

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

NEBRASKA FIREARMS OWNERS )  
ASSOCIATION, a Nebraska non-profit )  
corporation; LONNY SUND; JUSTIN )  
ARMSBURY; MICHAEL O'DONNELL; )  
ROBERT ROBINSON; and ALAN )  
KOZIOL, )

Plaintiffs, )

vs. )

CITY OF OMAHA, NEBRASKA, a )  
municipal corporation; and JEAN L. )  
STOTHERT, in her official capacity as )  
the Mayor of the City of Omaha, )

Defendants. )

Case No. CI 23-9905

**ORDER ON PLAINTIFFS'  
MOTION FOR TEMPORARY  
INJUNCTION**

This matter comes before the Court on Plaintiffs' motion for a temporary injunction, filed December 18, 2023. A hearing was held on January 19, 2024. Jacob Huebert and Seth Morris appeared for Plaintiffs, and Bernard J. in den Bosch and Tyler Hiipakka appeared for Defendants. Evidence was adduced. Arguments were heard, and the matter was taken under advisement. Being fully advised in the premises, the Court finds and orders as follows:

**INTRODUCTION**

On August 30, 2023, Omaha Mayor Jean Stothert signed an executive order providing that "[n]o person shall have in his or her possession any firearm on any City Property." (Ex. 1). The order defines City Property as "all City managed buildings/facilities/Parks/public spaces and surrounding areas such as sidewalks,

driveways, and parking lots under the City's control." (Ex. 1). Exceptions exist for law enforcement, security personnel, those transporting and using shotguns at a City Trap and Skeet facility, and those who have prior approval from the Chief of Police. (See Ex. 1). Additionally, in October 2023, the Omaha City Council passed ordinance 43579 stating "[i]t shall be unlawful for a person who is not a licensed firearms importer or licensed manufacturer to knowingly possess an unfinished frame or receiver that does not contain a serial number placed by a licensed importer or licensed manufacturer." (Ex. 2). Finally, in November 2023, the Omaha City Council passed Ordinance 43580, stating, "[i]t shall be unlawful for any person to sell, manufacture, transfer, or possess a bump stock or trigger crank." (Ex. 3).

In December 2023, the Nebraska Firearms Owners Association, along with four individual plaintiffs, filed this suit alleging that the above firearms-related executive order and ordinances violated their rights under Nebraska's "Constitutional Carry" law enacted in Neb. Law 2023 LB 77. The only issue presently before this Court is whether LB 77 so clearly preempts the City executive order and ordinances that this Court should temporarily enjoin their enforcement while litigation proceeds. As discussed in detail below, the Court finds that at this stage of litigation, the executive order prohibiting possession of firearms on most City Property should be temporarily enjoined while litigation proceeds. However, the Court declines to issue a temporary injunction against the ordinances passed by the City Council while litigation proceeds. The Court makes no final determinations in this order.

## BACKGROUND AND PROCEDURAL HISTORY

This is a proceeding in equity to enjoin various firearms-related actions taken by the Mayor of Omaha and the Omaha City Council. Plaintiffs are a non-profit entity and multiple individuals who possess firearms and/or firearm component parts that are subject to the firearms-related actions taken by the Mayor and City Council. (*See generally* Complaint for Declaratory and Injunctive Relief). Defendants are the City of Omaha and Mayor Jean Stothert. Combined, the Mayor and the City Council enacted a trio of policies that are the subject of this suit.

The first City action challenged in this case is an executive order (“Firearms Order”) which, in general, prohibits the possession of firearms on certain city-owned property. (*See generally* Ex. 1). In particular, the Firearms Order provides that “[n]o person shall have in his or her possession any firearm on any City Property.” (Ex. 1). The order defines City Property as “all City managed buildings/facilities/Parks/public spaces and surrounding areas such as sidewalks, driveways, and parking lots under the City’s control.” (Ex. 1). Exceptions exist for law enforcement, security personnel, those transporting and using shotguns at a City Trap and Skeet facility, and those who have prior approval from the Chief of Police. (*See* Ex. 1).

The second City action challenged is Ordinance 43579 (“Gun Parts Ban”) passed by the City Council, which prohibits the possession of unfinished firearm frames or receivers that do not bear serial numbers. (*See generally* Ex. 2). In particular, the ordinance states, “[i]t shall be unlawful for a person who is not a licensed firearms importer or licensed manufacturer to knowingly possess an



unfinished frame or receiver that does not contain a serial number placed by a licensed importer or licensed manufacturer.” (Ex. 2).

Finally, Plaintiffs challenge Ordinance 43580 (“Bump Stock Ban”), which prohibits the manufacturing, transfer, use, and possession of items known as bump stocks and trigger cranks. (*See generally* Ex. 3). In particular, Ordinance 43580 states, “[i]t shall be unlawful for any person to sell, manufacture, transfer, or possess a bump stock or trigger crank.” (Ex. 3).

In this suit, Plaintiffs assert that all three of the City actions outlined above are pre-empted by LB 77’s “Constitutional Carry” provisions, which took effect in September 2023. LB 77, a recently enacted legislative bill by the Nebraska Legislature, created numerous changes to state firearms law. Of primary concern is LB 77’s preemption language. Neb. Rev. Stat. § 13-330, as amended by LB 77, presently reads:

(1) The Legislature finds and declares that the regulation of the ownership, possession, storage, transportation, sale, and transfer of firearms and other weapons is a matter of statewide concern.

(2) Notwithstanding the provisions of any home rule charter, counties, cities, and villages shall not have the power to:

(a) Regulate the ownership, possession, storage, transportation, sale, or transfer of firearms or other weapons, except as expressly provided by state law; or

(b) Require registration of firearms or other weapons.

(3) Any county, city, or village ordinance, permit, or regulation in violation of subsection (2) of this section is declared to be null and void.

Neb. Rev. Stat. § 13-330 (Cum. Supp. 2023).

Plaintiffs' Complaint asks this Court to declare the three City actions outlined above null and void. Plaintiffs' Complaint additionally asks this Court to permanently enjoin enforcement of this executive order and these ordinances. However, final rulings on those requests are not yet before this Court. This litigation has only recently begun and is in its early stages. On the motion that is currently before this Court, Plaintiffs ask this Court to enter a temporary injunction, which would temporarily prevent enforcement of the City actions outlined above until trial is held in this matter. A hearing on the motion for temporary injunction was held on January 19, 2024, and this order follows.

### STANDARD OF REVIEW

"[O]rders relating to temporary injunctions and restraining orders are not final orders" and are not subject to interlocutory appeal. *See Waite v. City of Omaha*, 263 Neb. 589, 593, 641 N.W.2d 351, 354 (2002); *see also Shasta Linen Supply, Inc. v. Applied Underwriters, Inc.*, 290 Neb. 640, 646, 861 N.W.2d 425, 430 (2015) ("a temporary injunction is not a final, appealable order.").

### ANALYSIS

Plaintiffs seek a temporary injunction as to the Firearms Order, the Gun Parts Ban, and the Bump Stock Ban. This case is not concerned with whether or how firearms and firearm parts should be regulated as a matter of public policy, and the

Court expresses no opinion as to the wisdom or lack thereof of such policies. The sole issue for this Court is whether LB 77 preempts these three local regulations. At this stage in litigation, the Court is not called upon to make a final determination. Instead, the Court only assesses whether a temporary injunction should be entered while litigation proceeds.

Temporary injunctions in Nebraska are controlled by statute, which provides:

When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great or irreparable injury to the plaintiff, or when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act, subject to the limitations of sections 25-1062 to 25-1080. It may also be granted in any case specially authorized by statute.

Neb. Rev. Stat. § 25-1063 (Reissue 2016).

Given that orders granting or denying temporary injunctions are not final, appealable orders, *e.g.*, *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 299, 673 N.W.2d 558, 566 (2004) (“A temporary injunction is not a final, appealable order.”), there are no published appellate decisions in Nebraska that specify the requirements for interlocutory injunctive relief. *See* Lenich, *Requirements for interlocutory injunctions*, 5 Neb. Prac., Civil Procedure § 18:2. In the federal courts, however, a party may obtain temporary injunctive relief when: “(1) [that party] is likely to succeed on the merits; (2) [that party] is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in [the party’s] favor; and (4) an injunction is in the public interest.” *MPAY Inc. v. Erie Custom Computer*

*Applications, Inc.*, 970 F.3d 1010, 1015 (8th Cir. 2020) (internal quotation marks omitted) (quoting *Wise v. Dep't of Transp.*, 943 F.3d 1161, 1165 (8th Cir. 2019)). A treatise on the subject has noted that “Because these requirements are so well-accepted elsewhere, presumably they apply in Nebraska as well.” Lenich, *Requirements for interlocutory injunctions*, 5 Neb. Prac., Civil Procedure § 18:2. The purpose of a temporary injunction is to maintain the parties’ positions, not to adjudicate the case on its merits. 11A Wright & Miller, *Federal Practice and Procedure: Civil* § 2949 (3d ed.); see also *Ramaekers v. Creighton Univ.*, 312 Neb. 248, 261, 978 N.W.2d 298, 307 (2022) (“Generally, a district court should not order a judgment on the merits at the temporary injunction stage of proceedings.”).

Below, the Court addresses each of the three City actions challenged in this matter in turn. For each action, the Court assesses whether a temporary injunction is appropriate to enjoin its enforcement while litigation continues.

### **I. Firearms Order**

Plaintiffs seek to preliminarily enjoin enforcement of the Firearms Order. With a few irrelevant exceptions, the Firearms Order prohibits a person in Omaha from possessing “any firearm on any City Property.” (Ex. 1). “City property is defined as all City managed buildings/facilities/Parks/public spaces and surrounding areas such as sidewalks, driveways, and parking lots under the City’s control.” (Ex. 1). The Court will first analyze whether the Firearms Order is expressly preempted by LB 77 and then will address whether the City’s proprietary authority justifies the Firearms Order.



### A. Likelihood of Success on the Merits

Plaintiffs have demonstrated they are likely to succeed on the merits of their argument that Neb. Rev. Stat. § 13-330, as amended by LB 77, preempts the City's Firearms Order.

“There are three types of preemption: (1) express preemption, (2) field preemption, and (3) conflict preemption.” *Hauptman, O'Brien, Wolf & Lathrop, P.C. v. Auto-Owners Insurance Company*, 310 Neb. 147, 153, 964 N.W.2d 264, 270 (2021). “In all three cases, the touchstone of preemption analysis is legislative intent.” *Id.* at 153-54, 964 N.W.2d at 270. “Express preemption occurs when the Legislature has expressly declared in explicit statutory language its intent to preempt local laws.” *Id.* at 154, 964 N.W.2d at 270.

“State preemption arises with respect to municipal ordinances or township laws and flows from the principle that municipal legislation is invalid if it is repugnant to, or inconsistent with, state law.” *State v. Albarenga*, 313 Neb. 72, 83, 982 N.W.2d 799, 810 (2022). “Preemption of municipal ordinances by state law is based on the fundamental principle that municipal ordinances are inferior in status and subordinate to the laws of the state.” *Id.* at 83-84, 982 N.W.2d at 810. Local laws are expressly preempted when “the Legislature includes provisions explicitly stating in some manner that (1) the legislation preempts local laws related to the subject matter of the legislation, (2) a certain subject is governed solely by the legislation, or (3) political subdivisions are prohibited from enacting any local law conflicting with the legislation.” *Id.* at 85, 982 N.W.2d at 811.



Plaintiffs argue that LB 77 expressly preempts the Firearms Order. Considering the plain language of LB 77, Plaintiffs are likely to succeed in this argument. Neb. Rev. Stat. § 13-330, as amended by LB 77, prohibits cities from regulating the “ownership, possession, storage, transportation, sale, or transfer of firearms or other weapons.” Neb. Rev. Stat. § 13-330(2)(a) (Cum. Supp. 2023). The Firearms Order prohibits the possession, and presumably transportation, of firearms on an expansive list of city-owned property. The plain language of the Firearms Order, thus, appears to be “repugnant to, or inconsistent with, state law.” *State v. Albarenga, supra*. This is sufficient to satisfy Plaintiffs’ burden to show that they are likely to succeed on the merits of their case.

### **B. Governmental Authority versus Proprietary Authority**

Defendants assert that the Firearms Order is not preempted by LB 77 because the City, as a property owner, is allowed to prohibit firearm possession on property it controls using its proprietary powers.

Evaluating this argument requires a discussion of the distinction between municipalities exercising proprietary power and exercising governmental power. The plain language of LB 77 preempts the City’s ability to exercise governmental power to regulate firearms. Whether LB 77 preempts the City’s actions exercising proprietary power is much less clear.

“The powers granted to a municipal corporation can be divided into two general classes,—the one including those which are legislative, public or governmental, and import sovereignty; the second, those which are proprietary or quasi private,

conferred for the private advantage of the inhabitants and the city itself as a legal entity.” *Obitz v. Airport Authority of City of Red Cloud*, 181 Neb. 410, 415, 149 N.W.2d 105, 110 (1967) (citation omitted). “Whether the act of a municipal corporation is in its capacity as the one or the other is often a difficult question to answer.” 2A Eugene McQuillin, *The Law of Municipal Corporations* § 10.5 (3d ed. 2023).

“A governmental function is not of a proprietary nature but is performed under the police power to promote the health and well-being of the people.” *Id.* “Among the powers generally held to be governmental rather than private are the construction and maintenance of streets; conservation of public health; extinguishment of fires and making arrangements for that activity; and power to legislate as to public utilities.” *Id.* (internal citations omitted). *See also Obitz*, 181 Neb. at 417, 149 N.W.2d at 111 (describing “preserving the peace, or maintaining a fire or police department, or improving its streets” as “strictly governmental functions.”). In the context of tort liability, as a general rule, “a municipality, in maintaining a public park, is engaged in a governmental activity,—discharging a public duty” because the park is established with the “purpose of furnishing to the people at large a place for free recreation to promote the health and general welfare of the public, and as a means of adding to the beauty of a city.” 29 A.L.R. 863 (Originally published in 1924).

In contrast, “[p]rivate, municipal, proprietary functions and powers are those relating to the accomplishment of private corporate purposes in which the public is only indirectly concerned, and as to which the municipal corporation is regarded as a legal individual.” *Id.* “When operating in its proprietary capacity, a municipal

corporation is subject to the same burdens, responsibilities, and liabilities as a private corporation or individual acting in the same capacity and is entitled to the rights, privileges, and immunities accorded to others.” 56 Am. Jur. 2d Municipal Corporations, Etc. § 169. “Among the powers generally held to be private are . . . ‘improvements; entering into franchise agreements with utility companies; the making of local public operation by a municipality of a public utility plant; and determination of the details of a bond issue to be submitted to the electors.’” 2A Eugene McQuillin, *The Law of Municipal Corporations* § 10.5 (3d ed. 2023).

Defendants argue that the Mayor had authority under § 28-1202.01(5) to enact the Firearms Order because Defendants acted in a proprietary manner over their property.<sup>1</sup> (*See* Def. Br. at 9-14). While it is undoubtedly true that the City of Omaha owns the premises it regulated, the Firearms Order appears to be an action taken for the public welfare pursuant to governmental or police power. While not specifically stating a precise criminal penalty, the Firearms Order states that the Omaha Police Department will enforce it. (*See* Ex. 1) (“The Omaha Police Department will have responsibility for enforcement of this Executive Order.”)). Enacting a law that will be

---

<sup>1</sup> In support of this argument, the City points to Neb. Rev. Stat. § 28-1202.01, section (2) of which provides: “[e]xcept as provided in subsection (10) of this section, a person shall not carry a concealed handgun into or onto any place or premises where the person, persons, entity, or entities in control of the place or premises or employer in control of the place or premises has prohibited the carrying of concealed handguns into or onto the place or premises.” Neb. Rev. Stat. § 28-1202.01(2) (Cum. Supp. 2023). The Attorney General’s opinion describes this provision as “effectively codif[ying] the proprietary right to exclude individuals carrying a concealed handgun” and concludes that “[i]ndividuals or entities properly imbued with and appropriately exercising their common law proprietary authority can restrict or forbid the carriage of any type of firearm or other weaponry on property they own or control.” (Ex. 10 at 6 note 2).



enforced by a law enforcement agency that could, given the criminal penalty that exists in § 1201.01(8), carry a criminal penalty is the quintessential example of an act taken pursuant to the City of Omaha's police power. *See* Neb. Rev. Stat. § 28-1202.01(8) (Cum. Supp. 2023) (describing the penalties for unlawfully possessing a concealed handgun). On top of that, Defendant's brief and the Firearms Order itself appear to concede the point. Defendants' brief states that the Mayor enacted the Firearms Order to make citizens feel safe. (*See* Def. Br. at 14 ("the Mayor wanted to and intended that citizens felt safe.")). The Firearms Order states that the order was created so that citizens could "safe[ly] use City Property" and was motivated by "various threats" and "episodes of public violence." (Ex. 1).

While these concerns are important, they tend to show that the Firearms Order is an exercise of governmental authority as opposed to proprietary authority because it appears intended to regulate public welfare and safety as opposed to the proprietary interests of certain City-owned buildings or property. It is possible that the City could act in its proprietary authority over some of these properties, but the blunderbuss approach taken in the Firearms Order, coupled with the stated purposes of the order, appears to show actions taken in a governmental capacity as opposed to a proprietary one.

Because it appears that the city maintains a great deal of the premises covered by the Firearms Order for the public good, the exercise of power is best understood as governmental, and the City's argument based on common-law proprietary power and § 28-1202.01 fails. Plaintiffs have adequately demonstrated that they are likely to

succeed on the merits of their claim asserting that the Firearms Order is expressly preempted by LB 77.

### **C. Irreparable Harm, Balance of Equities, Public Interest**

Having concluded that Plaintiffs are likely to succeed on the merits, the Court next turns to the issues of irreparable harm, balance of equities, and public interest.

An “injury is irreparable when it is of such a character or nature that the party injured cannot be adequately compensated in damages, or when the damages which may result cannot be measured by any certain pecuniary standard.” *Hogelin v. City of Columbus*, 274 Neb. 453, 463, 741 N.W.2d 617, 625–26 (2007). “Irreparable injury, as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great.” *Id.*

To the extent that Plaintiffs do succeed in demonstrating that the Firearms Order is in violation of State law, the continued enforcement of the order threatens irreparable harm to Plaintiffs. *See Hogelin v. City of Columbus*, 274 Neb. 453, 465, 741 N.W.2d 617, 627 (2007) (where City violated firefighters’ working hour limits under state law with mandatory training, holding “a remedy at law is not adequate if the situation requires and the law permits preventative relief as preventing the repetition and continuance of wrongful acts.”). Likewise, it is in the public interest that City orders, enforced by the City police, not be in violation of State law. Given the Plaintiffs’ likelihood of success on the merits, the factors of irreparable harm, the balance of the equities, and the public interest also weigh in favor of a temporary injunction.

#### D. Inadequate Remedy at Law

Defendants also assert that Plaintiffs have an adequate remedy at law, which precludes issuance of a temporary injunction. An inadequate remedy at law is a requirement for permanent injunctive relief in Nebraska. *See County of Cedar v. Thelen*, 305 Neb. 351, 357, 940 N.W.2d 521, 526 (2020). It is unclear whether an inadequate remedy at law is required for the issuance of a temporary injunction, and some commenters suggest it is not. *See Lenich, Requirements for interlocutory injunctions*, 5 Neb. Prac., Civil Procedure § 18:2. However, even if this requirement applies, for the reasons below, the Court determines that it does not prevent the issuance of a temporary injunction in this case.

Defendants argue that Plaintiffs have an adequate remedy at law because they seek a declaratory judgment. (*See* Def. Br. at 16). The Nebraska Supreme Court has “held that whether an action for declaratory judgment is to be treated as one at law or one in equity is to be determined by the nature of the dispute.” *In re Margaret L. Matthews Revocable Trust*, 312 Neb. 381, 389, 979 N.W.2d 259, 268 (2022). “The test is whether, in the absence of the prayer for declaratory judgment, the issues presented should properly be disposed of in an equitable action, as opposed to a legal action.” *Id.* Plaintiff’s complaint only seeks declaratory relief and an injunction against the regulations. (*See* Complaint for Declaratory and Injunctive Relief at 20). Once the declarations are removed, it is evident that Plaintiffs only seek injunctive relief, which is equitable in nature. Thus, Plaintiffs have no adequate remedy at law.



In sum, as it relates to the Firearms Order, Plaintiff's rights are clear and they, at this stage, have shown irreparable harm. A temporary injunction against the Firearms Order is warranted.

## II. Gun Parts Ban and Bump Stock Ban

Plaintiffs also seek a temporary injunction against the Gun Parts Ban and the Bump Stock Ban. The issue this Court must resolve is whether the express preemption of firearms regulations applies to parts regulations.

LB 77 expressly preempts cities' ability to "[r]egulate the ownership, possession, storage, transportation, sale, or transfer of firearms or other weapons." *See* Neb. Rev. Stat. § 13-330 (Cum. Supp. 2023). The Gun Parts Ban states, "It shall be unlawful for a person who is not a licensed firearm importer or licensed manufacturer to knowingly possess an unfinished frame or receiver that does not contain a serial number placed by a licensed importer or licensed manufacturer." (Ex. 2). The Bump Stock Ban provides, "It shall be unlawful for any person to sell, manufacture, transfer, or possess a bump stock or trigger crank." (Ex. 3).

To determine whether the Gun Parts Ban and Bump Stock Ban are preempted by LB 77, the Court turns to Nebraska's definition of "firearm" and the plain meaning of the word "weapon." Under Nebraska's criminal code, a firearm means "any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive or frame or receiver of any such weapon." Neb. Rev. Stat. § 28-1201(3) (Cum. Supp. 2023). A weapon means an "instrument used or designed to be used to kill someone." WEAPON, Black's Law Dictionary (11th ed. 2019).

Because LB 77's preemptive provision applies only to weapons, Plaintiffs' likelihood of success on the merits is insufficiently clear to warrant an injunction at this stage. While not expressly defined, bump stocks and unfinished frames and receivers can be categorized as firearm attachments or modification components. Such items are used to modify or customize pre-existing firearms, which places them outside the plain meaning of "weapon." A "firearm" under Nebraska law must be a weapon. *See* Neb. Rev. Stat. § 28-1201(3) (Cum. Supp. 2023) ("Firearm means any *weapon*") (emphasis added). Because bump stocks and unfinished frames and receivers are firearm attachments or modification components, they are not weapons by their plain meaning because they are not independently capable of killing anyone or intended to be independently used to kill anyone. *See* WEAPON, Black's Law Dictionary (11th ed. 2019). As such, Plaintiffs' rights are not obvious, and a temporary injunction against the Gun Parts Ban and the Bump Stock Ban is not warranted.

## CONCLUSION


As stated at the beginning of this order, this case is not about whether those within Omaha should be permitted to possess a firearm in certain places or be allowed to possess certain firearm parts or bump stocks. The issue for this Court is only whether, at this preliminary stage, the challenged regulations appear to be preempted by LB 77. Plaintiffs have demonstrated that the City's Firearms Order prohibiting possession of firearms on most city property is likely expressly preempted by LB 77. Whether the two ordinances at issue are preempted is less clear at this

preliminary stage. Accordingly, the Court will issue a temporary injunction to restrain the enforcement of the Firearms Order while this litigation continues but will not issue a temporary injunction of the two ordinances dealing with possession of unregistered firearm parts, bump stocks, and trigger cranks.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that Plaintiffs' motion for a temporary injunction is **GRANTED IN PART AND DENIED IN PART**. The Court hereby issues a temporary injunction restraining enforcement of Executive Order S-48-23, which prohibits "possession [of] any firearm on any City Property." The Court denies Plaintiffs' request for a temporary injunction enjoining City Ordinance 43579 and City Ordinance 43580.

DATED this 9<sup>th</sup> day of February, 2024.

BY THE COURT:



---

LeAnne M. Srb  
District Judge