

SENIOR COUNSEL
C. D. MICHEL*

SPECIAL COUNSEL
JOSHUA R. DALE
W. LEE SMITH

ASSOCIATES
ANNA M. BARVIR
SEAN A. BRADY
SCOTT M. FRANKLIN
THOMAS E. MACIEJEWSKI
CLINT B. MONFORT
TAMARA M. RIDER
JOSEPH A. SILVOSO, III
LOS ANGELES, CA

*ALSO ADMITTED IN TEXAS

WRITER'S DIRECT CONTACT:
562-216-4444
ABARVIR@MICHELLAWYERS.COM



OF COUNSEL
DON B. KATES
BATTLEGROUND, WA

RUTH P. HARING
MATTHEW M. HORECZKO
LOS ANGELES, CA

GLENN S. MCROBERTS
SAN DIEGO, CA

AFFILIATE COUNSEL
JOHN F. MACHTINGER
JEFFREY M. COHON
LOS ANGELES, CA

DAVID T. HARDY
TUCSON, AZ

June 17, 2013

Mayor Barbara Spector
Vice Mayor Steve Leonardis
Council Member Diane McNutt
Council Member Joe Pirzynski
Council Member Marcia Jensen
LOS GATOS TOWN COUNCIL
Los Gatos Civic Center
110 East Main Street
Los Gatos, CA 95030
VIA EMAIL (FirearmsRegulations@LosGatosCa.Gov)

Re: Firearms Dealers: Sale of Firearms & Ammunition – OPPOSITION

Dear Honorable Mayor and Town Council Members:

We write on behalf of our clients, *FFLGuard*, 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 Los Gatos.

Our clients oppose adoption of the proposed ordinance concerning the sale of firearms and ammunition currently being considered by the Town Council (“the Proposed Ordinance”). Various provisions of the proposal unlawfully burden business, are preempted by state law, and/or violate constitutional protections, such as the right to keep and bear arms.

The United States Supreme Court recently 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. *See 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

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them . . .”); *see also Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011)). This is important to remember when considering the constitutionality of any regulation on firearms.

While firearm dealers are not exempt from general commercial or zoning regulations (and may conceivably be subjected to additional, narrowly tailored ones, like requiring background checks of employees who handle firearms), they cannot be singled out for exceptionally harsh restrictions and regulations that do not meet heightened scrutiny. But that is exactly what the Proposed Ordinance does. It places several onerous burdens on those wishing to conduct a lawful firearms business under the guise of “regulation.” But the provisions of the Proposed Ordinance are hardly related to the furtherance of any governmental interest, let alone necessary to achieve one. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (citations omitted) (“when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest.”).

Tellingly, when considering the adoption of a similar ordinance package purporting to regulate firearm dealers, the San Mateo County Board of Supervisors, upon consideration of a letter from our office, rejected that package. The San Mateo Board likely understood that “regulations” (like those contained in the Proposed Ordinance) are replete with legal issues. Aside from being unduly burdensome and unnecessary, the proposal conflicts with the preemption doctrine, First Amendment, Second Amendment, and the Equal Protection Clause. Adopting the Proposed Ordinance will subject the City to a lawsuit to resolve these conflicts.

The area of Second Amendment civil rights jurisprudence is evolving rapidly in the wake of the Supreme Court recognizing an individual Second Amendment right. *See Dist. of Columbia v. Heller*, 554 U.S. 570 (2008). The law, and not mere ideology, supports our positions. The City of Los Gatos would be wise to refrain from adopting this proposal while this new field of law develops through litigation in other jurisdictions. The City is free to adopt reasonable regulations for firearm dealers, such as requiring employee background checks, some security measures, etc. But as the *Fiscal* court admonished: “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.*” *Fiscal v. City and County of San Francisco*, 158 Cal. App. 4th 895, 919. (2008) (emphasis added).

While anti-Second Amendment-rights groups such as the Law Center to Prevent Gun Violence may promise to provide a *pro bono* legal defense of the ordinance, if the challengers prevail, the City will still be liable for the challengers’ costs and attorneys’ fees, which can be significant. Defending its handgun ban ordinance in the *Fiscal* case cost San Francisco roughly \$600,000.00, in addition to the \$380,000.00 it paid to the NRA to reimburse it for its attorney’s fees when San Francisco lost. The City of Chicago recently paid \$125,000 to a plaintiff who

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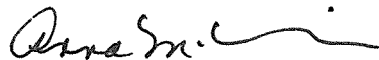
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challenged the constitutionality of that city's ordinance banning people with certain non-violent misdemeanor convictions from possessing firearms in their homes for self-defense in the case of *Gowder v. Chicago*, 11 C 1304 WL 2325826 (N.D. Ill. June 19, 2012). That was following Chicago's payment of approximately \$1.4 million dollars to the NRA and \$400,000 to the Second Amendment Foundation for the *McDonald* case. And, the District of Columbia had to pay \$1.1 million to Mr. Heller.

Our clients understand the need to fight the criminal misuse of firearms and gun violence, and they have a variety of effective programs available to the City upon request; programs that do not flout constitutional guarantees. We suggest the Town Council consider taking our clients up on their offer to provide those programs before delving into highly restrictive and ineffective laws.

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.



Anna M. Barvir