



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 17, 1994

Honorable Bill G. Carter
Chair
Public Safety Committee
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 94-56

Re: Whether provisions of a home-rule city ordinance directed at preventing children's discharge of firearms are invalid because inconsistent with provisions in Local Government Code section 215.001 barring municipal regulations relating to the transfer, private ownership, keeping, transportation, licensing, or registration of firearms (ID# 16486)

Dear Representative Carter:

You ask whether provisions of a City of Houston ordinance directed at preventing children's discharge of firearms are invalid because inconsistent with provisions in Local Government Code section 215.001. *See* HOUSTON, TEX., CODE § 28-47 (1992). Section 215.001(a) generally bars municipal "regulations relating to the transfer, private ownership, keeping, transportation, licensing, or registration of firearms." Subsection (b) of the statute, however, provides that "subsection (a) does not affect the authority" of a municipality to, *inter alia*, "regulate the discharge of firearms" within the city limits. Local Gov't Code § 215.001(b)(2).¹

Subsection (a) of the ordinance declares that the latter's purpose is "to reduce the discharges of firearms by minors." Subsection (c) of the ordinance makes it "unlawful for a child . . . to discharge a firearm within the city [limits]." Your inquiry is directed at subsections (d) and (e) which make it an offense to "facilitate, suffer, or permit the discharge" or "physical possession of a firearm by a child by allowing the child to obtain unsupervised access to [a] firearm." While these provisions, you say, "purport[] to focus on the discharge" or "possession of a firearm by a child," they "in effect, regulate[] the keeping of a firearm by an adult." You say that "[t]his is especially evident from the fact that the defenses to a violation of subsection (d)" or "(e) in subsection (f) focus on how a firearm was possessed and stored by an adult." Subsection (f) of the ordinance provides that it is a defense to prosecution under subsections (d) and (e) that "the actor had taken

¹See also Penal Code section 46.07(a)(2), making it an offense to intentionally or knowingly sell, rent, lease, or give a child a firearm, or offer to do so, with exception for transfers with consent of parent or custodian.

reasonable precautions under the attendant circumstances to ensure that minors would not have the ability to obtain access to the firearm without supervision," including 1) storage where a child would not reasonably be expected to gain access, 2) storage in a locked container, and 3) putting a lock on the firearm.

While we cannot, of course, anticipate how the ordinance here might be sought to be applied in particular cases or determine the lawfulness of all possible applications, we do not believe that on its face or as a matter of law the ordinance runs afoul of the section 215.001 restrictions on municipal regulations pertaining to firearms.² Home-rule cities like Houston, have, under the constitution, broad powers of self-government. Tex. Const. art. XI, § 5. They look to the legislature not for grants of power, but only for limitations on their power. *MJR's Fare, Inc. v. City of Dallas*, 792 S.W.2d 569, 573 (Tex. App.--Dallas 1990, writ denied). Their ordinances may not be inconsistent with state law, but they will not be found so "if any other reasonable construction leaving both in effect can be reached." Tex. Const art. XI, § 1; *City of Beaumont v. Fall*, 291 S.W. 202, 206 (Tex. 1927). Moreover, if the legislature chooses to remove a field of regulation from the home-rule power, it must do so with "unmistakable clarity." *City of Sweetwater v. Geron* 380 S.W.2d 550, 552 (Tex. 1964).

Again, subsection (b)(2) of section 215.001 states that the restrictions set out in subsection (a) of the section on municipal regulation "do not affect the authority a municipality has . . . to regulate the discharge of firearms within the limits of the municipality." The object of the ordinance here is clearly the regulation of the discharge of firearms. Further, where, as here, the object sought is the prevention of the discharge of firearms *by children*, the prevention of firearms coming in to the hands of children seems not only reasonable but perhaps the only effective means of attaining such object.

We are especially mindful here that, again, preemption should not be found if any reasonable construction can be reached leaving local law in place, and that the test for determining whether the legislature has intended to remove a field of regulation from a home-rule city's authority is whether it has spoken with "unmistakable clarity" to that effect. *See Fall*, 291 S.W. 202; *Geron*, 380 S.W.2d 552. Even though the ordinance here may, as you argue, also affect the "keeping" of firearms, the same could be said of any regulation of discharges of firearms. Thus, to give effect to the legislature's specific reservation to municipalities, in subsection (f), of the authority to regulate the discharge of firearms, we construe subsection (f) as having been intended to prevail over the general preemptive language of subsection (a) to the extent of conflict, and to permit municipal

²Please note that, in accordance with your question, we consider here only the validity of the ordinance *vis-à-vis* section 215.001. We do not attempt to address here *e.g.*, its constitutionality under article I, section 23, of the state constitution (right to keep and bear arms), or article I section 10 thereof (requiring that penal provision give adequate notice of conduct it seeks to proscribe).

regulations reasonably within its ambit, as we think the ordinance here to be, despite the broad, general language of subsection (a).

S U M M A R Y

A home-rule city ordinance directed at the prevention of discharges of firearms by children, does not on its face violate Local Government Code section 215.001 which bars municipal regulation of *inter alia* the "keeping of firearms," since the ordinance falls within the field of regulation of the discharge of firearms specifically reserved to municipalities by the statute.

Yours very truly,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, slightly slanted style.

Dan Morales
Attorney General