

**OLSON & OLSON
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Firearms and Municipal Regulation

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Firearms and Municipal Regulation

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 individuals and the 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 regulation of firearms, especially in light of a recent landmark Supreme Court decision and state legislation.

I. FEDERAL LAW LIMITATIONS

A. *District of Columbia v. Heller*, 554 U.S. 570, 592, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008)

In this 2008 decision, the United States Supreme Court held that a D.C. law prohibiting possession of handguns violated the Second Amendment. (In 2010, the Supreme Court would similarly invalidate the City of Chicago's handgun ban in *McDonald v. City of Chicago*, — U.S. —, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010)).

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 sets forth definitions, interpretations, and limitations on governmental regulation of firearms based on the Second Amendment. It is likely 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. The D.C. law made it a crime to carry an unregistered firearm but then prohibited the registration of handguns. It also required residents to keep lawfully owned firearms unloaded and disassembled, or bound by a trigger lock or similar device. The Supreme Court struck down both the ban and the disassembly requirement.

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

- Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. 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.
- 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.
- As used in the Second Amendment, “keep arms” means to “have weapons.”
- The “militia” comprised all males physically capable of acting in concert for the common defense.
- 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.
- 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.

B. *Illinois Ass'n of Firearms Retailers v. City of Chicago*, United States District Court, N.D. Illinois, Eastern Division, January 6, 2014, --- F.Supp.2d ---- (2014 WL 31339)

Although this is a federal district court opinion (that most likely will be appealed), it is an important one because it attempts to impose a standard of judicial review for Second Amendment cases. In *Heller*, the Supreme Court did not address which standard of review to use because in striking down the law in that case, the Court said the law would not survive under any standard of review.

In this 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. The ordinance was a regulatory ordinance but also involved the City’s zoning ordinance. The ban covered virtually all sales and transfers, including sales by federally licensed firearms dealers and even gifts amongst family members.

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).

The Court held that, for a regulation to satisfy Second Amendment, there must be heightened scrutiny of the city regulation. The Court opined that the City must establish a close fit between

its ban and actual public interests served and prove that public interests were strong enough to justify so substantial an encumbrance on individual Second Amendment rights.

If this heightened scrutiny test is upheld and not altered by higher courts, municipalities can expect to be called on to prove their strong public interest in any regulation implicating Second Amendment rights. This may mean municipalities may need studies, evidence, testimony and similar ways to show a strong public interest, to survive a Second Amendment challenge.

II. STATE LAW LIMITATIONS

A. Texas Local Government 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 far as firearms 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;
- 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; or
- 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.

B. Texas Local Government Code, § 229.002.

In the same statute we find another express limitation on municipal regulatory authority in this area.

§ 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. Atty. Gen. Op., No. GA-0862 (2011).

C. Texas Agriculture Code § 251.005

As a follow up to § 229.002 cited above, the Texas Agriculture Code provides another limitation upon recently annexed property that contains agricultural operations. Section 251.005 states

that, upon annexation, a governmental requirement of a city does not apply to any agricultural operation unless the 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, Texas Local Government Code.

However, to impose these governmental requirements, the city must make certain findings and take action. 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. Texas Local Government Code § 250.001 et seq.

Additionally, there are 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 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.

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.”

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 applicable ordinance, then the law is cited as a bar to any suit

involving noise or complaints about a shooting range. There is at least one case pending where this law is being used as the basis for an absolute bar against homeowners complaining of an adjacent shooting range, where there is no regulation in place.

Therefore if a municipality wishes to regulate this type of nuisance, it must have an ordinance in place, or risk the perpetrators using this law as a bar against the city.

III. 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 you comply with the licensing requirements you can obtain a license to carry a concealed handgun in the State of Texas. Because of reciprocal agreements with other states, you can also 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. This provides property owners who do not want those carrying concealed handguns on the property a means to prohibit them from entering or remaining on their property. The enforcement of this provision is through criminal proceedings. The crime is in the nature of criminal trespass.

The notice requirement is expressly provided by section 30.06. 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. 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.

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.

There are two important exceptions, and they are noted in section 30.06(e). 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.

The exceptions cited under Penal Code sections 46.03 and 46.035 will cause section 30.06 to apply 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.

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 any meeting of a governmental entity.

Section 46.03, Texas Penal Code states:

§ 46.03. Places Weapons Prohibited

(a) (2) on the premises of a polling place on the day of an election or while early voting is in progress;

and

(a)(3) on the premises of any government court or offices utilized by the court, unless pursuant to written regulations or written authorization of the court;

IV. LIMITATIONS ON REGULATING EMPLOYEES

A governmental entity, as an employer, has control over its employees and can generally impose restrictions on its employees. Enforcement of any violation of such restrictions is an employment matter, not a criminal matter. However, there is one law that will affect a governmental entity from imposing a firearms ban in the workplace.

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. However, there is one major limitation. In the definition of “premises”, the term expressly excludes a public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area. Therefore, a governmental entity may not prohibit, as an employer, an employee who has a concealed carry license from having a handgun in their vehicle (in the parking lot, garage, street, etc.).

Texas Government Code § 411.203. Rights of Employers

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. In this section, “premises” has the meaning assigned by Section 46.035(f)(3), Penal Code.

Section 46.035(f)(3), Penal Code states:

(3) "Premises" means a building or a portion of a building. The term does not include any public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area.