



KOPELMAN AND PAIGE, P.C.

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January 22, 2013

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Hon. Kelly Ross and
Members of Board of Selectmen
Westford Town Hall
55 Main Street
Westford, MA 01886

Re: Prohibition on Possession of Certain Types of Firearms

Dear Members of the Board of Selectmen:

You have requested an opinion as to whether a bylaw prohibiting possession of assault weapons, large capacity firearms and machine guns within the Town of Westford would survive legal challenge if passed at Town Meeting. In my opinion, such a bylaw, if passed, may be subject to challenge on three primary grounds:

1. that the Bylaw violates of the Second Amendment to the United States Constitution;
2. that the Bylaw is preempted by the Massachusetts General Laws; and
3. that the Bylaw violates the Fourteenth Amendment Right to Due Process insofar as the ban may constitute a regulatory taking.

I will address each of these issues in turn below. Please be advised, however, that I am not aware of any case in which a Massachusetts Court has adjudicated the question of the authority of a municipality to regulate firearms in the manner suggested. Therefore, given the controversial nature of the subject matter and the lack of clear judicial guidance, it is difficult to predict how a reviewing court will treat this issue. Please be further advised that because this is an emergent area of law, there may be other grounds upon which parties may seek to challenge the proposed bylaw. As such, this letter is not intended to serve as an exhaustive treatise on every possible claim that may be raised. Rather, what follows is an analysis of how common principles of law may be applied in evaluating the proposed bylaw. I am also enclosing herewith a proposed draft bylaw for your consideration.

The Second Amendment

Prior to 2008, most courts, including the First Circuit Court of Appeals, had taken the position that the Second Amendment did not give individuals a right to own or carry a weapon. Thomas v. Members of City Council of Portland, 730 F.2d 41 (1st Cir. 1984). That changed in 2008, when the Supreme Court in District of Columbia v. Heller, 128 S.Ct. 2783 (2008), held that the Second Amendment guarantees an individual right to possess and carry weapons for the lawful purpose of self defense. In 2010, the Supreme Court further held that the Second Amendment applies to the state and local regulation of firearms. McDonald v. City of Chicago,

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130 S.Ct. 3020 (2010). Since those decisions, numerous lower courts have struggled with the extent of individuals' rights under the Second Amendment.

With respect to the types of weapons at issue here, neither the First Circuit Court of Appeals nor the United States District Court for the District of Massachusetts has ruled on the issue of whether the Second Amendment protects assault weapons, high capacity rifles and/or machine guns. Courts in at least six other circuits, however, have upheld bans on these types of firearms. See, e.g. Heller v. District of Columbia, 670 F.3d 1244 (D.C.Cir. 2011) ("Heller II"); Hamblin v. United States, 591 F.3d 471 (6th Cir. 2009); United States v. Allen, 630 F.3d 762 (8th Cir. 2011); United States v. Henry, 688 F.3d 637 (9th Cir. 2012); U.S. v. Zaleski, 2012 WL 2866278 (2nd Cir. 2012) (unpublished decision); U.S. v. Ross, 323 Fed.Appx. 117 (3rd Cir. 2009) (unpublished decision).

Although I am not aware of any cases holding that such a ban violates the Second Amendment, in a different context, the United States District Court for the District of Massachusetts has recently adopted the following "two-prong approach to Second Amendment challenges": (1) whether the law imposes a burden on conducted falling within the scope of the Second Amendment's guarantee. If it does not, the inquiry ends. If it does, the proponent of the law must make a "strong showing" of a substantial relationship between the restriction and an important governmental objective. Fletcher v. Haas, 851 F.Supp.2d 287 (D.Mass. 2012); but see Hightower v. City of Boston, 693 F.3d 61, 74 (1st Cir. 2012) (First Circuit Court of Appeals declined to reach the question of what standard of scrutiny applied to legislation challenged on Second Amendment grounds).

With regard to assault weapons, reviewing courts have recognized that the Second Amendment does not protect an individual's right to possess "dangerous and unusual weapons", i.e. those sorts of weapons not in common use for lawful purposes such as hunting and self-defense. Heller II, 670 F.3d at 1260. Thus, in United States v. Fincher, 538 F.3d 868 (8th Cir. 2008), the Eighth Circuit Court of Appeals applied the first-prong of the test and held that machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that are not protected by the Second Amendment. In a different context, one justice of the First Circuit Court of Appeals observed that it is common-knowledge, even amongst "city dwellers" who do not hunt, that sawed-off shotguns are associated with crime, not hunting. United States v. Shaw, 670 F.3d 360, 368-9 (1st Cir. 2012) (Boudin, concurring).

In Heller II, however, the Court of Appeals for the District of Columbia found that it had insufficient evidence to conclude that assault weapons and large-capacity magazines were not the types of weapons protected by the Second Amendment and therefore, it analyzed the issue under the second-prong of the test. The Court ultimately upheld the District of Columbia's ban, finding that "the District has carried its burden of showing a substantial relationship between the

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prohibition of both semi-automatic rifles and magazines holding more than ten rounds and the objectives of protecting police officers and controlling crime.” In Wilson v. County of Cook, 968 N.E.2d 641 (2012), the Supreme Court of Illinois found that it could not dismiss a challenge to Chicago’s ban on assault weapons because, at the early stages of the case, there were too many unanswered questions as to whether the ordinance prohibited “dangerous and unusual weapons” beyond the reach of the Second Amendment and whether the City could demonstrate that the ordinance furthered a substantial governmental interest.

If the proposed bylaw is challenged on Second Amendment grounds, the Town will bear the burden of showing that the types of weapons at issue are “dangerous and unusual” and it may further have the burden of showing that there is a substantial relationship or reasonable fit between the proposed bylaw and an important governmental objective. Whether the Town can satisfy this burden will depend upon the volume and quality of evidence that it can amass to demonstrate the nexus between the proposed bylaw and the governmental interests it seeks to protect. Therefore, if you decide to proceed with the proposed bylaw, I recommend that you include a preamble, identifying the interests you are seeking to protect, and describing studies upon which you relied in concluding that the proposed bylaw will further those objectives. I have provided a sample preamble based on studies referred-to in the Heller II case, but given the substantial burden you will face if challenged, I suggest further independent research into this issue.

State Law Preemption

Assuming that the proposed bylaw passes constitutional scrutiny, the Town may be further required to demonstrate that it is within the Town’s authority under state law. Under the Home Rule Procedures Act, municipalities may enact legislation to advance the common good so long as it is not inconsistent with state law. The mere existence of legislation of the subject matter at the state level is not necessarily a bar to local legislation on the same subject. Town of Amherst v. Attorney General, 398 Mass. 793 (1986). Where, however, State laws on a particular subject are comprehensive or where the Legislature has explicitly limited the manner in which cities and towns may act on a subject, a locality’s right to act on that subject may be preempted. Marshfield Family Skateland, Inc. v. Town of Marshfield, 389 Mass. 436 (1983).

Opponents of the proposed bylaw may argue that Chapter 140 of the Massachusetts General Laws constitutes comprehensive state regulation of firearms such that it should preempt further regulation at the local level. See, e.g. Town of Wendell v. Attorney General, 394 Mass. 518 (1985) (local regulation of pesticides preempted where it would defeat goal of the Legislature in creating statewide standards for use of such chemicals). It is not the comprehensiveness of the legislation alone, however, that makes a local regulation inconsistent. The question is whether the local regulation will frustrate the purpose of the statute.

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The state's grant of authority to issue licenses does not automatically prohibit local regulation of a particular subject. In fact, the Supreme Judicial Court has said that "[i]t is clear that in some areas of legal business activities regulated by state law may be prohibited by local bylaws." Marshfield Family Skateland, 389 Mass. at 442. Thus, in the Marshfield case, the Court upheld a local bylaw prohibiting the keeping and use of coin operated amusement devices, despite the fact that state law permitted municipalities to issue licenses for the keeping of such devices. Likewise, in American Lithuanian Naturalization Club, Athol, Mass., Inc. v. Board of Health of Athol, 446 Mass. 310 (2006), the Court upheld a local regulation prohibiting smoking in private clubs, despite the fact that the Commonwealth's Smoke-Free Workplace Law exempted private clubs from its prohibition of smoking in public places. In so holding, the Court found that, by extending the reach of the state statute, the local regulation was complimentary of the state law rather than conflicting. Finally, in Town of Amherst v. Attorney General, 398 Mass. 793 (1986), the Court upheld a bylaw prohibiting the discharge of certain firearms within town limits on the grounds that "[w]hile hunting is permissible in the Commonwealth, there is no indication in c. 131 that a municipality cannot prohibit the use of firearms."

Given the deferential standard of review that courts pay to municipal bylaws, it is my opinion that the proposed prohibition on the keeping of certain types of firearms is likely to survive review on state law preemption grounds. Although Chapter 140 of the General Laws regulates the use and possession of firearms in the Commonwealth, there is nothing in that statute that evidences a legislative intent to preclude local action on the subject. As with the regulations at issue in the Marshfield case, the mere fact that the Commonwealth permits the issuance of licenses for the use and possession of certain types of firearms, does not necessarily prevent the Town from legislatively determining that it will not issue any such licenses. Therefore, in my opinion, like the local enactments in the cases cited above, the proposed bylaw is complimentary of the state statute by extending its reach to a class of weapons that the Town may reasonably consider to be dangerous and unusual, and for that reason, it is likely to survive challenge on state law preemption grounds.

Due Process – Regulatory Taking

Finally, those who lawfully possessed firearms prior to the passage of the proposed bylaw may argue that it constitutes a taking of property without just compensation. A taking occurs when there is a physical appropriation of property or when some significant restriction is placed upon an owner's use of his property for which justice and fairness require that compensation be given, a so-called "regulatory taking". Philip Morris, Inc. v. Reilly, 312 F.3d 24 (1st Cir. 2002). The Due Process Clause protects both real and personal property. Id. Thus, in the Philip Morris case, the Court held that a statute requiring tobacco companies to disclose constituent ingredients of their products, which were formerly protected trade secrets, constituted a regulatory taking. In United States v. Patton, 451 F.3d 615 (4th Cir. 2006), however, the Court found that a statute

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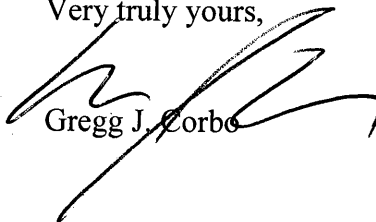
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criminalizing possession of body armor by felons did not implicate the Due Process Clause. In so-holding, the Court observed that “[i]t is not unconstitutional for Congress or a state legislature to forbid possession of a previously licit good . . . Such legislation may, in a sense, be a deprivation of property, but if the legislation is duly enacted and enforced through proper procedures, there is no denial of due process of law.” Id.

Whether or not the proposed bylaw is subject to constitutional challenge as a regulatory taking, those who were lawfully in possession of banned weapons prior to its effective date may attempt seek compensation for their losses pursuant to the Commonwealth’s inverse condemnation statute, G.L. c. 79, §10, which expressly applies to regulations which result in the taking of personal property. Therefore, in order to avoid the impact of such claims, I recommend that you either provide an exemption for those who were lawfully in possession prior to the effective date of the proposed bylaw or that you provide a grace period so as to provide such persons with an opportunity to lawfully dispose of any firearms that may be prohibited by the bylaw.

Please do not hesitate to contact me if you have any further questions in this regard.

Very truly yours,


Gregg J. Corbo

GJC/lem
Enc.
cc: Town Manager
466091/33000/0001

To see if the Town will vote to amend Chapter 95 of the General Bylaws, titled "Firearms", by renumbering section 95.4 to 95.5, and adding new section 95.4, as follows:

§ 95.4. Other Prohibited Activities

§95.4.1 Preamble

Whereas, there exists a certain class of firearms that are not useful for purposes of hunting or self-defense, but rather are "military style" weapons designed for offensive use.

Whereas, the military features of such "assault weapons", which are designed to enhance their capacity to shoot multiple human targets very rapidly, are preferred by criminals and place law enforcement officers at particular risk because of their high fire power.

Whereas, studies have shown that so-called "assault weapons" account for a larger share of guns used in mass murders of police officers and civilians, as demonstrated by recent horrific events in Connecticut, New York and Colorado.

Whereas, the Town has an interest in controlling crime and protecting its citizens and police force from the threat of harm posed by such dangerous and unusual weapons.

Whereas, a ban on a particular subset of weapons with characteristics that make them capable of firing rapidly, delivering a large number of shots without reloading, and creating a high risk of collateral damage, will further the Town's interests in controlling crime and protecting its citizens and police force, without impinging upon the right of its residents to bear arms.

§95.4.2 Prohibition of Dangerous and Unusual Weapons

No person shall sell, transfer, or possess any assault weapons, large capacity weapons, machine guns or large capacity feeding devices, regardless of the date of manufacture, within the Town of Westford. The definitions of "assault weapon", "large capacity weapon", "machine gun" and of "large capacity feeding device" shall be the same as defined in Massachusetts General Law, Chapter 140, Section 121, as may be amended from time-to-time.

Any person in lawful possession of any firearm prohibited by this bylaw shall have a period of ninety days from the effective date to lawfully remove it from the Town or to surrender possession to the Chief of Police.

§95.4.3 Exemptions

The provisions of this Bylaw shall not apply to possession by a law enforcement officer for purposes of law enforcement.

§ 95.4.4. Violations and penalties.

Whoever violates any provision of this bylaw may be penalized by indictment or on complaint brought in the district court. Except as may be otherwise provided by law and as the district court may see fit to impose, the penalty for each violation or offense shall be one hundred dollars for the first offense, two hundred dollars for the second offense, and three hundred dollars for the third and each subsequent offense. Each day or portion thereof shall constitute a separate offense. If more than one, each condition violated shall constitute a separate offense.

Whoever violates any provision of this bylaw may be penalized by a noncriminal disposition process as provided in G.L. c.40, §21D and the Town's non-criminal disposition by-law. If noncriminal disposition is elected, then any person who violates any provision of this by-law shall be subject to a penalty of one hundred dollars for the first offense, two hundred dollars for the second offense, and three hundred dollars for the third and each subsequent offense.

The Westford Police Department shall have authority to enforce this regulation.

The Town may enforce this regulation or enjoin violations thereof through any lawful process, and the election of one remedy by the Town shall not preclude enforcement through any other lawful means.

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