

## LEGAL OPINION

**To: Administration &  
City Council**

**Dated: March 18, 2011**

### **STATEMENT OF FACTS:**

On January 5, 2011, Van Wert Area Convention and Visitors Bureau, the manager of the Van Wert Regional Airport, and the Van Wert Regional Airport Authority Board sent a letter to Van Wert City Council announcing that they were “hosting” the fourth annual Wheels-N-Wings Festival on May 21, 2011, and were requesting the City to make an exception to the Van Wert City Ordinance prohibiting the possession of beer on city property.

Questions concerning the authority of the Airport Authority to hold such an event pursuant to their lease with the City of Van Wert were resolved in the Airport Authority’s favor pursuant to ORC Section 4582.01(B) by legal opinion presented at the January 24, 2011, Committee meeting.

Insurance questions arose which were settled by a redefinition of the status of the parties, which Amendment was passed on March 14, 2011.

In Van Wert Municipal Code of Ordinances Chapter 93.10, also known as Section 93.10, the City currently prohibits any person “...while on city public property” from having in his/her possession “...an opened container of an intoxicating liquor, beer, including 3.2% beer, wine, or a mixed beverage that has as an ingredient an intoxicating liquor, beer, or wine.” This Ordinance No. 5441-77 was passed on August 22, 1977.

In response to adverse legal decisions, the State Assembly passed Amendments to ORC Sections 4303.26 (12-20-2005) and Section 4303.292 (9-21-2006), copies of which are attached hereto, and incorporated herein by reference.

The Assembly passed an amended ORC 4301.62 , with an effective date of September 10, 2010. A copy of this statute is attached hereto and is incorporated herein by reference.

Note that ORC Section 4301.62 (C )(1) and 4301.62(C )(2) permit a person to have in his possession a open container of beer, lawfully purchased for consumption on the premises where bought from the holder of a liquor permit.

**Statement of Issue:**

- 1) Whether the City Chapter/Section 93.10 is pre-empted by the Revised Code Section 4301.62?

**Analysis:**

When municipal home rule powers come into conflict with state statutes, and there is a conflict in the exercise of police power, the state exercise prevails and the local exercise is invalid. (Rispo Realty and Development Co. v Parma, 55 OS(3d) 101, 103, 564 NE(2d) 425 (1990) ).

This applies only to “general laws” The Ohio Supreme Court held in West Jefferson v Robinson, 1 OS(2d) 113, 205 NE(2d) 382(1965) to-wit:

“...The words “general laws” as set forth in Section 3 of Article XVIII of the Ohio Constitution means statutes setting forth police, sanitary, or similar regulations and not statutes which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations.”

In determining whether a conflict exists, the Ohio Supreme Court held in Struthers v Sokol, 108 OS 263, 140 NE 519(1923) as follows:

“...2. In determining whether an ordinance is in ‘conflict’ with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.

3. A police ordinance is not in conflict with a general law upon the same subject merely because specific acts are declared unlawful by the ordinance, which acts are not referred to in the general law, or because certain specific acts are omitted in the ordinance but referred to in the general law, or because different penalties are provided for the same acts, even though greater penalties are imposed by the municipal ordinance.”

It is my Legal Opinion that ORC Sections 4301.62, 4303.26, and 4303.292 are “general laws.”

It is my Legal Opinion the Chapter/Section 93.10 of the Van Wert City Code of Ordinances is in direct “**conflict**” with ORC Section 4301.62(C)(1)

**Conclusion:**

Chapter/Section 93.10 and Ordinance 5441-77 are in conflict with the general laws of the State of Ohio.

Since they have been pre-empted by general laws of the State of Ohio, Code Section 93.10 and Ordinance No. 5441-77 are invalid and unenforceable!

Respectfully submitted,

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Gregory W. Unterbrink  
Van Wert City Law Director