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10  
11 **UNITED STATES DISTRICT COURT**  
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

13  
14 JOHN TEIXEIRA, STEVE  
15 NOBRIGA, GARY GAMAZA,  
16 CALGUNS FOUNDATION (CGF),  
INC., SECOND AMENDMENT  
17 FOUNDATION (SAF), INC., and  
18 CALIFORNIA ASSOCIATION OF  
FEDERAL FIREARMS LICENSEES,  
INC. (Cal-FFL),

19 Plaintiffs,

20 vs.

21  
22 COUNTY OF ALAMEDA, ALAMEDA  
BOARD OF SUPERVISORS (as a  
23 policy making body), WILMA CHAN  
in her official capacity, NATE MILEY  
24 in his official capacity, and KEITH  
25 CARSON in his official capacity.

26 Defendants.  
27

CASE NO.: 3:12-CV-03288 SI

PLAINTIFFS' SUPPLEMENTAL  
BRIEF

Date: February 22, 2013  
Time: 9:00 a.m.  
Place: United States District  
Court - San Francisco  
450 Golden Gate Ave.  
Court: Courtroom 10, 19<sup>th</sup> Floor  
Judge: Hon. Susan Illston

1 Pursuant to this Court's order of December 18, 2012 (Doc # 30), Plaintiffs submit  
2 this Supplemental Brief.

3 **Re: Late Administrative Appeal / Due Process Claim**

4 There is one factual dispute that gives rise to the issue preclusion and/or res  
5 judicata concerns this Court raised in its order for supplemental briefing that can  
6 be summarily adjudicated. That is whether the appeals filed by San Lorenzo  
7 Village Homes Association and Diane Wydler were timely filed. If those appeals  
8 were timely filed, then the Board of Supervisors had jurisdiction to review the  
9 decision of the West County Board of Zoning Adjustment. (Which was favorable to  
10 the Plaintiffs.) If the appeals were not timely filed, then the Board of Supervisors  
11 acted without lawful authority when they revoked the variance and conditional use  
12 permit for the Plaintiffs' gun store.

13 Plaintiffs are prepared to accept as conclusively proven, and would waive any  
14 hearsay objection to the DECLARATION OF ALBERT LOPEZ IN SUPPORT OF  
15 DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY  
16 INJUNCTION. (Doc #23-1) But this is new information that was not available to  
17 the Plaintiffs when they filed their complaint. Furthermore, it is highly likely that  
18 a trial court in a mandamus review, would defer to an agency's decision to accept a  
19 late-filed appeal. *Simi Valley Adventist Hosp. v. Bonta*, 81 Cal. App. 4th 346 (2000).

20 Therefore Plaintiffs stipulate to a dismissal of their First Claim and withdraw  
21 one of their three reasons for requesting a preliminary injunction.

22 **Re: 500' Foot Rule / Equal Protection and Second Amendment**

23 There is no dispute of facts, and therefore no state court adjudication required,  
24 regarding the distances between the various points (front door, back wall, building  
25 wall, center of building, etc..) on the property of the Plaintiffs' proposed gun store  
26 and the disqualifying properties. Plaintiffs have already implied, and expressly  
27 concede herein, that the multitude of measurements taken by all parties and  
28 reported accurately by the administrative agency are "res judicata."

1 All of those various permutations of taking the same measurement are set forth  
2 in pages 5 and 6 of the Staff Report prepared by the Alameda County Community  
3 Development Agency Planning Department dated December 14, 2011. The Staff  
4 Report was addressed to the West County Board of Zoning Adjustments. [See Doc  
5 #20-15; Exhibit O; DECLARATION OF PLAINTIFFS: STEVE NOBRIGA, JOHN  
6 TEIXEIRA AND GARY GAMAZA.]

7 Neither did the appeal conducted by the Board of Supervisors dispute that there  
8 were various permutations of measurements set forth in the Staff Report. They  
9 merely adopted one set of measurements over another, equally reasonable, set of  
10 measurements. There are no findings of fact that a Superior Court Judge could add  
11 to that Staff Report that would improve Plaintiffs' theory of the case.

12 It may be that a Superior Court Judge could make a "legal" ruling that would  
13 interpret how simple measurements are to be taken. (e.g., from the center of  
14 properties, from portal to portal, from closest point to closest point, etc...) But that  
15 process would just mean that this case would have to journey through: (1) The West  
16 County Board of Zoning Adjustment, (2) The Alameda Board of Supervisors, (3)  
17 Alameda Superior Court for a writ of mandate, (4) The First District Court of  
18 Appeals, and (5) and the California Supreme Court before state law judicial  
19 remedies would be exhausted on a point of law wholly unnecessary to Plaintiffs'  
20 claims.

21 The issue that this Court has to grapple with on the equal protection claim,  
22 especially one that touches on a fundamental right, is whether the rules are  
23 uniform for all similarly situated persons or whether they are arbitrary and  
24 capricious, and therefore subject to abuse that offends the Fourteenth Amendment.  
25 *Allegheny Pittsburgh Coal Co. v. County Com.*, (1989) 488 U.S. 336.

26 In other words, the issue isn't what is the final, non-appealable rule for  
27 measurements under the 500 foot rule. The issue is whether the County uses the  
28 same methodology for measuring these zoning restrictions in all cases.

1 Notwithstanding the DECLARATION OF RODRIGO ORDUÑA IN SUPPORT  
2 OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR  
3 PRELIMINARY INJUNCTION (Doc # 23-2), which cites no written law or written  
4 regulation for choosing endpoints for making these measurements – this case is  
5 about whether these measurements are objective and uniform for all zoning  
6 regulation measurements and whether the Board of Supervisors revoked  
7 Plaintiffs's variance and conditional use permit, when permits and variances for  
8 similarly situated businesses were allowed by the same body.

9 Giving preclusive effect to the fact that multiple methodologies exist for taking  
10 simple zoning measurements does nothing to undermine Plaintiffs' theory of their  
11 case. The very fact that no objective standards exist, and that the County has not  
12 tendered any on this record helps to make the Plaintiffs' case.

13 Even if this Court gives preclusive effect to the inchoate legal interpretation  
14 proffered by the County for where the endpoints for the measurements are to be  
15 taken, this does nothing to address the substantive issue of why there is an  
16 important (or compelling) government interest in forbidding a gun store from  
17 opening 499 feet away from a residential property (located across 12 lanes of  
18 freeway) but no government interest when it is to be located 501 feet away.

19 This Court's jurisdiction has been invoked for constitutional claims and the  
20 gravamen of those remaining claims are that:

- 21 1. Plaintiffs were denied "equal protection" of law by an arbitrary and  
22 capricious zoning scheme, which fairly includes a claim that there are  
23 no objective standards for measuring distances between subject and  
24 disqualifying properties. This claim also necessarily means that  
25 discovery will be required to determine if The Alameda County Board  
26 of Supervisors has revoked conditional use permits and variances in  
27 other instances where an inferior zoning board has approved such  
28 permits and variances.

- 1           2.     Whether the zoning scheme is invalid as applied under the Second  
2                    Amendment. This is a mixed question of fact and law that will require  
3                    the same factual inquiry as the equal protection claim.
- 4           3.     Whether the zoning scheme is facially invalid under the Second  
5                    Amendment. This is a pure question of law.

6           One final point. On page 2, beginning at line 6 of the December 18, 2012 Order  
7 (Doc #30) the Court wrote: “[...] nor did plaintiffs challenge the legality of the  
8 Alameda County Ordinance § 17.54.131.” In point of fact the Third and Fourth  
9 Claims of the Complaint are constitutional challenges to that ordinance under  
10 standard notice pleading requirements of the Federal Rules of Civil Procedure. If  
11 clarification is necessary, Plaintiffs are happy to oblige and respectfully request  
12 leave to amend their complaint.

13  
14

**Conclusion**

15           Exhaustion of state judicial/administrative remedies is not required under 42  
16 U.S.C. § 1983. *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982); *Lira v. Herrera*, 427  
17 F.3d 1164 (9<sup>th</sup> Cir. 2005). And any Res Judicata and/or Collateral Estoppel effect of  
18 the findings by the West County Board of Zoning Adjustment and the Alameda  
19 County Board of Supervisors has no impact on Plaintiffs’ remaining claims under  
20 the Fourteenth and Second Amendment.

21           Respectfully Submitted on January 25, 2013.

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          /s/ Donald Kilmer          

24           Donald Kilmer, Attorney for the Plaintiffs

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