



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

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| <p>INVESTIGATIVE REPORT</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>November 14, 2016</p> | <p>No. 16-002</p> <p>Re: City of Tucson Ordinance Requiring Destruction of Firearms by Tucson Police Department</p> |
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To: The Honorable Douglas A. Ducey, Governor of Arizona
The Honorable Andy Biggs, President of the Arizona State Senate
The Honorable David M. Gowan Sr., Speaker of the Arizona House of Representatives
The Honorable Mark Finchem, Member of the Arizona Legislature
The Honorable Michele Reagan, Secretary of State of Arizona

I. Summary

Pursuant to Arizona Revised Statutes ("A.R.S.") § 41-194.01, the Attorney General's Office ("Office") has investigated the City of Tucson ("City") ordinance requiring destruction of firearms by the Tucson Police Department. *See* Tucson City Code § 2-142 (the "Ordinance"). Based on a review of relevant authorities and materials during the limited 30-day period in § 41-194.01(B), the Attorney General has determined that the Ordinance **may violate** one or more provisions of state law.

The Office determines that the Ordinance's requirements are in conflict with state law. The Ordinance directs the Tucson Police Department to destroy forfeited firearms, with certain

enumerated exceptions. *See* Tucson City Code § 2-142. In contrast, Arizona state statutes prohibit municipalities from destroying firearms and require municipalities to transfer firearms to authorized dealers. *See* A.R.S. §§ 12-945(B), 13-3108(F).

As a charter city, however, the City claims the right to enact ordinances conflicting with state law when those ordinances relate to matters of purely local concern. Assuming without deciding that the City is correct for purposes of A.R.S. § 41-194.01, the Office determines that the destruction of firearms is likely not such a matter. Rather, there is a statewide interest in (1) preserving the right to bear arms under the Arizona and Federal Constitutions; (2) regulating firearms as a way to preserve public safety; (3) regulating the conduct of police departments, including how they dispose of firearms; and (4) ensuring that cities do not waste resources that could generate revenue. The destruction of firearms is thus distinguishable from the disposition of municipal real property, which courts have treated as being purely of local concern.

II. Background

A. The Office's Investigation

On October 12, 2016, Representative Mark Finchem submitted a request for legal review (“Request”) pursuant to A.R.S. § 41-194.01.¹ Representative Finchem’s Request states in part:

Public records released by the City of Tucson . . . memorialize the ongoing and regular destruction of hundreds of confiscated and forfeited firearms that appear to be valuable, in working condition, and lawful to possess under Arizona and federal law. It appears that the Tucson Police Department regularly approves requests to destroy such firearms notwithstanding Arizona statutes that require the City to sell them.

¹ An initial request was submitted without Representative Finchem’s signature, but the Office received the signed request on October 12. On October 19, Representative Finchem submitted an “amended” request. The amendment simply identified Tucson City Code § 2-142 as the offending ordinance and did not otherwise change the substance of the Request.

After receiving the Request, the Office asked the City to provide a voluntary response. The City has cooperated with the Office's review—providing the requested response, as well as responding to a public records request from the Office.² In performing the required investigation during the limited 30-day period, the Office reviewed relevant materials and authorities. The Office also spoke separately with Representative Finchem and City representatives to gather additional facts and discuss each side's concerns.

The Office's legal conclusions are set forth below. The facts recited in this report serve as a basis for those legal conclusions, but they are not administrative findings of fact and are not made for purposes other than those set forth in § 41-194.01.

B. The State's Regulation of Firearms

The Arizona Legislature has enacted statutes regulating firearms. Among other things, the Legislature has regulated who may carry a firearm, where persons may carry firearms, and how persons may use firearms. A.R.S. §§ 13-3101 *et seq.* The Legislature also has restricted the ability of political subdivisions to regulate firearms. In 2000, the Legislature provided that “[f]irearms regulation is of statewide concern. Therefore, the Legislature intends to limit the ability of any political subdivision of this state to regulate firearms and ammunition.” H.B. 2095, 44th Leg., 2nd Reg. Sess. (2000). The Legislature explicitly prohibited political subdivisions from enacting any ordinance relating to the acquisition, licensing, registration, or use of firearms. A.R.S. § 13-3108(A).

The Legislature also has specifically regulated the circumstances under which state and local governments may destroy firearms. In 2013, it revised two statutes relevant here. *See* H.B.

² In its response, as well as additional letters, the City also laid out arguments challenging the constitutionality of S.B. 1487, codified at A.R.S. § 41-194.01. The Office considered those arguments, but this Report will not address them and will reserve any response for a court proceeding, if one arises, where the City may raise them.

2455, 51st Leg., 1st Reg. Sess. (2013). First, the Legislature stipulated that “[t]his state, any agency or political subdivision of this state and any law enforcement agency in this state shall not facilitate the destruction of a firearm or purchase or otherwise acquire a firearm for the purpose of destroying the firearm except as authorized by § 13-3105 or 17-240.” A.R.S. § 13-3108(F).³ Second, the Legislature laid out the proper procedure for disposing of firearms: “[T]he agency shall sell the firearm to any business that is authorized to receive and dispose of the firearm under federal and state law and that shall sell the firearm to the public . . . unless the firearm is otherwise prohibited from being sold under federal and state law.” *Id.* § 12-945(B).⁴ Section 12-943 states that forfeited firearms “in the possession of a state, county, city or town agency may only be disposed of pursuant to this article,” which includes § 12-945.

C. The Tucson City Ordinance at Issue

On April 19, 2005, before the Legislature prohibited the destruction of certain firearms, the Tucson City Council passed the Ordinance, which provides in part:

(a) Unless needed as evidence, and except as provided in subsection (b) of this section, after either forfeiture in accordance with section 2-140, forfeiture to the police department pursuant to a court order, or a determination that a firearm is contraband, the police department *shall dispose of such firearm by destroying the firearm.*

Tucson City Code § 2-142 (emphasis added). The Ordinance permits the Tucson Police Department to keep a firearm for its own purposes, to lend or transfer the firearm to another law enforcement agency, and to lend or transfer the firearm to a museum. *Id.* § 2-142(b). The Ordinance also defines firearm. *Id.* § 2-142(c). Tucson City Code § 2-140 prescribes the

³ A.R.S. §§ 13-3195 and 17-240 lay out a few exceptions to the general rule that firearms may not be destroyed but rather must be transferred to an authorized dealer. These exceptions apply to firearms that are illegal under federal or state law and firearms that are “classified as a curio or relic by the United States treasury department.”

⁴ This statute also authorizes police departments to trade a firearm to a federally licensed business for “ammunition, weapons, equipment or other materials to be exclusively used for law enforcement purposes.” A.R.S. § 12-945(B).

procedure for deeming a firearm “forfeited.” The Tucson Police Department has developed procedures for the disposal of firearms to carry out the requirements of the Ordinance.

Despite the enactment of A.R.S. §§ 12-945(B) and 13-3108(F), the Ordinance remains in effect, and the Tucson Police Department continues to destroy forfeited firearms. According to the City’s estimates, the Tucson Police Department has destroyed roughly 4,820 firearms over the past four years.

III. Analysis

A. The Ordinance’s Requirements Are in Conflict With, and thus Violate, State Law Unless the Ordinance Supersedes State Law.

The Ordinance’s requirements are in conflict with state law, which explicitly prohibits political subdivisions from enacting ordinances relating to the possession, transfer, storage, sale, licensing, registration, discharge, or use of firearms. *See* A.R.S. §§ 13-3108(A), 13-3118(A). Furthermore, state law requires that political subdivisions “shall not facilitate the destruction of a firearm or purchase or otherwise acquire a firearm for the purpose of destroying the firearm[.]” A.R.S. § 13-3108(F). Rather, a political subdivision must dispose of legal firearms by selling them to “any business that is authorized to receive and dispose of the firearm under federal and state law.” A.R.S. § 12-945(B). The Ordinance states that the Tucson Police Department “shall dispose” of forfeited firearms “by destroying the firearm.” Tucson City Code § 2-142(a). The Tucson Police Department cannot comply with both the Ordinance and A.R.S. §§ 12-945(B) and 13-3108(F).⁵

⁵ The City frames the issue as whether state law preempts the Ordinance. The Office determines in this case that resolution of the A.R.S. § 41-191.01 inquiry requires only that the Attorney General decide whether the Ordinance’s requirements violate state law.

B. Even Assuming an Ordinance on a Matter of Purely Local Concern Could Supersede State Law for Purposes of § 41-194.01, the Regulation of Firearms, Including Destruction of Firearms, Is Not Such a Matter.

The City contends that the Ordinance is lawful because the disposition of “municipal property” is a “purely local concern” that is exempt from A.R.S. §§ 12-945(B) and 13-3108(F) when performed by a charter city. The City is a charter city under Article XIII, Section 2 of the Arizona Constitution. Before the adoption of A.R.S. § 41-194.01, the Arizona Supreme Court “uniformly held that a city charter, when regularly adopted and approved, becomes the organic law of the city and the provisions of the charter supersede all laws of the state in conflict with such charter provisions insofar as such laws relate to purely municipal affairs.” *City of Tucson v. State*, 229 Ariz. 172, 176 ¶ 19 (2012) (quoting *Strode v. Sullivan*, 72 Ariz. 360, 365 (1951)); see also A.R.S. § 9-284. The Office assumes without deciding that the City enacted the Ordinance in accord with the City’s charter. See Tucson City Charter, Ch. IV, Sec. 1(4) (“The city shall have the power . . . (4) To purchase, receive, have, take, hold, lease, use and enjoy property of every kind and description, both within and without the limits of said city, and control and dispose of the same for the common benefit.”).

Also assuming without deciding that a charter-approved ordinance may supersede state law in the context of § 41-194.01 when it relates to a “purely municipal affair,” the Office determines that the regulation of firearms, including the destruction of firearms, is most likely not a purely municipal affair. While not dispositive of the issue, see *City of Tucson*, 229 Ariz. at 178 ¶¶ 33-34, the Legislature has declared firearm regulation to be a matter of “statewide concern,” and that declaration is entitled to substantial weight. See H.B. 2095, 44th Leg., 2nd Reg. Sess. (2000). Furthermore, the destruction of forfeited firearms implicates at least four statewide interests: (1) preserving the right to bear arms under the Arizona and Federal Constitutions; (2) regulating firearms as a way to preserve public safety; (3) regulating the

conduct of police departments, including how they dispose of firearms; and (4) ensuring that cities do not waste resources that could generate revenue.

The State has an interest in preserving the right to bear arms under the Arizona and Federal Constitutions. Courts in other states have recognized that “[b]ecause the ownership of firearms is constitutionally protected, its regulation is a matter of statewide concern.” *Ortiz v. Commonwealth*, 681 A.2d 152, 156 (Pa. 1996); *see also Cleveland v. State*, 942 N.E.2d 370, 375 (Ohio 2010) (holding Ohio’s firearms regulations were “a comprehensive statewide legislative enactment”); *Doe v. City & Cnty. of San Francisco*, 186 Cal. Rptr. 380, 382 (Ct. App. 1982) (concluding a city’s handgun ordinance “legislates in an area of statewide concern”). The statutes regulating firearms, A.R.S. §§ 12-945(B) and § 13-3108(F), are directly tied to this interest because they ensure that the thousands of guns that the Tucson Police Department acquires every year remain on the legal market. This may increase the supply of firearms, lower the cost of firearms, and generally facilitate citizens’ right to bear arms. The Ordinance contravenes this interest by mandating the destruction, on average, of over a thousand firearms every year.

The State also has an interest in regulating firearms as a way to preserve public safety. The Arizona Supreme Court has recognized that “it is the concern of the state in the exercise of its police powers to see that such steps are taken as may be necessary to protect the health of its citizenry.” *Associated Dairy Prod. Co. v. Page*, 68 Ariz. 393, 396-97 (1949) (holding the regulation of milk products to be a matter of statewide concern); *City of Flagstaff v. Associated Dairy Prod. Co.*, 75 Ariz. 254, 259 (1953) (same). If public health is a matter of statewide concern, then so is public safety. As evidenced by its statutes, the State believes that increasing the supply of firearms is in the interest of public safety. Thus, by prohibiting the municipal

destruction of firearms, the State has taken a step that it believes to “be necessary to protect the health of its citizenry.” *Page*, 68 Ariz. at 397. The Ordinance infringes upon this interest by eliminating a lawful source of firearms in the state.

The State also has an interest in regulating the conduct of local police departments, including how they dispose of firearms. Arizona courts have determined that “the preservation of order and the protection of life and property and the suppression of crime” are matters in which “the entire state” is interested. *Luhrs v. City of Phoenix*, 52 Ariz. 438, 448 (1938). Relying on this reasoning, Arizona courts have found that matters even tangentially connected to the primary work of public safety officers are nonetheless of statewide concern. *See, e.g., id.* at 448 (finding that “fixing a minimum wage for policemen and firemen” is a matter of statewide concern); *Prendergast v. City of Tempe*, 143 Ariz. 14, 17-18 (App. 1984) (finding the compensation of local police officers to be a matter of statewide concern); *Phoenix Respirator & Ambulance Serv., Inc. v. McWilliams*, 12 Ariz. App. 186, 188 (App. 1970) (finding the regulation of “emergency vehicles” to be a matter of statewide concern). Here also, the State has an interest in ensuring that local police departments are taking the best steps to preserve “order . . . and the suppression of crime.” *Luhrs*, 52 Ariz. at 448. The State is protecting that interest by requiring police departments to take advantage of forfeited firearms or to transfer them for public sale, which the State believes to be important for public safety.

Finally, the State has an interest in ensuring that cities do not waste resources that could generate revenue. In *American-La France & Foamite Corporation v. City of Phoenix*, 47 Ariz. 133 (1936), the Arizona Supreme Court held that there is a statewide interest in regulating and ensuring the fiscal health of municipal budgets. Specifically, the Court held that a charter city was not exempt from a state law prohibiting cities from purchasing anything for which they had

not budgeted or for which they did not have sufficient cash on hand. Here also, the State has an interest in ensuring that the City does not waste firearms that the City could sell to authorized dealers. Under the reasoning of *American-La France*, the revenue from these sales could help strengthen the fiscal health of Tucson's budget.⁶

C. The Destruction of Firearms Is Unlike the Dispositions of Real Property, Which Courts Have Found to be of Purely Local Concern.

Arizona courts have found that “the sale or disposition of property by charter cities’ is a matter of solely local concern in which the state legislature may not interfere.” *McMann v. City of Tucson*, 202 Ariz. 468, 472 ¶ 10 (App. 2002) (quoting *City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon* (“AASAE”), 67 Ariz. 330, 336 (1948)). These cases dealt with the disposition of municipal real property. The City contends that these cases also apply to its destruction of firearms.

In *AASAE*, the City deeded a portion of land to the plaintiffs. 67 Ariz. at 332. The City, however, had not complied with a statute requiring cities to allow for public bidding before disposing of land. *Id.* The Court concluded: “By its charter [the City] was given the power to dispose of its real estate and to provide for the method of its disposition. It is clear that the provisions contained in [the statute requiring public bidding have] no application to charter cities. . . . [T]he sale or disposition of property by charter cities is not a matter of general or public concern[.]” *Id.* at 335-36. The City, therefore, was free to dispose of land as it saw fit.

In *McMann*, the plaintiffs challenged the City's practice of conditioning the use of the Tucson Convention Center “for gun shows on the show's promoter's agreement to require

⁶ The Court has held that a city's securing of revenue is a matter of local concern. *Barrett v. State*, 44 Ariz. 270, 273 (1934). The cases citing this principle, however, have used it simply to uphold the power of charter cities to tax items concurrently with the State. These cases do not affect the principle that the State has an interest in strengthening the fiscal health of municipal budgets.

instant background checks for prospective gun purchasers.” *Id.* at 470 ¶ 3. The plaintiffs argued that this conflicted with A.R.S. § 13-3108(A), which prohibited municipalities from enacting “any ordinance . . . relating to the transportation, possession, carrying, sale . . . or use of firearms.” The court concluded that the statute did not preempt the City’s practice. “Here, the use permit the parties entered into is . . . essentially a lease, which is a disposition of property.” *Id.* at 472 ¶ 10. Relying on *AASAE*, the court found that any conditions attached to that lease are a matter of purely local concern. *Id.*

These cases are unlike the City’s destruction of firearms for three reasons. First, these cases involved the disposition of real property, not personal property like firearms. This difference is significant. In *AASAE*, the Court stressed that “the manner and method of disposal of real estate of a city is not a matter of state-wide public concern” because, for example, what Tucson’s charter provided regarding real estate in Tucson “is of no interest to the cities of Phoenix, Yuma, or any other city or town in the State of Arizona[.]” 67 Ariz. at 336. Real estate will remain within the confines of the municipality and cannot move. Personal property like firearms, however, is by its nature portable. Thus, the City’s destruction of firearms will affect the entire State’s supply of firearms.

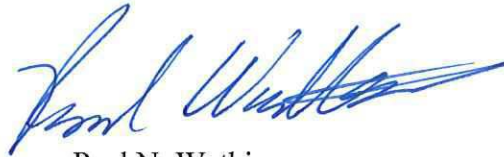
Second, the court in *McMann* stressed that “municipalities have a constitutional right to engage in business activities. . . . When engaging in business activities, a city is presumed to act under the same restrictions as a private person.” 202 Ariz. at 472 ¶ 11. The City was therefore free to attach conditions to the lease of its own property. Here, the City is not engaging in a business activity by destroying firearms. This activity does not generate revenue or benefit the City financially. Rather than making a business judgment about firearms, the City appears to be

making a political and policy judgment about firearms and has therefore entered into the realm of statewide interests.

Finally, the State in *AASAE* and *McMann* failed to articulate any statewide interest in the dispositions of real property involved in those cases. Here, there are at least four statewide interests in the destruction of firearms. Admittedly, the City also may have a local interest in this practice. But where there are both statewide and local interests in a particular practice, “a charter city’s ordinance is invalid if it conflicts with a valid state statute.” *City of Tucson v. Consumers For Retail Choice Sponsored by Wal-Mart*, 197 Ariz. 600, 602 ¶ 6 (App. 2000).

IV. Conclusion

The Ordinance, which requires the Tucson Police Department to destroy forfeited firearms, conflicts with state law. The Office recognizes, however, that while the prior case law is most likely distinguishable, there is a question as to whether this matter is of purely local concern and thus the Ordinance might not violate state law. The Office therefore concludes under A.R.S. § 41-194.01(B) that the Ordinance **may violate** state law.



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