



Ohio Municipal League

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May 8, 2016

Hon. Robert Peterson
Chair
Senate Ways & Means Committee

Home Rule Concerns,
Am. Sub. H.B. 166,
Pet Store Animal Sales

Dear Chair Peterson:

Ed Albright, Deputy Executive Director, of the Ohio Municipal League, has asked that I review proposed Am. Sub. H.B. 166, Pet Store Animal Sales, new Ohio Revised Code §§ 956.19-21 from a Home Rule perspective. It is my opinion, on behalf of the Ohio Municipal League, that there are Home Rule issues with the proposed new Ohio Revised Code §§ 956.19-21.

Ohio Constitution Article XVIII, § 3, the Home Rule Amendment to the Ohio Constitution, authorizes municipalities to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. It has been held by Ohio Courts that a home-rule analysis presents a three-step process. *Am. Fin. Servs. Assn. v. Cleveland*, 112 Ohio St. 3d 170, 2006 Ohio 6043, P23-24, 858 N.E.2d 776; see also *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008 Ohio 270, 881 N.E.2d 255, P 17.

The first step is to determine whether the ordinance at issue "involves an exercise of local self-government or an exercise of local police power." *Am. Fin. Servs. at P 23*, quoting *Twinsburg v. State Emp. Relations Bd.* (1988), 39 Ohio St.3d 226, 228, 530 N.E.2d 26, overruled on other grounds, *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, 20, 539 N.E.2d 103. If the ordinance is one relating solely to matters of self-government, "the analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction." *Id.*

The second step, which becomes necessary if the local ordinance is an exercise of police power, requires a review of the statute to determine whether it is a general law under the four-part test announced in *Canton v. State*, 2002 Ohio2005, 766 N.E.2d 963, 95 Ohio St. 3d 149, syllabus. See also *Mendenhall*, 117 Ohio St.3d 33, 2008 Ohio 270, 881 N.E.2d 255, P 18. If the statute qualifies as a general law under this test, the local ordinance must give way if it conflicts with the general law. *Id.*

The final step in the analysis, therefore, is to determine whether the ordinance conflicts with the statute, *i.e.*, "whether the ordinance permits or licenses that which the statute forbids, and vice versa." *Struthers v. Sokol* (1923), 108 Ohio St. 263, 1 Ohio Law Abs. 485, 2 Ohio Law Abs. 9, 140 N.E. 519, at paragraph two of the syllabus; see also *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St.3d 553, 2008 Ohio 92, 880 N.E.2d 906, P 30.

Since, it is conceded that proposed new Ohio Revised Code §§ 956.19-21 is an exercise of police power, the analysis starts at the second step which requires a review of the statute to determine whether it is a general law under the four-part *Canton* test. In *Canton*, the Ohio Supreme Court held, "[a] statute qualifies as a general law if it satisfies four conditions. It 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 prescribe those regulations, and (4) prescribe a rule of conduct upon citizens generally. *Mendenhall*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, at ¶ 20; *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963. Syllabus.

A statement, such as is found in the proposed new Ohio Revised Code § 956.19 (E), that, [t]he regulation of pet stores is a matter of general interest that requires statewide regulation", . . ." [a]ccordingly, it is the intent of the general assembly to preempt any local ordinance, resolution, or other law adopted to regulate the sale, delivery, barter, auction, broker, or transfer of a dog to a person from a pet store", is a statement of legislative intent that may be considered in a home-rule analysis but does not dispose of the issue. *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 2008-Ohio-4605, ¶¶ 24-26, 120 Ohio St. 3d 96, 99, 896 N.E.2d 967, 971.

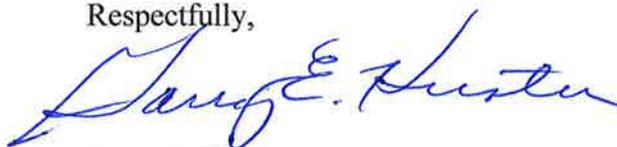
I believe the proposed statute fails as a general law on several counts. First, it is not a comprehensive legislative enactment since it applies only to dogs, not other animals sold by pet stores. Second, Ohio Revised Code § 956.19 (D) means the law is not comprehensive because it does not apply to premises where the dog was bred and reared. Third, the term high volume breeder is stated by Ohio Revised Code § 956.19 (B)(1) to reference 7 U.S.C. § 2133 which issue licenses to dealers and exhibitors for all types of animals, not just dogs. Fourth, the pre-emption language of Ohio Revised Code § 956.20 (E) is illegal. Pursuant to Ohio Constitution Article XVIII, § 3, local regulations cannot be in conflict with general laws; local regulation cannot be pre-empted if the local regulation is not in conflict. In this case, it is possible to enact local regulations that are not in conflict.

Finally, and probably most importantly, the state legislative enactment must prescribe a rule upon citizens generally. The sale of dogs by pet stores, which seems to be the entire thrust of this legislation, in almost every situation is a sale to a local resident of the community in which he/she lives. The sale almost never affects the state citizens generally. When determine this criteria, the courts weigh who has the greater interest in regulating the activity, and the answer is unequivocally the local community.

I believe this legislation if enacted will violate the Home Rule Amendment of Ohio Constitution Article XVIII, § 3. Former Chief Justice Moyer described his concerns about the erosion of the Home Rule Doctrine when he stated in *City of Lima v. State*, 2009-Ohio-2597, 122 Ohio St. 3d 155, 909 N.E. 2d 616: "In plain terms, (*sic* Ohio Constitution Article II,) Section 34 enables the General Assembly to pass laws related to hours of labor, minimum wage, and the health, safety, and general welfare of all employees. By expanding this language to include the authority to ban residency requirements by political subdivisions, the majority has opened the door for the General Assembly to use this section -- which trumps all other constitutional provisions -- in a conceivably limitless variety of situations to eviscerate municipal home rule. I would hold that R.C. 9.481 was not enacted pursuant to Section 34 authority, and that the Section 3, Article XVIII municipal home-rule provision of the Constitution prevails over R.C. 9.481."

Former Chief Justice Moyer's comments are most appropriate when analyzing Am. Sub. H.B. 166.

Respectfully,



Garry E. Hunter
General Counsel
Ohio Municipal League

Copy to Kent Scarrett, OML Executive Director; Ed Albright, OML Deputy Executive Director