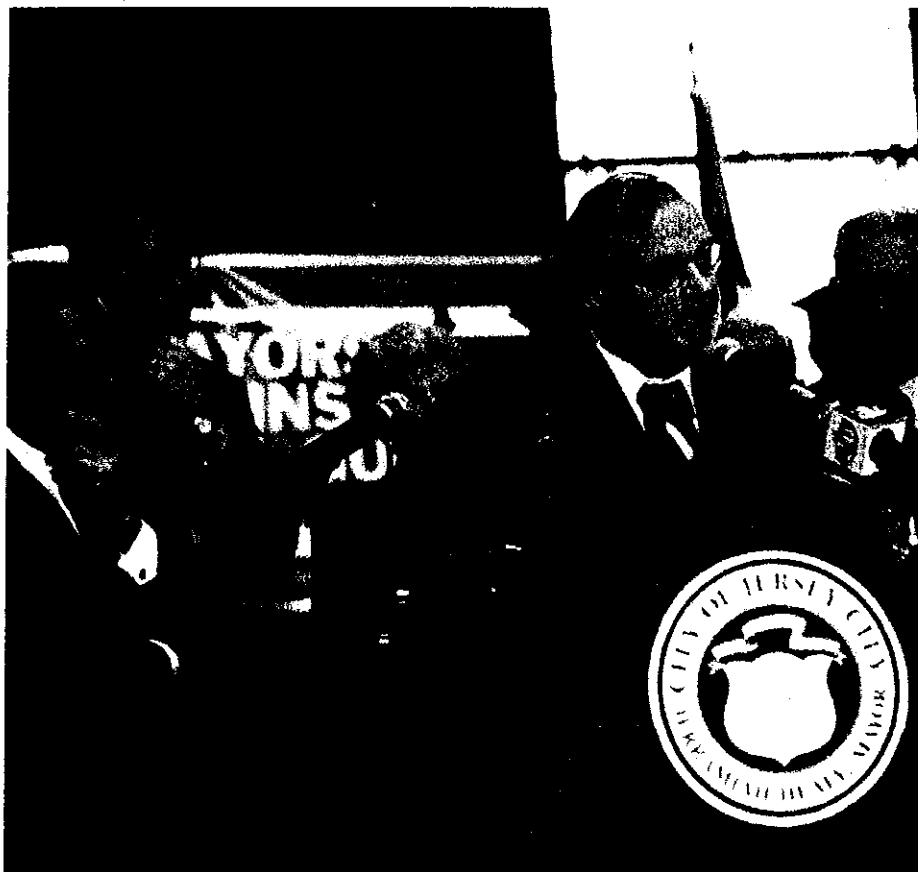


Home Rule and the Fight Against Gun Violence



By Tom Jardim, Partner,
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Jersey City Mayor and member of the League Executive Board Jerramiah Healy speaks at a press conference about gun control measures, including a gun buy back program, known as Operation Lifesaver, that took 900 lethal weapons off the streets in 2005, according to city officials.

The venerable doctrine of "home rule," long cherished by New Jerseyans, took another hit recently, thanks to a court decision that has struck down one city's attempt to cut down on the gun violence that is disrupting public order.

In June 2006, Jersey City adopted an ordinance that prohibits residents from buying more than one handgun per month, and bans gun dealers from selling more than one handgun per month to any one individual. But the city has been told that it can't do this, supposedly

because the authority behind such a municipal ordinance is outweighed, or preempted, by the system that New Jersey already has in place for the licensing of handguns.

The ordinance was struck down by a Hudson County trial court's ruling that flies in the face of a New Jersey law, nearly a century old, which gives municipalities the authority to "regulate or prohibit the sale and use" of firearms.

It's a frustrating situation for Jersey City, which is trying hard to cut down on gun violence – the city had the second highest number of murders of

any Garden State locale in 2005. And it's not alone. New Jersey's major urban centers, despite accounting for only 11 percent of the state's population, chalked up a sizable 23 percent of violent crimes in that period. As for Jersey City itself, *The New York Times* reported in June 2006 that violent crime there rose by 8.4 percent over the previous year. Thirty-eight people were killed by gunshot in Jersey City in 2005 alone, 15 more than in the previous year.

IN JUNE 2006, JERSEY CITY ADOPTED AN ORDINANCE THAT PROHIBITS RESIDENTS FROM BUYING MORE THAN ONE HANDGUN PER MONTH, AND BANS GUN DEALERS FROM SELLING MORE THAN ONE HANDGUN PER MONTH TO ANY ONE INDIVIDUAL.

Mayor Takes Action

The spike in gun violence prompted Jersey City and its mayor, Jerramiah Healy, to take action rather than wait for relief from the state or federal government: So more police officers were hired, and the city proceeded to mobilize a gang unit and to implement a gun "buy back" program. Known as Operation Lifesaver and funded by private rather than public resources, the program took 900 lethal weapons off the streets in 2005, according to city officials.

Going a step further, Mayor Healy proposed the adoption of two new local laws, one of them being the one-gun-a-month ordinance and the second an ordinance that would require residents to report to police all lost or stolen firearms. The latter measure was adopted in June 2006 and has not been challenged in the courts.

The one-gun-a-month ordinance was, however, challenged in July 2006 when Caso's Gun-a-Rama, one of two such dealers in Jersey City, filed suit. The ordinance was struck down in December.

Caso's is one of the top 10 New Jersey dealers when it comes to selling multiple guns at one time to buyers. Between 1995 and 2000, it engaged in 166 multiple sale transactions, a term defined under federal law as the sale of more than one handgun to a single purchaser in a five-day period.

Jersey City officials had good reason to be concerned about Caso's sales. According to a former employee of the Federal Bureau of Alcohol, Tobacco and Firearms, who analyzed those sales from 1989 to 1997, there were 87 crime-related guns traced to its shop that were recovered by law-enforcement agencies. Involved were a number of serious crimes that included assaults, illegal conveying of concealed weapons, and a homicide.

Caso's challenged the law on two grounds. First of all, it said, the ordinance violated the principle of equal protection as set forth in New Jersey's Constitution. The dealership argued that it was being treated differently than gun dealers in other New Jersey municipalities, and so its right to equal protection was violated.

Secondly, in Caso's view, the Jersey City ordinance was preempted by state statutes regulating the purchase of handguns in New Jersey. In particular, Caso's claimed that a provision of the New Jersey criminal code (N.J.S.A. 2C:58-3f), which provides that "there shall be no conditions or requirements... required by the licensing authority for the issuance of a permit or identification card other than those that are specifically set forth" in state law, preempts any regulation of firearms by municipalities.

The contention by Caso's was upheld by Superior Court Judge

Maurice Gallipoli, who on December 13, 2006, ruled both that the law violated the gun dealer's right to equal protection and that the ordinance was in fact preempted by state law.

The decision, which is being appealed by Jersey City officials, is remarkable for two reasons. First, the trial court apparently believed that any municipal law or regulation that puts a business at a conceivable economic disadvantage relative to similar

businesses located outside the municipality's borders unfairly discriminates against that municipality's businesses and thus violates the equal protection clause of the New Jersey Constitution. Such a ruling, should it be upheld, would have far-reaching consequences for municipalities and is inherently illogical, since municipalities only have the authority, if at all, to regulate those businesses within their municipal borders.

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Even more striking is the court's ruling that Jersey City is preempted by state law from acting to curb gun violence. The judicial doctrine of "preemption" provides, essentially, that local government may not act either (1) contrary to state law; or (2) in a field that the state, either explicitly or by implication, intended to occupy exclusively.

Under well-established case law in New Jersey, proving "field-occupying" preemption of municipal action is a heavy burden. As the New Jersey Supreme Court has stated:

It is not enough that the Legislature has legislated upon the subject, for the question is whether the Legislature intended its action to preclude the exercise of the delegated police power. The ultimate question is whether, upon a survey of all the interests involved in the subject, it can be said with confidence that the Legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act.

Summer v. Teaneck, 53 N.J. 548, 554-555 (1969).

Put in other words by the Supreme Court, "because our State Constitution enjoins a liberal construction of legislation in favor of local authority, legislative intent to supersede local powers must clearly be present." Garden State Farms, Inc. v. Mayor Louis Bay, II, 77 N.J. 439, 450 (1978).

In reaching its conclusion that the Jersey City ordinance was preempted

by state law, the trial court recognized that New Jersey municipalities have the express power to regulate and prohibit the sale and use of firearms. The power to enact municipal regulation of gun use is specifically delegated by N.J.S.A. 40:48-1(18), derived from the Home Rule Act of 1917. That law provides: "The governing body of every municipality may make, amend, repeal and enforce ordinances to...[r]egulate and prohibit the sale and use of guns, pistols, firearms, and fireworks of all descriptions."

Despite this specific and long-standing grant of authority, however, the trial court believed that the firearm licensing scheme in New Jersey is so extensive as to, in effect, repeal this law.

The legislative scheme in New Jersey regulating firearms is indeed extensive. There exist provisions in state law which, among other things, compel firearms manufacturers and wholesale dealers to register with the state; obligate retail firearms dealers and their employees to obtain licenses from the state to sell firearms; and require individuals to obtain permits to purchase firearms.

However, the New Jersey Supreme Court has already rejected preemption challenges to ordinances adopted pursuant to the explicit authority under state law for municipalities to regulate and prohibit the sale and use of firearms provided in N.J.S.A. 40:48-1. In Chester v. Panicucci, 62 N.J. 94 (1973), the Supreme Court of New Jersey rejected a preemption challenge

to an ordinance restricting loaded gun possession for hunting purposes within 300 feet of an "occupied dwelling" or within 400 feet of a school playground. In that case, New Jersey's highest court found that the ordinance was not preempted either by the state's hunting laws or by the state's laws respecting gun licensing. The court further determined that the Legislature did not intend to preempt the entire field of firearm control, but expressly delegated to municipalities the power to "regulate and prohibit the sale and use of guns, pistols, firearms, and fireworks of all descriptions" pursuant to N.J.S.A. 40:48-1(18).

The Panicucci opinions provide sound support for municipal handgun sales prohibitions, particularly using N.J.S.A. 40:48-1(18) as a basis for such restrictions. Notably, in Panicucci, the state Supreme Court "entirely agree[d]" with the lower court's finding that New Jersey did not intend to preempt the field of firearm control when it adopted laws on gun control, and that N.J.S.A. 40:48-1(18) can be used to locally regulate firearms.

Although the state of New Jersey has adopted many gun violence prevention statutes regulating sales since the Panicucci decision, N.J.S.A. 40:48-1(18), originally adopted in 1917, was reenacted in 1999. The Legislature had a chance to repeal the provision but chose to leave it intact, demonstrating legislative approval for municipal ordinances that "regulate and prohibit" the sale of handguns. The existence of N.J.S.A. 40:48-1(18) demonstrates the Legislature's express intent to permit, rather than prohibit, municipal regulation of handgun sales.

If the concept of "home rule" is to maintain its historic resonance in the Garden State, the trial court's ruling will be and should be reversed on appeal, so that Jersey City can keep focusing on its mission to reduce gun violence and keep its homes, streets, schools and workplaces safe and secure for all of its people. ▲

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