

C. D. MICHEL
SPECIAL COUNSEL
JOSHUA R. DALE
W. LEE SMITH

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

Writer's Direct Contact:
(562) 216-4444
cmichel@michellawyers.com



OF COUNSEL
DON B. KATES
SAN FRANCISCO, CA

RUTH P. HARING
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

September 26, 2011

Mayor Melinda Hamilton
Vice-Mayor Jim Griffith
Council Member Otto Lee
Council Member Christopher R. Moylan
Council Member Anthony Spitaleri
Council Member David Whittum
SUNNYVALE CITY COUNCIL
CITY OF SUNNYVALE
456 W. Olive Ave.
Sunnyvale, CA 94088-3707
VIA FAX (408) 730-7699 & E-MAIL AT FirearmSales@ci.sunnyvale.ca.us

**Re: File # 2011-7071 – Location and Operation of Firearm Sales Business
and Proposed Ordinance Adding Chapter 9.43 of Title 9 (Public Peace,
Safety or Welfare) and Amending Various Provisions of the Sunnyvale
Municipal Code Related to the Zoning of Firearms Sales Business**

Honorable Mayor and City Council Members:

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, including those who reside in the City of Sunnyvale.

It has come to our attention that on August 22, 2011, the Sunnyvale Planning Commission (SPC) passed a motion concerning file # 2011-7071 to recommend that the Sunnyvale City Council (SCC) do the following:

1. Introduce an ordinance to amend the Municipal Code to:
 - a. Create a definition in Titles 9 (Public Peace, Safety and Welfare) and 19 (Zoning) for “firearms sales;”

- b. Amend the Zoning District Tables (Title 19) to prohibit firearm sales in any commercial and industrial zoning districts located within 200 feet of a public school; and
- c. Amend Title 9 to require a new firearm Dealer Permit issued by the Director of Public Safety.

It is our understanding that this proposed ordinance is now scheduled to come before the SCC on September 27, 2011.

Our office submitted a letter to the SPC pointing out potential problems with the proposed ordinance. That letter sought to provide valuable information to the SPC in order to help the City of Sunnyvale avoid future litigation caused by enacting ill-fated ordinances. We now seek to inform the honorable members of this body about those concerns.

I. DISCUSSION

A. The Proposed Amendments to Sunnyvale's Zoning Code Violate Various Constitutional Principles

The provisions being proposed for addition to the Sunnyvale zoning code are improper content-based restrictions that violate the First Amendment, unduly and unjustifiably burden activity protected by the Second Amendment, and treat similarly situated people differently in violation of equal protection.

1. First Amendment

The display of firearms at locations open to the public is expressive conduct protected by the First Amendment. A panel of the Ninth Circuit Court of Appeals did not contradict this notion when it was recently given the opportunity to. *See Nordyke v. King*, 644 F.3d 776, 791 (9th Cir. 2011). The zoning provisions suppress that expressive conduct by relegating gun stores to limited areas merely because of the content involved. The First Amendment does not permit such unless the regulation meets strict scrutiny. *See Texas v. Johnson*, 491 U.S. 397, 412 (1989).

These zoning provisions cannot pass constitutional muster because they do not employ the least restrictive means necessary to achieve the City's interest.¹ There already exist myriad laws prohibiting firearms from being carried in public while loaded, discharged in public, brandished, possessed within 1,000 feet of a school zone, etc., and enforcement of those laws is a less restrictive and more efficient means of achieving Sunnyvale's interests.

It is true that cities may zone businesses if there is a reason for doing so unrelated to the content of the "speech" involved, such as to protect against secondary effects that are detrimental to

¹ *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983).

the quality of public life. *See City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41 (1986). But, the city must support its reasons for doing so with facts. *Id.* at 50-52. Though Sunnyvale need not conduct its own original study regarding the facts, it must provide some factual showing from another city's study or other source. *Id.* There is no evidence that firearm stores are a threat to their surrounding areas. In fact, Sunnyvale staff notes that "there has been *no evidence of increased crime, property devaluation or land use incompatibilities* as the result of the businesses."² Moreover, "staff has not identified any adverse land use impacts associated with a firearms store,"³ and they concluded "there is no correlation between gun-related crimes and the location of firearms businesses."⁴

Thus, even if the City's purpose for the zoning provisions is to address secondary effects, unrelated to firearm stores' expressive conduct, it has not met, and likely cannot meet, its burden to justify them.

2. Second Amendment

The U.S. Supreme Court has held that a city's "zoning power is not infinite and unchallengeable; it 'must be exercised within constitutional limits.' Accordingly, it is subject to judicial review; and is most often the case, the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (citations omitted). And, "when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." *Id.*

It is important to remember that the U.S. Supreme Court has held the right to keep arms to be a fundamental right,⁵ and that several courts, including the Ninth Circuit panel in *Nordyke*, have concluded that the right to keep and bear arms implies a corresponding right to acquire firearms. *See also Ezell v. City of Chicago*, 2011 WL 2623511, *14 (July 6, 2011). As such, based on *Schad*, the zoning provisions must be reviewed under heightened scrutiny.⁶

² See 2011-7071 Location and Operation of Firearm Sales Businesses (Study Issue) Staff Report, available at <http://sunnyvale.ca.gov/Portals/0/Sunnyvale/NonCouncilReports/pc/2011/pc-2011-7071.pdf> at 1 (last visited Sept. 22, 2011) (emphasis added).

³ *Id.* at 10.

⁴ See 2011-7071 Location and Operation of Firearm Sales Businesses (Study Issue) Report to Mayor and Council, available at <http://sunnyvale.ca.gov/Portals/0/Sunnyvale/CouncilReports/2011/11-209.pdf> at 5 (last visited Sept. 23, 2011).

⁵ The United States Supreme Court held in its landmark decision, *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Second Amendment guarantees the right of individuals to keep and bear arms free from federal government infringement. *McDonald v. Chicago*, 130 S. Ct. 3020 (2010), "incorporated" the Second Amendment right recognized in *Heller* into the Fourteenth Amendment as a fundamental right, thereby restraining *local* governments from infringing on an individual's right to keep and bear arms.

⁶ *See also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973).

As explained in the previous section discussing the First Amendment, the zoning provisions cannot meet strict scrutiny. Even under intermediate scrutiny, the government “bears the burden of justifying its restrictions, [and] it must affirmatively establish the reasonable fit” that the test requires. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (internal citation omitted). In other words, “the public benefits of the restrictions must be established by evidence, and not just asserted[;] . . . lawyers’ talk is insufficient.” *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 463 (7th Cir. 2009). As also explained above, there is no evidence that firearm stores are a threat to the areas that surround them.

The Seventh Circuit’s recent decision in *Ezell* is instructive here (striking down a Chicago zoning ordinance prohibiting the establishment of shooting ranges within the city limits as a violation of the Second Amendment).⁷

3. Equal Protection

Where a zoning ordinance singles out firearm vendors, the principles of equal protection demand 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, firearm vendors are being singled out by the zoning restrictions, even though there is *no* evidence of a correlation between increased gun-related crime, property devaluation or other detriments and firearm related businesses. In fact, as mentioned, Sunnyvale staff did not identify *any* adverse land use impacts associated with a firearms store.

And, “where fundamental right and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized . . .” *Hussey v. City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995). In other words, the zoning provisions making firearm vendors, the purveyors of the right to keep arms, into a classification that is restrained from serving in that capacity must pass heightened scrutiny. As explained above, they cannot.

In sum, the zoning provisions in their current form violate multiple constitutional principles. This is not to say that the City of Sunnyvale does not have the authority to restrict the activities of a retail or residential FFL. It just cannot completely ban them or subject them to their own separate zoning scheme without evidence that it is necessary.

⁷ At least one court has also struck down a zoning ordinance restricting the locations of abortion providers. *Haskell v. Washington Twp.*, 635 F. Supp. 550 (S.D. Ohio 1986) *rev’d on other grounds*, 864 F.2d 1266 (6th Cir. 1988). That court reasoned that abortion is a fundamental right and thus subject to strict scrutiny: “in finding the standard of review, the important fact is that this lawsuit concerns women’s abortion rights, not that the resolution is a zoning law.” *Id.* at 557

B. The Fee Charged to Applicants for a Firearm Dealer Permit Issued by the Director of Public Safety Cannot be Excessive.

The SCC should understand that the amount of any fee charged to Applicants for a Permit pursuant to section 9.43.030 of the proposed ordinance must be commensurate with the City's *actual* costs for the processing of the application per California Penal Code section 12071(a)(7).

Also, in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), the United States Supreme Court explained that when constitutionally protected activity is being regulated, the government may impose a fee only "as a regulatory measure and calculated to defray the expenses of policing the activities in question." As explained, the fundamental right to keep arms protects the right to acquire firearms.

Dealers are the purveyors of this right to acquire firearms. As such, any fee imposed on their operation is subject to the limitations announced in *Murdock*. Before imposing any such fee, the City must be able to show the amount of the fee reflect the City's actual costs. Our clients are currently litigating this very issue with the State. *See Bauer v. Harris*, No. 11-01440 (E.D. Cal., filed Aug. 25, 2011).

On a similar note, the amount of the insurance policy the City decides to require of firearm vendors cannot be excessive. And, unless other businesses are required to obtain similar policies, the requirement is likely a violation of equal protection.

C. Conclusion

The proposed ordinance appears to be a solution in search of a problem. As mentioned above, Sunnyvale staff has stated that there has been no increase in crime nor any property devaluation as a result of firearms businesses located in Sunnyvale. In fact, this study was prompted by outcry of a small number of individuals who are uncomfortable around firearms - *not* because of any harm or public safety problems caused by any of the firearms businesses. There is no problem here that needs to be fixed.

Our clients understand the need to fight the criminal misuse of firearms and gun violence, and have a variety of *effective* programs available to you upon request. 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."⁸

While we recognize that local governments have been left some authority to regulate firearms, that authority is subject to constitutional restraints, the contours of which are continuously being defined through a myriad of ongoing litigation across the nation. Accordingly, it would be prudent for the City of Sunnyvale to wait until Second Amendment jurisprudence has been more developed before enacting any regulations that might subject Sunnyvale itself to the litigation.

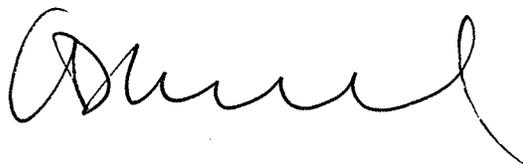
⁸ *Fiscal v. City and County of San Francisco*, 158 Cal. App. 4th 895, 919 (2008).

Honorable Mayor and City Council Members
September 26, 2011
Page 6

The new area of Second Amendment civil rights jurisprudence is evolving rapidly. The law, and not mere ideology, supports our positions. The SCC would be wise to refrain from adopting this proposed ordinance while this new field of law develops through litigation in other jurisdictions.

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.

A handwritten signature in black ink, appearing to read "C. D. Michel", written in a cursive style.

C. D. Michel

CDM/ca

cc: David Kahn, Sunnyvale City Attorney
Kathleen Franco Simmons, City Clerk
Andrew Miner, Principal Planner
Don Johnson, Chief of Public Safety
Trudi Ryan, Planning Officer, Community Development Department (Planning Division)

MICHEL & ASSOCIATES, P.C.
Attorneys at Law

Writer's Direct Contact:
(562) 216-4444
CMichel@michellawyers.com

FAX TRANSMITTAL SHEET

TO: Sunnyvale City Council

FIRM: City of Sunnyvale

FAX NO.: (408) 730-7699

TEL. NO.

FROM: C. D. Michel

DATE: September 27, 2011

RE: **File #2011-7071 - Location and Operation of Firearm Sales Business and Proposed Ordinances Adding Chapter 9.43 of Title 9 (Public Peace, Safety or Welfare) and Amending Various Provisions of the Sunnyvale Municipal Code Related to the Zoning of Firearms Sales Business**

THIS FAX CONTAINS COVER PAGE PLUS 6 PAGES. IF YOU DO NOT RECEIVE ALL PAGES PLEASE CONTACT Claudia Ayala AT (562) 216-4444.

SPECIAL INSTRUCTIONS

Will follow via electronic email.

THIS MESSAGE IS INTENDED FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY REVIEW, DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ADDRESS BELOW VIA THE U.S. POSTAL SERVICE. THANK YOU.

*** TX REPORT ***

TRANSMISSION OK

TX/RX NO 2165
CONNECTION TEL 914087307699
SUBADDRESS
CONNECTION ID
ST. TIME 09/27 12:49
USAGE T 01'43
PGS. SENT 7
RESULT OK

MICHEL & ASSOCIATES, P.C.
Attorneys at Law

Writer's Direct Contact:
(562) 216-4444
CMichel@michellawyers.com

FAX TRANSMITTAL SHEET

TO: Sunnyvale City Council

FIRM: City of Sunnyvale

FAX NO.: (408) 730-7699

TEL. NO.

FROM: C. D. Michel

DATE: September 27, 2011

RE: File #2011-7071 - Location and Operation of Firearm Sales Business and Proposed Ordinances Adding Chapter 9.43 of Title 9 (Public Peace, Safety or Welfare) and Amending Various Provisions of the Sunnyvale Municipal Code Related to the Zoning of Firearms Sales Business

THIS FAX CONTAINS COVER PAGE PLUS 6 PAGES. IF YOU DO NOT RECEIVE ALL PAGES PLEASE CONTACT Claudia Ayala AT (562) 216-4444.

SPECIAL INSTRUCTIONS

Will follow via electronic email.