



To: Walter J. Foeman

From: Craig E. Leen, City Attorney for the City of Coral Gables 

RE: Legal Opinion Regarding Elimination of Preempted Code Provisions Pursuant To Section 2-201(e)(9) Of The City Code

Date: February 8, 2013

Pursuant to the authority granted in section 2-201(e)(9) of the City Code, and consistent with the attached opinion and recommendation of outside counsel, my office hereby directs that section 38-26 of the City Code be removed, and that sections 42-26 and 62-186 of the City Code be revised, in the manner discussed below. These changes will eliminate language from the City Code that is expressly preempted by state law, namely section 790.33 of the Florida Statutes. The Florida Legislature has clearly expressed its will that such provisions may not be enforced, and provides penalties to City officials and staff if such language is enforced. The City has complied with section 790.33 by not enforcing such provisions. The City also engaged outside counsel to consider whether such language should be removed from the City Code entirely, in order to ensure such language is not mistakenly enforced. A copy of outside counsel's opinion, which recommends these revisions to the City Code, is attached.

Section 2-201(e)(9) grants the City Attorney the authority "to delete provisions [from the City Code and Zoning Code] that have been superseded or preempted by applicable law." The attached opinion from outside counsel explains why the provisions mentioned herein are expressly preempted, and why they should be removed pursuant to section 2-201(e)(9).

The revisions are as follows:

~~Sec. 38.6. — Discharging firearms.~~

~~It shall be unlawful for any person to discharge any kind of firearm within the corporate limits of the city except as permitted under F.S. §§ 790.02 and 790.25.~~

Sec. 42-46. Firearms, fireworks, weapons, explosives, missiles, etc.

- a. ~~No person, except law enforcement officers, shall carry firearms of any description, within or adjacent to a park. This subsection shall not apply to members of the Armed Forces of the United States or the National Guard, while engaged in official duties as such.~~
- b. ~~No person, except law enforcement officers in the line of duty, shall have or carry any gun, on or about his person while within or adjacent to a park.~~
- c. No person shall have in his possession or ignite fireworks of any kind in or adjacent to any park, recreation, or open space facility without specific written permission from the director.
- d. Incidents and violations of this section may in fact be violations of state statutes and will be enforced accordingly.

Sec. 62-186. - Application permit required for work or commercial activities that obstruct or close a public right-of-way or impede traffic; permit for assemblies; permit for parades; prohibitions (Ordinance stated in part)

(f) The following prohibitions shall apply to all special events, parades and public assemblies, except those listed under section 62-184, necessary for use by a disabled person, honor guard, or color guard approved by the chief of police, and will not apply to spontaneous events, block parties, etc.

(1) It shall be unlawful for any person at any special event, parade or public assembly to carry or possess any weapon, as defined below.

a. Any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, ~~or other deadly weapon~~ carried on or about a person in such a manner as to conceal the weapon from the ordinary sight of another person.

c. ~~Any bomb, grenade, mine, rocket, missile, pipe bomb, or similar device containing an explosive, incendiary, or poison gas and includes any frangible container filled with an explosive, incendiary, explosive gas, or expanding gas, which is designed or so constructed as to explode by such filler and is capable of causing bodily harm or property damage; any combination of parts either designed or intended for use in converting any device into a destructive~~

~~device and from which a destructive device by the Bureau of Alcohol, Tobacco, and Firearms; any type of weapon which will, is designed to, or may readily be converted to expel a projectile by the action of any explosive and which has a barrel with a bore of one half inch or more including shotguns shells or any ammunition designed for use in a firearm other than a destructive device.~~

~~d. Any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun.~~

Of course, this office would also note, as indicated in the attached opinion, that Florida Statutes related to the regulation of firearms and ammunition remain in full force and effect and can be enforced.

Please inform the Municipal Code Corporation of these revisions to the City Code, and please copy my office. A copy of the opinion and recommendation from outside counsel is attached to this memorandum.

Hernandez, Cristina

From: Leen, Craig
Sent: Friday, February 08, 2013 4:53 PM
To: Hernandez, Cristina
Subject: FW: Elimination of Preempted Code Provisions Pursuant to Section 2-201(e)(9) of the City Code
Attachments: 2010.01 Legal Opinion - Preempted Code Provisions 2-7-13 (IUR Approved)(Executed).pdf

Please place in the opinion folder, along with the attached opinion from outside counsel.

Craig E. Leen
City Attorney
City of Coral Gables
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Email: cleen@coralgables.com

From: Leen, Craig
Sent: Friday, February 08, 2013 4:52 PM
To: Foeman, Walter
Cc: 'bthornton@coralgables.com'; Israel Reyes, ESQ; 'Manuel Guarch'
Subject: Elimination of Preempted Code Provisions Pursuant to Section 2-201(e)(9) of the City Code

City Attorney Memorandum

To: Walter J. Foeman, City Clerk

From: Craig E. Leen, City Attorney

Re: Elimination of Preempted Code Provisions pursuant to Section 2-201(e)(9) of the City Code

Pursuant to the authority granted in section 2-201(e)(9) of the City Code, and consistent with the attached opinion and recommendation of outside counsel, my office hereby directs that section 38-26 of the City Code be removed, and that sections 42-26 and 62-186 of the City Code be revised, in the manner discussed below. These changes will eliminate language from the City Code that is expressly preempted by state law, namely section 790.33 of the Florida Statutes. The Florida Legislature has clearly expressed its will that such provisions may not be enforced, and provides penalties to City officials and staff if such language is enforced. The City has complied with section 790.33 by not enforcing such provisions. The City also engaged outside counsel to consider whether such language should be removed from the City Code entirely, in order to ensure such language is not mistakenly enforced. A copy of outside counsel's opinion, which recommends these revisions to the City Code, is attached.

Section 2-201(e)(9) grants the City Attorney the authority "to delete provisions [from the City Code and Zoning Code] that have been superseded or preempted by applicable law." The attached opinion from outside counsel explains why the provisions mentioned herein are expressly preempted, and why they should be removed pursuant to section 2-201(e)(9).

The revisions are as follows:

Sec. 38-6. — Discharging firearms.

~~It shall be unlawful for any person to discharge any kind of firearm within the corporate limits of the city except as permitted under F.S. §§ 790.22 and 790.25.~~

Sec. 42-26. — ~~Firearms, fireworks, weapons, explosives, missiles, etc.~~

- ~~a. No person, except law enforcement officers, shall carry firearms of any description, within or adjacent to a park. This subsection shall not apply to members of the Armed Forces of the United States or the National Guard, while engaged in official duties as such.~~
- ~~b. No person, except law enforcement officers in the line of duty, shall have or carry any gun, on or about his person while within or adjacent to a park.~~
- c. No person shall have in his possession or ignite fireworks of any kind in or adjacent to any park, recreation, or open space facility without specific written permission from the director.
- d. Incidents and violations of this section may in fact be violations of state statutes and will be enforced accordingly.

Sec. 62-186. — Application permit required for work or commercial activities that obstruct or close a public right-of-way or impede traffic; permit for assemblies; permit for parades; prohibitions (Ordinance stated in part)

(f) The following prohibitions shall apply to all special events, parades and public assemblies, except those listed under section 62-184, necessary for use by a disabled person, honor guard, or color guard approved by the chief of police, and will not apply to spontaneous events, block parties, etc.:

(1) It shall be unlawful for any person at any special event, parade or public assembly to carry or possess any weapon, as defined below.

a. Any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, ~~or other deadly weapon~~ carried on or about a person in such a manner as to conceal the weapon from the ordinary sight of another person.

c. ~~Any bomb, grenade, mine, rocket, missile, pipe bomb, or similar device containing an explosive, incendiary, or poison gas and includes any frangible container filled with an explosive, incendiary, explosive gas, or expanding gas, which is designed or so constructed as to explode by such filler and is capable of causing bodily harm or property damage; any combination of parts either designed or intended for use in converting any device into a destructive device and from which a destructive device may be readily assembled; any device declared a destructive device by the Bureau of Alcohol, Tobacco, and Firearms; any~~

~~type of weapon which will, is designed to, or may readily be converted to expel a projectile by the action of any explosive and which has a barrel with a bore of one half inch or more in diameter; and ammunition for such destructive devices, but not including shotgun shells or any other ammunition designed for use in a firearm other than a destructive device.~~

~~d. Any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun.~~

Of course, this office would also note, as indicated in the attached opinion, that Florida Statutes related to the regulation of firearms and ammunition remain in full force and effect and can be enforced.

Please inform the Municipal Code Corporation of these revisions to the City Code, and please copy my office. A copy of the opinion and recommendation from outside counsel is attached to this memorandum.

Respectfully submitted,



Craig E. Leen
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THE REYES LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS

LEGAL OPINION

Preemption of Firearm Related Ordinances pursuant to § 790.33, Florida Statutes (2012)

To: C. Leen, City Attorney
City of Coral Gables

From: Israel U. Reyes, Managing Partner
Manuel A. Guarch, Associate
The Reyes Law Firm, P.A.
Police Legal Advisors



Date: February 7, 2013

The City Attorney for the City of Coral Gables has sought an opinion regarding what Coral Gables City Ordinances are made null and void by operation of State Law Preemption pursuant to Section 790.33, Florida Statutes (2012), and what if any Coral Gables City Ordinances can be amended to comply with Section 790.33, Florida Statutes (2012), without striking the sections in their entirety.

I. Background

In 2011, the Florida Legislature enacted Florida Statutes Section 790.33, Field of Regulation of Firearms and Ammunition Preempted, which became effective October 1, 2011. As a result, the State has now occupied the entire field of firearms and ammunition regulation and, with limited exception, has declared all local ordinances, administrative regulations, and rules related to this field null and void.¹ In addition, the new provisions provide for the

¹ In general, officers are reminded that Florida Statutes related to firearms and ammunition remain in full force and effect and can be enforced as usual.

imposition of financial and other penalties on local governments, elected officials, and staff that adopt policies or take enforcement action in violation of the state preemption of firearms and ammunition regulation.

II. Impacted Coral Gables City Code Provisions & Recommendation

The City Attorney for the City of Coral Gables is empowered “to delete provisions that have been superseded or preempted by applicable law.” *See* Coral Gables City Code Ordinance Section 2-201(e)(9). Pursuant to Directive Number 12-01, and in accordance with this Firm’s review of the Coral Gables City Code of Ordinances, multiple sections of the City Code are impacted by the enactment of Florida Statutes Section 790.33 and, by operation of the statute, are made null and void either in whole or in part as further detailed herein. It is the recommendation of this Firm that the following provisions be amended by the City Attorney, in accordance with the powers vested in him by virtue of Coral Gables City Code Ordinance Section 2-201(e)(9), as follows:

Coral Gables City Ordinance Section 38-6 - Discharging Firearms, should be stricken in its entirety as it is preempted by operation of state law pursuant to Florida Statutes Section 790.33, Field of Regulation of Firearms and Ammunition Preempted.

~~Sec. 38-6. Discharging firearms.~~

~~It shall be unlawful for any person to discharge any kind of firearm within the corporate limits of the city except as permitted under F.S. §§ 790.22 and 790.25.~~

It should be noted however, that the substance of 790.15, Discharging Firearm in Public or on Residential Property, Florida Statutes (2012), achieves substantially the same effect as the

preempted City Code Provision, and is included herein for reference as officers of the City of Coral Gables Police Department are empowered to enforce section 790.15.

790.15. Discharging Firearm in Public or On Residential Property.

(1) Except as provided in subsection (2) or subsection (3), any person who knowingly discharges a firearm in any public place or on the right-of-way of any paved public road, highway, or street, who knowingly discharges any firearm over the right-of-way of any paved public road, highway, or street or over any occupied premises, or who recklessly or negligently discharges a firearm outdoors on any property used primarily as the site of a dwelling as defined in s. 776.013 or zoned exclusively for residential use commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. This section does not apply to a person lawfully defending life or property or performing official duties requiring the discharge of a firearm or to a person discharging a firearm on public roads or properties expressly approved for hunting by the Fish and Wildlife Conservation Commission or Florida Forest Service.

(2) Any occupant of any vehicle who knowingly and willfully discharges any firearm from the vehicle within 1,000 feet of any person commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) Any driver or owner of any vehicle, whether or not the owner of the vehicle is occupying the vehicle, who knowingly directs any other person to discharge any firearm from the vehicle commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Coral Gables City Ordinance Section 42-26 - Firearms, fireworks, weapons, explosives, missiles, etc., should be amended deleting subsections (a) and (b) as set forth below in order to comply with Florida Statutes Section 790.33.

Sec. 42-26. — ~~Firearms, fireworks, weapons, explosives, missiles, etc.~~

- a. ~~No person, except law enforcement officers, shall carry firearms of any description, within or adjacent to a park. This subsection shall not apply to members of the Armed Forces of the United States or the National Guard, while engaged in official duties as such.~~

- b. ~~No person, except law enforcement officers in the line of duty, shall have or carry any gun, on or about his person while within or adjacent to a park.~~
- c. No person shall have in his possession or ignite fireworks of any kind in or adjacent to any park, recreation, or open space facility without specific written permission from the director.
- d. Incidents and violations of this section may in fact be violations of state statutes and will be enforced accordingly.

Coral Gables City Ordinance Section 62-186 - Application permit required for work or commercial activities that obstruct or close a public right-of-way or impede traffic; permit for assemblies; permit for parades; prohibitions should be amended as set forth below in order to comply with Florida Statutes Section 790.33.

Sec. 62-186. - Application permit required for work or commercial activities that obstruct or close a public right-of-way or impede traffic; permit for assemblies; permit for parades; prohibitions (Ordinance stated in part)

(f) The following prohibitions shall apply to all special events, parades and public assemblies, except those listed under section 62-184, necessary for use by a disabled person, honor guard, or color guard approved by the chief of police, and will not apply to spontaneous events, block parties, etc.:

(1) It shall be unlawful for any person at any special event, parade or public assembly to carry or possess any weapon, as defined below.

a. Any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, ~~or other deadly weapon~~ carried on or about a person in such a manner as to conceal the weapon from the ordinary sight of another person.

c. ~~Any bomb, grenade, mine, rocket, missile, pipe bomb, or similar device containing an explosive, incendiary, or poison gas and includes any frangible container filled with an explosive, incendiary,~~

~~explosive gas, or expanding gas, which is designed or so constructed as to explode by such filler and is capable of causing bodily harm or property damage; any combination of parts either designed or intended for use in converting any device into a destructive device and from which a destructive device may be readily assembled; any device declared a destructive device by the Bureau of Alcohol, Tobacco, and Firearms; any type of weapon which will, is designed to, or may readily be converted to expel a projectile by the action of any explosive and which has a barrel with a bore of one-half inch or more in diameter; and ammunition for such destructive devices, but not including shotgun shells or any other ammunition designed for use in a firearm other than a destructive device.~~

~~d. Any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun.~~

Pursuant to Florida Statutes section 790.001(6), “ ‘Firearm’ means any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; *any destructive device*; or any machine gun.”(emphasis added)

Further, “Destructive Device” is defined as;

‘Destructive device’ means any bomb, grenade, mine, rocket, missile, pipebomb, or similar device containing an explosive, incendiary, or poison gas and includes any frangible container filled with an explosive, incendiary, explosive gas, or expanding gas, which is designed or so constructed as to explode by such filler and is capable of causing bodily harm or property damage; any combination of parts either designed or intended for use in converting any device into a destructive device and from which a destructive device may be readily assembled; any device declared a destructive device by the Bureau of Alcohol, Tobacco, and Firearms; any type of weapon which will, is designed to, or may readily be converted to expel a projectile by the action of any explosive and which has a barrel with a bore of one-half inch or more in diameter; and ammunition for such destructive devices, but not including shotgun shells

or any other ammunition designed for use in a firearm other than a destructive device.

§790.001 (4), Fla. Stat. (2011).

As the pertinent language of section 62-186, subsection (c) mirrors the definition of “destructive device” in Florida Statutes, 790.001(4) and Coral Gables City Code section 62-186(d) mirrors the definition of Firearm in Florida Statutes, they are necessarily preempted by operation of 790.33, Florida Statutes (2011). It is therefore the opinion of this Firm that the above revisions be made to the City Code to avoid any possible confusion or mistaken enforcement of the above preempted provisions.²

² Again, officers are reminded that Florida Statutes related to firearms and ammunition remain in full force and effect and can be enforced as usual.