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June 16, 2011

Mayor Jim Frazier
Vice-Mayor Kevin Romick
Councilmember Pat Anderson
Councilmember Randy Pope
Councilmember Carol Rios
OAKLEY CITY COUNCIL
CITY OF OAKLEY
3231 Main Street
Oakley, CA 94561
VIA FAX (925) 625-4745, E-MAIL & OVERNIGHT MAIL

**Re: Oakley City Council Agenda Item 5.3 (June 14, 2011 Council Meeting)
"An Urgency Ordinance of the City Council of the City of Oakley to Add
Chapter 11 to Title 5 of the Oakley Municipal Code Dealing with
Firearms Sales"**

Honorable Mayor and Oakley City Councilmembers:

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.

It has come to our attention that the Oakley City Council ("OCC") has passed an urgency ordinance to modify the City of Oakley's municipal code as it relates to the sale of firearms. We write to notify the OCC that there are significant problems, including illegalities with portions of the urgency ordinance.

We apologize for this last minute letter, but we just found out about this matter. We respectfully ask that Mayor Frazier not sign this ordinance, or in the event that he does (or already has), that the OCC repeal the ordinance so that our clients may have the opportunity to provide the OCC and the City of Oakley with accurate information as to the applicable law in this matter, as well as possible alternatives. Our clients have experience in these matters that they would like to share with the OCC.

I. Provisions of the Ordinance In Item 5.3 Are Preempted by State Law And Are Therefore Illegal

Certain provisions of the recently passed ordinance are preempted by state law. Under California's implied preemption doctrine, a local regulation will be struck down where it conflicts with state law, *i.e.*, duplicates state law, contradicts a state law, or enters into a field fully occupied by the state¹ to the exclusion of local regulation. *See Fiscal v. City and County of San Francisco*, 158 Cal.App.4th 895 (2008). "If the preemption doctrine means anything, it means that a local entity may not pass an ordinance, the effect of which is to completely frustrate a broad, evolutionary statutory regime enacted by the Legislature." *Id.* at 911.

California has a broad, detailed statutory regime on the state level for handling firearm transactions. Part of that regime is the 10-day wait period. *See* California Penal Code § 12071(b)(3)(A). Most concerning with Oakley's new ordinance is that it contradicts state law by requiring a fifteen (15) day waiting period, instead of ten (10) days. This provision not only enters a field clearly occupied by the state – criteria for lawful firearm transactions – but in doing so also frustrates the state's interest in having a broad, uniform scheme for firearm dealers. It is therefore unlawful, being preempted by state law. "If every city and county were able to opt out of the statutory regime simply by passing a local ordinance, the statewide goal of uniform regulation of handgun possession, licensing, and sales would surely be frustrated." *Id.* at 919.

Additionally, most of the provisions mandated as requirements under the ordinance are duplicative of state law, and therefore unnecessary and preempted (*i.e.*, unlawful).

II. The Second Amendment Is A Fundamental Right, Therefore Restrictions Placed Upon It Must Meet Heightened Scrutiny

While we recognize that local governments have been left some authority to create regulations within their municipalities, it must also be noted that the right to keep and bear arms has recently been declared an individual, fundamental right by the United States Supreme Court.² Therefore, restrictions

¹ A local ordinance "enters a field fully occupied" by state law either expressly or impliedly. *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal.App.4th 893, 898 (1993). A law impliedly occupies a field when: 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. *Id.*

² *See District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

on it must be able to pass constitutional muster. And, any regulation that serves to create a “substantial burden” on the right of law-abiding citizens to exercise their Second Amendment rights will be struck down.³

Problematically, the zoning restrictions included in the recently passed ordinance equate to more than a *de minimis* obstacle in the path of law-abiding residents of Oakley who wish to acquire a firearm. And, because a fundamental right is involved, Oakley must be able to show *facts* that support the concerns about the dangers of having firearm dealers in a certain area, not simple pronouncements of *possible* dangers.⁴

Even if the zoning restrictions were otherwise valid, regulations involving fundamental rights must employ the least restrictive means necessary to achieve the interest.⁵ A myriad of laws already exist prohibiting firearms from being carried in public while loaded without a permit, discharged in public, brandished, possessed within 1,000 feet of a school zone, etc. Enforcement of these laws constitutes a less restrictive and more efficient means of achieving the City of Oakley’s interest.

There are also Equal Protection issues involved. Where a zoning ordinance singles out firearm dealers Equal Protection demands consideration of the zoning requirements for similarly situated businesses. Pharmacies, jewelry stores, banks, check-cashing operations are regularly robbed for prescription drugs, money and valuables, thereby causing a potentially dangerous situation for neighboring areas. Yet there is no such requirement that they be zoned away from churches, schools, parks, etc.

Additionally, the ordinance’s requirement concerning the purchase of an insurance policy is also flawed. Allowing an official (in this case, the Finance Director) to have unfettered discretion as to what the amount of coverage and policy limits can be is unlawful.⁶ After *McDonald*, firearm dealers enjoy a protected status as purveyors of a fundamental right. This means ordinances burdening them will be subject to a heightened standard of review.

³ See *Nordyke v. King*, ___ F.3d ___, 2011 WL 1632063 (9th Cir. May 2, 2011).

⁴ See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), holding that cities/counties may zone adult businesses if there is a reason unrelated to the content of the “speech” to do so, such as “to preserve the quality of urban life;” but that the cities/counties must support their reasons for doing so with facts. Although *Renton* held that a city or county need not conduct its own original study regarding the facts, they must still provide some factual showing from another city/county’s study or other source. This means the PHPC must show facts that Dealers make an area more dangerous, which it has failed to do.

⁵ See, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 54 (1983) (“strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution”).

⁶ See *Staub v. City of Baxley*, 355 U.S. 313 (1958).

III. Conclusion

We acknowledge that some of these legal issues are unsettled questions of first impression, due to the recentness of the U.S. Supreme Court's confirmation that the Second Amendment protects a fundamental, individual right to keep and to bear arms. But we remind the OCC that these are issues that will need to be litigated in the near future, and that our clients are prepared to do so.

The *Fiscal* court warned: "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, when it comes to regulating firearms, local governments are well advised to tread lightly."⁷

We suggest that, for the foregoing reasons, the City of Oakley consult with us in order to understand the potential ramifications that would result from enforcement of the ordinance created by Item 5.3, and work with our clients toward a mutual goal. As such, our clients are willing to work with the City of Oakley to develop and implement policies to achieve its goals without unduly burdening business or violating the constitutional rights of its residents.

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/ca

cc: Derek P. Cole, Oakley City Attorney
Nancy Ortenblad, City Clerk
Rebecca Willis, Community Development Director

⁷ See *Fiscal*, 158 Cal. App. 4th at 919.

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FAX TRANSMITTAL SHEET

TO: Mayor Jim Frazier
Vice-Mayor Kevin Romick
Councilmember Pat Anderson
Councilmember Randy Pope
Councilmember Carol Rios

FIRM: City of Oakley

FAX NO.: (925) 625-4745

FROM: C. D. Michel

DATE: June 16, 2011

RE: **Oakley City Council Agenda Item 5.3 (June 14, 2011 Council Meeting)**
"An Urgency Ordinance of the City Council of the City of Oakley to Add Chapter 11 to Title 5 of the Oakley Municipal Code Dealing with Firearms Sales"

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TO: Nancy Ortenblad, City Clerk
FIRM: City of Oakley
FAX NO.: (925) 625-9859
FROM: C. D. Michel
DATE: June 16, 2011
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TO: Derek P. Cole, Oakley City Attorney

FIRM: City of Oakley

FAX NO.: (925) 625-4230

FROM: C. D. Michel

DATE: June 16, 2011

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TO: Rebecca Willis, Community Development Director
FIRM: City of Oakley
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