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ATTORNEY GENERAL OF TEXAS

October 21, 2019

The Honorable Morgan Meyer
Chair, General Investigating Committee
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0274

Re: Whether provisions of the Dallas City Code regarding dangerous dogs conflict with chapter 822 of the Health and Safety Code (RQ-0287-KP)

Dear Representative Meyer:

You ask several questions regarding specific provisions of the Dallas City Code that relate to dangerous dogs and whether they conflict with related provisions in chapter 822, subchapter D, of the Health and Safety Code.[1] You question the enforceability of the specific provisions under the home-rule amendment in article XI, section 5 of the Texas Constitution. Request Letter at 1–2. This office does not ordinarily construe specific city ordinance provisions; rather, the City of Dallas ("City") must construe its own ordinances in the first instance. *See* Tex. Att'y Gen. Op. No. GA-0449 (2006) at 1 (leaving to municipal officials the interpretation of their charter and ordinances). We will however "address the legal question of whether a certain type of ordinance conflicts with state law." Tex. Att'y Gen. Op. No. GA-1078 (2014) at 1. Accordingly, we rely on your construction of the specific provisions only for purposes of this analysis and make no determination as a matter of law about the enforceability of a particular City ordinance.

"Home-rule cities possess the power of self-government and look to the Legislature not for grants of authority, but only for limitations on their authority." *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016); *see also* TEX. LOC. GOV'T CODE § 51.072(a). Yet, the Texas Constitution provides that a home-rule city's ordinance shall not "contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." TEX. CONST. art. XI, § 5(a). Thus, an ordinance that conflicts with or is inconsistent with a state statute preempting a particular subject matter is unenforceable. *BCCA Appeal Grp., Inc.*, 496 S.W.3d at 7.

The State's mere entry "into a field of legislation . . . does not automatically preempt that field from city regulation; local regulation, ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable." *Id.* (quotation marks omitted); *see also City of Richardson v. Responsible Dog Owners of Tex.*, 794 S.W.2d 17, 19 (Tex. 1990) ("[T]he mere fact

[1]Letter from Honorable Morgan Meyer, Chair, House Gen. Investigating Comm., to Honorable Ken Paxton, Tex. Att'y Gen. at 1–2 (Apr. 1, 2019), https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs ("Request Letter").

that the legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted."). The Legislature's limitation on local ordinances may be express or implied, but its "intent to impose the limitation must appear with 'unmistakable clarity.'" *City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586, 593 (Tex. 2018). "Absent an express limitation, if the general law and the local regulation can coexist peacefully without stepping on each other's toes, both will be given effect or the latter will be invalid only to the extent of any inconsistency." *Id.*; *see City of Richardson*, 794 S.W.2d at 19 ("A general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached." (quotation marks omitted)). We begin by examining the language of Health and Safety Code chapter 822, subchapter D, which governs dangerous dogs. TEX. HEALTH & SAFETY CODE §§ 822.041–.047.

Generally, subchapter D addresses the determination that a dog is dangerous and imposes requirements and corresponding time limits on an owner of a dog determined to be dangerous. *Id.* § 822.042. Subchapter D provides for the seizure and impoundment of a dangerous dog by the animal control authority[2] when an owner fails to comply with the applicable requirements. *Id.* § 822.042(c). The subchapter provides for the appeal of a determination that a dog is dangerous or a finding that the owner has not complied with the requirements of owning a dangerous dog. *Id.* § 822.0424(a) (applying to a party to an appeal under section 822.0421(d) or a hearing under section 822.0423); *see also id.* §§ 822.0421(d) (providing for appeal of a dangerous dog determination), 822.0423 (providing for hearing to determine whether a dog is dangerous or that owner of the dog did not comply with requirements). Lastly, the subchapter establishes offenses for an attack by a dangerous dog or for failure to comply with the requirements for owning a dangerous dog. *Id.* §§ 822.044, .045.

Relevant to your questions, subchapter D does not expressly preempt all local regulation of dangerous dogs, but instead authorizes it to a certain extent. *See id.* § 822.047. Section 822.047 provides that "[a] county or municipality may place additional requirements or restrictions on dangerous dogs if the requirements or restrictions: (1) are not specific to one breed or several breeds of dogs; and (2) are more stringent than restrictions provided by this subchapter." *Id.* Moreover, subchapter D compels compliance with applicable municipal (or county) regulations, requirements, or restrictions on dangerous dogs. *Id.* § 822.042(a)(4); *see also id.* § 822.042(d) (authorizing municipality or county to prescribe fees and costs related to seizure, acceptance, impoundment, or destruction of a dangerous dog and requiring owner to pay the costs or fee). Yet, within the overlapping state and local regulatory framework, subchapter D provides in specific instances that it applies despite any local regulation. With respect to owner noncompliance, subsection 822.042(e) states that "notwithstanding any other law or local regulation, the court may not order the destruction of a dog during the pendency of an appeal." *Id.* § 822.042(e). And subsection 822.0421(b) gives an owner a right to appeal a dangerous dog determination "[n]otwithstanding any other law, including a municipal ordinance." *Id.* § 822.0421(b); *see also id.* § 822.0424(e) (providing for an appeal to a county court or a county court at law "[n]otwithstanding any other law"). Subsections 822.042(e) and 822.0421(b) thus override with

[2]An "animal control authority" is the "municipal or county animal control office with authority over the area where the dog is kept or a county sheriff in an area with no animal control office." TEX. HEALTH & SAFETY CODE § 822.041(1).

unmistakable clarity a conflicting provision in a local ordinance. *See In re Lee*, 411 S.W.3d 445, 454 (Tex. 2013) (holding that the use of "notwithstanding" in a statute indicates intent that the statute prevails to the extent of a conflict with other law). Considered together, all provisions in subchapter D reveal the Legislature's intent to allow additional local regulation of dangerous dogs while at the same time expressly prohibiting local regulation in the specified circumstances. Accordingly, we consider whether state law expressly prohibits the types of provisions about which you ask or whether the provisions conflict with state law or can be construed in harmony with state law.

You first ask whether a municipal ordinance may reduce the time that section 822.042 permits for an owner to comply with certain requirements imposed on owners of a dangerous dog. Request Letter at 1. The deadline for an owner to comply with the requirements is "[n]ot later than the 30th day" after learning the dog is dangerous. TEX. HEALTH & SAFETY CODE § 822.042(a); *see id.* § 822.042(b)–(c) (requiring an owner of a dangerous dog who does not comply with the requirements to deliver the dog to the animal control authority and authorizing the animal control authority to seize a dangerous dog upon a court's finding that the owner has failed to comply with subsections 822.042(a) or (b)). A municipal ordinance's compliance period imposing a shorter deadline reduces an owner's compliance period granted by section 822.042. A court could not harmonize such an ordinance with section 822.042 to give effect to both at the same time, so the municipal ordinance provision would fall.

Second, you ask whether a municipal ordinance may increase the amount required of an owner for an appeal bond. Request Letter at 1. Subsection 822.0423(c-1) provides that, during the appeal process, the "court shall determine the estimated costs to house and care for the impounded dog during the appeal process and shall set the amount of bond for an appeal adequate to cover those estimated costs." TEX. HEALTH & SAFETY CODE § 822.0423(c-1). The statute authorizes only the court to determine the amount of the appeal bond, and a municipality may not alter that amount by ordinance. However, under subsection 822.0423(c-1) the appeal bond is merely a condition necessary to an appeal. *See id.* The subsection does not purport, and certainly not with unmistakable clarity, to limit other fees or costs that a municipality may impose on an owner. *See id.* § 822.047 (authorizing a municipality to impose additional requirements or restrictions).

Third, you ask whether a municipal ordinance may authorize the director of an animal control authority to destroy a dog found at large without providing for a time period for the owner to redeem the dog or to appeal the determination. Request Letter at 2. Subchapter D does not address the destruction of dogs merely because they are at large.[3] *See generally* TEX. HEALTH & SAFETY CODE §§ 822.041–.047. The subchapter's silence on dogs at large cannot be said to preempt an ordinance that regulates dangerous dogs at large. *See City of Richardson*, 794 S.W.2d at 19 (an ordinance can be more specific than the Health and Safety Code and not be conflicting or inconsistent); *see also Washer v. City of Borger*, No. 07-16-00413-CV, 2018 WL 3637379, *4

[3]Although other statutes may address the destruction of a dog found at large, they are beyond the scope of your question. *See id.* §§ 826.033(a) (relating to restraint, impoundment, and disposition of unrestrained animals under the Rabies Control Act), 822.013(a) (relating to the killing of a dog or coyote that attacks another animal), 822.031 (prohibiting unregistered dogs from running at large in county).

(Tex. App.—Amarillo July 31, 2018, no pet.) (mem. op.) ("Although the Ordinances are more specific, they are not conflicting or inconsistent with the Texas Health and Safety Code."). However, Texas law recognizes that a pet dog is "property in the eyes of the law" and a "special form of personal property." *Strickland v. Medlen*, 397 S.W.3d 184, 185, 192 (Tex. 2013). Though an ordinance providing for the destruction of a dog running at large could be a valid exercise of a municipality's police power, the government's impoundment or destruction of personal property invokes the protection of due process of law. *See* TEX. CONST. art. I, § 17, U.S. CONST. amend. XIV, § 1; *see also Jenkins v. City of Waxahachie*, 392 S.W.2d 482, 484 (Tex. Civ. App.—Waco 1965, writ ref'd n.r.e.) (reviewing an ordinance provision authorizing the destruction of a dog found at large and not redeemed within 72 hours). The United States Supreme Court recognizes that "due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (setting out a three-factor test to balance the interests of the State against the property deprivation to determine what type of process is constitutionally due (quotation marks omitted)). While a court will utilize the *Mathews* factors to balance the municipality's interest against the dog owner's rights to determine the process constitutionally required, a municipal ordinance affording an owner no process to redeem the dog or to appeal certain determinations whatsoever would likely fail a procedural due process challenge.

Specific to appeals, subchapter D currently provides for a right to appeal certain determinations and hearings regarding dogs and their owners. *See* TEX. HEALTH & SAFETY CODE § 822.0424(a) (providing for an appeal of a decision under section 822.0421(d) or hearing under section 822.0423); *see also id.* §§ 822.0421(d) (providing for appeal of a determination that a dog is dangerous), 822.0423 (providing for hearing on whether a dog is dangerous or whether owner has complied with the requirements of owning a dangerous dog). Importantly, during the pendency of an appeal under section 822.0424, the "court may not order the destruction of a dog." *Id.* § 822.042(e). This limitation on the court's authority to order the destruction of the dog applies "notwithstanding any other law or local regulation." *Id.* A municipal regulation providing for the destruction of a dog during an appeal is contrary to the statute and unenforceable.

Lastly, you ask whether a municipal ordinance may control what an owner does with a dog once taken out of its jurisdiction and whether a city's authority to govern the dog extends to any location throughout the State and county for the life of the dog. Request Letter at 2. As a general matter, a city can exercise its powers only within the city's corporate limits unless the law extends its power to apply to areas outside those limits. *See City of Austin v. Jamail*, 662 S.W.2d 779, 782–83 (Tex. App.—Austin 1983, writ dism'd); *see also City of West Lake Hills v. Westwood Legal Def. Fund*, 598 S.W.2d 681, 687 (Tex. App.—Waco 1980, no writ) (recognizing that generally "a municipal court only has jurisdiction to enforce violations occurring within the corporate limits of the city"). Nothing in subchapter D authorizes a city to extend its dangerous dog ordinance outside of its city limits.

SUMMARY

Subchapter D, chapter 822 of the Health and Safety Code governs dangerous dogs and incorporates local regulation. Under the home-rule amendment of the Texas Constitution, however, a municipality cannot adopt an ordinance that conflicts with or is inconsistent with state law.

Section 822.042 allows thirty days for an owner to comply with the applicable requirements for owning a dangerous dog. A municipal ordinance imposing a shorter compliance deadline cannot be harmonized with the statute and therefore the municipal ordinance provision would fall.

Subsection 822.0423(c-1) provides for an appeal bond in an amount established by the court. A municipal ordinance seeking to change the amount of an appeal bond is unenforceable. The section does not, however, purport to limit other fees or costs that a municipality may impose on an owner.

Though a municipal ordinance providing for the destruction of a dog running at large could be a valid exercise of a municipality's police power, the government's impoundment or destruction of personal property invokes the constitutional protection of due process of law. A municipal ordinance affording an owner no process to redeem the dog or to appeal certain determinations whatsoever would likely fail a procedural due process challenge. Moreover, section 822.0424 provides a right to appeal certain determinations made with respect to a dangerous dog and its owner. And subsection 822.042(e) expressly protects a dangerous dog from destruction during the pendency of such an appeal. A municipal ordinance providing for the destruction of a dangerous dog during the appeal is contrary to the statute and is unenforceable.

A municipality may exercise its powers only within its corporate limits unless its power is extended by law to apply to areas outside those limits. Nothing in subchapter D authorizes a city to extend its dangerous dog ordinance outside of its city limits.

Very truly yours,

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