

THE PHILADELPHIA FIREARMS ORDINANCE—A CASE OF COMPREHENSIVE OVERSIGHT

One of the more constructive public discussions following President Kennedy's assassination has focused upon the need for more comprehensive regulation of firearms. Among the first products of this public debate is Philadelphia's recently enacted firearms ordinance,¹ an attempt to strengthen and supplement² the regulatory screen already set up by the Pennsylvania Uniform Firearms Act.³ The city's measure requires a

¹ PHILADELPHIA, PA., CODE §10-814 (Appendix No. 122, 1965) [this ordinance is reproduced in 15 ABA Local Government Law Service Letter, Sept. 1965, p. 1].

² PROCEEDINGS OF THE COUNCIL OF PHILADELPHIA BEFORE THE COMMITTEE ON PUBLIC SAFETY, HEARINGS ON BILL No. 560, at 114 (1965) (remarks of Mr. Edward J. Bradley, Deputy City Solicitor) [hereinafter cited as PUBLIC SAFETY COMMITTEE PROCEEDINGS].

A threshold question of the city's power to legislate firearms controls at all is raised by the existence of a state statute regulating firearms. The usual rule seems to be that while the city may not prohibit what the state has expressly allowed, supplemental regulation aligned with the policy of the state statute is permissible. See 1 ANTIEAU, MUNICIPAL CORPORATION LAW §5.20 (1965). However, if a legislative intention to occupy exclusively a particular area is discernible, supplemental municipal legislation will be struck down in many jurisdictions. See *id.* §5.22. The Philadelphia ordinance seems acceptable under the first standard. No affirmative right to acquire a firearm arises from the failure of the state to regulate acquisition. Moreover, the city has a reasonable basis for adopting more comprehensive firearms regulations than those in force over the state as a whole. It does not appear that the ordinance would fall under the second standard since the Uniform Firearms Act does not seem to exhibit a legislative intention that it be exclusive.

The power of the city to legislate in this area might also be affected by the limitations section of the First Class City Home Rule Act. PA. STAT. ANN. tit. 53, §13133 (1957). The statute requires that:

[N]o city shall exercise powers contrary to, or in limitation or enlargement of, powers granted by acts of the General Assembly which are—

. . . .

(b) Applicable in every part of the Commonwealth.

Since the section speaks in terms of "powers granted by acts of the General Assembly," it would not seem to be a general supremacy provision.

Nonetheless, because the Uniform Firearms Act contains a general grant of power to police departments authorizing the issuance of licenses to carry concealed weapons, PA. STAT. ANN. tit. 18, §4628(f) (1963), it would seem that the limitations section is applicable, even under the standard read into the statute by the courts, *i.e.*, that the subject of the grant be a "substantive matter of statewide concern." *In re Addison*, 385 Pa. 48, 122 A.2d 272 (1956); *Lennox v. Clark*, 372 Pa. 355, 93 A.2d 834 (1953); *Bartle v. Zoning Bd. of Adjustment*, 10 Pa. D. & C.2d 613 (C.P. Philadelphia County 1957), *aff'd per curiam*, 391 Pa. 207, 137 A.2d 239 (1958); *Ebald v. Philadelphia*, 7 Pa. D. & C.2d 179 (C.P. Philadelphia County 1956), *aff'd per curiam*, 387 Pa. 407, 128 A.2d 352 (1957). The ordinance does not qualify the standards for the granting of a license to carry a concealed weapon, so it would seem that there is no fatal interference. If, however, the license to carry a concealed weapon is considered a "power granted by the General Assembly," even though the immediate grantor of the license is the police department, a different result might be required in at least one factual situation. This would be the case where an individual has a license to carry a concealed firearm but is unable to acquire a firearm because he has been found unlicensable under the ordinance. Here fatal interference would have to be found in order to breathe any substance into the state granted privilege. While academically interesting, the conflict can probably never arise, as the same body—the police department—administers both the statute and the ordinance.

³ PA. STAT. ANN. tit. 18, §4628 (1963).

license for the acquisition or transfer of firearms.⁴ The license is granted by the Department of Licenses and Inspections,⁵ if the application is approved by the police department. The police department is required to conduct a "due" investigation before ruling on an application,⁶ and must disapprove applications from those in four enumerated categories.⁷ The license is to be carried whenever the licensed firearm is transported,⁸ and the Department of Licenses and Inspections is directed to revoke licenses under specified conditions.⁹ Violations of the ordinance are punishable by "a fine of not more than three hundred . . . dollars, or imprisonment of not more than ninety . . . days, or both."¹⁰

The most significant attempt to strengthen the control afforded by the Uniform Firearms Act is represented by the ordinance's comprehensive definition of "firearm": "Any rifle, pistol, revolver, gun or shotgun."¹¹ The corresponding definition in the Uniform Firearms Act is much narrower, encompassing only revolvers, pistols and sawed-off rifles and shotguns.¹² The ordinance reflects the conviction that any rifle or shotgun is "just as deadly" as the classes of firearms already regulated.¹³

The provisions of the Uniform Firearms Act dealing with transfers¹⁴ are also inadequate. Where the transfer is not a sale, the statute leaves the transferor to decide on the basis of his own inquiry whether the transferee is anyone to whom delivery is prohibited.¹⁵ Although certain provisions of the act allow some official review of firearms sales,¹⁶ the pro-

⁴ PHILADELPHIA, PA., CODE § 10-814(2) (Appendix No. 122, 1965).

⁵ *Ibid.*

⁶ PHILADELPHIA, PA., CODE § 10-814(4) (a) (Appendix No. 122, 1965).

⁷ *Ibid.* The unlicensable categories are:

- (1) under eighteen . . . years of age;
- (2) a person convicted of either a crime of violence, any violation of the Uniform Firearms Act or carrying a concealed weapon;
- (3) a person convicted of selling, using or possessing narcotics; or
- (4) an habitual drunkard;

There is ample legislative precedent for the use of these categories. See note 30 *infra*.

⁸ PHILADELPHIA, PA., CODE § 10-814(4) (d) (Appendix No. 122, 1965).

⁹ PHILADELPHIA, PA., CODE § 10-814(4) (e) (Appendix No. 122, 1965). The conditions are substantively the same as categories .2-4 of subsection (4) (a). See note 7 *supra*.

¹⁰ PHILADELPHIA, PA., CODE § 10-814(7) (Appendix No. 122, 1965).

¹¹ PHILADELPHIA, PA., CODE § 10-814(1) (a) (Appendix No. 122, 1965).

¹² PA. STAT. ANN. tit. 18, § 4628(a) (1963): "[A]ny pistol or revolver with a barrel less than twelve inches, [and] any shotgun with a barrel less than fifteen inches."

¹³ PUBLIC SAFETY COMMITTEE PROCEEDINGS 49-50 (remarks of Ephriam R. Gomborg, Executive Vice President, Crime Commission of Philadelphia).

¹⁴ PA. STAT. ANN. tit. 18, §§ 4628(g), (h), (j) (1963).

¹⁵ PA. STAT. ANN. tit. 18, § 4628(g) (1963). The section prohibits delivery of a firearm to "any person under the age of eighteen," or to anyone the transferor "has reasonable cause to believe has been convicted of a crime of violence, or is a drug addict, an habitual drunkard, or of unsound mind."

¹⁶ Subsections (h) and (j) deal with transfer by sale. Subsection (h) prohibits the delivery of a firearm within forty-eight hours of application for its purchase and requires the purchaser to complete in quadruplicate a statement containing the following information—full name, address, occupation, color and place of birth of the appli-

cedures are unsound. The provisions place no affirmative obligation on the police to investigate a prospective purchaser and afford only forty-eight hours for investigation.¹⁷ Although fingerprints and a picture are almost indispensable for quick verification of identity,¹⁸ the act does not require that they be submitted. Hence an efficient check of police records is precluded.¹⁹

The ordinance avoids these shortcomings. It subjects all transfers to regulation,²⁰ and the police department is given ample time to investigate.²¹ The ordinance places an affirmative obligation on the department to conduct an investigation,²² and requires information sufficient for a fairly comprehensive review of an application.²³ Significantly, fingerprints and a picture are required on a license application.²⁴

cant, date and hour of application, calibre, length of barrel, make, model, and manufacturer's number of the firearm to be purchased and a statement that the applicant has never been convicted in the Commonwealth or elsewhere of a crime of violence. This information is to be forwarded by the seller within six hours to: (1) the head of the local police department having jurisdiction over the seller's place of business, and (2) the comparable police official in the area of the purchaser's residence. The seller is also required to forward a copy within seven days to the Pennsylvania state police. PA. STAT. ANN. tit. 18, § 4628(h) (1963).

¹⁷ PA. STAT. ANN. tit. 18, § 4628(h) (1963).

¹⁸ PUBLIC SAFETY COMMITTEE PROCEEDINGS 115 (remarks of Edward J. Bradley, Deputy City Solicitor).

¹⁹ This conclusion suggests that the Uniform Firearms Act was not intended to afford police review of the prospective purchaser, but was designed to be a comprehensive system of firearms registration. The forty-eight hour mandatory delay between sale and delivery, PA. STAT. ANN. tit. 18, § 4628(h) (1963), seems to have been intended primarily as a cooling off period. It appears, however, that at least the Philadelphia police department had adopted the practice of reviewing the required prepurchase affidavit and forwarding its recommendation to the seller. See PUBLIC SAFETY COMMITTEE PROCEEDINGS 32.

²⁰ PHILADELPHIA, PA., CODE §§ 10-814(2), 10-814(5) (a) (Appendix No. 122, 1965).

²¹ PHILADELPHIA, PA., CODE § 10-814(4) (b) (Appendix No. 122, 1965): "A license shall be issued or refused within thirty . . . days after the filing of an application."

²² PHILADELPHIA, PA., CODE § 10-814(4) (a) (Appendix No. 122, 1965).

²³ PHILADELPHIA, PA., CODE §§ 10-814(3) (a)-(h) (Appendix No. 122, 1965): The applicant . . . shall . . . supply the following information on forms provided by the Department:

- (a) the name, and any other names by which applicant has been known;
- (b) the home address, and any other addresses at which applicant resided within five . . . years immediately prior to application;
- (c) the present business or occupation, and any business or occupation, in which applicant has engaged for five . . . years immediately prior to the application;
- (d) the date and place of birth of applicant;
- (e) the caliber, length of barrel, make, model and, if known, manufacturer's number of the firearm;
- (f) a statement by applicant indicating the date, place, nature and disposition of any criminal proceedings brought against the applicant for any offense other than traffic violations;
- (g) name, address and occupation, of the person from whom the firearm is to be acquired or transferred; and
- (h) a copy of applicant's fingerprints and his photograph.

²⁴ PHILADELPHIA, PA., CODE § 10-814(3) (h) (Appendix No. 122, 1965).

No matter how well constructed the procedural mechanism, the substantive program of a firearms ordinance must, in order to be effective, deal adequately with the social problems presented by private firearms. Although the possible scope of a regulatory measure might appear to be limited by the state and federal constitutional provisions establishing a right to bear arms, this limitation is illusory. The second amendment to the federal constitution restricts only the national government,²⁵ and creates only a collective right to bear arms in militia-like organizations authorized by law.²⁶ State constitutional limitations have not, in practice, placed any limits on legislative choice in regulating firearms.²⁷

²⁵ *E.g.*, *United States v. Cruikshank*, 92 U.S. 542 (1875); *McKenna, The Right To Keep and Bear Arms*, 12 MARQ. L. REV. 138 (1927).

²⁶ *United States v. Miller*, 307 U.S. 174 (1938); *Cases v. United States*, 131 F.2d 916 (1st Cir.), *cert. denied*, 319 U.S. 770 (1942); *United States v. Adams*, 11 F. Supp. 216 (S.D. Fla. 1935).

²⁷ Most of the states have constitutional provisions creating some sort of right to bear arms. The language of some of these provisions follows the federal constitution and has been found to create only a "public" right. *E.g.*, *City of Salina v. Blaksley*, 72 Kan. 230, 83 Pac. 619 (1905); *Emery, The Constitutional Right To Keep and Bear Arms*, 28 HARV. L. REV. 473, 476-77 (1914); *McKenna, supra* note 25, at 144-45. In many states, constitutional provisions seem to create a "private" right. *E.g.*, PA. CONST. art. 1, §21: "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned." In testing regulatory measures under these provisions, the courts have developed a "reasonableness" standard. The cases indicate, however, that this is less a standard than a verbal formula used to declare the constitutionality of legislation, the necessity for which, in policy terms, seems compelling. The desire to reach the conclusion of constitutionality has led to confusion as to what "reasonableness" means. The confusion has been manifested in an anomalous balance between an individual right of constitutional dimension and state power. With firearms measures, the concern is not the effect of a measure on the individual's right, but its effect on the general enjoyment of the right by the community at large. See *Strickland v. State*, 137 Ga. 1, 72 S.E. 260 (1911) (statute requiring license to carry revolver not offensive to right to bear arms in Georgia Constitution). Since the statute in *Strickland* embraced only the carrying of revolvers, the court could have found the legislation reasonable because it left to the individual some measure of the constitutionally protected right. He still could possess any firearm at his home, and could carry shotguns and rifles, even if denied a license. Only one case, however, formulates the "reasonableness" standard in terms of the individual's right. *Matthews v. State*, 237 Ind. 677, 148 N.E.2d 334 (1958) (constitutionality of the Indiana Uniform Firearms Act upheld). This case sustained the statute over a vigorous dissent that expediency cannot justify circumvention of constitutional language. *Id.* at 687, 148 N.E.2d at 338.

Only two decisions in this century struck down firearms measures because of conflict with a state constitutional provision. *In re Brickey*, 8 Idaho 597, 70 Pac. 609 (1902) (statute prohibiting the carrying of firearms within the confines of Idaho municipalities); *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922) (statute denying aliens possession of firearms, except with the permission of county sheriff).

The great weight of authority upholds firearms regulations against state constitutional attack. *Mason v. State*, 39 Ala. App. 1, 103 So. 2d 37 (1956), *aff'd*, 267 Ala. 507, 103 So. 2d 341 (1958), *cert. denied*, 358 U.S. 934 (1959) (persons convicted of a crime of violence prohibited from possessing pistols); *Jackson v. State*, 37 Ala. App. 335, 68 So. 2d 850, *cert. denied*, 260 Ala. 698, 68 So. 2d 853 (1953) (same); *Davis v. State*, 146 So. 2d 892 (Fla. 1962) (license required for an individual to carry or "have in his manual possession" pistol or repeating rifle); *Glenn v. State*, 10 Ga. App. 128, 72 S.E. 927 (1911) (minors under eighteen prohibited from possessing pistols or revolvers); *Matthews v. State, supra*; *State v. Nieto*, 101 Ohio St. 409, 130 N.E. 663 (1920) (carrying concealed weapon prohibited); *City of Akron v. Williams*, 113 Ohio App. 293, 177 N.E.2d 802 (1960), *rev'd on other grounds*, 175 Ohio St. 186, 192 N.E.2d 63 (1963) (possession of firearms by persons convicted of felony prohibited by municipal ordinance); *City of Akron v. White*, 28 Ohio Op.

If total prohibition of private firearms is conceded to be undesirable,²⁸ the goals of firearms regulation come down to reducing violence and accidental injury by selectively limiting availability of guns.²⁹ An effective firearms measure must, therefore, single out the violence prone and the careless³⁰ and restrict their access to firearms. There are two general methods of restricting availability: (1) regulation of possession, and (2) regulation of carrying. Regulation of possession is the better approach, since ideally it entirely deprives dangerous individuals of access to firearms. Regulation of carrying, on the other hand, assumes that the availability of firearms to the careless or violence prone at places other than their homes can be effectively curtailed, even though these individuals may be in legal possession of firearms at home. This assumption seems correct as it applies to the curtailment of tragic accidents and is probably of some validity for the prevention of violence growing out of momentary impulse. Both of these situations posit the unpremeditated presence of firearms in unfortunate circumstantial settings; the penalty for a violation is probably sufficient to remove the firearm. Hence the zone of risk created by the careless individual is considerably circumscribed, and the time required for obtaining a firearm is probably sufficient to dissipate the hot-head's violent impulse. The assumption seems unjustified, however, as to premeditated violence. Anyone willing to risk the heavy penalties imposed

2d 355, 194 N.E.2d 478 (Akron Munic. Ct. 1963); *State v. Robinson*, 217 Ore. 612, 343 P.2d 886 (1959) (convicted felons prohibited from possessing concealable weapons); *Morrison v. State*, 170 Tex. Crim. 218, 339 S.W.2d 529 (1960) (possession of machine gun prohibited).

²⁸ See Note, *Restrictions on the Right To Bear Arms: State and Federal Firearms Legislation*, 98 U. PA. L. REV. 905-06 (1950).

²⁹ Provisions requiring only registration are not discussed here. Their primary purpose is to assist in police investigative activities, rather than to operate preventively.

³⁰ Some fairly standard categories have been employed in regulating possession and carrying privileges:

(1) Individuals convicted of the commission of, or attempt to commit, a crime of violence. See, e.g., CAL. PEN. CODE § 12021; N.J. STAT. ANN. § 2A:151-9 (1953); N.Y. PEN. LAW §§ 1897.6, 1903.1; PA. STAT. ANN. tit. 18, § 4628(d) (1963).

(2) Aliens. See, e.g., CAL. PEN. CODE § 12021; MICH. STAT. ANN. § 28.92 (1962); N.Y. PEN. LAW § 1897.5.

(3) Individuals addicted to or using narcotics. See, e.g., ALA. CODE tit. 14, § 174 (1958); CAL. PEN. CODE § 12021; N.J. STAT. ANN. § 2A:151-9 (1953); PA. STAT. ANN. tit. 18, § 4628(g) (1963).

(4) Minors. See, e.g., FLA. STAT. ANN. § 790.06 (1965); IDAHO CODE ANN. § 18-3302 (1948); N.J. STAT. ANN. § 2A:151-11 (1953); PA. STAT. ANN. tit. 18, § 4628(g) (1963).

(5) Individuals suffering from mental illness. See, e.g., MICH. STAT. ANN. § 28.92 (1962); N.J. STAT. ANN. § 2A:151-9 (1953); N.Y. PEN. LAW § 1897.10; PA. STAT. ANN. tit. 18, § 4628(g) (1963).

(6) Habitual drunkards. See, e.g., ALA. CODE tit. 14, § 174 (1958); PA. STAT. ANN. tit. 18, § 4628(g) (1963).

(7) Individuals not "of good moral character." See, e.g., FLA. STAT. ANN. § 790.06 (1965); N.Y. PEN. LAW § 1903.1.

(8) Individuals without a proper purpose for desiring a license (used particularly with regard to the privilege of carrying concealed weapons). See, e.g., MICH. STAT. ANN. § 28.93 (1962); PA. STAT. ANN. tit. 18, § 4628(f) (1963).

for crimes of violence is unlikely to be deterred by a relatively small additional penalty for a firearms violation. Of course, prohibition of carrying does give the police a preventive implement useful even in this case. Anybody abroad with a firearm may be stopped and if unlicensed, arrested. What little protection this factor adds, however, is dependent upon the vigilance of the police and the violator's ineptness in concealment.

The Philadelphia ordinance pursues the first alternative, regulation of possession,³¹ but adopts a curiously ineffective approach. The measure regulates only the acquisition and transfer of firearms, ignoring weapons already possessed when the ordinance was enacted. The city council's reason for denying classes of persons the right to acquire firearms seems to have been its conviction that possession of firearms by these persons presented grave social risks.³² A measure seeking to obviate these risks should logically prohibit the possession of firearms by dangerous individuals. Drawing the line at acquisition³³ suggests the untenable premise that individuals who possessed firearms prior to the ordinance's passage are less dangerous than those who subsequently acquired them.³⁴ The ordinance should not ignore the threat posed by admittedly dangerous

³¹ The ordinance also regulates carrying, PHILADELPHIA, PA., CODE § 10-814 (4) (d) (Appendix No. 122, 1965), but this provision is merely supplemental. It requires only that the license for a firearm be carried by anyone "licensed hereunder" when carrying the firearm. See p. 559 *infra*.

³² The transcript of the public hearings on the ordinance is full of loose discussion about problems which, though partially problems of ease of acquisition, certainly have a lower common denominator in terms of unregulated possession. Police Commissioner Howard Leary's statement—a general discussion of how the lack of firearms regulation amplified law enforcement problems—is typical. It was supported by statistics showing the number of firearms involved in various sorts of criminal activity, and would adequately support a measure which generally regulated possession. But Commissioner Leary's statement did nothing to justify drawing the line at acquisition. Actually, Commissioner Leary implicitly challenged the validity of the ordinance's focus, as he revealed the gaps in the measure's coverage, without providing any rationale for leaving them unfilled. PUBLIC SAFETY COMMITTEE PROCEEDINGS 29-44.

The statement of Mr. Paul Maloney, President, Crime Commission of Philadelphia, is of similar import: "I do not believe it can be disputed, in view of the statistics cited by Commissioner Leary, that there are a great many firearms in the hands of people who should not have them. The question is, should something be done about it?" PUBLIC SAFETY COMMITTEE PROCEEDINGS 46. Mr. Maloney did not, however, explain how regulating acquisition deals with the general possessory problem he highlighted.

³³ The focus on acquisition also creates a needless administrative problem, since the measure does not require registration of previously acquired firearms. Shoulder weapons generally do not have serial numbers, PUBLIC SAFETY COMMITTEE PROCEEDINGS 186, which renders difficult proof that such a weapon, if unlicensed, was purchased after the adoption of the ordinance. If the focus on acquisition is retained, the problem could be remedied by an amendment requiring all firearms to be registered, with a presumption that firearms not registered were illegally acquired after the passage of the ordinance.

³⁴ A comment by Chairman Paul D'Ortona during the public hearings approaches express statement of this assumption: "[T]he law is not prohibiting a person from having a gun. The law, as it reads, is a question of the police wanting to know who has the gun, who will acquire a gun when the legislation passes. . . . It is not retroactive to what the sportsmen have. . . ." PUBLIC SAFETY COMMITTEE PROCEEDINGS 74-75.

individuals who can obtain a previously acquired firearm merely by reaching into a closet.³⁵

The line drawn at acquisition is understandable if viewed as a political compromise rather than as a response to policy considerations. Attempts to pass more restrictive firearms regulations have been opposed at all legislative levels by well organized groups of sportsmen and allied gun fanciers, usually led by the National Rifle Association.³⁶ Certainly trouble from this sector was anticipated by the sponsors of the ordinance; the prospective focus of the measure may have been intended to abate the force of this opposition.

The ordinance's focus on acquisition is not, however, its sole substantive weakness. The license revocation provision also raises problems.³⁷ Because a license is required only to acquire a firearm³⁸ or to carry firearms acquired after the ordinance's passage,³⁹ the individual whose license is revoked apparently can retain possession of any firearms acquired previous to the revocation. The sole consequence of revocation to the revokee's privilege to use firearms acquired with the license seems to be a prohibition of carrying.⁴⁰ This does not provide a sufficient measure of protection, however, because of the inherent weaknesses in a scheme which regulates carrying. The revocation provision should require the individual to dispose of his firearms, and should provide for confiscation if this is not done within a reasonable period.⁴¹

³⁵ Eventually all firearms in Philadelphia will be transferred and therefore be subject to the ordinance.

³⁶ For analysis of the pressure group problem at the congressional level, see Bakal, *The Traffic in Guns: A Forgotten Lesson of the Assassination*, Harpers, Dec. 1964, p. 62. In fact the ordinance proved to be one of the most controversial measures handled in recent years by the council, with gun enthusiasts being the prime source of the furor. See Philadelphia Inquirer, March 12, 1965, p. 29, col. 4; PUBLIC SAFETY COMMITTEE PROCEEDINGS 1-B, 1-C, 228-B to 228-D (list of opposing witnesses at public hearings).

³⁷ PHILADELPHIA, PA., CODE § 10-814(4) (e) (Appendix No. 122, 1965).

³⁸ PHILADELPHIA, PA., CODE § 10-814(2) (Appendix No. 122, 1965).

³⁹ PHILADELPHIA, PA., CODE § 10-814(4) (d) (Appendix No. 122, 1965).

⁴⁰ See text accompanying note 49 *infra*.

⁴¹ Confiscation provisions are fairly common in state firearms measures. See, e.g., CAL. PEN. CODE §§ 12028-29; N.J. STAT. ANN. § 2A:151-16 (1953); N.Y. PEN. LAW § 1901. *Jennings v. State*, 5 Tex. Ct. App. R. 298 (1878), is the only case which holds the state without power to confiscate firearms, but the decision is based on the right to bear arms in the Texas Constitution. Because of the treatment which modern courts have given these constitutional provisions, see note 27 *supra*, this case can no longer be considered persuasive authority.

An early South Carolina case held that a municipality could not exact a forfeiture for violation of a firearms ordinance, because power to establish this penalty had not been conferred by the state. *City Council v. Leopard*, 61 S.C. 99, 105, 39 S.E. 248, 250 (1901). Philadelphia, however, has been delegated the requisite authority. First Class City Home Rule Act, PA. STAT. ANN. tit. 53, § 13131 (1957) ("Ordinances . . . shall be enforceable by the imposition of . . . forfeitures. . ."), implemented by PHILADELPHIA HOME RULE CHARTER art. 1, § 1-100.

In addition to these substantive problems, the ordinance suffers from poor draftsmanship. The most serious of the resulting ambiguities are those which leave important substantive problems unresolved. For example, the provision on licensing standards leaves undefined the scope of the police department's authority to disapprove an applicant:

No license shall be issued unless the Police Department, after due investigation, approves the application. The Police Department shall not approve the application if it finds that applicant is either:
. . . [followed by enumerated categories].⁴²

It is not clear whether the council, by enumerating those cases in which the department must refuse approval, intended that the department must approve all other applicants, or that approval of these applicants be discretionary. The language gives no clear answer, and the legislative history, while consistent with the "no discretion" view,⁴³ hardly forecloses the matter. In any case, since the scope of the department's discretion is one of the most important questions the ordinance has to deal with, it should have been spelled out, rather than left to constructional inference. The ambiguity leaves vital aspects of the ordinance's character to judicial determination. The "no residual discretion" alternative requires approval of an applicant in "horror" cases where denial is clearly desirable.⁴⁴ To allow residual discretion, however, may be to err in the other direction. The police department might exercise broad discretionary authority in an

⁴² PHILADELPHIA, PA., CODE § 10-814(4) (a) (Appendix No. 122, 1965).

⁴³ The available materials could never conclusively dispose of the problem, as they are not legislative history in the usual sense. All that is available is the transcript of public hearings on the measure conducted by the Public Safety Committee of the Philadelphia City Council. The council's intention therefore must be constructed inferentially from the councilmen's exchanges with witnesses, as these remarks assume significance in light of what later was done in executive session. A rough approximation is all that can be expected from this process. The public hearings nonetheless give some hint of the council's intention with regard to § 10-814 (4) (a), because the provision was the target of most of the responsible dissatisfaction with the measure. As originally introduced, (4) (a) contained three more enumerated categories than it now does: persons "of unsound mind," "not of good moral character," and those "without proper reason for acquiring a firearm." Bill No. 560, Appendix No. 88, at 238 (1965). Three of the four members of the committee objected to the vagueness of the categories and to the breadth of the discretion thus given the department. See PUBLIC SAFETY COMMITTEE HEARINGS 40-41 (Paul D'Ortona, Chairman); *id.* at 60-61 (H. Norwitch, member); *id.* at 26-28, 31-32 (T. McIntosh, member). This expression of concern, followed by deletion of the objectionable categories, seems to indicate counsel's desire to limit discretion.

⁴⁴ The desirability of refusing the application of the certified lunatic, for example, probably explains the Philadelphia police department's assumption of residual discretion. Police Commissioner Howard Leary has indicated that the department has occasionally disapproved an application on grounds other than those embraced by the enumerated categories: "The Department occasionally refuses to approve a License to Purchase for other reasons not listed in Section 4 categories. An example of this would be a person who is not mentally or psychologically fitted to possess a firearm. This is ascertained by investigation." Letter From Police Commissioner Howard R. Leary to the *University of Pennsylvania Law Review*, Aug. 18, 1965, on file in Biddle Law Library, University of Pennsylvania.

overly conservative fashion,⁴⁵ denying approval in cases where an agency less concerned with enforcement problems might not.⁴⁶

The question could have been resolved by careful draftsmanship. Eliminating the negative mode of expression would have made it clear that no residual discretion lurked in the head clause, which would then read:

The Police Department shall approve the application, unless it finds that applicant is either: [followed by enumerated categories].

Then if the council had preferred to leave the department residual discretion to disapprove an application it could have included a general discretionary category:

(.5) or is considered otherwise unqualified by the Police Department.

A provision less broad in scope, yet providing a satisfactory measure of residual discretion, is included among recently proposed amendments to the ordinance:⁴⁷

(.6) has a physical or mental impairment which would preclude safe and proper handling of a firearm.⁴⁸

The revocation provision is also drafted so that its objective is unclear. Subsection (4)(d) requires:

⁴⁵ See Note, *Regulation of Carrying Pistols for Self-Defense*, N.Y.U. INTRA. L. REV. 20-21 (1959).

Institutional bias possibly could be overcome by an amendment giving the police department only an informational function to perform and transferring the judgmental function to the Department of Licenses and Inspections. Under such a scheme, the police department would submit a report stating whether an applicant was within an unlicensable category. The Department of Licenses and Inspections would then decide whether or not to grant the license. If the scheme is to effectuate a better check on institutional bias than is presently afforded by the appeal provisions, see note 46 *infra*, it will probably be at the expense of a residual discretion clause and the flexibility which such a provision confers. Because the Department of Licenses and Inspections lacks the necessary expertise to administer a discretionary provision, it would probably tend to give the police department's recommendation whether an individual was "otherwise unlicensable" conclusive weight. Thus the institutional bias problem would remain. Moreover, the bias problem has its greatest impact in the administration of broad, discretionary provisions. The review provisions alone are probably sufficient to attenuate the impact of the problem with regard to the more narrowly defined unlicensable categories. Review affords, however, little control over the boundaries of an avowedly discretionary category. Thus to retain a residual discretion provision would not only perpetuate the problem, but would also perpetuate its most serious aspect.

⁴⁶ Arbitrary exercise of discretion is, at least in theory, checked by the appeal provision in the Philadelphia City Charter. PHILADELPHIA HOME RULE CHARTER art. V, § 5-1005, provides for appeal as of right from any decision of the Department of Licenses and Inspections to a Board of License and Inspection Review. This provision is supplemented by a requirement that any applicant denied a license must be informed in writing of the reasons for denial. PHILADELPHIA HOME RULE CHARTER art. V, § 5-1002(e).

⁴⁷ As is frequently the case with local legislative bodies, there are no legislative history materials to suggest the reason that these amendments were proposed.

⁴⁸ Philadelphia City Council, Bill No. 1203, § 10-814(4)(a)(.6) (1965).

All persons licensed hereunder carrying a firearm on or about their persons shall carry the license for that firearm on their person as provided herein with the exception of: . . . [listing exceptions].⁴⁹

Whether or not a person whose license has been revoked pursuant to subsection (4)(e) may carry a legally acquired firearm is left in doubt. Because his license has been revoked, he is no longer a person "licensed hereunder," and hence arguably is not subject to the requirement. Such a result seems absurd. It both puts the revokee in a better position than his counterpart whose license has not been revoked and renders the act of revocation impotent. Revoking an individual's license would merely deny him the privilege of acquiring additional firearms while he remained within an unlicensable category and would have no effect on the individual's use of firearms acquired under the privilege which the license conferred. However indefensibly, the ordinance deals only with firearms acquired after its passage. Its treatment of this restricted class must be fairly comprehensive if the measure is to be effective at all. A proper construction of persons "licensed hereunder" therefore should embrace all individuals licensed at any time. No constructional problem would arise if the provision had been carefully drafted. The difficulty is avoided, for example, if the provision is worded:

No person shall carry a firearm acquired subject to this ordinance without also carrying the license for that firearm.

Poor draftsmanship has created a further group of problems where the objective of the provision is fairly clear but the language could be construed to defeat the objective. The provision dealing with firearms acquired outside the city, for example, is susceptible of a construction which creates a jurisdictional problem imperiling the subsection's validity in light of state legislation which precludes the city from exercising extra-territorial authority to deal with the firearms problem.⁵⁰ On its face the language of the Philadelphia ordinance suggests, however, that the city has attempted to regulate directly the acquisition of firearms beyond its borders. The language of the prohibition focuses on the act of acquiring a firearm, not on importation:

[N]o person shall acquire a firearm outside of the City, which is brought into the City, unless application has been made to, and license obtained from, the Department.⁵¹

⁴⁹ PHILADELPHIA, PA., CODE § 10-814(4)(d) (Appendix No. 122, 1965).

⁵⁰ See First Class City Home Rule Act, PA. STAT. ANN. tit. 53, § 13133 (1957), requiring special authorization from the legislature for a city to exercise authority beyond its borders. There has been no special grant with respect to the firearms problem.

⁵¹ PHILADELPHIA, PA., CODE § 10-814(2) (Appendix No. 122, 1965).

Because a literal reading would render this clause of the ordinance void, it will probably be construed as requiring a license to bring into the city a firearm acquired after the passage of the ordinance. While this construction sensibly serves the policies of the measure and most courts probably would adopt it, it strains the language of the provision; conceivably, a court unsympathetic to the measure could adopt the more literal construction, and declare this part of the ordinance void. This possibility could easily have been avoided by using language which unambiguously prohibited only bringing a firearm into the city without a license.