Argument Would Eviscerate Article 1, Section 21 And 18 Pa.C.S. § 6120 And There Additionally Exists Express Preemption In 18 Pa.C.S. § 6109.*

If this Court were to agree with Appellee that it is entitled to regulate firearms and ammunition on property held by it, such would open Pandora's box and eviscerate the purpose of Article 1, Section 21 and 18 Pa.C.S. § 6120, as local governments could enact a patchwork of laws across the Commonwealth that would ensnare law-abiding citizens, who have no intent to violate the law. In point of fact, if the Court were to agree with Appellee, municipalities across the Commonwealth could prohibit the carrying of firearms on municipally held sidewalks, roads, highways, byways, and other property; thereby, invalidating and eviscerating Commonwealth issued licenses to carry firearms, even though a license to carry firearms is issued "for purposes of carrying a firearm concealed on or about one's person in a vehicle *throughout this Commonwealth.*" 18 Pa.C.S. § 6109(a).

In this vein, Appellants additionally argue that there exists express preemption in 18 Pa.C.S. § 6109(a), as the General Assembly explicitly stated that a license to carry firearms is valid throughout the Commonwealth and did not provide an exception for municipally created regulations. If the General Assembly desired to prohibit possession of firearms in city parks or in other municipally controlled locations, it was well aware of how to enact such prohibitions, as reflected by its enacted prohibition preventing the carrying of a firearm “upon the public streets or upon any public property in a city of the first class”,<sup>10</sup> “upon the public streets or upon any public property during an emergency proclaimed by a State or municipal governmental executive”,<sup>11</sup> on school property,<sup>12</sup> in court facilities,<sup>13</sup> in detention facilities, correctional institutions and mental hospitals,<sup>14</sup> and prohibiting the discharge of firearms in cemeteries and burial grounds.<sup>15</sup>

It was to prevent any such patchwork that the Commonwealth enacted a *uniform* firearms act, 18 Pa.C.S. § 6101, *et seq.*, and why the General Assembly enacted Section 6120 in 1974.

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<sup>10</sup> Unless exempted. *See*, 18 Pa.C.S. § 6108.

<sup>11</sup> 18 Pa.C.S. § 6107

<sup>12</sup> 18 Pa.C.S. § 912.

<sup>13</sup> 18 Pa.C.S. § 913.

<sup>14</sup> 18 Pa.C.S. § 5122.

<sup>15</sup> 34 Pa.C.S. § 2506


Accordingly as the Pennsylvania Constitution and the General Assembly have explicitly precluded any regulation by counties, municipalities and townships through express preemption of Article 1, Section 21 and 18 Pa.C.S. § 6120 and field preemption, Appellee is precluded from regulating firearms and ammunition, in any manner, in its city parks.

## **II. CONCLUSION**

**WHEREFORE**, Appellants respectfully request that this Court reverse the trial court's denial of their request for a preliminary injunction and issue an Order enjoining Appellee's enforcement of Section 109-16.

Respectfully Submitted,

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### **Word Count Certification**

I certify that this brief complies with the word count limit, as it does not exceed 7,000 words. This certificate is based on the word count of the word processing system – Microsoft Word – used to prepare the brief, which reflects that there are 5,764 words wherein.

  
Joshua Prince, Esq.