

UNDERSTANDING MUNICIPALITIES' RIGHTS AND LIABILITIES IN WEAPONS AND ORDNANCE LEGISLATION

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There is no denying the current controversy surrounding the Second Amendment and relatedly all of the legislation that has sought to define its parameters. In line with years of gun-rights expansion, on June 13, 2022, Senate Bill 215 took effect, allowing anyone 21 or older in Ohio to carry a concealed firearm without a permit or training unless otherwise prohibited by state or federal law. Ohio is the 23rd state to enact permitless concealed carry, also known as “constitutional carry.” In this past election cycle, efforts to legislate gun restriction took center stage. However, when it comes to enacting local gun reform, the conversation in Ohio regarding increased restriction is largely moot. R.C. § 9.68 and its limitation of Ohio’s Home Rule Amendment renders most municipalities impotent in the face of broader state legislation.

“Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” Constitution of the State of Ohio, Article XVIII, Section 3. Home Rule does not allow a municipality to contradict state law if the ordinance is an exercise of police power and the state law is a general law, meaning one that is necessary to allow for uniform statewide regulation. State ex rel. *McElroy v. Akron* (1962), 173 Ohio St. 189, 194, 19 O.O.2d 3, 181 N.E.2d 26. In 2006, Ohio enacted R.C. § 9.68 prohibiting cities and other local governments from passing divergent gun-control measures. Courts have routinely held that R.C. § 9.68 “is a general law that displaces municipal firearm ordinances and does not unconstitutionally infringe on municipal authority.” *Cleveland v. State*, 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370, ¶ 1. Despite the General

Assembly’s intent to occupy the field of handgun possession, there is still room for a municipality to enact ordinances that are not in conflict with state gun laws. *Ohioans for Concealed Carry, Inc. v. Cleveland*, 8th Dist. No. 104970, 2017-Ohio-1560, ¶ 20, 90 N.E.3d 80.

The enactment and enforcement of R.C. § 9.68 ultimately eradicated nearly 80 local gun laws in Ohio’s largest cities. This overruled local laws, including bans on assault weapons, notification requirements for concealed weapons on school property, and firearm registration. Ordinances of this type were found to be in contravention of general state law and, therefore, unenforceable. Consequently, attempts by local governments to draft restrictions or expansions to the state laws will likely be met by expensive taxpayer actions filed pursuant to R.C. § 733.59 to force local regulations into conformity with state gun laws. So, what can municipalities do if their constituents are interested in greater gun restriction? One solution is that municipalities can mirror the state law in their local code, but then increase the penalties for violations.

Case law supports municipal authority to increase penalties where the violation being enforced is no different than what is enforceable under state law. In *Niles v. Howard*, the Ohio Supreme Court held that Niles’ marijuana ordinance was not in conflict with the general drug laws of the state despite the fact that it elevated the penalty from a lesser misdemeanor to a first-degree misdemeanor. *Id.*, 12 Ohio St.3d 162, 466 N.E.2d 539, 12 O.B.R. 232 (Jul. 25, 1984). The court held that “a police ordinance is not in conflict with a general law upon the same subject merely because different penalties are provided for the same acts, even though greater penalties are imposed by the municipal ordinance.” *Id.*, quoting *Struthers v. Sokol* (1923), 108 Ohio St. 263, 140 N.E. 519. This principle is true even

if a penalty is enhanced from a misdemeanor to a felony. R.C. § 715.67; *Dayton v. Miller* (1951), 154 Ohio St. 500, 96 N.E.2d 780, 43 O.O. 433; and *Greenburg v. Cleveland* (1918), 98 Ohio St. 282, 120 N.E. 829. In *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, the Ohio Supreme Court reaffirmed *Niles* and applied the Home Rule power to Akron’s speed camera ordinance, allowing for civil penalties against a vehicle owner. The court held that if a municipal ordinance only imposes a greater penalty, but does not change the character of an offense, then it is not in conflict with state law. Despite the fact that Akron’s ordinance changed enforcement from a criminal penalty to a civil penalty, the ordinance did not change the speed limits established by state law or the ability of officers to cite offenders. Therefore, the court found that the Akron ordinance complemented rather than conflicted with state law. As applied specifically to gun legislation, the Eighth District has cited these holdings to opine that, if not for other error, a Cleveland ordinance enhancing the penalty for “Failure to Secure Dangerous Ordnance” would have been a proper exercise of Cleveland’s Home Rule power. *Ohioans*, 8th Dist. Cuyahoga No. 104970, 2017-Ohio-1560 at ¶23. Therefore, if local governments are looking to boost gun restrictions, the safest route to avoid application of R.C. § 9.68 is through penalty enhancement.

The legal landscape is constantly changing, and municipalities need to be ready to adapt to changes in Ohio and federal law in order to avoid costly taxpayer suits that can bring damage awards for petitioners’ legal fees. One such area where we can expect change both nationally and locally is in the ownership of assault rifles. Many of the ordinances challenged within Ohio have been in regards to assault rifles or the implementation of mechanisms that alter the function of a rifle

to resemble the firing power of an automatic weapon. In 2020, a Cincinnati ordinance banning “trigger activators,” including bump stocks, was determined to violate the Ohio Constitution as a restriction on firearm components. *Buckeye Firearms Foundation, Inc. v. Cincinnati*, 1st Dist. No. C-190569, 2020-Ohio-5422, 163 N.E.3d 68. A bump stock — which achieved national recognition following the 2017 Las Vegas mass shooting — is a device that uses the inertia of a semi-automatic firearm’s recoil to “bump” the trigger, allowing rapid, essentially automatic, fire. A taxpayer suit requested that Cincinnati revoke its ordinance, and, in a testament to the power of R.C. § 9.68, Cincinnati was forced to repeal its trigger activator ban, despite the enactment of a similar federal ban prior to the First District’s holding. The holding cited Ohio’s law allowing residents to possess any firearm, its components and its ammunition without further permit. *Id.* at ¶ 33. It appears the First District did not consider R.C. § 2923.17, which prohibits the possession of a “dangerous ordnance” for most citizens, when considering a bump stock. A “dangerous ordnance” includes any “automatic or sawed-off firearm” and includes any “combination of parts that is intended by the owner for use in converting any firearm or other device into a dangerous ordnance.” R.C. § 2923.11. At first blush, a bump stock or a trigger activator would be a component part intended to create an automatic weapon — in fact, that was the impression of the Trump Administration, resulting in a change in the Bureau of Alcohol, Tobacco and Firearms’ administrative rules banning bump stocks as a machinegun. This is only one example of the evolution of gun laws, and this dichotomy regarding bump stocks is precisely why municipalities need to be cautious when seeking to change local law in this area.

In 2019, shortly after Cincinnati enacted its ordinance, the ATF published an administrative rule which included bump stocks as a “machinegun” under the National Firearms Act of 1934, effectively banning bump stocks at the federal level. Bump-Stock-Type Devices, 83 FR 66514-01. Prior to the 2019 administrative rule, a machinegun was defined by its ability to fire multiple rounds by a “single function of the trigger.” Like Ohio’s definitions, this aspect is critical to defining an “automatic firearm.” With limited exceptions, the National Firearms

Act of 1934 and the Gun Control Act of 1968 make it unlawful for any person to transfer or possess a machinegun. Opponents to this rule change have submitted their arguments to the Supreme Court of the United States, alleging that the ATF was outside of its scope and that a bump stock requires multiple trigger pulls, thereby precluding it from the definition of a machine gun. Though not yet accepted, *Aposhian v. Garland* asks the Supreme Court of the United States to consider the implications of the Chevron Deference (a doctrine that requires deferral to administrative agency opinions in lieu of judicial interpretation) to determine if a federal agency can change its interpretation of an unambiguous federal statute that could have criminal ramifications. The ATF’s new interpretation has allegedly put previously law-abiding Americans — including Ohioans — into a situation where they could be in felony possession of an automatic firearm by possessing a bump stock. Whether this interpretation stands may have some significant ramifications on how Ohio defines

a firearm and dangerous ordnance, and may breathe life back into the repealed Cincinnati ordinance and ordinances like it throughout the state.

With multiple gun-rights cases before the U.S. Supreme Court and a growing movement to restrict gun rights across the country, we can expect that “constitutional carry” and other similar legislation will spark Home Rule litigation and taxpayer challenges in the state in the coming years. It is, therefore, critical for local governments to remain vigilant to changes in the law in order to avoid being out of step with Ohio state legislation.



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