



MEMORANDUM

TO: The Honorable Chair and Members of the
Board of County Commissioners

THROUGH: Jewel White, County Attorney *[Signature]*

FROM: Christy Donovan Pemberton, Managing Assistant County Attorney

SUBJECT: State Firearm Preemption Law

DATE: May 25, 2018

This memo is being provided to provide context to the Board's discussion about the state law preemption of local ordinances regulating firearms and the possibility of filing suit against the State of Florida and other relevant defendants, as numerous municipalities and other counties have done. What follows is a discussion of the legislative history of the firearm preemption, current county ordinances in effect, as well as changes that could be made to those ordinances in compliance with current state law. Lastly, a recommended first step is provided as a precursor to any litigation.

In 2011, the State Legislature enhanced the State's preemption of firearms and ammunition by striking the existing limited exceptions and including specific penalties for violations of preemption. The prohibitions and penalties expressly include:

1. Civil fines up to \$5,000 against elected or appointed local governmental officials under whose jurisdiction a knowing and willful violation, through the adoption of an improper local ordinance or administrative rule, occurred;
2. The express prohibition against using public funds to defend or reimburse "the unlawful conduct of any person found to have knowingly and willfully violated" the preemption;
3. The legislative finding that a knowing and willful violation by "any person acting in an official capacity for any entity enacting or causing to be enforced" a local ordinance, rule or regulation that is preempted shall be cause for termination of employment/contract or removal from office by the Governor; and
4. Award of the prevailing party's reasonable attorney's fees, including a contingency fee multiplier, actual damages incurred of \$100,000 or less, plus interest.

The preemption expressly does not prohibit, in relevant part, zoning ordinances that encompass firearms and other businesses, except those designed to restrict or prohibit the sale, purchase, transfer, or manufacture of firearms or ammunition; or a court from hearing and resolving any case or controversy or issuing any opinion or order on a matter within that court's jurisdiction.

Florida Statutes §790.33 purports to be a limited preemption expressly stating, “[e]xcept as provided by the State Constitution or general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition...to the exclusion of all existing and future county...ordinances or any administrative regulations or rules adopted by local...government relating thereto. Any such existing ordinances, rules, or regulations are hereby declared null and void.” Fla. Stat. §790.33(1). As a result, in 2011, the Board of County Commissioners (Board) quickly amended the Code so as to avoid ordinances being declared null and void by operation of law. The provisions of §790.33 that provide for civil penalties, private causes of action, and potential removal from office set this preemption statute apart from others.

In 2012, Palm Beach County and its commissioners filed suit contending that the provision allowing the Governor to remove a county commissioner from office was unconstitutional and violated the separation of powers doctrine. The Plaintiffs prevailed as to their challenge; however, the Court specifically found that its holding applied only to the Palm Beach Commissioners and not other similarly situated public officials. Specifically, the Court declared Fla. Stat. §790.33(3)(e) unconstitutional “as to the Plaintiffs.” The statute has not been amended since that time.

Article 8, Section 5 of the Florida Constitution grants each county the authority to require a criminal history records check and a three to five-day waiting period, excluding weekends and legal holidays, in connection with the sale of any firearm occurring within the county. Sale is defined as “the transfer of money or other valuable consideration for any firearm when any part of the transaction is conducted on property to which the public has the right of access.” Holders of concealed weapons permits cannot be subjected to these constitutional provisions by the terms of the Constitution.

Pinellas County currently imposes a three-day waiting period, which is defined as “an uninterrupted continuous, and cumulative aggregate of 72 hours...between...sale and receipt of the firearm, excluding the hours of weekends and legal holidays.” Pinellas County Code (PCC), §86-88. Pinellas also requires a mandatory national criminal history records check in connection with the sale of firearms. PCC, §86-89. These requirements are not applicable to holders of Florida concealed weapon permits. PCC, §86-90.

For purposes of the County Code, firearm is defined as “any weapon which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun” but does not include antique firearms. PCC, §86-86. State law defines firearm nearly the same as the County Code, but includes starter guns and excludes antique firearms *unless* used in the commission of a crime.

Without violating the preemption, the County could extend the waiting period to five days. Any further restrictions upon gun ownership or sale would violate the express language of the State's preemption statute and would subject the Board and individual commissioners to the penalties set forth therein and discussed above.

In order to demonstrate standing for a Constitutional challenge to the preemption statute should the Board wish to proceed with a challenge to the state law, it would be prudent to adopt a resolution setting forth the legislation the Board would like to pass, subject to public hearing, but is precluded from passing due to the preemption language and the penalties associated therewith. Such action would provide the basis for asserting a case and controversy appropriate for a declaratory action, which would be the recommended approach to bringing suit. A copy of such a resolution adopted by Broward County is attached.

1 RESOLUTION NO. 2018-103

2 A RESOLUTION OF THE BOARD OF COUNTY
3 COMMISSIONERS OF BROWARD COUNTY, FLORIDA,
4 EXPRESSING THE DESIRE AND INTENTION, BUT FOR
5 THE PRECLUSION AND PENALTIES SET FORTH IN THE
6 STATE GUN LAWS, TO ADOPT RESOLUTIONS AND
7 ENACT ORDINANCES TO RESTRICT AND REGULATE
8 FIREARMS AND AMMUNITION IN BROWARD COUNTY;
9 AUTHORIZING THE FILING OF LITIGATION
10 CHALLENGING THE CONSTITUTIONALITY OF THE
11 FLORIDA GUN LAWS AND SEEKING A JUDICIAL
12 DECLARATION AS TO THE SCOPE OF REGULATION
13 AND OTHER ACTION THAT MAY PERMISSIBLY BE
14 TAKEN BY BROWARD COUNTY; AND PROVIDING FOR
15 SEVERABILITY AND AN EFFECTIVE DATE.

16 WHEREAS, the Broward County Board of County Commissioners (the "Board")
17 desires to adopt and enact, to the greatest extent possible, such resolutions,
18 ordinances, regulations, and other action as may permissibly be taken under Florida law
19 to restrict access to firearms and ammunition in order to keep the children and adults
20 residing in or visiting Broward County safe from gun violence; and

21 WHEREAS, Section 790.33, Florida Statutes, declares that the State of Florida is
22 occupying the whole field of regulation of firearms and ammunition, including the
23 purchase, sale, transfer, taxation, manufacture, ownership, possession, transfer, and
24 transportation thereof, to the exclusion of all county ordinances, regulations, or rules;
and

WHEREAS, Section 790.33, Florida Statutes, purports to prohibit the enactment
of any future ordinances or regulations "relating to firearms, ammunition, or components
thereof," and purports to create liability for any person, county, or other entity that

1 enacts or causes to be enforced any local ordinance or rule impinging upon such
2 exclusive occupation of the field, including actual damages, civil fines, and attorneys'
3 fees, and precludes the use of public funds to defend or reimburse any such person
4 acting in an official capacity for a local government; and

5 WHEREAS, the purported preemption by the State of Florida is extremely broad
6 and vague, and could be construed to apply to a panoply of measures that the Board
7 would like to adopt or enact, including action in a proprietary capacity to restrict firearms
8 or gun shows at County-owned or County-operated properties, regulation of
9 accessories to firearms such as large capacity magazines, generally applicable zoning
10 ordinances that have a material effect on the ownership, possession, storage, or
11 transportation of firearms and ammunition or the components thereof, and action to
12 preclude firearms on a year-round basis at certain exempted locations such as polling
13 places and school administration buildings; and

14 WHEREAS, the Board expresses its strong desire to adopt these measures to
15 protect the health, safety, and welfare of the children and adults who reside in or visit
16 Broward County, and would take such action but for the preclusive, prohibitive, and
17 chilling effect of the purported preemption and penalties of Section 790.33, Florida
18 Statutes, and related laws, NOW, THEREFORE,

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20 BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF
21 BROWARD COUNTY, FLORIDA:
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1 Section 1. The Board expresses its strong desire to adopt and enact
2 resolutions, ordinances, and other rules and regulations to protect the children and
3 adults who reside in and visit Broward County, including through the following actions:

4 (a) Acting in its capacity as a proprietor to restrict firearms and gun shows
5 from County-owned or County-operated facilities and locations;

6 (b) Amending County ordinances to retain the permitted local option of a five-
7 day waiting period for firearms sales but to also enforce recent state legislation requiring
8 the completion of criminal history records checks prior to the purchase of firearms;

9 (c) Regulating accessories and other items related to firearms or ammunition
10 but not inherent in the initial purchase of firearms, such as aftermarket large capacity
11 magazines;

12 (d) Adopting generally applicable zoning ordinances that impact the
13 ownership, possession, storage, and transportation of firearms, ammunition, and
14 components thereof;

15 (e) Adopting rules and regulations to preclude firearms on a year-round basis
16 in certain areas specified as statutory exceptions to permissible concealed weapons,
17 including polling places or school administration buildings;

18 (f) Adopting rules and regulations to exercise the full scope of the County's
19 constitutional authority under Article VIII, Section 5, of the Florida Constitution, and all
20 necessary and related powers inherent in that constitutional grant of local government
21 authority, and imposing record retention requirements on licensed importers,
22 manufacturers, and dealers for any firearm sold or delivered from inventory to any other
23 person, including requiring documentation of the date and hour of the firearm sale, the
24 date and hour of the firearm transfer or receipt, the unique approval number obtained

1 from the inquiry to the Department of Law Enforcement, and the serial number of the
2 firearm at issue, in addition to any records required under state or federal law; and

3 (g) Any other action to restrict access to or use of firearms and ammunition in
4 the interest of public health, safety, and welfare.

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6 Section 2. The Board states that but for the purported prohibitions and
7 penalties of Section 790.33, Florida Statutes, and the Board's uncertainty as to the
8 permissibility of the intended actions, the Board would immediately take action to
9 implement these measures for the health, safety, and welfare of its residents and
10 visitors, including through enactment of an Ordinance in substantially the form attached
11 hereto as Exhibit A.

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13 Section 3. The Board authorizes the Office of the County Attorney to file a
14 lawsuit against the State of Florida and appropriate officials of the State of Florida
15 challenging the constitutionality of the Florida gun laws, including, without limitation,
16 Section 790.33, Florida Statutes, or, in the County Attorney's discretion, to intervene
17 into any filed action that raises the same issues and concerns.

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19 Section 4. SEVERABILITY.

20 If any portion of this Resolution is determined by any Court to be invalid, the
21 invalid portion shall be stricken, and such striking shall not affect the validity of the
22 remainder of this Resolution. If any Court determines that this Resolution, or any
23 portion hereof, cannot be legally applied to any individual(s), group(s), entity(ies),
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1 property(ies), or circumstance(s), such determination shall not affect the applicability
2 hereof to any other individual, group, entity, property, or circumstance.

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5 Section 5. EFFECTIVE DATE.

6 This Resolution shall become effective upon adoption.

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8 ADOPTED this 10th day of April, 2018. (Item 49)

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12 Approved as to form and legal sufficiency:
13 Andrew J. Meyers, County Attorney

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15 By /s/ René D. Harrod 04/10/18
16 René D. Harrod (date)
17 Deputy County Attorne
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