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March 13, 2009

Ronald D. Leonhardt
City Clerk
City Hall, Room 205

Re: Sale of Dangerous Weapons

Dear Mr. Leonhardt:

You asked us to review the City's code provisions relating to firearms, and to advise what revisions would be required to ensure they are consistent with state law. We understand that many of these City code provisions are not currently enforced because they conflict with state law. We will provide you with a review of state law generally, and then analyze relevant provisions of the code. We note that our conclusions are consistent with those of the League of Wisconsin Municipalities in its 1996 Legal Comment, (attached).

Wisconsin Statute § 66.0409 generally addresses how the City may legislate in the area of firearms, and provides, in relevant part:

Local regulation of firearms. (1) In this section:

- (a) "Firearm" has the meaning given in s. 167.31(1)(c).
- (b) "Political subdivision" means a city, village, town or county.
- (c) "Sport shooting range" means an area designed and operated for the practice of weapons used in hunting, skeet shooting and similar sport shooting.

(2) Except as provided in subs. (3) and (4), no political subdivision may enact an ordinance or adopt a resolution that regulates the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing,

permitting, registration or taxation of any firearm or part of a firearm, including ammunition and reloader components, unless the ordinance or resolution is the same as or similar to, and no more stringent than, a state statute.

(3)...

(b) Nothing in this section prohibits a city...from enacting an ordinance or adopting a resolution that restricts the discharge of a firearm.

(4) (a) Nothing in this section prohibits a political subdivision from continuing to enforce an ordinance or resolution that is in effect on November 18, 1995, and that regulates the sale, purchase, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration or taxation of any firearm or part of a firearm, including ammunition and reloader components, if the ordinance or resolution is the same as or similar to, and no more stringent than, a state statute.

(am) Nothing in this section prohibits a political subdivision from continuing to enforce until November 30, 1998, an ordinance or resolution that is in effect on November 18, 1995, and that requires a waiting period of not more than 7 days for the purchase of a handgun.

(b) If a political subdivision has in effect on November 17, 1995, an ordinance or resolution that regulates the sale, purchase, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration or taxation of any firearm or part of a firearm, including ammunition and reloader components, and the ordinance or resolution is not the same as or similar to a state statute, the ordinance or resolution shall have no legal effect and the political subdivision may not enforce the ordinance or resolution on or after November 18, 1995.

(c) Nothing in this section prohibits a political subdivision from enacting and enforcing a zoning ordinance that regulates the new construction of a sport shooting range or when the expansion of an existing sport shooting range would impact public health and safety.

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Enacted in 1995, § 66.0409 significantly restricts the ability of the City to legislate in the area of firearms, defined as “a weapon that acts by force of gunpowder.” Wis. Stat. § 167.31(1)(c). Generally, § 66.0409(2), (4)(a), and (4)(b), taken together, provide that the City may not enact or enforce an ordinance that regulates firearms more strictly than state law. Exceptions are provided in § 66.0409(3)(b), (4)(am), and (4)(c), for the discharge of firearms, a waiting period enforced prior to 1998, and the zoning of sport shooting ranges, respectively. Again, we understand that the City currently has many ordinances regulating firearms that are stricter than state law, which may not be, and to our knowledge are not, enforced. We will separately examine each Code provision that is potentially affected.

MCO § 20-01. Nuisances. This ordinance provides, in relevant part: “Depots, houses or buildings of any kind, wherein more than twenty-five pounds of gunpowder are deposited, stored or kept at one time...are hereby declared and shall be deemed public or common nuisances.”

Analysis. Wisconsin Statute § 66.0409 restricts the manner in which the City may regulate “the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration or taxation of any firearm or part of a firearm, including ammunition and reloader components.” Wis. Stat. § 66.0409(2). “Reloader components” are not defined in Wis. Stat. § 66.0409, or elsewhere in the statutes, however, that phrase is typically used to describe the components used to build ammunition, namely: cartridge cases, bullets, primers, and propellants. Gunpowder is the substance that acts a propellant in firearms. Thus, MCO § 20-01 regulates the “keeping” of “reloader components,” and therefore, must not regulate in this area more stringently than state law.

We could locate no statute which declares the keeping of any amount of gunpowder to be a nuisance. *See, e.g.*, Chapter 823. Therefore, MCO § 20-01 appears to be more stringent than state law and may be amended to eliminate this provision. We do note, however, that there may well be other ordinances which prohibit this conduct, (see *infra* **MCO § 207-3**).

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MCO § 63-11. Possession of Firearms. This ordinance provides: "No person shall possess any gun, pistol or firearm in any park or parkway. The word 'gun' shall include airgun."

Analysis. "Airgun" is not defined in Wis. Stat. § 66.0409, but is defined in Wis. Stat. § 939.22(2) as "a weapon which expels a missile by the expansion of compressed air or other gas." Thus, an "airgun" is not a "firearm," defined in Wis. Stat. § 66.0409(1)(a), by reference as "a weapon that acts by force of gunpowder." Wis. Stat. § 167.31(1)(c). However, except to this extent, MCO § 63-11 regulates the "possession" of "firearm[s]," and therefore, must not regulate in this area more stringently than state law.


We could locate no statute that prohibits the possession of a firearm in a park or parkway. Thus, MCO § 63-11 is more stringent than state law could be amended to eliminate firearms from its prohibition, (a prohibition on airguns may remain). We do note that Wis. Stat. § 167.30 does regulate the *use* of firearms near a park, although it provides, somewhat confusingly:

Any person who shall discharge or cause the discharge of any missile from any firearm, slung shot, bow and arrow or other weapon, within 40 rods of any public park, square or enclosure owned or controlled by any municipality within this state and resorted to for recreation or pleasure, when such park, square or enclosure is wholly situated without the limits of such municipality, shall be punished by imprisonment in the county jail not exceeding 60 days or by fine of not more than \$25 nor less than one dollar.

The City could enact an ordinance in conformance with this statute, however, we note that the discharge of any firearm within the City is already prohibited by MCO § 105-35-1, which, as we explain below, is unaffected by Wis. Stat. § 66.0409.

MCO § 63-21. Fish, Waterfowl and Game Birds. This ordinance provides, in part, that "No person may...fish with the aid or use of any firearm or pellet gun...." MCO § 63-21-1-c.

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Analysis. "Pellet gun" is not defined in Wis. Stat. § 66.0409, or elsewhere in the statutes, however, that phrase is typically used to describe a type of air gun. Thus, a "pellet gun" is not a "firearm." However, except to this extent, MCO § 66-21 regulates the "use" of "firearm[s]," and therefore, must not regulate in this area more stringently than state law. 

Chapter 29 of the Wisconsin Statutes regulates hunting and fishing and allows the Department of Natural Resources to promulgate rules regarding the "conditions governing the taking of fish." Wis. Stat. §§ 29.014(1) and 29.041. Pursuant to this authority, the DNR enacted an administrative rule providing: "No person may...[f]ish by any means other than hook and line except as specifically authorized in this chapter or chs. NR 21, 22, 23, 24 and 25." WIS. ADMIN. CODE § NR 20.05(1). None of these chapters appear to authorize the use of firearms for fishing. See WIS. ADMIN. CODE Chs. NR 20-25. The DNR has further provided that: "No person may...[p]ossess or control any firearm, gun or similar device at any time while on the waters, banks or shores that might be used for the purpose of fishing." WIS. ADMIN. CODE § NR 20.05(2). Although Wis. Stat. § 66.0409(2), provides that the City may not legislate in the area of firearms "unless the ordinance or resolution is the same as or similar to, and no more stringent than, a *state statute*," we interpret this provision to mean that the City may also adopt an ordinance or resolution that is the same as or similar to an administrative regulation adopted pursuant to a state statute. (Emphasis added.) Therefore, we conclude that MCO § 63-21 does not regulate firearms more stringently than state law, and need not be amended.

MCO § 80-10. Chronic Nuisance Premises. This ordinance allows the chief of police and the commissioner of DNS to charge the owners of nuisance properties for police services. Under this ordinance, the "[d]ischarge of a firearm as defined in s. 105-35" constitutes "[n]uisance activity...whenever engaged in by persons associated with a premises." MCO § 80-10-2-b-17.

Analysis. Section 80-10 of the Milwaukee Code of Ordinances regulates the "use" of "firearm[s]," however, Wis. Stat. § 66.0409(3)(b), provides: "Nothing in this section prohibits a city...from enacting an ordinance or adopting a resolution that restricts the discharge of a firearm." Therefore, MCO § 80-10-2-b-17 is unaffected by Wis. Stat. § 66.0409 and need not be amended.

MCO § 92-2. Secondhand Dealer's License. This ordinance provides that "[i]t shall be unlawful to operate or carry on the business of being a secondhand dealer without having first obtained a secondhand dealer's license." MCO § 92-2-2-a. A "secondhand dealer" is "any person, firm, partnership, corporation or association operating, owning or leasing a fixed place of business for the purchase, sale or exchange of any secondhand articles of personal property." MCO § 92-2-1-d. The ordinance "does not apply to transactions at occasional garage or yard sales, estate sales, coin, gem, stamp or antiques shows, conventions or auctions." MCO § 92-2-2-e. Furthermore, the ordinance "does not apply to parties dealing in motor vehicles, coins, stamps, gold and silver bullion, secondhand jewelry, videos, video games, cassettes, compact discs, baseball cards, secondhand books and magazines, works of fine art and secondhand industrial machinery and equipment." MCO § 92-2-2-c.

Analysis. Although MCO § 92-2 may not appear to regulate firearms, a closer examination of Wis. Stat. § 134.71, which regulates pawnbrokers and secondhand article and jewelry dealers, reveals a potential issue. State law exempts from the definition of "secondhand article dealer" a "person...engaging in any...transaction at an occasional garage or yard sale, an estate sale, a gun, knife, gem or antique show or a convention." Wis. Stat. § 134.71(1)(g)1. "Ammunition" is, however, expressly included in the definition of "article." Wis. Stat. § 134.71(1)(a)9. The exception for occasional sales in MCO § 92-2-2-e does not explicitly mention gun shows and conventions. Thus, because MCO § 92-2 has the potential to regulate the "sale" and "purchase" of "any firearm or part of a firearm" in a manner which so directly conflicts with state law, you may wish to expand the exception outlined in MCO § 92-2-2-e to include gun shows and conventions.

MCO § 105-34. Carrying Dangerous Weapons. This ordinance contains two major prohibitions. First, the ordinance provides: "It shall be unlawful for any person except a peace officer to go armed with a concealed and dangerous weapon within the city of Milwaukee." MCO § 105-34-1-a. "Dangerous Weapon" is defined in relevant part as: "[A]ny device designed as a weapon and capable of producing death or great bodily harm...." MCO § 105-34-2-a. The following are dangerous per se:...any instrument which impels a missile by compressed air,

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spring or other means, [and] any weapon in which loaded or blank cartridges are used....” *Id.*

Second, the ordinance provides: “Except as provided in par. c, it shall be unlawful for any person to go armed with any firearm on or about their person within the city, unless the firearm is both unloaded and enclosed within a carrying case.” MCO § 105-34-1-b. “Firearm” is defined as:

[A] handgun, rifle or shotgun which acts by force of gunpowder or explosive to expel a projectile through a smooth or rifled bore, excluding airguns, ammunition, antique firearms or any device which is neither designed nor redesigned for use as a weapon including signaling, pyrotechnic, line throwing, safety or fastening devices.

MCO § 105-34-2-b. The exceptions located in paragraph c include, under certain circumstances: government employees who are authorized to carry a firearm in connection with their official duties; private detectives and security persons; members of veterans organizations; guards of armored car carriers and financial institutions; individuals engaged in live theatrical performances or historical reenactments; owners or authorized employees of a business; individuals in their own homes; individuals at a shooting gallery; individuals engaged in the display or sale of firearms at a gun show or exhibition; individuals in possession of a federal firearms dealer license; and individuals conducting or participating in hunter safety training courses. MCO § 105-34-2-c.

Analysis. With respect to the first prohibition, because MCO § 105-34-2-a defines “dangerous weapon” in a manner that includes firearms, MCO § 105-34-1-a clearly regulates the “bearing” of “firearm[s],” and therefore, must not regulate in this area more stringently than state law.

Section 941.23 of the Wisconsin Statutes provides: “Any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor.” State law further defines “dangerous weapon” to include “any firearm, whether loaded or unloaded....” Wis. Stat. § 939.22(10). Therefore,

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we conclude that MCO § 105-34-1-a does not regulate firearms more stringently than state law, and need not be amended.

With respect to the second prohibition, MCO § 105-34-1-b clearly regulates the "bearing" of "firearm[s]," and thus, must not regulate in this area more stringently than state law.

We could locate no equivalent provision in state law to MCO § 105-34-1-b. Thus, MCO § 105-34-1-b is more stringent than state law and could be repealed, (along with the exceptions in MCO § 105-34-1-c, and the relevant penalty provisions in MCO § 105-34-3-b; although we are of the opinion that the City may retain the two-tiered penalty structure for violation of MCO § 105-34-1-a, depending on whether a firearm was the dangerous weapon). We do note that Wis. Stat. § 167.31 contains many restrictions on the transportation of firearms, including the requirement that, with some exceptions, "no person may place, possess or transport a firearm...in or on a vehicle, unless the firearm is unloaded and encased..." Wis. Stat. § 167.31(2)(b). The City could enact an ordinance in conformity with this statute. We also note that under certain circumstances, state law prohibits the carrying of firearms in public buildings, in places where alcohol is sold or consumed, and in school zones. Wis. Stats. §§ 941.235, 941.237, and 948.605. The City may also enact ordinances in conformance with these statutes.

MCO § 105-35. Discharge of Firearms. This ordinance provides, in relevant part:

No person shall fire or discharge any cannon, gun, fowling piece, pistol, firearm, air rifle, air gun of any description, or any instrument which impels a missile or pellet by compressed air, spring or other means, within the limits of the city; provided, however, that the chief of police may from time to time issue to an authorized person or authority a permit for a specified purpose and period of time to use, fire and discharge any of the aforesaid weapons or instruments within the limits of said city.

MCO § 105-35-1.

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Analysis. Section 105-35 of the Milwaukee Code of Ordinances regulates the “use” of “firearm[s],” however, pursuant to Wis. Stat. § 66.0409(3)(b), MCO § 105-35 is unaffected by Wis. Stat. § 66.0409 and need not be amended.

MCO § 105-39. Regulations for Shooting Galleries (Firearms). This ordinance requires that any “premises...used or permitted to be used, leased or hired as a shooting gallery or place to practice target shooting, wherein firearms shall be discharged...” must be licensed. MCO § 105-39-1.

Analysis. See infra MCO § 105-42.

MCO § 105-40. Application for License. This ordinance describes the application process for the shooting gallery license required under MCO § 105-39.

Analysis. See infra MCO § 105-42.

MCO § 105-41. Specifications. This ordinance sets forth specifications for various features of a shooting gallery that must be met in order to obtain the shooting gallery license required under MCO § 105-39, including specifications relating to: use and construction, bullet protecting plates, door and window openings, bullet stops, targets, firing line, and sound quieting treatment. Furthermore, this section provides that “[t]he firing of high-powered rifles shall not be permitted on any shooting premises.” MCO § 105-41-8.

Analysis. See infra MCO § 105-42.

MCO § 105-42. Penalty. This ordinance sets forth penalties for the violation of the provisions of MCO §§ 105-39, 105-40, and 105-41.

Analysis. The preceding four ordinances relate to the licensing of shooting galleries, and the intended effect of Wis. Stat. § 66.0409, on these ordinances is unclear. Strictly speaking, the licensing of shooting galleries does not appear to constitute “the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration or taxation of any firearm or part of a firearm, including ammunition and reloader components....” Wis. Stat. § 66.0409 (emphasis added). However, we also note

that the legislature included an exception in Wis. Stat. § 66.0409(4)(c), relating to the *zoning* of sport shooting ranges, defined as “an area designed and operated for the practice of weapons used in hunting, skeet shooting and similar sport shooting.” Inclusion of this exception might lead to the conclusion that the legislature intended for regulations in the area of sport shooting ranges, (except zoning), to come under the coverage of the statute.

Moreover, it appears that the term “shooting galleries,” which is not defined in the ordinances, may not constitute the same thing as “sport shooting ranges” defined by statute. The ordinances clearly appear to be primarily, if not exclusively, regulating indoor shooting facilities by the use of such terms as a “*premises...wherein* firearms shall be discharged....” MCO § 105-39-1 (emphasis added); *See also* MCO § 105-41-1 (“The room, place, or enclosure wherein the firing of firearms is to take place...”). In contrast, use of the word “area” in Wis. Stat. § 66.0409(1)(c), as well as the descriptive phrase “in hunting, skeet shooting and similar sport shooting” appear to imply an outdoor location. Further complicating matters is Wis. Stat. § 895.527, which provides:

Sport shooting range activities; limitations on liability and restrictions on operation. (1) In this section, “sport shooting range” means an area designed and operated for the use and discharge of firearms.

(2) A person who owns or operates a sport shooting range is immune from civil liability related to noise resulting from the operation of the sport shooting range.

(3) A person who owns or operates a sport shooting range is not subject to an action for nuisance or to zoning conditions related to noise and no court may enjoin or restrain the operation or use of a sport shooting range on the basis of noise.

(4) Any sport shooting range that exists on June 18, 1998, may continue to operate as a sport shooting range at that location notwithstanding any zoning ordinance enacted under s. 59.69, 60.61, 60.62, 61.35 or 62.23(7), if the sport shooting range is a lawful use or a legal nonconforming use under any zoning ordinance enacted under s. 59.69, 60.61, 60.62, 61.35 or 62.23(7) that is in effect on June 18, 1998.

(5) Any sport shooting range that exists on June 18, 1998, may continue to operate as a sport shooting range at that location notwithstanding all of the following:

(a) Section 167.30, 941.20(1)(d) or 948.605 or any rule promulgated under those sections regulating or prohibiting the discharge of firearms.

(b) Section 66.0409(3)(b) or any ordinance or resolution.

(c) Any zoning ordinance that is enacted, or resolution that is adopted, under s. 59.69, 60.61, 60.62, 61.35 [sic] or 62.23(7) that is related to noise.

(6) A city, village town or county may regulate the hours between 11:00 p.m. and 6:00 a.m. that an outdoor sport shooting range may operate, except that such a regulation may not apply to a law enforcement officer as defined in s. 165.85(2)(c), a member of the U.S. armed forces or a private security person as defined in s. 440.26 (1m) (h) who meets all of the requirements under s. 167.31(4)(a)4.

(7) A person who is shooting in the customary or a generally acceptable manner at a sport shooting range between the hours of 6:00 a.m. and 11:00 p.m. is presumed to not be engaging in disorderly conduct merely because of the noise caused by the shooting.

“Sport shooting range” is given a more expansive definition in Wis. Stat. § 895.527(1), than it is in § 66.0409(1)(c), however, it does appear that the former is directed mainly at outdoor locales, given the emphasis on the regulation of noise in the statute. However, even that is unclear given the use of the qualifier “outdoor” in subsection (6).

State law does not provide for the licensing of shooting galleries, and therefore, if Wis. Stat. § 66.0409 applies, the ordinances regulate in this area more stringently than state law. While repealing these four ordinances, (along with the fee provision contained in MCO § 81-105), would eliminate any chance of a legal challenge, we believe we can defend the retention of these ordinances on the ground that Wis. Stat. § 66.0409 does not implicate the licensing of “shooting galleries.” In the event the decision is made to retain the ordinances, we suggest

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the addition of an exception for outdoor sport shooting ranges, (or a clarification that the ordinance only regulates "indoor" facilities). Outdoor sport shooting ranges clearly may not be regulated in any manner other than that described in Wis. Stat. §§ 66.0409 and 895.527. *See also* Wis. Stat. § 182.021 (regulating "gun clubs").

MCO § 105-43. Sale of Dangerous Weapons. This ordinance sets forth numerous prohibitions with regard to the sale and purchase of firearms. For instance, MCO § 105-43-1 provides, in relevant part:

LICENSE REQUIRED. It shall be unlawful for any person, firm or corporation to engage in the business of buying or selling, or to sell or give away to any person, or to buy or receive of any person within the city, any weapon listed or defined as dangerous in s. 105-34, except rifles or shotguns used for hunting purposes, air rifles, weapons used solely for target practice purposes, straight-edge razors, household purpose knives, any knife having a blade less than 3 inches, or instruments necessary to certain trades, crafts, professions or sports, without securing a license so to do as provided in subs. 1 and 3 of this section.... It is the intent of this section that no permit to purchase or no license to sell shall be required for the purchase or sale of sporting goods, which are defined as any of those items that further interest in the commonly accepted fields of sport.

Furthermore, MCO § 105-43-6-a provides, in relevant part:

It shall be unlawful for any person to purchase or obtain by gift or any method, scheme or device by which possession is obtained, without first securing from the chief of police a permit so to do, any weapons listed or defined as dangerous in s. 105-34, except rifles or shotguns used for hunting purposes, air rifles, weapons used solely for target practice purposes, sporting goods, as defined in sub. 1, straight-edge razors, household purpose knives, any knife having a blade less than 3 inches, or instruments necessary to certain trades, crafts, professions or sports.

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Thus, subsections 1 and 6-a generally require both that the sellers of firearms be licensed, and that the purchasers of firearms have a permit, except in the case of hunting rifles or shotguns, and weapons used only for target practice. The procedure for obtaining a license is set forth in subsection 3, and the procedure for obtaining a permit is set forth in subsection 6.

Section 105-43-2 makes it unlawful "to sell or give away to any minor under the age of 18, any weapon listed or defined as dangerous in s. 105-34; or to any person under the age of 21 in the case of handguns, except household purpose knives or knives having blades less than 3 inches." Thus, subsection 2 prohibits the sale of all firearms to individuals under the age of 18, and further prohibits the sale of handguns to individuals under the age of 21.

Section 105-43-4 specifically relates to firearms, and provides:

FIREARMS BACKGROUND INFORMATION. Every dangerous weapon dealer shall, prior to the transfer of a firearm to a person other than a dealer, contact the Wisconsin department of justice pursuant to s. 175.35, Wis. Stats., and determine if the person seeking to purchase a firearm is eligible to possess a firearm under s. 941.29, Wis. Stats.

Section 105-43-5 requires licensees to provide the chief of police with daily reports on each sale or gift of a dangerous weapon in the previous 24 hours. This requirement applies to firearms, except "rifles or shotguns used for hunting purposes...[and] weapons used for target practice purposes...."

Section 105-43-6-b, also specifically provides, with respect to firearms: "No person shall mutilate a shotgun or rifle or destroy the identification marks on any firearm. No shotgun or rifle shall be shortened to barrel length of less than 18 inches nor shall anyone remove the serial number from any weapon."

Finally, § 105-43-7 provides:

EXHIBIT OF WEAPONS PROHIBITED. It shall be unlawful for any person, firm or corporation to exhibit for sale in show windows

in a public manner, or to exhibit in show cases or counters in the inside which can be seen from the public street, any weapons listed or defined as dangerous in s. 105-34; or to display any signs, posters, cartoons or display cards suggesting the sale of any weapons so defined or listed in said section; provided, however, that this section shall not apply to the exhibition or display of rifles or shotguns used for hunting purposes, air rifles, weapons used solely for target practice purposes, sporting goods, as defined in sub. 1, straight-edge razors, household purpose knives, any knife having a blade less than 3 inches, or instruments necessary to certain trades, crafts, professions or sports. The exhibit for sale in show windows in a public manner, or the exhibit in show cases or counters in the inside which can be seen from the public street, of all pistols and revolvers, target practice purpose or otherwise, is expressly prohibited. However, the display of any signs, posters, cartoons, or display cards suggesting the sale of all pistols and revolvers, target practice purpose or otherwise, is permitted.

Thus, subsection 7 prohibits the public exhibition for sale or advertising described of all firearms unless they are "rifles or shotguns used for hunting purposes...[or] weapons used solely for target practice purposes;" although pistols and revolvers may not be publicly exhibited even if used solely for target practice purposes.

Analysis. To the extent that MCO § 105-43 requires that the sellers and other transferors of firearms be licensed, this ordinance regulates the "sale," or "transfer" of "firearm[s]," and therefore, must not regulate in this area more stringently than state law. Similarly, to the extent MCO § 105-43 requires that the purchasers or other transferees of firearms obtain a permit, this ordinance regulates the "purchase" or "transfer" of "firearm[s]," and thus, must not regulate in this area more stringently than state law.

State law does not require the transferors of firearms to be licensed, or the transferees of firearms to obtain a permit. Therefore, those portions of MCO § 105-43, (including subsections 1, 3, 5, and 6), are more stringent than state law in that regard, and could either be repealed, or an exception could be created for

firearms, (the restrictions may be retained with respect to “dangerous weapons” that are not “firearms”).

In addition, MCO § 105-43-2 prohibits the transfer of “dangerous weapons” to anyone under 18 years of age, and prohibits the transfer of “handguns” to anyone under 21 years of age. Clearly, the ordinance regulates the “sale” or “transfer” of “firearm[s],” and therefore, must not regulate in this area more stringently than state law.

Section 948.60(2)(b), of the Wisconsin Statutes provides: “Except as provided in par. (c), any person who intentionally sells, loans or gives a dangerous weapon to a person under 18 years of age is guilty of a Class I felony.” Paragraph (c) provides: “Whoever violates par. (b) is guilty of a Class H felony if the person under 18 years of age under par. (b) discharges the firearm and the discharge causes death to himself, herself or another.” Exceptions to the prohibitions contained in Wis. Stat. § 948.60(3) provide:

This section does not apply to an adult who[:] transfers a dangerous weapon to a person under 18 years of age for use only in target practice under the adult’s supervision or in a course of instruction in the traditional and proper use of the dangerous weapon under the adult’s supervision[;...] is a member of the armed forces or national guard and who transfers a dangerous weapon to a person under 18 years of age in the line of duty[;...or] transfers a firearm to a person under 18 years of age if the person under 18 years of age is not in compliance with ss. 29.304 and 29.593 or to an adult who is in violation of s. 941.28.”

State law does not prohibit the transfer of handguns to those under 21 years of age. Therefore, MCO § 105-43-2 regulates firearms more strictly than state law, and could be amended to eliminate the prohibition relating to handguns, and to include the exceptions in Wis. Stat. 948.60(3), with respect to firearms, (the ordinance may remain unchanged to the extent it regulates “dangerous weapons” that are not “firearms”).

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Subsection 4 regulates the “sale” or “transfer” of “firearm[s],” and in so doing, the ordinance references Wis. Stat. § 175.35. However, the ordinance applies more broadly than the statute, with the former imposing the requirement to contact the DOJ prior to every firearm transfer, whereas the statute only applies to handgun transfers. Wis. Stat. § 175.35(2). Therefore, MCO § 105-43-4 regulates firearms more stringently than state law, and may be amended so that it only applies to the transfer of handguns.

In addition, MCO § 105-43-6-b includes several prohibitions implicating the “use” of “firearm[s].” Thus, these provisions may be no more stringent than state law. We could find no state law regarding the “destr[uction of] marks on any firearm,” or the “remov[al of] the serial numbers from any weapon.” Thus, this provision could be deleted. State law, however, does provide: “No person may sell or offer to sell, transport, purchase, possess or go armed with a short-barreled shotgun or short-barreled rifle.” A short-barreled rifle and a short-barreled shotgun are defined as: “[A] rifle [or shotgun] having one or more barrels having a length of less than 16 inches [or 18 inches in the case of a shotgun] measured from closed breech or bolt face to muzzle or a rifle [or shotgun] having an overall length of less than 26 inches.” Wis. Stats. § 941.28(1)(b) and (c). The ordinance regarding the shortening of rifles and shotguns appears narrower than the statute, and therefore need not be amended.

Finally, subsection 7 regulates the “sale” or “transfer” of “firearm[s],” and thus may not be more stringent than state law. We could find no statute attempting to regulate the manner in which firearms are displayed for sale. Therefore, subsection 7 could be amended so that its provisions do not relate to firearms, (the restrictions may be retained with respect to “dangerous weapons” that are not “firearms”).

MCO § 105-43.2. Waiting Period Required for Transfer of Handguns. This ordinance provides: “No dangerous weapon dealer shall transfer possession of any handgun to any person other than a dealer for 7 days following application for sale or transfer of such handgun.”

Analysis. Clearly, this provision regulates the “sale” and “purchase” of “firearm[s],” and therefore, must not regulate more stringently than state law.

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Section 66.0409(4)(am) would have allowed the City to enforce this ordinance only until November 30, 1998. State law currently provides a “waiting period” of 48 hours to purchase a handgun, (with some extensions), in connection with the requirement that background checks be performed. Wis. Stat. § 175.35(2)(d). This ordinance is therefore more stringent than state law and may be amended to provide a waiting period of 48 hours, consistent with state law.

MCO § 105-122. Seized Firearms or Ammunition, etc. This ordinance relates to the disposition of abandoned or unclaimed property. Section 105-122-1-a, relating to dangerous unclaimed or abandoned materials, provides:

The chief of police may, by any lawful means, safely dispose of abandoned or unclaimed flammable, explosive or incendiary substances, materials or devices in his custody posing a danger to life or property in their storage, transportation or use immediately after taking possession of such substances, materials or devices.

Further, MCO § 105-122-1-b, relating to unclaimed and abandoned firearms and ammunition, provides, in relevant part:

The chief of police may dispose of firearms or ammunition in the custody of the chief of police which have been abandoned or remain unclaimed for a period of 12 months after the taking of possession of such property by the chief of police, by return to the rightful owner, destruction or transfer to the state crime laboratory under s. 165.75, Wis. Stats., the division of law enforcement services of the Department of Justice, the Federal Bureau of Investigation or the Alcohol, Tobacco and Firearms Bureau of the U.S. Department of the Treasury.

With respect to seized firearms and ammunition, MCO § 105-122-2 provides, in relevant part:

a. ...If firearms or ammunition seized by the chief of police are not required for evidence or further investigation but pose a danger to life or property in their storage, transportation or use or constitute

contraband, the chief of police may safely dispose of such firearms or ammunition by any lawful means.

b. ...If firearms or ammunition seized by the chief of police are not required for evidence or further investigation or do not appear to be or are not reported stolen, and have not been disposed of pursuant to court order at the completion of a criminal action or proceeding or in accordance with par. a, and the rightful owner has not requested their return within 12 months after the taking of possession of such firearms or ammunition by the chief of police, such firearms or ammunition may be shipped by the chief of police to the state crime laboratory for disposition under s. 968.20(3)(a), Wis. Stats.

c. ...If firearms or ammunition seized by the chief of police appear to be or are reported stolen but are not required for evidence or further investigation and have not been disposed of pursuant to court order at the completion of a criminal action or proceeding or in accordance with par. a, and the rightful owner has not requested their return within 12 months after the taking of possession of such firearms or ammunition by the chief of police, the chief of police may ship such firearms or ammunition to the state crime laboratory for disposition under s. 968.20(3)(a), Wis. Stats., after the chief of police shall have made a reasonable effort to notify the rightful owner, and the rightful owner shall not have requested their return within 30 days following receipt of such notification. If after a reasonable effort the chief of police is unable to notify the rightful owner, the chief of police may ship such firearms or ammunition to the state crime laboratory for disposition under s. 968.20(3)(a), Wis. Stats., provided not less than 15 months shall have elapsed since the taking of possession of such firearms or ammunition by the chief of police.

Analysis. MCO § 105-122 regulates the *disposal* of firearms and ammunition, subjects which do not appear to be contemplated by § 66.0409. Moreover, the provisions of MCO 105-122 appear to be consistent with state law on the subject of disposal of abandoned and seized weapons. Wis. Stats. §§ 66.0139 and 968.20(3). Therefore, it does not appear any amendments to MCO 105-122 are called for.

MCO § 118-80. Boat Regulations, Milwaukee Harbor. Subsection 4 of this ordinance provides: “No person shall fire or discharge or permit to be fired or discharged any spear gun within the limits of the city.”

Analysis. A “spear gun” is not defined in the ordinance or in the statutes. Almost all spear guns appear to be powered by elastic or pneumatic means, rather than “by force of gunpowder.” Wis. Stat. § 167.31(1)(c). Therefore, MCO § 118-80-4 does not appear to be affected by Wis. Stat. § 66.0409. However, it should be noted that a very few spear guns are powered by gunpowder and that state law, which authorizes the spearing of some fish in Lake Michigan and its tributaries, defines “spearing,” in part, as fishing with a “spear gun[.]” WIS. ADMIN. CODE §§ NR 20.03(38), 20.09(1), and 20.20(73)(L). Therefore, it is possible MCO § 118-80-4 is unenforceable in very limited circumstances.

MCO § 207-3. Explosives. Section 207-3 requires permits for the transport, storage, sale, delivery, use, and possession of explosives. “Explosive” is defined in MCO § 207-3-1-c:

Explosive. Shall mean and include any chemical compound or mechanical mixture, commonly used or intended for the purpose of producing an explosion that contains any oxidizing and combustible units or other ingredients in such proportions, quantities, or packing that an ignition by fire, by friction, by concussion, by percussion, or by detonation of any parts of the compound or mixture may cause a sudden generation of highly heated gases, so that the resultant gaseous pressures are capable of producing destructive effects on contiguous objects or of destroying life or limb.

A “magazine” is defined as “[a]ny building, structure, or receptacle used for the storage of explosives.” MCO § 207-3-1-d. Finally, “primer” is defined as “[a] capped fuse, electric exploder, or other source of ignition inserted in a cartridge of explosive.” This ordinance contains various regulations regarding the transport, storage, sale, delivery, use, and possession of explosives in general, as well as specific regulations regarding the sale and storage of gunpowder and primer.

With respect to explosives generally, subsection 2 of the ordinance regulates the issuance of permits and provides, for instance, that permits for the use of explosives may be limited to 25 pounds; that permits for use or storage must be kept on premises; and that a satisfactory certificate of insurance must be furnished before a permit will issue. Subsection 3 provides that a permit may be revoked by the Commissioner of City Development for failure to comply with the provisions of this ordinance. Subsection 4 provides that any conveyance of explosives "by means of a boat, vessel, railroad car, wagon, automobile, or other conveyance" through the City must first be reported to the Commissioner, and that a permit is required if the conveyance will exceed five hours. Further, subsection 5 regulates the vehicles used to convey explosives, requiring, for instance: That such vehicles "shall not exceed 25 miles per hour;" that such conveyances shall take place between 12:00 p.m. and 6:00 a.m.; and that "[e]xplosives shall not be transported in any bus or in any form of trailer...." Subsection 6 regulates the drivers conveying explosives and provides, for instance, that such persons are not permitted to "smoke in or upon such vehicle...." Section 207-3-7 provides:

REPORTS. Any person storing explosives for blasting, sale or for any other purpose or use shall make a monthly report to the commissioner on forms furnished for such purpose, stating the amount and kind of explosives in storage and the location of the magazine, or the exact location of such storage in any building or magazine.

Subsections 8, 9, and 10 establish various specifications for explosives magazines. Subsection 11 prohibits the manufacture of "electric fuses, safety fuses, blasting caps, or explosives within the City." Finally, subsections 13, 14, 15, 16, and 17 generally regulate blasting.

Specifically with respect to gunpowder and primer, MCO § 207-3-12 provides:

STORAGE AND SALE OF GUNPOWDER. a-1. Persons having a permit may store for sale on their premises a total quantity not exceeding in all 25 pounds of gunpowder and black powder. Such powder shall be kept in closed metal canisters, placed in a separate magazine constructed of lumber not less than 2 inches in thickness

(nominal) and covered on the outside with not less than No. 26 U.S. gage sheet metal and equipped with a hinged lid and lock, and mounted on wheels or skids at least 2 inches from the floor. The magazine shall be plainly marked EXPLOSIVES in 3 inch letters and located within a building on the floor nearest the ground level, and within 10 feet from an outside entrance.

a-2. Except for single-family residences, the storage of gunpowder is prohibited in all other buildings occupied for residential purposes.

b. Persons having a permit may store for sale on their premises a total quantity not exceeding in all 300 pounds of modern smokeless powder, generally classified as propellant powder or sometimes as flammable solids, and including double base powder, for ammunition loading, in original containers in a locked cabinet painted red and labeled SMOKELESS POWDER STORAGE in letters at least 4 inches high, and located within a building on the floor nearest the ground level and within 10 feet from an outside entrance.

c. The commissioner may at his discretion permit a storage arrangement which is not strictly in compliance with this section. Such modifications shall vary only a reasonable minimum from the regulations herein established, but shall comply with the spirit and intent. Requests for such modifications or variations and the action taken thereon shall be in writing.

In addition, MCO § 207-3-10 provides, in part:

Except as otherwise regulated by this section, various types of explosives shall be stored separately in approved magazines as follows:

....

c. No person shall place, keep, or store black powder, blasting powder, or smokeless powder in a magazine containing any other explosive.

d. No person shall place, keep, or store blasting caps, detonators, electric fuses, cordeau fuses or any other type of primer in a magazine containing other explosives.

e. No person shall prepare a primer in a magazine containing any explosives, or within a radius of 50 feet of such magazine, nor prepare more primers than necessary for immediate use....

Analysis. Recall that § 66.0409 also implicates local laws relating to the “keeping” of “ammunition and reloader components.” “Reloader components” is not a term defined by state law, but is commonly used to encompass ammunition components: cartridge cases, bullets, primers, and propellants, (gun powder in firearms). Based on the definitions contained in MCO 207-3, it appears Chapter 207 regulates “reloader components,” among other substances, and must therefore be no more stringent than state law in the regulation of the covered materials. The City has also incorporated the provisions of Chapter Comm 7 of the Wisconsin Administrative Code, unless otherwise provided in Chapter 207). MCO § 207-01. Rather than outline substantive requirements, Chapter Comm 7 primarily incorporates the National Fire Prevention Association’s Explosive Materials Code by reference. WIS. ADMIN. CODE § Comm 7.21. The NFPA publication is available for purchase from the Association and a copy is also on file with the State Department of Commerce and Legislative Reference Bureau. Because the provisions of the ordinance and presumably the NFPA Code, are highly technical, we suggest that if amendments to Chapter 207 are desired, you consult with the DCD and the State Department of Commerce.

Zoning Code. Under the Zoning Code, the manufacture of explosives is only permitted as a special use in districts zoned Industrial-Heavy (IH). MCO §§ 295-201-363-d, 295-203-13-c-4, 295-503-1, 295-603-1, 295-801-4, and 295-803-1. In addition, gun shops are regulated as retail establishments which are either a prohibited or limited use in residential districts, a limited use in commercial districts, or a permitted or limited use in industrial districts. MCO §§ 295-201-505, 295-503-1, 295-603-1, and 295-803-1. Finally, home occupations are regulated as accessory uses in all residential dwellings. MCO §§ 295-201-279, 295-503-3-c, 295-603-4-c, and 295-803-4-c.

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Analysis. As we have previously explained, certain explosives may fall within the ambit of § 66.0409. However, § 66.0409 does not appear to apply to the *manufacture* of “ammunition and reloader components.” Therefore, we believe the zoning provisions relating to the manufacture of explosives need not be altered.

A more difficult question is presented by the zoning regulations pertaining to gun shops, or to home occupations, (which could conceivably implicate firearms). While these zoning ordinances potentially implicate the “sale” of “firearm[s],” § 66.0409(2) does not expressly appear to ban local ordinances relating to the *zoning* of firearm-related businesses. However, we note that it could be argued, based on the exception for the zoning of sport shooting ranges contained in §66.0409(4)(c), that the state legislature intended only to exempt that type of zoning regulation and no other zoning regulations. Despite this, we believe we can continue to defend the zoning ordinances relating to gun shops and other home occupations involving firearms in good faith.

MCO § 312-13. Auxiliary Police Service. Subsection 7 of this ordinance provides: “No volunteer auxiliary policeman shall, while on duty or in any training exercise, carry or use any weapon or firearm.”

Analysis. This ordinance clearly appears to implicate the “use,” “keeping,” and “bearing” of a “firearm” and therefore may not regulate in this area more stringently than state law. While state law prohibits the carrying of a concealed weapon, presumably an auxiliary officer would not plan on concealing a firearm. Wis. Stat. § 941.23. We could find no state law specifically relating to the carrying of weapons by auxiliary police. Therefore, it appears that MCO § 312-13 could be amended to eliminate the prohibition with respect to firearms. The Chief of Police could continue this as a policy by departmental regulation, (as departmental regulations are not implicated by § 66.0409), however, we are not empowered to enforce an ordinance on this subject in light of Wis. Stat. § 66.0409.

MCO § 320-27. Safety Commission. This ordinance creates a nine-member safety commission that has “the duty...to investigate, advise and report to the mayor, common council, police department and commissioner of public works and other city officials concerning the best methods of providing for the safety and

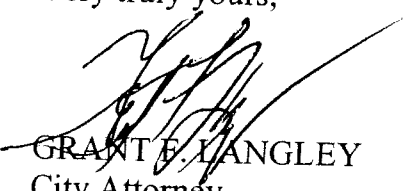
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convenience of the public in matters of safety and to give the greatest possible publicity as to safety precautions," including on matters of "firearm safety." MCO § 320-27-3-a-1.


Analysis. We can find no prohibition in § 66.0409 relating to the *investigation, advising, or reporting* on matters involving firearms, and therefore conclude that this ordinance need not be amended.

If you have any questions about the foregoing, please do not hesitate to ask.

Very truly yours,



GRANT E. LANGLEY
City Attorney



KATHRYN Z. BLOCK
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KZB:kzb

c: Barry Zalben, LRB Manager
1055-2005-3511:143466

Municipal Authority to Regulate Firearms

by Curt Witynski
Legal Counsel

As most local officials are aware, last November the state legislature adopted a bill preempting municipal handgun ordinances. The bill, which became 1995 Wisconsin Act 72, was signed by the Governor on November 16 and took effect on November 18. The League has received a number of calls from municipal officials with questions concerning what effect Act 72 might have on their ordinances regulating firearms.

This month's comment reviews Act 72, discusses what powers municipalities currently have to regulate firearms, and summarizes state laws regulating firearms.

1995 Wisconsin Act 72

Act 72 created sec. 66.092, Stats., which prohibits, with certain exceptions, any city, village, town or county from enacting an ordinance or adopting a resolution that regulates the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration or taxation of any firearm or part of a firearm, including ammunition and reloader components, unless the ordinance or resolution is the same as or similar to, and no more stringent than, a state statute.¹ "Firearm" is defined to mean "...a weapon that acts by force of gunpowder."²

*Endnotes appear on page 19

As a result of this prohibition, municipalities may adopt or continue to enforce ordinances regulating, among other things, purchasing, owning, selling, transferring, bearing and using a firearm only if the ordinance has a statutory counterpart. All existing municipal ordinances which attempt to regulate firearms differently or more stringently than state law are invalid and unenforceable.³ State laws regulating firearms are summarized below.

Act 72 recognizes several exceptions to the general restriction it imposes on municipal ordinances regulating firearms. These exceptions were added as amendments to the bill when it was being considered by the legislature. The exceptions to the general prohibition against adopting firearm ordinances inconsistent with state law are as follows:

1. A municipality is not prohibited from enacting an ordinance or adopting a resolution that restricts the discharge of a firearm.⁴ Many municipalities have ordinances in place prohibiting the discharge of firearms within their boundaries. Such ordinances remain valid under the Act.
2. A municipality is not prohibited from enacting and enforcing a zoning ordinance that regulates the new construction of a "sport shooting range" or when the expansion of an existing "sport shooting range" would impact public health and safety. "Sport shooting range" is defined to mean "...an

area designed and operated for the practice of weapons used in hunting, skeet shooting and similar sport shooting."⁵

This language is troubling because it creates an exception for the adoption of zoning ordinances regulating the location and expansion of new or existing sport shooting ranges. This implies that other zoning ordinances, such as those regulating the location of gun shops, for example, are prohibited by Act 72. However, Act 72 does not appear on its face to preempt a municipality's zoning powers. Nowhere in the Act is there a reference to sec. 62.23(7), Stats., the municipal zoning enabling law. It's unclear to me why the legislature felt this exception was necessary. Nevertheless, the exception creates ambiguity regarding the application of municipal zoning ordinances to businesses that sell guns.

Indeed, Wisconsin Legislative Council staff attorney Shaun Haag has concluded in a memorandum on this issue to Senator Alberta Darling, dated November 29, 1995, that Act 72 invalidates any zoning ordinance that has the effect of totally banning gun shops. He believes that the exception allowing the adoption of zoning ordinances regulating the location and expansion of new or existing sport shooting ranges shows that the legislature intended the general prohibition in Act 72 to apply to zoning ordinances.

(Continued on next page)

Firearms

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However, he also states that while a total ban on the sale of firearms is prohibited under Act 72, municipalities "may continue to use their zoning authority to reasonably regulate the building structure and location of gun shops in the same manner as they regulate other retail businesses." Thus, he concludes, "zoning ordinances that exclude retail businesses from certain areas of the community, such as residential areas, arguably continue to be valid, despite the fact that such an ordinance indirectly affects the location of a gun shop (and, therefore, regulates the place of sale)." A complete copy of attorney Haas' memorandum can be obtained by calling the League office.

3. Municipalities which had an ordinance requiring a waiting period of

not more than seven days for the purchase of a handgun in effect on the date Act 72 took effect, may enforce such an ordinance until November 30, 1998. This exception was designed to allow the City of Milwaukee to continue to enforce its waiting period ordinance. The City of Madison took advantage of this exception by adopting its own 7-day waiting period ordinance just before Act 72 took effect on November 18, 1995.

Wisconsin Laws Regulating Firearms

As a result of Act 72, municipalities are limited to adopting and enforcing ordinances regulating firearms which are the same as or similar to, and no more stringent than, state law. The question which naturally arises is in what ways does the state currently regulate firearms. Following is a brief description of those state statutes regulating firearms which municipalities might be interested in adopting locally. Bear in mind that the list is not compre-

hensive. For example, it does not include the various firearm regulations related to hunting in this state.

Wisconsin statutes regulating firearms can be categorized as follows: (1) restrictions on the possession of certain types of firearms, (2) restrictions on the possession of firearms by certain persons, and (3) prohibitions on the improper or unsafe possession or use of firearms.

I. Restrictions on the Possession of Certain Types of Firearms

A. Automatic and Short-Barreled Firearms

State law generally prohibits the sale, possession, use or transportation of machine guns or other fully automatic firearms and of short-barreled shotguns or short-barreled rifles.⁶ Also, the conversion of a firearm to a fully automatic firearm is generally prohibited.

There are exceptions to the prohibition on machine guns and other fully automatic firearms and short-barreled

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firearms, which I will not take the time to list here. However, any ordinances with similar prohibitions would have to provide for the same exceptions or risk being found invalid for being more stringent than state law.

B. Silencers

The sale, delivery and possession of firearm silencers is generally prohibited under state law.⁷ Again, there are certain exceptions to this prohibition which are set forth in the statute.

II. Restrictions on Possession of Firearms by Certain Persons

A. Possession by Felons, Serious Juvenile Offenders and Dangerous Persons Involuntarily Committed

1. It is generally unlawful under state law for a person to be in possession of a firearm if:

(a) The person has been convicted of a felony in Wisconsin or another state.

(b) The person has been found not guilty of a felony by reason of mental illness in Wisconsin or another state.

(c) The person has been adjudicated delinquent for an act on or after April 21, 1994 that if committed by an adult in this state would be a felony.

(d) The person has been involuntarily committed for treatment for mental illness, drug dependency or developmental disability and the court has issued an order prohibiting the person from possessing a firearm.⁸

2. Criminal History Background Check for Handgun Purchases

In an effort to prevent the sale of handguns to persons ineligible to possess firearms because of a prior felony conviction, delinquency adjudication or involuntary commitment, Wisconsin law prohibits a federally-licensed firearms dealer from transferring a handgun to a purchaser until the dealer

requests the department of justice to conduct a criminal history and involuntary commitment record search pertaining to the purchaser and 48 hours have elapsed since the request was made.⁹

B. Possession by Children and Furnishing to Children

1. Possession of Dangerous Weapons by Children

Possession of or going armed with dangerous weapons by children is generally prohibited under Wisconsin law.¹⁰ "Dangerous weapon" means, among other things, "any firearm, loaded or unloaded."¹¹ There are several exceptions to the general prohibition against a child possessing or going armed with a firearm which mainly relate to hunting or target practice.¹²

It is unlawful, under circumstances not relating to the hunting exceptions mentioned above, for a person to intentionally sell, loan or give a firearm to a child.¹³

2. Safe Storage of Firearms

It is unlawful for a person to recklessly store or leave a loaded firearm within easy access of a child (any person under the age of 14 years). Persons who recklessly store or leave a loaded firearm within easy access of a child are guilty of a Class A misdemeanor if:

(a) a child obtains the firearm without the permission of the child's parent or guardian; and (b) the child discharges the firearm and the discharge causes bodily harm or death to another person. If a child obtains a firearm under the above circumstances and the child possesses or exhibits the firearm in a public place, the adult is guilty of a Class C misdemeanor.¹⁴

The criminal penalties for reckless storage of a loaded firearm do not apply under certain circumstances spelled out in the statutes.¹⁵

3. Sale and Distribution of Facsimile Firearms

The sale or distribution of facsimile or "look-alike" firearms is generally prohibited under state law.¹⁶ The prohibition on the sale and distribution of look-alike firearms does not apply to a look-alike firearm that complies with the marking (generally, a blaze-orange plug inserted in the barrel or other authorized marking) or waiver requirements of federal law.

4. Restrictions on the Use of Facsimile Firearms

Wisconsin law provides various penalties for persons who use a toy or fake firearm for unlawful purposes

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Firearms

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such as committing a robbery.¹⁷ In addition, a person is prohibited from carrying or displaying a "facsimile firearm in a manner that could reasonably be expected to alarm, intimidate, threaten or terrify another person."¹⁸

III. Improper or Unsafe Use of Firearms

A. Endangering Safety by Use of a Firearm

1. General Prohibitions

The following are prohibited under Wisconsin law:¹⁹

a. Endangering another's safety by the negligent operation or handling of a firearm.

b. Operating or going armed with a firearm while under the influence of an intoxicant.

c. Intentionally pointing a firearm at or toward another.

d. While on the lands of another, discharging a firearm within 100 yards of any building devoted to human occupancy that is situated on and attached to lands of another without the express permission of the owner or occupant of the building.

e. Intentionally discharging a firearm into a vehicle or building under circumstances in which the person should realize there might be a human being present in the vehicle or building.

f. Setting a spring gun (presumably, a trap involving the use of a dangerous weapon, including a firearm.)

2. Discharging a Firearm Near a Public Park

The statutes prohibit the discharge of a missile from a firearm or other weapon within 40 rods of any public park, square or enclosure owned or controlled by any municipality when such park, square or enclosure is wholly situated without the limits of such municipality.²⁰

3. Discharging a Firearm at a Train

State law prohibits intentionally shooting a firearm at any portion of a railroad train.²¹

4. Discharging a Firearm from a Vehicle

It is unlawful under state law to intentionally discharge a firearm from a vehicle while on a highway, which includes all public ways and thoroughfares and bridges, or from a vehicle on a parking lot open to the public under any of the following circumstances:

a. The person discharges the firearm at or toward another.

b. The person discharges the firearm at or toward any building or other vehicle.²²

B. Possession of a Handgun with Armor Piercing Bullets

Possession or use of a handgun during the commission of certain crimes is considered a Class E felony if the hand-

gun is loaded with an armor-piercing bullet or the person possesses an armor-piercing bullet capable of being fired from a handgun.²³

C. Carrying a Concealed Firearm

State law prohibits persons, other than law enforcement officers, from going armed with a concealed firearm.²⁴

D. Carrying a Firearm in a Public Building

State law prohibits, with certain exceptions relating to peace officers and military personnel, persons from going armed with a firearm in any building owned or leased by the state or any political subdivision of the state.²⁵

E. Carrying a Handgun in Taverns

State law prohibits persons, with certain exceptions, from intentionally going armed with a handgun on any premises licensed to sell alcohol beverages for consumption on the premises.²⁶

F. Possession of a Firearm in a School Zone

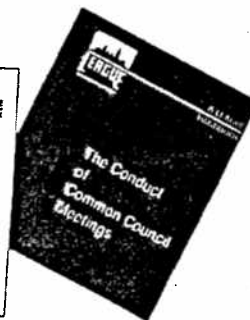
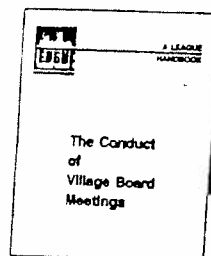
Under state law, a person may not knowingly possess, discharge or attempt to discharge a firearm at a place the individual knows is a school zone.²⁷ "School zone" means in or on the grounds of a school or within 1,000 feet from the grounds of a school.

G. Safe Use and Transportation of Firearms

Under state law, the transport, pos-

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session or placement of any firearm in a motor vehicle, motorboat or aircraft is generally prohibited, unless the firearm is unloaded and encased. The loading or discharging of a firearm in or from a vehicle or aircraft and the discharging of a firearm from or across a highway or within 50 feet of the center of a roadway are also prohibited.²⁸

What Municipalities Can and Can't Do

Under Act 72, municipalities are prohibited from enacting an ordinance or continuing to enforce an existing ordinance that regulates, among other things, the possession, use, bearing and transportation of any firearm, unless the ordinance is the same as or similar to, and no more stringent than, the above described state statutes. Municipalities are specifically authorized to adopt ordinances prohibiting conduct which is the same as or similar to that prohibited in the criminal statutes described above.²⁹

~~One activity that state law does not prohibit and which municipalities, therefore, may not prohibit is carrying an unconcealed, loaded firearm in a public place. While it is unlawful to carry a concealed firearm and it is unlawful to enter any state or municipal building carrying a firearm, no state law prohibits, in general, carrying an unconcealed, loaded firearm in a public place.~~

Many municipalities in this state had ordinances in place prior to the enactment of Act 72 restricting the carrying of a firearm, unless unloaded and encased. These ordinances are no longer valid.

Some legislators, when presented with the above information on the effect of Act 72, argued that municipalities could apply the state disorderly conduct statute, or a local ordinance based on that statute, against a person carrying an unconcealed, loaded firearm in a public place within the municipality. However, as a Wisconsin Legislative Council Staff memorandum on this issue concludes, enforcement of the disorderly conduct statute, or an ordinance based on that statute, against a person carrying an unconcealed, loaded firearm in a public place within a city or village may or may not be proper, depending on the nature and circumstances of the alleged disorderly conduct.³⁰

In other words, carrying an unconcealed, loaded firearm in a public place does not automatically constitute a violation of the disorderly conduct statute or an ordinance based on that statute. Thus, contrary to the suggestion of some, the disorderly conduct statute or an ordinance based on that statute is not an adequate substitute for a specific ordinance prohibiting the carrying of an unconcealed, loaded firearm in public. The latter option no longer exists, however, as a result of Act 72.

Endnotes

- ¹ Sec. 66.092(2), Stats.
- ² Sec. 66.092(1)(a), Stats.
- ³ Sec. 66.092(4)(b), Stats.
- ⁴ Sec. 66.092(3)(b), Stats.
- ⁵ This summary of state statutes regulating firearms was taken from Information Memorandum 94-13, *Wisconsin Laws Regulating Firearms*, dated May 19, 1994. The memorandum was prepared by Shaun Haas, Senior Staff Attorney for the Wisconsin Legislative Council. Copies of the Memorandum can be obtained by calling the League:
- ⁶ Secs. 941.26 to 941.28, Stats.
- ⁷ Sec. 941.298, Stats.
- ⁸ Sec. 941.29, Stats.
- ⁹ Sec. 175.35, Stats.
- ¹⁰ Sec. 948.60, Stats.
- ¹¹ Sec. 948.60(1), Stats.
- ¹² Sec. 948.60(3), Stats.
- ¹³ Sec. 948.60(2)(b), Stats.
- ¹⁴ Sec. 948.55, Stats.
- ¹⁵ Sec. 948.55(4), Stats.
- ¹⁶ Sec. 941.297, Stats.
- ¹⁷ See, for example, secs. 943.32(2), Stats., and 946.44(1m), Stats.
- ¹⁸ Sec. 941.296(2), Stats.
- ¹⁹ Sec. 941.20, Stats.
- ²⁰ Sec. 167.30, Stats.
- ²¹ Sec. 943.07(2), Stats.
- ²² Sec. 941.20(3), Stats.
- ²³ Sec. 941.296, Stats.
- ²⁴ Sec. 941.23, Stats.
- ²⁵ Sec. 941.235, Stats.
- ²⁶ Sec. 941.237, Stats.
- ²⁷ Sec. 948.605(2), Stats.
- ²⁸ Sec. 167.31, Stats.
- ²⁹ Sec. 66.051(1)(c), Stats.
- ³⁰ Wisconsin Legislative Council Staff Memorandum prepared by staff attorney Shaun Haas, dated November 28, 1995. Copies of the memo may be obtained by calling the League.
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