NEBRASKA DEPARTMENT OF JUSTICE

Opinion No. 23-009 — December 15, 2023

OPINION FOR SENATOR TOM BREWER

The Power of Municipalities to Regulate the Possession of Weaponry at Public Parks, Trails, and Sidewalks.

Summary: Municipalities lack authority to regulate the possession of firearms and certain weapons in quintessential public spaces, such as parks, trails, and sidewalks. A statute enacted in 2023, L.B. 77, deprives municipalities of regulatory authority over the possession of firearms or other weapons. And municipalities cannot use their common law proprietary authority to evade this regulatory restriction. Additionally, a blanket ban on firearms possession in such spaces would infringe constitutional rights under the Second Amendment and the Nebraska Constitution.

This year, the Legislature passed L.B. 77, which, after becoming law, significantly changes the way the possession, carriage, and sale of firearms and other weapons are regulated in Nebraska. L.B. 77, 108th Leg., 1st Sess. (2023) (enacted). Relevant here, L.B. 77 declared the regulation of the "ownership, possession, storage, transportation, sale, and transfer" of weaponry to be a "matter of statewide concern" and stripped municipalities of nearly all regulatory authority in that space. Neb. Rev. Stat. § 13-330 (Cum. Supp. 2023). In the wake of L.B. 77's passage, several Nebraska municipalities have issued executive orders that purport to restrict or ban the possession of weaponry on property the municipality owns or controls. These orders include public buildings (such as courthouses), and in some cases expand beyond buildings to include quintessential public places that are usually held open to the public at large, such as parks, trails, and

sidewalks. *See, e.g., Prohibition of Firearms on City of Omaha Property*, Executive Order No. S-48-23 (Aug. 30, 2023), https://perma.cc/N6KY-M47S; *City of Lincoln Weapons Policy*, Executive Order No. 97985 (Sep. 12, 2023), https://perma.cc/RBL8-MKXB.

You have asked whether existing law "prevent[s] Nebraska municipalities from regulating the possession of firearms and other weapons in public spaces, *e.g.*, public parks, trails, and sidewalks." It does. You have also asked whether additional legislation would be necessary to prevent municipalities from regulating weapon possession in these places. None is needed. Municipal action—regardless of the form it takes (enacted ordinance, executive order, informal policy, etc.)—that restricts or bans the possession of weaponry in quintessential public spaces, like those public places identified in your opinion request (parks, trails, sidewalks, and the like), violates at least two rules of law.

First, L.B. 77 forbids municipalities from "regulat[ing] the . . . possession [and] transportation . . . of firearm or other weapons, except as expressly provided by state law." Neb. Rev. Stat. § 13-330(2), (3). The public spaces identified in your request are not public buildings or like areas where municipal corporations can properly exercise significant common law "proprietary" authority; as such, restrictions on weapon possession in places such as parks, trails, and sidewalks necessarily are regulatory in nature. No matter the form of the restriction nor the way in which it is described, these prohibitions are in conflict with L.B. 77. Second, there is an individual constitutional right to bear arms in public secured by the constitutions of the United States and the State of Nebraska. Thus, even if a municipality possessed and could properly exercise proprietary authority over quintessential public spaces such as parks, trails, and sidewalks, a total ban or

significant restriction on the possession of weaponry would violate those constitutionally protected rights.

Accordingly, measures like Omaha Executive Order S-48-23 and Lincoln Executive Order 97985 are unlawful, at least to the extent they restrict or prohibit the possession of weaponry in those quintessential public spaces traditionally held open to the public at large, such as public parks, trails, and sidewalks. No additional legislation would be needed to cabin the authority of Nebraska municipalities to regulate the possession of firearms and other weapons in such spaces.

Because your opinion request expressly is directed towards these spaces, and not to specific public buildings such as courthouses, this opinion does not address the legality of the orders in those respects. Indeed, the question as to whether and to what extent a governmental entity may restrict possession in these facilities is a subject of ongoing jurisprudential and scholarly debate.

I.

A.

We begin with L.B. 77, the Legislature's 2023 law that deprived Nebraska municipalities of any regulatory authority over the possession of firearms and other weapons. The Act provides, in pertinent part:

> (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.
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> (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. For L.B. 77 to make an executive order or other municipal action "null and void," three factors must be present. Voidable action must (1) regulate, (2) cover the "the ownership, possession, storage, transportation, sale, or transfer of firearms or other weapons," and (3) not be grounded in some express authority provided elsewhere in state law.

The second and third factors clearly apply to the Omaha and Lincoln executive orders. Omaha's order provides that "no person shall have in his or her possession any firearm on City Property" which is broadly defined to include "all City managed buildings/facilities/parks/public spaces" and the "surrounding areas such as sidewalks, driveways, and parking lots under the City's Control." Executive Order No. S-48-23, https://perma.cc/N6KY-M47S. Lincoln's order prohibits the "possession of weapons" on "City property," which is defined as "any premises under the care and control of the City of Lincoln" including "sidewalks . . . [and] parks . . . ." Executive Order No. 97985, https://perma.cc/RBL8-MKXB.[1] Thus, both concern the possession of firearms or other weaponry. And neither cites to any provision of state law that "expressly

[1] Lincoln's executive order does exclude from its definition of "City property" "public street[s]" and "public sidewalk[s] that run[] parallel to a public street."

provides" municipalities authority to regulate the possession of weaponry. Nor are we aware of one.

B.

Having concluded that the Omaha and Lincoln executive orders satisfy two of the three factors that trigger the preemptive language of L.B. 77, we turn to the final factor, whether those orders "regulate." They do.

The portions of the executive orders that apply to quintessential public spaces have a regulatory character. When a municipality engages in action that is "public in nature" or "in furtherance of general law for the interest of the public at large," it is exercising governmental (regulatory) power. *Gates v. City of Dallas*, 704 S.W.2d 737, 738 (Tex. 1986). This includes the promulgation of policies that are "aimed at society as a whole" and actions that are "historically undertaken exclusively by the State as one of its unique civic responsibilities." *Sebastian v. State*, 93 N.Y.2d 790, 795 (1999). For example, "it is clear that a municipality is acting in a governmental capacity in the acquisition and allocation of resources for fighting fires." *Hall v. City of Youngstown*, 239 N.E.2d 57, 60 (Ohio 1968).

Municipalities' regulatory authority stands in contrast to their proprietary authority. Municipal corporations, like all other persons or legal entities with a possessory interest in real property, enjoy fundamental property rights recognized at common law. *See Henry v. City of Lincoln*, 93 Neb. 331, 140 N.W. 664, 666 (1913). "Property owned by [a] city used in a proprietary business enterprise . . . is regarded by the law the same as property owned by any individual or business corporation." *Borgman v. City of Fort Wayne*, 215 Ind. 201, 206 (1939).

The "right to exclude" is one of the "most essential sticks" in the "bundle of rights commonly characterized as

property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Because municipalities possess proprietary authority, they can (absent other pertinent considerations, as discussed below) exercise this fundamental right at or in property they own or control. Thus, just as a private person or business entity can bid a houseguest or other licensee to leave property under their control by simple request, a municipality exercising its proprietary authority can do the same. *See, e.g., State v. Stanko*, 304 Neb. 675, 685, 936 N.W.2d 353, 362 (2019). And subsidiary of the power to remove is the power to condition entry. The ubiquity of "no shirt, no shoes, no service" illustrates this principle in action at the most basic level.

Given the foregoing, it follows that there are places where, relying solely on its fundamental common law proprietary authority,[2] a municipality can restrict (or even ban entirely) the possession of firearms or other weapons. As our Supreme Court said in *Stanko*, the common law recognizes the right of business owners to "exclude from their premises [individuals] whose actions disrupt the regular and essential operations of the premises or threaten the security of the premises and its occupants."

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[2] L.B. 77 contains a provision that effectively codifies the proprietary right to exclude individuals carrying a concealed handgun. L.B. 77, § 9, 108th Leg., 1st Sess. (2023) (enacted), *codified at* Neb. Rev. Stat. § 28-1202.01(2). L.B. 77 does not contain any language suggesting that this provision was intended to *restrict* the scope of proprietary authority recognized at common law. Our Supreme Court has instructed that legislative enactments should not be read or construed to "restrict[] or abolish[] common-law rights" unless "the plain words of the statute compel such result." *Macku v. Drackett Prod. Co.*, 216 Neb. 176, 180, 343 N.W.2d 58, 61 (1984). Thus, it would be inappropriate to read L.B. 77 as a limitation, rather than a textual reinforcement, of the proprietary authority recognized at common law. Individuals 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.

304 Neb. at 686, 936 N.W.2d at 362. A municipality wearing its "proprietary hat" enjoys a commensurate right.

That said, the proprietary authority of municipal corporations over quintessential public spaces, such as public parks, trails, and sidewalks, is limited.[3] Though municipalities may hold legal title to or otherwise exercise control over them, these spaces are held in trust for public use and are presumptively open to and accessible by the public at large. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939); *see also United States v. Kokinda*, 497 U.S. 720, 743–74 (1990) (Brennan, J., dissenting). A municipality that governs behavior in these places must, with limited exception, exercise regulatory, not proprietary, power. "Wherever the title of streets and parks may rest . . . [the] use of [these] public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague*, 307 U.S. at 515; *accord Abboud v. Lakeview, Inc.*, 237 Neb. 326, 335, 466 N.W.2d 442, 449 (1991) ("A park is for the benefit of and is held in trust by a city for the public").

The character of these quintessential public spaces makes them unamenable to most exercises of proprietary authority by a municipality. In *Hague*, the United States Supreme Court rejected the argument, advanced by a municipality, that because "the city's ownership of streets and parks is as absolute as one's ownership of his home" its ownership interest carried with it the "consequent power [to] altogether . . . exclude citizens from the use thereof." 307 U.S. at 514. Exercising a proprietary "right to

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[3] The limited proprietary authority municipalities retain over these spaces can be used to do basic things, such as set hours of operation. *See, e.g., Borough of Dumont v. Caruth*, 123 N.J. Super. 331, 336 (Mun. Ct. 1973) ("[A] municipality may close a park during certain hours of the night just as it may close public buildings . . . municipalities are [not] required to hold open all public facilities for public use 24 hours a day.").

exclude," the Court explained, is incompatible with the concept of a space that is "held in trust for the use of the public," which necessarily makes such spaces open to the public at large. *Id.* at 515.[4]

That does not mean these public areas are law-free zones. On the contrary, *Hague* recognized that "[t]he privilege of a citizen . . . to use the streets and parks . . . may be *regulated* in the interest of all." *Id.* (emphasis added). But there is a material difference between the exercise of proprietary and regulatory (governmental) authority. *See, e.g., Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 227 (1993); *City of Buffalo v. State Bd. of Equalization & Assessment*, 260 N.Y.S.2d 710, 713 (Sup. Ct. 1965), *rev'd on other grounds*, 272 N.Y.S.2d 168 (1966) ("The distinction between these capacities [proprietary and regulatory] is not semantical; nor are the consequences insignificant."). Thus, as the Supreme Court of Illinois has stated, because "public streets are held in trust for the use of the public" municipalities generally "do not possess proprietary powers over [them]." *Am. Tel. & Tel. Co. v. Vill. of Arlington Heights*, 156 Ill. 2d 399, 409, 620 N.E.2d 1040, 1044 (1993). Instead, there (and in analogous public places) "[t]hey only possess regulatory powers." *Id.*

At least insofar as they apply to public parks, trails, sidewalks and analogous spaces, the executive orders do not exercise propriety authority. Consider Lincoln Executive Order No. 97985, which applies broadly to "any premises under the care and control of the City of Lincoln" including "public sidewalks . . . [and] parks . . . under the

[4] The inaptitude of proprietary power over such spaces also reflects practical reality. "Public access [to streets, sidewalks, parks, and other similar public spaces] is not a matter of grace by government officials but rather is inherent in the open nature of the locations." *Kokinda*, 497 U.S. at 743 (Brennan, J., dissenting).

City's ownership or control." Executive Order 97,985, https://perma.cc/RBL8-MKXB. The order explicitly states that it is "intended to protect and promote the health, safety, and welfare of *all* community residents." *Id.* (emphasis added). Similarly, the stated impetus for Omaha Executive Order S-48-23, which prohibits firearms at all property "owned or leased [by the] City of Omaha," is the city's "obligation to provide a safe place for [its] citizens" and the "members of the public" who have access to and are "able to use" city property. Executive Order S-48-23, https://perma.cc/N6KY-M47S.

On their face, these orders are "aimed at society as a whole" and the "interests of the public at large." They both apply their weapons prohibition to public parks, sidewalks, and other quintessentially public places that have "immemorially been held in trust for the use of the public." Concomitantly, these executive orders (at least the portions that apply to such quintessential public spaces) are best understood as regulatory measures.[5]

To sum up, because L.B. 77 deprives municipalities of any regulatory power with respect to the possession and transportation of weaponry, municipal action that bans or

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[5] Our conclusion would hold even if the orders were understood to properly exercise proprietary authority. A governmental entity cannot evade an express restriction on its regulatory authority through the exercise of its proprietary power. *See Wisconsin Dep't of Indus., Lab. & Hum. Rels. v. Gould Inc.*, 475 U.S. 282, 290–91 (1986). "In exercising its proprietary power, a municipality may not act beyond the purposes of [a] statutory grant of power or contrary to express statutory or constitutional limitations." *Burns v. City of Seattle*, 161 Wash. 2d 129, 154 (2007). When a municipality attempts to subvert a regulatory restriction in this way, even a legitimate exercise of proprietary power will be treated as if it were an exercise of regulatory authority, and any applicable limitations constraining an exercise of regulatory authority in that context will be respected. *See Gould*, 475 U.S. at 291; *Friends of the Eel River v. N. Coast R.R. Auth.*, 3 Cal. 5th 677, 736–37 (2017).

otherwise regulates the possession of firearms or other weapons in those quintessentially public spaces is unlawful.[6] There can be little doubt that portions of the municipal actions that prompted this Opinion have a regulatory character. Public parks, trails, and sidewalks are presumptively open to the public at large. General edicts designed to govern behavior in such spaces, then, are not aimed at a small subset of the public, like municipal employees or individuals who come to a government office or other facility (akin to a customer) to interact with the municipal corporation operating in a proprietary capacity (akin to a business). Instead, they operate as a policy prescription applicable to all. Action with this sort of universal impact necessarily involves the exercise of regulatory authority.

II.

The Lincoln and Omaha executive orders (and any similar municipal action) also violate the Constitution. Insofar as those orders limit the right to carry weapons in public for self-defense, they infringe on the right to "bear arms" secured by the constitutions of the United States and Nebraska.

Both the Second Amendment to the United States Constitution and Article I, Section 1, of the Nebraska Constitution secure the right of Nebraska citizens "to keep

[6] Section 13-330 renders any municipal regulation of "the ownership, possession, storage, transportation, sale, or transfer of firearms or other weapons" not expressly permitted by state law to be "null and void." Neb. Rev. Stat. § 13-330(2), (3). Whether Section 13-330 requires the *entirety* of an impermissible ordinance or other action be nullified, or instead renders only any unlawful portion of such action void, raises a severability question that is not facially resolved by the statutory text. Because there is no need to resolve that question here, we decline to wade into the murky waters of severability.

and bear arms." These constitutional enshrinements secure to Nebraskans the fundamental, "basic" right to carry a firearm or other weapon for the purpose of self-defense. *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010).

The United States Supreme Court has explained that the plain meaning of the phrase "bear arms" "naturally encompasses [the] public carry" of firearms. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). The Second Amendment's reference to the right to "bear arms" refers to the right to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *D.C. v. Heller*, 554 U.S. 570, 584 (2008) (citations and internal quotation marks omitted). Thus, "the Second Amendment guarantees 'an individual right to possess and carry weapons in case of confrontation.'" *Bruen*, 597 U.S. at 33 (quoting *Heller*, 554 U.S. at 592). Given that a "confrontation can surely take place outside the home" a less expansive understanding of the right to bear arms—one that did not embrace a right to public carriage—would "nullify half of the Second Amendment's operative protections." *Id.*[7]

The import of *Bruen*, then, is clear: "The Second Amendment's plain text . . . presumptively guarantees . . . a right to 'bear' arms in public for self-defense." 597 U.S. at 33. To the extent some municipal action, like Lincoln's or Omaha's executive order, infringes on that right, it is unconstitutional.

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[7] Our Supreme Court has not directly addressed whether Article I, Section 1, of the Nebraska Constitution embraces the public carriage of firearms. That said, textual similarity between the Second Amendment and Article I, Section 1, leads us to presume, at a minimum, a congruence between the rights secured by those two authorities.

That said, not every exercise of municipal proprietary authority that restricts firearm or other weapon possession is unconstitutional. Both *Bruen* and *Heller* recognized that there are some "sensitive places" where it is constitutionally permissible for the possession of weapons to be "altogether prohibited." *Bruen*, 597 U.S. at 30; *D.C. v. Heller*, 554 U.S. 570, 626 (2008). "Courthouses" along with "legislative assemblies" and "polling places" have been offered as examples, *Bruen*, 597 U.S. at 30, as have "schools and government buildings," *Heller*, 554 U.S. at 626. The precise scope of the doctrine remains unsettled: *Bruen* rejected an overly broad conception—any location where "people typically congregate and where law-enforcement . . . professionals are presumptively available"—but left the task of outlining a "comprehensive definition" to a later date. *See* 597 U.S. at 30–31.

Just as was the case above, the fact that one portion of an executive order or other municipal action is unconstitutional does not necessarily render that action unlawful in its entirety.[8] Many public buildings where government business is conducted can be fairly described as "public places;" some, like courthouses, are even presumptively open to members of the public. *See, e.g.*, Neb. Rev. Stat. § 24-1001 (Reissue 2016) ("All judicial proceedings of all courts established in this state must be open to the attendance of the public unless otherwise specially provided by statute."). But there are many obvious and material differences between a courtroom and a public park or trail or sidewalk. That a municipality cannot constitutionally ban the possession of firearms or other weapons in a park or on its sidewalks does not mean

[8] Then again, Section 13-330 may require just that. This Opinion does not address this question of severability. *See* FN 6, *supra*.

that weapons must be allowed in the public gallery of a courtroom or other sensitive place.

Because your question is addressed to public spaces such as parks, trails, and sidewalks, not public buildings, this Opinion does not address where the "sensitive places" line exactly lies, which is a subject of ongoing jurisprudential and scholarly debate. Because state law already prohibits municipalities from regulating firearm possession, it suffices for present purposes to note that the sensitive places doctrine is but one of several possible reasons why constitutional limitations on the possession of weaponry may differ across various locations that can fairly be described as a "public space."

III.

Existing law prevents Nebraska municipalities from regulating the possession of firearms or other weapons in public spaces like those identified in your opinion request, namely "public parks, trails, and sidewalks." Municipalities have sharply limited proprietary authority over these spaces, and L.B. 77 deprived municipalities of all regulatory authority over the possession of weaponry. Consequently, municipalities have no lawful means of restricting or prohibiting the possession of firearms or other weapons there.

Furthermore, the right to publicly bear arms for self-defense provides a constitutional backstop that would preclude a blanket prohibition on weapon possession in those spaces, regardless of whether a municipality sought to implement such a restriction or prohibition by way of regulation or through an exercise of its common law proprietary authority.

MICHAEL T. HILGERS
Attorney General of Nebraska