

**IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS**

Guns Save Life, Inc. and John William Wombacher, Ill.,)	
)	
Plaintiffs,)	
)	
v.)	18CH498
)	
Village of Deerfield, Illinois, and Harriet Rosenthal, solely in her official capacity as Mayor of the Village of Deerfield,)	
)	
Defendants.)	

MEMORANDUM ORDER

This case is before the Court for hearing and ruling on plaintiffs Guns Save Life, Inc.'s and John William Wombacher, III's (collectively plaintiff) Motion for Temporary Restraining Order and Preliminary Injunction. In its petition, plaintiff requests that the Court enjoin the defendant Village of Deerfield from enforcing Ordinance No. 0-18-06 banning the ownership and possession of assault weapons and large capacity magazines. The Court has considered the parties' briefs, the Home Rule provisions of the Illinois Constitution, the relevant statutory provisions, the cases cited by the parties and the arguments of counsel. For the following reasons, the Court grants plaintiff's request for a temporary restraining order.¹

FACTS

The relevant facts are not in dispute. On July 1, 2013, Deerfield adopted Ordinance No.

¹ Also, before the Court is another lawsuit filed against Deerfield in a case captioned Daniel D. Easterday, Illinois State Rifle Association and Second Amendment Foundation, Inc. v. Village of Deerfield, Illinois, a municipal corporation, under case number 18CH427. Plaintiffs in the Easterfield case only raise a preemption challenge to Deerfield's ordinance. The preemption challenge raised by all plaintiffs will be addressed in this Memorandum Order.

O-13-24 titled "AN ORDINANCE REGULATING THE OWNERSHIP AND POSSESSION OF ASSAULT WEAPONS IN THE VILLAGE OF DEERFIELD". The 2013 Ordinance: 1. defines what constitutes an assault weapon (§15-86); 2 defines what constitutes a large capacity magazine (§15-86); 3. mandates how assault weapons should be stored (§15-87); 4. mandates how assault weapons should be transported within Deerfield's village limits (§15-88); 5. makes it unlawful to carry or possess an assault weapon within Deerfield unless the person is on his land, his abode, legal dwelling or fixed place of business or unless the person is on the land or in the dwelling of another person as an invitee with that person's permission (§15-88); and 6. provides for a fine between \$250.00 to \$1,000.00 for each violation (§15-89).

On July 9, 2013, the Illinois legislature amended §13.1 of the Firearm Owner's Identification Card Act (FOIDCA). 430 ILCS 65/13.1 (West 2018). Section 13.1 of FOIDCA provides:

Preemption.

(a) Except as otherwise provided in the Firearm Concealed Carry Act and subsections (b) and (c) of this Section, the provisions of any ordinance enacted by any municipality which requires registration or imposes greater restrictions or limitations on the acquisition, possession and transfer of firearms than are imposed by this Act, are not invalidated or affected by this Act.

(b) Notwithstanding subsection (a) of this Section, the regulation, licensing, possession, and registration of handguns and ammunition for a handgun, and the transportation of any firearm and ammunition by a holder of a valid Firearm Owner's Identification Card issued by the Department of State Police under this Act are exclusive powers and functions of this State. Any ordinance or regulation, or portion of that ordinance or regulation, enacted on or before the effective date of this amendatory Act of the 98th General Assembly that purports to impose regulations or restrictions on a holder of a valid Firearm Owner's Identification Card issued by the Department of State Police under this Act in a manner that is inconsistent with this Act, on the effective date of this amendatory Act of the 98th General Assembly, shall be invalid in its application to a holder of a valid Firearm Owner's Identification Card issued by the Department of State Police under this Act.

c) Notwithstanding subsection (a) of this Section, the regulation of the possession or ownership of assault weapons are exclusive powers and functions of this State. Any ordinance or regulation, or portion of that ordinance or regulation, that purports to regulate the possession or ownership of assault weapons in a manner that is inconsistent with this Act, shall be invalid unless the ordinance or regulation is enacted on, before, or within 10 days after the effective date of this amendatory Act of the 98th General Assembly. Any ordinance or regulation described in this subsection (c) enacted more than 10 days after the effective date of this amendatory Act of the 98th General Assembly is invalid. An ordinance enacted on, before, or within 10 days after the effective date of this amendatory Act of the 98th General Assembly may be amended. The enactment or amendment of ordinances under this subsection (c) are subject to the submission requirements of Section 13.3. For the purposes of this subsection, "assault weapons" means firearms designated by either make or model or by a test or list of cosmetic features that cumulatively would place the firearm into a definition of "assault weapon" under the ordinance.

(d) For the purposes of this Section, "handgun" has the meaning ascribed to it in Section 5 of the Firearm Concealed Carry Act.

(e) This Section is a denial and limitation of home rule powers and functions under subsection (h) of Section 6 of Article VII of the Illinois Constitution.

430 ILCS 65/13.1 (West 2018). That same day, the Illinois legislature also passed the Firearm Concealed Carry Act (the FCCA). 430 ILCS 66/1, *et seq.* (West 2018). The FCCA provides:

Preemption.

Any ordinance or regulation, or portion thereof, enacted on or before the effective date of this Act that purports to impose regulations or restrictions on licensees or handguns and ammunition for handguns in a manner inconsistent with this Act shall be invalid in its application to licensees under this Act on the effective date of this Act. This Section is a denial and limitation of home rule powers and functions under subsection (h) of Section 6 of Article VII of the Illinois Constitution. 430 ILCS 66/90 (West 2018).

"Handgun" means any device which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas, or escape of gas that is designed to be held and fired by the use of a single hand." 430 ILCS 66/5 (West 2018).

Sometime in 2018, Deerfield revisited the issue of whether assault weapons and large capacity magazines should be banned and on April 2, 2018 Deerfield adopted Ordinance

No. O-18-06 titled "AN ORDINANCE AMENDING CHAPTER 15 (MORALS AND CONDUCT), ARTICLE 11 (ASSAULT WEAPONS), SECTION 15-87 (SAFE STORAGE OF ASSAULT WEAPONS) AND SECTION 15-88 (TRANSPORTATION OF ASSAULT WEAPONS) OF THE MUNICIPAL CODE OF THE VILLAGE OF DEERFIELD TO REGULATE THE POSSESSION, MANUFACTURE AND SALE OF ASSAULT WEAPONS IN THE VILLAGE OF DEERFIELD". The 2018 Ordinance made minor changes to §15-86 dealing with definitions and made more extensive changes to: (1) §15-87 Safe Storage of Assault Weapons; (2) §15-88 Transportation of Assault Weapons; and (3) §15-89 Penalty. The 2018 Ordinance adopted two new sections, §15-90 addressing Disposition of Assault Weapon and Large Capacity Magazine and §15-91 addressing Destruction of Assault Weapons and Large Capacity Magazines.

The text of the 2018 Ordinance provisions that plaintiff challenges are set out in their entirety with the additions indicated by underscoring and the deletions indicated by strikeouts as reflected in the copy of the 2018 Ordinance attached as Exhibit A to plaintiff's motion.

Sec. 15-87. Safe Storage of Assault Weapons; Exceptions

(a) ~~Safe Storage.~~ It shall be unlawful to possess, bear, manufacture, sell, transfer, transport, store or keep any assault weapon in the Village, ~~unless such weapon is secured in a locked container or equipped with a tamper resistant mechanical lock or either safety device, properly engaged so as to render such weapon inoperable by any person other than the owner or other lawfully authorized user. For purposes of this section such weapon shall not be deemed stored or kept when being carried by or under the control of the owner or other lawfully authorized user.~~

(b) ~~Self-defense exception.~~ No person shall be punished for a violation of this section if an assault weapon is used in a lawful act of self-defense or in defense of ~~another.~~

~~(c)~~ The provisions of this section, excluding those pertaining to the manufacture and sale of any assault weapon in the Village, do not apply to (i) any law enforcement officer, agent or employee of any municipality of the State of Illinois (ii) any law enforcement officer, agent or employee of the State of Illinois, of the United States, or

of any other state (iii) any member of the military or other service of any state or the United States, including national guard and reserves, if the persons described are authorized by a competent authority to so carry an assault weapon loaded on a public way and such person is acting within the scope of his duties or training, or (iv) any qualified retired law enforcement officer, as that term is defined in 18 U.S.C. § 926C(c); however, any such assault weapon subject to the aforesaid exceptions under this section shall be safely stored and secured in a locked container or equipped with a tamper-resistant mechanical lock or other safety device properly engaged so as to render such weapon inoperable by any person other than the owner or other lawfully authorized user, or broken down in a nonfunctioning state and not immediately accessible to any person, or unloaded and enclosed in a case, firearm carrying box, shipping box or other container by a person who has been issued a currently valid Firearm Owner's Identification Card, except as may otherwise be lawfully provided by the rules, regulations, general orders, ordinances or laws regulating the conduct of any such law enforcement officer, service member or qualified retired law enforcement officer.

Section 15-88. Transportation of Assault Weapons; Exceptions.

(a) It is unlawful and a violation of this section for any person to carry, keep, bear, transport or possess an assault weapon in the Village, ~~except when on his land or in his own abode, legal dwelling or fixed place of business, or on the land or in the legal dwelling of another as an invitee with that person's permission,~~ except that this section does not apply to or affect transportation of assault weapons that meet one of the following conditions:

- (i) are broken down in a non-functioning state; ~~or~~ and
- (ii) are not immediately accessible to any person; or
- (iii) are unloaded and enclosed in a case, firearm carrying box, shipping box, or other container by a person who has been issued a currently valid Firearm Owner's Identification Card. ~~;~~

(b) The provisions of this section do not apply to (i) any law enforcement officer, agent or employee of any municipality of the State of Illinois (ii) any law enforcement officer, agent or employee of the State of Illinois, of the United States, or of any other state (iii) any member of the military or other service of any state or the United States, including national guard and reserves, if the persons described are authorized by a competent authority to so carry an assault weapon loaded on a public way and such person is acting within the scope of his duties or training, or (iv) any qualified retired law enforcement officer, as that term is defined in 18 U.S.C. § 926C(c); however, any such assault weapon subject to the aforesaid exceptions under this section shall be safely stored and secured in a locked container or equipped with a tamper-resistant mechanical lock or other safety device properly engaged so as to render such weapon inoperable by any person other than the owner or other lawfully authorized user, or

broken down in a nonfunctioning state and not immediately accessible to any person, or unloaded and enclosed in a case, firearm carrying box, shipping box or other container by a person who has been issued a currently valid Firearm Owner's Identification Card, except as may otherwise be lawfully provided by the rules, regulations, general orders, ordinances or laws regulating the conduct of any such law enforcement officer, service member or qualified retired law enforcement officer.

Section 15-89. Penalty.

Any person who is found to have violated this Article shall be fined not less than \$250 and not more than \$1,000 for each offense, and a separate offense shall be deemed committed on each day during or on which a violation occurs or continues. Every person convicted of any violation under this Article shall, in addition to any penalty provided in this Code, forfeit to the Village any assault weapon.

Section 15-90. Disposition of Assault Weapon and Large Capacity Magazine.

Any person who, prior to the effective date of Ordinance No. _____, was legally in possession of an Assault Weapon or Large Capacity Magazine prohibited by this Article, shall have 60 days from the effective date of Ordinance No. _____, to do any of the following without being subject to prosecution hereunder:

(a) Remove, sell or transfer the Assault Weapon or Large Capacity Magazine from within the limits of the Village;

(b) Modify the Assault Weapon or Large Capacity Magazine either to render it permanently inoperable or to permanently make it a device no longer defined as an Assault Weapon or large capacity Magazine; or

(c) Surrender the Assault Weapon or Large Capacity Magazine to the Chief of Police or his or her designee for disposal as provided in Section 15-91 of this Article.

Section 15-91. Destruction of Assault Weapons and Large Capacity Magazines.

The Chief of Police or his or her designee shall have the power to confiscate any assault Weapon of any person charged with a violation under this Article. The Chief of Police shall cause to be destroyed each Assault Weapon or Large Capacity Magazine surrendered or confiscated pursuant to this Article; provided, however, that no Assault Weapon or Large Capacity Magazine shall be destroyed until such time as the Chief of Police determines that the assault Weapon or Large Capacity Magazine is not needed as evidence in any matter. The Chief of Police shall cause to be kept a record of the date and method of destruction of each Assault Weapon or Large Capacity Magazine destroyed pursuant to this Article.

Plaintiff raises several challenges to the validity of the 2018 Ordinance and the Court requested that the parties brief an additional issue. The Court will address the following issues. (1) Whether the State preempted and stripped Deerfield's power to exercise concurrent power to regulate assault weapons or large capacity magazines pursuant to the Home Rule provisions of the Illinois Constitution. (2) Whether the changes to the 2013 Ordinance resulting in the 2018 Ordinance are amendments to the 2013 Ordinance or a new ordinance that is preempted by the provisions of FOIDCA, FCCA and the Wildlife Code. (3) Whether the language of the 2018 Ordinance prohibits ownership and possession of large capacity magazines. and (4) Whether the 2018 Ordinance violates the takings clause in Article 1, Section 15 of the Illinois Constitution and §10-5-5 of the Eminent Domain Act.

ANALYSIS

Plaintiffs seek a temporary restraining order and a preliminary injunction.² A temporary restraining order or preliminary injunction may issue when plaintiff establishes that: 1. he has a clearly ascertainable right that needs protection; 2. he will suffer irreparable harm in the absence of an injunction; 3. he lacks an adequate remedy at law; and 4. he has a likelihood of success on the merits. *Makindu v. Illinois High Sch. Ass'n*, 2015 IL App. (2d) 141201, ¶131, 40 N.E.2d 182, 190; *Village of Westmont v. Lenihan*, 301 Ill. App.3d 1050, 1055, 704 N.E.2d 891,

² Generally, there is a distinction as to how the Court and the parties proceed when requesting a temporary restraining order or a preliminary injunction. A proceeding for a temporary restraining order is a summary proceeding even when the party opposing the request for a temporary restraining order files a verified answer the Court still proceeds in a summary fashion hearing only oral argument to determine whether a temporary restraining order should be entered. *Passon v. TCR, Inc.*, 242 Ill. App.3d 259, 263, 608 N.E.2d 1346, 1349 (2d Dist. 1993); *People Gas Light and Coke Co. v City of Chicago*, 117 Ill. App.3d 353, 355, 453 N.E.2d 740, 742 (1st Dist.1983). A request for a preliminary injunction when a verified answer is filed, generally requires an evidentiary hearing. *Id.* The distinction between these procedures is inconsequential in this case as this case involves the interpretation, application and interplay of Deerfield's ordinance, State statutory provisions and provisions of the Illinois Constitution.

894-95 (2d Dist. 1998). If the moving party establishes these elements, the Court must then balance the hardships to the parties and consider the public interest involved. *Makindu v. Illinois High Sch. Ass'n*, 2015 IL App. (2d) 141201, ¶31, 40 N.E.2d at 190. The issuance of an injunction is within the sound discretion of the trial court when plaintiff demonstrates that there is a fair question as to the existence of the right claimed and that the circumstances lead to a reasonable belief that the moving party will be entitled to the relief sought. *Stenstrom Petroleum Services Group, Inc. v. Mesch*, 375 Ill. App.3d 1077, 1089, 874 N.E.2d 959, 971 (2d Dist. 2007); *Village of Westmont v. Lenihan*, 301 Ill. App.3d at 1055, 704 N.E.2d at 895. The Court must determine whether a fair question is raised as to the existence of a right that needs protection and is not to, at this time, decide controverted facts or the ultimate merits of the case. *Stenstrom Petroleum Services Group, Inc. v. Mesch*, 375 Ill. App.3d at 1089, 874 N.E.2d at 971.

I. Preemption

Deerfield in the exercise of its home rule powers adopted Ordinance No. O-13-24.

As a home rule unit, Deerfield's home rule power is derived from Article 7, §6 of the Illinois Constitution which provides in relevant part:

(a) A County which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000 are home rule units. Other municipalities may elect by referendum to become home rule units. Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.

(h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in subsection (l) of this Section.

(i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.

(m) Powers and functions of home rule units shall be construed liberally.

ILL. CONST. art. VII, § 6 (a), (h), (i), and (h) (West 2018). These home rule sections provide that a home rule unit has the right to exercise any power and perform any function pertaining to its government affairs except as limited by Article 7, §6. The home rule unit's authority includes concurrently exercising with the State any power or function of a home rule unit. Section 6 however, clearly provides that the General Assembly by law may deprive the home rule unit from exercising any power the General Assembly feels should be exercised exclusively by the State when the State specifically declares that the State's exercise of such power or function is exclusive.

Our Supreme Court in a comprehensive preemption opinion in *City of Chicago v. Roman*, 184 Ill.2d 504, 705 N.E.2d 81 (1998), discussed how the State preempts a home rule unit from acting on a subject that the State asserts exclusive power to regulate and how the State can limit the home rule unit's concurrent exercise of power without preempting that exercise of power. The Court held that: "[To] meet the requirements of section 6(h), legislation must contain express language that the area covered by the legislation is to be exclusively controlled by the State. *Id.*, 184 Ill.2d at 517, 705 N.E.2 at 89. The Court stated that: "When the General Assembly intends to preempt or exclude home rule units from exercising power over a matter, that body knows how to do so. In many statutes that touch on countless areas of our lives, the legislature has expressly stated that, pursuant to section 6(h) or 6(i), or both, of article VII of the Illinois Constitution, a statute is declared to be an exclusive exercise of power by the state and

that such power shall not be exercised by home rule units.” *Id.* The statutory provisions that the Court used as examples of when the legislature preempted home rule authority to regulate, excluding the two statutes that have since been repealed, were:

1. Section 17 of the Illinois Health Facilities Planning Act which provides:

It is hereby specifically declared that the powers and functions exercised and performed by the State pursuant to this Act **are exclusive to the State of Illinois** and that these powers and functions shall not be exercised, either independently or concurrently, by any home rule unit. 20 ILCS 3960/17 (West 1992) (emphasis added).

2. Section 2.1 of the Illinois Insurance Code which provides:

Public Policy. It is declared to be the public policy of this State, pursuant to paragraphs (h) and (i) of Section 6 of Article VII of the Illinois Constitution of 1970, that any power or function set forth in this Act to be **exercised by the State is an exclusive State power or function**. Such power or function shall not be exercised concurrently, either directly or indirectly, by any unit of local government, including home rule units, except as otherwise provided in this Act. Provided further that the fees, charges and taxes provided for by this Act shall, as provided for in Section 415 of this Act, be in lieu of all license fees or privilege or occupation taxes or other fees levied or assessed by any home rule unit and said Section 415 of this Act is declared to be **a denial and limitation of the powers of home rule units** pursuant to paragraph (g) of Section 6 of Article VII of the Illinois Constitution of 1970. 215 ILCS 5/2.1 (West 1992) (emphasis added).

3. Section 21 of the Citizens Utility Board Act which provides:

Home rule preemption. The provisions of this Act are declared to be **an exclusive exercise of power by the State of Illinois** pursuant to paragraphs (h) or (i) of Section 6 of Article VII of the Illinois Constitution. No home rule unit may impose any requirement or regulation on any public utility inconsistent with or in addition to the requirements or regulations set forth in this Act. 220 ILCS 10/21 (West 1992) (emphasis added).

4. Section 6 of the Medical Practice Act of 1987 which provides:

It is declared to be the public policy of this State, pursuant to paragraphs (h) and (i) of Section 6 of Article VII of the Illinois Constitution of 1970, that any power or function set forth in this Act to be exercised by the State is **an exclusive State power or function**. Such power or function shall not be exercised concurrently, either directly or indirectly, by any unit of local

government, including home rule units, except as otherwise provided in this Act. 225 ILCS 60/6 (West 1992) (emphasis added).

5. Section 6-18 of the Liquor Control Act of 1934 which provides:

No home rule unit, as defined in Article VII of the Illinois Constitution, may amend or alter or in any way change the legal age at which persons may purchase, consume or possess alcoholic liquors as provided in this Act, and it is declared to be the law of this State, pursuant to paragraphs (h) and (i) of Section 6 of Article VII of the Constitution, that the establishment of such legal age is an **exercise of exclusive State power** which may not be exercised concurrently by a home rule unit. 235 ILCS 5/6–18 (West 1992) (emphasis added).

6. Section 7 of the Missing Children Registration Law which provides:

Home rule. This Article shall constitute the **exercise of the State's exclusive jurisdiction** pursuant to subsection (h) of Section 6 of Article VII of the Illinois Constitution and **shall preempt the jurisdiction of any home rule unit**. 325 ILCS 55/7 (West 1992) (emphasis added).

7. Section 2 of the Burial of Dead Bodies Act which provides;

No home rule unit, as defined in Section 6 of Article VII of the Illinois Constitution, may change, alter or amend in any way the provisions contained in this Act, and it is declared to be the law of this State, pursuant to subsections (h) and (i) of Section 6 of Article VII of the Illinois Constitution, that powers and functions authorized by this Act **are the subjects of exclusive State jurisdiction**, and no such powers or functions may be exercised concurrently, either directly or indirectly, by any home rule unit. 410 ILCS 5/2(c) (West 1992) (emphasis added).

8. Section 2 of the Wildlife Code which provides:

The regulation and licensing of the taking of wildlife in Illinois are **exclusive powers and functions of the State**. A home rule unit may not regulate or license the taking of wildlife. This Section is a **denial and limitation of home rule powers** and functions under subsection (h) of Section 6 of Article VII of the Illinois Constitution. 410 ILCS 5/2 (West 1992) (emphasis added).

9. Section 11-208.2 of the Illinois Vehicle Code which provides:

Limitation on home rule units. The provisions of this Chapter of this Act limit the authority of home rule units to adopt local police regulations inconsistent herewith except pursuant to Sections 11-208, 11-209, 11-1005.1, 11-1412.1, and 11-1412.2 of this Chapter of this Act. 625 ILCS 5/11–208.2 (West 1992) (emphasis added).

The Supreme Court also held that the General Assembly may limit a home rule unit's concurrent exercise of power without completely preempting such power through partial exclusion or

conformity. *City of Chicago v. Roman*, 184 Ill.2d at 519, 705 N.E.2d at 90. The Court further stated: “[T]he General Assembly knows how to accomplish this, and has done so countless times, expressly stating that, pursuant to article VII, section 6(i), of the Illinois Constitution, a statute.” constitutes a limitation on the power of home rule units to enact ordinances that are contrary to or inconsistent with the statute”. *Id.*, 184 Ill.2d at 520, 705 N.E.2d at 90. The Court then set-out those statutes in which the State through its expression in the statute provided for partial exclusion or conformity of the home rule unit’s authority to exercise its power to regulate over those matters. The language of the statutory provisions that the Court used as examples of when there is partial exclusion or conformity were:

1. Section 5-919 of the Illinois Highway Code which provides:

Home Rule Preemption. A home rule unit may not impose road improvement impact fees in a manner inconsistent with this Division. This Division is a limitation under subsection (i) of Section 6 of Article VII of the Illinois Constitution on the concurrent exercise by home rule units of powers and functions exercised by the State. 605 ILCS 5/5–919 (West 1992).

2. Section 8 of the Carrier and Racing Pigeon Act of 1984 which provides:

This Act applies to all municipalities and counties and pursuant to paragraph (i) of Section 6 of Article VII of the Constitution, this Act is a limitation upon the power of home rule units to enact ordinances contrary to this Act. 510 ILCS 45/8 (West 1992).

The preemption language in the FOIDCA and the FCCA mirrors the language in those statutes our Supreme Court has stated have preempted a home rule unit’s authority to regulate in the statute’s subject area. The preemption language in the FOIDCA is:

(b) Notwithstanding subsection (a) of this Section, the regulation, licensing, possession, and registration of handguns and ammunition for a handgun, and the transportation of any firearm and ammunition by a holder of a valid Firearm Owner's Identification Card issued by the Department of State Police under this Act **are exclusive powers and functions of this State.** (emphasis added).

c) Notwithstanding subsection (a) of this Section, the regulation of the possession or ownership of assault weapons **are exclusive powers and functions of this State.** (emphasis added).

(e) This Section is a **denial and limitation of home rule powers and functions under subsection (h)** of Section 6 of Article VII of the Illinois Constitution. (emphasis added).

The language in the FCCA is:

Any ordinance or regulation, or portion thereof, enacted on or before the effective date of this Act that purports to impose regulations or restrictions on licensees or handguns and ammunition for handguns in a manner inconsistent with this Act shall be invalid in its application to licensees under this Act on the effective date of this Act. **This Section is a denial and limitation of home rule powers and functions under subsection (h)** of Section 6 of Article VII of the Illinois Constitution. (emphasis added).

The language in the FOIDCA and the FCCA show the State's intent to preempt and have exclusive authority to regulate the ownership, possession, and carrying of handguns and assault weapons.

The plaintiff's last preemption argument claims that the Wildlife Code preempts Deerfield's ability to regulate assault weapons and large capacity magazines. While the Wildlife Code does have specific language showing an intent to preempt, the Wildlife Code is a statute regulating the hunting and taking of game in Illinois. Any regulation as to what firearms may be used to hunt is consequential to the subject matter the State is preempting in the Wildlife Code. The Wildlife Code is meant to regulate hunting and taking of game which is the subject the State is preempting, not firearm ownership or possession.

Plaintiff also asserts that the 2018 Ordinance does not specifically prohibit large capacity magazines, however, Deerfield claims that when the entire text of the ordinance is read that ownership or possession of any large capacity magazine is prohibited. Deerfield's expanded reading of the 2018 Ordinance is not supported by the ordinance's text. No where in the 2018

Ordinance is there any text that specifically prohibits possessing or owning a large capacity magazine. The term large capacity magazine is defined in §15-86 and is then used to define assault weapon. The ordinance only references large capacity magazine as a component part of an assault weapon. At best, Deerfield only prohibited large capacity magazines to the extent that the magazine is a component part of an assault weapon as defined in §15-86. Deerfield's claim that the 2018 Ordinance prohibits ownership or possession of any large capacity magazine fails because the 2018 Ordinance does not contain specific language prohibiting all large capacity magazines; if the ordinance did effectuate a ban on all large capacity magazines such prohibition is beyond Deerfield's home rule power because the FCCA preempted Deerfield's exercise of such power.

Some of the language in the FOIDCA may appear to be inconsistent in asserting the State's intent to assert preemption over the regulation of the possession or ownership of assault weapons. When the State preempts an area by declaring that it is exercising exclusive power to regulate specific matters as provided for in the Illinois Constitution, and passes a law declaring that exclusive power, the only result that can follow from complying with these Constitutional requirements is to deprive the home rule unit of the authority to regulate that matter. The legislature is presumed to know the law and if the State wishes to allow home rule units to have concurrent jurisdiction through partial preemption or conformity it has the knowledge and ability to do so. The State's attempt to limit preempting the regulation of the possession or ownership of assault weapons fails in the face of the specific language in the FOIDCA granting the State the exclusive power to regulate these areas.

Deerfield claims that the language in §13.1 allowing for inconsistent ordinances and amendments to the FOIDCA creates an inconsistency that shows the legislature did not intend to preempt this area. The Court does not agree that this language has such an effect. The specific language in §13.1(e) of the FOIDCA, the last subsection in §13.1, repeats and emphasizes the General Assembly's intent to preempt by stating: "This Section is a denial and limitation of home rule powers and functions under subsection (h) of Section 6 of Article VII of the Illinois Constitution. 430 ILCS 65/13.1(e) (West 2018). If any confusion or ambiguity exists, this final provision in the preemption section leaves no doubt what the General Assembly intended to do, preempt the regulation of this subject matter. The Illinois Constitution prescribes what happens to a home rule unit's authority to exercise power over matters preempted by the State. The General Assembly cannot expand the powers granted to home rule units by the Illinois Constitution. Thus, Deerfield lost its authority to regulate possession or ownership of assault weapons and large capacity magazines once the State passed §13.1 of FOIDCA.

Plaintiff also asserts that the changes to Deerfield's ordinance was not an amendment but was an entirely new ordinance that does not comply with the preemption exception in the FOIDCA.³ In determining whether changes to an ordinance are amendments or a new ordinance repealing the prior ordinance, our Supreme Court and Appellate Courts have provided clear guidelines for the trial courts. Deerfield's characterization of Ordinance No. O-18-06 as an amendment of Ordinance No. O-13-24 is not dispositive of whether it is an amendment or a new ordinance that repealed the prior ordinance. "Where an amendatory

³ The Court believes its preemption analysis should end the inquiry regarding preemption. The Court however, will address all of plaintiff's alternative arguments to avoid the potential of piecemeal litigation and appeals.

ordinance is enacted which re-enacts some of the provisions of the former ordinance, such portions of the old ordinance as are repeated or retained, either literally or substantially, are to be regarded as a continuation of the old ordinance and not as the enactment of a new ordinance on the subject or as [the] repeal of the former ordinance." *Village of Park Forest v. Wojciechowski*, 29 Ill.2d 435, 438, 194 N.E.2d 346, 348 (1963); *Athey v. City of Peru*, 22 Ill. App.3d 363, 367, 317 N.E.2d 294, 297 (3d Dist. 1974). If, however, there is a clear conflict between the two ordinances where both cannot be carried out, then an intention to repeal will be presumed. *Nolan v. City of Granite City*, 162 Ill. App.3d 187, 188, 514 N.E.2d 1196, 1199 (5th Dist. 1987). To resolve the issue of whether the changes are an amendment or a new ordinance, the court must perform a comparative analysis of the ordinances and analyze all its terms. *Athey v. City of Peru*, 22 Ill. App.3d at 367-368, 317 N.E.2d at 297-298.

In comparing the language of the 2013 Ordinance to the language of the 2018 Ordinance there exists significant differences between the two ordinances. The 2013 Ordinance only regulated transportation and storage of assault weapons within Deerfield's village limits and provided for penalties for improperly transporting or storing such weapons. While §§15-87 and 15-88 of the 2018 Ordinance keep the same titles these sections had in the 2013 Ordinance (§15-87 Safe Storage of Assault Weapons; Exceptions, §15-88 Transportation of Assault Weapons; Exceptions); the new text in the 2018 Ordinance sections does not deal with transporting or storing assault weapons but instead bans such weapons. The 2013 Ordinance did not ban ownership or possession of assault weapons or large capacity magazines within the Deerfield village limits. The banning of assault weapons is substantively different than regulations regarding the transportation and storage of such weapons by one who owns or

possesses assault weapons. In addition, there are two sections that are entirely new. Section 15-90 Disposition of Assault Weapon and Large Capacity Magazine and §15-91 Destruction of Assault Weapons and Large Capacity Magazines in the 2018 Ordinance are not found in the 2013 Ordinance which further supports the claim that the changes to the 2013 Ordinance resulted in a new ordinance and not an amended ordinance. For these reasons the 2018 Ordinance is a new ordinance and not an amendment.

II. Eminent Domain

Plaintiff's last challenge to the 2018 Ordinance is that the ordinance violates Article 1, Section 15 of the Illinois Constitution and §10-5-5 of the Eminent Domain Act. The Illinois Constitution provides: "Private property shall not be taken or damaged for public use without just compensation as provided by law." ILL CONST. Article 1, Section 15 (West 2018). Section 10-5-5 of the Eminent Domain Act provides in part: "Private property shall not be taken or damaged for public use without just compensation[.]" 735 ILCS 30/10-5-5 (West 2018). Plaintiff cites to *Duncan v. Becerra*, 265 F.Supp.3d 1106 (S.D. Cal. 2017) a California case addressing a takings challenge to California's ban on large capacity magazines that hold more than ten rounds in support of its position that provisions of the 2018 Ordinance constitute an uncompensated and an unconstitutional taking. Deerfield cites to *Rupp v. Becerra*, 2018 WL 2138452 (C.D. Cal. 2018) a California case addressing a taking challenge to California's ban on assault weapons in support of its position that provisions of the 2018 Ordinance do not result in an unconstitutional taking. While these two federal cases are not binding on this Court; these cases are helpful in evaluating plaintiff's takings claim.

The *Rupp* case cited by Deerfield is more persuasive than the *Duncan* case relied on by

plaintiff. In *Rupp*, the court analyzed whether the ban on assault weapons is a taking when California exercised its police powers to protect the health, morals, or safety of the community. Relying on *Mugler v. Kansas*, 123 U.S. 623 (1887), where the Court distinguished between a taking pursuant to eminent domain and a taking based on the government's other police powers the *Rupp* court found that no taking occurred when California banned assault weapons. *Mugler* dealt with the issue of whether Kansas' constitutional amendment prohibiting the manufacture and sale of intoxicating liquor except under limited circumstances constituted a taking under the U.S. Constitution when prior to the amendment Kansas statutes regulated but allowed the manufacture and sale of intoxicating liquor. In holding that a taking had not occurred the Court held:

This court said it would be a very curious and unsatisfactory result, were it held that, 'if the government refrains from the absolute conversion of real *668 property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision[.]

These principles have no application to the case under consideration. The question in *Pumpelly v. Green Bay Co.*, arose under the state's power of eminent domain; while the question now before us arises under what are, strictly, the police powers of the state, exerted for the protection of the health, morals, and safety of the people.

As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.

Mugler v. Kansas, 123 U.S. 623, 667–69, (1887). The *Duncan* Court did not address the takings claim from the perspective of the state exercising its police powers to protect the public health, morals, and safety instead of under the state's eminent domain powers. Here, Deerfield makes

it clear that the 2018 Ordinance is adopted pursuant to Deerfield's power to regulate for the protection of the public health, safety, morals and welfare, thus under the holding in *Mugler v. Kansas*, absent a finding that the 2018 Ordinance is not valid, there is no taking.

III. THE COURT'S FINDINGS

The Court finds that: (1) The 2018 Ordinance is preempted by the FOIDCA and the FCCA and therefore unenforceable. (2) The 2018 Ordinance is a new ordinance and not an amendment of the 2013 Ordinance and is therefore preempted by FOIDCA and FCCA. (3) The 2018 Ordinance does not prohibit ownership or possession of large capacity magazines. The Court also finds that: (1) plaintiff has raised a fair question that he has a clearly ascertainable right to not be subject to an unenforceable ordinance's restrictions, prohibitions, fines, penalties and resulting deprivation of full use and enjoyment of his property; (2) plaintiff will suffer irreparable harm absent an injunction as he will not be able to pursue a remedy that will fully compensate him if he is subject to an unenforceable ordinance whose subject matter is preempted by the State; (3) plaintiff does not have an adequate remedy at law for the same reason that he will suffer irreparable harm; and (4) plaintiff has a likelihood of success on the merits by showing that the State has preempted the subject matter that the 2018 Ordinance seeks to regulate or that the language of the 2018 Ordinance does not prohibit possession or ownership of large capacity magazines. The Court also finds that the balance of hardships favors plaintiff because the irreparable harm plaintiff will suffer outweighs any harm to Deerfield in delaying the effective date and enforcement of the 2018 Ordinance.

The Court further finds that plaintiff has not raised a fair question with respect to his takings claim under the Illinois Constitution, the Eminent Domain claim or his Wildlife Code preemption claim.

IT IS HEREBY ORDERED THAT:

1. A temporary restraining order is issued enjoining defendant Village of Deerfield, its agents, officials or police department from enforcing any provision of the 2018 Ordinance relating to the ownership, possession, storage or transportation of assault weapons or large capacity magazines within the Village of Deerfield.

Entered this 12th day of June 2018.

ENTER:

Luis A. Berrones

Judge