OFFICE OF THE ATTORNEY GENERAL

September 22, 1983

Honorable Al Williams
St. Sen., 32nd District
4801 Fremont Avenue North
Seattle, Washington 98103

Cite As:
AGO 1983 No. 14
ADDENDUM

Dear Senator Williams:

I am writing this letter as an addendum to AGO 1983 No. 14, which was issued to you on July 28, 1983. I am doing so for two reasons.

First, I think it appropriate to review and report on the subsequent decision of the Court of Appeals in Second Amendment Foundation, et al. v. City of Renton, 35 Wn.App. 583 (1983), wherein the Court reached the same basic conclusion as we did in our opinion. And second, I believe it also necessary to add a note of caution for those who may be inclined to read AGO 1983 No. 14 itself too broadly.[1]

The critical issue involves the very limited preemptive effect of the language employed in § 12 of SSB 3782 (now chapter 232, Laws of 1983). It has, unfortunately, become apparent to us since AGO 1983 No. 14 was issued that some proponents and many supporters of that bill were misled into thinking that the language of § 12 was sufficient to prevent the continuing enactment or enforcement of local ordinances addressing the kinds of places where weapons might be possessed--with or without a permit. Such ordinances, in the minds of many, have led to a confusing patchwork of prohibitions from one locality to the next, across the state.

It is necessary, therefore, to briefly discuss the concept of preemption.

It is most certainly within the power of the legislature to effect a policy that such a patchwork situation will not exist. If the legislature intends to accomplish this policy through the technique of "preemption" there are numerous judicial decisions,

1 Enclosed for your immediate reference are copies of our opinion and the court decision. I would also point out that this office did not participate in the Second Amendment Foundation litigation.

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both within our own state and elsewhere, that contain examples of appropriate terminology that should be used. For, quite simply, preemption indicates a complete take-over of a field of activity to the exclusion of all local actions, regulations or interference--and thus, if that is the intention of the legislature, the best and most effective way to manifest that intent would be to use the term "preemption" or "occupies the field" or similar terms. See, P. Lorillard Co. v. City of Seattle, 8 Wn.App. 510, 507 P.2d 1212 (1973). Neither term, however, was used in the case of § 12 of SSB 3782, supra.[2]

With that in mind let me next turn to the recent decision in Second Amendment Foundation, et al. v. City of Renton, supra. There, citing most of the same cases and using the same line of reasoning employed in our prior opinions on this general question, the Court upheld an ordinance of the City of Renton limiting possession of firearms in places where alcoholic beverages are dispensed by the drink. In so doing, the Court specifically identified one of the questions presented on appeal as follows:

> "Is [the ordinance] preempted by state law governing the issuance of licenses to carry concealed pistols, as provided for in RCW 9.41?" (35 Wn.App. at 585)

The Court then answered that question in the negative for the following stated reasons:

> "The Uniform Firearms Act, RCW 9.41, proscribes possession of pistols by those convicted of crimes of violence. It prohibits sale to drug addicts, habitual drunkards and persons under the age of 21, and regulates the method of sale. It further provides for a license to carry a pistol concealed on the person. A careful examination of the Uniform Firearms Act, RCW 9.41, demonstrates no express preemption concerning the possession of firearms on premises where liquor is sold by the drink. The Legislature has not indicated an intention to preempt municipal regulation in all areas of gun control.3/ The power of municipalities to so legislate survives . . .

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2 We would, of course, be happy to assist the legislature in drafting such a legally effective preemption clause.

> "The other test of preemption is whether the ordinance permits or licenses that which the statute forbids, or the statute permits or licenses that which the ordinance forbids. Bellingham v. Schampera, supra, at 111. Our statutes do not expressly state an unqualified right to be in possession of a firearm at any time or place. The Renton ordinance does not purport to contradict or restrict any provision of the statute. Therefore, the statute and ordinance are not inconsistent.
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> "While an absolute and unqualified local prohibition against possession of a pistol by the holder of a state permit would conflict with state law, an ordinance which is a limited prohibition reasonably related to particular places and necessary to protect the public safety, health, morals and general welfare is not preempted by state statute." (35 Wn.App. at 588-89)

In addition, most significantly, the Court footnoted its opinion by including the following reference to § 12 of SSB 3782, supra:

> "3/ Since oral argument in this case, the Legislature added a new section to RCW 9.41, to be effective July 24, 1983. Laws of 1983, Ch. 232, § 12. This provision prohibits the enactment of local ordinances inconsistent with the requirements of RCW 9.41. It does not militate against the result reached here." (Emphasis supplied) (35 Wn.App. at 588)

In short, the Court of Appeals thus confirmed the conclusion which we had reached in AGO 1983 No. 14 less than a month earlier. Our opinion, in turn, was simply a prediction as to how the question would be resolved in formal litigation, based upon the language used by the legislature in § 12 of the subject enactment.[3]

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3 In performing the function of rendering legal opinions pursuant to RCW 43.10.030, we are not in a position to "take a stand," as a matter of policy, on the issue presented. Rather, a reasoned prediction of the outcome if the matter were to be litigated is all that we attempt to provide in performing this function. To paraphrase Oliver Wendell Holmes, "[t]he prophesies of what the courts will do, in fact, and nothing more pretentious, are . . . the law." Holmes, The Path of the Law, 10 Harv. L.R., 457, 461 (1897).

And, in this instance, our prediction turned out to be entirely accurate. It thus now seems even more apparent than it did to us before, that whatever some of the sponsors and/or proponents of SSB 3782 may have hoped its legal effect would be, that legislation did not preempt all local control of the possession and use of firearms--within even certain specified places.

Indeed I think it worthy of note, in passing, that during the 1983 session somewhat more specific preemptive language was actually suggested to the sponsors of SSB 3782 by certain proponents of the elimination of local gun control laws. Those individuals have further pointed out to us, however, that they were then advised by one of the prime sponsors that such additional, specific language would be unnecessary since the bill, as then drafted, already was said to have the same legal effect. We have no reason to doubt the veracity of this account. But it only harkens back to the lament of Lord Halsbury who, after having earlier drafted a certain statute, thereafter found himself having to interpret it as a judge. Whereupon, he said:

> ". . . I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed." Hilder v. Dexter [1902] A.C. 474, 477.

This brings me, however, to the second aspect of this addendum. As noted at the outset, I believe a word of caution is also clearly in order following the decision in City of Renton. While the Court in that case held that local police power control over places in which one may be in possession of a firearm is not preempted by general state law, the Court also indicated (rather clearly, I think) that such control is by no means "open-ended." Instead, it is fairly constrained. Thus, in emphasizing that the ordinance there involved was limited to places where liquor by the drink was dispensed, the Court implied the general principle that the right to own and bear arms is only subject to minimal abridgement under any circumstances, saying:

> "Regulations enacted by a municipality in the exercise of its police powers must meet the judicial test of reasonableness. This test requires that the regulation be reasonably necessary to protect the public safety,

> health, morals and general welfare and be substantially related to the legitimate ends sought. . .
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> "The scope of permissible regulation must depend upon a balancing of the public benefit to be derived from the regulation against the degree to which it frustrates the purpose of the constitutional provision. The right to own and bear arms is only minimally reduced by limiting their possession in bars. The benefit to public safety by reducing the possibility of armed conflict while under the influence of alcohol outweighs the general right to bear arms in defense of self and state. The Renton ordinance is narrowly drawn and demonstrates legislative concern for reasonable exercise of the police power where liquor by the drink is dispensed. . . ." (35 Wn.App. at 586-87) (Emphasis supplied) (Citation omitted)

Accordingly, those who may have interpreted AGO 1983 No. 14 as an invitation to local governments to enact broad-based ordinances greatly restricting the places and circumstances under which the right to keep and bear arms may be exercised (something, incidentally, which we did not say and did not intend to imply) should be cautioned that an approach of that sort is not consonant with the law--especially after City of Renton. Rather, in enacting local ordinances restricting firearm possession on certain premises, local governments should be keenly aware that a demonstrable net benefit to public safety is required in order to justify any abridgement[4] of the constitutionally-recognized right to own and bear arms.

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4 In AGO 1983 No. 14, we dealt with four specific examples of places which local regulations might attempt to cover--all of which you also mentioned in your request; i.e., cocktail lounges and taverns, county and city jails, school premises and courtrooms. And, based upon the above set forth analysis of City of Renton, it now appears that differing considerations may govern the validity of an ordinance pertaining to each such type of place. As to taverns and cocktail lounges, of course, the Renton case specifically recognized a public safety benefit realized by reducing the possibility of armed conflict while under the influence of alcohol. That same considerations might, or might not, validate a local ordinance generally limiting the possession of firearms on the premises of county jails or at educational institutions. Quite possibly, specific factual findings would

It is hoped that the foregoing additional analysis on the primary issue covered by this office in AGO 1983 No. 14, supra, will be of further assistance to you.

Very truly yours,

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be in order, in each instance, in the enactment of the particular ordinance. As for the validity of a local ordinance limiting the possession of firearms by spectators in courtrooms while the court is in session, we would think that such an ordinance could well be found to be reasonably related to the safety of the judiciary, the litigants and other persons present.