STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL September 25, 2013	No. I13-010 (R13-012) Re: Preemption of Tucson Ordinances

To: Representative Brenda Barton
Arizona House of Representatives

Questions Presented

You have asked for an opinion on the following question:

1. Whether Arizona Revised Statute ("A.R.S.") § 13-3108 preempts the City of Tucson's ("Tucson's") Ordinances 11080 and 11081 of May 29, 2013?

Summary Answers

1. Yes. Ordinances 11080 and 11081 directly contradict A.R.S. § 13-3108. Moreover, Ordinances 11080 and 11081 govern a subject in a field that state law already fully occupies.

Background

In 2000, the Arizona Legislature amended A.R.S. § 13-3108(A) to read as follows:

> Except as provided in subsection C of this section, a political subdivision of this state shall not enact any ordinance, rule or tax relating to the transportation, possession, carrying, sale or use of firearms or ammunition or any firearm or ammunition components in this state.

2000 Ariz. Sess. Laws, ch. 376, § 2. The amendment also included the following statement of the Legislature's intent:

> It is the intent of the legislature to clarify existing law relating to the state's preemption of firearms regulation in this state. Firearms regulation is of statewide concern. Therefore, the legislature intends to limit the ability of any political subdivision in this state to regulate firearms and ammunition. This act applies to any ordinance enacted before or after the effective date of this act.

2000 Ariz. Sess. Laws, ch. 376, § 4. Since that amendment, the Legislature has made minor additions to § 13-3108(A). 2003 Ariz. Sess. Laws, ch. 162, § 1; 2010 Ariz. Sess. Laws, ch. 19, § 1; 2011 Ariz. Sess. Laws, ch. 349, § 2.

In 2010, the Arizona Legislature added two subsections to A.R.S. § 13-3108. The first subsection (now § 13-3108(D)) provides in relevant part:

> A political subdivision of this state shall not enact any rule or ordinance that relates to firearms and is more prohibitive than or that has a penalty that is greater than any state law penalty.

2010 Ariz. Sess. Laws, ch. 19, § 1. The second subsection (now § 13-3108(H)) provides:

> For the purposes of this section, "political subdivision" includes a political subdivision acting in any capacity, including under police power, in a proprietary capacity or otherwise.

Id.

On May 29, 2013, Tucson passed two ordinances related to firearms. The first, Ordinance 11080, provides in relevant part:

> A law enforcement officer who has probable cause to believe that a person, with criminal negligence, has discharged a firearm within or into the corporate limits of the City of Tucson may request that such person submit to a blood or breath test to determine that person's alcohol concentration. In the event that the person refuses this request, the law enforcement officer may pursue a search warrant, pursuant to Title 13, Chapter 38, Article 8 of the Arizona Revised Statutes, to obtain a blood or breath test to determine that person's alcohol concentration.

The second, Ordinance 11081, provides in relevant part:

> A. Any person who owns or possesses a firearm shall report the theft or loss of such firearm to the Tucson Police Department within forty-eight (48) hours of the time he or she knew or should have known the firearm has been stolen or lost, when either the owner or possessor resides in the city, or the theft or loss of the firearm occurs in the city.
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> ...
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> C. A failure to report the loss or theft of a firearm as required in this section is a violation of the provisions of this section and constitutes a civil infraction, punishable by a civil sanction of one hundred dollars ($100.00).

You have asked whether A.R.S. § 13-3108 preempts these ordinances.

Analysis

We do not address whether Tucson had an "independent and affirmative source of legislative power" to enact the ordinances at issue, *Union Transportes de Nogales v. City of Nogales*, 195 Ariz. 166, 169, 985 P.2d 1025, 1028 (1999), and our analysis assumes that Tucson had this power. The Arizona Constitution authorizes a city to frame its own charter, *see id.*, which then becomes the city's "organic law" and authorizes the city to enact ordinances in certain areas, *see id.* We assume that Tucson's charter authorized Tucson to enact the ordinances at issue.

The preemption question is distinct from the authorization question. *See id.* at 170-71, 985 P.2d at 1029-30 ("Finding the ordinance within the scope of the [city] charter does not conclude our analysis. We must determine as well whether the ordinance, despite authorization by the charter, is preempted by the statutory or constitutional law of the state."). We address only the preemption question.

"Preemption becomes an issue when the charter city legislates in contradiction to state law or over a subject that is in a 'field' already fully occupied by state law." *Id.* at 171; 985 P.2d

at 1030. Thus, any Tucson ordinance that directly contradicts an Arizona statute or that governs a subject in a field that Arizona statutes fully occupies is thereby preempted.

A. Ordinances 11080 and 11081 directly contradict A.R.S. § 13-3108.

For a city ordinance to contradict a state statute, "'the assertedly competing provisions in question must be actually conflicting, rather than capable of peaceful coexistence.'" *Jett v. City of Tucson*, 180 Ariz. 115, 121, 882 P.2d 426, 432 (1994) (quoting *City of Prescott v. Town of Chino Valley,* 163 Ariz. 608, 616, 790 P.2d 263, 271 (App. 1989), *vacated in part on other grounds,* 166 Ariz. 480, 803 P.2d 891 (1990)).

1. Ordinance 11080 actually conflicts with A.R.S. § 13-3108(A).

Ordinance 11080 permits a law enforcement officer to "request" a blood or breath test from a person if the officer has probable cause to believe that the person criminally negligently "discharged a firearm" in the Tucson area. If the person refuses, Ordinance 11080 permits the officer to "pursue" a search warrant under the appropriate Arizona statutes. However, A.R.S. § 13-3108(A) prohibits cities from enacting "any ordinance . . . relating to the . . . discharge or use of firearms."[1] Because Ordinance 11080 relates to the discharge or use of firearms, it conflicts with § 13-3108(A).

This conflict exists even though Ordinance 11080 does not give law enforcement officers more power than they already had under state law. Because no Arizona statute prevents a Tucson police officer from *requesting* a blood or breath test from suspected criminals or from *pursuing* a search warrant for suspects who refuse such a request, Ordinance 11080 does not authorize officers to step beyond state law. Nevertheless, § 13-3108(A) broadly prohibits ordinances "relating" to the discharge of firearms. Ordinance 11080 "relates" to the discharge of firearms and therefore cannot peacefully coexist with § 13-3108(A).

[1] Subsection F lists exceptions to this prohibition, none of which applies here.

2. Ordinance 11081 actually conflicts with A.R.S. §§ 13-3108(A) and 13-3108(D).

Ordinance 11081 requires a person who "owns or possesses a firearm" to report its "theft or loss" to the Tucson Police Department if either the person resides in Tucson or the incident occurs in Tucson. Failure to make a timely report is "punishable by a civil sanction of one hundred dollars." However, A.R.S. § 13-3108(A) prohibits cities from enacting "any ordinance . . . relating to the . . . possession . . . [or] transfer . . . of firearms."[2] Because Ordinance 11081 relates to the possession or transfer of firearms, it conflicts with § 13-3108(A).

Ordinance 11081 also conflicts with A.R.S. § 13-3108(D), which prohibits cities from enacting any "ordinance that relates to firearms and . . . that has a penalty that is greater than any state law penalty." According to Ordinance 11081's prefatory language, "Arizona state law does not . . . establish any penalty for a failure to report the loss or theft of a firearm." Consequently, the civil infraction that Ordinance 11081 imposes is greater than any state law penalty and brings Ordinance 11081 directly into conflict with § 13-3108(D).

B. Ordinances 11080 and 11081 govern subjects in a field that state law already fully occupies.

"When the state has legislated in a particular area, whether that legislation preempts . . . a city from legislating in the same area depends on . . . whether the subject is of statewide concern . . . ." *Jett*, 180 Ariz. at 121, 882 P.2d at 432. In addition, "'[t]he existence of a preempting policy must be clear. . . . Mere commonality of some aspect of subject matter is insufficient.'" *Union Transportes de Nogales v. City of Nogales*, 195 Ariz. 166, 171, 985 P.2d 1025, 1030 (1999) (quoting *Jett*, 180 Ariz. at 121, 882 P.2d at 432)).

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[2] Again, Subsection F lists exceptions to this prohibition, none of which applies here.

1. Ordinances 11080 and 11081 govern a subject of statewide concern.

Ordinances 11080 and 11081 regulate firearm use and possession, respectively. More specifically, Ordinance 11080 governs how law enforcement may respond to unlawful firearm use, and Ordinance 11081 governs how gun owners must respond to firearm misplacement or theft.

Such subjects invoke statewide concerns. "Possession of firearms and similar weapons . . . presents dangers to the public and the police which have 'no reference either to time or place' and which render it a 'matter of state-wide concern.'" Ariz. Att'y Gen. Op. I78-274 (quoting *Clayton v. State*, 38 Ariz. 135, 148-49, 297 P. 1037, 1042 (1931)). That conclusion applies here.

2. Ordinances 11080 and 11081 govern a subject in a field where the Arizona Legislature has implemented a clear preempting policy.

When a state legislature creates a "comprehensive statutory scheme" regarding a particular field, that scheme implies "an obvious preemptive policy" toward that field. *See Jett*, 180 Ariz. at 122, 882 P.2d at 433. In enacting and amending A.R.S. § 13-3108, the Arizona Legislature has developed a comprehensive statutory scheme regarding firearm regulation, thus adopting a clear preemptive policy.

First, the statute's comprehensive language implies a preemptive policy. Subsection A prohibits cities from enacting an ordinance even "*relating* to the transportation, possession, carrying, sale, transfer, purchase, acquisition, gift, devise, storage, licensing, registration, discharge or use of firearms" (emphasis added).[3] Subsection D also prohibits cities from enacting an ordinance that "*relates* to firearms and . . . that has a penalty that is greater than *any* state law penalty" (emphasis added). Finally, Subsection H clarifies that these prohibitions apply to "a political subdivision acting in *any* capacity" (emphasis added). Such broad language

[3] Again, Subsection F lists exceptions to this general prohibition, none of which applies here.

indicates that the Legislature intended to make itself the only decision maker in the state law field of Arizona firearms regulation.

The statute's title also indicates a preemptive policy. The current title of A.R.S. § 13-3108 is "*Firearms regulated by state*; *state preemption*; violation; classification; definition." (Emphasis added.) This title evinces the Legislature's clear intent to preempt cities from regulating firearms.

Finally, the Legislature's statement of intent reflects a preemptive policy. Along with the amendment of § 13-3108(A) in 2000, the Legislature included the following statement:

> It is the intent of the legislature to clarify existing law relating to the *state's preemption of firearms regulation* in this state. Firearms regulation is of statewide concern. Therefore, *the legislature intends to limit the ability of any political subdivision in this state to regulate firearms* and ammunition.

2000 Ariz. Sess. Laws, ch. 376, § 4. Although the Legislature could have conclusively demonstrated its intent to preempt cities from regulating firearms with more explicit and unequivocal language, it nevertheless appears to have effectively preempted the field.

Therefore, Ordinances 11080 and 11081 are preempted because they each govern a subject in a field that state law already fully occupies.

Conclusion

Arizona Revised Statutes Section 13-3108 preempts Tucson Ordinances 11080 and 11081. The ordinances directly contradict § 13-3108, and they govern subjects in a field that state law already fully occupies.

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