

GUN PERMITTEES CHALLENGE PARK FIREARM REGULATIONS

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As illustrated by the state court opinions described herein, gun owner groups and individuals have increasingly brought constitutional challenges to test state and local regulations which regulate or prohibit the possession of legal firearms in parks. In reviewing these challenges, state courts may consider the relationship between agency regulations, home rule powers, and the statutory and constitutional right to bear arms in a given jurisdiction. In particular, state courts will determine whether state law effectively preempts the ability of localities and agencies to enact and enforce regulation of firearms in parks.

GUNS IN STATE PARKS

In the case of *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 2016 Del. Super. LEXIS 647 (12/23/2016), the state court considered a challenge to regulations which prohibited the possession of firearms in state parks administered by the Delaware Department of Natural Resources and Environmental Control (DNREC). Plaintiffs in this case had permits to carry concealed deadly weapons.

The plaintiff Bridgeville Rifle & Pistol Club (Club) claimed regulations restricting the possession of firearms in state parks violated the Constitution of the State of Delaware. Accordingly, the Club petitioned the court to prohibit enforcement of these challenged regulations. As cited by the court, the challenged DNREC regulation provided as follows:

It shall be unlawful to display, possess or discharge firearms of any description, air rifles, B.B. guns, sling shots, or archery equipment upon any lands or waters administered by the Division [of Parks and Recreation], except with prior written approval of the Director.

As noted by the court, the challenged regulations were promulgated pursuant to the statutory authority granted to DNREC to create rules and regulations. In this particular instance, the purpose of the challenged DNREC regulations was as follows:

It shall be the intent and purpose of the Division of Parks and Recreation to adopt only those minimal Rules and Regulations that are essential to the protection of Park resources and improvements thereto and to the safety, protection and general welfare of the visitors and personnel on properties under its jurisdiction.

RIGHT TO BEAR ARMS

According to the court, the challenged regulations "had been in existence for quite some time, in one form or another, prior to the adoption of Delaware's version of the [Second](#) Amendment to the United States Constitution in 1987." Specifically, Section 20 of the Delaware Constitution provided: "A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use." (hereinafter, "Section 20").

The Club argued the Regulations violated Delaware citizens' right to bear arms as set forth in Section 20. In so doing, the Club claimed: "Section 20 recognizes a constitutional right to bear arms outside of the home as well as a right to bear arms for hunting and recreation in addition to self-defense."

DNREC did not reject the Club's characterization of Section 20, but DNREC argued, "Section 20 does not grant Plaintiffs an unfettered right to possess firearms in State Parks." Moreover, DNREC claimed "the Regulations do not place an undue burden on Plaintiffs' Section 20 rights."

INTEREST IN PUBLIC SAFETY

As noted by the court, the Delaware Supreme Court had addressed the scope of Section 20, examining "the State's interest in public safety and balanced that against the interest of a citizen's right to keep and bear arms under the Delaware Constitution":

On its face, the Delaware provision is intentionally broader than the Second Amendment [to the United States Constitution] and protects the right to bear arms outside the home, including for hunting and recreation. Section 20 specifically provides for the defense of self and family in addition to the home.

Since the "right to bear arms is considered a fundamental constitutional right," the court found the following standard of judicial review would be applicable "when government action infringes upon the right to bear arms protected by Section 20":

[G]overnmental action must serve important governmental objectives, and must be substantially related to the achievement of those objectives. The governmental action cannot burden the right more than is reasonably necessary to ensure that the asserted governmental objective is met.

Further, the court acknowledged "an individual's interest in the right to keep and bear arms is strongest when the weapon is in one's home or business and is being used for security." However, in this particular instance, the court found government agencies had "a legitimate interest in controlling unsafe or disruptive behavior on its property":

[DNREC is] responsible for managing and overseeing the recreational activities of all persons, citizens and non-citizens alike, so they all may enjoy both our parks... Without question, ensuring the safety of all visitors is an important consideration... Firearms are designed to injure or kill. As experience demonstrates, a firearm can be converted instantaneously from currency to cannon.

Accordingly, in the opinion of the court, DNREC was "not unreasonable in concluding that permitting unregulated firearms in State Parks ...would heighten the potential of injury or death to the visitors thereto."

GOVERNMENTAL OBJECTIVE

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The court acknowledged, "there are many responsible gun owners and users, including Plaintiffs and/or their members." The court, however, noted that DNREC had prohibited other "dangerous instruments," not just guns, including slingshots and archery equipment. In the opinion of the court, it would defy logic to "ban slingshots and archery, but to allow firearms."

Further, the court noted a "contextual, objective reading of the Regulations reveals the primary concern of [DNREC]... is to permit all visitors to enjoy the State's public areas without undue risk of harm." Moreover, in response to the "Plaintiffs' concerns for self defense," the court observed, "the need to respond to a threat with a firearm is diminished when firearms are prohibited in the area."

CONCLUSION

Having found DNREC had "an important governmental objective of keeping the public safe from the potential harm of firearms in State Parks," the court held "[t]he Regulations do not run afoul of guaranteed right under the state constitution to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use":

The Regulations are substantially related to the achievement of this important governmental objective. Moreover, the Regulations do not place an undue or unreasonable burden on Plaintiffs.

Plaintiffs remain free to hunt on State lands in accordance with the reasonable restrictions in place. Their right to bear arms to protect themselves if the need for self-defense arises is not hindered but, rather, aided in effect by the presence of the Regulations.

"UNLAWFUL" FIREARM POSSESSION

In the case of *Ohioans for Concealed Carry, Inc. v. City Of Oberlin, Ohio*, 2017-Ohio-36; 2017 Ohio App. LEXIS 34 (1/9/2017), the state court considered a challenge to a city ordinance which prohibited the possession of firearms in city parks and recreation areas.

Brian and Janae Kuzawa were frequent visitors to Oberlin city parks. On August 2, 2013, Mr. Kuzawa noticed a sign in an Oberlin park indicating that firearms were not permitted in the park. Mr. Kuzawa believed that the ordinance conflicted with R.C. 9.68, a state statute protecting gun rights. Kuzawa subsequently contacted the police about his concerns with the ordinance. He additionally brought the issue to the attention of Oberlin City Council and Ohioans for Concealed Carry, Inc., the latter of which he was a member. Ohioans for Concealed Carry, Inc., (OCC) is a not-for-profit corporation that advocates for and protects the right of the people to keep and bear arms.

The Ohio Supreme Court had concluded that, "the General Assembly, by enacting R.C. 9.68(A), gave persons in Ohio the right to carry a handgun unless federal or state law prohibits them from doing so." Further, the state supreme court had held: "A municipal ordinance cannot infringe on that broad statutory right." Specifically, R.C. 9.68(A) provided as follows:

The individual right to keep and bear arms, being a fundamental individual right that predates the United States Constitution and Ohio Constitution, and being a

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constitutionally protected right in every part of Ohio, the general assembly finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, or other transfer of firearms, their components, and their ammunition.

Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition.

On October 1, 2013, OCC filed a complaint against Oberlin seeking a declaratory judgment that Oberlin Ordinances 927.07 (prohibiting the possession of firearms in city parks and recreation areas) was unlawful and in violation of R.C. 9.68. OCC additionally sought a permanent injunction prohibiting the enforcement of the ordinance.

Shortly thereafter, on October 3, 2013, OCC amended its complaint, pointing out that Oberlin had amended the language of Oberlin Ordinance 927.07 to prohibit the *unlawful* possession of firearms in city parks and recreation areas. (*Emphasis of court.*) Specifically, Oberlin Ordinance 927.07 as amended stated in relevant part that, "[t]he unlawful possession, use or discharge of any type of a firearm within a City park or recreation area is strictly forbidden."

Oberlin attached a copy of the amended ordinance to its pleading which indicated that the prior version conflicted with R.C. 9.68. The amendment was enacted on September 16, 2013, and became effective October 16, 2013. Thereafter, Oberlin filed a motion for partial summary judgment asserting that the declaratory judgment action was moot with respect to any alleged conflict between R.C. 9.68 and the repealed ordinances. OCC opposed the motion and also filed a motion for summary judgment.

In support of its motion for summary judgment, OCC submitted affidavits and also minutes from several Oberlin City Council meetings in an effort to demonstrate that Oberlin repealed the ordinances because of the lawsuit. Subsequently, Oberlin filed another motion for summary judgment arguing that Oberlin Ordinance 927.07, as amended, did not conflict with R.C. 9.68.

The trial court determined that there was no longer a controversy involving the repealed ordinances because Oberlin Ordinance 927.07, as amended, was lawful and constitutional. OCC appealed. On appeal, OCC argued that the trial court erred in concluding that the amended version of Oberlin Ordinance 927.07 did not conflict with R.C. 9.68.

LOCAL HOME RULE

As cited by the appeals court: "Section 3, Article XVIII of the Ohio Constitution, commonly known as the Home Rule Amendment, gives municipalities the 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."

As described by the court, a "home-rule analysis" involves a "three-step process." In the first step, a court would "determine whether the ordinance at issue involves an exercise of local self-government or an exercise of local police power":

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If the ordinance is one relating solely to matters of self-government, the analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction.

In this particular instance, the court noted that there was no "dispute that the ordinance is an exercise of police power." If the "local ordinance is an exercise of police power," in the second step, the court would then determine whether the statute is a "general law." In this particular instance, the court acknowledged that the Ohio supreme court had "already determined that R.C. 9.68 is a general law that displaces municipal firearm ordinances and does not unconstitutionally infringe on municipal home rule authority."

In the final step of this home rule analysis of a general law, the court would "determine whether the ordinance conflicts with the statute." Specifically, the issue before the court was "whether the ordinance permits or licenses that which the statute forbids and vice versa."

CONFLICT WITH STATE LAW?

In this particular instance, the trial court had concluded that Oberlin's ordinance "complements rather than conflicts with R.C. 9.68." Similarly, the appeals court concluded that Oberlin Ordinance 927.07 "does not prohibit that which R.C. 9.68(A) permits or vice versa":

Oberlin Codified Ordinance 927.07 prohibits only the "unlawful" possession, use, or discharge of firearms in a city park or recreation area. Unlawful has been defined as "not authorized by law; illegal." *Black's Law Dictionary* 1574 (8th Ed.2004).

We see nothing in the language of Oberlin Codified Ordinance 927.07 that prohibits conduct authorized by R.C. 9.68(A), particularly given that R.C. 9.68(A) authorizes the unrestricted possession, purchase, sale, transfer, transport, or storage of any firearm *except* as provided by state or federal law.

While the state supreme court had found R.C. 9.68 indicated the "General Assembly's intent to occupy the field of handgun possession in Ohio," the appeals court acknowledged that municipalities, like Oberlin, could still "enact legislation pursuant to the Home Rule Amendment, provided that the local legislation is not in conflict with general laws."

Having found the amended Oberlin Ordinance 927.07 was valid and not in conflict with R.C. 9.68(A), the appeals court affirmed the summary judgment of the trial court in favor of Oberlin.

STATE LAW PREEMPTION

Similarly, in the case of *Firearm Owners Against Crime v. Lower Merion Township*, 2016 Pa. Commw. LEXIS 545 (12/16/2016), plaintiff Firearm Owners (FOAC) asked the state court to enjoin (i.e., prohibit) the enforcement of a local ordinance which regulated guns in parks. However, in contrast to the *Oberlin* opinion described above, the state court in this particular case found state law preempted (i.e., prohibit) any local Home Rule attempt to regulate firearms in parks, including a prohibition on unlawful possession of firearms in parks.

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In 2011, Lower Merion Township (Township) passed an ordinance amending section 109-16 of its Code (Ordinance) to prohibit persons from "carry[ing] or discharg[ing] firearms of any kind in a park without a special permit, unless exempted." (Lower Merion Township, Pa., Code §109-16.) The Ordinance imposed a maximum fine of \$600.00 per violation and authorizes the police to remove violators from Township parks or recreation areas.

In 2014, FOAC contacted the Township and alleged that the Ordinance violated section 6120(a) of the Pennsylvania Uniform Firearms Act (UFA) because it improperly restricted firearm possession in Township parks. In pertinent part, the UFA provided that "[n]o county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms." 18 Pa.C.S. §6120(a).

Upon review, the Township determined that "the Ordinance was consistent with the UFA because it only prohibited the unlawful possession of firearms in parks." FOAC subsequently conducted a rally in a Township park where many of its members carried firearms; however, no citations were issued and no threats of prosecution were made.

On March 20, 2015, FOAC filed a complaint against the Township seeking declaratory and injunctive relief, alleging "the Ordinance violated Article 1, Section 21 of the Pennsylvania Constitution and was preempted by the UFA."

On May 8, 2015, FOAC filed a motion for preliminary injunction. In their motion, FOAC alleged that: "the Ordinance's violation of the Pennsylvania Constitution and the UFA constituted *per se* [i.e., in and of itself] immediate harm ... because Firearm Owners would face prosecution and be deprived of their constitutional and statutory rights."

The Township filed an answer to FOAC's motion, asserting the Ordinance did not violate the UFA because it only regulated the "unlawful" possession of firearms in Township parks. According to the Township, "prohibiting the unlawful possession of firearms is essential to the safety of the Township's residents." Further, the Township claimed there was "no evidence indicating that the Township ever enforced the Ordinance" against anyone, including FOAC members.

The trial court denied FOAC's motion for preliminary injunction. In so doing, the trial court found "FOAC failed to meet their burden to prove immediate and irreparable injury because the alleged injury was speculative." FOAC appealed.

On appeal to this Court, FOAC claimed, "the trial court erred in denying their motion for preliminary injunction because the Ordinance is preempted by the Pennsylvania Constitution and the UFA."

STATE/LOCAL FIREARM RELATIONSHIP

As cited by the appeals court: Article 1, Section 21 of the Constitution of the Commonwealth of Pennsylvania provided that "the right of the citizens to bear arms in defence of themselves and the State shall not be questioned." Pa. Const. art. 1, §21. Moreover, the appeals court noted that the Pennsylvania Supreme Court had delineated "the relationship between state and local firearm regulation as follows:

[T]he 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;

Since the General Assembly had said municipalities may not seek to regulate firearms, the appeals court acknowledged any municipal "attempt to ban the possession of certain types of firearms is constitutionally infirm."

On appeal, the Township argued, "a home rule municipality's power may be restricted only when the General Assembly has enacted a statute on a matter of statewide concern." The appeals court, however, found the regulation of firearms was indeed a substantive matter of statewide concern because the ownership of firearms was expressly protected under Article 1, Section 21 of the Pennsylvania Constitution. Accordingly, the appeals court found "the General Assembly, not city councils, is the proper forum for the imposition of such regulation."

ONLY "UNLAWFUL" POSSESSION

On appeal, the Township had also claimed "the Ordinance purports to regulate only the unlawful possession of firearms," not the constitutional right to bear arms legally. The appeals court disagreed. As characterized by the appeals court, "the subject Ordinance, by its terms does not solely regulate the possession of firearms that the General Assembly has already decided to be unlawful." On the contrary, the appeals court found "[t]he Ordinance is a broad proscription against carrying or discharging any kind of firearm in a park absent a 'special permit' unless exempted."

Moreover, the appeals court noted, "the Township does not point to any corresponding provision in the Pennsylvania Crimes Code that contains such a blanket ban of firearm possession in a park." As a result, the appeals court determined the Ordinance was indeed "preempted by state law." Specifically, the court found the General Assembly, through enactment of the UFA, had "denied all municipalities the power to regulate the ownership, possession, transfer, or transportation of firearms."

Accordingly, the appeals court agreed with the Firearm Owners argument that "the Township is preempted from regulating firearm possession in any manner." In so doing, the appeals court rejected the Township's position that there was a "cognizable distinction... between regulating lawful activity and unlawful activity."

[T]he Ordinance is not consistent with the UFA. Rather, the UFA explicitly prohibits a township from regulating "in any manner" and contains no express exemptions authorizing a township to enact ordinances permitting firearm regulation on its property, i.e., parks...

As a result, the appeals court held "the Ordinance is preempted by section 6120(a) of the UFA and, therefore, the Township's enactment of the same violates the UFA." Accordingly, the appeals court concluded the "issuance of a preliminary injunction is necessary to prevent immediate and irreparable harm, i.e., the continued statutory violation."

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In so doing, the appeals court found the fact that "FOAC violated the Ordinance was sufficient to confer standing to obtain judicial review...even if no enforcement action has occurred."

[I]t is undisputed that FOAC and many of its members conducted a rally in a Township park while carrying firearms *in violation of the Ordinance*, although no citations were issued and no threats of prosecution were made...

[W]e cannot presume that a local government would enact an ordinance it has no intention of enforcing. Thus, although the Township did not enforce the Ordinance when FOAC and its members conducted a rally in its park, we must not presume that it will act similarly if another rally is performed or an individual violates the Ordinance...

The Township should not be the entity determining when and who may invoke judicial review by arbitrarily enforcing the Ordinance; rather, that determination is within the purview of the courts and should be determined by the relevant facts and constitutional considerations.

The appeals court, therefore, held that the trial court had erred in not granting FOAC's request for a preliminary injunction to prevent the Township's enforcement of an Ordinance which violated state law.

SEE ALSO:

[Gun Rights Tested in Parks and Public Spaces](#)

[James C. Kozlowski, *Parks & Recreation*, Mar. 2016 Vol. 50, Iss. 3](#)

<http://cehdclass.gmu.edu/jkozlows/lawarts/03MAR16.pdf>

[Right to Bear Arms Limited in "Sensitive" Public Facilities](#)

[James C. Kozlowski, *Parks & Recreation*, Apr. 2011 Vol. 46, Iss. 4](#)

<http://cehdclass.gmu.edu/jkozlows/lawarts/04APR11.pdf>

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