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October 13, 2011

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Council Member Angel Carrillo
Council Member Robert Gonzales
CITY OF AZUSA
MAYOR & CITY COUNCIL MEMBERS
213 E. Foothill Blvd.
Azusa, CA 91702-2550
VIA EMAIL, U. S. MAIL, & FAX

**Re: Opposition to Zoning Code Amendment 233 – 2011 Development Code Cleanup
Amending Various Sections of Chapter 88 of the Azusa Municipal Code**

Honorable Mayor and Council Members:

We write on behalf of our clients the National Rifle Association (NRA) and the California Rifle and Pistol Association (CRPA), as well as the hundreds of thousands of their members in California, including members in the City of Azusa, to address concerns regarding a proposed ordinance being considered by the Azusa City Council (ACC) which would amend various sections of Chapter 88 of the Azusa Municipal Code (“Code Amendment 233”), to, among other things, place new restrictions on firearm vendors.

It is our understanding that at its October 3, 2011 meeting, the ACC voted to pass Code Amendment 233 on first reading, and that the item will soon come up for second reading and potential adoption. With regard to firearm vendors, Code Amendment 233 would do the following:

1. Amend the Development Code to require a Use Permit for businesses engaged in the retail sale of firearms;
2. Restrict the retail sale of firearms to non-neighborhood zones, corridor zones excluding the San Gabriel corridor zone, and the District West End Light Industrial (DWL) or light industrial zone;

3. Require a minimum separation distance of five hundred feet between each commercial zoned parcel containing a retail firearms use;
4. Require a minimum separation distance of five hundred feet between each commercial zoned parcel containing a retail firearms use and a school or church;
5. Prohibit firearm vendors from operation on commercial parcels that abut residentially zoned parcels; and
6. Create revised standards for firearm sales that will be more restrictive than they are currently.

This letter is intended to address the legal ramifications of Code Amendment 233's provisions that affect firearm vendors, so the ACC understands the full scope of the matter before it.

I. DISCUSSION

A. Code Amendment 233 Violates Various Constitutional Principles

The provisions being proposed for addition to the Azusa development code are improper content-based restrictions that violate the First Amendment, unduly and unjustifiably burden activity protected by the Second Amendment, treat similarly situated people differently in violation of equal protection, and run afoul of federal preemption principles.

1. First Amendment

The display of firearms at locations open to the public is expressive conduct protected by the First Amendment. A panel of the Ninth Circuit Court of Appeals did not contradict this notion when it was recently given the opportunity to. *See Nordyke v. King*, 644 F.3d 776, 791 (9th Cir. 2011). The zoning provisions suppress that expressive conduct by relegating gun stores to limited areas merely because of the content they involve. The First Amendment does not permit such unless the regulation meets strict scrutiny. *See Texas v. Johnson*, 491 U.S. 397, 412 (1989).

The zoning provisions of Code Amendment 233 relating to firearm vendors cannot pass constitutional muster because they do not employ the least restrictive means necessary to achieve the City's interest.¹ There already exist myriad laws prohibiting firearms from being carried in public while loaded, discharged in public, brandished, possessed within 1,000 feet of a school zone, etc., and enforcement of those laws is a less restrictive and more efficient means of achieving Azusa's

¹ *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983).

interests.

It is true that cities may zone businesses if there is a reason for doing so unrelated to the content of the “speech” involved, such as to protect against secondary effects that are detrimental to the quality of public life. *See City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41 (1986). But, the city must support its reasons for doing so with facts. *Id.* at 50-52. Though Azusa need not conduct its own original study regarding the facts, it must provide some factual showing from another city’s study or other source. *Id.* There is no evidence that firearm stores are a threat to their surrounding areas.

In fact, when recently considering adoption of a similar ordinance, the City of Sunnyvale performed its own study about the secondary effects of firearm vendors, and concluded there was no evidence that firearm stores are a threat to their surrounding areas. Sunnyvale staff noted in their study that “there ha[d] been *no evidence of increased crime, property devaluation or land use incompatibilities* as the result of the businesses.”² Likewise, Sunnyvale “staff ha[d] not identified any adverse land use impacts associated with a firearms store,”³ and they concluded that “there is no correlation between gun-related crimes and the location of firearms businesses.”⁴

Even if the City’s purpose for the zoning provisions is to address secondary effects, unrelated to firearm stores’ expressive conduct, it has not met, and likely cannot meet, its burden to justify them. The City of Sunnyvale got it right by conducting an actual study of the matter and rejecting its similar ordinance based on the facts, not its members’ feelings. The ACC should do likewise.

2. Second Amendment

The United States Supreme Court has held that a city’s “zoning power is not infinite and unchallengeable; it ‘must be exercised within constitutional limits.’ Accordingly, it is subject to judicial review; and is most often the case, the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.” *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (citations omitted). And, “when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest.” *Id.*

² See 2011-7071 Location and Operation of Firearm Sales Businesses (Study Issue) Staff Report, available at <http://sunnyvale.ca.gov/Portals/0/Sunnyvale/NonCouncilReports/pc/2011/pc-2011-7071.pdf> at 1 (last visited Sept. 22, 2011) (emphasis added).

³ *Id.* at 10.

⁴ See 2011-7071 Location and Operation of Firearm Sales Businesses (Study Issue) Report to Mayor and Council, available at <http://sunnyvale.ca.gov/Portals/0/Sunnyvale/CouncilReports/2011/11-209.pdf> at 5 (last visited Sept. 23, 2011).

It is important to remember that the U.S. Supreme Court has held the right to keep arms to be a fundamental right,⁵ and that several courts, including the Ninth Circuit panel in *Nordyke*, have concluded that the right to keep and bear arms implies a corresponding right to acquire firearms. *See Nordyke*, 644 F.3d at 787; *see also Ezell v. City of Chicago*, 2011 WL 2623511, *14 (July 6, 2011). As such, based on *Schad*, the zoning provisions must be reviewed under heightened scrutiny.⁶

As explained in the previous section discussing the First Amendment, the zoning provisions of Code Amendment 233 cannot meet strict scrutiny. Even under intermediate scrutiny, the government “bears the burden of justifying its restrictions, [and] it must affirmatively establish the reasonable fit” that the test requires. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (internal citation omitted). In other words, “the public benefits of the restrictions must be established by evidence, and not just asserted[;] . . . lawyers’ talk is insufficient.” *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 463 (7th Cir. 2009). As also explained above, there is no evidence that firearm stores are a threat to the areas that surround them.

The Seventh Circuit’s recent decision in *Ezell* (striking down a Chicago zoning ordinance prohibiting the establishment of shooting ranges within the city limits as a violation of the Second Amendment) is instructive here.⁷

3. Equal Protection

Where a zoning ordinance singles out firearm vendors, the principles of equal protection demand consideration of the zoning requirements for similarly situated businesses. Though Code Amendment 233 also affects tattoo shops and massage parlors, it excludes pharmacies, jewelry stores, banks, check-cashing operations, which are regularly robbed for prescription drugs, money and valuables, thereby causing a potentially dangerous situation for neighboring areas. Yet, firearm vendors are being singled out by the zoning restrictions, even though there is *no* evidence of a correlation between increased gun-related crime, property devaluation or other detriments and firearm related businesses. In fact, as already mentioned, the City of Sunnyvale did not identify *any* adverse

⁵ The United States Supreme Court held in its landmark decision, *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Second Amendment guarantees the right of individuals to keep and bear arms free from federal government infringement. *McDonald v. Chicago*, 130 S. Ct. 3020 (2010), “incorporated” the Second Amendment right recognized in *Heller* into the Fourteenth Amendment as a fundamental right, thereby restraining *local* governments from infringing on an individual’s right to keep and bear arms.

⁶ *See also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973).

⁷ At least one court has also struck down a zoning ordinance restricting the locations of abortion providers. *Haskell v. Washington Twp.*, 635 F. Supp. 550 (S.D. Ohio 1986) *rev’d on other grounds*, 864 F.2d 1266 (6th Cir. 1988). That court reasoned that abortion is a fundamental right and thus subject to strict scrutiny: “in finding the standard of review, the important fact is that this lawsuit concerns women’s abortion rights, not that the resolution is a zoning law.” *Id.* at 557

land use impacts associated with firearm stores.

And, “where fundamental right and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized . . .” *Hussey v. City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995). In other words, the zoning provisions making firearm vendors, the purveyors of the right to keep arms, into a classification that is restrained from serving in that capacity must pass heightened scrutiny. As explained above, they cannot.

4. Federal Preemption

The zoning provisions found in Code Amendment 233 also present federal preemption issues. “There are four species of federal preemption: express, conflict, obstacle, and field. . . . [C]onflict preemption will be found when simultaneous compliance with both state and federal directives is impossible.” *Pack v. Superior Court*, No. B228781, 2011 WL 4553155 at *7 (Cal. Ct. App. Oct. 4, 2011) (internal citations and quotation marks omitted).

Federal law requires that firearm dealers conduct business at the premises listed on their federal firearms license. *See* 27 C.F.R. § 478.50. Those firearm vendors currently operating at premises that would be prohibited under Code Amendment 233 would not be able to comply with both federal law and the provisions of Code Amendment 233. Therefore, Code Amendment 233 is federally preempted.

In sum, the zoning provisions in their current form violate multiple constitutional principles. This is not to say that the City of Azusa does not have the authority to restrict the activities of a retail or residential FFL. It just cannot completely ban them or subject them to their own separate zoning scheme without evidence that it is necessary.

II. CONCLUSION

To the extent legal issues remain unresolved, our clients are prepared to resolve them through litigation if necessary. Even if groups such as LCAV promise to provide a legal defense to the City of Azusa *pro bono*, if they lose, the City will still be liable for our clients’ costs and attorneys’ fees, which can be significant.⁸

Our clients understand the need to fight the criminal misuse of firearms and gun violence, and have a variety of *effective* programs available to you upon request. But as the *Fiscal* court admonished: “the goal of any local authority wishing to legislate in the area of gun control should be to accommodate the local interest with the least possible interference with state law . . . Therefore,

⁸ Defending its handgun ban ordinance cost San Francisco roughly \$600,000.00, in addition to \$380,000.00 it paid to the NRA to reimburse it for its attorney’s fees when San Francisco lost.

Honorable Mayor and City Council Members
October 13, 2011
Page 6

when it comes to regulating firearms, local governments are well advised to tread lightly.”⁹

The new area of Second Amendment civil rights jurisprudence is evolving rapidly. The law, and not mere ideology, supports our positions. The City of Azusa would be wise to refrain from adopting this proposed ordinance while this new field of law develops through litigation in other jurisdictions.

If you have any questions or concerns concerning the content of this correspondence, please feel free to contact us at your convenience.

Sincerely,
MICHEL & ASSOCIATES, P.C.



C. D. Michel

CDM/jr

cc: City Clerk Vera Mendoza
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⁹ See *Fiscal v. City and County of San Francisco*, 158 Cal. App. 4th 895, 919 (2008).