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May 24, 2019

The Honorable Donna Campbell, M.D.
Chair, Committee on Veterans Affairs
and Border Security
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. KP-0252

Re: Authority of municipalities to regulate
firearm and ammunition sales through zoning
and other regulations (RQ-0269-KP)

Dear Senator Campbell:

You ask generally about the authority of a municipality to regulate firearm and ammunition sales through zoning and other regulations.¹ You tell us that “some Texas cities have begun pursuing gun-control measures that regulate firearms and ammunition sales in ways that seem likely to impinge upon the individual freedoms of Texas citizens.” Request Letter at 1. You state that the regulations “include prohibitions against everything from sporting goods stores to gun shows within vast portions of some cities.” *Id.*

You refer us to Local Government Code subsection 229.001(a)(1), which prohibits a city from regulating “the transfer, private ownership, keeping, transportation, licensing, or registration of firearms, . . . or firearm . . . supplies.” TEX. LOC. GOV’T CODE § 229.001(a)(1); Request Letter at 1. You tell us the San Antonio city attorney seems to construe this provision to allow a city to “freely regulate gun sales simply because it is not regulating licensing, registration, or transportation of firearms *as well.*” Request Letter at 1–2 (noting also that the City of San Antonio observed that the City of Galveston adopted such regulations).² With this background, you ask three questions. *See id.* at 3–4.

You first ask whether section 229.001 of the Local Government Code preempts a city from enacting regulations that (1) prohibit firearm and ammunition sales within 1,000 feet of any school or church; (2) restrict the location of a business that sells guns or ammunition to the highest-density commercial areas; and (3) prohibit “gun shops” from locating within 200 feet of schools, public

¹See Letter from Honorable Donna Campbell, M.D., Chair, Senate Comm. on Veterans Affairs & Border Sec., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Feb. 4, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

²You cite to the recording of a meeting on September 26, 2018, of the City of San Antonio’s Public Safety Committee. *See id.* at 2, nn.1–5 (citing <https://sanantonio.legistar.com/MeetingDetail.aspx?ID=639220&GUID=CA409134-DA36-45E0-ABE3-287F5528E91E&Options=info&Search=public+safety>). The City of San Antonio informs us in briefing that it has not adopted any ordinance of the kind you describe. *See* Brief from Edward F. Guzman, Deputy City Att’y at 2 (Mar. 8, 2019) (on file with the Op. Comm.).

parks, or places of worship.³ *Id.* at 2, 3. Local Government Code subsection 229.001(a)(1) provides that “[n]otwithstanding any other law, . . . a municipality may not adopt regulations relating to: (1) the transfer, private ownership, keeping, transportation, licensing, or registration of firearms, air guns, knives, ammunition, or firearm or air gun supplies.” TEX. LOC. GOV’T CODE § 229.001(a)(1). Subsection 229.001(b)(3) creates an exception providing that the prohibition in subsection (a) does not affect a municipality’s authority under another law to “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 Subsection (a).”⁴ *Id.* § 229.001(b)(3).

Subsection 229.001(a)(1) prohibits municipal regulations relating to the transfer of firearms and firearm ammunition. *Id.* § 229.001(a)(1). The term “transfer” is commonly understood to include a sale. *See* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 2427 (2002) (defining “transfer” to mean “the conveyance of right, title, or interest in either real or personal property from one person to another by sale, gift, or other process”); *see also* TEX. PENAL CODE § 46.06 (providing for the offense of unlawful transfer of weapons that encompasses the sale, rental, lease, loan, or gift of a handgun). The regulations you describe prohibit or restrict a business or business location solely because the business involves the sale of firearms and ammunition. While subsection 229.001(b)(3) acknowledges a municipality’s ongoing authority to regulate the location of businesses generally, a regulation that expressly identifies and prohibits gun stores from operating in a specific area relates to the transfer of firearms and is prohibited by subsection 229.001(a)(1). Similarly, an ordinance singling out firearm and ammunition sales relates to the transfer of firearms and is prohibited.⁵

You next ask whether subsection 229.001(a)(1) prohibits the listed actions only as a whole or as to any one of the listed actions. *See* Request Letter at 4. In addressing your question, we recognize that the goal of statutory construction “is to ascertain and give effect to the Legislature’s intent.” *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm’n*, 518 S.W.3d 318, 325 (Tex. 2017). The surest sign of that intent is the plain language of the statute. *See Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 507 (Tex. 2012). The list in subsection 229.001(a)(1)—the “transfer, private ownership, keeping, transportation, licensing, or registration of firearms, . . . or firearm . . . supplies”—uses the word “or.” TEX. LOC. GOV’T CODE § 229.001(a)(1) (emphasis added). The Legislature typically uses the word “or” as a disjunctive. *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 581 (Tex. 2000). “It separates words or phrases in the alternate

³A home-rule municipality’s self-governing power is limited to the extent that it is “inconsistent with the Constitution . . . or . . . general laws” of the State. TEX. CONST. art. XI, § 5(a) (“[N]o charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws . . . of this State.”). A general law city may not adopt an ordinance, act, or law that is inconsistent with state law. *See* TEX. LOC. GOV’T CODE § 51.012.

⁴Local Government Code chapter 211 authorizes a city to regulate, among other things, “the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes.” *Id.* § 211.003(a)(5); *see also id.* § 211.001 (stating that zoning powers “are for the purpose of promoting the public health, safety, morals, or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance and significance”).

⁵House Bill 3231, currently pending before the Legislature, revises section 229.001 with language that is consistent with this conclusion. *See* Tex. H. B. 3231, 86th Leg., R.S. (2019).

relationship, indicating that either of the separated words or phrases may be employed without the other.” *Jones v. State*, 175 S.W.3d 927, 932 (Tex. App.—Dallas 2005, no pet.) (citing *Perez v. State*, 11 S.W.3d 218, 225 (Tex. Crim. App. 2000)). The Legislature’s use of the disjunctive here evidences its intent to treat the listed activities in subsection 229.001(a)(1) as separate alternatives. Thus, subsection 229.001(a)(1)’s prohibition encompasses any one (or more) of the listed items. Accordingly, to the extent a municipality regulates the transfer of firearms but not also licensing, registration, or transportation of firearms, it nonetheless violates subsection 229.001(a)(1).

Your last question concerns the consequences to the members of the city council for violating either section 229.001 or the Texas or the U.S. Constitution. *See* Request Letter at 4. Subsection 229.001(f) authorizes the Attorney General to “bring an action in the name of the state to obtain a temporary or permanent injunction against a municipality adopting a regulation in violation of this section.” TEX. LOC. GOV’T CODE § 229.001(f). In addition, any plaintiff with standing under the Texas Constitution or the U.S. Constitution could bring an action seeking declaratory or injunctive relief against enforcement of an unconstitutional ordinance. *See* 28 U.S.C. § 2201 (federal declaratory judgments); TEX. CIV. PRAC. & REM. CODE § 37.003 (state declaratory judgments). Individual city council members who voted on a zoning ordinance ultimately found to violate Local Government Code section 229.001 or the Texas or the U.S. Constitution would likely be immune from personal liability.⁶ *See Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982) (discussing federal qualified immunity); *Kassen v. Hatley*, 887 S.W.2d 4, 8–12 (Tex. 1994) (discussing state official immunity).

⁶In considering the issue of qualified immunity, one justice observed:

To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly. Merely proving a constitutional deprivation doesn’t cut it; plaintiff must cite functionally identical precedent that places the legal question “beyond debate” to “every” reasonable officer. Put differently, it’s immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawful.

Zadeh v. Robinson, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring).

S U M M A R Y

Subsection 229.001(a)(1) of the Local Government Code prohibits a municipality from regulating the transfer, private ownership, keeping, transportation, licensing, or registration of firearms, air guns, knives, ammunition, or firearm or air gun supplies. Subsection 229.001(b)(3) excepts from this prohibition a municipality's regulation on the use of property or businesses and the location of businesses as long as the regulation does not circumvent the intent of subsection (a)(1). A regulation that expressly prohibits gun stores from operating in a specific area relates to the transfer of firearms and is prohibited by subsection 229.001(a)(1). Similarly, an ordinance singling out firearm and ammunition sales relates to the transfer of firearms and is therefore prohibited.

A court would likely conclude subsection 229.001(a)(1)'s prohibition encompasses any one or more of the listed items. To the extent a municipality regulates firearm transfers but not also licensing, registration, or transportation of firearms, it acts contrary to subsection 229.001(a)(1).

A violation of section 229.001 may be enforced by the Attorney General. Any plaintiff with standing under the Texas Constitution or the U.S. Constitution could bring an action seeking declaratory or injunctive relief against enforcement of an unconstitutional ordinance. Individual city council members who voted on a zoning provision that is ultimately found to violate section 229.001 or the Texas or the U.S. Constitution would likely be immune from personal liability.

Very truly yours,



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