

IN THE SUPREME COURT OF OHIO

Ohioans for Concealed Carry, Inc., ) Case No. 2007-0960  
et al., )  
)  
Plaintiffs-Appellees, ) On Appeal from the  
) Sandusky County Court  
) of Appeals, Sixth  
vs. ) Appellate District  
)  
)  
City of Clyde, et al., ) Court of Appeals  
) Case Nos. S-06-039  
) S-06-040  
Defendants-Appellants. )

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**MERIT BRIEF OF PLAINTIFF-APPELLEE  
OHIOANS FOR CONCEALED CARRY, INC.**

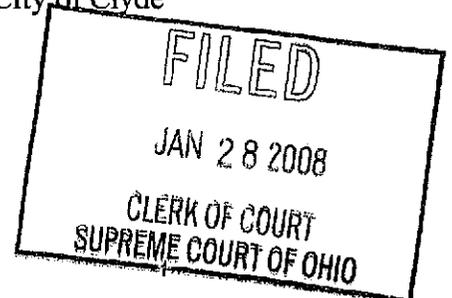
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Daniel T. Ellis (0038555)  
(*Counsel of Record*)  
Frederick E. Kalmbach (0074716)  
LYDY & MOAN  
4930 Holland Sylvania Road  
Sylvania, OH 43560  
(419) 882-7100  
Fax No.: (419) 882-7201  
[dellis@lydymoan.com](mailto:dellis@lydymoan.com)

L. Kenneth Hanson, III (0064978)  
Firestone, Brehm, Hanson, Wolf, Young, LLP  
15 West Winter Street  
Delaware, OH 43015  
(714) 363-1213  
Fax No.: (740) 369-0875  
Counsel for Appellee, Ohioans for Concealed  
Carry, Inc.)

John C. McDonald (0012190)  
(*Counsel of Record*)  
Stephen J. Smith (001344)  
Matthew T. Green (0075408)  
Schottenstein Zox & Dunn Co., LPA  
250 West Street  
Columbus, OH 43215-2538  
(614) 462-2700  
(614) 462-5135 (Fax)  
[jmcdonald@szd.com](mailto:jmcdonald@szd.com)

Barry W. Bova (0041047)  
817 Kilbourne Street, P.O. Box 448  
Bellevue, OH 44811  
(419) 483-7224  
Fax No. (419) 483-7224  
[bbova@clydeohio.org](mailto:bbova@clydeohio.org)  
Counsel for Appellant, City of Clyde



Marc Dann (0039425)  
Attorney General of Ohio  
William P. Marshall (0038077) (COUNSEL OF RECORD)  
Solicitor General  
Stephen P. Carney (0063460)  
Deputy Solicitor  
30 East Broad Street, 17<sup>th</sup> Floor  
Columbus, OH 43215  
(614) 466-8980  
(614) 466-5087 (fax)  
[wmarshall@ag.state.oh.us](mailto:wmarshall@ag.state.oh.us)  
Counsel for Intervenor-Appellee  
Ohio Attorney General Marc Dann

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS.....	3
ARGUMENT .....	
I. Appellee’s Proposition of Law No. 1: Clyde’s Ordinance Unconstitutionally Infringes on an Individual’s Fundamental Right to Bear Arms.....	7
II. Appellee’s Restatement of Appellant’s Proposition of Law No. 1: R.C. §§ 2923.15 et. seq. and R.C. § 9.68 are General Laws Operating Uniformly Throughout the State.....	10
A. The General Assembly’s Statement of Preemption Expresses Intent that Legislation is a Matter of General and Statewide Concern.....	18
III. Appellee’s Restatement of Appellant’s Proposition of Law No. 2: Municipal Regulation of Firearms in City Parks is an Exercise of Police Power, Not Local Self-Government.....	20
IV. Cleveland Incorrectly Asserts R.C. § 9.68 as an Unconstitutional Attempt to Withdraw the Municipalities’ Home Rule Authority.....	25
V. Cleveland’s Argument that the General Assembly has Failed to Enact a Comprehensive Scheme Must Also Fail.....	26
VI. Ohio Municipal League Private Property Arguments are bit Applicable to the Issue Before the Court.....	31
VII. Appellee’s Proposition of Law No. 2: If this Court Determines R.C. § 2923.126 is not a General Law Under Ohio’s Home Rule Amendment then the Proper Remedy is to Sever R.C. § 2923.126(B) from the Statute.....	33
CONCLUSION.....	35
CERTIFICATE OF SERVICE.....	36
APPENDIX.....	37

## TABLE OF AUTHORITIES

<b>Cases</b>	<b><u>Page</u></b>
<i>American Financial Servs. Assn. v. Cleveland</i> (2006) 112 Ohio St.3d 170, 173, 858 N.E.2d 776, 780.....	10,18
<i>Arnold et al. v. City of Cleveland</i> (1993), 67 Ohio St. 3d 35, 47; 616 N.E. 2d 163; 1993 Ohio LEXIS 1608 .....	8,9,21,22
<i>Benjamin v. Columbus</i> , (1957) 167 Ohio St. 103; 146 N.E.2d 854 .....	32
<i>Cincinnati v. Baskin</i> (2006) 112 Ohio St.3d 279, 281;859 N.E.2d 514.....	22,29,30
<i>City of Canton v. State</i> (2002) 95 Ohio St.3d 149, 766 N.E.2d 963 .....	11,13,14
<i>City of Toledo v. Beatty</i> (2006) 169 Ohio App.3d 502, 963 N.E.2d 1051, 1058 .....	7,11,12
<i>City of University Heights v. O'Leary</i> (1981), 68 Ohio St.2d 130, 135.....	21
<i>Clermont Environmental Reclamation Co.v.l Wiederhold</i> (1982) 2 Ohio St.3d 44, 48, 442 N.E.2d 1278, 1282.....	11,28
<i>Cleveland Electric Illuminating Co. v. Panesville</i> (1968) 15 Ohio St.2d 125, 239 N.E.2d 75 21,23	
<i>Garcia v. Siffrin Residential Assn.</i> (1980) 63 Ohio St.2d. 259, 863 N.E.2d 1051 .....	13
<i>Kelly v. Accountancy Bd. of Ohio</i> (1993) 88 Ohio App.3d 453, 458-459 .....	33
<i>Klein v. Leis</i> (2003), 99 Ohio St. 3d 537, 542; 2003 Ohio 4779; 795 N.E. 2d 633; 2003 Ohio LEXIS 2418 .....	1,8,21
<i>Mosher v. City of Dayton</i> (1976), 48 Ohio St.2d 243, 247 .....	21
<i>Sorrell v. Thevenir</i> (1994), 69 Ohio St.3d 415.....	9
<i>State ex rel. Dispatch Printing Co. v. Wells</i> (1985) 18 Ohio St.3d 382, 384.....	33
<i>State v. Foster</i> (2006) 109 Ohio St.3d 1, 28.....	33,343
<i>State v. Hogan</i> (1900) 63 Ohio St. 202, 218 .....	1
<i>State v. Nieto</i> (1920) 101 Ohio St. 409, 413 .....	21,22
<i>State v. Thompson</i> (2002) 95 Ohio St.3d 264 .....	1

**Statutes**

R.C. §§ 109.69, 109.731, 311.41, 311.42, 2923.124, 2923.125, 2923.126, 2923.127, 2923.128, 2923.129, 2923.1210, 2923.1211, 2923.1212, and 2923.1213 ..... 3

R.C. § 1.50 ..... 33

R.C. § 2911.21(A)(4) ..... 5

R.C. § 2329.11 ..... 6,28

R.C. § 2923.12 ..... 11

R.C. § 2923.12(G)(1) ..... 5

R.C. § 2923.15 ..... 10

R.C. § 2923.125 ..... 3,8,10,21,35

R.C. § 2923.126 ..... 10,11,29,30,33

R.C. § 2923.126(A) ..... 3,28

R.C. § 2923.126(B) ..... 3,5,33,34,35

R.C. § 2923.126(C) ..... 3

R.C. § 9.68 ..... 5,10,11,19,21,24,24,26,27,28,29,30,31

R.C. § 9.68(A) ..... 33

R.C. §§ 1547.69, 2911.21, 2913.02, 2921.13, 2923.12, 2923.121, 2923.123, 2923.16, 2929.14, 2953.32, and 4749.10 ..... 34

**Other Authorities**

Baldwins Oh. Prac Crim L § 106.2 (2007) ..... 20

**Constitutional Provisions**

Article I, Section 1 of the Ohio Constitution ..... 32

Article I, Section 4 of the Ohio Constitution ..... 1,7,9,35

Article I, Section 16 of the Ohio Constitution ..... 32

Article XVIII, Section 3 of the Ohio Constitution ..... 9,10,20

Article XVIII, Section 7 of the Ohio Constitution ..... 22

Article XIV, Section 1 of the Amendments to the Constitution of the United States ..... 32

**House and General Assembly Legislation**

H.B. No. 12, 125<sup>th</sup> General Assembly..... 3,5,34  
H.B. 12, Section 9 ..... 3,33  
H.B. No. 347 ..... 28

**Municipal Codes and Ordinances**

Cincinnati Municipal Code 708-37 ..... 22,23  
Clyde Ordinance No. 2004-41 ..... 5,7,8,9,20,21,22  
City of Clyde Codified Ordinances Section 923.10(a) ..... 8

## INTRODUCTION

The question of the validity of Clyde ordinance challenged by the Appellee in this case is not limited to the issue of whether the enactment of the ordinance was a valid exercise of the municipality's powers under the Home Rule Amendment to the Ohio Constitution, but includes as well the question of whether the ordinance infringes the fundamental rights of persons under Article I, Section 4, of the Ohio Constitution, which provides that "[t]he people have the right to bear arms for their defense and security."

This Court, in *Klein v. Leis* (2003) 99 Ohio St.3d 537, reiterated the Court's earlier declarations in stating that the right to bear arms is fundamental, *id.* at 539, and is a right of which citizens "cannot be deprived," *id.* (citing to *State v. Hogan* (1900) 63 Ohio St. 202, 218). The Court in *Klein* then concluded that although it continued to recognize the right to bear arms as fundamental; such right did not extend to the right to bear concealed weapons. *See, id.* at 541 ("[t]here is no constitutional right to bear concealed weapons") thereby establishing, *a priori*, that the constitutional right must therefore apply, if it is to apply at all, to those arms carried openly. Infringements upon fundamental rights, such as the rights of the people to openly bear arms, are subject to a heightened scrutiny requiring them to be necessary to serve a compelling government interest. *Id.* at 543, J. O'Connor dissent, (citing *State v. Thompson* (2002) 95 Ohio St.3d 264).

In the case before the bar, the Clyde Ordinance is a clear infringement on a fundamental right, providing a blanket prohibition on knowingly carrying any deadly weapon in any City Park in the municipality, making no differentiation between those carried in a concealed manner, and therefore not protected by the State's Constitution, and those carried openly, and as indicated above, in the exercise of a fundamental right protected by the Ohio Constitution. By virtue of such blanket prohibition, its breadth encompassing any deadly

weapon, and applying at all times and under any circumstances in the prohibited areas, the Clyde Ordinance clearly fails to meet the test of strict scrutiny, a narrow tailoring as is necessary to serve a compelling government interest. The prohibition is anything but narrow, and the government interest in banning all weapons in the park areas, if it ever had been considered compelling, certainly deserves no such recognition today under modern public policy considerations, which overwhelmingly throughout the nation as well as the State, have clearly come to the recognition that the rights of individuals to protect themselves and their property require that the means to do so be made available to them, and that prohibitions against carrying weapons by individuals do not enhance public safety. Under these constitutional law principles, the Clyde ordinance, to the extent it prohibits the carrying of all deadly weapons, fails both the narrow tailoring and compelling purpose requirements, and thus does not pass constitutional muster under the Constitution of the State of Ohio.

As to the effect of the ordinance on the rights of persons to carry concealed weapons, the Home Rule analysis is pertinent, but as set forth *infra* in this brief, such analysis requires that the Clyde ordinance be held invalid as it applies to the rights of persons to carry concealed handguns, as it clearly conflicts with the general law of this State expressed in the Ohio Concealed Carry statutory regimen.

Thus to summarize, and as set forth in detail below, the Clyde ordinance must be found to be unconstitutional as it applies to the open carrying of weapons, and invalid as conflicting with the general law of Ohio, as it applies to concealed carry of hand guns.

## STATEMENT OF THE CASE AND FACTS

Appellees Ohioans for Concealed Carry, Inc., et al., adopts the statement of the case and facts set forth by Appellee Ohio Attorney General Marc Dann, and add the following facts.

### A. Ohio's Concealed Carry Law

On January 7, 2004 the 125th General Assembly passed Am.Sub.H.B. No. 12 (“Concealed Carry Law”), as part of comprehensive and uniform statewide legislation, affirmatively granting qualified individuals the right to carry concealed handguns in Ohio. Am.Sub.H.B. No. 12 became effective April 8, 2004 and was the first law in Ohio’s history to allow for a Concealed Handgun License (“CHL”). Am.Sub.H.B. No. 12 implements a comprehensive and uniform statewide licensing system for the carrying of concealed handguns. While expressly granting the right to carry concealed handguns, Am.Sub.H.B. No. 12 prohibits concealed carry in certain places and provides that local entities may not enact ordinances or resolutions that restrict locations in which holders of valid CHL(s) may carry concealed handguns. Section 9, Am.Sub.H.B. No. 12.

R.C. § 2923.125 provides the process and requirements for obtaining a license to carry a concealed handgun. R.C. § 2923.126(A) provides that, “[e]xcept as provided in divisions (B) and (C) of this section, a licensee who has been issued a license under section 2923.125 or 2923.1213 of the Revised Code may carry a concealed handgun anywhere in this state ....” The exceptions listed in R.C. § 2923.126(B) and (C) are as follows:

“(B) A valid license . . . does not authorize the licensee to carry a concealed handgun into any of the following places:

“(1) A police station, sheriff’s office, or state highway patrol station, premises controlled by the bureau of criminal identification and

investigation, a state correctional institution, jail, workhouse, or other detention facility, an airport passenger terminal . . .;

“(2) A school safety zone . . .;

“(3) A courthouse or another building or structure in which a courtroom is located . . .;

“(4) Any room or open air arena in which liquor is being dispensed . . .;

“(5) Any premises owned or leased by any public or private college, university, or other institution of higher education . . .;

“(6) Any church, synagogue, mosque, or other place of worship, unless the church, synagogue, mosque, or other place of worship posts or permits otherwise;

“(7) A child day-care center, type A family day-care home, a type B family day-care home, or a type C family day-care home . . .;

“(8) An aircraft that is in, or intended for operation in, foreign air transportation, interstate air transportation, intrastate air transportation, or the transportation of mail by aircraft;

“(9) Any building that is owned by this state or any political subdivision of this state, and all portions of any building that is not owned by any governmental entity listed in this division but that is leased by such a governmental entity listed in this division;

“(10) A place in which federal law prohibits the carrying of handguns.

“(C)(1) Nothing in this section shall negate or restrict a rule, policy, or practice of a private employer that is not a private college, university, or other institution of higher education concerning or prohibiting the presence of firearms on the private employer’s premises or property, including motor vehicles owned by the private employer. Nothing in this section shall require a private employer of that nature to adopt a rule, policy, or practice concerning or prohibiting the presence of firearms on the private employer’s premises or property, including motor vehicles owned by the private employer.

“\* \* \*

“(3) The owner or person in control of private land or premises, and a private person or entity leasing land or premises owned by the state, the United States, or a political subdivision of the state or the United States,

may post a sign in a conspicuous location on that land or on those premises prohibiting persons from carrying firearms or concealed firearms on or onto that land or those premises. A person who knowingly violates a posted prohibition of that nature is guilty of criminal trespass in violation of division (A)(4) of section 2911.21 of the Revised Code and is guilty of a misdemeanor of the fourth degree.”

Under R.C. 2923.12(G)(1), penalties for violating the prohibitions enumerated in R.C. 2923.126(B) range from a first degree misdemeanor to a fifth degree felony.

**B. Clyde Codified Ordinance 2004-41.**

On May 18, 2004, the City of Clyde, Ohio passed Clyde Codified Ordinance 2004-41, which prohibits CHL holders from carrying concealed handguns in city parks and is a direct response to Am.Sub.H.B. 12. Clyde Codified Ordinance 2004-41 provides, in pertinent part, that:

(a) no person located within the confines of any City Park shall knowingly carry or have, on or about his person or readily to hand, any deadly weapon, irrespective of whether such person has been issued a license to carry a concealed handgun pursuant to Ohio R.C. 2923.125 or pursuant to a comparable provision of the law of any other state.

A violation of Clyde Codified Ordinance 2004-41 is a misdemeanor of the first degree.

Clyde Codified Ordinance 2004-41 prohibits the carrying of a handgun in a city park, which is permitted by the Concealed Carry Law and the reciprocity agreements entered into between the attorney general of this state and other states. Additionally, the penalty for violating Clyde Codified Ordinance 2004-41 differs from the Concealed Carry Law.

**C. Revised Code Section § 9.68**

On March 14, 2007, R.C. § 9.68 went into effect.

Sec. 9.68. (A) The individual right to keep and bear arms, being a fundamental individual right that predates the United States Constitution

and Ohio Constitution, and being a constitutionally protected right in every part of Ohio, the general assembly finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, or other transfer of firearms, their components, and their ammunition. Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition.

(B) In addition to any other relief provided, the court shall award costs and reasonable attorney fees to any person, group, or entity that prevails in a challenge to an ordinance, rule, or regulation as being in conflict with this section.

(C) As used in this section:

(1) The possession, transporting, or carrying of firearms, their components, or their ammunition include, but are not limited to, the possession, transporting, or carrying, openly or concealed on a person's person or concealed ready at hand, of firearms, their components, or their ammunition.

(2) "Firearm" has the same meaning as in Section 2923.11 of the Revised Code.

(D) This section does not apply to either of the following:

(1) A zoning ordinance that regulates or prohibits the commercial sale of firearms, firearm components, or ammunition for firearms in areas zoned for residential or agricultural uses;

(2) A zoning ordinance that specifies the hours of operation or the geographic areas where the commercial sale of firearms, firearm components, or ammunition for firearms may occur, provided that the zoning ordinance is consistent with zoning ordinances for other retail establishments in the same geographic area and does not result in a de facto prohibition of the commercial sale of firearms, firearm components, or ammunition for firearms in areas zoned for commercial, retail, or industrial uses.

Appellee would add the following to the procedural record of the Appellant:

Appellant previously argued in the instant case that Clyde Ordinance No. 2004-41 was an exercise of police powers, not one of local self-government. See, for instance, Clyde's Motion for Summary Judgment Page 6 and Page 8. "The City of Clyde has a constitutional right to enact legislation adopting police, sanitary and other regulations not in conflict with general laws." (Emphasis added.) This language is almost word for word from the case law considering police powers, and Clyde has never, prior to its Merit Brief being filed with this Court, asserted that its Ordinance is an exercise of local self-government.

Moreover, Appellant correctly points out that 6th District Court in *Toledo v. Beatty* (2006), 169 Ohio App. 3d 502, held that regulation of firearms in municipal parks was an exercise of police powers, not an exercise of self-government. Appellant's Summary Judgment Motion, which argued that Clyde Ordinance No. 2004-41 was an exercise of police powers, was granted based entirely upon the *Beatty* decision. Appellant did not file a cross-appeal in the instant case challenging the *Beatty* holding that such regulation is an exercise of police powers, not an exercise of local self-government.

Finally, in its Memorandum in Support of Jurisdiction, Appellee, Ohioans For Concealed Carry asserted that Clyde's Ordinance violated Article 1 § 4 of the Ohio Constitution by banning all lawful carry of arms.

## ARGUMENT

### **I. Appellee's Proposition of Law No. 1: Clyde's Ordinance Unconstitutionally Infringes on an Individual's Fundamental Right to Bear Arms Under the Constitution of the State of Ohio.**

Article 1 § 4 of the Ohio Constitution states: "The people have the right to bear arms for their defense and security ..." This clause allows an individual to possess firearms for

defense of self and property, and this Court has determined that Article 1 § 4 of the Ohio Constitution confers upon the people of Ohio the **fundamental right to bear arms**. *Arnold et al. v. City of Cleveland* (1993), 67 Ohio St. 3d 35, 47; 616 N.E. 2d 163; 1993 Ohio LEXIS 1608 (emphasis added).

In deciding there is no constitutional right to bear “concealed weapons,” this Court determined that every citizen of Ohio has right to bear arms “openly.” *Klein et al. v. Sheriff, et al.* (2003), 99 Ohio St. 3d 537, 542; 2003 Ohio 4779; 795 N.E. 2d 633; 2003 Ohio LEXIS 2418. In *Klein*, this Court upheld several laws that limited the manner in which firearms could be carried. However, it was clear to affirm that the right to bear arms is fundamental. *Klein*, 99 Ohio St.3d at ¶ 7. This Court reasoned that these laws regulated the manner in which weapons may be carried. *Id.* at ¶ 13. However, the statute in question in *Klein* “leaves open the ability to bear arms by openly carrying a firearm” as the State admitted in argument. *Id.* at 42 (J. O’Connor, dissenting). In other words, the State admitted that the restriction on carrying concealed weapons left open the means of carrying firearms openly so that all people could exercise their fundamental right to protect themselves.

The Clyde City Ordinance No. 2004-41, explicitly bans all lawful means to bear arms whether openly carried or concealed within its City Parks.

No persons located within the confines of any City Park shall knowingly carry or have, on or about his person or readily to hand, any deadly weapon, irrespective of whether such person has been issued a license to carry a concealed handgun pursuant to Ohio R.C. § 2923.125 or pursuant to a comparable provision of the law of any other state.

Codified Ordinance of the City of Clyde, Ohio § 923.10(a) Prohibition of Deadly Weapons in Parks.

A municipality cannot enact legislation that prohibits the general population from carrying all firearms. *Arnold*, 67 Ohio St.3d 35. *Arnold*, in so stating, confirmed the test for the constitutionality of the action of the State or a political subdivisions when seeking to regulate a fundamental right. In order to be constitutional, a statute that infringes on a constitutional right must pass strict scrutiny. To survive strict scrutiny, a statute must be necessary and narrowly tailored to fit a compelling government interest. *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415.

This Court has found that a city's interest in laws or ordinances passed by virtue of a city's police power is in protecting the health, safety, morals, or general welfare. *Arnold*, 67 Ohio St.3d at 46. Appellant has not provided any evidence that carrying a firearm in the park by law abiding citizens, concealed or otherwise, puts the general health, safety, or welfare of the public at risk. More importantly, Clyde Codified Ordinance 2004-41 is not necessary or narrowly tailored to meet any governmental interest. Rather, it is overly broad, encompassing the carry of all firearms whether concealed or openly carried in plain sight or whether the individual is properly licensed to carry concealed.

By enacting Ordinance 2004-41, the City of Clyde directly conflicted with Article 1 § 4 of the Ohio Constitution. Clearly, the City of Clyde exceeded its authority under Article XVIII Section 3, and violated Article 1 § 4 when it elected to ban all firearms. Therefore, this Court must find that Clyde Codified Ordinance 2004-41 does not pass strict scrutiny and is unconstitutional.

**II. Appellee's Restatement of Appellant's Proposition of Law No. 1: R.C. §§ 2923.15 et. seq. and R.C. § 9.68 are General Laws Operating Uniformly Throughout the State<sup>1</sup>**

The City of Clyde seeks to establish that its Ordinance 2004-41, despite its clear and undisputed conflict with R.C. §§ 2923.15 et. seq, and R.C. § 9.68, is valid under Ohio's Home Rule Amendment, Article XVIII, § 3 of the Ohio Constitution.

The determination of whether a local ordinance is permissible under Home Rule provisions of the State Constitution is essentially determined by a two step analysis. The first question is whether the ordinance relates to a matter of local self government or alternatively, whether it seeks to enforce local police, sanitary, and other similar regulation. Article XVIII, § 3 of the Ohio Constitution. If the ordinance relates to a matter of self-government, the analysis ends, and the ordinance is valid by virtue of the authority granted to municipalities under Home Rule. If the ordinance does not relate to a matter of local self government. i.e. it relates to police, sanitary, and other similar regulation, then such ordinance will be valid only if it does not conflict with a general law of the state. *Id. American Financial Servs. Assn. v. Cleveland* (2006) 112 Ohio St.3d 170, 173, 858 N.E.2d 776, 780.

The City of Clyde, in its Proposition of Law No. 2 of its merit brief, states that its city park firearms ban in Ordinance 2004-41 is an exercise of local self-government and therefore valid without regard to whether or not it may conflict with a general law of the State. That issue is addressed *infra*.

The City also maintains, however, that even if the ordinance is found not to be an exercise of local self-government, but instead an exercise of police power, then it is still valid under Ohio Home Rule as Ohio's concealed carry regulation, R.C. §§ 2923.125 et. seq., is not a

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<sup>1</sup> Appellants Proposition of Law No. 1 states "R.C. 2923.126 is not a general law under Ohio's Home Rule Amendment."

“general law” of the state, and thus there was no requirement that the ordinance not conflict with it. The City has not contended that its ordinance does not conflict with the State regulatory scheme, only that the State’s regulation is a not “general law.”

This Court has previously established, in *Canton v. State* (2002) 95 Ohio St. 3d. 149 a four part test to determine if an enactment of the General Assembly is a “general law:”

[t]o constitute a general law for purposes of home-rule analysis, a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.

*Id.* Syllabus.

The City of Clyde, has not sought to challenge elements (1), (3), or (4), stated above, however in Section B of the City of Clyde’s Proposition of Law No. 1, the City argues that R.C. § 2923.126 does not meet the second test, contending it does not operate uniformly throughout the State.

The position adopted by the City of Clyde is essentially that as stated by the Court of Appeals of the Sixth District, in *City of Toledo v. Beatty* (2006) 169 Ohio App.3d 502, 963 N.E.2d 1051.<sup>2</sup> Such argument does not withstand scrutiny when considered under the previous pronouncements of this Court defining the meaning of uniform application.

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<sup>2</sup> It should be noted that the *Beatty* decision predated the enactment of R.C. § 9.68, which, in its statement of the intention of the General Assembly, “the General Assembly finds the need to provide uniform laws throughout the State regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, or other transfer of firearms, their components, and their ammunition,” made clear that the Assembly considered its concealed carry weapons regulation to be a matter of statewide concern and to be the subject of general law, considerations described *supra* that invalidate local ordinances which conflict with such legislative enactments. Recognizing the more recent enactment of R.C. § 9.68, and considering it in *pari materia* (as required by *Clermont Environmental Reclamation Co.v. Wiederhold* (1982) 2 Ohio St.3d 44, 48, 442 N.E.2d 1278, 1282), with firearms regulation of R.C. § 2923.12 et. seq. the Sixth District reversed the trial court’s decision in favor of the City of Clyde in the instant case, which the trial court had decided in accord with the prior Sixth District *Beatty* decision.

In substance, the City of Clyde's argument, echoing the *Beatty* decision, states that the statutory scheme involved in Ohio's concealed carry laws does not apply uniformly throughout the State because a private land owner or private employer has the ability to determine that firearms may not be carried on the private land owner's or employer's property. *Id.* at 511-12, 963 N.E.2d at 1058. Clyde argues that as a result of this deemed "lack of uniform application," the statutory scheme embodied in Ohio's Conceal Carry Law does not meet the test to be considered a "general law," and consequently the local ordinance may validly conflict with the statutory scheme. *Id.*

The implication of the City's argument, that mere recognition of basic private property rights, and the consequent tailoring of a statutory scheme to accommodate such constitutionally protected rights, would cause a statutory enactment to fail to be a "general law," if adopted by this Court, could eliminate the statewide effect of countless statutes. Certainly the effects of accommodating the rights of owners of private property in a legislative scheme can not be painted with such a broad brush.

To mention a few of the implications of the adoption of such a viewpoint, vehicle registration statutes could not be considered to be a general law because owners of private property may allow unregistered vehicles to operate on their property. Likewise civil rights legislation would fail the "general law" test, because in matters other than public accommodation, a private land owner is not required to honor requirements to disregard race, gender, religion, or other protected classifications in determining who may enter his or her property. Similarly, state vehicular speed limits would fail, as clearly they are not applicable to private property. In each and every one of these areas of regulation, the private property owners' rights are every bit as significant as those recognized in the concealed carry statutory scheme. It

is nearly impossible to conceive of the breath and scope of state legislation that would fail the test of general law by virtue of its recognition that differing application to public and private property is warranted.

In all such areas, because the state legislation would not meet the test of uniform application (i.e., as it was applied in the *Beatty* decision and as propounded by the City of Clyde), and consequently not be a “general law,” a local ordinance could completely abrogate such state laws within the boundaries of the locality. Clearly, previous decisions which have upheld the statewide application of licensing, speed limits, and other statutes would also be overturned under the reasoning employed in the *Beatty* decision. In effect, any state law which did not apply equally to private as well as public property would be subject to being effectively negated within the boundaries of any municipality under Home Rule. It is not an exaggeration to say that if the reasoning underlying the *Beatty* decision were to stand, the state government would cease to exist as we know it, and Ohio would more resemble a confederation of city-states.

This is not the intent of any of the previous jurisprudence involving Home Rule. The requirement of uniform operation as set forth by this Court in *Garcia v. Siffrin Residential Assn.* (1980) 63 Ohio St.2d. 259, 863 N.E.2d 1051, noted that “uniform operation throughout the state of laws of a general nature does not forbid different treatment of various classes or types of citizens, but does prohibit non-uniform classification if such be arbitrary, unreasonable or capricious,” *Id.* at 272, 863 N.E.2d at 1058.

This Court has previously indicated that it is proper to compare the actual operation of a statute with its stated purpose in determining whether a law operated uniformly through the State. *City of Canton v. State* (2002) 95 Ohio St.3d 149 (finding a statute to fail the

test of a general law because a provision of the statute was found to be “inconsistent with the statutes stated purpose”). *Id.* at 155. The Court’s decision in *Canton* (in which the Court found that a statute prohibiting municipalities from barring manufactured homes in single family zoned areas did not operate as a “general law”), argued by the Appellant as applicable to the case before the bar, is clearly distinguished by the fact that the statutory scheme in question in *Canton* specifically provided that the central provisions of the statutes could be defeated by the inclusion of contrary restrictions in deeds. The effect of such a qualification goes beyond the traditional, and constitutional, protections of private property owners’ rights in that by incorporating restrictions in deeds, the property could be permanently removed from application of the statute, even in the event successor property owners would prefer that the property be subject to such statute. Clearly large areas of the state, and as the Court noted, most likely areas undergoing current or future development, could readily be permanently excluded from the effects of the statute, thereby creating a patchwork pattern of effectiveness of the statute, in practice applying to older, previously developed areas, but not those developed recently or in the future.

Furthermore, as the Court recognized in *Canton*, the opportunity to avoid the statutory requirements through deed restrictions would be available primarily to developers or persons who were members of active homeowner associations (generally newer neighborhoods), and not equally available, in practice and effect, to all persons.

Most importantly, there was no reasonable logical and rational basis for differing treatment afforded to those in the previously developed and urbanized areas of the state, who would have little power to establish effective restrictions in deeds, versus the treatment accorded to property owners and developers in areas of new development, who were afforded an easily accessible power to deny manufactured housing in their neighborhoods. Clearly, no rational

basis had been established to justify the statute's grant of the power to deny manufactured housing in certain neighborhoods but not in others. Thus, it can be seen that the statutory scheme in *Canton* could reasonably be considered to cause a pattern of non-uniform application that is qualitatively different than that of other statutes, including those comprising Ohio's concealed carry regulation, which do no more than recognize the distinction between public and private property, in that a private property owner's general and fundamental rights to control access and the activities conducted on his or her private property call for differences in the application of police power.

The City of Clyde's merit brief, cites to the requirement noted above of uniform operation as qualified by *Garcia*, (Appellant's brief pp. 9-10) i.e. that "uniform operation throughout the state of laws of a general nature does not forbid different treatment of various classes or types of citizens, but does prohibit non-uniform classification if such be arbitrary, unreasonable or capricious." From this precept, Appellant, as the *Beatty* court did, has made an unwarranted extension in contending that other distinctions in the concealed carry legislation, which Appellant contends are "arbitrary" implicate the prohibition of "non-uniform classification." In fact, these distinctions are not properly considered distinctions in classification of persons subject to the statutory scheme, they merely regulate behavior of all citizens depending on the place or event they may be attending.

Clyde cites as an arbitrary distinction of the concealed carry legislation, the treatment of public versus private property, yet this distinction merely determines what rights and obligations apply equally to all persons depending on their location from time to time, whether that location is public property or private property, and if private, whether owned or controlled by such person or by others. All persons have the same rights in public places, all

persons are limited by the exceptions where concealed carry does not apply, and all persons share the same rights with respect to private property they own or control, whether as a property owner or an employer.

The statutory scheme does not classify persons and subject them to differing rights and duties; it merely states how rights and duties of all persons vary in like manner according to their current location. This same incorrect application of the arbitrary distinction principle applies to the arguments regarding school sponsored events at public facilities, e.g. athletic events. All persons are treated equally with regard to the concealed carry regulation at such events, they are prohibited from carrying concealed weapons, and equally all persons may be allowed to carry concealed weapons at other events on the same public property.

The examples of the City of Clyde's merit brief describing the differing application of the statute in various locations and events, e.g. golf courses, places of worship, high school athletic events on municipal fields (Appellant's brief pp. 10 *et seq.*), only demonstrate differentiation based on place or event, not differentiation between classes of citizens at such places or events. The prohibition of *Garcia* is for a statute to operate uniformly it must not make arbitrary distinctions among classes of citizens, it does not speak to distinctions, amount, places or events. All persons are treated equally in all such places under the statutory scheme for concealed carry.

Even assuming, *arguendo*, that the concealed carry statutory scheme does classify citizens according to whether or not they are property owners or employers, certainly to the extent that the regulation recognizes distinctions where private property is involved, such distinctions are surely not arbitrary, unreasonable or capricious. Municipalities, as state actors, are significantly proscribed by the 14th Amendment to the United States Constitution as to how

they regulate the public's use of municipal property, and in doing so must adhere to the requirements of the Constitution's Due Process, Privileges and Immunities, and Equal Protection clauses.

On the other hand, rights of private property owners to make any number of determinations with respect to their own property are fundamental, and protected constitutionally as part of life, liberty, and property. Private property owners' rights to make decisions with respect to their own property for any reason or no reason have traditionally been upheld by courts throughout the nation. Without question, a private property owner, with limited exceptions, may deny access to virtually all persons and declare an uninvited entry to be a trespass, and may similarly govern the conduct of those he or she invites to enter such private property.

For this reason alone, differences in how police powers are applied to public and private property are justified and rational. Where public property is concerned, a citizen has no power to prevent access on such property to those he or she does not know or those who could be a threat to the citizen, including those with criminal intent. It is quite logical, and certainly not capricious or arbitrary for the General Assembly to determine that it is appropriate to allow a citizen to carry a firearm for personal protection in a public area, and not consider the need as great for private property where the general public has no inherent right to enter.

In summary, a statutory scheme does not call for non-uniform application throughout the State when it does no more than recognize private property rights and the differing conditions inherent in public versus private property. The limitation in the concealed carry legislative scheme, as in many other regulatory and licensing schemes, merely defines the scope of the legislation, and to the extent it treats persons differently with regard to private

property, the differences are logical, rational, and recognize the inherently differing conditions, and their effect on the need for personal protection, between public and private property.

Equally as important, any differences in application of the concealed carry scheme are justified by the need to respect the constitutionally protected rights of property owners. In the countless areas of licensing and regulation adopted by the General Assembly since the inception of statehood, which have appropriately recognized the rights of private property owners and the essential differences between private and public property, it would be wrong to allow the municipalities of the State to overrule such legislation within their boundaries, simply because the General Assembly has recognized and provided for such constitutionally protected private property rights. After all, the principle that rights and obligations of persons differ according to whether they relate to public or private property, predates the founding of our nation, and is fundamental to our system of government.

**A. The General Assembly's Statement of Preemption Expresses Its Intent that Legislation is a Matter of General and Statewide Concern.**

The City of Clyde argues, in Section C. of its Proposition of Law No. 1, that the General Assembly's attempts at preemption are ineffective. In this regard, while the statement must be considered literally true, what has in the past been described as "preemption" by the General Assembly is more correctly deemed to be the General Assembly's expressed intent that its legislation is a matter of general and statewide concern. This Court, in *American Financial Services*, stated as much "[a] statement by the General Assembly of its intent to preempt a field of legislation is a statement of legislative intent and may be considered to determine whether a matter presents an issue of statewide concern . . .". *American Financial Services* at 175. 858 N.E.2d at 782. The Court indicated its agreement with the Second District Court of Appeals in

its conclusion the doctrine of statewide concern “is relevant only ‘in deciding, as a preliminary matter, whether a particular issue is ‘not a matter of merely local concern, but is of statewide concern, and therefore not included within the power of local self-government.’” *Id.* (emphasis supplied).

In this regard it is proper to consider the intent expressed by the General Assembly as evidenced by the clear language of R.C. § 9.68 “the general assembly finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, or other transfer of firearms, their components, and their ammunition.”

Although it is correct to state that the courts have the final say on whether an ordinance may stand under the Home Rule Amendment to the State Constitution, clearly the function and the purpose of the State Legislature is to address issues of statewide concern, and its very structure, including members from each and every district in the State (who, it may be presumed, are not eager to see the legislature meddle in the strictly local affairs of their constituent communities) and requiring the concurrence of a majority of those members to pass any legislation, further ensures the legitimacy, as subjects of statewide concern, of the legislation enacted by the General Assembly. A recognition of the structure and purpose of the State legislature, with appropriate deference to separation of powers, would indicate that the expressed intent of the legislature as to the issue of statewide concern should be respected by the courts, and it should be appropriate for a court to entertain the presumption that the judgment of the legislature is correct on such determination, in all but the most clear circumstances suggesting otherwise.

Here, it is abundantly clear that the General Assembly has come to recognize the need for the concealed carry legislation as necessary for the safety and protection of all citizens of the State. In so doing, the General Assembly's pronouncements allowed the State to become the forty-sixth state to allow the carrying of concealed weapons in some form. Baldwins Oh. Prac Crim L § 106.2 (2007). Under these circumstances, the subject of the concealed carry statutory scheme is of statewide concern, if not national, and certainly is not a matter affecting only the local self government of any individual municipality.

**III. Appellee's Restatement of Appellant's Proposition of Law No. 2: Municipal Regulation of Firearms in City Parks is an Exercise of Police Power, Not Local Self-Government.<sup>3</sup>**

In its Proposition of Law No. 2, the City of Clyde argues that its Ordinance No. 2004-41 is purely a matter of local self-government, and therefore is not subject to the constraint of Ohio Constitution, Article XVIII Section 3, applying to the exercise of local police power and stating that such exercise must not conflict with general laws. Clyde states that "[t]hus, a municipal ordinance relating solely to matters of local self-government is enforceable *irrespective* of any pronouncement by the state" (emphasis in original). (Appellants merit brief p. 16) The City further states that its ordinance banning concealed firearms is "purely a matter of self government" (*Id.*, p 18).

In addition to the arguments of the preceding section of this brief regarding the application of the statewide concern doctrine, it is readily apparent that the enactment of Ordinance No. 2004-41 is an exercise of police powers. In addition, Appellant Clyde, for the

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<sup>3</sup> Appellant's Proposition of Law No. 2 states: "A Municipality's Ability To Regulate City Parks Is A Power Of Local Self Government And, As Such, Cannot Be Limited Or Diminished By The General Assembly."

first time in this case and remarkably so, is now arguing that its Ordinance is merely an innocuous exercise of local self-government. This argument must fail for the following reasons:

1. Clyde has previously argued their Ordinance was an exercise of local police powers.
2. The implementation of Ordinance No. 2004-41 was done on an emergency basis, citing to the preservation of peace, health and safety of the City of Clyde, which is the very definition of a police power.
3. The precedent controlling in this case, the *Beatty* case, held that the regulation of firearms in city parks was an exercise of police powers, and Clyde did not cross-appeal from this determination.
4. The statewide concern or “preemption” examination of R.C. §§ 2923.125 et seq and R.C. § 9.68 reveals that the need to provide a uniform system of statewide system for the carrying and transportation of firearms outweighs any purely local interest.
5. Ordinance No. 2004-41 fits the case law definition of “police power” and not that of “self-government.”

Most importantly, opposing this contention are the previous holdings of this Court, which have unequivocally stated that the regulation of firearms is an exercise of police power. In *Klein v. Leis*, 99 Ohio St. 3d 537 (2003) 795 N.E.2d 633, this Court stated [t]he statutory scheme in question prohibits the carrying of concealed weapons . . . [w]e consider this to be regulation of the manner in which weapons can be carried . . . [s]ee *Nieto*, 101 Ohio St. at 413, 130 N.E. 663. . . [a]s such, it involves the police power of the state . . . [s]ee *Arnold*, 67 Ohio St.3d at 47, 616 N.E.2d 163 (“[t]his court has established that firearm controls are within the ambit of the police power”).

An examination of the body of case law finding that the regulation of firearms is the exercise of police powers is a somewhat voluminous undertaking, but made infinitely easier by the fact that the holdings are uniformly consistent. *Mosher v. City of Dayton* (1976), 48 Ohio St.2d 243, 247 (“This is a reasonable police regulation...”); *City of University Heights v.*

*O'Leary* (1981), 68 Ohio St.2d 130, 135 (“We hold it is a reasonable exercise of the police power...”); *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 47 (“Legislative concern for public safety is not only a proper police power objective-it is a mandate. This Court has established that firearm controls are within the ambit of the police power.”); *State v. Nieto* (1920) 101 Ohio St. 409, 413 (“The Constitution contains no prohibition against the Legislature making such police regulations...”); *Cincinnati v. Baskin* (2006) 112 Ohio St.3d 279, 281 (“There is no dispute in this case that Cincinnati Municipal Code 708-37 is an exercise of the police power, rather than of local self-government.”)

From the above examination of case law on the issue, it cannot be seriously doubted that all prior precedent holds that attempts by any branch or level of government to control or restrict the carrying of weapons involve the exercise of police power, whether such action is by the State by statute or administrative regulation, by a Municipality through an ordinance, regulation, rule, publication, signage, or by any government power exercised by persons acting for the State or its political subdivisions. Clyde’s ordinance, banning all deadly weapons from its parks, falls clearly into that ambit.

Furthermore, the City of Clyde, in enacting its ordinance, itself recognized the enactment as the exercise of police powers, indicating in recitations to the ordinance that “[w]hereas, the City of Clyde has Home Rule authority to adopt Ordinances directly related to police powers pursuant to Article 18, Section 7 of the Constitution of the State of Ohio.” (Ordinance No. 2004-41, Appellant’s merit brief, App. P. 18).

Additional examination of the face of the Ordinance is similarly conclusive.

**Section 2:** That this ordinance is hereby declared to be an emergency measure necessary for the preservation of the public peace, health and safety of the City of Clyde and its inhabitants for the reason that there exists an imperative necessity to create an

Ordinance prohibiting the carrying of deadly weapons in the several parks of the City of Clyde. Clyde Ordinance No. 2004-41 Section 2. (Emphasis added.)

This wording, used to waive separate readings and declare an emergency, almost exactly mirrors the description of most definitions of police powers. Things that impact public peace, health or safety are police powers, not powers of self-government.<sup>4</sup>

Finally, the City's argument that its ordinance prohibiting the rights protected by state concealed carry regulation is not a matter of statewide concern is factually incorrect. The City quotes the test of whether an ordinance is a matter of local self government as stated in *Cleveland Electric Illuminating Co. v. Panesville* (1968) 15 Ohio St.2d 125, 239 N.E.2d 75.

To determine whether legislation is such as falls within the area of local self-government, the result of such legislation or the result of the proceedings thereunder must be considered. If the result affects only the municipality itself, with no extraterritorial effects, the subject is clearly within the power of local self-government and is a matter for the determination of the municipality. However, if the result is not so confined it becomes a matter for the General Assembly.

*Id.* at 129, 239 N.E.2d at 78 (emphasis added).

Certainly, however, the individual regulatory schemes of municipalities have extraterritorial effects on the most basic level to the extent they affect citizens other than their own residents, citizens who may have no more than fleeting contact with the municipalities as they travel through them. In this case, if the arguments of Clyde are to prevail, citizens of the state as well as those of other states, who have complied with the state's concealed carry regulations will, as a practical matter, be unable to travel throughout the state without the

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<sup>4</sup> It is notable to that the minutes from the meeting adopting Ordinance No. 2004-41 are completely silent as to exactly what the threat to the peace, health or safety was being addressed. Apparently no evidence or testimony was offered to establish the need for the Ordinance. In fact, the majority of states, as well as the General Assembly, have recognized that enacting legislation permitting an individual to have effective means to take responsibility for his or her own personal protection, and that of others as well, better serves the interests of peace, health and safety of the community. Despite the statement of purpose of the Clyde ordinance, whether the complete ban on weapons on park premises even serves such purpose, is questionable, and does not appear to be congruent with the thinking of a majority of the legislatures of the states enacting concealed carry legislation.

concern of criminal prosecution under a myriad of conflicting local ordinances. The effect of such ordinances and the natural concern of law abiding persons to avoid criminal prosecution effectively negate the rights for citizens to protect their persons and property in the manner the legislature sought to establish in enacting the concealed carry legislation. The intention of the legislature to establish a regimen that granted dependable guidance to its citizens in travels throughout Ohio could not be more clear from the language of R.C. § 9.68 “the general assembly finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, or other transfer of firearms, their components, and their ammunition.”

Thus, while the City of Clyde may contend that its ordinance is of no statewide concern, the General Assembly, whose members represent every district in the State, has indicated otherwise.

Furthermore, from a strictly factual and practical viewpoint, it is without question that public parks have been the scene of innumerable crimes against persons and property throughout the State of Ohio. Certainly persons from throughout the State visit public parks in the various municipalities. In point of fact, such visitors can not be expected to share the same knowledge that local persons have regarding the relative safety or danger from crime that a particular park provides, and therefore the non-resident’s needs for the personal protection provided by the states concealed carry regulation may be greater than that of a local resident. The State clearly has an interest, as expressed in its regulation, of ensuring that all of its citizens may avail themselves of the means of personal protection guaranteed in the Constitution and under the States statutory scheme for concealed carry. The language of R.C. § 9.68 clearly sets forth the General Assembly’s determination that the State has an interest in ensuring that the

individual right to keep and bear arms will be respected and observed throughout the State. Certainly the most fundamental duty of the General Assembly is to recognize, establish and protect the health and safety of the citizens of the State as a whole. With such a clear statement by the General Assembly of the State's interest, without a compelling argument counter such statement, it would be inappropriate for a court to determine otherwise.

**IV. Cleveland Incorrectly Asserts R.C. § 9.68 is an Unconstitutional Attempt to Withdraw the Municipalities' Home Rule Authority.**

Although Amicus, the City of Cleveland, argues that R.C. § 9.68 is an unconstitutional attempt to withdraw the municipalities' Home Rule authority, in fact it is best appreciated for what it says on its face, an expression by the General Assembly of the rights of all persons under Ohio law to own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition. The statute acknowledges open carry and grants affirmative rights to all persons with regard to firearms to the extent those rights do not conflict with Federal or State law and the United States and Ohio Constitutions. The statute, in applying to all persons, thereby provides that regulation included within State and Federal firearms laws shall be the general law of the State, and that it is the intent of these general laws that no regulation shall be more or less restrictive than the State and Federal regulation, nor infringe the guarantees afforded in the United States and Ohio Constitutions.

Thus, although the City of Cleveland attacks R.C. § 9.68 as an unconstitutional attempt to preempt the local Home Rule powers of municipalities, in fact it is more properly regarded as a statement of the intent of the General Assembly of the statewide concern that firearm regulation be done on a statewide basis and that it be uniform throughout the state to ensure its effectiveness and to prevent its citizens from being exposed to conflicting municipal

ordinances and criminal prosecution. The General Assembly's concerns include regulation of dangerous ordinance, restricting the rights of possession and use in certain places and circumstances, and by certain persons, but also include the intent that law abiding citizens be afforded the ability to protect person and property by ensuring that no local regulation shall take away what the State's Constitution and legislation allow. Thus, as stated above, the legitimate concern of the State, as expressed by the body that is charged with implementing legislation of Statewide concern, is that regulation by municipalities be neither more nor less restrictive than existing State and Federal law.

In summary, although Cleveland attacks the State's firearms control regulation as an attempt to preempt the powers granted by the State Constitution, the proper evaluation of the State's regimen is as it relates to the requirement that the exercise of local police powers not conflict with general laws of the State. Clearly the intent, and the operation of the statutory scheme, including the prohibitions of R.C. § 9.68 act as a general law that is enacted to prevent conflicting local regulation of the issues involved, whether such regulation be more or less restrictive. This is a legitimate concern and exercise of the State's police power and is enacted to allow the citizens of Ohio and sister states the ability to appropriately protect their person and property, and at the same time be protected from danger posed by dangerous ordinance and other matters involving firearms which the General Assembly has determined pose unacceptable risks to such citizens.

**V. Cleveland's Argument that the General Assembly Has Failed to Enact a Comprehensive Scheme Must Also Fail.**

Who is to say what a comprehensive scheme entails, particularly in the situation that State Legislature has recognized, that the proper exercise of the State's police power is

expressed both in prohibiting the possession and use of certain firearms and other weapons in some places, at some events, and by certain persons, and also in establishing that the right to the possession and carrying of certain other firearms not be restricted, in order to enhance the ability of the citizens to protect their persons and property. The City of Cleveland contends that because the statutory enactments of the General Assembly do not address all the weapons related matters that are the subject of certain municipal regulation, *see, e.g.*, the Cleveland ordinances appended to the City's brief, that therefore the State's regulatory scheme is not comprehensive. (City of Cleveland Brief, pp. 16 et. seq.) This contention ignores the responsibility of the legislature to honor the constitutionally protected right of individuals to bear arms that this Court has recognized time and again, but which the Cleveland ordinances do not. The State Legislature is uniquely positioned to consider and adopt regulation which in its considered judgment is necessary and appropriate to apply to all persons throughout the State. Such determinations include the extent of regulation that is necessary, as well as what matters should not be regulated, but be left to the determination of the State's citizens, in recognition of their constitutional rights, the fundamental concept of limited government, and the sense of the legislature as to the most effective manner of ensuring the health, safety, and welfare of the citizens.

Neither the Appellant, the City of Cleveland, nor any other Amicus, has provided any evidence or argument that suggests the General Assembly, in its deliberations, is not exercising its police powers on a rational basis for the welfare and protection of the State's citizens, as the Assembly perceives them.

Further, as mentioned elsewhere in this brief, the State legislature is comprised of representatives of every district in the State, all who have responsibilities, and who are in fact

accountable at time of election to their local constituents and the local municipalities in which those constituents reside. If in the collective wisdom of a majority of the State Legislature, a regulatory scheme needs uniform application throughout the State, clearly it may devise such scheme in as much detail as the legislature sees fit. The absence of regulation on any particular matter does not necessarily imply that no consideration has been given to the matter; it may only imply that the legislature has considered that such matter should not be regulated, e.g. city parks. No member of the General Assembly could mistake the import of the language of R.C. § 9.68, and its clear requirement that State and Federal law and the United States and Ohio Constitutions, should govern firearms regulation in Ohio, and that no municipality should enact either more stringent, or less restrictive regulation, thus there is no question of the intent of the legislature to enact a law of general application.

The Cleveland Amicus brief, on p. 10, apparently urging this Court to examine R.C. § 9.68 in isolation, makes the argument that Sub. H.B. No. 347, did not enact a series of statewide regulation in the field of firearms, only the limiting provision of R.C. § 9.68. However, substantial firearm regulation preexisted Sub. H.B. No. 347, and as indicated in *Clermont*, the individual statues making up a statutory scheme should be considered in *pari materia* (as required by *Clermont Environmental Reclamation Co. v. Wiederhold* (1982) 2 Ohio St.3d 44, 48, 442 N.E.2d 1278, 1282)

More importantly for the instant case, the pre-existence of Ohio concealed carry statutory scheme included with in R.C. § 2329.11 et seq. clearly comprehensively regulates handguns, particularly concealed handguns in the State. The specific language in R.C. § 2923.126(A) provides that a licensee “may carry a concealed handgun anywhere in this state if the licensee also carries a valid license and valid identification when the licensee is in actual

possession of a concealed handgun.” The provisions of division (A) are modified by divisions (B) and (C) of the statute, specifically excluding certain places and events in which a concealed handgun may be carried and allowing those in ownership or control of private property, including employers, to prohibit the carrying of firearms on private property and providing penalties for those who violate such provisions. Thus, without question, the specific municipal ordinance under review in the instant case which bans firearms on park property is in conflict with a statute that comprehensively deals with concealed carry of handguns.

Furthermore, even though the *Clermont* decision would require R.C. § 9.68 to be read in *pari materia* with R.C. § 2923.126, the language of the latter statute, stating that a properly licensed person may carry a concealed handgun “anywhere in the State,” (subject to specified exceptions) and the constitutionally protected manner of open carry, are sufficient even without the addition of R.C. § 9.68 to establish that any more restrictive regulation, such as Clyde ordinance prohibiting firearms in parks, is in conflict with a general law of the State. Thus, in regard to the instant case, R.C. § 9.68, while it reinforces the contention that R.C. § 2923.126 is a general law and that the Clyde ordinance must therefore be held invalid, is not necessary to reach such a conclusion. For this reason the analysis of R.C. § 9.68 in the Cleveland Amicus brief, while addressing an issue that may be of more concern to Cleveland with its concerns regarding its own body of firearm regulation, regulation that clearly unconstitutionally prohibits all manner of carry, whether open or concealed, (*See* appendix to brief of City of Cleveland), is not particularly relevant to the question of whether the Clyde ordinance should be held invalid.

The City of Cleveland’s analysis of the *Baskin* decision, *Cincinnati v. Baskin* (2006) 112 Ohio St.3d 279 , commencing on page 13 of Cleveland’s Amicus brief, is similarly

inapplicable to the case before the bar. Just as the *Baskin* could address a single statute and find that it constituted a general law, *Id.* at 283, so also can the Court determine that R.C. § 2923.126 constitutes general law, even without the assistance of R.C. § 9.68

Part B of the Amicus brief of the City of Cleveland is essentially an attack on the constitutionality of R.C. § 9.68, primarily on the grounds that the statute is not part of a comprehensive scheme for the regulation of firearms. This argument raises the question of who is to determine the amount and degree of regulation that should be applied to any area of conduct or subject matter. Although the City of Cleveland makes reference to the concurrence of Justice O'Connor for the her opinion that the State of Ohio had no comprehensive firearms regulation, the treatment of the issue by Cleveland begs the question of whether it is urging the Court to legislate in this area, rather than defer to the General Assembly's determination of the scope of regulation appropriate for the State.

As stated, the determination not to regulate a particular issue or area is not necessarily an indication that consideration was not given to the issues, but may just as well indicate that after well reasoned deliberation, the legislative body has decided that regulation is not appropriate or necessary, or that limited regulation better serves the purposes of the State and its citizens, e.g. by permitting concealed carry in parks.

Certainly, in a majority of states, the pendulum on firearm control issues has swung more and more to the realization that restrictions on firearms are not in the best interest of citizens and the recognition that citizens should be afforded the means to protect themselves and their property.

Moreover, the viewpoint of the City of Cleveland, that R.C. § 9.68 is simply a prohibition and usurpation of the municipalities' rights to establish firearms controls, is a

viewpoint that can be equated with the glass half empty or glass half full metaphor. R.C. § 9.68 can alternatively be viewed as noted above, not as a prohibition of the powers of municipalities, but rather as an affirmative grant or guarantee to the citizens of the State of their rights to firearm ownership and possession, and that no more burdensome regulation than that found in State and Federal law will be imposed upon them.

## **VI. Ohio Municipal League Private Property Arguments are not Applicable to the Issue Before the Court.**

Initially it may be remarked that the discussion of the rights of private property owners expressed in Proposition of Law No. 2 of the brief of the Ohio Municipal League (“League”) supports the argument of the Appellee that the City of Clyde is incorrect in its contention of that the concealed carry statutory scheme does not operate uniformly in the state. The arguments advanced by the League support the conclusion that any distinction in the rights of citizens based on whether a regulation implicates private property rights can not be considered arbitrary, unreasonable or capricious, but instead is based on the most fundamental principles of our State and Federal system of government.

The League’s Proposition of Law No. 2, states, on page 8 of its brief, that “[s]tated differently, the authority of the municipality to exclude persons carrying concealed weapons from municipal parks does **not** arise from the municipality’s exercise of its police power; rather it arises from the city’s **ownership** of its property” (emphasis in original).

Assuming arguendo, that this statement is a correct statement of law regarding a municipality’s authority, it has no relevance to the issues of this appeal, which deal with whether an ordinance providing for criminal penalties, and conflicting with state regulation of the same matter, may be enacted as an exercise of local police power under the provisions of Ohio’s Home Rule constitutional authority. While the rights of a property owner may allow such owner

to exclude others from the property, they do not confer any authority to establish an ordinance providing for criminal penalties for violation of such prohibition. Thus to the extent the League's argument relies on the municipality's ownership of its park property, rather than its rights to exercise local police power, the argument is inapposite to the case before the bar.

Secondly, although the League contends that State of Ohio could not pass a law which would allow a person with a permit to carry a concealed handgun to enter upon the private property with the owner's consent (Brief of Amici Curaie, The Ohio Municipal League, p. 6), in fact the legitimate police power of the state may infringe on the liberty and property of its citizens. "This Court held, in *Benjamin v. Columbus*, (1957) 167 Ohio St. 103; 146 N.E.2d 854 that:

Although almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, within the meaning of Section 1 of Article I of the Ohio Constitution, or involve an injury to a person within the meaning of Section 16 of Article I of that Constitution, or deprive a person of property within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States, an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.

*Id.* Syllabus, paragraph 5.

Thus, clearly the argument that the City of Clyde's ordinance is enforceable despite conflict with the State's statutory scheme, based on private property rights is unavailing.

The League further contended that the City of Clyde ordinance in question has no extra-territorial effect. This argument mirrors that of the City in its Proposition of Law No. 2, and is addressed *supra*, in the portion of this brief discussing such argument.

**VII. Appellee's Proposition of Law No. 2: If this Court Determines R.C. § 2923.126 is not a General Law Under Ohio's Home Rule Amendment then the Proper Remedy is to Sever R.C. § 2923.126(B) from the Statute.**

If this Court is inclined to adopt Appellant's Proposition of Law No. 1: R.C. § 2923.126(B) contains so many exceptions, the law does not operate uniformly across Ohio and is therefore not a general law. "It is an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences." *State ex rel. Dispatch Printing Co. v. Wells* (1985) 18 Ohio St.3d 382, 384. "A court interpreting a statute must first look to the language of the statute to determine legislative intent, and if that inquiry reveals that the statute conveys meaning which is clear, unequivocal and definite, interpretive effort is at \*459 an end, and the statute must be applied accordingly." *Kelly v. Accountancy Bd. of Ohio* (1993) 88 Ohio App.3d 453, 458-459. "When this court holds that a statute is unconstitutional, severance may be appropriate." *State v. Foster* (2006) 109 Ohio St.3d 1, 28. Finally, R.C. § 1.50 states "If any provision of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable."

In the instant case, the General Assembly clearly intended to establish a firearms carrying system that was uniform across the state. See, inter alia, Section 9 of H.B. No. 12 (125<sup>th</sup> General Assembly) and R.C. 9.68(A). Further, the General Assembly clearly intended that this uniform licensing scheme should survive and be given effect, even if a portion was found to be invalid.

**SECTION 10.** If any provision of R.C. §§ 1547.69, 2911.21, 2913.02, 2921.13, 2923.12, 2923.121, 2923.123, 2923.16, 2929.14, 2953.32, and 4749.10, as amended by this act, any provision of R.C. §§ 109.69, 109.731, 311.41, 311.42, 2923.124, 2923.125, 2923.126, 2923.127, 2923.128, 2923.129, 2923.1210, 2923.1211, 2923.1212, and 2923.1213, as enacted by this act, or the application of any provision of those sections to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the particular section or related sections that can be given effect without the invalid provision or application, and to this end the provisions of the particular section are severable. (H.B. No. 12, 125<sup>th</sup> General Assembly.)

Under Appellant's Proposition of Law No. 1, the only argument thwarting the General Assembly's clear intent is that R.C. § 2923.126(B) contains exceptions that preclude the law from operating uniformly across the state. If the law does not operate uniformly across the state, it is not a general law and therefore unconstitutionally infringes on Appellant's Home Rule authority. Necessarily, if R.C. § 2923.126(B) is removed, the law operates uniformly across the state, is a general law and is not an unconstitutional infringement of Appellant's Home Rule authority.

Three questions are to be answered before severance is appropriate. "(1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the \*29 whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?" *State v. Foster* (2006) 109 Ohio St.3d 1, 28-29.

Applying this test to the instant case, severance is clearly appropriate as the least drastic remedy, especially given that the alternative of Proposition of Law No. 1 is to allow each and every municipality in Ohio to regulate firearms as they wish, thus completely invalidating the concealed carry license scheme.

1. The balance of Ohio's concealed carry law may clearly stand separate from R.C. § 2923.126(B). The only impact will be that there are fewer places that are off limits to licensed carry.
2. The main intent of H.B. 12 was to provide a uniform system of statewide licensing that people could rely on in each corner of Ohio, and Appellants concede this point. Proposition of Law No. 1 suggests the only thing interfering with accomplishing this goal is the numerous exceptions.
3. No words or terms need to be added or inserted to accomplish the severing. Once the offending words are removed, the law is once again uniform in application across the state and therefore a general law of the state.

Clearly, R.C. §§ 2923.125 et seq. meet the three part test for severance, and if this Court is inclined to agree with Appellant's Proposition of Law No. 1, then the appropriate remedy is to remove the small sections of the law that render it non-uniform, thus allowing the remaining statute to operate as intended. The ultimate result is that Clyde's ordinance is still invalid.

## CONCLUSION

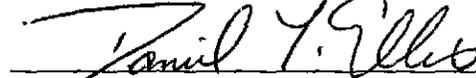
The General Assembly after careful consideration and debate, decided to affirmatively grant the citizens of this State the right to carry concealed hand guns. Clyde, like many other municipalities, enacted their own legislation under the Home Rule Amendment to thwart the policy decision made by the General Assembly. Clyde's ordinance unconstitutionally conflicts with a general law and must be declared invalid.

Moreover, Clyde also asserts it should be able to ignore the Constitution and judicial precedent by enacting legislation that completely bans an individual's ability to bear arms within its city limit in direct violation of the fundamental right to bear arms contained in Article 1 §4 of the Ohio Constitution. Clyde's ordinance bans all carry and should be declared unconstitutional.

R.C. §§ 2926.15 *et seq.* and R.C. § 9.68 are general laws operating uniformly throughout the State and represent the legitimate exercise of the General Assembly's police power. To the extent this Court concludes that the exceptions contained in R.C. §2923.16(B) preclude the concealed carry statute from being a general law, this Court should sever the offending provisions such that the remaining provisions meet the requirements of a general law.

Respectfully submitted,

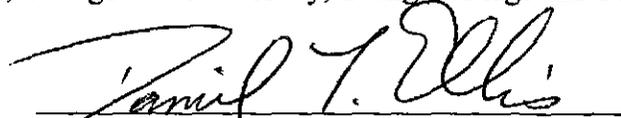
**OHIOANS FOR CONCEALED CARRY, INC.**



Daniel T. Ellis (0038555)  
Frederick E. Kalmbach (0074716)  
LYDY & MOAN, Ltd.  
4930 Holland Sylvania Road  
Sylvania, OH 43560  
Telephone: (419) 882-7100  
Fax: (419) 882-7201  
[dellis@lydymoan.com](mailto:dellis@lydymoan.com)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Plaintiff-Appellee, Ohioans for Concealed Carry, Inc. has been served by ordinary U.S. Mail this 28th day of January, 2008 upon John C. McDonald, Stephen J. Smith, Matthew T. Green, Schottenstein, Zox & Dunn, Co., LPA, 250 West Street, Columbus, OH 43215; Barry W. Bova, 817 Kilbourne Street, P.O. Box 448, Bellevue, Ohio 44811, counsel for Appellant; L. Kenneth Hanson, III, Firestone, Brehm, Hanson, Wolf, Young, LLP, 15 West Delaware Street, Delaware, Ohio 43015, counsel for Appellee, Ohioans for Concealed Carry, Inc., William P. Marshall, Stephen P. Carney, 30 East Broad Street, 17<sup>th</sup> Floor, Columbus, OH 43215, attorneys for Intervenor-Appellee Ohio Attorney General Marc Dann; Gary S. Singletary, Bridget M. O'Brien, City of Cleveland, Room 106-City Hall, 601 Lakeside Avenue, Cleveland, OH 44114, counsel for Amicus Curiae City of Cleveland; Stephen Byron, John Gotherman, Byron & Byron Co., LPA, Interstate Square Bldg. 1, Suite 240, 4230 State Route 306, Willoughby, OH 44094, attorneys for Amici Curiae The Ohio Municipal League, Cities of Beachwood, Cincinnati, Dublin, Kettering, Shaker Heights, Toledo, Village of New Albany, Orange Village and Dayton.



Daniel T. Ellis  
Counsel for Appellees, Ohioans  
For Concealed Carry, Inc, et al.

**APPENDIX**

See attached.

Westlaw.

OHPRACT-CRIM § 106:2  
 Baldwin's Oh. Prac. Crim. L. § 106:2 (2007)

Page 1

Baldwin's Ohio Practice Criminal Law  
 Complete through 2007 Pocket Parts

Lewis R. Katz, Paul C. Giannelli, Beverly J. Blair, Judith P. Lipton and Phyllis L. Crocker

Chapter 106. Weapons Offenses

§ 106:2. Carrying concealed weapons

Amended Sub. H.B. 12[FN1] substantially changed the statutory scheme governing the carrying of concealed handguns.[FN2] The primary purpose of the newly enacted legislation is the authorization and regulation of the issuance of licenses to carry a concealed handgun. [FN3]

It creates a comprehensive mechanism that permits applicants in specific circumstances to obtain a license to carry a concealed handgun, which is valid for four years and which may be renewed. Thus, Ohio became the forty-sixth state to allow the carrying of concealed weapons in some form.[FN4] The law allows private businesses to ban concealed handguns from their property, but prohibits local governments from enacting bans.[FN5]

RC 2923.12(A) prohibits carrying concealed on one's person or readily at hand, a deadly weapon,[FN6] a handgun,[FN7] or a dangerous ordnance.[FN8] Effective April 8, 2004, RC 2923.12(B) requires a person who (1) has been issued a license or temporary license pursuant to RC 2923.125 or RC 2923.1213 or by another state with which the Ohio Attorney General has entered into a reciprocity agreement under RC 109.69 and (2) has been stopped by a law enforcement officer to promptly notify such officer that the person stopped is licensed to carry a concealed handgun and that the person is currently carrying a concealed handgun. Effective March 14, 2007, however, division (B) was amended[FN9] to impose additional prohibitions on persons issued a concealed carry license who are stopped for a law enforcement purpose while carrying a concealed handgun. Such persons are now prohibited from:

- (1) failing to promptly notify the officer that the person is so licensed and is carrying a concealed handgun (as before the amendment);
- (2) knowingly failing to keep the person's hands in plain sight throughout the stop, unless otherwise directed by a law enforcement officer;
- (3) knowingly removing or attempting to remove the loaded handgun from the holster or other place it is carried, or knowingly grasping, holding, or touching it with the hand or fingers, unless otherwise directed by a law enforcement officer; and
- (4) knowingly disregarding or failing to comply with any lawful order by a law enforcement officer during the stop, including an order to keep the person's hand in plain sight.

When the concealed deadly weapon in question is a knife, it is the state's burden to "prove either (1) that the knife was designed or specifically adapted for use as a weapon, or (2) that the defendant possessed, carried or used the knife as a weapon." [FN10]

The test for "concealment" is whether the weapon is so situated as not to be discernible by ordinary observation.[FN11] A partially concealed weapon is a concealed weapon within the meaning of the statute.[FN12] However, where darkness alone obscures visibility, the weapon is not concealed.[FN13] A defendant in a room

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with his jacket containing the gun is carrying a concealed weapon.[FN14]

Access to the weapon, not ownership, is determinative of guilt.[FN15] The prosecution must prove that the weapon was loaded or that ammunition was ready at hand.[FN16] A pistol inside a zippered bag inside of a paper sack is "concealed ready at hand" within the meaning of the statute.[FN17] But a weapon is not "concealed ready at hand" when a defendant is found with a firearm in his van but a clip of ammunition was behind a console, unreachable by the defendant without exiting the van.[FN18] A gun concealed under the seat of a car is ready at hand,[FN19] even if it is an unloaded shotgun in a broken position, if the actor has ammunition on his person.[FN20] A gun in a glove compartment is a concealed weapon ready at hand.[FN21]

On September 24, 2003, the Supreme Court of Ohio ruled that RC 2923.12, carrying concealed weapons, does not unconstitutionally infringe on the right to bear arms and that there is no constitutional right to bear concealed weapons.[FN22]

**Mens rea.** The culpable mental element is knowledge;[FN23] the actor must know that he or she is carrying a deadly weapon or dangerous ordnance and know that it is concealed on his/her person or ready at hand.

**Exemption.** The statute does not apply to federal or state employees or law enforcement officers who are authorized to carry concealed weapons, handguns or ordnance and are acting within the scope of their duties.[FN24] Also, effective April 8, 2004, the statute does not apply to a person, who at the time of the alleged carrying or possession of a handgun is carrying a valid license to carry a concealed handgun. [FN25]

**Defenses.** The statute recognizes several affirmative defenses[FN26] which apply to weapons (but not a handgun or a dangerous ordnance), if the defendant is not otherwise under disability.[FN27] Effective April 8, 2004, affirmative defenses to unlawful carrying a concealed handgun appear in RC 2923.12(D); however, the statute no longer sets forth instances in which it is permissible for a person to carry a concealed handgun. As affirmative defenses, the defendant has the burden of production and the burden of persuasion.[FN28]

**Punishment.** Carrying a concealed weapon is a first-degree misdemeanor, but aggravating circumstances may elevate the degree of culpability to a third or fourth-degree felony.[FN29] The firearm enhancement penalty for possession of a firearm or dangerous ordnance during commission of a felony is not applicable to convictions of carrying a concealed weapon.[FN30] Carrying a concealed weapon and possession of weapons while under disability are not allied offenses of similar import, and a defendant can be convicted of both offenses.[FN31]

In addition, effective April 8, 2004, the amended statute provides for minor misdemeanor and misdemeanor offenses for persons arrested for violation of RC 2923.12(A)(2), carrying concealed on one's person or ready at hand, a handgun other than a dangerous ordnance, who have a license or temporary emergency license to carry a concealed handgun, but one, who fail to produce it at the time of arrest or two, whose license had expired within the two years immediately preceding the arrest and the offender presents a valid license within forty-five days of the arrest.[FN32]

Finally, also effective April 8, 2004, when stopped by a law enforcement officer, failure to promptly notify such officer that the person stopped is licensed to carry a concealed handgun and that the person currently is carrying a concealed handgun, a violation of RC 2923.12(B), and is a fourth-degree misdemeanor.[FN33] Effective March 14, 2007, division G(3) was amended to make failure to promptly notify a law enforcement officer of a concealed carry license and of carrying the concealed handgun in violation of division (B)(1) a first-degree misdemeanor. It also added divisions G(4), which makes a violation of divisions (B)(2) or (4) (failure to keep hands

in plain sight or comply with a lawful order) a first-degree misdemeanor for a first offense or a fifth-degree felony for a repeat offense. In addition, the offender's license shall be suspended pursuant to RC 2323.128(A)(2). Finally, 2006 Ohio Am. Sub. H.B. 347 added division G(5), which makes a violation of division (B)(3) (touching handgun or removing it from holster) a fifth degree felony.[FN34]

[FN1] 125th General Assembly, effective April 8, 2004.

[FN2] Amended RC 2923.11(C) defines "handgun" to include any firearm that has a short stock and is designed to be held by the use of single hand or any combination of parts from which a firearm so previously described can be assembled.

[FN3] Newly enacted RC 2923.125 and RC 2923.1213 authorize a person to obtain a license to carry a concealed handgun or temporary or emergency license to carry a concealed handgun, respectively.

In stating its public policy foundation, the General Assembly declared its intent to recognize both

(A) The inalienable and fundamental right of an individual to defend the individual's person and the members of the individual's family;

(B) The fact that the right described in division (A) of this section predates the adoption of the United States Constitution, the adoption of the Ohio Constitution, and the enactment of all statutory laws by the General Assembly and may not be infringed by any enactment of the General Assembly. 36, Am Sub.H.B. 12, 125th Gen. A. (2004).

[FN4] The licensing scheme is set forth in new Revised Code sections 2923.124 to 2923.1213. The application must be submitted to the sheriff of the county in which applicant resides, or any adjacent county, and must be accompanied by the fee (if required), photograph, fingerprints, one of several possible certificates of competency, and certification that the applicant has read a prescribed firearms pamphlet. RC 2923.125(A) and (B); RC 2923.1210. The sheriff must conduct a criminal records check and incompetency records check on the applicant, RC 2923.125(C), and upon approval must make certain license information available through the law enforcement automated data system, RC 2923.125(H). The applicant must be legally living in the United States, 21 years of age, not a fugitive of justice, not under indictment for certain offenses, not subject to a civil protection order, and not previously convicted of certain specified offenses within certain stated periods. RC 2923.125(D)(1). A temporary emergency license is available upon submission of a sworn application establishing imminent danger. RC 2923.1213. The results of a criminal records check can be challenged as inaccurate, RC 2923.127, and the denial of an application may be appealed to the court of common pleas. RC 119.12; RC 2923.125(D)(2)(b); RC 2923.1213(B)(2).

A civil protection order disqualifies the applicant even if the protection order explicitly states that it does not affect the applicant's right to carry firearms, *Masten v. Phalen*, 2005-Ohio-4076, 2005 WL 1871190 (Ohio Ct. App. 5th Dist. Fairfield County 2005), and a prior conviction disqualifies the applicant even if it has been sealed, *In re Forster*, 161 Ohio App. 3d 627, 2005-Ohio-3094, 831 N.E.2d 518 (11th Dist. Geauga County 2005).

[FN5] RC 2923.126(C). A private employer (other than a private institution of higher education) may have a policy prohibiting firearms on its premises or property, including vehicles. RC 2923.126(C)(1). Such employers are immune from civil liability arising from the decision to adopt or not to adopt such

policy, and all private employers as well as political subdivisions are immune from civil liability arising from gun licensees bringing handguns onto their premises or property. RC 2923.126(C)(2). If the owner of private land or premises (or a private lessor of government land or premises) posts a conspicuous sign prohibiting firearms, a person who knowingly violates such prohibition is guilty of criminal trespass in violation of RC 2911.21(A)(4), a fourth-degree misdemeanor. RC 2923.126(C)(3).

[FN6] RC 2923.11(A) ("deadly weapon" defined as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon."). See also Legislative Service Commission (1973) ("gun, knife, billy, or brass knuckles; rock or can when used for offensive or defensive purposes"). See *State v. Singh*, 117 Ohio App. 3d 381, 387, 690 N.E.2d 917 (1st Dist. Hamilton County 1996) ("The crucial issue then is whether the evidence was sufficient to establish beyond a reasonable doubt that the kirpan was designed or specially adapted for use as a weapon. We conclude that it was not. All three of the state's witnesses professed ignorance of the Sikh faith. None had any knowledge of whether the kirpan was designed or adapted as a weapon. . . . Despite the state's attempt to give significance to the expert's mention of a letter from a seventeenth-century cleric stating that the kirpan could be used as a weapon in the last resort, Dr. Spellman testified that the kirpan was designed as a religious symbol to remind Sikhs of their obligations to do justice."). See also *State v. Deluzia*, 2005-Ohio-4660, 2005 WL 2140563, ¶¶ 21-25 (Ohio Ct. App. 9th Dist. Summit County 2005) (held pocket knife with three-inch blade not "deadly weapon" unless proved to have been designed or specifically adapted as weapon, or possessed, carried or used as weapon).

[FN7] RC 2923.11(C) (handgun includes any firearm that has a short stock and is designed to be held and fired by the use of a single hand or any combination of parts from which such a type of firearm can be assembled).

[FN8] RC 2923.11(K) (dangerous ordnance includes, among other things, (1) automatic or sawed-off firearms, zip-guns, or ballistic knives; (2) explosive device or incendiary devices; (3) nitroglycerin, TNT, plastic explosives; dynamite, blasting gelatin, blasting powder, (4) rocket launcher, artillery piece, grenade, mine, bomb, torpedo, (5) firearm silencer; (6) any combination of parts intended to convert any firearm or other device into a dangerous ordnance); RC 2923.11(L) (excluding certain weapons from the definition of dangerous ordnance).

[FN9] 2006 Ohio Am. Sub. H.B. 347, 126th Gen. Assembly.

[FN10] *State v. Deluzia*, 2005-Ohio-4660, 2005 WL 2140563, ¶¶ 21-25 (Ohio Ct. App. 9th Dist. Summit County 2005); *State v. Cathel*, 127 Ohio App. 3d 408, 412, 713 N.E.2d 52 (9th Dist. Summit County 1998) ("Cathel did not brandish his knife. The state produced no proof at trial to support the criminal mischief charge, which had provided the justification for searching Cathel in the first place. The only circumstance left for the state to cite is the fact that Cathel carried the knife in his pocket as he walked down a residential street at 2:30 in the morning. That circumstance does not transform a pocketknife into a weapon."). But see *State v. Johns*, 2005-Ohio-1694, 2005 WL 820363, ¶ 18 (Ohio Ct. App. 3d Dist. Seneca County 2005) (held arresting officers' testimony that they carried "K-Bar" knife as weapon sufficient to establish that "K-Bar" knife possessed by defendant was "designed" for use as weapon).

[FN11] *State v. Pettit*, 20 Ohio App. 2d 170, 49 Ohio Op. 2d 200, 252 N.E.2d 325 (4th Dist. Highland County 1969) (by those who come in contact with the possessor in the usual associations of life).

[FN12] *State v. Johns*, 2005-Ohio-1694, 2005 WL 820363, ¶ 16 (Ohio Ct. App. 3d Dist. Seneca County 2005); *State v. Almalik*, 41 Ohio App. 3d 101, 534 N.E.2d 898 (8th Dist. Cuyahoga County 1987). See also *State v. Suber*, 118 Ohio App. 3d 771, 779, 694 N.E.2d 98 (10th Dist. Franklin County 1997) ("[U]nder certain specific facts, a single gun can be both 'in plain view' for purposes of search and seizure, and 'concealed' for purposes of sustaining a conviction for carrying a concealed weapon.").

[FN13] *State of Ohio v. Genavesi*, 1984 WL 5994 (Ohio Ct. App. 10th Dist. Franklin County 1984).

[FN14] *State v. Elkins*, 1984 WL 5453 (Ohio Ct. App. 8th Dist. Cuyahoga County 1984) (twelve-by-twelve room; gun in jacket pocket).

[FN15] *State v. Townsend*, 77 Ohio App. 3d 651, 603 N.E.2d 261 (11th Dist. Lake County 1991).

[FN16] Cf. *State v. Breaston*, 83 Ohio App. 3d 410, 614 N.E.2d 16 (10th Dist. Franklin County 1993). See *State v. Davis*, 166 Ohio App. 3d 37, 41-42, 2006-Ohio-1141, 849 N.E.2d 47, 50-51 (3d Dist. Marion County 2006) (handgun in closed case on driver's side floorboard was "ready at hand" although unloaded; loaded ammunition magazine was also in case and merely needed to be inserted for gun to be operable).

[FN17] *State v. Orin*, 84 Ohio App. 3d 812, 619 N.E.2d 14 (4th Dist. Ross County 1992).

[FN18] *State v. Bowman*, 79 Ohio App. 3d 407, 607 N.E.2d 516 (10th Dist. Franklin County 1992).

[FN19] *State v. Woods*, 8 Ohio App. 3d 56, 455 N.E.2d 1289 (8th Dist. Cuyahoga County 1982).

[FN20] *State v. Davis*, Ohio App. 3d 64, 472 N.E.2d 751 (1st Dist. Hamilton County 1984).

[FN21] *State v. Gibson*, 31 Ohio App. 2d 5, 60 Ohio Op. 2d 243, 287 N.E.2d 100 (2d Dist. Montgomery County 1971); see also *State v. Billups*, 1991 WL 160059 (Ohio Ct. App. 10th Dist. Franklin County 1991).

[FN22] *Klein v. Leis*, 99 Ohio St. 3d 537, syl. 1, 2003-Ohio-4779, 795 N.E.2d 633 (2003).

[FN23] See RC 2901.22(B) ("A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.").

[FN24] RC 2923.12(C)(1). See also Legislative Service Commission (1973) ("The prohibition does not apply to state or federal officers, agents, or employees, or to law enforcement officers, when they are authorized to carry concealed weapons and are acting within the scope of their duties."); 2004 Ohio Op. Attorney General No. 2004-028 addressing whether a law enforcement officer must apply for and receive a license under RC 2923.125 in order to carry a concealed handgun during his or her off-duty hours. The Attorney General has advised that one, "[a] law enforcement who has a right to carry a concealed handgun pursuant to RC 2923.126(D) is not required to obtain a license under RC 2923.125 in order to carry a concealed handgun anywhere in this state while on duty or off duty and except as provided by statute, [and two] a law enforcement officer who has a right to carry a concealed handgun pursuant to RC 2923.126(D) may carry a concealed handgun anywhere in this state while on duty or off duty."

Effective March 14, 2007, division (C)(1) was amended to extend the exemption to certain persons employed in Ohio (but not necessarily by the state) who are authorized to carry handguns, concealed weapons, or dangerous ordnance and who are subject to annual requalification under RC 109.801 (principally police officers, law enforcement, and security personnel). 2006 Ohio Am. Sub. H.B. 347, 126th Gen. Assembly.

[FN25] RC 2923.12(C)(2). The valid license or temporary license to carry a concealed handgun may be issued pursuant to RC 2923.125 or RC 2923.1213 or by another state with which the Ohio Attorney General has entered into a reciprocity agreement under RC 109.69.

The exemption for concealed gun licensees applies only to the carrying of a concealed handgun, not other deadly weapons or dangerous ordnance. RC 2923.12(C)(2). Also, this exemption does not apply if the concealed handgun is knowingly carried in violation of RC 2923.126(B), which prohibits transporting such handguns in a motor vehicle in a manner prohibited by RC 2923.16 (see Text § 106:8, Improper handling firearms in motor vehicles), and restricts licensees from carrying concealed handguns into certain premises including police stations, colleges and schools, courthouses and other government buildings, licensed alcohol establishments, places of worship, day care centers, aircraft, and places where federal law bans handguns.

[FN26] See Legislative Service Commission (1973) ("affirmative defenses.. . including: (1) that the accused was engaged in, or going to, or coming from his lawful business or occupation, which was of such character or carried on at such a time or place as to justify a prudent man in going armed; (2) that the accused was engaged in a lawful activity and had good reason to fear an attack on himself or member of his family, such as to justify a prudent man in going armed; (3) that the weapon was carried or kept in the accused's own home for any lawful purpose; and (4) that the weapon was a firearm being transported in a motor vehicle in compliance with new section 2923.16.").

[FN27] See RC 2923.12(D)(1) (weapon carried for defensive purposes while actor engaged in lawful business which of such character in time or place to render the actor particularly susceptible to criminal attack); RC 2923.12(D)(2) (weapon carried for defensive purposes while actor engaged in lawful activity and having reasonable cause to fear a criminal attack upon himself, family, or home); RC 2923.12(D)(3) (weapon carried for lawful purpose in own home); RC 2923.12(D) (weapon being transported in vehicle for lawful purpose, not on the actor's person, and, if a firearm, carried in compliance with RC 2923.16(C)). See *State v. Davis*, 166 Ohio App. 3d 37, 41, 2006-Ohio-1141, 849 N.E.2d 47, 50 (3d Dist. Marion County 2006) (affirmative defense of lawful transportation not available when weapon in question is a handgun).

[FN28] See RC 2901.05(A) ("burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused"). See also *State v. Assad*, 83 Ohio App. 3d 114, 614 N.E.2d 772 (8th Dist. Cuyahoga County 1992) (defendant adequately demonstrated affirmative defense of reasonable cause to fear criminal attack when he presented evidence that he often carried large amounts of cash between his three stores, although he did not on the night he was stopped; that his stores had been robbed on a number of occasions; and that he departed one of his stores in a high crime area at a very late hour); *State v. Doss*, 111 Ohio App. 3d 63, 675 N.E.2d 854 (8th Dist. Cuyahoga County 1996) (defendant adequately demonstrated affirmative defense that he was engaged in lawful activity and had reasonable cause to fear a criminal attack when defendant provided security services in high-crime area characterized by gang activity). But see *State v. DeGrey*, 2005-Ohio-5372, 2005 WL 2488017, ¶¶ 18-28 (Ohio Ct. App. 12th

Dist. Warren County 2005) (holding no constitutional defense based on right to bear arms, and statutory defense under RC 2923(C)(1) not applicable when defendant carried concealed weapon far from location of business); State v. Orin, 84 Ohio App. 3d 812, 619 N.E.2d 14 (4th Dist. Ross County 1992) (defendant failed to establish defense of self-defense when a trial court concluded that the nature and extent of the threatened harm against the defendant was speculative).

[FN29] RC 2923.12(G)(1). The crime is a fourth-degree felony (1) if the offender has previously been convicted of this crime or an offense of violence (RC 2901.01(A)(9)); (2) if the weapon was a firearm either loaded or with ammunition ready at hand; or (3) if the weapon was dangerous ordnance. The crime is a third-degree felony: (1) if the weapon was a firearm and the crime is committed at premises for which a D permit has been issued under RC Chapter 4303; or (2) if the offense is committed aboard an aircraft, or with purpose to carry concealed weapon aboard an aircraft, regardless of the weapon involved. Courts must not require a defendant charged with carrying a concealed weapon to obtain a concealed gun license as a condition for dismissal of the charge.

[FN30] RC 2929.14(D)(1)(e).

[FN31] State v. Rice, 69 Ohio St. 2d 422, 23 Ohio Op. 3d 374, 433 N.E.2d 175 (1982).

[FN32] RC 2923.12(G)(2)(a) and (b).

[FN33] RC 2923.12(G)(3).

[FN34] 2006 Ohio Am. Sub. H.B. 347, 126th Gen. Assembly.

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