

C. D. MICHEL

SPECIAL COUNSEL
VICTOR J. OTTEN
W. LEE SMITH

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

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

December 23, 2009

Mr. Zach Cowan
City Attorney of Berkeley
2180 Milvia Street
Berkeley, CA 94704

VIA FAX (510) 981-6960 & U.S. Mail

**Re: Pre Litigation Demand
to Repeal "Assault Weapon" Ban Ordinance**

Honorable City Attorney Cowan:

I am writing on behalf of my clients, the National Rifle Association (NRA), the California Rifle & Pistol Association Foundation (CRPAF), and the members of those organizations that reside in your community.

We have recently been made aware that Berkeley still maintains Municipal Code section 13.74, which bans possession of "assault weapons." This preempted ordinance is causing confusion for my clients. I discussed this matter with members of the City Attorney's Office years ago, and thought the ordinance was repealed per my previous discussions with those city representatives. When we learned the ordinance was still on the books, my office contacted your office and spoke with Mr. Matthew Orebick on November 30, 2009. Mr. Orebick said he believed the ordinance had been repealed or was not being enforced or both, but that he needed to confirm this understanding. Mr. Orebick kindly offered to contact our office within a couple weeks to discuss his findings, and if necessary, to put the ordinance on the agenda for removal from the municipal code in January.

As of the date of this letter, Mr. Orebick has not contacted our office, despite our leaving two voice mails with him last week. While I appreciate that this may not be a high priority item for the city, under these circumstances, I must proceed for now as if you do not intend to repeal the preempted ordinance. I hope this letter prompts you to bring this issue to the City Council's attention in closed session so the City can expedite a response to us.

As I am sure you are aware, with the passage of the Roberti-Roos Assault Weapon Control Act of 1989 and the adoption of Penal Code section 12276 et seq. and its subsequent amendments, all local

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“assault weapon” ordinances are now preempted by state law.¹ Every other city that had an ordinance like section 13.74 has repealed the ordinance in recognition of this. Berkeley’s ordinance continues to confuse the membership of my associational clients and should like those other ordinances be repealed.

The Court of Appeal has declared laws like Berkeley’s to be preempted by state law, and has warned that “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.”²

Several years ago we filed suit against the City of West Hollywood for its “assault weapon” ordinance, which it had failed to repeal. The allegations were never tested—for the City’s response to our Complaint was to immediately repeal it’s ordinance. While there might be some minor changes, we contemplate instituting legal action based on more or less the same allegations against the City of Berkeley if it proves necessary to sue. We would additionally make the same allegations made against the city of Columbus, Ohio in a section 1983 lawsuit challenging its “assault weapon” ordinance (very similar to San Francisco), as well as new Second Amendment claims under *District of Columbia v. Heller*, 128 S.Ct. 2783. The Columbus ordinance was declared unconstitutional by the U.S. Court of Appeals. *People’s Rights Organization v. City of Columbus* (6th Cir. 1998) 152 F.3d 522. My clients’ civil rights lawsuit against the City of Berkeley would also be filed in federal court.

We hope your office will recommend to the City Council that it repeal section 13.74 of the Berkeley Municipal Code. If I do not receive confirmation within the next thirty days that you either intend to repeal the ordinance in question or have a legitimate reason for delaying its repeal, my clients will file a lawsuit against the City, and will seek reimbursement for attorneys’ fees incurred in the process. It is our hope that this will not be necessary.

Please let me know your client’s intentions. Your courtesy and cooperation is appreciated.

Sincerely,
MICHEL & ASSOCIATES, P.C.

C.D. Michel

—/—

CC: Matthew Orebick

¹ Fundamental principles of preemption dictate that a local ordinance is preempted if it “duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.” *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897. “Local legislation is ‘duplicative’ of general law when it is coextensive therewith. Local legislation is ‘contradictory’ to general law when it is inimical thereto.”

² See *Fiscal v. City and County of San Francisco*, (2008) 158 Cal. App. 4th 895, 919