

## ATTORNEY GENERAL'S OFFICE OF THE OPINION THAT MUNICIPALITIES AND COUNTIES MAY NOT BAN CONCEALED HANDGUNS

*David J. A. Bargaen, Esq.*  
*Rembolt Ludtke LLP*

**O**n Wednesday, January 14, 2009, the Attorney General's Office, in response to a request for an opinion from Senator Mark Christensen of Imperial, concluded in the face of different state statutes on the matter that municipalities and counties may not ban the carrying of concealed handguns everywhere within their jurisdictions.

Since the passage of the Concealed Handgun Permit Act (the "Act") in 2006, some question has remained in how to harmonize other provisions of state law that permit municipalities of all classes to regulate the carrying of concealed weapons. For instance, Neb. Rev. Stat. § 17-556 provides that cities of the second class and villages "shall have power to regulate, prevent and punish the carrying of concealed weapons." Similar authority is given to cities of the metropolitan, primary, first, and village classes. Those statutes were not changed or repealed with the passage of the Act in 2006.

The Act provides at Neb. Rev. Stat. § 69-2441 (1)(a) that a person who has obtained a permit for a concealed handgun pursuant to the Act and its regulations:

may carry a concealed handgun **anywhere in Nebraska, except** any: Police, sheriff, or Nebraska State Patrol station or office; detention facility, prison, or jail; courtroom or building which contains a courtroom; polling place during a bona fide election; meeting of the governing body of a county, public school district, municipality, or other political subdivision; meeting of the Legislature or a committee of the Legislature; financial institution; professional or semiprofessional athletic event; building, grounds, vehicle, or sponsored activity or athletic event of any public, private, denominational, or parochial school or private or public university, college, or community college; place of worship; hospital, emergency room, or trauma center; political rally or fundraiser; establishment having a license issued under the Nebraska Liquor Control Act that derives over one-half of its total income from the sale of alcoholic liquor; place where the possession or carrying of a firearm is prohibited by state or federal law; **a place or premises where the person, persons, entity, or entities in control of the property or employer in control of the property has prohibited permitholders from carrying concealed handguns into or onto the place or premises; or into or onto any other place or premises where handguns are prohibited by law or rule or regulation.**

### Municipal Law Practice Group

**David J. A. Bargaen**  
[dbargaen@remboltludtke.com](mailto:dbargaen@remboltludtke.com)

**Mark A. Fahleson**  
[mfahleson@remboltludtke.com](mailto:mfahleson@remboltludtke.com)

**Timothy L. Moll**  
[tmoll@remboltludtke.com](mailto:tmoll@remboltludtke.com)

### Rembolt Ludtke LLP Attorneys at Law

#### MAIN OFFICE

**1201 Lincoln Mall, Suite 102**  
**Lincoln, NE 68508**  
**Fax: 402 / 475-5087**  
**402 / 475-5100**

#### BRANCH OFFICES

**125 South 6<sup>th</sup> Street**  
**Seward, NE 68434**  
**Fax: 402 / 643-3969**  
**402 / 643-4770**

**3280 Woodridge Boulevard**  
**Suite 160**  
**Grand Island, NE 68801**  
**308 / 384-6888**

[www.remboltludtke.com](http://www.remboltludtke.com)

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The Attorney General Opinion (the “Opinion”) relies in part on a theory of “preemption” of state law over local ordinances. This theory is discussed at length in *State ex rel. City of Alma v. Furnas County Farms*, 266 Neb. 558 (2003), wherein the authority granted by statute to municipalities to regulate some aspects of environmental quality close to their jurisdictions was analyzed alongside a general authority granted by statute to the state to regulate environmental quality state-wide. In *City of Alma*, the Court used a theory of “preemption” to consider the different statutory authorities and harmonize them where possible, striking down the authority of the City of Alma only in a narrow instance where the local ordinance directly conflicted with state law.

The Opinion construed the language of the Act permitting concealed handguns “anywhere in Nebraska” to mean that the Legislature had set forth the “overall policy” of the state, and thus had “occupied the entire field” of concealed weapon regulation, keeping municipalities from legislating in the area where the effect is to prohibit the carrying of concealed handguns by permitholders everywhere in their jurisdictions. The Opinion also concludes that because the Act and those statutes granting municipalities authority to regulate concealed weapons are in conflict, any ordinances passed pursuant to those pre-existing statutes are not valid. The Opinion concludes that municipalities may not prohibit the carrying of concealed handguns everywhere within their jurisdictions.

The Opinion also rejects the notion that municipalities may regulate concealed handguns under the Act’s exception regarding “any other place or premises where handguns are prohibited by law or rule or regulation.” The Opinion concluded that because the exception does not say “where concealed handguns are prohibited by law,” and the statutes at issue granting municipalities the authority to regulate weapons grant such authority with regard only to concealed weapons, that the exception does not allow municipalities to ban concealed weapons. The Opinion notes that because no statute allows a municipality to ban handguns altogether, this exception in the Act does not apply. The Opinion also states that the phrase “place or premises” refers not to the entire jurisdiction of a municipality, but to discrete places similar to those listed previously in the Act.

The Opinion also takes a narrow view of the Act’s exception regarding “a place or premises where the person, persons, entity, or entities in control of the property or employer in control of the property has prohibited permitholders from carrying concealed handguns into or onto the place or premises.” The Opinion states that while a municipality may prohibit concealed handguns from city-owned parks, buildings, recreation facilities, and arenas, it may not do so on just any public property, such as streets and sidewalks, citing the Act’s broad “anywhere in Nebraska” language, and construing the language of the exception to refer to “distinct properties.”

It is important to note that this issue has not been reviewed by the Nebraska Supreme Court or Court of Appeals, and the Opinion is only advisory, and is not legal precedent. No doubt questions remain about the interpretation of the Act and its interplay with pre-existing statutes wherein the Legislature granted municipalities the authority to “regulate, prevent and punish the carrying of concealed weapons.” Municipalities should seek careful legal advice regarding how they proceed in matters of concealed weapon regulation.

*David J. A. Bargen is an associate with the Lincoln-based law firm of Rembolt Ludtke LLP and may be reached at (402) 475-5100 or [dbargen@remboltludtke.com](mailto:dbargen@remboltludtke.com). This article is provided for general information purposes only and should not be construed as legal advice. Those requiring legal advice are encouraged to consult with their attorney.*