IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Firearm Owners Against Crime; Firearm Policy Coalition, Inc; Firearm Policy Foundation; Matthew Boardley, Saadyah Averick, Fred Rak	: : : : : :	
v.	: :	No. 1754 C.D. 2019 Argued: October 14, 2020
City of Pittsburgh; Mayor William Peduto; Councilman Bruce Kraus; Councilman Corey O'Connor; Councilman R. Daniel Lavelle; Councilwoman Deb Gross; Councilwoman Erika Strassburger; and Councilman Ricky Burgess, Appellants	: : : : : : : :	

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge

CONCURRING AND DISSENTING OPINION
BY JUDGE CEISLER FILED: May 27, 2022

Though I am constrained to largely concur with my colleagues in the majority, I must nevertheless dissent in part. I do so because I believe that the scope of preemption in the field of firearms regulation has been defined by our courts in an unjustifiably broad manner and, in addition, that the Court of Common Pleas of Allegheny County's (Trial Court) grant of summary judgment in favor of Appellees Firearm Owners Against Crime, Firearm Policy Coalition, Inc., Firearm Policy

Foundation, Matthew Boardley, Saadyah Averick, and Fred Rak (collectively FOAC) swept too broadly.

The heart of this case is whether the Trial Court correctly determined that the General Assembly has completely occupied the field of local firearms regulation and, therefore, that the challenged ordinances are preempted in full under state law. Appellant City of Pittsburgh (City) enacted these ordinances pursuant to the power vested in it as a home rule municipality, a point which must be factored into the preemption analysis. "Under the concept of home rule, . . . the locality in question may legislate concerning municipal governance without express statutory warrant for each new ordinance; rather, its ability to exercise municipal functions is limited only by its home rule charter, the Pennsylvania Constitution, and the General Assembly." *City of Philadelphia v. Schweiker*, 858 A.2d 75, 84 (Pa. 2004).

> The [Home Rule Charter and Optional Plans Law] instructs that "[a]ll grants of municipal power to municipalities governed by a home rule charter under this subchapter, whether in the form of specific enumeration or general terms, shall be liberally construed in favor of the municipality." 53 Pa. C.S. § 2961. Accordingly, when we find ambiguity in the scope of municipal authority or the limitations imposed thereon, we must resolve that ambiguity in the municipality's favor.

Pennsylvania Rest. & Lodging Ass'n v. City of Pittsburgh, 211 A.3d 810, 817 (Pa. 2019); *accord Nutter v. Dougherty*, 938 A.2d 401, 414 (Pa. 2007) ("We cannot stress enough that a home rule municipality's exercise of its local authority is not lightly intruded upon, with ambiguities regarding such authority resolved in favor of the municipality.").

> Notwithstanding the legislature's and the courts' concomitant care to protect the authority of home rule municipalities, fundamental principles of preemption also apply to the courts' consideration of whether a given municipal exercise of power is in fact limited by an act of

> the General Assembly. Preemption [can come in the shape of any of] three forms . . . : express, conflict, and field preemption.

Nutter, 938 A.2d at 411. "[A]bsent a clear statement of legislative intent to preempt, state legislation will not generally preempt local legislation on the same issue." *Mars Emergency Med. Services, Inc. v. Twp. of Adams*, 740 A.2d 193, 196 (Pa. 1999). "Such clarity is mandated because of the severity of the consequences of a determination of preemption[.]" *Hoffman Mining Co. v. Zoning Hearing Bd. of Adams Twp., Cambria Cnty.*, 32 A.3d 587, 593 (Pa. 2011). With this in mind, "[the Supreme] Court has determined that the General Assembly has evidenced a clear intent to totally preempt local regulation in only three areas: alcoholic beverages, anthracite strip mining, and banking." *Id.* at 609-10.

As for what exactly constitutes field preemption,

> if [a] statute is silent on supersession, but proclaims a course of regulation and control which brooks no municipal intervention, all ordinances touching the topic of exclusive control fade away into the limbo of 'innocuous desuetude.' However, where [that statute] is silent as to monopolistic domination and a municipal ordinance provides for a localized procedure which furthers the [statute's] salutary scope . . . , the ordinance is welcomed as an ally, bringing reinforcements into the field of attainment of the statute's objectives.

Dep't of Licenses & Inspections, Bd. of License & Inspection Rev. v. Weber, 147 A.2d 326, 327 (Pa. 1959). "[T]he mere fact of legislation in a field is insufficient, without more, to support a finding of preemptive legislative intent as to that field." *Nutter*, 938 A.2d at 414. "The state is not presumed to have preempted a field merely by legislating in it. [Rather, t]he General Assembly must clearly show its intent to preempt a field in which it has legislated." *Council of Middletown Twp., Delaware Cnty. v. Benham*, 523 A.2d 311, 314 (Pa. 1987).

There are two preemption statutes at play in this matter, the wording of which is nearly identical. Section 6120(a) of the Pennsylvania Uniform Firearms Act (Uniform Firearms Act) states: "No county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components when carried or transported for purposes not prohibited by the laws of this Commonwealth." 18 Pa. C.S. § 6120(a).[1] Similarly, Section 2962(g) of the Home Rule Charter and Optional Plans Law provides that, "[a] municipality shall not enact any ordinance or take any other action dealing with the regulation of the transfer, ownership, transportation or possession of firearms." 53 Pa. C.S. § 2962. These statutes are thus unambiguous in effect: taken together, they clearly bar local ordinances that deal with four types of activities (ownership, possession, transfer, and transportation) regarding three classes of items (firearms, ammunition, and ammunition components). Thus, from all outward appearances, these statutes would appear to permit local regulation of other types of activities involving the three enumerated item classes, as well as of activities in the four specified areas that do not involve items in the three highlighted classes. This reading comports with both the General Assembly's directive that "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit[,]" 1 Pa. C.S. § 1921(b), as well

[1] The Uniform Firearms Act does not define ammunition or ammunition components, but does define "firearm" as, in relevant part, "[a]ny pistol or revolver with a barrel length less than 15 inches, any shotgun with a barrel length less than 18 inches or any rifle with a barrel length less than 16 inches, or any pistol, revolver, rifle or shotgun with an overall length of less than 26 inches." 18 Pa. C.S. § 6102. In addition, and unlike the Uniform Firearms Act, the Home Rule Charter and Optional Plans Law does not include a statutory definition for "firearm." I note, however, that "[w]here a term is not expressly defined in a statute, this Court will construe the term according to its common and approved usage." *Moonlite Cafe, Inc. v. Dep't of Health*, 23 A.3d 1111, 1114 (Pa. Cmwlth. 2011).

as the aforementioned case law regarding the scope of home rule municipalities' legislative powers.

In addition, there are two statutes that authorize the City to restrict and/or prevent the use of firearms. First, cities of the second class, such as the City, are permitted by what is known as the Second Class City Code

> [t]o prevent and restrain riots, routs, noises, disturbances or disorderly assemblies, in any street, house or place in the city; *to regulate, prevent and punish the discharge of firearms*, rockets, powder, fireworks, or any other dangerous, combustible material, *in the streets, lots, grounds, alleys, or in the vicinity of any buildings; to prevent and punish the carrying of concealed deadly weapons*.

53 P.S. § 23131 (emphasis added).[2] Second, per Section 1 of the Act of May 10, 1921, P.L. 430, all

> *cities of this Commonwealth . . . are . . . authorized to regulate or to prohibit and prevent* the sale and use of fireworks, firecrackers, sparklers, and other pyrotechnics in such cities, and *the unnecessary firing and discharge of firearms in or into the highways and other public places thereof, and to pass all necessary ordinances regulating or forbidding the same and prescribing penalties for their violation*.

Id. at § 3703 (emphasis added). Between the precise language of the preemption statutes and that of the two statutes authorizing local regulation of firearms usage, I must conclude that the General Assembly *has not* preempted the field of local firearms regulation, but has instead only placed limited constraints on municipal authority in that area. *Cf. Carroll v. Ringgold Educ. Ass'n*, 680 A.2d 1137, 1142 (Pa.

[2] "The Second Class City Code is comprised of several legislative acts." *Apartment Ass'n of Metro. Pittsburgh, Inc. v. City of Pittsburgh*, 228 A.3d 960, 962 n.1 (Pa. Cmwlth.), *aff'd*, 261 A.3d 1036 (Pa. 2021). The provision cited here is Section 3 of the Second Class City Code, Act of March 7, 1901, P.L. 20, *as amended*, 53 P.S. § 23131.

1996) ("[S]tatutes should be construed in harmony with the existing law, and repeal by implication is carefully avoided by the courts.").[3]

Unfortunately, this straightforward reading cannot carry the day because of the current state of our case law. In *Ortiz v. Commonwealth*, the Pennsylvania Supreme Court addressed two ordinances, one from Philadelphia and one from Pittsburgh, each of which "purport[ed] to regulate the ownership, use, possession or transfer of certain firearms." 681 A.2d 152, 154 (Pa. 1996). Our Supreme Court ruled that these ordinances were completely preempted by Section 6120(a) of the Uniform Firearms Act and declared that "the General Assembly, not city councils, is the proper forum for the imposition of such regulation." *Id.* at 155-56. Subsequent decisions have built upon the foundation established by *Ortiz* and have interpreted Section 6120(a) as prohibiting *any and all* local regulation of firearms. *See, e.g., Com. v. Hicks*, 208 A.3d 916, 926 n.6 (Pa. 2019) ("[T]he General Assembly [has reserved] the exclusive prerogative to regulate firearms in this Commonwealth, [as] codified at 18 Pa. C.S. § 6120[.]"); *Dillon v. City of Erie*, 83 A.3d 467, 473 (Pa. Cmwlth. 2014) ("Section 6120(a) preempts all [local] firearms regulation[s.]"); *Clarke v. House of Representatives of Com.*, 957 A.2d 361, 364 (Pa. Cmwlth. 2008), *aff'd*, 980 A.2d 34 (Pa. 2009) ("[B]oth Section 6120 [of the Uniform Firearms Act] and binding precedent have made clear [that the regulation of firearms] is an area of

[3] FOAC also asserts that the preemption statutes expressly preempt local regulation of firearms, as well as that such local regulation is preempted by the Pennsylvania Constitution. The former argument is fatally undermined by the language used in those statutes, as the General Assembly did not see fit to explicitly state that local municipalities are barred from enacting *any and all* manner of firearms regulations. Instead, the General Assembly merely limited its statutory restrictions to the actions and items mentioned above. The latter has no basis in law, as "[t]he right to bear arms, although a constitutional right, is not unlimited, and . . . may be restricted in the exercise of the police power for the good order of society and the protection of the citizens." *Minich v. Cnty. of Jefferson*, 919 A.2d 356, 361 (Pa. Cmwlth. 2007).

statewide concern over which the General Assembly has assumed sole regulatory power."). Given this, I am compelled to agree with the majority that the challenged ordinances are preempted by both Section 2962(g) of the Home Rule Charter and Optional Plans Law and Section 6120(a) of the Uniform Firearms Act, insofar as those ordinances regulate ammunition, ammunition components, and firearms.

Despite my decision to concur with the majority, however, I urge our Supreme Court to either overturn or rein in the reach of *Ortiz*. To reiterate, the scope of both preemption statutes at issue in this matter is more limited than understood through our extant corpus of case law. Specifically, they collectively preempt local regulation of ownership, possession, transfer, and transportation of three classes of items, *i.e.*, firearms, ammunition, and ammunition components, but extend no further than that. Only through a narrower reading of Section 6120(a), one which sticks to the plain language of that statute, as well as a similar textual reading of Section 2962(g), will full and proper effect be given to both the General Assembly's preemptive intent and the City's home rule powers.

In addition, and independent of my concerns about preemption, I take issue with the majority's conclusion that the challenged ordinances "are all invalid in their entirety" and that the City did not sufficiently articulate a basis for severing (and preserving) certain portions of those ordinances. *See Firearm Owners Against Crime v. City of Pittsburgh*, __ A.3d __, __ n.16 (Pa. Cmwlth., No. 1754 C.D. 2019, filed May 27, 2022).

> [A] statute or ordinance may be partially valid and partially invalid[. I]f the provisions are distinct and not so interwoven as to be inseparable, [a] court[] should sustain the valid[] portions.
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> . . . .
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> In determining the severability of a statute or ordinance, the legislative intent is of primary significance. However, the problem is twofold: The legislating body must have intended that the act or ordinance be separable and *the*

> *statute or ordinance must be capable of separation in fact.* The valid portion of the enactment must be independent and complete within itself.
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> . . . .
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> Nor is the fact that the ordinances contain a severability clause controlling. . . . [W]hile a severability clause must be given due weight, it is not to be accepted judicially as conclusive if the unity of the general legislative scheme is completely destroyed by a severance of its provisions.

Saulsbury v. Bethlehem Steel Co., 196 A.2d 664, 666-67 (Pa. 1964) (emphasis in original and internal citations omitted). In its brief, the City argued that portions of these ordinances, specifically those which bar possession of weapons that are not firearms and the public carrying of fake firearms,[4] as well as those which institute firearm and gun magazine bans that will not go into effect until authorized by the General Assembly or the Supreme Court,[5] are severable. City's Br. at 52-54. Accordingly, I would conclude that the City's reasoning on this point is sufficiently detailed and would reverse in part the Trial Court's granting of summary judgment in FOAC's favor as to those sections of the ordinances, regardless of whether the Supreme Court sees fit to revisit *Ortiz*.

ELLEN CEISLER, Judge

Judges Cohn Jubelirer and Wojcik join in this Concurring and Dissenting opinion.

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[4] City of Pittsburgh, Pa. Ordinances (2019), Ordinance 2018-1218 §§ 1101.02, 1101.03.

[5] *Id.* § 1103.02; Ordinance 2018-1219 § 1105.06.