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January 19, 2012

ATTORNEY GENERAL OPINION NO. 2012 2

Mark R. Maloney  
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1300 Epic Center, 301 North Main  
Wichita, Kansas 67202-4813

Re: Constitution of the State of Kansas—Corporations—Cities' Powers of Home Rule

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

Synopsis: K.S.A. 2011 Supp. 12-16,124 preempts local zoning regulations that prohibit home-based businesses engaged in the sale of firearms or ammunition over the internet. Cited herein: K.S.A. 2011 Supp. 12-16,124; Kan. Const., Art. 12, §5; L. 2007, Ch. 166.

\* \* \*

Dear Mr. Maloney:

As city attorney for the City of Rose Hill, Kansas, you inquire whether the City may lawfully regulate home-based businesses involving the sale of firearms or ammunition through local zoning regulations. At issue is a specific Rose Hill zoning regulation, adopted on October 5, 1998, which states:

Permitted home occupations shall not in any event be deemed to include...Sale of firearms or ammunition; but not to prohibit gunsmithing, i.e., the repair of firearms.<sup>1</sup>

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<sup>1</sup> Zoning Regulations of the City of Rose Hill, Kansas, Article 6, § 102.D.13, dated May 5, 2011.

You ask whether K.S.A. 2011 Supp. 12-16,124(a) would preempt this city zoning regulation. For the reasons outlined below, we opine that this zoning regulation is preempted by state law, and as a consequence the City of Rose Hill may not lawfully enforce it.

K.S.A. 2011 Supp. 12-16,124(a) reads in relevant part:

No city or county shall adopt any ordinance, resolution or regulation, and no agent of any city or county shall take any administrative action, governing the purchase, transfer, ownership, storage or transporting of firearms or ammunition, or any component or combination thereof... any such ordinance, resolution or regulation adopted prior to the effective date of this 2007 act shall be null and void.<sup>2</sup>

Generally, cities are empowered to determine their local government through the enactment of ordinances and regulations.<sup>3</sup> The Home Rule Amendment to the Kansas Constitution expressly grants cities the power to enact local laws so long as such laws do not conflict with state statutes.<sup>4</sup> Home rule powers are intended to be broad: "Powers and authority granted cities pursuant to this section shall be liberally construed for the purpose of giving to the cities the largest measure of self-government."<sup>5</sup>

Cities' home rule power is not unlimited, however: "[h]ome rule power does not authorize cities to act where the state legislature has precluded municipal action by clearly preempting the field with a uniformly applicable enactment."<sup>6</sup> At issue, then, is whether the Kansas Legislature clearly preempted the field of governing the purchase, transfer, ownership, storage or transporting of firearms or ammunition by enacting the current version of K.S.A. 2011 Supp. 12-16,124(a).

Kansas courts have identified two means by which a state statute may overrule a city's home rule power: (1) if there is a conflict between the local regulation and a state statute, or (2) if the state legislature has preempted the field of regulation.<sup>7</sup> Because we conclude that K.S.A. 2011 Supp. 12-16,124(a) demonstrates the Legislature's intent to preempt the field of firearms regulation, we do not address the issue of whether Rose Hill's zoning regulation conflicts with state law.

### **State Law Preempts Local Zoning of Home-Based Firearms Businesses**

In determining whether a particular state statute preempts local laws, legislative intent "must be clearly manifested by statute before it can be held that the state has withdrawn

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<sup>2</sup> There are four exceptions to this subsection, but we do not address them as we have determined such exceptions are not relevant to your inquiry.

<sup>3</sup> *Kansas City Renaissance Festival Corp. v. City of Bonner Springs*, 269 Kan. 670, 673 (2000).

<sup>4</sup> Kan. Const. Art. 12, §5(b).

<sup>5</sup> Kan. Const. Art. 12, §5(d).

<sup>6</sup> 269 Kan. at 673. Internal citation omitted.

<sup>7</sup> *City of Junction City v. Lee*, 216 Kan. 495, 498 (1975).

from the cities power to regulate in the area.”<sup>8</sup> The Kansas Supreme Court offered three examples of statutory language showing clear legislative intent to “occupy the field” of firearms regulation:

“[n]o local ordinance, resolution or regulation shall prohibit....”

“No city or county shall have jurisdiction or control over....”

“The power to regulate, license, and tax...is hereby vested exclusively in the state.”<sup>9</sup>

In each of these examples, the legislature has either expressly removed the power of local authorities to enact laws regarding a particular subject, or has granted express, exclusive regulatory authority in the state. K.S.A. 2011 Supp. 12-16,124(a) contains similar language: “No city or county shall adopt any ordinance, resolution or regulation...” Applying the same reasoning as Kansas courts, it is clear that the legislature intended to occupy the field with this statute and thereby preempt local laws governing the purchase, transfer, ownership, storage or transporting of firearms or ammunition.

Having established state preemption, we next determine whether the Rose Hill zoning regulation falls within the “field” that the state intended to occupy. A zoning regulation that prohibits the sale of firearms at a particular location (i.e., online sales conducted at one’s home) clearly purports to govern the purchase and transfer of firearms. Thus, Rose Hill’s regulation is preempted because it falls within the regulatory field occupied by the State.

### **Intent to Preempt Local Laws Supported by Legislative History**

In determining the meaning of a statute, “the intent of the legislature governs if that intent can be ascertained.”<sup>10</sup> As further support for our opinion that the Rose Hill zoning regulation is preempted, we note the legislative history of K.S.A. 2011 Supp. 12-16,124. The current statutory language was enacted as part of 2007 House Bill (HB) 2528.<sup>11</sup> Prior to the passage of 2007 HB 2528, K.S.A. 2006 Supp. 12-16,124 included the following subsection:

(b) Nothing in this section shall:

(1) Prohibit a city or county from adopting any zoning measure related to firearms licensees if otherwise authorized by law to do so.<sup>12</sup>

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<sup>8</sup> *Id.* at 496.

<sup>9</sup> *Zimmerman v. Board of Comm’rs of Wabaunsee County*, 289 Kan. 926, 973 (2009).

<sup>10</sup> *See, e.g., Steffes v. City of Lawrence*, 284 Kan. 380, Syl. ¶ 2 (2007).

<sup>11</sup> L. 2007, Ch. 166, Sec. 1.

<sup>12</sup> K.S.A. 2006 Supp. 12-16,124(b)(1).

2007 HB 2528 struck the above subsection. As part of our inquiry, we examine the effect of 2007 HB 2528. Ordinarily, there is a presumption that a change in the language of a statute demonstrates legislative intent to change the effect of the statute.<sup>13</sup> Applying this presumption, we conclude that the repeal of the above language specifically exempting city zoning measures from the broad preemption of K.S.A. 2011 Supp. 12-16,124(a) demonstrates legislative intent to remove the authority of cities to regulate firearms licensees through zoning regulations.

The above analysis is consistent with our prior opinions concluding that certain city ordinances regulating the carry of firearms are *not* preempted by K.S.A. 2011 Supp. 12-16,124(a).<sup>14</sup> Those opinions dealt with the exceptions listed in subsection (b) of the statute. As noted above, the enactment of 2007 HB 2528 removed the exception for zoning regulations related to firearms licensees from that subsection.

## **Conclusion**

The Kansas Constitution directs courts to construe home rule powers to afford cities the largest measure of self-government. Accordingly, courts are reluctant to find state preemption of local ordinances absent clearly manifested legislative intent. By amending 2006 Supp. 12-16,124 to strike the express authority of cities to enact zoning regulations for firearms licensees, and by enacting the broad preemptive language in 2011 Supp. 12-16,124(a), the Kansas Legislature has clearly manifested its intent to occupy the field of regulating the purchase, transfer, ownership, storage or transporting of firearms or ammunition.

This reasoning and analysis leads to a conclusion that is consistent with the limited legislative history, which you cited in your request letter, regarding the intended effect of this legislative language on existing zoning ordinances. As you pointed out in your letter, at least one conferee advised the House Federal and State Affairs Committee during hearings on 2007 HB 2528 that the proposed legislative language, if adopted, would have the effect that “all zoning regulations that contain firearm restrictions would be void.”<sup>15</sup> The conferee further testified that the proposed bill “voids fundamental city zoning powers.”<sup>16</sup> There is nothing in the legislative record that indicates that the legislature, once made aware of this concern by this testimony, made any changes to the proposed language that would in any way address it. Therefore, concluding that the legislature intended to have the effect of preempting local zoning ordinances such as the one in Rose Hill is consistent with what information is in the record regarding the legislature’s intent.

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<sup>13</sup> *Board of Educ. of Unified School Dist. 512 v. Vic Regnier Builders, Inc.*, 231 Kan. 731, 736 (1982); *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, 773 (2003).

<sup>14</sup> Attorney General Opinion Nos. 2011-006, 2011-024.

<sup>15</sup> Minutes, House Federal and State Affairs Committee, February 20, 2007, Attachment 15, page 2.

<sup>16</sup> *Id.* at page 1 (conferee testified that such effect of 2007 HB 2528 was “unintentional;” however, we note that the legislature, once put on notice of this effect, did nothing to avoid it, which suggests that the effect was, in fact, intentional).

Mr. Mark Maloney  
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We opine that K.S.A. 2011 Supp. 12-16,124(a) preempts Rose Hill's zoning regulation prohibiting home-based firearms businesses.

Sincerely,

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Kansas Attorney General

Sarah Fertig  
Assistant Attorney General

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