

1982 WL 43763 (Alaska A.G.)

Office of the Attorney General

State of Alaska
File No. 166-486-82
November 19, 1982

Authority of Board of Game to Adopt Regulations for Public Safety Purposes

*1 Milstead C. Zahn
Executive Director
Boards of Fisheries and Game
Department of Fish and Game

Your October 6, 1982 memorandum requested advice from this office regarding the scope of authority of the Board of Game to adopt hunting regulations that serve a purpose other than wildlife management. In addition, you asked seven specific questions about game board prohibitions and restrictions relating to shooting.

By way of summary response, the Board of Game may not adopt regulations that exceed the authority delegated to that board by the legislature. Although the Board of Game's authority will be broadly construed, the purpose of the regulations must relate to the conservation and development of the game resources of the state, including resource utilization and allocation. Regulations based upon a purely public safety purpose are not within the scope of the board's authority. These conclusions are analyzed in more detail below.

Any determination of the extent of the Board of Game's authority to adopt regulations requires an examination of the statutes which created the board and established its powers. Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d 897, 901 (Alaska 1981). The legislature created the Alaska Board of Game as a separate P.2d 897, 901 (Alaska 1981). conservation and development of the game resources of the state' [AS 16.05.221\(b\)](#).¹ The legislature gave the Board of Game specific regulation-making powers, but excluded administrative, budgeting, and fiscal powers from the board's functions. [AS 16.05.241](#). The primary regulatory powers of the board are set out at [AS 16.05.255](#), as discussed below.² In addition, the Board of Game has authority to adopt emergency regulations under [AS 44.62.250](#), where 'necessary for the immediate preservation of the public peace, health, safety, or general welfare.' However, this does not confer upon the Board of Game broad powers to enact regulations outside the scope of conservation and development purposes. The emergency regulation statutes 'do not . . . augment the authority of a state agency to adopt, administer, or enforce a regulation', and the regulation must still be within the 'scope of authority' conferred upon the board. [AS 44.62.020](#).

[AS 16.05.255](#) provides that the Board of Game 'may make regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62)' for specific enumerated game management purposes.³ Game board regulations must to within the scope of these statutory authorities, and 'must be premised on the need to effectuate conservation and development purposes. Kenai Peninsula Fisherman's Cooperative Association v. State, Id. at 903.

As a general rule, conservation laws such as fish and game statutes are liberally construed to achieve their intended purpose. Id. Conservation and development purposes include the concept of utilization of the resource. Id. 'Conservation' has been defined as 'planned management of a resource to prevent exploitation, destruction, or neglect', and 'development' has been defined as 'to make available or usable'. See Webster's New Collegiate Dictionary (1973), quoted in Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d at 903.

*2 Thus, the Board of Game is not vested with any inherent or common law power to enact regulations for the general welfare or public safety. It must act within the scope of authority delegated by the legislature. Id. The board's regulations must be consistent with the statute that grants regulatory authority and be reasonably necessary to carry out the statute's purposes. [AS 44.62.030](#). In other words, the regulations of a state agency must be within the framework of the statutory grant of authority: 'the agency may make rules and regulations supplementing the legislation for its complete operation and enforcement, so long as such rules and regulations are within the standards set forth in the act of the legislative body.' [Adams v. Industrial Commission](#), 547 P.2d 1089, 1090 (Ariz. App. 1976), citing, inter alia, Ruiz v. Morton, 462 F.2d 818 (9th Cir. 1972), affirmed 415 U.S. 199 (1974) .

None of the functions of the Board of Game set out at [AS 16.05.255](#) or elsewhere, grant the Board of Game any independent authority to adopt regulations for public safety purposes.⁴ However, the board may adopt regulations that serve a conservation and development purpose, but which incidently have a public safety effect. See e.g., Kenai Peninsula Fisherman's Cooperative Association, Id. at 908.

With the above general principles in mind, the following responses address the seven specific questions set out in your memorandum of October 6, 1982.

1. 'May the board open and close areas to game harvest for purposes other than resource management necessity?'

Answer: No, the board may only open and close areas to game harvest for purposes of conservation and development of the game resources of the state. The board may, under [AS 16.05.255\(b\)](#) and [AS 16.05.257](#), restrict defined geographic areas to subsistence uses only, but the subsistence harvest must be within conservation limits . By analogy, our state supreme court has held that the Commissioner of the Department of Fish and Game's broad authority to adopt emergency field orders under [AS 16.05.060](#) to open and and close seasons 'where circumstances require', must relate to a resource conservation and development purpose. [Kenai Peninsula Fisherman's Cooperative Association v. State](#), 628 P.2d 897 (Alaska 1981). Similarly the Board of Game's implementation of its statutory authority must relate to resource conservation and development needs .⁵

2. 'May the board prohibit shooting in defined areas for the purpose of public safety, or the protection of property?'

Answer: No, the board may only enact game management regulations, but these may include regulation of the 'methods and means' used to take game ([AS 16.05.255\(a\)\(3\)](#)), and allocations among users, such as bow hunters, rifle hunters, and photographers. If there is coincidentally an effect on public safety, this does not invalidate the regulation.

3. 'In view of the history of shooting prohibitions on highways in Alaska and in other states, and restrictions on shooting over navigable waters, is there any common law precedence for the boards to regulate shooting, per se, when not in a resource management context?'

*3 Answer: No. As discussed above, the Board of Game has no common law powers independent of those powers specifically delegated by the legislature. Clearly, the Board of Game could restrict hunting with guns in the vicinity of highways as a means of making hunting less efficient, to effectuate a conservation purpose. However, merely prohibiting discharge of firearms along roadways for public safety purposes is not within the parameters of the board's authority delegated by the legislature.

4. 'Does the state and federal subsistence priority restrict board authority to make shooting or harvest closures that are not management necessities?'

Answer: Because the Board does not have authority to make shooting or harvest closures that are not related to conservation and development, the subsistence law cannot 'restrict' any such 'authority'. The subsistence law, set out at [AS 16.05.255\(b\)](#) authorizes adoption of regulations to protect customary and traditional subsistence uses by providing allocations of available harvest. The determination of when that harvest is available must be based on a conservation or development purpose. Once that determination has been made, the subsistence law allows the Board of Game to divide up the available take among subsistence and non-subsistence uses and users giving subsistence uses a priority.

5. 'What authorities other than AS 16 regulate firearm use and hunting closures, such as on highways and state parks? Do these authorities offer any management convenience or restriction in the situation under discussion?'

Answer: Several Alaska statutes relate directly to the use of firearms and other weapons for general public safety purposes, and other statutes grant authority to agencies such as the Department of Natural Resources and local governments to adopt regulations controlling firearms discharge for public safety purposes.⁶ Although these statutes do not restrict the authority of the Board of Game to enact regulations for the conservation and development of the wildlife resources of the state, they may effectively result in closures, for public safety purposes of areas that the Board of Game would otherwise wish to have open to hunting.

AS 41.20.020(4) authorizes the Department of Natural Resources to 'control, develop and maintain state parks and recreational areas', and AS 41.20.020(6) authorizes that department to 'establish in accordance with the Administrative Procedures Act [AS 44.62] rules and regulations governing the use and designating incompatible uses within the boundaries of state parks and recreational areas to protect property and preserve the peace.' Based upon this broad authority, the Division of Parks, Department of Natural Resources, can regulate discharge of firearms within areas under its jurisdiction. See 1982 Informal Op. Att'y Gen'l (Alaska, November 19, 1982).

In addition, several statutes establishing specific parks incorporate language relating to discharge of firearms within the park, generally allowing the discharge of firearms 'if authorized by a regulation of the Department of Natural Resources.' See AS 41.20.230(c); AS 41.20.260(e); and AS 41.20.280. Although state park regulations may limit the discharge of firearms, [AS 41.99.010](#) clearly specifies that 'nothing in this title denies the Alaska Department of Fish and Game or the Boards of Fisheries and Game their management and enforcement responsibilities relating to fish and game within the state.' Thus, regulation of firearms discharge by the Division of Parks must relate to the purposes and policies for which park and recreation areas were created, and may not be based on a game management objective. See [AS 44.62.020](#).

*4 The very fact that the legislature has dealt separately with public safety considerations regarding the discharge of firearms on a statewide basis (in the criminal code and within parks and recreational areas) lends support to the argument that the authority of the Board of Game to adopt regulations for the 'conservation and development' of the wildlife resources does not include the broad authority to enact regulations solely for public safety purposes.⁷

6. 'Where statutory firearm restrictions exist, as in [AS 11.61.210\(a\)\(2\)](#), is the board obligated to promulgate its regulations in a manner consistent with such statutes?'

Answer: No, the Board of Game is not required to adopt 'consistent' regulations that in effect duplicate existing statutes. By the same token, the board should not adopt regulations that conflict with statutes, since state statutes have precedence over board regulations. The example you gave, [AS 11.61.210\(a\)\(2\)](#), is a state statute regarding misconduct involving weapons, which precludes discharging a firearm from, on, or across a highway. As indicated in the above discussions, the Board of Game does not have authority to enact regulations for strictly public safety purposes, and therefore could not adopt a regulation directly prohibiting discharge of firearms. The board could, however, as discussed above, enact a regulation restricting hunting near a road system where there is a valid management objective. For example, the board might find that the access to game animals provided by hunting from a road system might result in an overharvest; the board could then enact a regulation precluding hunting within a certain distance from that road system.

Where another statute or regulation (for example, a park statute or regulation that closes a park to the discharge of firearms), already essentially closes an area to hunting, the Board of Game is not under a duty to enact a parallel regulation closing that area to hunting, although it could if the closure was deemed necessary for game management.⁸ Clearly the board must take into account the effect that the other statute or regulation will have on overall game management in that area. Since the board cannot open the area to the discharge of firearms, it should anticipate reduced harvest. In the park regulation example, hunting could, however, continue by means other than firearms, if this were consistent with the game management objectives in the area.

Hunting regulations are an important part of the complex fabric of resource and land use laws in the state. Regardless of which agency (Game Board or Department of Natural Resources) enacts regulations restricting hunting or the methods used for hunting, the state is under a duty to inform the public of the closure. The state could provide this notice either in a separate pamphlet distributed by the Department of Natural Resources (for a park regulation) or, more simply, by supplementing the game hunting regulation booklet with notice of the areas closed by park regulation. See [Wacek v. State, 530 P.2d 751 \(Alaska 1975\)](#).

7. 'Do local governments, *i.e.* cities and boroughs, have an obligation of authority on behalf of public safety or local zoning that preempts state authority to manage wildlife?'

*5 Answer: No, local governments cannot preempt state authority. However, local governments, in the exercise of valid police powers, may restrict the discharge of firearms or enact similar kinds of ordinances that may have an incidental effect on hunting and trapping. However, as discussed further below, where the local government ordinance goes beyond legitimate local concerns or where it frustrates a statewide program for game management, the local regulation must yield. [Macauley v. Hildebrand, 491 P.2d 120 \(Alaska 1971\)](#).

Under the [Alaska constitution, Article 10, Section 1](#), local government powers are to be given a liberal construction. Home rule boroughs or cities may exercise all legislative powers not prohibited by law or by charter. [Alaska Constitution Article 10, Section 11](#). As the court stated in [Jefferson v. State, 527 P.2d 37, 43 \(Alaska 1974\)](#) 'however, to say that home rule powers are intended to be broadly applied in Alaska is not say that they are intended to be pre-eminent. The constitution's authors did not intend to create city states with mini legislature.'

In determining when a municipal ordinance is invalid as being preempted by a state statute, the court looks at whether the exercise of the authority by the local government has been prohibited by law. [City of Kodiak v. Jackson, 584 P.2d 1130 \(Alaska 1978\)](#). The prohibition must be either by express terms or by implication, such as where the statute and ordinance are 'so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law.' [City of Kodiak v. Jackson, 584 P.2d 1130, 1132 \(Alaska 1978\)](#) (holding unenforceable a city ordinance requiring mandatory minimum sentences for assault against a police officer where state statute was to the contrary).

Stated otherwise, preemption by state statutes exists either by express legislative direction, or where there is a direct conflict with a statute, or where the ordinance 'substantially interferes with the effective functioning of a state statute or regulation or its underlying purpose'. [Liberati v. Bristol Bay Borough, 584 P.2d 1115 \(Alaska 1978\)](#). Merely because the state has enacted legislation concerning a particular subject does not necessarily mean that all municipal power to enact on the same subject is lost. [Id. at 1121](#). In the absence of express preemption, one must inquire whether the local government ordinance serves a legitimate local concern, and the extent to which it interferes with state statutes.

As the court held in [Bennion v. City and County of Denver, 504 P.2d 350 \(Colo. 1972\)](#), it is often difficult to determine what is a legitimate local, as opposed to a statewide, concern. In that case, the court held that a local government's interest in outlawing resistance to unlawful arrest was not exclusively a matter of local concern, and the local ordinance was deemed invalid in light of a state law authorizing resistance to unlawful arrest.

*6 In [Liberati v. Bristol Bay Borough](#), 584 P.2d 1115 (Alaska 1978), the court upheld a borough tax on raw fish, even though some of the incidents of the sale of raw fish were regulated under state law, and even though the state does manage the harvesting of fish ‘to a very detailed extent.’ [Id.](#) at 1121. The court held the tax to be a legitimate exercise of local taxing power.

A borough ordinance that did not directly address legitimate local concerns and which frustrated overall game management would probably be held invalid as preempted by the statewide interest in uniform game management. For example, if a borough, through a firearms or similar ordinance, were effectively to close down huge areas of the state to hunting or trapping, for reasons not reasonably related to protection of life and property, the local ordinance would probably be held invalid as a frustration of the statewide management of game. The reason for this result is that effective statewide game management, including regulation of species that transverse local political boundaries, requires uniform management decisions, leaving no room for independent game management jurisdiction by local governments. Localized game control would ‘substantially interfere’ with the purposes of conservation and development of the resources and the functions of the Board of Game, under the test articulated in [Liberati](#).

In summary, under no circumstances does a local governmental ordinance ‘preempt’ state authority. Local governments may, however, enact ordinances within their general police powers that are on the same subject as state statutes, so long as they do not conflict with the state statute or frustrate the exercise of statewide laws. Local governments do not have authority to directly regulate the management of fish and wildlife, but may enact legitimate police power regulations such as restrictions on the use of firearms where they are reasonably necessary to protect life or property.

I hope these responses have answered all your questions. If you have further inquiries, please direct them to this office.

Wilson L. Condon
Attorney General
Sarah Elizabeth McCracken
Assistant Attorney General
AGO Anchorage

Footnotes

- 1 Before 1975, fish and game management authority was vested in a single board, the Alaska Board of Fish and Game.
- 2 Other statutes authorize adoption of regulations for specific purposes: [AS 16.05.260](#) (advisory committees); [AS 16.05.780](#) (antlerless moose seasons); [AS 16.20.034](#) (Mendenhall Wetlands State Game Refuge); [AS 16.20.040](#) (State Game Refuges); [AS 16.20.160](#) (McNeil State Game Sanctuary); [AS 16.20.240](#) (critical habitat areas) . With the exception of the statutes discussed in footnote 4, all the regulation-making authorities in these statutes are premised on ‘conservation and development’ or ‘conservation and protection’ purposes. See discussion of ‘protection’ in footnote 4.
- 3 [AS 16.05.255](#) provides in full: (a) the Board of Game may make regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for
 - (1) setting apart game reserve areas, refuges and sanctuaries in the waters and the lands of the state over which it has jurisdiction, subject to the approval of legislature;
 - (2) establishment of open and closed seasons and areas for the taking of game;
 - (3) establishment of the means and methods employed in the pursuit, capture and transport of game;
 - (4) setting quotas and bag limits for the taking of game;
 - (5) classifying game as game birds, song birds, big game animals, fur bearing animals, predators or other categories;
 - (6) investigating and determining the extent and effect of predation and competition among game in the state, exercising control measures considered necessary to the resources of the state and designating game management units or parts of game management units in which bounties for predatory animals shall be paid;

- (7) engaging in biological research, watershed and habitat improvement, and game management, protection, propagation, and stocking;
- (8) entering into cooperative agreements with educational institutions and state, federal or other agencies to promote game research, management, education, and information and to train men for game management;
- (9) prohibiting the live capture, possession, transport, or release of native or exotic game or their eggs;
- (10) establishing the times and dates during which the issuance of game licenses, permits and registrations and the transfer of permits and registrations between registration areas and game management units or subunits is allowed.

(b) the Board of Game shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) permitting the taking of game for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of such regulations will jeopardize or interfere with the maintenance of game resources on a sustained-yield basis. Whenever it is necessary to restrict the taking of game to assure the maintenance of game resources on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria: (1) customary and direct dependence upon the resource as the mainstay as one's livelihood; (2) local residency; and (3) availability of alternative resources.

4 Some game board statutes pertaining to certain limited subjects do authorize adoption of regulations for arguably non-conservation or development purposes. [AS 16.05.255](#)(b) and [AS 16.05.257](#) provide for adoption of regulations allocating the available game harvest for subsistence uses. However, the statutes require that subsistence regulations be within the general 'conservation' bounds of maintaining game populations based on the sustained yield, and only authorize priority allocations based on socio-economic considerations within that general framework.

[AS 16.20.034](#), establishing the Mendenhall Wetlands State Game Refuge, authorizes the Board of Game to establish regulations for hunting and recreational activities ([AS 16.20.034](#)(e) and (f)), but specifies that no use or activity in the Refuge 'may occur in a manner that creates a hazard to aircraft.' [AS 16.20.034](#)(h). Under this direct authority, the board could tailor hunting regulations to take into account safety to aircraft. In contrast, [AS 16.30.040](#), relating to refuges in general, authorizes the Board of Game to establish regulations it considers 'advisable for conservation and protection purposes' in state game refuges. We believe the term 'protection' as used in this statute refers to protection of the game and its habitat, not protection of the public in general. This conclusion is based on the overall legislative purpose in establishing refuges, including the 'value to the state and the nation of areas of unspoiled habitat and the game characteristic to it' ([AS 16.20.010](#)(3)), and the purpose of the refuges to 'protect and preserve the natural habitat and game population in certain designated areas of the state.' ([AS 16.20.020](#))

5 In the one area of commercial harvest regulated by the board, trapping, the board may have more flexibility to regulate for non-biological purposes in order to promote development of the industry. For example, the board might determine that allowing trapping in a specific area was inconsistent with an overall plan to foster trapping because of the quality of pelts in that area, or where traps would be wasted by being sprung by domestic dogs. Also, within the board's broad authority to regulate uses of game, it may make allocations for such activities as viewing.

6 [AS 11.61.200](#) specifies those activities that constitute misconduct involving weapons in the first degree. [AS 11.61.210](#) relates to misconduct involving weapons in the second degree, and [AS 11.61.220](#) specifies misconduct involving weapons in the third degree. [AS 11.61.210](#), for example, includes the language that a person who 'discharges a firearm from, on, or across a highway or discharges a firearm with reckless disregard for a risk of damage to property or a risk or physical injury to a person' is guilty of misconduct involving a weapon in the second degree.

In addition, other statutes including [AS 11.46.482](#), [AS 11.46.484](#) and [AS 11.46.486](#), relating to criminal mischief, implicitly restrict the use of potentially dangerous items, such as firearms that can create a risk of damage to property.

7 The Department of Fish and Game (as opposed to the Board of Game) does have authority to develop a hunter safety program and develop shooting facilities for the people of the state. [AS 16.55.010-AS 16.05.040](#).

8 [AS 41.20.220](#), relating specifically to Chugach State Park, mandates that the Department of Fish and Game 'cooperate' with the Department of Natural Resources to provide for the purpose for which the Park was created and which are relevant to the duties of the Department of Fish and Game. It could be argued that this requires the Board of Game to adopt regulations that dovetail with Chugach Park regulations (See 1980 Informal Op. Att'y Gen'l (Alaska, May 25, 1980)).

1982 WL 43763 (Alaska A.G.)