



NRA-ILA

NATIONAL RIFLE ASSOCIATION OF AMERICA
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Memorandum

To: Baltimore Council President Bernard Young
Members of the Baltimore City Council
From: Shannon Alford, Maryland State Liaison
Date: October 20, 2016
Re: Proposed Ordinance, Council Bill 16-0761

This letter outlines initial concerns raised by a proposed Ordinance, Council Bill 16-0761, read for a first time on September 19, 2016 (“the proposed Ordinance”).

The National Rifle Association of America, Inc. (“NRA”) is a nonprofit, voluntary membership organization dedicated to preserving and defending the Second Amendment to the United States Constitution. Insofar as the proposed Ordinance prohibits the possession and ownership of otherwise legal non-powder guns, even for lawful educational and recreational purposes, and proposes a ban on firearms that are replica or collector firearms, the NRA members in Maryland have a clear interest in how this proposed Ordinance will adversely affect law-abiding citizens in contravention of the right to keep and bear arms in the Second Amendment.

The proposed Ordinance, § 39-1, defines a “replica gun” as “any toy, imitation, facsimile or replica pistol, revolver, shotgun, rifle, air rifle, B-B gun, pellet gun, machine gun, or other simulated weapon, which because of its color, size, shape, or other characteristics, can reasonably be perceived to be a real firearm.” The operative section, § 39-2, prohibits outright the owning, carrying, or possession of any “replica gun” in the City of Baltimore.

This proposed Ordinance raises several concerns.

Federal law, 15 U.S.C. § 5001, already addresses “toy, look-alike, or imitation firearm[s].” This legislation curtails and preempts state and local laws or ordinances: 15 U.S.C. § 5001(g) provides that no state may prohibit the sale or manufacture of any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898, or, other than prohibiting the sale to minors, prohibit the sale of traditional B-B, paint ball, or pellet-firing air guns that expel a projectile through the force of air pressure.

Although the proposed Ordinance doesn't mention "sales," the United States Supreme Court described the right to sell or otherwise dispose of an item as an integral component or "incident of ownership." *Henderson v. United States*, 575 U. S. ____ (2015). Because the proposed Ordinance absolutely prohibits any ownership of "replica guns," it necessarily prohibits all included and lesser "incidents" of such ownership, such as sales or transfers of these items. The proposed Ordinance directly conflicts with federal law and is therefore preempted.

In addition to exceeding the scope of what is permitted under federal law, the proposed Ordinance exceeds the limits of municipal authority in another way. The Baltimore City Charter, at § 27, grants the City "all the power commonly known as the Police Power" but with this important limitation: the grant applies only to "the same extent as the State has or could exercise that power within the limits of Baltimore City." The proposed Ordinance rests on this municipal police power (being an amendment to the Police Ordinances), and accordingly, the City of Baltimore has no authority in law to regulate beyond what may be legislated by the State itself. State laws that ban sales of "look-alike firearms" are prohibited, and the City is expressly forbidden to exercise its police powers in such circumstances.

Second, the specific inclusion of a "replica... shotgun, rifle" in the proposed Ordinance creates uncertainty as to the interpretation, scope and enforcement of the proposed Ordinance due to language in existing Baltimore ordinances. A "replica gun" under the proposed Ordinance may include an actual firearm because Baltimore City Code, Art. 19, § 59-1(a)(2), defines "antique firearms" as including "*any replica of any firearm*" described in that subsection. That law, in § 59-1, allows these replicas and exempts them from the prohibition on carrying firearms about the person or in a vehicle.

Another deficiency in the proposed Ordinance is the lack of reasonable exemptions. The proposed Ordinance requires law enforcement officers to "seize" and take into police custody any item believed to be a replica gun pursuant to the proposed Ordinance, § 39-5. Because the Ordinance lacks an exemption on carrying or possession of any "replica gun" by law enforcement officers, in complying with the mandatory direction in § 39-5 the officer at the same time commits a violation of the ordinance. The deficiency is compounded by the lack of any exemptions for lawful ownership, possession and carrying: for example, within the person's place of abode, premises or vehicle, at a target range or gun or trade show, as part of a historic reenactment, for ROTC or JROTC programs and activities, for props on movie sets, or for persons lawfully transporting such items through and to a point outside the city, just to list a few.

Most troubling, however, is the directive contained in the proposed Ordinance at § 39-5. This authorizes a law enforcement officer to seize, without a warrant, anything the officer has "probable cause" to believe is a replica gun. "Probable cause" is a relatively low standard of proof, and because all ownership, possession and carrying of a "replica gun" is prohibited, this authorizes police to investigate any situation in which a potential replica gun is suspected to be present, even if the "replica" is an actual firearm, possessed and

carried in compliance with the law (e.g., as authorized by Baltimore Code, Art. 19, § 59-1, at a residence, fixed place of business, target range, gun show, historic reenactment, or civic event). What the proposed Ordinance creates is new police authority to stop persons, including those who are lawfully carrying or in possession of firearms, and seize otherwise lawful property.

The proposed Ordinance lacks a preamble outlining the legislative policy. However, existing Baltimore ordinances prohibit allowing minors to access firearms, and prohibit providing a minor with or allowing a minor or anyone believed to be a minor to use an air gun, pellet gun or paintball gun. Baltimore already has a comprehensive ban on *anyone* possessing or using any gas- or air- pellet gun or paintball gun in the city, except for four exceptions, and already prohibits anyone from carrying a firearm about the person with the intent to use the firearm in the commission of a crime; Baltimore City Code, Art. 19, §§ 59-1(b), 59-26 and 59-12. There is no research or other information provided that links the new bans in this proposed Ordinance to increased public safety or more effective law enforcement.

Quite simply, the proposed Ordinance is bad law and bad policy. It does precisely that which Congress provided that States and localities may not do. It oversteps the limits of the authority delegated to the local government. It criminalizes ordinary and lawful conduct, including conduct by the law enforcement officers who are authorized to enforce its provisions, and contains no exceptions recognizing legitimate educational, recreational and other uses of “replica guns.” If the intention is to protect children and police officers from apprehended misuses of firearms and non-powder guns, it fails to show how banning replicas will work better than the prohibitions already in place in Baltimore’s laws. The proposed Ordinance sanctions and enables a policy whereby completely innocent citizens, lawfully in possession of a firearm, face new and intrusive police actions. Nothing in the proposed Ordinance supports a claim that Baltimoreans will be safer because of this Ordinance.