

Counties -- Firearms -- Zoning

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Date: June 27, 2016

Subject:
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Mr. Michael S. Craig
County Attorney for Polk County
Post Office Box 9005
Bartow, Florida 33831-9005

RE: COUNTIES – FIREARMS – PREEMPTION – ZONING – application of county zoning ordinance pursuant to preemption exception in s. 790.33(4)(a), Fla. Stat., to prohibit manufacture of firearms in the home.

Dear Mr. Craig:

On behalf of the Polk County Attorney's Office, you have asked for an opinion on substantially the following question:

Does the preemption exception for zoning ordinances in section 790.33(4)(a), Florida Statutes, allow Polk County to enforce a zoning regulation that prohibits firearms manufacturing within a person's home?

In sum:

The express exemption for zoning ordinances in section 790.33(4)(a), Florida Statutes, allows Polk County to enforce its regulation restricting citizens from conducting a broad range of businesses, including manufacturing, within the home in residential areas, to the extent that the ordinance does not prohibit firearms manufacture as a means of regulating firearms or ammunition.

According to your request, an individual in Polk County applied to the federal Bureau of Alcohol, Tobacco, Firearms and Explosives for a license to manufacture and sell firearms in his home. He applied for a Type 1 license, required for a dealer in firearms, and a Type 7 license, required for a manufacturer of firearms.[1] The Bureau directed the applicant to the Polk County Land Development Division for a determination as to whether firearms manufacturing would comply with the county's regulations regarding home occupations. The applicant seeks to conduct the manufacturing in an accessory structure on his property.

This office has repeatedly recognized that in section 790.33(1), Florida Statutes, the Legislature has preempted the entire field of firearms regulation and thus local governments have no authority to enact ordinances regulating firearms and ammunition.[2] The question you present is whether the county regulation you cite in your letter is allowed by the Legislature's exception in

section 790.33(4)(a), Florida Statutes, for certain zoning ordinances. You report that Polk County has previously permitted retail and internet sales of firearms and ammunition, as well as assembly of small amounts of ammunition, but the home occupation at issue here is firearms manufacture.

The Polk County Land Development Code, Article III, was enacted pursuant to the authority of section 163.3202, Florida Statutes, which directs each county and municipality to adopt land development regulations to implement the county's comprehensive plan. Within the code are guidelines for the various standard land use districts, such as residential, commercial, and agricultural. Section 206 addresses accessory property uses, defined as "incidental and subordinate to the primary use of the property" within the districts, such as garage apartments, guest houses, security residences, clubhouses, recreation facilities, child- and adult-care facilities, outdoor storage, etc. Section 206-E regulates home occupations as an accessory property use within a residential land use district, addressing such factors as the percentage of habitable space that may be used, amount of traffic that may be generated, and signage, as well as prohibitions against display of merchandise, noise, glare, fumes, etc. Five types of acceptable home occupations are provided as "examples of home occupations":

- "a. Activities conducted principally by telephone, computer, facsimile, or mail.
- b. Studios where handicrafts or objects-of-art are produced.
- c. Teaching and tutoring instruction of no more than four pupils at a time.
- d. Dressmaking or apparel alterations.
- e. Barber and beauty shop (one chair)."

In the provision at issue herein, paragraph E.12 lists nine types of at-home occupations that are prohibited:

- "a. Adult entertainment.
- b. Automotive service and repair.
- c. Bed and breakfasts.
- d. Eating and drinking establishments.
- e. Kennels.
- f. *Manufacturing*.
- g. Tanning salons, tattoo parlors, massage parlors.
- h. Commercial sales or leasing of vehicles.
- i. Any use that requires a Building Code upgrade (i.e., from residential standards to commercial standards) to accommodate the home occupation." (e.s.)

You question whether the county has the power to prohibit firearms manufacture in the applicant's home in light of section 790.33, Florida Statutes, which preempts the field of firearm regulation to the state, as follows:

"(1) PREEMPTION.—Except as expressly provided by the State Constitution or general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, *manufacture*, ownership, possession, storage, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or any administrative regulations or rules adopted by local or

state government relating thereto. Any such existing ordinances, rules, or regulations are hereby declared null and void.” (e.s.)

Paragraph (4) of the statute, however, goes on to list five exceptions that are not preempted, including:

“(4) EXCEPTIONS. – This section does not prohibit:

(a) Zoning ordinances that encompass firearms businesses along with other businesses, except that zoning ordinances that are designed for the purpose of restricting or prohibiting the sale, purchase, transfer, or manufacture of firearms or ammunition as a method of regulating firearms or ammunition are in conflict with this subsection and are prohibited[.]”

Polk County has previously asked a question about the zoning exception, which this office answered in Attorney General Opinion 2008-34. The county asked whether under section 790.33, Florida Statutes, it would be permitted to restrict shooting ranges to commercial rather than residential land use districts, because shooting ranges were considered commercial businesses or high-intensity recreation under the land development code, which would be excluded from residential districts. This office considered the question in light of the zoning exception, stating:

“Clearly, a municipality’s attempt to regulate firearms is null and void. However, the general provisions in section 790.33, Florida Statutes, recognize that *local zoning ordinances which affect other businesses in the same way are allowed*. The statute is equally clear in prohibiting zoning ordinances designed to restrict or prohibit the sale, purchase, transfer, or manufacture of firearms or ammunition as a method of regulating firearms or ammunition. Thus, a zoning ordinance prohibiting any commercial business activities within an area zoned for residential use would not appear to be inconsistent with the intent of section 790.33, Florida Statutes.” (e.s.)

This office concluded that the county was permitted to restrict the siting of a sports shooting range to a commercial land use area based upon existing zoning regulations.

Section 206-E in the Polk County Land Development Code prohibits nine broad categories of business from being conducted in the home in residential areas, including all types of manufacturing. To the extent that the ordinance treats all of the nine diverse business categories the same way, as well as all forms of manufacturing, it appears that the ordinance was not designed to restrict or prohibit firearms manufacture with the underlying goal of regulating firearms.

Based upon the plain language of the exception for zoning ordinances and the scope of section 206-E of the Polk County Land Development Code, it is my opinion that to the extent that the regulation prohibits all manufacturing as a home occupation, it is not preempted by section 790.33(1), Florida Statutes.

Sincerely,

Pam Bondi
Attorney General

[1] See <https://www.atf.gov/firearms/listing-federal-firearms-licensees-ffls-2016>.

[2] See Ops. Att’y Gen. Fla. 11-20 (2011), 11-17 (2011), and 05-40 (2005).