

FIREARMS INDUSTRY CONSULTING GROUP

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Lower Merion Township
Township Administration Building
75 East Lancaster Avenue
Ardmore, PA 19003-2323

Dear Board of Commissioners,

I have been retained by Firearm Owners Against Crime (FOAC) regarding your recent enactment of an ordinance regulating firearm sales in Lower Merion Township. As explained *infra*, the ordinance is unlawful and its enactment constitutes a criminal offense.

18 Pa.C.S. § 6120 provided, in relevant part,

(a) General rule. 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.

Pursuant to 18 Pa.C.S. § 6119, "an offense under this subchapter constitutes a misdemeanor of the first degree," which, pursuant to 18 Pa.C.S. § 106(b)(6), provides for a maximum of sentence of five (5) years. Furthermore, pursuant to 18 Pa.C.S. § 5301, any Township official who "impedes another in the exercise or enjoyment of any right or privilege" is guilty of official oppression, which is a misdemeanor of the second degree, which is punishable by up to two (2) years in jail.

In interpreting Section 6120, the Pennsylvania Supreme Court has been "crystal clear" that only the General Assembly can regulate firearms, as the entire field is preempted. *See, Nat'l Rifle Ass'n v. City of Philadelphia*, 977 A.2d 78, 82 (Pa. Cmwlth. 2009). The Court stated in *Ortiz v. Commonwealth* that "[b]ecause the ownership of firearms is constitutionally protected, its regulation is a matter of statewide concern. . . . [T]he General Assembly, not city councils, is the proper forum for the imposition of such regulation." 681 A.2d 152, 156 (Pa. 1996). (Emphasis added). Continuing, the *Ortiz* Court stated that:

. . . the Constitution of Pennsylvania requires that home rule municipalities may not perform any power denied by the General Assembly; the General Assembly has denied all municipalities the power to regulate the ownership, possession, transfer or transportation of firearms; and the municipalities seek to regulate that which the General Assembly has said they may not regulate. The inescapable conclusion, unless there is more, is that the municipalities' attempt to ban the possession of certain types of firearms is constitutionally infirm.

The Court continued: "Although we agree with [the municipalities] that the General Assembly may negate ordinances enacted by home rule municipalities only when the General Assembly's conflicting statute concerns substantive matters of statewide concern, this does not help municipal appellants, for the matters at issue in this case [municipal regulation of firearms] are substantive matters of statewide concern."

More recently, the Pennsylvania Supreme Court reaffirmed *Ortiz* in *Commonwealth v. Hicks*, 208 A.3d 916, 926, fn. 6 (Pa. May 31, 2019), where the Court explicitly declared that, pursuant to Section 6120, it is the General Assembly's "exclusive prerogative to regulate firearms in this Commonwealth."

Likewise, the Commonwealth Court has invariably held that Section 6120 and the *Ortiz* decision prohibit the regulation of firearms and ammunition. See, *National Rifle Ass'n v. City of Philadelphia*, 977 A.2d 78 (Pa. Cmwlt. 2009) (holding that a Straw Purchaser Ordinance and an Assault Weapons Ordinance were preempted by § 6120); *Dillon v. City of Erie*, 83 A.3d 467 (Pa. Cmwlt. 2014) (holding that the prohibition on possession of firearms in city parks violates Section 6120); *Clarke v. House of Rep. of Commonwealth*, 957 A.2d 361, 365 (Pa. Cmwlt. 2008) (holding that "practical considerations do not alter the clear preemption imposed by the legislature"); *Ortiz v. Commonwealth*, 655 A.2d 194 (Pa. Cmwlt. 1995) (holding municipal assault weapons ban invalid and unenforceable); *Schneck v. City of Philadelphia*, 383 A.2d 227 (Pa. Cmwlt. 1978) (holding that municipal regulations on the acquisition and transfer of firearms was preempted by § 6120).

Most recently, and consistent with Supreme Court's statement in *Hicks*, the Commonwealth Court, *en banc*, declared that "the regulation of firearms is an area where legislative activity is vested singularly and absolutely in the General Assembly of the Commonwealth" and "section 6120(a) of the UFA contains a prolific, sweeping, and expansive force of preemption ... that an ordinance will be preempted so long as it touches upon or relates to the field of firearm regulation 'in any manner.'" *FOAC, et al. v. City of Pittsburgh* 276 A.3d 878, 886, 890 (Pa. Cmwlt. 2022).

As you may be aware, I have litigated a number of preemption cases, including *Dillon v. City of Erie*, 83 A.3d 467 (Pa. Cmwlt. 2014), where the Commonwealth Court struck down the City of Erie's ordinance, *inter alia*, prohibiting individuals from possessing and discharging firearms in city parks. I also was the attorney who litigated the matter of *FOAC v. Lower Merion Township*, 151 A.3d 1172 (Pa. Cmwlt. 2016)(*petition for allocatur denied July 11, 2017*), where the Commonwealth Court struck down, *inter alia*, your Township's prior discharge ordinance. More recently, I was also successful in having all three of the City of Pittsburgh's ordinances struck down, which regulated everything from what it termed "assault weapons" and "high capacity magazines" to a red flag/extreme risk provision. *FOAC, et al. v. City of Pittsburgh* 276 A.3d 878, 886, 890 (Pa. Cmwlt. 2022).

In addition to the statutes and case law, on August 24, 2009, then-Attorney General Tom Corbett issued a letter to the Adams County Office of the District Attorney regarding the issue of Section 6120's preemption and informing District Attorney Wagner that local municipalities are precluded from enacting ordinances regarding firearms.

As a result of the case law and determinations, numerous municipalities have found themselves in violation of these legal protections and have taken immediate corrective action, especially in light of the fact that numerous insurance carriers have contacted their municipal clients and demanded that they immediately rescind, repeal or preclude enactment of any firearms-related ordinances.

1. In August of 2007, District Township, Berks County, wanted to consider enacting restrictions on the carrying of firearms in the township building. Ed Overberger, Supervisors Chairman, was quoted as saying, "Our solicitor, the state police and the state association of township supervisors all have told us that we can't adopt an ordinance regulating firearms." <http://readingeagle.com/article.aspx?id=53999>.
2. In September of 2012, Centre Township was considering passing a firearms discharge ordinance, which would have precluded the discharge of firearms in the township; however, when presented with the above-listed statutes and holdings, the Township opted to enact a discharge protection ordinance, declaring, "It shall be lawful for any person to discharge a firearm within the Township, except if discharged in violation of all local, state and federal laws, rules and regulations, including but not limited to the Air Rifles Law, Game Commission Rules and Regulations and the Game Law." Ordinance 145-2012, November 12, 2012.
<http://www.centretownship.com/wp-content/uploads/2012/11/Firearms-Ordinance.pdf>.
3. In 2012, both Chestnut Hill Township, Monroe County, and Lower Saucon Township, Northampton County, adjusted their ordinances to comply with the preemption of Section 6120.
<http://www.nbcphiladelphia.com/news/politics/Pa-Towns-Repeal-Gun-Bans-as-Philly-Forges-Ahead-201097011.html>.
4. In October of 2012, in Washington Township, Berks County, PA, the Township Board, in addition to refusing to move forward on Firearm/Archery Ordinance, unanimously voted to strike Ordinance 76-5(B) (relating to the possession of firearms in the parks) and repeal Ordinance 79-3 (relating to carrying firearms in the township buildings without a license to carry firearms). See, <http://blog.princelaw.com/2012/11/16/washington-township-decides-to-tablefirearmsarchery-ordinance-and-modify-existing-ordinances>.
5. In April of 2013, the Borough of Quakertown, PA was made aware of its illegal ordinance precluding individuals from possessing firearms on its public lands and repealed its ordinance. <http://www.nbcphiladelphia.com/news/politics/Pa-Towns-Repeal-Gun-Bans-as-Philly-Forges-Ahead-201097011.html>.
6. Additionally, on April 16, 2013, East Rockhill Township, Montgomery County, removed its prohibition on the possession of firearms in parks and township-owned property, because of Section 6120.
http://www.montgomerynews.com/articles/2013/0/22/perkasie_news_herald/news/doc5175802b6e10b5
7. On May 12, 2013, in Morrisville, Pennsylvania, Chief Thomas Herron of the Morrisville Police Department, in relation to a similar pro-gun rally, where firearms were present in Morrisville's Williamson Park, was quoted as saying, "Though a borough ordinance forbids firearms in the park, state law allows citizens the right to carry firearms and state law supersedes the borough ordinance." http://www.phillyburbs.com/my_town/falls/rally-for-gun-safety-drawshundreds/article_2775a9b5-a509-5f6f-8049-29c0883f61b2.html.
8. On May 12, 2013, in Morrisville, Pennsylvania, Chief Thomas Herron of the Morrisville Police Department, in relation to a similar pro-gun rally, where firearms were present in

Morrisville's Williamson Park, was quoted as saying, "Though a borough ordinance forbids firearms in the park, state law allows citizens the right to carry firearms and state law supersedes the borough ordinance." http://www.phillyburbs.com/my_town/falls/rally-for-gun-safety-drawshundreds/article_2775a9b5-a509-5f6f-8049-29c0883f61b2.html.

9. South Heidelberg Township was considering passing a no-discharge ordinance in relation to a resident's complaint about gunfire. On September 12, 2013, the Board elected not to proceed with the discharge ordinance when presented with information regarding Section 6120 and the residents' outrage. <http://readingeagle.com/article.aspx?id=510781>.
10. On December 10, 2014, the Borough of Doylestown Public Safety Committee unanimously voted to rescind all of its ordinances regarding firearms and ammunition, including its firearm discharge and possession ordinances, after its insurance carrier demanded it take such action. <http://www.wfmz.com/news/news-regional-southeasternpa/doylestown-borough-plans-torepeal-gun-law/30171960>.
11. On January 13, 2015, Chalfont Borough repealed its discharge ordinance. http://www.theintell.com/news/local/chalfont-repeals-gun-dischargeordinance/article_eb256296-5b85-5add-b459-08c74220cac4.html.
12. On January 28, 2020, the Manheim Township Commissioner rejected a proposal to regulate Federal Firearm Licensees (FFLs), otherwise known as gun shops, from being within 1000 feet of a school, as well as, signage regarding firearms. https://lancasteronline.com/news/local/manheim-township-commissioners-reject-a-ban-on-gun-shops-near/article_ccc7ce56-4146-11ea-8e26-3b59c2c109e6.html.

These are but a few recent instances in which local municipalities have taken corrective action in light of the aforementioned Constitutional and legislative protections, as well as, the potential civil and criminal ramifications.

In relation to Lower Merion Township's recent enactment of an ordinance regulating the sale and transfer of firearms in the township, there can be no dispute that it is preempted pursuant to Article 1, Sections 21, and 25 of the Pennsylvania Constitution, 18 Pa.C.S. §§ 5301, 6120, and the Pennsylvania Supreme Court's holding in *Ortiz*, as well as, the legion of precedent from the Commonwealth Court, especially most recently in *FOAC, et al v. City of Pittsburgh* where it declared that "*an ordinance will be preempted so long as it touches upon or relates to the field of firearm regulation 'in any manner.'*"

In the event Lower Merion Township does not immediately repeal this ordinance, FOAC is prepared to file private criminal complaints against each official involved in the proposing and enactment of the ordinance and to file suit against the Township, which will result in substantial additional burdens on the taxpayers, as the last preemption-related lawsuit - *FOAC, et al v. Lower Merion Township* - cost this Township almost \$50,000. Clearly, it is in the best of interest of all of those involved that the ordinance be repealed. Accordingly, I am respectfully requesting that you advise me in fourteen (14) days of whether it will be repealed. In the event the Township refuses to do so, please let me know whether you will accept service of the Complaint or require service by the Sheriff.

Thanking you for your time and consideration in this matter, I am

Yours truly,
Firearms Industry Consulting Group


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