

At its meeting on Tuesday, March 8, 2016, the Board of Selectmen voted 5-0 to release the attached Confidential Attorney Client Memorandum from Anderson & Kreiger that contains its legal opinion regarding Article 34 – Amend General Bylaws - Guns.



MEMORANDUM

CONFIDENTIAL: ATTORNEY-CLIENT COMMUNICATION

To: Board of Selectmen, Town of Lexington
Carl Valente, Town Manager

From: Kevin Batt, Mina Makarious, and Christina Marshall
ANDERSON & KREIGER LLP

Re: Citizen's Article on Assault Weapons Ban

Date: February 4, 2016

You have asked us to identify potential legal concerns with a ban on the manufacture, sale, and possession of assault weapons in Lexington. A Lexington Town Meeting Member has submitted a citizen's petition article substantially similar to an assault weapons ban ("AWB") ordinance enacted in Highland Park, Illinois.

The Highland Park ordinance was recently upheld by the Seventh Circuit. The Supreme Court denied the plaintiff's petition for writ of certiorari in December 2015. *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406 (2015), *cert. denied*, 136 S.Ct. 447 (2015). Although the Supreme Court's denial has no precedential effect, it signals a continued reluctance by the Court to consider Second Amendment cases following *District of Columbia v. Heller*, 554 U.S. 570 (2008), which recognized a constitutionally-protected right to keep guns in the home for self-defense, and *McDonald v. City of Chicago, Illinois*, 561 U.S. 742 (2010), extending the Second Amendment to the States through the Fourteenth Amendment.

Leaving aside federal constitutional and preemption challenges, the proposed bylaw may well be preempted by the Massachusetts state AWB, codified at G.L. c. 140, § 131M.

SHORT ANSWER

This article contemplates enactment of a bylaw and is therefore reviewable by the Attorney General. If enacted and approved by the Attorney General, the bylaw may be subject to challenges under Article 89 of the Massachusetts Constitution (the "Home Rule Amendment"), state preemption principles, and the Second Amendment of the U.S. Constitution. Given the existence of a state-level AWB and comprehensive licensing scheme for firearms, the proposed bylaw is quite vulnerable to such challenges.

ANALYSIS

A. Comparison of Relevant Assault Weapons Bans

1. Massachusetts AWB

As of September 1994, Massachusetts has banned most assault weapons and large capacity feeding devices: “No person shall sell, offer for sale, transfer or possess an assault weapon or a large capacity feeding device that was not otherwise lawfully possessed on September 13, 1994.” G.L. c. 140, § 131M. Massachusetts defines the term “assault weapon” as a rifle, pistol or shotgun with certain combinations of specific attributes such as the ability to accept a detachable magazine. In addition, the statute bans specific makes and models of weapons, or copies or duplicates of those weapons. G.L. c. 140, § 121. For a detailed summary of assault weapon definitions under Massachusetts law, see Exhibit A.

2. Proposed Bylaw

The proposed bylaw adopts several provisions of the Highland Park ordinance, including its definitions of assault weapon and large capacity magazine. There are only a few differences between the Highland Park ordinance and the proposed bylaw; for example, the proposed bylaw does not include the ordinance’s 60-day grace period for citizens to surrender banned weapons. For specific features of the Highland Park ordinance, see Exhibit B.

Violation of the proposed bylaw would be a misdemeanor, but punishable only by a flat fine of \$1000—the proposed language does not contemplate imprisonment or a range of fines.

The prohibitions in the Massachusetts AWB are similar to the proposed bylaw, but slightly less restrictive. The Massachusetts AWB bans only selling, offering to sell, transferring, or possessing assault weapons. The proposed bylaw’s language is more expansive: no person shall “manufacture, sell, offer or display for sale, give, lend, transfer ownership of, acquire or possess” assault weapons. Other than the ban on manufacturing, in practice the banned activities do not differ substantially.

The Massachusetts AWB’s definition of assault weapons requires a semiautomatic rifle or pistol to meet three requirements: that it has the capacity to accept a detachable magazine, and two additional specified features. The proposed bylaw requires that a rifle or pistol have the capacity to accept a detachable magazine and only one additional specified feature. The requirements for semiautomatic shotguns in the two AWBs are virtually identical. The list of specifically-banned makes and models of weapons in the Massachusetts AWB is different than the proposed bylaw modeled after the Highland Park ordinance—this difference is likely due at least in part to changes in manufacturing over the last 20 years.

B. State Preemption & Home Rule Analysis

1. Legal Standard

Home rule and state preemption issues are subject to substantively identical analyses. Under the Home Rule Amendment of the Massachusetts Constitution, municipalities retain the

constitutional authority to adopt and administer bylaws and regulations that pertain to the protection of the public health, safety, and welfare, without the need for any additional statutory authority, unless such bylaws or regulations are “inconsistent with . . . laws enacted by the general court.” Amendments to the Constitution of Massachusetts, Art. 89, Section 6; G.L. c. 43B, § 13; *Doe v. City of Lynn*, 472 Mass. 521, 525-526 (2015). A local enactment is “inconsistent” with or preempted by state law if (1) there is an express provision barring local legislation (“express preemption”), (2) the local regulation would frustrate the purpose of state law (“conflict preemption”), or (3) state legislation is so pervasive that any local enactment would frustrate state law (“field preemption”). *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000); *Connors v. City of Boston*, 430 Mass. 31, 35 (1999). “The legislative intent to preclude local action must be clear.” *Bloom v. Worcester*, 363 Mass. 136, 155 (1973).

2. Massachusetts AWB: Overview

Express preemption: There is no express provision barring local legislation relating to the regulation of firearms in G.L. c. 140, §§ 121 *et seq.* (the “Firearms Act”), or specifically contained within § 131M of that Act (the Massachusetts AWB).

*Field preemption*¹: No Massachusetts court has addressed whether the Firearms Act preempts the field of firearms regulation to the exclusion of local municipalities. The question was raised in *City of Boston v. Smith & Wesson Corp.*, 12 Mass. L. Rptr. 225, 2000 WL 1473568, at *11 (Mass. Super. 2000), but the court held that preemption was irrelevant to the case and declined to address the issue.

“The existence of legislation on a subject . . . is not necessarily a bar to the enactment of local ordinances and by-laws exercising powers or functions with respect to the same subject. If the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject, the local ordinance or by-law is not inconsistent with the State legislation.” *Town of Amherst*, 398 Mass. at 797 (quoting *Bloom*, 363 Mass. at 156). However, “[w]here legislation deals with a subject comprehensively, it ‘may reasonably be inferred as intended to preclude the exercise of any local power or function on the same subject because otherwise the legislative purpose of that statute would be frustrated.’” *Dartmouth v. Greater New Bedford Regional Vocational Technical High Sch. Dist.*, 461 Mass. 366, 375 (2012), quoting *Boston Teachers Union, Local 66 v. Boston*, 382 Mass. 553, 564 (1981).

The proposed bylaw does not, on its face, contravene the purpose of the Firearms Act, which “is to limit access to deadly weapons by irresponsible persons,” arising out of “a realization that prevention of harm is often preferable to meting out punishment after an unfortunate event.” *Ruggiero v. Police Comm’r of Boston*, 18 Mass. App. Ct. 256, 258-259 (1984).

However, the Firearms Act is extremely comprehensive, and goes beyond its AWB. The licensing scheme of the Act provides for different tiers of licenses to carry, and provides a specific description of which types of firearms are permitted under each license. Under G.L. c.

¹ In considering whether the proposed bylaw is preempted by state law, the Attorney General and any reviewing court is likely to consider field preemption before conflict preemption. This Memorandum uses the same approach.

140, § 131, the holder of a Class A license may purchase, rent, lease, borrow, possess and carry “large capacity firearms.” That term is defined as “any firearm, rifle or shotgun (i) that is semiautomatic with a fixed large capacity feeding device; (ii) that is semiautomatic and capable of accepting, or readily modifiable to accept, any detachable large capacity feeding device; (iii) that employs a rotating cylinder capable of accepting more than ten rounds of ammunition in a rifle or firearm and more than five shotgun shells in the case of a shotgun or firearm; or (iv) that is an assault weapon.” *Id.* at § 121. In providing this definition, the Firearms Act comprehensively establishes what is lawful to carry and what is unlawful to carry under various licenses. To the extent the proposed bylaw draws a different line or reclassifies lawful weapons as unlawful, the bylaw would occupy a field of regulation already reserved by the state. This issue could also be raised under conflict preemption, in that this local regulation would frustrate the purpose of the state law.

In sum, the comprehensive licensing provisions in the Firearms Act indicate an intent to preclude local action on determining which weapons are illegal, to the extent that these conflicts prevent achievement of the State legislative purpose.

C. Double Jeopardy Implications

The prohibition on double jeopardy limits prosecution and sentencing twice for the same conduct. *See Kvitka v. Board of Registration in Medicine*, 407 Mass. 140, 144-145 (1990) (imposition of criminal fine following criminal convictions for same action violated double jeopardy clause). Here, there is a significant difference in penalties for the violation of the proposed bylaw and the Massachusetts AWB, and under double jeopardy principles, enforcement of the local bylaw may undermine its own purpose by supplanting enforcement under state law and protecting violators from the more severe sanctions available under state law.

While any violation of the proposed bylaw would be a misdemeanor punishable by a fine of \$1000,² the Massachusetts AWB has a sliding scale of fines and imprisonment for offenders based on the number of prior offenses. An individual in Lexington in violation of the proposed bylaw and the Massachusetts AWB could be subject to a \$1000 local fine at the same time as much as a \$15,000 fine or 15 years of imprisonment at the state level. Should a local prosecuting officer choose to charge an offender with violation of the proposed bylaw—and thus impose the less stringent punishment—that offender would be able to avoid the significantly more strict penalties at the state level. This discretion could serve to undermine the purpose of the Massachusetts AWB and the Firearms Act. *See Doe v. City of Lynn*, 472 Mass. at 527 (finding local sex offender registration ordinance preempted by state law in part from “the negative effect that the ordinance may have on the monitoring and tracking of sex offenders”).

D. Second Amendment

Federal-level challenges to AWBs such as the proposed bylaw often come in the form of a Second Amendment challenge. *See, e.g., Friedman*, 784 F.3d 412. The *Friedman* court

² Under the Home Rule Amendment reserving the power “to define and provide for the punishment of a felony or to impose imprisonment as a punishment for any violation of law” to the Commonwealth, the Town cannot impose any term of imprisonment on violators of the proposed bylaw.

considered and rejected several challenges to the Highland Park ordinance: that there was no “historical tradition” of banning semi-automatic guns or large-capacity magazines; that semi-automatic guns are commonly owned for lawful purposes; that the ordinance restricted options for armed self-defense; and that the ban would have no effect on gun violence. The court held that the ordinance did not violate the Second Amendment, which does not foreclose a government’s ability to consider, within certain limits, which weapons are appropriate for self-defense. *Id.* at 412.

Given the similarity between the Highland Park ordinance and the proposed bylaw, it is likely that the proposed bylaw would also survive a Second Amendment challenge.³

CONCLUSION

Although on its face an assault weapons ban would likely be permissible under the Second Amendment, the proposed bylaw would likely be disapproved by the Attorney General or by a court as preempted by the comprehensive Firearms Act.

Beyond the strictly legal issues raised by the proposed bylaw, this suggested ban has already generated a large amount of attention from gun advocates. If passed and approved by the Attorney General, the bylaw is almost certain to generate significant litigation. Given the similarities between the proposed bylaw and the Massachusetts AWB, the potential state preemption issues raised above, and the potential for the state-level AWB to actually be weakened with implementation of the proposed bylaw’s penalty provision, the benefits of the bylaw would likely not justify its cost.

³ We cannot assume that the existence of the Massachusetts AWB or Firearms Act precludes any constitutional challenges to the proposed bylaw. Previous challenges to the Firearms Act were based only on Article XVII of the Massachusetts Declaration of Rights, which guarantees a right to keep and bear arms for the common defense. The SJC has interpreted Article XVII to protect the right to bear arms with respect to military service. *See Commonwealth v. Davis*, 343 N.E.2d 847, 848-849 (1976). The Supreme Court extended the Second Amendment to the states in 2010 in *McDonald*, 561 U.S. 742, and has held that the Second Amendment protects the right to keep guns in the home for self-defense, *Heller*, 554 U.S. 570. The SJC has not yet heard a Second Amendment challenge to the Firearms Act or the Massachusetts AWB.

EXHIBIT A

Summary of Massachusetts AWB

1. Definition of Banned Weapons

Massachusetts defines the term “assault weapon” with reference to the federal Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. § 921(a)(30), as that section appeared on September 13, 1994. The federal AWB referenced in the Massachusetts statute expired in 2004. As of September 13, 1994, 18 U.S.C. § 921 defined a “semiautomatic assault weapon” as:

(a) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least two of: (i) a folding or telescoping stock; (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon; (iii) a bayonet mount; (iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and (v) a grenade launcher;

(b) a semiautomatic pistol that has an ability to accept a detachable magazine and has at least two of: (i) an ammunition magazine that attaches to the pistol outside of the pistol grip; (ii) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer; (iii) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned; (iv) a manufactured weight of 50 ounces or more when the pistol is unloaded; and (v) a semiautomatic version of an automatic firearm; or

(c) a semiautomatic shotgun that has at least two of: (i) a folding or telescoping stock; (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon; (iii) a fixed magazine capacity in excess of 5 rounds; and (iv) an ability to accept a detachable magazine.

The statute defines “large capacity feeding devices” as devices capable of accepting more than 10 rounds of ammunition or more than 5 shotgun shells, or a large capacity ammunition feeding device as defined by 18 U.S.C. § 921(a)(31) as of September 13, 1994. *Id.* The federal AWB defined “large capacity ammunition feeding device” as a magazine, belt, drum, feed strop, or similar device, manufactured after 1994, that has the capacity to, or can be readily restored or converted to accept, more than 10 rounds of ammunition. It specifically exempted attached tubular devices designed to accept, and capable of operating only with, .22 caliber rimfire ammunition.

2. Specific Models Banned

The Massachusetts AWB specifically bans the following models: (i) Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models); (ii) Action Arms Israeli Military Industries UZI and Galil; (iii) Beretta Ar70 (SC-70); (iv) Colt AR-15; (v) Fabrique National FN/FAL, FN/LAR, and FNC; (vi) SWD M-10, M-11, M-11/9, and M-12; (vii) Steyr AUG; (viii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and (ix) revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12.

3. Exemptions

The statute exempts (i) any of the weapons, or replicas or duplicates of such weapons, specified in appendix A to 18 U.S.C. § 922 as appearing on September 13, 1994, as such weapons were manufactured on October 1, 1993; (ii) any weapon that is operated by manual bolt, pump, lever or slid action; (iii) any weapon that has been rendered permanently inoperable or otherwise rendered permanently unable to be designated a semiautomatic assault weapon; (iv) any weapon that was manufactured prior to the year 1899; (v) any weapon that is an antique or relic, theatrical prop or other weapon that is not capable of firing a projectile and which is not intended for use as a functional weapon and cannot be readily modified through a combination of available parts into an operable assault weapon; (vi) any semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition; or (vii) any semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine.

The Massachusetts AWB does not apply to active or retired law enforcement officers.

4. Sanctions

Violators of the Massachusetts AWB shall be punished, for a first offense, by a fine of not less than \$1,000 nor more than \$10,000 or by imprisonment for not less than one year nor more than ten years, or by both such fine and imprisonment, and for a second offense, by a fine of not less than \$5,000 nor more than \$15,000 or by imprisonment for not less than five years nor more than 15 years, or by both such fine and imprisonment.

EXHIBIT B

Summary of Highland Park AWB

1. Definition of Banned Weapons

The Highland Park ordinance (§ 136.005 of the City Code) states that “[n]o person shall manufacture, sell, offer or display for sale, give, lend, transfer ownership of, acquire or possess any Assault Weapon or Large Capacity Magazine.”

In Highland Park, “assault weapon” is defined as:

- (a) a semiautomatic rifle with the capacity to accept a large capacity magazine, detachable or otherwise, and one or more of the following characteristics: (i) only a pistol grip without a stock attached; (ii) any feature capable of functioning as a protruding grip that can be held by the non-trigger hand; (iii) a folding, telescoping or thumbhole stock; (iv) a shroud attached to or partially or completely encircling the barrel which allows the bearer to hold the firearm with the non-trigger hand without being burned, but excluding a slide that closes the barrel; or (v) a muzzle brake or muzzle compensator;
- (b) a semiautomatic pistol or any semi-automatic rifle with a fixed magazine with the capacity to accept more than ten rounds of ammunition;
- (c) a semiautomatic pistol with the capacity to accept a detachable magazine and one or more of the following characteristics: (i) any feature capable of functioning as a protruding grip that can be held by the non-trigger hand; (ii) a folding, telescoping or thumbhole stock; (iii) a shroud attached to or partially or completely encircling the barrel which allows the bearer to hold the firearm with the non-trigger hand without being burned, but excluding a slide that closes the barrel; (iv) a muzzle brake or muzzle compensator; or (v) the capacity to accept a detachable magazine at some location outside the pistol grip;
- (d) a semiautomatic shotgun with one or more of the following characteristics: (i) only a pistol grip without a stock attached; (ii) any feature capable of functioning as a protruding grip that can be held by the non-trigger hand; (iii) a folding, telescoping or thumbhole stock; (iv) a fixed magazine capacity in excess of five rounds; or (v) an ability to accept a detachable magazine;
- (e) any shotgun with a revolving cylinder;
- (f) a conversion kit, part, or combination of parts, from which an assault weapon can be assembled, if those parts are in the possession or under the control of the same person; or
- (g) specific makes and models of rifles, pistols, and shotguns, or copies thereof.

A “large capacity magazine” is defined as an ammunition feeding device with the capacity to accept more than ten rounds, but not (a) a feeding device permanently altered so that it cannot accommodate more than ten rounds; (b) a 22 caliber tube ammunition feeding device; or (c) a tubular magazine contained in a lever-action firearm.

2. Specific Models Banned

Rifles: (i) AK, AKM, AKS, AK-47, AK-74, ARM, MAK90, Misr, NHM 90, NHM 91, SA 85, SA 93, VEPR; (ii) AR-10; (iii) AR-15, Bushmaster XM15, Armalite M15, or Olympic Arms PCR; (iv) AR70; (v) Calico Liberty; (vi) Dragunov SVD Sniper Rifle or Dragunov SVU; (vii) Fabrique National FN/FAL, FN/LAR, or FNC; (viii) Hi-Point Carbine; (ix) HK-91, HK-93, HK-94, or HK-PSG-1; (x) Kel-Tec Sub Rifle; (xi) Saiga; (xii) SAR-8, SAR-4800; (xiii) SKS with Detachable Magazine; (xiv) SLG 95; (xv) SLR 95 or 96; (xvi) Steyr AUG; (xvii) Sturm, Ruger Mini-14; (xviii) Tavor; (xix) Thompson 1927, Thompson M1, or Thompson 1927 Commando; or (xx) Uzi, Galil and Uzi Sporter, Galil Sporter, or Galil Sniper Rifle (Galatz).

Pistols: (i) Calico M-110; (ii) MAC-10, MAC-11, or MPA3; (iii) Olympic Arms OA; (iv) TEC-9, TEC-DC9, TEC-22 Scorpion, or AB-10; or (v) Uzi.

Shotguns: (i) Armscor 30 BG; (ii) SPAS 12 or LAW 12; (iii) Striker 12; or (iv) Streetsweeper.

3. Exemptions

The term “assault weapon” does not include any firearm that has been made permanently inoperable, or weapons designed for Olympic target shooting events. The ordinance also does not apply to the transportation of banned weapons if they are broken down and in a nonfunctioning state and are not immediately accessible to any person, to antique firearms (i.e., manufactured before 1898), or to federally-licensed curios or relics.

The ordinance does not apply to government employees or members of the armed forces who are otherwise authorized to acquire or possess assault weapons and/or large capacity magazines and does so within the scope of his or her duties, or qualified retired law enforcement officers safely storing or displaying the weapon.

4. Sanctions

Violation of the ordinance is a misdemeanor, punishable by not more than six months imprisonment or a fine of not less than \$500 and not more than \$1000, or both.