No. 07 – 15763 [DC# CV 99-4389-MJJ]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE; et al.,
Plaintiffs - Appellants,

vs.

MARY V. KING; et al.,
Defendants - Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPELLANTS' MOTION TO SUPPLEMENT FACTUAL RECORD

Donald E. J. Kilmer, Jr.*
Law Offices of Donald Kilmer
1645 Willow Street, Suite 150
San Jose, California 95125
Vc: 408/264-8489 Fx: 408/264-8487
E-Mail: Don@DKLawOffice.com

Counsel for Plaintiff - Appellants

Don B. Kates
Attorney at Law
22608 N.E. 269th Avenue
Battleground, Washington 98604
Vc: 360/666-2688 Fx: 360/666-3303
E-Mail: DonKates@earthlink.net

Co-Counsel for Plaintiff - Appellants

**Counsel of Record*

MOTION

This court has inherent authority to supplement the record in "extraordinary cases." *Lowry v. Barnhart*, 329 F.3d 1019 (9th Cir. 2003).

Plaintiff/Appellants seek leave to supplement the factual record to further address issues that were raised by the Defendant/Appellees during oral argument before the *en banc* panel on March 19, 2012 – namely the wholly new idea that the appellants could have held gun shows at the Alameda County Fairgrounds for the last 12 years, if only they had consented to have the firearms at their shows "tethered" in some way that would meet the County's shifting and undefined exceptions to their ordinance.

The two new items that Plaintiff/Appellants seek leave to place in the record before this Court are: (1) the actual discovery response from the County giving rise to Plaintiff/Appellants' reliance on the interpretation of the ordinance by the Office of County Counsel and (2) an even more recent email (September 22, 2010) sent to the County attempting to open a dialogue about how guns can be present at gun shows. The County once again – just as they did in 1999 – refused even the courtesy of a response to the Appellants' overture.

During the discovery phase of this case the Plaintiffs propounded the following:

INTERROGATORY 21.A

Identify all persons authorized by the County of Alameda to interpret the Alameda Ordinance (and its exceptions).

The County responded as follows:

RESPONSE TO INTERROGATORY 21.A:

Defendants object to this Interrogatory on the grounds that it is vague and ambiguous as phrased particularly with regard to plaintiffs' meaning in using the phrase "authorized." In addition, this Interrogatory is incomplete and fails to specify the circumstances in which an "interpretation" of the Ordinance is requested or is necessary. Without waiver of these objections, defendants state: County Counsel's Office.

As set forth in the Joint Statement of Undisputed Facts that was used for the Summary Judgment Motion, Fact #88 states: "*Alameda County Counsel's Office is authorized to interpret the Ordinance and its exceptions.*" To date, the only written interpretation of the ordinance with respect to the possession of guns at gun shows is County Counsel's

interpretation in the August 23, 1999 letter. That letter along with his reiteration in a September 20, 1999 letter to the Alameda Board of Supervisors that the new exceptions made no substantive changes – even in light of the lawsuit brought by the Nordykes – compels a conclusion that the County must be estopped from reinterpreting their ordinance to either moot this case and/or avoid liability at this late stage.

The second item that the Plaintiff/Appellants would like this Court to consider is an email that was sent to the County's outside litigation counsel on September 22, 2010 which requested that they retract the false statements of fact in Docket Entry 167. (They did so in Docket Entry 168.)

The last paragraph of the letter from Plaintiff/Appellants' counsel states: "*With respect to gun shows qualifying for an exception to the ordinance, we should begin discussing the terms of a stipulation to that effect. I'll let you start.*"

A true and correct copy of the entire email is set forth in the attachment to this motion. Just like the letters sent to County Counsel in 1999 attempting to open a dialogue for interpretation of the

ordinance [JSUF: 12, 18, 21], the County's outside litigation counsel never responded to this communication by the Plaintiffs/Appellants.

What makes this development disingenuous on the part of the County is that the mere "tethering" of firearms fails to address all of the obstacles that its Ordinance poses to gun shows.

First, while the idea of tethered guns, which is still not defined[1], might address the County's inchoate safety concerns while still permitting the exhibitors and vendors to possess, display and market guns as part of their gun show activities – it is an incomplete solution.

This idea of "tethered-guns" does not address whether the attendees of the gun show, who purchased a ticket to attend a gun show, can also possess (even if only momentarily) any firearms while they are engaged in the activities associated with viewing, buying and selling guns, which commerce the County admits is permitted by the Ordinance. After all, the Ordinance only permits "authorized participants" to possess guns. This term is not defined by the

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[1] Does each gun require its own separate cable? Or can one cable be run through the trigger guard of several guns? Can the gun be un-tethered for any reason? Does the County consider its new definition of "secured" (tethered) a substitute for the State's definition of "secured"? (plastic/nylon ties that prevent the action from working)

Ordinance. Is everyone who attends a gun show, whether patron, exhibitor, vendor or promoter an "authorized participant"? If that is the case, then why require the guns to be "tethered" if the guns will always be in the possession of an authorized participant?

State law regulating gun shows defines "secured" and Plaintiff/Appellants have unquestionably complied with all State and Federal laws including the requirements that their guns be secured. The County's Ordinance fails to define "secured" and the only written interpretation we have of this Ordinance vis-à-vis guns shows is from the Office of County Counsel.

Nor does the "tethered-guns" suggestion address whether ammunition can be possessed at the gun shows. Are boxes of ammunition to be tethered to the display tables? Is ammunition still forbidden? State law already forbids anyone from simultaneously possessing a firearm and the ammunition for that firearm at a gun show. Yet the County's Ordinance has already been interpreted as permitting the Scottish Games to possess firearms and blank ammunition for those firearms. The County has never explained how their exceptions for the possession of firearms at the Scottish Games

expanded into an exception for possessing ammunition – and why that exception would not extend to gun shows.

This issue of the shifting definition of "secured firearms" has already been partially addressed in the following filings:

- Docket Entry 105 [Appellants' Supplemental Filings, Vol. I of IV, Tab 8] is an August 6, 2009 letter that was lodged before the first *en banc* panel. It is a refiling of an earlier letter dated January 20, 2009 explaining – with attachments that were already a part of the record – the efforts that Plaintiff/Appellants went through back in 1999 to avoid litigation with respect to the County's interpretation of the status of guns at gun shows. To date, the only definitive interpretation of the ordinance with respect to guns at gun shows is County Counsel's letter of August 23, 1999 wherein Richard Winnie stated: "*We recognize that some media reports have indicated that this ordinance prevents gun shows. This is not the case. Gun shows may be conducted on the fairgrounds, provided that they comply with the ordinance's* ***restrictions on the presence of firearms and ammunition on County property***. *Firearm accessories and other paraphernalia*

that are not with the definitions of section 9.12.120 of the ordinance may be displayed and sold at any gun show. ***The ordinance also does not proscribe the sale of firearms or ammunition provided that such articles cannot be displayed on the premises.*** (Emphasis added.) Furthermore, County Counsel's September 20, 1999 letter to the Alameda Board of Supervisors, which introduced and recommended amendments to the ordinance that would come to include "*an exception for firearms used in certain defined entertainment productions...*" also stated that the "*amended ordinance does not make substantive changes to the ordinance adopted on July 27, 1999.*" This September 20, 1999 letter from the Office of County Counsel also assured the Board of Supervisors that these amendments – "*are not a response to [this] lawsuit.*" So much for the proposition that the August 23, 1999 letter is only a interpretation of the earlier iteration of the ordinance. These are the facts as they existed on the day this case was docketed for appeal. The County gave no indication then, and none since, that they would not enforce the Ordinance in this manner and thus subject Plaintiff/Appellants to

potential criminal penalties for conducting their gun shows in compliance with Federal and State law.

- Docket Entry 166 [Appellants' Supplemental Filings, Vol. III of IV, Tab 11] is an FRAP 28(j) letter filed by the Appellants regarding the case of *Anderson v. City of Hermosa*, 2010 U.S. App. LEXIS 18838 (9TH Circuit). Appellees responded with Docket Entry 167 which made false statements of fact that were brought to the attention of Appellees though email correspondence. Docket Entry 168 is the Appellees' corrected submission. Docket Entry 169 [Appellants' Supplemental Filings, Vol. III of IV, Tab 12] is the Appellants' response to Docket Entry 168 addressing this issue of the Nordykes' alleged refusal to avail themselves of this phantom exception to the ordinance that would permit gun shows. Docket Entry 169 also refers to the findings of the Ninth Circuit and the California Supreme Court with respect to the status of guns at gun shows under the ordinance. See respectively: *Nordyke v. King*, 229 F.3d 1266, 1268 (2000), and *Nordyke v. King*, 27 Cal. 4th 875, 882 (2002).

CONCLUSION

The Court should grant Plaintiff/Appellant's Motion to Supplement the Factual Record to prevent a gross mis-characterization of the facts before this Court.

At best, the County's attempt to try and moot the case has only highlighted the constitutional infirmities of this Ordinance. If the undefined terms "secured" and "authorized participant" are so vague and ambiguous that the County can change its own interpretation of an ordinance they authored, and if that Ordinance has a chilling effect on at least three constitutional rights of the gun show litigants, then the matter should be remanded to the trial court with instructions to enter an injunction to either strike the ordinance in its entirety or enter a judgment for declaratory relief overruling the interpretation of the Ordinance by the Office of County Counsel – such that gun shows operated in compliance with Federal and State laws are congruent with the Ordinance.

Respectfully Submitted on March 27, 2012,

/s/

Donald Kilmer, Attorney for Appellants.

CERTIFICATE OF SERVICE

On March 27, 2012, I served the foregoing **APPELLANTS' MOTION TO SUPPLEMENT FACTUAL RECORD w/ Attachment** by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case. [By agreement, hard-copy service of County Counsel Richard Winnie has been previously waived by T. Peter Peirce, Attorney of Record for Appellees.]

I declare under penalty of perjury that the foregoing is true and correct.

Executed this March 27, 2012,

/s/ Donald Kilmer

Attorney of Record for Appellants

Don Kilmer

From: Don Kilmer <don@dklawoffice.com>
Sent: Wednesday, September 22, 2010 1:19 PM
To: Sayre Weaver (sweaver@rwglaw.com); Peter Pierce (ppierce@rwglaw.com)
Cc: 'Kates', 'Don'
Subject: Nordyke v. King

Dear Sayre and Peter:

I am in receipt of your September 22, 2010 letter brief to the Court.

Of course I would expect that we would disagree about the impact of the *Anderson* case on our pending matter, but I must take issue with, what appears to be, a false or misleading statement of fact.

At the end of paragraph 2, you make an assertion "that gun shows continue to take place elsewhere in Alameda County." You cite the excerpt of record at Vol. II, pp. 420-431.

I checked the record and I am unable to find any reference to a gun show in Alameda County on those pages. I did find a single Bay Area Military Show, which took place in Hayward on November 15, 2003. But a military show is not a gun show.

Therefore a correct statement of fact would be "that gun shows continue to take place elsewhere throughout (Northern) California."

Your letter also overstates (and is misleading in my opinion) that the factual record indicates that gun shows qualify for an exception to the ordinance.

With respect to the false statement about gun shows in Alameda County: either show me where I'm wrong, or file your own correction.

With respect to gun shows qualifying for an exception to the ordinance, we should begin discussing the terms of a stipulation to that effect. I'll let you start.

Donald E. J. Kilmer, Jr.
Attorney at Law SBN: 179986
Law Offices of Donald Kilmer, A.P.C.
1645 Willow Street, Suite 150
San Jose, California 95125
Don@DKLawOffice.com
Voice: (408) 264-8489
Fax: (408) 264-8487

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