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Municipal Regulation of Firearms

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If you can keep playing tennis when somebody is shooting a gun down the street, that's concentration.

- **Serena Williams**

While there are many federal and state laws that affect an individual's right to own and use firearms, local governments are also known to enact regulations. Municipalities in Texas have broad powers to regulate matters of health, safety and welfare, through home-rule powers or through police powers of a general law city, as well as by specific legislative grants of authority.

The purpose of this paper is to explore the federal and state limitations on the municipal power to regulate firearms, especially in light of recent landmark Supreme Court decisions and current state legislation.

I. FEDERAL LAW LIMITATIONS

A. The *Heller* and *McDonald* Supreme Court Cases

1. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

In this 2008 landmark decision, the United States Supreme Court held that a D.C. law prohibiting possession of handguns violated the Second Amendment. *Id*. at 635. This case is worthy of discussion here because, although this decision has arguably little direct impact in the State of Texas (because of a state law that already prevents a Texas municipality from doing this), it addresses important definitions, interpretations, and limitations on governmental regulation of firearms based on the Second Amendment. It is highly regarded as the most important decision involving the Second Amendment by the Supreme Court in decades.

In the *Heller* case, the issue was the constitutionality of the law enacted by the District of Columbia banning handgun possession. *Id*. at 573. The D.C. law made it a crime to carry an unregistered firearm, but then prohibited the registration of handguns. *Id*. It also required residents to keep lawfully owned firearms unloaded and disassembled, or bound by a trigger lock or similar device. *Id*. at 574. The Supreme Court struck down both the ban and the disassembly requirement. *Id*. at 635.

The opinion, written by Justice Scalia for the majority, is roughly 66 pages long and amounts to a treatise on the Second Amendment.

Some of the important language from the opinion that will affect the legality of any municipal regulation on firearms follows:

- The Second Amendment codifies a preexisting individual right to possess and carry weapons in case of confrontation. *Id*. at 592.

- Like most rights, the Second Amendment right is not unlimited. *Id*. at 595. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. *Id*. The Court's opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. *Id*.

- Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding. *Id*. at 582.

- As used in the Second Amendment, "keep arms" means to "have weapons." *Id*. at 586-87.

- The "militia" comprised all males physically capable of acting in concert for the common defense. *Id*. at 579.

- The natural meaning of "bear arms," as used in the Second Amendment, means wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person. *Id*. at 586-87.

- The enshrinement of constitutional rights necessarily takes certain policy choices off the table, and these include the absolute prohibition of handguns held and used for self-defense in the home. *Id*. at 636.

2. *McDonald v. City of Chicago.*, 130 S.Ct. 3020 (2010).

In 2010, the Supreme Court would similarly invalidate the City of Chicago's handgun ban, expanding the Heller case holding from a federal enclave (D.C.) to now cover the states. *Id*. at 3021. In the *McDonald* case, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment right recognized in *Heller*: the right to keep and bear arms for the purpose of self-defense. *Id*. Therefore, the Second Amendment right was fully applicable to the States. *Id*.

The petitioners in this case were Chicago and Oak Park residents who desired to keep handguns in their homes for self-defense but were prohibited from doing so by Chicago and Oak Park's firearm laws. *Id*. at 3026-27. The Chicago and Oak Park ordinances banned nearly all handgun possession by a private party. *Id*. Although Chicago and Oak Park enacted such ordinances to ensure the safety of their residents, Chicago Police Department statistics showed that the handgun murder rate within the area had increased since the ban was enacted and that Chicago had one of the highest murder rates in the country. *Id*.

After the *Heller* decision, the petitioners filed suit in two separate actions against Chicago and Oak Park, seeking a declaration that the handgun ban and several related ordinances violate the Second and Fourteenth Amendments to the United States Constitution. *Id*. The District Court rejected plaintiffs' argument that the Chicago and Oak Park laws are unconstitutional. *Id*. The

Seventh Circuit affirmed. *Id*. The Supreme Court was faced with the issue of whether the Second Amendment was fully applicable to the States, either under the Privileges or Immunities Clause or the Fourteenth Amendment's Due Process Clause. *Id*. at 3031.

The opinion, written by Justice Alito for the majority, is 86 pages long and essentially a history of the incorporation of the Bill of Rights into State law under the Due Process Clause of the Fourteenth Amendment. The Supreme Court held that Second Amendment right to keep and bear arms is fully applicable to the States by virtue of Fourteenth Amendment and invalidated the ordinances.

Some of the important language from the opinion:

- It reaffirmed that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense. *Id*. at 3026.

- Self-defense is a basic right, recognized by many legal systems from ancient times to the present day; individual self-defense is the central component of the Second Amendment right. *Id*. at 3036. As the need for defense of self, family, and property is most acute in the home, this right applies to handguns because they are the most preferred firearm in the nation to keep and use for protection of one's home and family. *Id*. This right is deeply rooted in the nation's history and tradition. *Id*.

- The Fourteenth Amendment Privileges or Immunities Clause protects only those rights which owe their existence to the federal government, its national character, its Constitution, or its laws. *Id*. at 3028. Other fundamental rights – rights that predated the creation of the federal government and that the state governments were created to establish and secure--are not protected by the Clause. *Id*.

- Most of the provisions of the Bill of Rights apply with full force to both the federal government and the states. *Id*. at 3034.

- The governing standard regarding incorporation of rights under the Fourteenth Amendment Due Process Clause is not whether any civilized system can be imagined that would not accord the particular protection. Instead, the inquiry is whether a particular Bill of Rights guarantee is fundamental to the United States ' scheme of ordered liberty and system of justice. *Id*. at 3035.

- The framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to the United States ' system of ordered liberty. *Id*. at 3042.

B. Important Cases After *Heller* and *McDonald*

1. *United States v. Bogle*, 717 F.3d 281 (2d Cir. 2013).

Bogle appealed his conviction for possessing a firearm and body armor as a convicted felon. *Id*. Bogle argued that § 922(g)(1), which makes it unlawful for a convicted felon to possess a firearm in or affecting interstate commerce, violates his Second Amendment right to keep and bear arms. *Id*. The Court opined that the Supreme Court in several other opinions clearly emphasized that Second Amendment jurisprudence should not "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Id*. The court found the conviction of the defendant under a federal law prohibiting felons from possessing firearms and body armor did not violate the Second Amendment. *Id*. at 282.

2. Illinois Ass'n of Firearms Retailers v. City of Chicago, 961 F. Supp. 928 (N.D. Ill. 2014).

In this 2014 case, three Chicago residents and an association of Illinois firearms dealers brought suit against the City of Chicago challenging the constitutionality of City ordinances that banned virtually all sales and transfers of firearms inside the City's limits. *Id*. at 930. The ordinance was a regulatory ordinance, but also involved the City's zoning ordinance. *Id*. The ordinance stated ""no firearm may be sold, acquired or otherwise transferred within the city, except through inheritance of the firearm." *Id*. The ban covered virtually all sales and transfers of guns, including sales by federally licensed firearms dealers and even gifts amongst family members. *Id*.

The Court struck down the City's ordinance and its related zoning ordinance (to the extent that it banned the operation of gun stores in Chicago). *Id*. at 931. Although the Court considering evaluating the regulation as tantamount to an outright "ban" that would be impermissible under *Heller*, the Court decided to go through the analysis to allow the State a chance to prove its case. *Id*. at 932-33. The Court held the ordinances violated the Second Amendment because City did not demonstrate "that allowing gun sales and transfers within city limits creates such genuine and serious risks to public safety that flatly prohibiting them is justified." *Id*. at 946.

The Court reached this conclusion using "heightened scrutiny" as the standard of review. Id. at 938-39. The Court held that heightened scrutiny was appropriate under the Second Amendment for the City's regulation. *Id*. The Court opined that the City must establish a close fit between its firearms ban and the actual public interests served, and prove that public interests were strong enough to justify so substantial an encumbrance on an individual's Second Amendment rights. *Id*.

3. *New York. Rifle & Pistol Ass'n v. Cuomo*, No. 13-CV-291S, 2013 WL 6909955 (W.D.N.Y December 31, 2013).

Another widely publicized gun case involved the constitutionality of an assault weapon ban and limit on high capacity magazines violated the Second Amendment. *Id. at 38-39.* In January 2013, shortly after the Sandy Hook shootings, the state legislature of New York enacted the SAFE Act, imposing stringent regulation for possession of "assault weapons" and prohibiting the possession of high capacity magazines. *Id*. at 4. The SAFE Act also required all sales of

ammunition be made in person (therefore eliminating internet purchases). *Id*. at 5.

The Federal District Court for the Western District of New York applied intermediate scrutiny and upheld most of the regulations, holding that the State of New York presented sufficient evidence that the regulations were substantially related to achieving an important governmental interest. *Id*. at 83-84. The Court found that one specific provision, the limit of magazine rounds to seven, was arbitrary and infringed the Second Amendment. *Id*.

4. *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013).

Four New Jersey residents and two organizations appealed from a judgment of the US District Court for the District of New Jersey that held constitutional N.J.S.A. § 2C:58-4, a New Jersey law regulating the issuance of permits to carry handguns in public. *Id*. at 427. The residents and organization argued that: (1) the Second Amendment secures a right to carry arms in public for self-defense; (2) the "justifiable need" standard of the Handgun Permit Law is an unconstitutional prior restraint; and (3) the standard fails any level of means-end scrutiny a court may apply. *Id*.

The appellate court held that the requirement that applicants demonstrate a "justifiable need" to publicly carry a handgun for self-defense qualifies as a "presumptively lawful," "longstanding" regulation, does not burden conduct within the scope of the Second Amendment's guarantee, and even if the "justifiable need" standard fails to qualify as such a regulation, it nonetheless withstands intermediate scrutiny and is therefore constitutional. *Id*. at 429-30. The Court opined that under intermediate scrutiny the government must assert a significant, substantial, or important interest. There must also be a reasonable fit between that asserted interest and the challenged law, such that the law does not burden more conduct than is reasonably necessary. When reviewing the constitutionality of statutes, courts accord substantial deference to the legislature's predictive judgments. *Id*. at 436-37.

5. *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013).

Plaintiffs, a handgun permit applicant and an advocacy group, sued state officials asserting that Maryland's "good-and-substantial-reason" requirement, [Md. Code Ann., Pub. Safety § 5-306(a)(5)(ii)], for obtaining a handgun permit contravened the Second Amendment. Plaintiffs argued that the good-and-substantial-reason requirement for obtaining a handgun permit implicated the Second Amendment and passed constitutional muster under intermediate scrutiny. The 4th Circuit held that intermediate scrutiny did apply and the statute was reasonably adapted to substantial government interests of public safety and preventing crime.

The Court found that the good-and-substantial-reason requirement advanced the objectives of protecting public safety and preventing crime because it reduced the number of handguns carried in public and ensured that persons in palpable need of self-protection could arm themselves in public places where exceptions did not apply.

6. *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014).

California generally prohibits the open or concealed carriage of a handgun, whether loaded or unloaded, in public locations. *Id*. at 1147-1148. Persons may, however, apply for a license to carry a concealed weapon in the city or county in which he or she works or resides. *Id*. To obtain such a license, the applicant must meet several requirements, including a "good cause" requirement. *Id*. Plaintiffs sued because they were all denied handgun licenses due to the fact that

they could not produce "good cause" to apply for such a permit. *Id*. at 1148. After paralleling an analysis like the Supreme Court did in *Heller*, the 9th Circuit found the county's "good cause" requirement for obtaining a concealed-carry permit violated the Second Amendment right to bear arms in lawful self-defense. *Id*. at 1179. Some interesting quotes from the opinion:

- Constitutional rights are enshrined with the scope they were understood to have when the people adopted them. *Id*. at 1157. A law that, under the pretense of regulating, amounts to a destruction of the right would not pass constitutional muster under any of the standards of scrutiny that apply to enumerated constitutional rights. *Id*. Put simply, a law that destroys (rather than merely burdens) a right central to the Second Amendment must be struck down. *Id*.

- Regulations affecting a destruction of the right to bear arms, just like regulations that affect a destruction of the right to keep arms, cannot be sustained under any standard of scrutiny. *Id.*

C. The Fifth Circuit After *Heller* and *McDonald*

1. *NRA of America v. Bureau of Alcohol,* 700 F.3d 185 (5th Cir. 2012) *amended by NRA, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, No. 11-10959, 2012 U.S. App. LEXIS 26949 (5th Cir. 2012).

Appellants, an association and individuals who at the time of filing were over the age of 18 but under the age of 21, sued several federal agencies. *Id*. at 181. The issue of the case addressed the constitutionality of federal regulations that prohibited federally licensed firearms dealers from selling handguns to persons under the age of 21. *Id*. at 199-200. Appellants argued that the laws violated the Second Amendment and the equal protection component of the Fifth Amendment by preventing law-abiding 18-to-20-year-old adults from purchasing handguns from federally licensed dealers. *Id*. at 188.

The Fifth Circuit held that the challenged ban passed constitutional muster under. *Id*. at 204. The Court used a two-step inquiry for its analysis. The first inquiry was whether the conduct at issue fell within the scope of the Second Amendment. The second step was to determine whether to apply intermediate or strict scrutiny to the law, and then to determine whether the law survives the proper level of scrutiny.

After finding that the law arguably burdened conduct that fell within the Second Amendment's scope, the court decided that a level of scrutiny closest to "intermediate scrutiny" was the proper test to apply. In applying that, the court found that the government satisfied its burden of showing a reasonable means-ends fit between the challenged federal laws and an important government interest. *Id*. The rationale was that Congress designed its scheme to solve a particular problem: violent crime associated with the trafficking of handguns from federal firearms licensees to young adults. *Id*. at 208. Congress's intended scheme reasonably fit that objective. *Id*. For the same reasons the challenged laws were reasonably adapted to an important state interest, the laws were rationally related to a legitimate state interest. *Id*. at 211.

Some of the important language from the opinion that will affect the legality of any municipal regulation on firearms for jurisdictions within the 5th Circuit are as follows:

- A two-step inquiry has emerged as the prevailing approach: the first step is to determine whether the challenged law impinges upon a right protected by the Second Amendment--that is, whether the law regulates conduct that falls within the scope of the Second Amendment's guarantee; the second step is to determine whether to apply intermediate or strict scrutiny to the law, and then to determine whether the law survives the proper level of scrutiny. *Id*. at 194.

- The first inquiry is whether the conduct at issue falls within the scope of the Second Amendment right. *Id*. To determine whether a law impinges on the Second Amendment right, courts look to whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee. *Id*. Courts may rely on a wide array of interpretive materials to conduct a historical analysis. *Id*. If the challenged law burdens conduct that falls outside the Second Amendment's scope, then the law passes constitutional muster. *Id*. at 195. If the law burdens conduct that falls within the Second Amendment's scope, courts then proceed to apply the appropriate level of means-ends scrutiny. *Id*.

- The appropriate level of scrutiny depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right. *Id*. A regulation that threatens a right at the core of the Second Amendment--for example, the right of a law-abiding, responsible adult to possess and use a handgun to defend his or her home and family--triggers strict scrutiny. *Id*. A less severe regulation--a regulation that does not encroach on the core of the Second Amendment--requires a less demanding means-ends showing. *Id*. This more lenient level of scrutiny could be called intermediate scrutiny, but regardless of the label, this level requires the government to demonstrate a reasonable fit between the challenged regulation and an important government objective. *Id*.

- This intermediate scrutiny test must be more rigorous than rational basis review, which could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right such as the right to keep and bear arms. *Id*.

- A law that burdens the core of the Second Amendment guarantee--for example, the right of law-abiding, responsible citizens to use arms in defense of hearth and home--would trigger strict scrutiny, while a less severe law would be proportionately easier to justify. *Id*. at 205. The latter, intermediate standard of scrutiny requires the government to show a reasonable fit between the law and an important government objective. *Id*.

- In applying intermediate scrutiny, courts determine whether there is a reasonable fit between the law and an important government objective; that is, the government must show that the law is reasonably adapted to an important government interest. *Id*. at 207.

2. *NRA v. BATFE*, 714 F.3d 334 (5th Cir. 2013).

There is an interesting dissent in a subsequent decision denying a motion to rehear *en banc* the *BATF* case cited above. Justice Jones criticizes the majority for not rehearing the case and comments on the two-step test adopted by the 5th Circuit. She describes the level of scrutiny that the Fifth Circuit used as "intermediate scrutiny of a very weak sort." Her analysis as to what the Fifth Circuit adopted, in her critique, is actually helpful in understanding the two-step test and how the Fifth Circuit got there. Some pertinent excerpts:

- Like other circuits, the panel adopted a two-step approach to interpretation of the Second Amendment. *Id*. at 336. The first consideration is whether "the conduct at issue falls within the scope of the Second Amendment right" as shown by "historical traditions." *Id*. The second level of consideration is to apply a type of intermediate scrutiny based on the panel's conclusion that "[a] less severe regulation—a regulation that does not encroach on the core of the Second Amendment—requires a less demanding means-ends showing." *Id*.

- The panel used a rather rough means-ends calculation to uphold these federal regulations.

- Under a First Amendment analogy, which *Heller* seems clearly to support, the legislature's objective must be narrowly tailored to achieve its constitutional purpose.

- Free speech rights are not subject to tests of "responsible adults," speakers are not age-restricted, and class-based abridgement of speech is unthinkable today. *Id*. at 338.

3. *NRA of America, Inc. v. McCraw*, 719 F.3d 338 (5th Cir. 2013).

In this 2013 case, the plaintiffs, an association and several persons under the age of 21, challenged Texas's concealed handgun licensing statutory scheme in Tex. Gov't Code Ann. § 411.172(a) and Tex. Penal Code Ann. § 46.02(a) prohibiting most 18-20-year-olds from carrying a handgun in public. *Id*. at 342. The Texas Penal Code § 46.02(a) prohibits the carrying of a handgun in public but provides an exception for those who obtain CHLs through the state licensing scheme.

In applying step one of the test, the Court found that the age restrictions on keeping and bearing firearms were part of a "longstanding tradition of age- and safety-based restrictions on the ability to access arms " and likely outside of the Second Amendment. *Id*. at 346. Similar to the approach in the *BATF* case, the Court went on to apply the send step of the test. The Court cited the same concern about the "institutional challenges in conducting a definitive review of the relevant historical record," *id. at 204*, that the court faced in *BATF*.

Based on its ruling in the *BATF* case, the court held that the age-based federal statute challenged in *BATF* "[u]nquestionably triggered nothing more than the latter, intermediate scrutiny." In applying intermediate scrutiny, the law was upheld. The rationale was: (1) the law had a temporary effect; (2) it restricted only the ability to carry handguns in public (not from using guns in defense of hearth and home); and (3) it banned use only outside a home or vehicle. Because the scheme survived intermediate scrutiny under the Second Amendment challenge,

§46.02(a) was found constitutional. *Id*. at 350.

Some of the important language from the dissenting opinion that may affect the legality of any municipal regulation on firearms follows:

- A two-step inquiry is used to evaluate whether a firearms regulation comports with the Second Amendment. *Id*. at 346. The first inquiry is whether the conduct at issue falls within the scope of the Second Amendment right. *Id*. If the challenged law burdens conduct that falls outside the Second Amendment's scope, then the law passes constitutional muster. *Id*. If the law burdens conduct that falls within the Second Amendment's scope, the court then proceeds to apply the appropriate level of means-ends scrutiny. *Id*. The appropriate level of scrutiny depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right. *Id*.

- Statutes enacted to safeguard the public using age-based restrictions on access to and use of firearms are part of a succession of "longstanding prohibitions" that are likely outside the scope of the Second Amendment, because such restrictions are "consistent with" both the longstanding tradition of targeting select groups' ability to access and to use arms for the sake of public safety and the longstanding tradition of age-and safety-based restrictions on the ability to access arms. *Id*. at 347.

- The appropriate level of scrutiny depends on (1) the nature of the conduct being regulated and (2) the degree to which the challenged law burdens the right. A law that burdens the core of the Second Amendment guarantee — for example, the right of law-abiding, responsible citizens to use arms in defense of hearth and home, — would trigger strict scrutiny. *Id*. A less severe law only requires the government to show a reasonable fit between the law and an important government objective. *Id*.

- In order to withstand intermediate scrutiny, a statutory scheme must be reasonably adapted to achieve an important government interest. *Id*. at 348. Furthermore, the justification must be genuine, not hypothesized or invented post hoc in response to litigation, or relying on overbroad generalizations. *Id*.

- A state statutory scheme must merely be reasonably adapted to its legitimate objective to pass constitutional muster under an intermediate scrutiny standard. *Id*. at 349. The state need not employ the least restrictive means to achieve its goal. *Id*.

D. "Take Aways" for Texas Municipal Attorneys from *Heller, McDonald,* and Recent Cases:

1. From the Supreme Court, the only thing we know for sure is that a law banning handgun possession and requiring legally owned firearms in the home to be unloaded and disassembled or bound by a trigger lock, is unconstitutional. Such a law will be unconstitutional under any standard of review. (*Heller*) The Supreme Court appears reluctant, at this time, to take on any new Second Amendment cases.

2. Under Fifth Circuit review, a Texas law that has the "effect" of banning handguns will also most likely be found unconstitutional. Such a law could take the form of outlawing places where firearms could be purchased, like the *Illinois* case.

3. The more a law threatens a right at the core of the Second Amendment, the greater likelihood it will be found unconstitutional.

4. Longstanding criminal laws appear to be unchanged by the *Heller* and *McDonald* opinions. Felons still cannot possess firearms. (*Bogle*, for example)

5. A two-step inquiry has emerged in the Fifth Circuit as the prevailing level of scrutiny: the first step is to determine whether the challenged law impinges upon a right protected by the Second Amendment--that is, whether the law regulates conduct that falls within the scope of the Second Amendment's guarantee; the second step is to determine what level of scrutiny applies to the law, and then to determine whether the law survives the proper level of scrutiny. (*BATF**)***

6. The appropriate level of scrutiny depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right. The Court found it significant in the *McCraw* case that the law only prohibited the purchase of firearms by those aged 18-20, it did not prohibit possession.

7. A longstanding, presumptively lawful regulatory measure would likely fall outside the ambit of the Second Amendment; that is, such a measure would likely be upheld at step one of the framework. A longtime law prohibiting possession of firearms by felons and the mentally ill is an example of a law that would likely fall outside of Second Amendment protection and be upheld. (*Bogle*)

8. Courts, including the Fifth Circuit, appear reluctant to base their ruling solely on the first step of the test (whether the law regulates conduct that falls within the scope of the Second Amendment's guarantee). It appears that, rather than argue about historical facts, the Courts are going through the determination whether it survives scrutiny, in an over-abundance of caution (even if the Court believes the activity to fall outside of Second Amendment protection). (*BATF, McCraw*)

9. In order to withstand intermediate scrutiny at the Fifth Circuit, a Texas law must be reasonably adapted to achieve an important government interest. Furthermore, the justification must be genuine, not hypothesized or invented *post hoc* in response to litigation, or relying on overbroad generalizations. *McCraw* at 348.

10. The "book" on this topic is still being written. New cases are working their way through the judicial system as we speak.

II. STATE LAW LIMITATIONS

A. Basic Regulation. Tex. Local Gov't Code § 229.001.

While home-rule and general law municipalities possess authority to adopt ordinances for the "good government, peace, or order of the municipality," chapter 229 of the Texas Local Government Code creates a general limitation on such authority as to firearm regulations.

Texas Local Government Code § 229.001(a) provides that "[a] municipality may not adopt regulations relating to:

> (1) the transfer, private ownership, keeping, transportation, licensing, or registration of firearms, air guns, ammunition, or firearm or air gun supplies; or
>
> (2) the discharge of a firearm at a sport shooting range."

Section 229.001(a) provides exceptions and makes clear that it does not affect the authority a municipality has under another law to:

- require residents or public employees to be armed for personal or national defense, law enforcement, or another lawful purpose;
- regulate the discharge of firearms or air guns within the limits of the municipality, other than at a sport shooting range (but see § 229.002);
- regulate the use of property, the location of a business, or uses at a business under the municipality's fire code, zoning ordinance, or land-use regulations as long as the code, ordinance, or regulations are not used to circumvent the intent of section 229.001(a);
- regulate the use of firearms or air guns in the case of an insurrection, riot, or natural disaster if the municipality finds the regulations necessary to protect public health and safety (this exception does not authorize the seizure or confiscation of firearms or ammunition from any person in lawful possession of firearms or ammunition but *see* Texas Government Code §418.184(a) and §433.0045);
- regulate the storage or transportation of explosives to protect public health and safety, except that 25 pounds or less of black powder for each private residence and 50 pounds or less of black powder for each retail dealer are not subject to regulation;
- regulate the carrying of a firearm by a person other than a person licensed to carry a concealed handgun under Texas law at: 1) a public park; 2) a public meeting of a municipality, county, or other governmental body; 3) a political rally, parade or official political meeting; or 4) a non-firearms-related school, college, or professional athletic event (this does not apply if the firearm or air gun is in or is carried to or from an area designated for use in a lawful hunting, fishing, or other sporting event and the firearm or air gun is of the type commonly used in the activity);
- regulate the hours of operation of a sport shooting range, except that the hours of operation may not be more limited than the least limited hours of operation of any other business in the municipality other than a business permitted or licensed to sell or serve alcoholic beverages for on-premises consumption; or

- regulate the carrying of an air gun by a minor on:

  (A) public property; or

  (B) private property without consent of the property owner.

In the case of ***HC Gun & Knife Shows, Inc. v. City of Houston*, 201 F.3d 544 (5th Cir. 2000),** the court addressed the issue as to whether Texas law preempted a Houston ordinance regulating gun shows conducted on city property. *Id.* at 546. The appellees conducted ten shows at Houston's George R. Brown Convention Center from 1990 to 1993. *Id.* In 1993, the Houston City Council passed an ordinance requiring all persons attending gun shows at city-owned facilities to: (1) sign a form declaring firearms in their possession; and (2) either remove the firing pins or install key-operated trigger locks on all firearms brought to the shows. *Id.*

The district court denied summary judgment for Houston and granted partial summary judgment for the appellees, permanently enjoining Houston from enforcing the ordinance. *Id.* The declaratory relief was premised on the ordinance being preempted by § 215.00(a) of the Local Government Code (now § 229.001(a)(1)), which prohibits municipal regulation of the "transfer, private ownership, keeping, transportation,…or registration of firearms." *Id.*

Reviewing the grant of partial summary judgment de novo, the Fifth Circuit agreed with the district court's conclusion that the ordinance was preempted by the Local Government Code § 215.001(a), and it determined that the ordinance was not authorized by the discharge-exception in the statute. *Id.* at 551.

B. Discharge of Weapons. Tex. Local Gov't Code § 229.002.

In the same statute, there is another express limitation on municipal regulatory authority related to discharge of firearms and other weapons (e.g., cross-bows): Tex. Local Gov't Code § 229.002.

§ 229.002. Regulation of Discharge of Weapon

A municipality may not apply a regulation relating to the discharge of firearms or other weapons in the extraterritorial jurisdiction of the municipality or in an area annexed by the municipality after September 1, 1981, if the firearm or other weapon is:

(1) a shotgun, air rifle or pistol, BB gun, or bow and arrow discharged:

(A) on a tract of land of 10 acres or more and more than 150 feet from a residence or occupied building located on another property; and

(B) in a manner not reasonably expected to cause a projectile to cross the boundary of the tract; or

(2) a center fire or rim fire rifle or pistol of any caliber discharged:

(A) on a tract of land of 50 acres or more and more than 300 feet from a residence or occupied building located on another property; and

(B) in a manner not reasonably expected to cause a projectile to cross the boundary of the tract.

Note**,** a municipality is not prohibited from regulating the discharge of a firearm or other weapon within the municipality's original city limits. Tex. Att'y Gen. Op. No. GA-0862 (2011). Property located in a municipality's original corporate boundaries is not property "in the extraterritorial jurisdiction of the municipality or in an area annexed by the municipality."

C. Restrictions on Agricultural Operations. Tex. Agric. Code § 251.005.

The Texas Agriculture Code provides another limitation on municipal regulation. Section 251.005 of the Texas Agriculture Code states that a governmental requirement, including a municipal regulation governing firearms, does not apply to agricultural operations located outside of the city. This restriction still applies to the agricultural operation even if annexed or otherwise brought within the corporate boundaries at a subsequent date, although there are limited exceptions.

(1) **Agricultural Operation**. Section 251.005 only applies when the land in question is an "agricultural operation." An "agricultural operation" includes, but is not limited to: (1) the cultivating the soil; (2)producing crops for human food, animal feed, planting seed, or fiber; (3) floriculture; (4) viticulture; (5) horticulture; (6) raising or keeping livestock or poultry; (7) the planting of cover crops; (8) leaving land idle for the purpose of participating in any governmental program or normal crop; (9) or livestock rotation procedure. Agric. Code § 251.002(1).

(2) Section 251.005 also only applies to an agricultural operation situated outside the corporate boundaries of the city "on the effective date of this chapter" (chapter 251). Chapter 251 was added by Acts 1981, 67th Leg., p. 2595, ch. 693, Sec. 21, and became effective Aug. 31, 1981.

(3) The effective date of a governmental requirement is the date on which the requirement requires or attempts to require compliance as to the geographic area encompassed by the agricultural operation. The recodification of a municipal ordinance does not change the original effective date to the extent of the original requirements.

(4) **The all-important exception:**

The general rule is that governmental requirements of the city do not apply to the qualifying agricultural operation but there is an exception if the governmental requirement "is reasonably necessary to protect persons who reside in the immediate vicinity or persons on public property in the immediate vicinity of the agricultural operation from the danger of:

(1) explosion, flooding, vermin, insects, physical injury, contagious disease, removal of lateral or subjacent support, contamination of water supplies, radiation, storage of toxic materials, or traffic hazards; or

(2) discharge of firearms or other weapons, subject to the restrictions in Section 229.002, Local Government Code.

(5) However, to impose these governmental requirements, the city must make certain findings and take action. Added in 1995 by H.B. 1757, section 251.005(c-1) states:

> (c-1) A governmental requirement may be imposed under Subsection (c) only after the governing body of the city makes findings by resolution that the requirement is necessary to protect public health. Before making findings as to the necessity of the requirement, the governing body of the city must use the services of the city health officer or employ a consultant to prepare a report to identify the health hazards related to agricultural operations and determine the necessity of regulation and manner in which agricultural operations should be regulated.

So, there are additional hoops a city must go through in imposing its discharge of firearms regulations to annexed property that includes an agricultural operation.

D. Shooting Ranges. Tex. Local Gov't Code § 250.001 et seq.

State law provides certain restrictions on a municipality from seeking relief or abatement of a nuisance relating to the discharge of firearms from a shooting range. In addition to noise from shooting ranges being specifically excluded from the definition of "disorderly conduct" under the Texas Penal Code, the legislature has enacted section 250.001 of the Texas Local Government Code. Section 250.001 pertains to relief or abatement of a nuisance by a governmental body, or a person, relating to the discharge of firearms from a shooting range. This law has been called the "Gun Range Protection Act" in one cited option, although there is no name cited in the statute itself.

According to section 250.001 of the Texas Local Government Code, a governmental official may not seek a civil or criminal penalty against a sport shooting range or its owner or operator based on the violation of a municipal or county ordinance, order, or rule regulating noise:

> (1) if the sport shooting range is in compliance with the applicable ordinance, order, or rule; or
>
> (2) if no applicable noise ordinance, order, or rule exists.

There is also a mirror provision extending this type of remedy to "persons." Tex. Local Gov't Code § 250.001 et seq.

While it seems axiomatic that a municipality would not be seeking relief in the first place if the shooting range was in compliance with its ordinance, the crux of this law appears to be in subsection (2). If there is no municipal ordinance regulating noise at a shoot range, then the state law may be cited as a bar to any municipal penalty involving noise or complaints from a shooting range.

If a municipality wishes to regulate this type of nuisance or, perhaps, even permit its residents to abate this nuisance by their own suit, the municipality must have an applicable noise ordinance in place, or risk the perpetrators using this law as a bar against the city and its residents. We have seen this argument in at least one case.

***See Layton v. Ball*, 396 S.W.3d 747 (Tex. App.—Tyler 2013, no pet.).**

In the *Layton* case, homeowners with properties located adjacent to a shooting range in a small housing subdivision sued claiming the range was a nuisance because of several stray bullets. Although the reported decision pertains to a temporary injunction prohibiting the range from operating pending a trial unless appellants complied with the National Rifle Association (NRA) Range Manual, in one of the issues raised in the appeal the Appellants contend that Texas Local Government Code Section 250.001 prohibits the homeowners' suit based upon noise when no applicable county ordinance, order, or rule regulating noise exists. *Id*. at 755.

The Appellants argued that "Texas recently signed into law the Gun Range Protection Act, which prohibits [the homeowners] from suing High Noon for injunctive relief or abatement of a nuisance relating to the discharge of firearms." The Court held that this issue was in fact an unresolved contested issue in the underlying case. The Court said this issue was best left to be determined at a full trial on the merits and that "the applicability of Section 250.001 is one of the key issues in the underlying suit." Nothing further on this case has been reported.

III. STATE CONCEALED HANDGUN LICENSE (CHL)_ LIMITATIONS.

Like most states, Texas has enacted a concealed handgun carry licensing scheme. Under subchapter H of Chapter 411 of the Texas Government Code, if a person complies with the licensing requirements then that person may obtain a license to carry a concealed handgun in the State of Texas. Tex. Gov't Code § 411. Because of reciprocal agreements with other states, the person is also permitted to concealed carry in many states around the nation.

The right to concealed carry is not unlimited, however. Under section 30.06 of the Texas Penal Code, it is a crime for holders of concealed carry licenses to enter or remain on property where there is notice that entry is forbidden. Tex. Penal Code § 30.06. This provides property owners who do not want those carrying concealed handguns on their property a means to prohibit persons with concealed handguns from entering or remaining on the property. *Id*. The enforcement of this provision is through criminal proceedings. *Id*. The crime is in the nature of criminal trespass. *Id*.

The notice requirement is expressly provided by section 30.06. *Id*. Notice can be by actual notice (orally or by presenting the license holder with a specific written notice), or it can be by displaying a sign with the specific wording. *Id*. at § 30.06(b). The specific wording, which must be in contrasting colors with block letters at least one inch in height, is:

> "Pursuant to Section 30.06, Penal Code (trespass by holder of license to carry a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (concealed handgun law), may not enter this property with a concealed handgun"

An offense under this section is a Class A misdemeanor. *Id*.

So, may a governmental entity, as a property owner, make use of this provision to provide notice to potential license holders who may want to come onto the premises and prevent them from entering? The short answer is, "no."

Under section 30.06(e), it is not a crime for a license holder to enter onto property of the governmental entity. Section 30.06(e) states:

> (e) It is an exception to the application of this section that the property on which the license holder carries a handgun is owned or leased by a governmental entity and is not a premises or other place on which the license holder is prohibited from carrying the handgun under Section 46.03 or 46.035 (Penal Code).

Therefore, on property owned or leased by a governmental entity, the entity cannot, generally, prohibit a license holder from coming onto the premises. Tex. Penal Code § 30.06(e).

There are two important exceptions, and they are noted in section 30.06(e). Section 30.06(e) will not apply if the license holder is prohibited from carrying the handgun under Section 46.03 or 46.035 of the Texas Penal Code. Tex. Penal Code §§ 46.03, 46.035. The exceptions cited under Penal Code sections 46.03 and 46.035 permit a local government to prohibit a license holder from carrying a handgun on its property in three important instances: (1) during a meeting of a governmental entity; (2) where the premises are being used as a polling place; and (3) where the premises are premises of a government court or offices utilized by the court. *Id*.

Section 46.035(c), Texas Penal Code states:

> (c) A license holder commits an offense if the license holder intentionally, knowingly, or recklessly carries a handgun under the authority of Subchapter H, Chapter 411, Government Code, regardless of whether the handgun is concealed, at <u>any meeting of a governmental entity</u>. [emphasis added]

Section 46.03, Texas Penal Code states:

> § 46.03. Places Weapons Prohibited
>
> (a) (2) on the premises of a <u>polling place</u> on the day of an election or while early voting is in progress; and
>
> (a)(3) on the premises of any <u>government court</u> <u>or offices utilized by the court</u>, unless pursuant to written regulations or written authorization of the court;

IV. LIMITATIONS ON REGULATING EMPLOYEES

A governmental entity, as an employer, also has control over its employees and can, generally, impose restrictions on its employees' rights to possess and use firearms on the employer's premises and while in the employer's service. Enforcement of any violation of such restrictions is an employment matter, not a criminal matter.

Generally the right of a governmental entity, as a public employer, to prohibit persons who are licensed to carry a concealed handgun on the premises is expressly authorized by Texas Government Code § 411.203, which provides, in part that "This subchapter does not prevent or otherwise limit the right of a public or private employer to prohibit persons who are licensed

under this subchapter from carrying a concealed handgun on the premises of the business." Tex. Gov't Code § 411.203.

There is, however, one major limitation in the government's regulation of firearms in the workplace. In the definition of "premises," the Texas Legislature expressly excludes a public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area. § 411.203. Therefore, a governmental entity may not prohibit, as an employer, an employee who has a concealed carry licenses from having a handgun in their vehicle (in the parking lot, garage, street, etc.). *Id*.

CONCLUSION

Although this paper has set forth many of the new rules affecting a municipality's right to adopt firearms regulation, a city attorney must still keep in mind that this area of the law is a hotbed of federal and state regulations, which invariably will affect local regulation. We urge all of you to be very cautious when drafting municipal regulations regarding firearms, and to check for recent developments.