

July 17, 2009

To: City Council
Cc: P. VandenBosch, R. Somerlott, S. Smith, M. Manning
From: Brian Dissette
Re: City Parks Firearm Prohibition

At the July 6th City Council meeting, comments were voiced by members of the public regarding the city's ability to prohibit firearms within city parks. Similar questions have been submitted to the City Council via email over the past few months. On Monday, July 20th at the City Council workshop session, Attorney Scott G. Smith will be present to offer guidance to the City Council on this issue. Prior to the upcoming meeting, I am forwarding several documents to the City Council, which addresses the question of whether the City of South Haven can regulate firearms within the city's parks.

Based on the initial review of the existing code, it appears that the City Council has several options available (e.g., amending the code to include statements which reference state law, striking the code to allow firearms, or seeking an outside review of code.) At this time staff is recommending that the adopted code be reviewed by the Attorney General's office for compliance with state law, prior to any further action.

More information will be presented to the City Council at the July 20th workshop session. Thank you for your time and attention. Please let me know if you have any questions and/or concerns.

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MEMORANDUM

TO: BRIAN DISSETTE, SOUTH HAVEN CITY MANAGER; ROD SOMER-
LOTT, SOUTH HAVEN CHIEF OF POLICE

FROM: MARK A. MANNING, ATTORNEY AT LAW

DATE: MAY 14, 2009

SUBJECT: ORDINANCE NUMBER 58-83(3)

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LEGAL OPINION SH CITY ORDINANCE 58-83(3)
MCLA 123.1101, ET SEQ (FIREARMS AND AMMUNITION)
MCLA 28.421, et seq; 28.425(c)
MCORGO V. CITY OF FERNDALE, 256 MICH APP 401 (2003)
MCLA 123.1101, et seq,
MICHIGAN HOUSE BILLS 4334 AND 4348 OF 2009
CONCEALED CARRY
OPEN CARRY, PLAIN SIGHT.

SUMMARY: As applied, a person carrying a concealed pistol and lawfully holding a concealed carry license would be allowed to carry a pistol into the park and would not be subject to prosecution under the Ordinance. A person, whether issued a concealed carry license or not, carrying a firearm, other than a pistol, or brandishing a pistol or discharging a pistol in violation of the law; open carrying or plain sight carrying a firearm, or a person not licensed to carry a concealed pistol, or otherwise carrying a concealed pistol in violation of the law could be prosecuted under the Ordinance.

You have requested that I review South Haven City Ordinance Section 58-83(3) and provide a legal opinion as its validity in relation to an individual licensed to carry or use a concealed weapon in a public park. At the onset, it should be understood due to the mish-mash of laws in Michigan relative to the topic of carrying of firearms, particularly pistols, this opinion is subject to very “fine” legal distinctions. For example the reader must keep in mind the differing factual and legal concepts between an ability to “carry” which is different than “use”, “discharge” or “brandishing” a firearm. In addition the law makes fine distinctions between a pistol and a weapon or firearm; carrying a pistol “concealed” and carrying a pistol “open” or in “plain sight”. It is also important to understand at the onset, the meaning of a “concealed weapon or concealed pistol” in the law. “Concealed” is defined as, “when a weapon is “not discernable on the person by casual observing in the ordinary associations of life.” *People v. Reynolds*, 38 Mich App 159 (1972). Finally it should be noted, the “law” relative to this matter is set forth in a number of different statutes which must be construed in pari materia to determine the validity of this ordinance as it relates to both a right to carry and an ability to use, hence some complication in illustrating the reasoning in the opinion. In sum this opinion needs to be read very, very carefully.

Relative to public parks the City of South Haven expressly prohibits the carrying or use of any firearm in a public park. South Haven City Code Section 58-83(3) states:

No person or organization shall do any of the following activities in the park without consent of the City Manager...

(3) **Carry or use any firearm of any description...**

It appears this Ordinance was in effect as early as the 1965. It does not distinguish between firearms generally and pistols specifically. The ordinance does deal with both “carrying” and “use” in a public park.

Pursuant to Article 2 of the United States Constitution and Article 1 Section 6 of the Michigan Constitution a person has a right to keep and bear arms. This right, however, is not absolute and is subject to reasonable regulation.

An individual’s right to carry a concealed dangerous weapon or pistol is restricted in the criminal law by MCLA 750.227 which states:

750.227 Concealed weapons; carrying; penalty.

Sec. 227.

(1) A person shall not carry a dagger, dirk, stiletto, a double-edged nonfolding stabbing instrument of any length, or any other dangerous weapon, except a hunting knife adapted and carried as such, concealed on or about his or her person, or whether concealed or otherwise in any vehicle operated or occupied by the person, except in his or her dwelling house, place of business or on other land possessed by the person.

(2) A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license.

In sum, a person may carry a concealed weapon in his dwelling house, place of business or other land possessed by the person. However, a person issued a concealed carry license, has a

broader authority as to where they may carry a concealed pistol.

The State of Michigan has enacted a “shall issue” concealed carry statute which sets forth the licensing and regulations relative to individuals granted authority to carry a concealed weapon on their person or in the passenger compartment of a motor vehicle beyond the restrictions of their home and property. Relative to the permissible scope of where of an individual licensed may carry a concealed pistol the Act at MCLA 28.425(c) states in part:

MCLA 28.425c License; form; authorized conduct.

Sec. 5c.

(2) Subject to section 5o and except as otherwise provided by law, a license to carry a concealed pistol issued by the county concealed weapon licensing board authorizes the licensee to do all of the following:

(a) Carry a pistol concealed on or about his or her person anywhere in this state.

(b) Carry a pistol in a vehicle, whether concealed or not concealed, anywhere in this state.

MCLA 28.425(o)(a-h) of the Act, sets forth certain enumerated locations as expressly being “prohibited” areas for a licensed individual to carry a concealed pistol, viz:

MCLA 28.425o Premises on which carrying concealed weapon prohibited; “premises” defined;

exceptions to subsection (1); violation; penalties.

Sec. 5o. (1) Subject to subsection (4), an individual licensed under this act to carry a concealed pistol, or who is exempt from licensure under section 12a(1)(f), shall not carry a concealed pistol on the premises of any of the following:

(a) A school or school property except that a parent or legal guardian of a student of the school is not precluded from carrying a concealed pistol while in a vehicle on school property, if he or she is dropping the student off at the school or picking up the child from the school. As used in this section, "school" and "school property" mean those terms as defined in section 237a of the Michigan penal code, 1931 PA 328, MCL 750.237a.

(b) A public or private child care center or day care center, public or private child caring institution, or public or private child placing agency.

(c) A sports arena or stadium.

(d) A bar or tavern licensed under the Michigan liquor control code of 1998, 1998 PA 58, MCL 436.1101 to 436.2303, where the primary source of income of the business is the sale of alcoholic liquor by the glass and consumed on the premises. This subdivision does not apply to an owner or employee of the business. The Michigan liquor control commission shall develop and make available to holders of licenses under the Michigan liquor control code of 1998, 1998 PA 58, MCL 436.1101 to 436.2303, an appropriate sign stating that "This establishment

prohibits patrons from carrying concealed weapons". The owner or operator of an establishment licensed under the Michigan liquor control code of 1998, 1998 PA 58, MCL 436.1101 to 436.2303, may, but is not required to, post the sign developed under this subdivision. A record made available by an establishment licensed under the Michigan liquor control code of 1998, 1998 PA 58, MCL 436.1101 to 436.2303, necessary to enforce this subdivision is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(e) Any property or facility owned or operated by a church, synagogue, mosque, temple, or other place of worship, unless the presiding official or officials of the church, synagogue, mosque, temple, or other place of worship permit the carrying of concealed pistol on that property or facility.

(f) An entertainment facility with a seating capacity of 2,500 or more individuals that the individual knows or should know has a seating capacity of 2,500 or more individuals or that has a sign above each public entrance stating in letters not less than 1-inch high a seating capacity of 2,500 or more individuals.

(g) A hospital.

(h) A dormitory or classroom of a community college, college, or university.

In 1990, the State of Michigan enacted MCLA 123.1101, et seq, relating to Firearms and Ammunition. As relates to a local unit of government, subsection 2 of this statute states:

Sec. 2.

A local unit of government shall not impose special taxation on, enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols or other firearms, ammunition for pistols or other firearms, or components of pistols or other firearms, except as otherwise provided by federal law or a law of this state.

Subsection 3 of the Firearms and Ammunition Act, expressly allows municipalities to regulate the discharge of weapons. The Firearms and Ammunition Act also does not address and appears to keep in tact existing laws relative "use" of the pistol. Finally, the Firearms and Ammunition Act preserves the ability of a municipality to enact and enforce regulations "as provided by federal law or laws of this state".

This impact of the Firearms and Ammunition Act, was addressed by the Michigan Court of Appeals in the case of the case of Michigan Coalition for Responsible Gun Owners v. City of Ferndale. 256 Mich App 401 (2003). At the issue of whether the City of Ferndale could establish certain prohibited areas for concealed carry of a pistol beyond the scope of the enumerated prohibited area set forth in MCLA 28.425(o)(a-h). The Court narrowed its opinion by expressly stating, "...we briefly note, what is *not* at issue here is whether governmental entities in Michigan generally have the power to create gun free zones." The Court held that as relates to a licensed person, the State concealed carry law pre-empted the field and as such the City could

not enact or enforce a prohibition as to concealed carry in a municipal building beyond those not enumerated under the Act.

Relative to exposing a pistol not concealed or in plain sight this conduct is prohibited by the criminal code, at MCLA 750.234e, which states:

Sec. 234e.

(1) Except as provided in subsection (2), a person shall not knowingly brandish a firearm in public.

(2) Subsection (1) does not apply to any of the following:

(a) A peace officer lawfully performing his or her duties as a peace officer.

(b) A person lawfully engaged in hunting.

(c) A person lawfully engaged in target practice.

(d) A person lawfully engaged in the sale, purchase, repair, or transfer of that firearm.

As such, the law does not grant to an individual issued a concealed carry permit to brandish or expose the pistol to the public, except in the necessary self defense for himself and others. Furthermore, despite having been issued a license to carry, the licensee, even though authorized to carry concealed, remains subject to state and local rules, statues and ordinances relative to the use and discharge of the pistol.

State law expressly grants to municipalities the right to enact and enforce ordinances and regulations relative to the management and control of municipal property; this includes the discharge and use of firearms, including pistols, beyond the permissible scope of concealed carry. Because only locations and the ability to carry concealed pistols (and now tasers) are addressed in the concealed carry statute, it is my opinion that municipalities may regulate the firearms, other than pistols, and may regulate "open carry" or "plain sight displays" of firearms, including pistols, in other public areas, including their own property.

Based upon the foregoing, it is my opinion that South Haven City Ordinance 58-83(3) is valid. It encompasses a broader scope than simple regulation of concealed carry of pistols, controlling firearms in general as well as use. As applied, however, to those individuals who possess a valid concealed carry permit and carry the pistol in a concealed manner, they are not subject to prosecution under the Ordinance. As applied to a non-licensed individual violates the lawful scope of their carry license, they are subject to prosecution. Further the City may regulate other firearms and non-concealed carry displays and conduct in public places.

If you have any questions relative to this opinion, please feel free to call.

TO: Mr. Brian Dissette
City Manager
City of South Haven

FROM: Scott G. Smith
Kenneth P. Lane

DATE: July 9, 2009

SUBJECT: Carrying of firearms in City parks and cemeteries

Background

Residents and others have recently contacted the City suggesting that two sections of the City's code of ordinances impose an improper restriction on the carrying and possession of firearms in violation of state law. City ordinance Section 58-83(3) prohibits the carrying or use of any firearm in any City park.¹ City ordinance Section 18-34 prohibits the possession of any firearm in any City cemetery.² Accordingly, the question has become: does state law preempt the City from prohibiting the carrying or possessing of firearms in City parks and cemeteries?

Analysis

With limited exception,³ Michigan law prohibits a local unit of government⁴ from regulating by local ordinance the ownership, registration, purchase, sale, transfer, transportation or possession of pistols or other firearms.⁵ Michigan courts have interpreted this prohibition to mean that only the state has the authority to regulate the possession of firearms.⁶ "Possession" has been defined to include open⁷ and concealed carrying.⁸

Michigan law requires an individual to obtain a license to possess and carry a pistol.⁹ Once the pistol is licensed, an individual may openly¹⁰ carry it anywhere in the state, except in those areas expressly

¹ Code of Ordinances, City of South Haven, Michigan, Section 58-83(3).

² Code of Ordinances, City of South Haven, Michigan, Section 18-34.

³ Exceptions include: 1) prohibiting or regulating conduct with a pistol or other firearm that is a criminal offense under state law; e.g., possession without a license, possession with the intent to commit a criminal act, possession by a minor, or the "brandishing" of a firearm ("brandishing is defined as waving or flourishing a weapon in a menacing manner. *See*, Mich OAG 7101, 2002); 2) prohibiting or regulating the transportation, carrying or possession of pistols or firearms by City employees; and 3) prohibiting the discharge of a pistol or firearm (City Ordinance Section 54-181 prohibits the discharging of firearms within the City). MCL 123.1103, MCL 123.1104.

⁴ A city, village, township or county. MCL 123.1101.

⁵ MCL 123.1102.

⁶ Subject to the exceptions listed above. *See, Michigan Coalition for Responsible Gun Owners v Ferndale*, 256 Mich App 401, 418 (2003).

⁷ "Open carrying" is recognized as within a holster that is in plain view. Mich OAG, No. 7113, 2002.

⁸ *People v Womack*, 2009 Mich App LEXIS 158, citing, *People v Green*, 260 Mich App 392 (2004), Mich OAG, No. 7113, 2002, Mich OAG 7101, 2002.

⁹ MCL 28.442. A "pistol" is defined as a loaded or unloaded firearm that is 30 inches or less in length, or a loaded or unloaded firearm that by its construction and appearance conceals it as a firearm. MCL 28.421(e). A "firearm" is defined as a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air, excluding a rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BB's not exceeding .177 caliber. MCL 28.421(b).

¹⁰ Again, it is important to note that "open carrying" is recognized as within a holster that is in plain view. Mich OAG, No. 7113, 2002.

prohibited by state law.¹¹ Additionally, an individual may obtain a separate license to carry a pistol concealed on their person anywhere in the state, except in those areas expressly prohibited by state law.¹² City parks, cemeteries and buildings are not recognized as prohibited areas.

An individual without a license may not legally possess or carry a pistol.¹³

Conclusion

With limited exception, Michigan law preempts the City from regulating the carrying or possession of pistols and other firearms. Michigan law permits an individual to openly carry a licensed pistol on City property. Additionally, Michigan law permits a licensed individual to carry a pistol concealed on their person on City property. As such, state law does preclude the City from enforcing Ordinance Sections 58-83(3) and 18-34 against individual who have obtained the required license. However, both sections may be enforced against individuals carrying a pistol in a City park or cemetery without the required license. Both sections can be modified to comply with state law by including the phrase “except as otherwise permitted by law”. We would be happy to assist you with the formal amendment of both sections upon your request.

¹¹ MCL 28.442. Prohibited areas are: banks, churches or other houses of worship, courts, theatres, schools and day care centers, sports arenas or stadiums, bars or taverns, and hospitals. MCL 750.234d.

¹² MCL 28.425c(2). Prohibited areas are: schools, day care centers, sports arenas or stadiums, bars or taverns, religious facilities owned or operated by a religious entity, entertainment facilities, hospitals, and college buildings. MCL 28.425o.

¹³ MCL 28.422, MCL 28.422a, MCL 750.227, MCL 750.234d(2)(c).

**CITY COUNCIL
CITY OF SOUTH HAVEN
Van Buren County, Michigan**

Council member _____, supported by Council member _____, moved the adoption of the following ordinance:

ORDINANCE NO. _____

**AN ORDINANCE TO AMEND SECTIONS 18-34 AND 58-83
OF THE CODE OF ORDINANCES OF THE CITY OF
SOUTH HAVEN, MICHIGAN**

The City of South Haven Ordains:

Section 1. Amendment. Section 18-34 of the Code of Ordinances of the City of South Haven, Michigan is amended to read as follows:

Sec. 18-34. Enumeration of forbidden acts.

Within the cemetery no person shall:

- (1) Loiter.
- (2) Litter.
- (3) Use profane language.
- (4) Bring in or consume any alcoholic beverage or controlled substance.
- (5) Peddle or solicit the sale of any commodity unconnected to cemetery usage.
- (6) Place signs or notices.
- (7) Possess firearms except as expressly permitted by law or unless the person is a duly authorized law enforcement officer or a duly authorized military escort for a veteran's funeral memorial service.
- (8) Allow animals to run at large or otherwise beyond a person's control.
- (9) Engage in any play or recreational activity.

Section 2. Amendment. Section 58-83 of the Code of Ordinances of the City of South Haven, Michigan is amended to read as follows:

Sec. 58-83. Prohibited Activities.

Except as otherwise expressly permitted by law, no person or organization shall do any of the following activities in a park without the written consent of the city manager. The person or organization may appeal the city manager's decision to the city council should they feel the need to do so.

- (1) Hold or participate in any parade, drill, exhibition or political or religious meeting.
- (2) Speak publicly or deliver oration, address, speech, sermon or lecture.
- (3) Carry or use any firearm of any description, air rifles or slingshots or discharge any fireworks or explosive devices of any nature.
- (4) Erect any structure.
- (5) Canvass, advertise, solicit, vend or rent any service, merchandise or object of any kind.
- (6) Hold or participate in any public function other than those conducted by the city.

(7) For any gatherings in excess of 500 people, chapter 42 of this Code shall apply.

Section 3. Publication and Effective Date. The City Clerk shall cause to be published a notice of adoption of this ordinance within 15 days of the date of its adoption. This ordinance shall take effect 10 days after its adoption or upon publication of the notice of adoption, whichever occurs first.

YEAS: Council member(s) _____

NAYS: Council member(s) _____

ABSTAIN: Council member(s) _____

ABSENT: Council member(s) _____

CERTIFICATION

As the City Clerk of the City of South Haven, Van Buren County, Michigan, I certify this is a true and complete copy of an ordinance adopted by the South Haven City Council at a regular meeting held on _____, 2009.

Date: _____, 2009

Amanda Morgan, City Clerk

Introduced: _____, 2009

Adopted: _____, 2009

Published: _____, 2009

Effective: _____, 2009