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ATTORNEY GENERAL OPINION NO. 2011- 024

Mr. Gary E. Rebenstorf
Director of Law and City Attorney
City Hall
455 North Main, 13th Floor
Wichita, Kansas 67202

Re: Cities and Municipalities—Miscellaneous Provisions—Firearms and Ammunition; Regulation by City or County, Limitations.

Synopsis: Regulating “the manner of openly carrying a loaded firearm” includes local ordinances requiring firearms to be carried in a holster, with the safety on, and/or within the control of the individual at all times. A city may not completely prohibit the open carry of a loaded firearm on one’s person, or in the immediate control of a person, while on property open to the public. Cities may regulate the way, mode, or method of openly carrying a loaded firearm within reaching distance of one’s person. A firearm stored in a glove compartment or underneath the seat of a vehicle is within the immediate control of a person. A city may lawfully require firearm permits, regulate training requirements and limit the make, model, and caliber of firearms that may be carried by private security officers while engaged in the duties of a private security officer. A city may not prohibit the concealed carry of firearms by private security officers beyond the restrictions authorized by the Personal and Family Protection Act, K.S.A. 2010 Supp. 75-7c01 *et seq.* Cited herein: K.S.A. 2010 Supp 12-16,124; K.S.A. 2010 Supp. 75-7c10; K.S.A. 2010 Supp. 75-7c17.

* * *

Dear Mr. Rebenstorf:

As City Attorney for the City of Wichita, you ask several questions concerning the ability of cities to regulate firearms. Your questions specifically pertain to K.S.A. 2010 Supp. 12-16,124(b)(2), which reads as follows:

(b) Nothing in this section shall:

...

(2) prohibit a city or county from regulating the manner of openly carrying a loaded firearm on one's person; or in the immediate control of a person, not licensed under the personal and family protection act while on property open to the public.

We address each of your questions in turn.

1. What is meant by regulating the manner of openly carrying a loaded firearm on one's person?

Answer: K.S.A. 2010 Supp. 12-16,124 does not define "manner," so we base our analysis on the ordinary meaning of the word. "Manner" is defined as "[a] way, mode, method of doing anything."¹ Therefore, K.S.A. 2010 Supp. 12-16,124(b)(2) preserves the authority of a city or county to regulate the way, mode, or method of openly carrying a loaded firearm on one's person, or in the immediate control of a person, who is not licensed to carry a concealed weapon. We opine that this statute includes, but is not necessarily limited to, a regulation requiring firearms to be secured in a holster, requiring openly carried firearms to have the safety on, and requiring an individual openly carrying a firearm to maintain control of the firearm at all times.

2. Does K.S.A. 12-16,124 preempt Section 5.88.010(1)(e) of the Wichita City Code?

Answer: Section 5.88.010(1)(e) of the Wichita City Code states: "Unlawful use of a weapon is knowingly...Carrying on one's person any *unconcealed, loaded* firearm, *while on property open to the public*, except when on one's land or in one's abode or fixed place of business."² Put another way, the Wichita City Code prohibits the open carry of a loaded firearm on one's person while on public property in all circumstances.

In Attorney General Opinion No. 2011-006, we determined that K.S.A. 2010 Supp. 12-16,124(b)(2) carves out specific circumstances under which the general rule of preemption of local regulatory authority³ does not apply. We further determined that where K.S.A. 2010 Supp. 12-16,124(b)(2) is silent on a factual circumstance, local

¹ Black's Law Dictionary, 5th Edition (1979).

² Emphasis added.

³ K.S.A. 2010 Supp. 12-16,124(a): "No city...shall adopt any ordinance, resolution or regulation... governing the purchase, transfer, ownership, storage or transporting of firearms or ammunition..." We note that this preemption language bars the "transporting of firearms." The United States Supreme Court, in discussing a case regarding firearms, has discussed the relationship between the terms "carry" and "transport" and has noted that "'transport' is a broader category that includes 'carry' ". *Muscarello v. U.S.*, 524 U.S. 125, 135 (1998). Given the general intent of the Kansas legislature to preempt local regulation of firearms, as we discussed in Opinion 2011-06, and given the Supreme Court's observation in *Muscarello* that "transport" includes "carry," we believe that the preemption language in K.S.A. 2010 Supp. 12-16, 124(a) includes the open carry of firearms and that, therefore, it is necessary to analyze whether any of the statutory exceptions to that general preemption apply.

authority is preempted. In this instance, the Wichita City Code prohibits *any* manner of openly carrying a loaded firearm while on property open to the public. By contrast, K.S.A. 2010 Supp. 12-16,124(b)(2) allows a city to regulate “the *manner* of openly carrying a loaded firearm,” which implies that a city may adopt ordinances to govern the way, mode, or method of such open carry, but may not ban the practice entirely. A city ordinance prohibiting *any* form of open carry of a loaded firearm on public property is a factual circumstance not within the exception created by K.S.A. 2010 Supp. 12-16,124(b)(2). As such, we opine that Section 5.88.010(1)(e) of the Wichita City Code is preempted.

3. *What is meant by regulating the manner of openly carrying a loaded firearm in the immediate control of a person?*

Answer: Kansas statutes do not define “immediate control of a person,” but we take guidance from court holdings regarding vehicle searches and seizures, because such cases frequently involve a determination of whether a seized item was within the immediate control of an occupant of the vehicle. The United States Supreme Court has held that the area in “immediate control” of an occupant of a vehicle is the area within “reaching distance” of that person.⁴ By extension, we opine that a firearm is in the immediate control of a person if such firearm is within reaching distance of that person.

As noted in Answer No. 1 above, K.S.A. 2010 Supp. 12-16,124(b)(2) preserves the authority of a city or county to regulate the way, mode, or method of openly carrying a loaded firearm on one’s person, or in the immediate control of a person, who is not licensed to carry a concealed weapon. Applying our logic in Answer No. 1 above to this question, we opine this statute includes, but is not necessarily limited to, a regulation requiring firearms to be secured in a holster, requiring openly carried firearms to have the safety on, and requiring an individual openly carrying a firearm to maintain control of the firearm at all times.

4. *If the language “immediate control of a person” in K.S.A. 12-16,124(b)(2) includes carrying a firearm in a vehicle, does this include the glove compartment or under the seat?*

Answer: As noted above, the area in “immediate control” of an occupant of a vehicle is the area within “reaching distance” of that person.⁵ By this standard, a glove compartment or the area beneath a seat would likely be considered within the immediate control of an occupant of a vehicle. K.S.A. 2010 Supp. 12-16,124 does not define “concealed,” so we apply the ordinary meaning of the word, which is “kept from sight or view.”⁶ A firearm stored under a seat or inside a glove compartment is kept from sight or view, and thus would be considered a concealed firearm outside the scope of K.S.A. 2010 Supp. 12-16,124(b)(2).

⁴ *New York v. Belton*, 453 U.S. 454 (1981).

⁵ *Id.*

⁶ Black’s Law Dictionary, 5th edition (1979).

5. Does K.S.A. 12-16,124 preempt Section 5.88.010(1)(f) of the Wichita City Code?

Answer: Section 5.88.010(1)(f) of the Wichita City Code states: “Unlawful use of a weapon is knowingly...Carrying in any vehicle under one’s immediate control, while on property open to the public, any loaded firearm, except when on one’s land or in one’s abode or fixed place of business.” Put another way, the Wichita City Code prohibits the carrying of a loaded firearm in a vehicle under one’s immediate control while on public property in all circumstances.

As a threshold matter, we note that the syntax of Section 5.88.010(1)(f) of the Wichita City Code suggests that the vehicle, and not the firearm, must be within the immediate control of the person. For example, a citizen driving through a city parking lot with a loaded firearm in the trunk of the vehicle would be in violation of Section 5.88.010(1)(f). This language would prohibit an individual from carrying any loaded firearm anywhere in a vehicle, when such vehicle is under the immediate control of the individual and is on property open to the public.

K.S.A. 2010 Supp. 12-16,124(b)(2) allows cities to regulate the manner of carrying a loaded firearm in the immediate control of person, who is not a concealed carry licensee, while on public property. However, Section 5.88.010(1)(f) of the Wichita City Code effectively makes it unlawful to be present in a vehicle with a loaded weapon on public property. In our opinion, Section 5.88.010(1)(f) of the Wichita City Code goes beyond the preemption exception of K.S.A. 2010 Supp. 12-16,124(b)(2), and thus is preempted by K.S.A. 2010 Supp. 12-16,124(a).

6. Does K.S.A. 12-16,124 preempt Section 5.88.010(1)(g) of the Wichita City Code as it relates to non-holders of concealed carry permits?

Answer: Section 5.88.010(1)(g) of the Wichita City Code states: “Unlawful use of a weapon is knowingly...Carrying in any air, land or water vehicle an unloaded firearm that is not encased in a container which completely encloses the firearm.” Section 5.88.010(6)(a) of the Wichita City Code states that Section 5.88.010(1)(g) shall not apply to holders of concealed carry permits.

K.S.A. 2010 Supp. 12-16,124(b)(4) states:

(b) Nothing in this section shall:

...

(4) prohibit a city...from adopting an ordinance, resolution or regulation requiring a firearm transported in any air, land or water vehicle to be unloaded and encased in a container which completely encloses the firearm or any less restrictive provision governing the transporting of

*firearms, provided such ordinance, resolution or regulation shall not apply to persons licensed under the personal and family protection act.*⁷

Because Section 5.88.010(1)(g) of the Wichita City Code does not exceed the statute's exception to the general rule of preemption of local firearms ordinances, and because Section 5.88.010(6)(a) expressly exempts concealed carry license holders from the ordinance, we opine that Section 5.88.010(1)(g) of the Wichita City Code is not preempted by state law.

7. *Does K.S.A. 12-16,124 preempt the City from requiring firearm permits for private security officers?*

Answer: No. Cities' home rule powers authorize cities to "determine their local affairs and government" so long as local rules are not preempted by state law.⁸ Legislative intent to eliminate the authority of a city to enact local regulations must be clearly manifested in statute, and cannot be implied.⁹ K.S.A. 2010 Supp. 12-16,124(a) preempts city regulations governing the "purchase, transfer, ownership, storage or transporting of firearms," but does not expressly preempt the authority of cities to require occupational licenses. A private security officer firearm permit does not impact the purchase, transfer, ownership, storage or transportation of firearms. In our opinion, city firearm permits for private security officers are not preempted by state law.

8. *Does K.S.A. 12-16,124 preempt the City from regulating training requirements and limiting make, model, and caliber of firearms that may be carried by private security officers?*

Answer: No. As noted above, K.S.A. 2010 Supp. 12-16,124(a) preempts city regulations governing the "purchase, transfer, ownership, storage or transporting of firearms." A city regulation governing training requirements for private security officers, or limiting the types of firearms that may be carried *while on duty as a private security officer*, does not govern an individual's ability to lawfully purchase, transfer, own, store or transport firearms in their capacity as a private citizen. It is our opinion that K.S.A. 2010 Supp. 12-16,124(a) is not intended to preempt local occupational regulations that only affect on-the-job activities.

9. *Can the City prohibit a person holding a concealed carry license from carrying a concealed firearm while performing the duties of a private security officer?*

Answer: A city may prohibit a city employee from carrying a concealed handgun while on city property or while engaged in the duties of city employment.¹⁰ A city also may prohibit *any* concealed carry of a handgun within a city building so long as signs are

⁷ Emphasis added. The Personal and Family Protection Act, K.S.A. 2010 Supp. 75-7c01 *et seq.*, authorizes the issuance of concealed carry licenses.

⁸ Kan. Const. Art. 12, §5(b); *Junction City v. Lee*, 216 Kan. 495 (1975).

⁹ *Zimmerman v. Board of County Comm'rs of Wabaunsee County*, 289 Kan. 926, 973 (2009).

¹⁰ K.S.A. 2010 Supp. 75-7c10(b)(1).

posted notifying the public of the prohibition.¹¹ Lastly, carrying a concealed handgun may be prohibited in certain buildings provided such premises are conspicuously posted as prohibiting concealed carry.¹²

Aside from the above restrictions, no city may regulate, restrict, or prohibit the carrying of concealed handguns by concealed carry licensees.¹³ Thus, the city would not be authorized to prohibit a person holding a concealed carry license from carrying a concealed firearm while performing the duties of a private security officer.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Attorney General

/s/Sarah Fertig

Sarah Fertig
Assistant Attorney General

DS:AA:SF:ke

¹¹ K.S.A. 2010 Supp. 75-7c10(b)(2).

¹² K.S.A. 2010 Supp. 75-7c10(a).

¹³ K.S.A. 2010 Supp. 75-7c17(a). This statute also permits counties to adopt a resolution to prohibit concealed carry by United States attorneys, district attorneys and other public attorneys inside a county courthouse, but this provision does not apply here.