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March 31, 2014

Pleasant Hill Planning Commission
100 Gregory Land
Pleasant Hill, CA 94523
VIA E- MAIL & FAX (925) 682-9327

**Re: Proposed Zoning Ordinance Amendment - Firearms and Ammunition Sales
– OPPOSITION**

Honorable Members of the Planning Commission:

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 residing in the City of Pleasant Hill. Our clients oppose adoption of the proposed zoning ordinance concerning the sale of firearms and ammunition currently being considered by the commission (“the Proposal”).

“[T]he zoning power is not infinite and unchallengeable; ‘it must be exercised within constitutional limits.’ ” *Schad v. Mt. Ephraim*, 452 U.S. 61, 68 (1981). It is thus subject to judicial review under the standards applicable to the right allegedly violated. *Id.* The Proposal is an improper content-based restriction that violates the First Amendment, it improperly burdens the Second Amendment, and treats similarly situated people differently in violation of equal protection.

For these reasons, we urge you to reject the proposed zoning ordinance.

I. 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 express. While it is true that cities are free to adopt zoning regulations, doing so must be unrelated to the suppression of free speech. *City*

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)

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 in fact traceable to the regulated business. *Id.* at 50-52. The City has provided no such evidence to show that lawful firearm dealers (“FFLs”) are a threat to their surrounding area, nor can it.

Mayor Harris and Councilmember Durant, proponents of the proposal, admitted that existing FFLs have heretofore “operated without creating problems for the City.” It is clear then that the proposal is a response to the assumption that their presence might increase in gun violence, rather than any real threat posed by FFLs in Pleasant Hill, or any other city for that matter.

Similarly, when the City of Sunnyvale actually studied the secondary effects of FFLs, they correctly concluded that there was no evidence that such FFLs are a threat to their surrounding area. The City of Sunnyvale staff found “no evidence of increased crime, property devaluation or land use incompatibilities as the result of [an FFL].”² The City of Sunnyvale also concluded that “there is no correlation between gun-related crimes and the location of [FFLs].”³ Thus, even if the zoning provisions in this proposal aim to address secondary effects unrelated to the stores expressive conduct, the City has not met and likely will be unable to meet its burden to justify them.

I. THE PROPOSAL VIOLATES THE SECOND AMENDMENT

In 2008, the United States Supreme Court confirmed that the Second Amendment protects a fundamental, individual right to keep and bear arms from infringement by local governments. *Dist. Of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. Chicago*, 130 S. Ct. 3020 (2010). That right necessarily implies a corresponding right to acquire firearms. *Jackson v. City and County of San Francisco*, No. 12-17803, 2014 WL 1193434 (9th Cir. March 25, 2014), *Andrews v. State*, 50 Tenn. 165, 178 (1871) (a case repeatedly cited by the Supreme Court in *Heller* holding that the right to keep and bear arms “necessarily includes the right to purchase them . . .”). This is important to remember when considering the constitutionality of any regulation on the sale or acquisition of firearms and ammunition.

As purveyors of the fundamental right to acquire firearms, FFLs—though not exempt from general commercial or zoning regulations—cannot be singled out for exceptionally harsh restrictions and regulations that do not meet heightened scrutiny. *See Schad*, 452 U.S. at 68 (“[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 any government interest.

² See 2011-7071 Location and Operation of Firearm Sales Business (Study Issue) Staff report, available at <http://sunnyvale.ca.gov/Portal/0/Sunnyvale/NonCouncilReports/pc/2011/pc-20117071.pdf> at 1 (last visited Sept. 25, 2013)

³ See 2011-7071 Location and Operation of Firearm Sales Business (Study Issue) Report to Mayor and Council, available at <http://sunnyvale.ca.gov/Portal/0/Sunnyvale/CouncilReports/2011/11-209.pdf> at 5 (last visited Sept. 25, 2013)

The proposed zoning ordinance is problematic because it places a significant obstacle in the path of law-abiding residents who wish to acquire firearms in Pleasant Hill. Indeed, the effect of the Proposal, when viewed together with the myriad FFL regulations adopted last fall, is a scheme so restrictive as to force legitimate firearms businesses out of Pleasant Hill altogether, leaving residents with precious few options for the exercise of their right to acquire arms inside city limits.

Because the proposal threatens the exercise of this fundamental right, the city must provide *evidence* supporting its concerns about the dangers posed by the presence of firearm dealers, not mere pronouncements of possible dangers as it has done. And, in light of the reports from the City of Sunnyvale and the admission of the proposal's supporters described above, it cannot make such a showing.

III. THE PROPOSAL VIOLATES EQUAL PROTECTION

The City cannot constitutionally justify the proposal's classification of FFLs and its disparate treatment of such 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 (1996), 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 locations open for the operation of firearms businesses—businesses that act as the purveyors of the fundamental right to acquire the firearms and ammunition necessary to the meaningful exercise of the individual right to arms. 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 discussed above, the proposal's zoning restrictions on FFLs 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 FFLs. Because the proposal lacks support showing that FFLs pose any threat to their surrounding communities, its classification and unequal treatment of those businesses cannot meet heightened scrutiny.

IV. CONCLUSION

The proposal is unlikely to provide any benefit to public safety, as existing firearms businesses have safely operated in Pleasant Hill for many years, providing no problems for the City as admitted by the Mayor. Aside from being unnecessary, the proposal raises a number of constitutional conflicts, exposing the City to costly litigation if passed.

Should you have any questions or concerns concerning the content of this correspondence,

Planning Commission Members

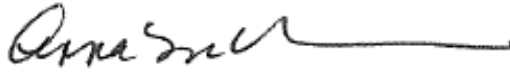
March 31, 2014

Page 4 of 4

please feel free to contact us at your convenience.

Sincerely,

Michel & Associates, P.C.

A handwritten signature in black ink, appearing to read "Anna M. Barvir", with a long horizontal flourish extending to the right.

Anna M. Barvir

cc: Troy Fujimoto, Project Planner
tfujimoto@ci.pleasant-hill.ca.us