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September 30, 2013

Mayor Michael G. Harris
Vice Mayor Jack Weir
Councilmember David E. Durant
Councilmember Timothy M. Flaherty
PLEASANT HILL CITY COUNCIL
Pleasant Hill City Hall
100 Gregory Lane
Pleasant Hill, Ca 94523
VIA FAX (925) 680-0294, EMAIL, & U.S. MAIL

**Re: Proposal to Amend Regulations on the Sale of Firearms and Ammunition –
OPPOSITION**

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 those members residing in the City of Pleasant Hill (the “City”). Our clients oppose adoption of the proposed amendments to Chapter 9.35 of the Pleasant Hill Municipal Code, which introduce several new regulations affecting firearm-related businesses (“the Proposal”).

With the City Council scheduled to consider the Proposal at its September 30, 2013 meeting, we write to express our clients’ concerns regarding its adoption. Specifically, various provisions offend constitutional rights or are preempted by state law. For these reasons, discussed in detail below, we urge you to vote no.

I. THE PROPOSAL OFFENDS VARIOUS CONSTITUTIONAL PRINCIPLES

The provisions being proposed for addition to the municipal code are improper content-based restrictions that violate the First Amendment, they unduly and unjustifiably burden Second Amendment activity, and they treat similarly situated people differently in violation of equal protection.

A. The Proposal Violates the First Amendment

The display of firearms at locations open to the public is arguably expressive conduct protected by the First Amendment.¹ The zoning provisions suppress that expression by relegating gun stores to significantly limited areas seemingly because of the viewpoint they seek to express. While it is true that cities may zone businesses, doing so must be unrelated to the suppression of free expression. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). For instance, the City may seek to protect against secondary effects that are detrimental to the quality of public life. *Id.* But the City must be able to show that such detrimental effects are traceable to the regulated business. *Id.* at 50-52. The City has provided no evidence that firearm stores are a threat to their surrounding areas – and it likely cannot.

Recall, Mayor Harris and Councilmember Durant, the sponsors of the Proposal, candidly admit that existing firearms dealers have heretofore “operated without creating problems for the City.” It is clear then that the Proposal is a general response to a perceived increase in overall gun violence, rather than any real threat posed by gun stores in Pleasant Hill (or other cities, for that matter). Indeed, neither the proposed ordinance, nor the Firearms-Related Ordinance Memorandum provide *any* evidence that firearm businesses themselves contribute to a decline in public safety or welfare.

When considering a similar ordinance, the City of Sunnyvale actually studied the secondary effects of firearm dealers, concluding there was no evidence that firearm stores are a threat to their surrounding areas. Unsurprisingly, city staff found “*no evidence of increased crime, property devaluation or land use incompatibilities* as the result of the [firearm] businesses.”² The city also concluded that “there is no correlation between gun-related crimes and the location of firearms businesses.”³

Thus, even if the zoning provisions aim to address secondary effects unrelated to the stores’ expressive conduct, the City has not met (and likely cannot meet) its burden to justify them.

Furthermore, parts of the Proposal directly prohibit protected commercial speech. Section 9.35.110(15) prevents dealers from advertising the sale of handguns “in any part of the premises where it can readily be seen from the outside.” Commercial speech, such as a placard advertising the sale of handguns from a licensed firearm dealer, has long been considered protected by the First Amendment.

¹ A panel of the Ninth Circuit Court of Appeals recently assumed, without deciding, that the display of guns at a gun show is “expressive conduct.” *Nordyke v. King*, 644 F.3d 776, 791 (9th Cir. 2011).

² See 2011-7071 Location and Operation of Firearm Sales Businesses (Study Issue) Staff Report (hereafter “Sunnyvale Staff Report”), available at <http://sunnyvale.ca.gov/Portals/0/Sunnyvale/NonCouncilReports/pc/2011/pc-2011-7071.pdf> at 1 (last visited Sept. 25, 2013) (emphasis added).

³ 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. 25, 2013).

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Indeed, an advertisement, like those banned by the Proposal, is entitled to First Amendment protection even if it “does no more than propose a commercial transaction.” *Edenfield v. Fane*, 507 U.S. 761 (1993). Blatantly unconstitutional restrictions on commercial speech that have the effect of hindering legitimate business activities without sufficient justification have no place in a Proposal that purports to protect the public from harm.

B. The Proposal Violates the Second Amendment

The United State Supreme Court held in its landmark decision, *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment guarantees the right of individuals to keep and bear arms. The Court later “incorporated” the Second Amendment right recognized in *Heller*, thereby restraining local governments from infringing on an individual’s right to keep and bear arms. *McDonald v. Chicago*, 130 S. Ct. 3020 (2010). And the fundamental right to arms necessarily protects the right to acquire them. *See Andrews v. State*, 50 Tenn. 165, 178 (1871), cited with approval, *Heller*, 554 U.S. at 614; *see also Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011).

As the purveyors of the fundamental right to acquire firearms, firearm dealers – though not exempt from general commercial or zoning – cannot be singled out for exceptionally harsh restrictions and regulations that do not meet heightened scrutiny. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (citations omitted) (“[W]hen a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest.”). But that is exactly what this Proposal does. It places various and onerous burdens on those wishing to conduct a lawful firearms business under the guise of “regulation” without truly furthering any governmental interest.

Problematically, these “regulations” equate to more than a *de minimis* obstacle in the path of law-abiding residents who wish to acquire a firearm. Indeed, the effect of the regulations in the aggregate appears to be a scheme so costly and restrictive as to force legitimate firearms businesses out of Pleasant Hill altogether. And because fundamental rights are involved, the City must provide *evidence* supporting its concerns about the dangers posed by the presence of firearm dealers, not mere pronouncements of *possible* dangers. This it cannot do.

C. The Proposal Violates Equal Protection

The City cannot constitutionally justify the Proposal’s classification of firearm dealers and its disparate treatment of those businesses by means of several particularly harsh zoning and business regulations. “Where fundamental rights 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) (*quoting Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966), and *citing Kramer v. Union Free School Dist.*, 395 U.S. 621, 633 (1969)). In short, classifications that “impinge on personal rights protected by the Constitution” “will be sustained only if they are suitably tailored to serve a compelling state interest,” i.e., meet strict scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

To reiterate, the Proposal impacts Second Amendment activity by heavily regulating the conduct of firearm dealers – the purveyors of the fundamental right to acquire firearms necessary to the meaningful exercise of the individual right to keep and bear arms. *See Heller*, 554 U.S. 570; *McDonald*, 130 S. Ct. 3020; *Ezell*, 651 F.3d at 704. In so regulating, the Proposal significantly limits access to firearms within the City, impinging on personal rights protected by the Second Amendment and triggering strict scrutiny. *See Cleburne*, 473 U.S. at 440.

As explained above, the Proposal’s many stringent regulations and zoning requirements further no compelling governmental interest and are not sufficiently tailored to any such end. Recall, there is *no* evidence of a correlation between increased gun-related crime, property devaluation, or other detriments and the presence of firearms dealers. In fact, as already mentioned, the City of Sunnyvale found *no* adverse land use impacts associated with gun stores. And, as admitted by the Proposal’s sponsors themselves, the existing FFLs in Pleasant Hill have not previously caused any problems for the City. Lacking support that firearm dealers pose any special threat to their communities, the Proposal’s classification and unequal treatment of those businesses cannot meet heightened scrutiny.

II. THE PROPOSAL IS UNNECESSARILY DUPLICATIVE AND IS LARGELY PREEMPTED BY STATE LAW

“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws.*” Cal. Const., art. XI, § 7 (emphasis added). “If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.” *O’Connell v. City of Stockton*, 41 Cal.4th 1061, 1067 (2007). Legislation is said to “conflict with” state law if it “*duplicates, contradicts, or enters an area fully occupied* by general law, either expressly or by legislative implication.” *Id.* (emphasis added).

The Proposal introduces a set of *at least 28 conditions* to which firearm dealers applying for a permit would be subjected. A majority of these simply emphasize that the permittee follow the state and federal laws it is already bound to follow or merely regurgitate those laws. Restating state law is duplicative of that law and renders the text a virtual dead letter that is void as preempted.

Other sections consider regulation that is already pending in the state legislature. Section 9.35.110(16) imposes a mandatory reporting requirement for lost or stolen firearms within 24 hours of the owner’s discovery of such a theft or loss. Senate Bill 299 would institute a 7-day reporting requirement in the same situation. That bill is currently awaiting Governor Brown’s signature. Should SB 299 become law, the City’s adoption of its own reporting requirement would effectively criminalize a failure to report during the additional 6 days provided by state law and would thus be in conflict with state law.

Still other sections misstate the requirements of state law completely. Section 9.35.110(13), for example, prohibits dealers from transferring a firearm to a purchaser unless that person presents to the seller a “current basic firearm safety certificate.” Presumably the City is referring to the “Handgun

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Safety Certificate” described in California Penal Code section 31615, which certifies that a would-be handgun purchaser must pass an exam before legally receiving the firearm. The term “basic firearm safety certificate” has not been used since 1992, when the term was changed to its current moniker.

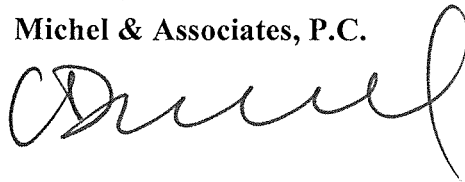
III. CONCLUSION

The Proposal is unlikely to provide any benefit to public safety, as existing firearms businesses have safely operated in Pleasant Hill for some time, providing “no problems” for the City. Aside from being unnecessary, the Proposal raises a number of constitutional conflicts and many of its provisions are likely preempted. Adopting the Proposal, or any ordinance similar to it, will subject the City to litigation, the cost of which can be very high.

If the honorable members of this Council have any questions or concerns regarding the content of this correspondence, please feel free to contact us at your convenience.

Sincerely,

Michel & Associates, P.C.



C.D. Michel

cc: Kimberly Lehmuhl, City Clerk, klehmkuhl@ci.pleasant-hill.ca.us



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FAX TRANSMITTAL SHEET

TO: Pleasant Hill Mayor & City Council

FIRM: City of Pleasant Hill

FAX NO.: (925) 680-0294

TEL. NO. (925) 671-5267

FROM: Anna M. Barvir

DATE: September 30, 2013

RE: **Proposal to Amend Regulations on the Sale of Firearms and Ammunition –
OPPOSITION**

THIS FAX CONTAINS COVER PAGE PLUS 5 PAGES. IF YOU DO NOT RECEIVE ALL PAGES PLEASE CONTACT Claudia Ayala AT (562) 216-4444.

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