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Vice Mayor Roger Wykle  
Councilmember Jeanette C. Fritzky  
Councilmember Kymberleigh Korpus  
Councilmember Dave Trotter

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**VIA EMAIL & FAX: (925) 376-5203**

**Re: Proposed Ordinance Adding Chapter 9.12 Regarding the Storage of Firearms to the Moraga Municipal Code—OPPOSITION**

Honorable Members of the Town Council,

We write to you on behalf of our clients, the National Rifle Association of America, and the California Rifle & Pistol Association, Inc., as well as the hundreds of thousands of their members in California, including those members residing in the town of Moraga.

Our clients oppose the adoption of the recently proposed ordinance mandating firearms be stored in a locked container or disabled with a lock in a person's place of residence (the "Proposed Ordinance"). As drafted, the Proposed Ordinance is preempted by state law, unconstitutionally burdens the right of self-defense, and is otherwise unenforceable.

For the following reasons, we ask the Town Council to reject the Proposed Ordinance, and instead consider the alternative programs offered by our clients that will better achieve the Town's goals of combatting criminal misuse of firearms and preventing accidental injuries.

## **I. THE PROPOSED ORDINANCE IS PREEMPTED BY STATE LAW**

Under the preemption doctrine, a local law will be struck down if it duplicates state law, conflicts with state law, or enters into a field wholly occupied by the state to the exclusion of local regulation, either expressly or by implication.<sup>1</sup> A local law “*duplicates* state law when it is “coextensive” with state law.”<sup>2</sup> A local law “*contradicts* state law when it is inimical to or cannot be reconciled with state law.”<sup>3</sup>

Here, the Proposed Ordinance dictates the manner in which residents keep their firearms within their own homes, and requires anyone who resides in Moraga to keep their firearms in a locked container or disabled with a trigger lock unless carried on their person or in the person’s immediate control.

### **a. The Proposed Ordinance Contradicts State Law**

California maintains a comprehensive set of statutes, creating criminal and/or civil liability for the improper storage of a firearm whenever a minor or prohibited person accesses a firearm and uses that firearm to cause death or bodily injury or carries it to a public place.<sup>4</sup> Liability for such is subject to an equally comprehensive set of exceptions.<sup>5</sup>

Specifically, state law exempts one from liability whenever: (1) the firearm is kept in a locked container; or (2) the firearm is kept in a location a reasonable person would believe to be secure; (3) or the firearm is carried on one’s person or the firearm is kept in close enough proximity to the person to be retrieved and used as if it were carried on one’s person; or (4) the firearm is locked by a locking device.<sup>6</sup>

By its express terms, the Proposed Ordinance strips from ordinary Moraga residents the right to engage in behavior specifically deemed lawful by the state. It flatly denies individuals the option of keeping their firearms in a secure location (locked or not)—thereby contradicting state law.

### **i. Possession by Minors**

The Proposed Ordinance also contradicts state law with regards to the possession of handguns by minors. California law generally prohibits minors from possessing a pistol, revolver, or other firearm capable of being concealed upon the person.<sup>7</sup> But there are a number of exemptions to this restriction, including:

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<sup>1</sup> Cal. Const., art. XI, § 7; *O’Connell v. City of Stockton*, 41 Cal.4th 1061, 1067 (2007); *Fiscal v. City & Cty. of San Francisco*, 158 Cal.App.4th 895, 903-04 (2008).

<sup>2</sup> *O’Connell*, 41 Cal.4th at 1068.

<sup>3</sup> *Id.*

<sup>4</sup> Cal. Penal Code §§ 25100-25135, 25200-25225.

<sup>5</sup> Cal. Penal Code §§ 25105(a-g), 25135(a)(1-6), 25205.

<sup>6</sup> Cal. Penal Code §§ 25105(a-g), 25135(a)(1-6), 25205.

<sup>7</sup> Cal. Penal Code § 29610.

- When the minor is accompanied by a parent or legal and is actively engaged in lawful activity, the nature of which involves the use of a firearm;
- When the minor is accompanied by a responsible adult and has the prior written consent of a parent or legal guardian and is actively engaged in a lawful activity, the nature of which involves the use of a firearm;
- The minor is at least 16 years old and has the prior written consent of a parent or legal guardian, and is actively engaged in a lawful activity, the nature of which involves the use of a firearm; and,
- The minor has the prior written consent of a parent or legal guardian, is on lands owned or lawfully possessed by the parent or legal guardian, and is actively engaged in lawful activity, the nature of which involves the use of a firearm.<sup>8</sup>

All of the above listed activities, which are expressly allowed under state law, will be prohibited by the Proposed Ordinance.

**b. The Proposed Ordinance Enters an Area Fully Occupied by State Law**

In addition to the above, a local law is impliedly preempted by state law when it encroaches on an area of law occupied by state law. This occurs when either:

- (1) The subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern;
- (2) The subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or,
- (3) The subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.<sup>9</sup>

As discussed above, the storage of firearms is fully and completely regulated by state law. In addition to California’s negligent storage provision, any firearm sold by a California licensed firearms dealer must include a firearm safety device.<sup>10</sup> Dealers must also obtain an affidavit from customers who purchase long guns stating ownership of a gun safe or lock box.<sup>11</sup> To be an approved firearm safety device, the California Department of Justice conducts rigorous safety tests to ensure they “significantly reduce the risk of firearm-related injuries to children 17 years of age and younger.”<sup>12</sup>

<sup>8</sup> Cal. Penal Code § 29615.

<sup>9</sup> *Fiscal*, 158 Cal.App.4th at 904.

<sup>10</sup> Cal. Penal Code § 23635(a).

<sup>11</sup> See *BOF 978 (Rev. 01/2013): Affidavit Stating Ownership of a Gun Safe or Lock Box*, California Department of Justice, Bureau of Firearms, [https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/bof\\_978.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/bof_978.pdf) (Jan. 2013).

<sup>12</sup> Cal. Penal Code § 23650(a).

There are also several storage requirements that apply to anyone living with another individual who is prohibited by state or federal law from owning firearms.<sup>13</sup> Because California’s firearm storage scheme is so comprehensive, any local interference with that scheme (except that which was expressly authorized) is preempted.

## **II. THE PROPOSED ORDINANCE UNCONSTITUTIONALLY BURDENS THE RIGHT OF MINORS TO ENGAGE IN LAWFUL SELF-DEFENSE**

The Second Amendment protects a fundamental, individual right to keep and bear arms. As the United States Supreme Court held in *District of Columbia v. Heller*, central to that right is the “inherent right of self-defense[,]” a right that “is most acute” in the home.<sup>14</sup> Laws that burden the exercise of that right are constitutionally suspect. Laws that prohibit it are categorically invalid. And yet that is exactly what the Proposed Ordinance does, for it directly interferes with a minor’s right to engage in lawful self-defense by failing to exempt the carrying of a firearm by an individual under the age of 18 in the home.

When the California Legislature enacted the restrictions against minors possessing handguns, it made clear that it was not their intent “to expand or narrow the application of the then-existing statutory and judicial authority as to the rights of minors to be loaned or to possess live ammunition or a firearm for the purpose of self-defense or the defense of others.”<sup>15</sup> As a result, because the Proposed Ordinance will prohibit minors from engaging in lawful self-defense, it is unconstitutional and therefore void.

## **III. THE PROPOSED ORDINANCE IS LARGELY UNENFORCEABLE AND DETRIMENTAL TO THE PUBLIC HEALTH, SAFETY, AND WELFARE OF RESIDENTS**

From a practical standpoint, Moraga cannot enforce the Proposed Ordinance without running afoul of the Fourth Amendment, which provides for “the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.”<sup>16</sup> This Amendment prevents Moraga from inspecting how individuals are storing their firearms in their home without first having established probable cause that they are in violation of the ordinance. Tellingly, although other California jurisdictions have similar ordinances in effect, we are unaware of a single instance where such a regulation has been enforced.

More importantly, Moraga’s ordinance fails to consider the many residents who wish—or need—to have immediate access to their firearms for the lawful purpose of self-defense in an emergency. In contrast, California’s comprehensive set of laws regarding the storage of firearms is written so that individuals can choose, based on their particular needs and circumstances, how best to store their firearms, while simultaneously achieving the state’s goal of preventing unauthorized persons from accessing firearms.

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<sup>13</sup> Cal. Penal Code § 25135.

<sup>14</sup> 554 U.S. 570, 628 (2008).

<sup>15</sup> Cal. Penal Code § 29750.

<sup>16</sup> U.S. Const. amend. IV.

Moraga's ordinance presents a myriad of problems for gun owners, and ultimately will only create an environment in which otherwise law-abiding individuals will be driven to not cooperate with police in fear of prosecution.

#### IV. CONCLUSION

Our clients understand the need to combat the criminal misuse of firearms and to prevent accidental injuries. To that end, they have a number of programs available to the Town upon request.<sup>17</sup> These include firearm safety training,<sup>18</sup> the Eddie Eagle GunSafe® Program,<sup>19</sup> the National School Shield Program,<sup>20</sup> and youth-specific programs designed to teach firearm safety and responsibility.<sup>21</sup> Each of these programs have proven to reduce accidental gun deaths and promote public safety—more so than any gun-control law can hope to achieve. Instead of adopting the Proposed Ordinance, we ask the Town of Moraga to consider such alternatives.

For these reasons, we strongly encourage the Town Council to reject the Proposed Ordinance. If you 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.**



Matthew D. Cubeiro

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<sup>17</sup> <https://explore.nra.org/interests/safety-and-education/>.

<sup>18</sup> <https://explore.nra.org/interests/firearms-training/>. With roughly 1 million people attending NRA training courses annually, the NRA is recognized nationally as the Gold Standard for firearm safety training.

<sup>19</sup> <https://eddieeagle.nra.org/>. The Eddie Eagle GunSafe® program is a gun accident prevention program that seeks to help parents, law enforcement, community groups and educators navigate a topic paramount to our children's safety, teaching children when they see a gun to "Stop! Don't touch! Leave the Area, and tell an adult."

<sup>20</sup> <https://www.nationalschoolshield.org/>. The National School Shield program is committed to addressing the many facets of school security, including best practices in security infrastructure, technology, personnel, training, and policy.

<sup>21</sup> <http://youth.nra.org/>.