

Andrew J. Meyers  
County Attorney




OFFICE OF THE COUNTY ATTORNEY  
115 S. Andrews Avenue, Suite 423  
Fort Lauderdale, Florida 33301

954-357-7600 · FAX 954-357-7641

**MEMORANDUM**

**TO:** Board of County Commissioners

**FROM:** Tricia D. Brissett, Assistant County Attorney 

**DATE:** March 19, 2018

**RE:** **Potential Board Action Regarding Firearms and Ammunition**  
**Our File: 10002/0001**

On February 27, 2018, the Board of County Commissioners ("Board") directed this Office to analyze limitations on the ability of local governments to regulate firearms and ammunition. The County Attorney asked me to prepare this memorandum, which analyzes the current state of the law including the changes that were made during the 2018 legislative session.

A. State Firearms Preemption and 2018 Legislation

Chapter 790, Florida Statutes ("State Gun Laws"), establishes the state's preemption of the entire field of regulation of firearms, ammunition, and components thereof. § 790.33, Fla. Stat. The State Gun Laws prohibit local governments from enacting any ordinance, rule, or regulation concerning, among other things, the purchase, sale, transfer, possession, storage, or transportation of firearms, ammunition, or components thereof. § 790.33(1), Fla. Stat. Instead, local governments must enforce the State Gun Laws. § 790.33(2)(a), Fla. Stat.

Local governments are directly liable if they violate the State Gun Laws. § 790.33(3)(a), Fla. Stat. Taking action in good faith, or in reliance on advice of counsel, is no defense to potential liability. Moreover, willful violations subject a culpable local government official to civil fines of up to \$5,000, suspension, and possible removal from office. § 790.33(3), Fla. Stat. The local government entity is also subject to liability for damages up to \$100,000 per civil litigant (and there could be numerous plaintiffs) plus each prevailing plaintiff's reasonable costs and attorney's fees. *Id.* The State Gun Laws also prohibit the use of public funds to pay for defense costs (unless otherwise required by applicable law). *Id.*

On March 9, 2018, the Florida Legislature enacted the Marjory Stoneman Douglas High School Public Safety Act, which amended the State Gun Laws to include provisions that prohibit mentally disabled individuals from possessing, purchasing, or owning firearms; to impose a mandatory waiting period for purchase and delivery of firearms until the criminal history records check for the purchaser is completed; to ban the import, transfer, distribution, sale, or possession of bump-fire stocks; and to temporarily prevent high-risk individuals from accessing firearms or ammunition. §§ 790.064, 790.065(2), 790.0655, 790.222, and 790.401, Fla. Stat. (2018). The National Rifle Association has already filed a federal lawsuit to challenge various aspects of the legislation.

B. County Authority to Limit Firearms as a Proprietor and Employer

In its role as a regulator, the County must enforce the State Guns Laws,<sup>1</sup> which prohibit (i) openly carrying a weapon, (ii) carrying a concealed weapon without a state-issued permit, and (iii) concealed carry in certain areas within the County. §§ 790.01, 790.053, and 790.06, Fla. Stat. The County might have more leeway when acting in its proprietary capacity. As proprietor, the County might have the ability to control access to and use of firearms on its own properties. While the court decisions and legislative history related to the State Gun Laws do not explicitly address this regulatory versus proprietary distinction, both federal and state law generally recognize the substantive difference between government acting as regulator and acting as proprietor. *See Enquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008). Therefore, to the extent the State Gun Laws do not prohibit the County from acting in its proprietary capacity, the County could potentially exclude firearms (including guns shows) from County-owned or County-managed properties such as the Convention Center (and, by extension, arguably even in County parks).

As an employer, the County can and does regulate its employees' possession of firearms on the job. *See, e.g., Pelt v. Dep't of Transp.*, 1995 WL 17944992 (Fla. 1st DCA 1995) (holding that an employee with a concealed weapons permit was not allowed to possess or use a firearm during the course of his workday without employer authorization). The one exception is in County parking lots: Section 790.251, Florida Statutes, the Florida guns-at-work statute, requires employers, including government employers, to allow employees to keep firearms in or locked to their private vehicles in the employer's parking lots. § 790.251(4)(b), Fla. Stat.

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<sup>1</sup> An exception to the state preemption for firearms regulation is the local option provision of the Florida Constitution, which allows counties to require a three-to-five day waiting period and criminal history records checks for firearm sales that take place in their respective counties. Art. VIII, § 5(b), Fla. Const.

Currently, pursuant to the County Policy Opposing Workplace Violence, possession, use, or the threat of use of firearms subjects the violating County employee to discipline and potential termination, and employees consent to searches or may be required to remove personal property from the County facility if not subject to search.

C. Declaratory Judgment Action

Because the State Gun Laws' penalty provisions are so harsh, it remains the recommendation of this Office that any attempt to adopt measures that are even arguably in contravention of the State Gun Laws should be preceded by two actions. The first is the adoption of a Board resolution stating the actions the Board would take were it not for concerns over potential personal and taxpayer liability under the State Gun Laws. The second is the filing of a declaratory judgment action asking a court to declare whether the State Gun Laws prohibit the intended actions and otherwise challenging the constitutionality of portions of the State Gun Laws. The lawsuit could raise numerous issues, including the following:

1. The constitutionality of the penalty provisions, in consideration of factors including legislative immunity and First Amendment protections;
2. Certain local government functions being exempt from the state preemption, such as a county acting in its capacity as a proprietor;
3. Whether the County could amend County ordinances to retain the permitted local option of a five-day waiting period for firearms sales but also enforce the 2018 legislation requiring the completion (as opposed to the initiation) of criminal history records checks;
4. Whether the County could regulate "accessories" not included with the initial purchase of the gun (e.g., an aftermarket large capacity magazine), which might not be considered "components" of firearms;
5. Whether a local government can adopt generally applicable zoning ordinances, which are arguably permitted under the exceptions to the State Gun Laws, that impact the ownership, possession, storage, and transportation of firearms, ammunition, and components thereof; and
6. Whether the County could preclude firearms on a year-round basis in certain areas specified as statutory exceptions to permissible concealed weapons, including polling places or school administration buildings.

Many local municipalities, including Weston and Coral Springs, are currently taking steps to initiate a declaratory action. The Broward County municipalities have expressed an interest in coordinating with the County and with other cities on such an action. The County Attorney believes that, if the County wishes to litigate these issues, such coordination would be mutually beneficial.

D. Other Possible Board Action

The County is required to enforce the State Gun Laws. However, the State Gun Laws are not always clear. For instance, the State Gun Laws do not specifically address where concealed weapons permit holders may carry their firearms. Instead, the State Gun Laws enumerate locations and properties where concealed weapons permit holders may not carry firearms. Such areas include Board meetings; career centers; elementary and secondary school facilities and administrative buildings; scholastic, collegiate, and professional athletic events (not related to firearms); portions of establishments licensed to dispense alcohol (primarily devoted to such purpose); courthouses; County jails; and polling places. § 790.06(12)(a), Fla. Stat. (2017).

Currently, the County enforces the State Gun Laws in such areas by posting County signage notifying employees, customers, vendors, and the general public that the state firearms laws will be enforced in County buildings; and through the use of magnetometers outside of the Commission Chambers and Room 430 when the Board is in session. The Board may choose to collaborate with local law enforcement to increase enforcement efforts in these areas.

E. Conclusion

Please let us know if you would like to place an item on an upcoming Board meeting agenda to discuss this issue and provide direction to our Office.

AJM/RDH/TDB/AFB/mm

c: Bertha Henry, County Administrator  
Bob Melton, County Auditor  
Andrew J. Meyers, County Attorney  
Rene D. Harrod, Deputy County Attorney  
Angela F. Benjamin, Senior Assistant County Attorney