2002-02

STATE OF MICHIGAN
IN THE COURT OF APPEALS
SECOND DISTRICT

MICHIGAN COALITION FOR RESPONSIBLE GUN OWNERS, a Michigan nonprofit Corporation, JEAN BRUCE, ALEXANDER KASA, and GREG NEU, Individually,

Plaintiffs/Appellants,

v.

CITY OF FERNDALE, a Municipal Corporation, KAREN PEDRO, in her official capacity as City Clerk for the City of Ferndale,

Defendants/Appellees.

_____/

Court of Appeal No. 242237

Lower Court No. 2-38045-CZ

BRIEF OF *AMICUS CURIAE*
MICHIGAN MUNICIPAL LEAGUE
IN SUPPORT OF DEFENDANTS/APPELLEES
CITY OF FERNDALE AND KAREN PEDRO

Respectfully submitted,

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STATEMENT OF BASIS OF JURISDICTION

This *amicus curiae* adopts the Counter Statement of Jurisdiction of Appellees.

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STATEMENT OF QUESTIONS INVOLVED

I. **WHETHER THE CITY OF FERNDALE'S ORDINANCE PROHIBITING WEAPONS IN ITS VARIOUS MUNICIPAL BUILDINGS IS AUTHORIZED BY THE MICHIGAN CONSTITUTION AND LAWS, WHICH GIVE LOCAL GOVERNMENTS THE POWER TO ADOPT ORDINANCES RELATED TO THEIR MUNICIPAL CONCERNS, PROPERTY, AND GOVERNMENT.**

Appellants say "No."

Appellees say "Yes."

The trial court said "Yes."

Amicus for says "Yes."

This Court should say "Yes."

II. **WHETHER THE CITY OF FERNDALE'S ORDINANCE IS PRE-EMPTED BY STATE LAW.**

Appellants say "Yes."

Appellees say "No."

The trial court said "No."

Amicus for says "No."

This Court should say "No."

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INTRODUCTION

This is not a gun rights case. This case is about a municipality's right to regulate conduct on property and in buildings that it owns and controls, consistent with long-established constitutional and statutory authority designed and historically interpreted to preclude just the kind of interference with local governmental affairs that Appellants (MCGRO, et al, hereafter "the Coalition") claim Michigan's firearms laws represent. It is in some respects a preemption case, but it is more directly an inquiry into the respective constitutional "standing" of the state and its local political subdivisions, and even more particularly into the former's ability to ignore the direct constitutional authority of the latter—if that is indeed what the state Legislature intended to do when it passed the various firearms laws. *Amicus* Michigan Municipal League (MML) believes, as does the City of Ferndale, that the Coalition reads far too much legislative intent into the language of the various statutes at issue.

Our country has a particular history fostering local self-governance as the cornerstone of an interested and informed—and therefore well-represented—populace:

> Since our country was conceived in the theory of local self-government, political power has, from the beginning, been exercised by citizens of the various local communities. Having been so dedicated by long practice, local self-government has come to be regarded as the most important feature in our system. The American people have always acted upon the deep-seated conviction that local matters can be better regulated by the people of the locality than by the state or central authority. One controlling idea of local self-government is to bring the officials nearer to the people whose interests are immediately affected by official conduct. . . . Local self government is, thus, a guaranty of individual liberty. Further, local self-government better insures that the public will not lose interest in their government. When the public does lose interest in the government, they run the risk of having their government

> lose interest in them. Thus, local self-government is a way of insuring individual liberty through an alert citizenry.
>
> * * *
>
> The popular character of local administration, all-pervading in its scope, exerts a dominating influence upon the life of United States citizens. Local self-government draws the citizen close to government, makes him feel that he is a living part of it and responsible for its actions; it stimulates public confidence, teaches the necessity for legal restraints on individual and property rights, and motivates respect for the will of the people as expressed in the law; it promotes the habit of cooperation, inspires citizens to be devoted to duty to the community, and instills confidence in the authority of the representatives and servants of the people; it leads to reasonableness in discussion and consideration of proposed community action, promotes moderation and harmony of opinion and results in sensible public regulation and administration; and finally it engenders pride in the conduct of common affairs.

McQuillan, Municipal Corporations, 3rd Ed, Rev, Section 1.37, pp 44-46. This notion of strong local control pervades Michigan law and history as well:

> It is also well settled that our state polity recognizes and perpetuates local government through various classes of municipal bodies whose essential character must be respected, as fixed by usage and recognition when the Constitution was adopted. And any legislation, for any purpose, which disregards any of the fundamental and essential requisites of such bodies, has always been regarded as invalid and unconstitutional.

Attorney General v. Detroit Common Council, 58 Mich. 213; 24 N.W. 887 (1885).

The question before the Court is whether a municipality can decide if guns will be brought into buildings owned and controlled by that municipality—and along with those guns arguably the right to control, influence, or affect—whether by real threat or even unreasonable and unfounded concern—the public and political business being conducted there. The Ferndale City Council passed a law establishing that its public business, on municipal property, will be conducted in its buildings without the fear—well-grounded or

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not—of other participants in the process being armed. What more fundamental issue of local self-governance could there possibly be?

A sound legal argument establishing the right of the City of Ferndale to enact an ordinance prohibiting guns in its public places is fairly easy to construct, and is set forth in the City's Brief on Appeal. Const. 1963, art. 7, §22, specifically provides that cities and villages "shall have the power to adopt resolutions and ordinances relating to its municipal concerns and property." That right is confirmed in the Home Rule Cities Act at MCL 117.4j(3). Art. 7, §34 of our Constitution broadly provides that these constitutional and statutory provisions are to be "liberally construed in [the City's] favor."

What is at issue here is not commerce or "mere" private rights, but the manner in which our local self-government itself is conducted, and who determines that. It cannot credibly be denied that how the public business is carried out in public places owned and controlled by local units of government is for the local body politic to decide, not for those who bear no relation to—or responsibility for—its conduct. The trial court recognized this essential political framework. This Court should uphold its decision.

STATEMENT OF FACTS

This *amicus curiae* adopts the Counter Statement of Facts of Appellees, as supplemented in the Argument section, below.

STANDARD OF REVIEW

Amicus curiae adopts the Standard of Review of Appellees.

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ARGUMENT

I. THE CITY OF FERNDALE'S ORDINANCE PROHIBITING WEAPONS IN ITS VARIOUS MUNICIPAL BUILDINGS IS AUTHORIZED BY THE MICHIGAN CONSTITUTION AND LAWS, WHICH GIVE LOCAL GOVERNMENTS THE POWER TO ADOPT ORDINANCES RELATED TO THEIR MUNICIPAL CONCERNS, PROPERTY, AND GOVERNMENT. THE STATE LEGISLATURE MAY NOT USURP THIS GENERAL GRANT OF AUTHORITY OVER PUBLIC BUILDINGS--AND THERE IS IN ANY EVENT NO EVIDENCE THAT THE STATE INTENDED TO DO SO WHEN IT ENACTED THE FIREARMS LAWS.

The Coalition relies substantially on the language of the recently adopted (2000) "carry concealed" law, and specifically MCL 28.425(c)(2), which allows a licensee to carry a concealed pistol "on or about his person *anywhere in this state*." (Emphasis added.) This seemingly broad authorization is significantly qualified, however, when read in the context of the entire section:

> (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 the state;
> (b) Carry a pistol in a vehicle, whether concealed or not concealed, anywhere in this state. (Emphasis added.)

The practical limitations in this provision, built directly into the authorization itself, are substantial.

Initially, the phrase "anywhere in the state" is problematic for the Coalition. This Court's function in construing the language at issue is to apply a reasonable construction of that language that best accomplishes the Legislature's purpose, while not abandoning "the canons of common sense." Marquis v. Hartford Accident & Indemnity, 444 Mich. 638, 644;

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513 N.W.2d 799 (1994). The Coalition makes a minor concession in this regard when it acknowledges that the Legislature probably did not mean that a homeowner must allow an individual, even one with a permit, to carry a concealed pistol in his or her home, although that would certainly fall under the description of "anywhere in the state." In its Brief on Appeal (p 27), the Coalition acknowledges the right of such a homeowner to deny entry to the home "for any reason."

Presumably, then, the Coalition would agree that the right of some other private property owner to refuse entry or service to an individual carrying a concealed pistol—e.g., a private office building, a private commercial retail establishment, or the like. These businesses invite individuals into their privately-owned establishments on terms and conditions they set—so long as those conditions don't violate the constitutional civil rights of the invitees—e.g., the right not to be discriminated against for color, religion, or national origin, etc. (See, generally, 42 U.S.C. § 2000, et seq, and corresponding state civil rights statutes.) If the Coalition does not concede this point directly, it certainly offers no legal analysis why the conclusion does not follow under the same logic applicable to private homeowners.

In addition to acknowledging the right of a private property owner to object to and prohibit the carrying of a concealed pistol even by a licensee, the Coalition acknowledges the prohibition, built into the statute in MCL 28.425o (Section 5o), against carrying a concealed pistol in certain enumerated locations:

> (1) An individual licensed under this act to carry a concealed pistol, or who is exempt from licensure under section 12a(f), shall not carry a concealed pistol on the premises of any of the following:

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(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 day care center, public or private child caring agency, or public or private child placing agency.

(c) A sports arena or stadium.

(d) A dining room, lounge, or bar area of a premises licensed under the Michigan liquor control code of 1998, 1998 PA 58, MCL 436.1101 to 436.2303. This subdivision shall not apply to an owner or employee of the premises.

(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 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.

The Coalition's main argument in this case seems to be that the list of places where carrying a concealed pistol is expressly prohibited does not include municipal or publicly-

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owned buildings. In fact, the Coalition argues, there were failed attempts in the legislative process to add references to public buildings (and public libraries) to the list of prohibited areas. The Coalition attaches to its Brief bits of the legislative history and congressional record in support of this argument.

The MML submits that the Coalition has misread this list of prohibited places to constitute the only places where carrying a concealed weapon may be prohibited. The MML submits that these are only areas that the Legislature has specifically designated as "pistol free" zones; that designation does not mean that other areas cannot be subjected to similar prohibitions authorized by law, particularly when read in light of Const. 1963, art. 7, §22 and §34.

This position is confirmed by the second "limiting" phrase in MCL 28.425(c)(2), which grants the carry concealed right "except as otherwise provided by law." The Coalition more or less ignores this language, subsuming it into the discussion of the list of exceptions contained in Section 5o and its discussion of MCL 123.1102, which it calls (although the Legislature did not) the "Firearm Preemption" law. But the phrase is highly relevant to the issue at hand because the City of Ferndale, a home rule city with specific constitutional standing, has the authority to pass and enforce laws, in the form of a local ordinance. By contrast, not one of the entities or areas listed in Section 5o above has the ability or authority to pass a law, whether prohibiting the carrying of concealed weapons on their premises or regulating any other aspect of the use of their premises.

Daycare centers/child care centers, sports arenas, bars/restaurants, churches, entertainment facilities, and hospitals (MCL 28.425o[1][b]-[g]), are, for the most part, premises and uses privately owned and operated by individuals or entities that cannot

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enact or enforce laws relating to the possession of a concealed pistol or any other subject matter. As noted above, even the Coalition seems to agree that each of those listed premises arguably has a private right—even after passage of the carry concealed law—to exclude or remove patrons or other individuals who wish to carry a concealed pistol. By including these areas within Section 5o, though, the Legislature has determined not to leave that question to those private individuals or entities. Carrying a concealed pistol in a bar is made illegal under Section 5o regardless of whether the bar owner cares or agrees.

The other two areas identified in Section 5o, schools and college dormitories/classrooms (MCL 28.425o[1][a] and [h] respectively) are certainly public places, but the public agencies that control those places have no independent constitutional or statutory authority to make, or more importantly to enforce, laws with respect to those premises, whether involving the carrying of concealed pistols or any other issue. Schools and colleges rely instead on the applicable state or local laws and law enforcement for the security of their buildings and premises.

By contrast, cities such as Ferndale, as well as townships, villages, and counties, have by constitution and statute the authority to adopt laws and ordinances that have the force of law relating to their own concerns, and their own property, and their own governance. It is thus entirely conceivable—and indeed even likely—that when the proposal to add municipal or publicly-owned buildings to the list of exempt premises, many of those who failed to see the purpose behind inclusion of such areas assumed that the "and except as otherwise provided by law" qualification would allow a public entity such as the City of Ferndale to pass an ordinance relating to its own local public buildings and public places.

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In fact, the City's authority to pass and enforce ordinances that have the force of law gives the City at least equal "standing" to regulate the possession of weapons within its own buildings as the Michigan Supreme Court has to adopt an administrative order prohibiting weapons in various public court buildings throughout the state. The Coalition has no good answer why the Supreme Court would have that authority even though it did not make it on to the list in Section 5o. The Coalition suggests that the Court is a "separate" constitutional entity, with separate authority. But so are cities, villages, townships, and counties—all are separately mentioned and granted "broad" authority under our state constitution.

Const. 1963, art. 7, §22, states:

> Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

The "general grant of authority" conferred by this provision takes care to mention municipal property specifically, which would certainly include municipal buildings.

In part to effectuate the general authority set forth in §22, the Legislature adopted the Home Rule Cities Act, MCL 117.1, et seq. As a home rule city, Ferndale has specific authority under MCL 117.4j(3) to enact ordinances in order to advance the interests of the City:

> For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not, for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to

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> pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state.

Again, the grant of authority directly refers to management and control of "municipal property" and "municipal government." MCL §117.3(j), also part of the Home Rule Cities Act, specifically requires cities to provide in their charters "for the public peace and health and for the safety of persons and property."

The Coalition argues that these broadly-stated powers must nonetheless yield to the apparent desire of the state Legislature now to foster gun rights and in particular the right to carry concealed guns. The Coalition also points to the 1990 legislation that it calls the "Firearm Preemption Act," MCL 125.1102, for the proposition that cities and other municipalities may not "enforce any ordinance or regulation pertaining to" the registration, purchase, sale, or possession of firearms. As with the new carry concealed law, though, this statute specifically qualifies the general regulation with the familiar phrase "except as otherwise provided by federal law or a law of this state."

The Coalition's position, simply put, is that that the prohibition against regulation in MCL 125.1102 is too broad, and the authorization to carry concealed in MCL 28.425c too clear, to allow municipalities to "bootstrap" regulatory authority by mere reference to general grants of power in the Constitution and Home Rule Cities Act. The Coalition entirely misses the point of those general grants of authority, which have equal footing (or better) under the law with the statutory provisions the Coalition cites. The language of another Constitutional provision, Const. 1963, art. 7, §34, drives the point home:

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution. (Emphasis added.)

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In 1908 the Michigan Constitution was amended to grant broad autonomy to home rule cities. This 1908 provision was followed by the Home Rule City Act, which was enacted to implement this constitutional power. The 1963 Constitution made that local authority even clearer:

> [T]he framers of the 1963 Constitution stated that they wanted to "reflect Michigan's successful experience with home rule" by providing "a more positive statement of municipal powers, giving home rule cities and villages full power over their own property and government subject to this constitution and law." Convention Comment, art. VII, §22. Further, the framers described article VII, section 34 as "a new section intended to direct the courts to give a liberal or broad construction to statutes and constitutional provisions concerning all local governments." The framers also noted that "home rule cities and villages already enjoy a broad construction of their powers and it is the intention here to extend to counties and townships within the powers granted to them equivalent latitude in the interpretation of the constitution and statutes." Convention Comment, art. 7, §34. Michigan Municipal League, Michigan Association of Municipal Attorneys, Local Government Law and Practice in Michigan 1-9 (1999).

The Coalition cites City of Kalamazoo v. Titus, 208 Mich. 252; 175 N.W. 480, 483, which said of cities, "They have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority." The Coalition also cites a case from this Court that asserts that local governments have "limited" powers "expressly conferred on them by the Constitution of the State of Michigan, by acts of the Legislature, or necessarily implied therefrom." Crain v. Gibson, 73 Mich. App. 192, 200; 250 N.W.2d 792 (1977).

A better and more contemporary discussion of municipal rights is found in the recent Michigan Supreme Court Adams Outdoor Advertising, Inc. v. City of Holland, 234 Mich. App. 681, 600 N.W.2d 339 (1999), aff'd 463 Mich. 675, 625 N.W.2d 377 (2001). Like the

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Coalition in this case, the plaintiff in Adams argued that the provision of the Home Rule Cities Act providing for "licensing, regulating, restricting, and limiting the number and locations of billboards within the city," (MCL §117.4i[f]; MSA 5.2082[f]) did not "expressly grant" authority for home rule cities to prohibit new billboards. Therefore, according to the plaintiffs, the city did not have the power to prohibit billboards because the Legislature had not specifically granted it.

The Court disagreed, saying that "unless a power or right is specifically proscribed by law, a home rule city has broad authority to enact ordinances for the benefit of the health, safety and welfare of its residents. Home rule cities are not limited to only those powers expressly enumerated." Id. at 689 (emphasis added). The Court expanded on its conclusion by specific reference to Const. 1963, art. 7, §22:

> Accordingly, it is clear that home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied. Home rule cities are empowered to form for themselves a plan of government suited to their unique needs, and upon local matters, exercise the treasured right of self-governance.

Id. at 687. The Adams Court went on to broadly describe the powers of all local government units in Michigan by stating, "Our municipal governance system has matured to one of general grant of rights and powers, subject only to certain enumerated restrictions instead of the earlier method of granting enumerated rights and powers definitely and specifically." Id. at 688. That general grant of right is not simply bestowed on municipalities by the Legislature, it includes authority granted directly, in the Constitution of 1963 itself.

The Adams decision culminated a series of cases in which the Supreme Court elaborated on the "broad grant" of authority to municipalities to regulate in the interest of

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municipal concerns. See, e.g., Square Lake Hills v. Bloomfield Township, 437 Mich. 310; 471 N.W.2d 321 (1991) ("The delegates to the 1961 Michigan Constitutional Convention replaced the common-law rule of strict construction by constitutionally requiring courts to liberally construe a legislature and constitutional powers conferred upon" municipalities); and Burt Township v. DNR, 459 Mich. 659; 593 N.W.2d 534 (1999) (citing Const. 1963, art. 7, §34 as a basis for its conclusion that the township could regulate aspects of public (state) boat launch).

Contrary to the Coalition's position, this Court must conclude, as the trial court did, that MCL 125.1102 is not clearly aimed at municipal control of activities within the confines of its own public buildings; and the carry concealed law, MCL 28.425c, is nowhere near as broad as the Coalition would like it to be. The language of the latter ("anywhere in the state") is by the Coalition's own admission inartful and unclear. The new law by its terms acknowledges that there may be "other laws" that limit the authorization granted. And nowhere is there any mention in either statute of an intention to so directly affect activities occurring entirely within publicly-owned buildings.

Once the City's authority to adopt the regulation is established, the only question becomes whether the regulation adopted is within that authority. As a general rule, an ordinance will be upheld if there is a rational relationship between the exercise of police power and the public health, safety, and welfare. Square Lake, supra; Delta Township v. Dinolfo, 419 Mich. 253; 251 N.W.2d 831 (1984).

Ferndale passed a law governing the manner in which it intends to use its public facilities. It determined to make its locally owned and controlled buildings "weapons free." It determined to conduct its local political and public business without those present being

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armed. It determined that arming those who come into the City's public buildings might well chill the frank and free exchange of information and ideas that is essential to local self-governance. It determined that it wants its citizens to participate in the local political process—with its sometimes-heated rhetoric—without the fear (real or imagined) of retaliation by armed opponents. The Ferndale ordinance at addresses a matter so fundamentally one of local concern—the conduct of public business and politics in local municipal buildings—that the state Legislature, even had it wanted to, cannot interfere with it, given the broad grant of authority directly under our state Constitution. And as described further below, nothing in the language of either the 2000 "carry concealed" law or the prior 1990 law suggests that the Legislature intended to take that right away from the City in any event.

II. THE CITY OF FERNDALE'S ORDINANCE IS NOT PRE-EMPTED BY STATE LAW.

A municipality is pre-empted from enacting an ordinance if: 1) it directly conflicts with a state statute, or 2) the state statutory scheme completely occupies the field of regulation. People v. Llewellyn, 401 Mich. 314, 322; 257 N.W.2d 902 (1977). In Llewellyn, the Michigan Supreme Court outlined four guidelines for a court to consider when deciding whether state law pre-empts a local ordinance: 1) where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that the municipal regulation is pre-empted; 2) preemption may be implied upon an examination of legislative history; 3) the pervasiveness of the state regulatory scheme may support a finding of preemption; and 4) the nature of the regulated subject matter may

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demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. Id. at 323-324.

While the City of Ferndale has ably and thoroughly pointed out the flaws in the Coalition's preemption analysis, *Amicus* has identified some additional points relevant to the Coalition's preemption arguments.

A. ***The Michigan Legislature has not expressed an intention to exclusively regulate firearms in public buildings owned and controlled by a City.***

As addressed above, the Coalition rests its analysis of this case on statutory interpretations of Michigan firearm regulations that ignore both the specific language of those provisions providing exceptions that reserve certain municipal authority to regulate, and that ignore the state Constitution, which directs the state and the courts to respect a municipality's general grant of police power.

For example, the Coalition points to the Legislature's enactment of MCL §123.1102, which prohibits a local unit of government from enacting laws concerning the ownership and possession of firearms, "except as otherwise provided by federal law or a law of this state." The Coalition argues that the explicit exception "except as otherwise provided by federal law or the law of this state," only extends municipal authority to regulate to those areas expressly mandated by state statute, i.e. regulating conduct that this a criminal offense under state law or regulating firearms that are transported, carried or possessed by municipal employees. (MCL §123.1103)

At the same time that the Coalition insists that state or federal law must expressly authorize firearms regulation, it admits that there are categories of individuals or entities who have the authority to prohibit firearms in certain areas even though such regulation is not explicitly authorized by any state or federal statute (e.g., courts and private property

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owners). The Coalition contends that applying an exception to these groups is "reasonable"; however, it warns that such exceptions "will be very narrow." (See, Appellants Brief p. 27)

The Coalition clearly feels that it is in the best position to judge what exceptions to the "exclusive" state firearm regulations fit into the "except for" language carved out within MCL §123.1102. But the exception is not limited to state statutes regulating firearms, or to the exceptions the Coalition deems "reasonable." This exception also refers to the state Constitution and to Michigan case law. Const. 1963, art. 7, §22 and §34 provide that local governments are granted liberal power to enact ordinances addressing municipal concerns—and more specifically, affecting municipal property on which local political and public business is conducted. There is nothing apparent in either statute evidencing an intention by the State Legislature to insert itself so thoroughly into a matter so obviously a local concern.

B. ***"Exclusive State Regulation" of the use of "local public buildings" is an oxymoron.***

The Coalition tries to draw an analogy between the Court's decision in Llewellyn to pre-empt local obscenity regulations and the present case. It quotes the Court's statement that to allow a municipality to determine its own standards of obscenity "would be to invite the cultivation of a legal thicket which would make both the scope of the individual right to free expression and the permissible prohibition of obscenity well-nigh impossible to determine." Llewellyn, supra, at 328. The Coalition argues that a similar situation would occur if local governments were allowed to prohibit weapons in local buildings because this would "confuse" gun licensees, who would not be able to determine where they can and

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cannot carry their guns. The Coalition also asserts that law enforcement would be stymied in efforts to enforce the law due to an overwhelming "patchwork" of local ordinances.

The facts in Llewellyn could not be more different from this case. In Llewellyn, the Court was faced with a City of Detroit ordinance that sought to *replace* the state's definition and standards to determine obscenity with its own local definition and test. In finding that this was an area that demanded a uniform and statewide law, the Court recognized that the United States Supreme Court had spent several decades trying to define the line between obscenity and protected speech. It was within this context that the Court decided that individual rights would be chilled, and national and statewide distributors of literature would face punishment for a definition of obscenity of which they were legitimately unaware.

Unlike the City of Detroit obscenity ordinance, the City of Ferndale's ordinance does not seek to replace state laws governing firearms. Rather the City's ordinance seeks to regulate conduct in its own municipal buildings – regulation that is outside any rational scope of the state's firearm statutes. This municipal right was recognized by the Court in Llewellyn when it stated, "Moreover, we do not mean to suggest in this opinion that a municipality is preempted from enacting ordinances *outside* the field of regulation occupied by the state statutory scheme governing criminal obscenity." Id. at 330. This holding in Llewellyn is in harmony with a history of Michigan case law that confirms, not only the right of a municipality to regulate outside those areas covered by state law, but also the right to add to or enlarge upon state law restrictions, as long as the resulting local ordinance does not directly conflict with a state statute. (See, Appellee's Brief pages 6-10); City of Detroit v. Qualls, 434 Mich. 340; 454 N.W.2d 374 (1990); Miller v Fabius Twp., 366 Mich. 250; 114 N.W.2d 205 (1962).

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It is disingenuous in the extreme for the Coalition to argue that prohibiting weapons in public buildings would confuse gun owners to such an extent that they would not be put on notice of what behavior is and is not criminal. The Coalition does not seem to dispute the right of our state courts to have metal detectors outside their doors, and this Court can certainly take judicial notice that the no weapons policy of the court system does not make it "impossible" for gun owners to know whether they are allowed to carry a weapon into a courtroom. Why then would a metal detector outside a library or a City Hall cause such confusion? The Ferndale ordinance specifically requires signage saying, "NO WEAPONS ALLOWED INSIDE THIS BUILDING." Isn't that sufficient notice to someone carrying a gun that they should leave it outside in their glove box?

The Court in Llewellyn specifically sought to distinguish the need for statewide uniformity with the need for local control: "As to this last point, examination of relevant Michigan cases indicates that where the nature of the regulated subject matter calls for regulation adapted to local conditions, and the local regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld." It is difficult to imagine a matter more obviously one of local, and not statewide, concern that the manner in which the public business will be conducted in local municipal buildings.

C. ***The state firearm statutes are not so pervasive that they inherently block the prohibition of weapons in municipal buildings.***

The Coalition's arguments regarding "pervasiveness" again reveal a misunderstanding of the holding in Llewellyn. The Coalition seems to believe that since the Llewellyn Court found that the obscenity statutory scheme was "pervasive," and the Court subsequently found that the City of Detroit's ordinance was pre-empted, this conclusively proves that the City of Ferndale's ordinance should be pre-empted because of the number

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of state firearm statutes. It says as much in its Brief: "Firearm regulations are at least as pervasive as those governing obscenity."

It is true that the State of Michigan has adopted a number of statutes regulating firearms. Similarly, it is true that in Llewellyn, the Court found that the obscenity statute "reveals a broad, detailed and multifaceted attack on the sale, distribution and exhibition of obscenity." Llewellyn, supra at 326.

What the Coalition fails to mention is that the holding in Llewellyn specifically declined to apply the preemption doctrine to local government's ability to regulate the zoning of adult businesses. The Court did so because it found that the act of zoning the location of adult businesses did not directly conflict with state obscenity statute, whereas the City of Detroit's replacement of the state definition of and test for obscenity did result in such a conflict. Further, the Llewellyn Court recognized that the United State Supreme Court had already upheld a Detroit zoning ordinance that regulated adult businesses from a constitutional attack. In so doing, the U.S. Supreme Court stated, "the City's interest in attempting to preserve the quality of life is one that must be accorded high respect. Moreover, the City must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." (Quoting 427 U.S. 50, 71, 96 U.S. S.Ct. 2440, 2453, 49 L.Ed.2d 310.)

Likewise, the fact that there are many state firearm statutes in Michigan and the breadth of regulation is substantial does not by itself preclude the City of Ferndale, and other local government units, from enacting reasonable regulations governing municipal properties. Not only do such regulations fail to directly conflict with state law, as set forth in

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Part I above, local governments are clearly granted the authority to enact such regulations by the Michigan Constitution.

D. *Summary.*

Using the Llewellyn analysis, this Court should conclude, as the trial court did, that there is no state preemption of Ferndale's right to adopt an ordinance governing possession of weapons in its public buildings. There is no clearly expressed intent in the firearms laws enacted by the state Legislature to invade the grounds of municipally-owned properties; in fact, just the opposite intention appears upon close review, given the numerous and consistent exceptions and qualifications to the state's regulatory authority set forth there. One needs only make the statement that there must be "exclusive state regulation of activities within local municipal buildings" to realize just how wrongheaded it is to suggest that the state ought to (or even wants to) be involved in rulemaking with regard to the conduct of local public and political activities occurring local government buildings. And while the firearms laws are certainly substantial in volume, they pale in comparison to the "pervasive" constitutional and statutory authority giving local municipalities control over their property and their public places.

The Trial Court recognized the inherent inconsistencies of the Coalition's arguments concerning preemption, and the Court should adopt and uphold its ruling on the issue.

CONCLUSION AND RELIEF SOUGHT

This is not a gun rights case. This case is about whether the City of Ferndale controls the manner in which its public business is conducted in its own municipal buildings, from the council chambers to the counter from which the Clerk, Treasurer, Building Official, etc., give and receive information. Ferndale has adopted a narrowly-focused ordinance

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that prohibits the participants in those public processes—occurring entirely within city-owned buildings—from carrying weapons. From being armed.

There is no question that the ordinance does not impermissibly infringe on any guaranteed constitutional right of the individuals affected. Even the Coalition seems to acknowledge that the "right" to bear arms is subject to substantial regulation. The question rather is whether the state through legislation can usurp any municipality's right to control use of its own premises, including regulation of the right to carry weapons into a public forum. Even if the state could do so, a separate question on these facts is whether the state in fact has done so by the passage of the various firearms laws.

The MML supports the position of the City of Ferndale and the trial court that the state has no right to so interfere with the operations of a local government, and that the state did not intend to do so and has not done so in any event.

This case is also not about whether the Ferndale ordinance is a good idea, or is offensive to law-abiding gun owners. The recent expansion of the right of "average" citizens to carry concealed weapons is just that—recent. The Ferndale City Council—the local governmental body "nearest to the people whose interests are immediately affected" (McQuillan, supra)—is surely the political body best able, and most clearly authorized by state constitution and law, to deal with that new circumstance as it relates to the conduct of the public's business in Ferndale's own public buildings.

The Coalition has argued passionately that it should not offend, frighten, or concern anyone if some of the participants in Council meetings or other exchanges are armed. That may well be true. But before this Court can say that a local governing body is prohibited from taking a different view, and from regulating and prescribing rules for how the most

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basic functions of government will be conducted in its local public buildings, a much clearer basis for such a conclusion must be articulated.

The trial court in this case correctly found that the Coalition had failed to present a basis for establishing either a lack of regulatory authority by the City to pass the ordinance or a basis for state preemption of the ordinance. That decision should be upheld by this Court.

Respectfully submitted,

SECREST, WARDLE, LYNCH, HAMPTON, TRUEX AND MORLEY

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Dated: October 23, 2002

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SECREST, WARDLE, LYNCH, HAMPTON, TRUEX AND MORLEY

STATE OF MICHIGAN
IN THE COURT OF APPEALS
SECOND DISTRICT

MICHIGAN COALITION FOR RESPONSIBLE GUN OWNERS, a Michigan nonprofit Corporation, JEAN BRUCE, ALEXANDER KASA, and GREG NEU, Individually,

Plaintiffs/Appellants,

v.

CITY OF FERNDALE, a Municipal Corporation, KAREN PEDRO, in her official capacity as City Clerk for the City of Ferndale,

Defendants/Appellees.
_____/

Court of Appeal No. 242237

Lower Court No. 2-38045-CZ

SECREST, WARDLE, LYNCH, HAMPTON, TRUEX AND MORLEY

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

JEAN E. SEEFELD, first being duly sworn, deposes and states that on the 23rd day of October, 2002, she served a true copy of the within BRIEF OF *AMICUS CURIAE* MICHIGAN MUNICIPAL LEAGUE IN SUPPORT OF DEFENDANTS/APPELLEES CITY OF FERNDALE AND KAREN PEDRO, upon:

M. CAROL BAMBERY
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P.O. Box 71
DeWitt, MI 48820

T. JOSEPH SEWARD
KAREN M. HAAPALA
Attorneys for Defendants/Appellees
33900 Schoolcraft
Livonia, MI 48105

by depositing same in the United States mail with postage fully prepaid thereon.

JEAN E. SEEFELD

Subscribed and sworn to before me this
23rd day of October, 2002.

ELIZABETH A. MAHER, Notary Public
Oakland County, Michigan
My Commission Expires: 7/4/03

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