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September 20, 2010

Mayor Patricia Mahan  
Vice Mayor Dominic J. Caserta  
Councilmember Will Kennedy  
Councilmember Joe Korneder  
Councilmember Jamie Matthews  
Councilmember Kevin Moore  
Councilmember Jamie McLeod  
CITY OF SANTA CLARA  
1500 Warburton Ave.  
Santa Clara, CA 95050  
**VIA FAX (408) 241-6771 & U. S. MAIL**

**Re: Opposition to Proposed Ordinance  
Prohibiting the Possession of Firearms in Santa Clara City Parks  
for all Non-Peace-Officers**

Hon. Mayor Mahan and Councilmembers:

On Tuesday, September 21, 2010, the Santa Clara City Council ("Council") is scheduled to consider the adoption of a proposed ordinance to add a new section to Chapter 9.05 of Title IX of The Code of the City of Santa Clara, California ("SCCC") that would prohibit the possession of firearms in Santa Clara City parks for anyone who is not a "peace officer" as that term is defined in California Penal Code section 830, *et seq.*

We write on behalf of our clients the National Rifle Association and the California Rifle & Pistol Association in opposition to this proposed ordinance because it is both unconstitutional and preempted by state law.

**I. The Proposed Ordinance is Unconstitutional.**

As the Council should be aware, two years ago the United States Supreme Court held in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), that the Second Amendment protects an individual right to keep and bear a firearm unconnected with service in a militia. More recently, in *McDonald v. Chicago*, 130 S. Ct. 3020 (2010), the Supreme Court held that state and local governments are restricted from infringing on that right.

The ordinance under consideration is an unconstitutional restraint on the individual right to bear arms because, although the City has a general interest in protecting its residents and visitors from gun violence at its parks, that interest is not furthered by *generally* depriving all responsible, law-abiding

citizens the right to “possess and carry weapons in case of confrontation.” (*Heller* at 2797.)<sup>1</sup>

In fact, consideration of the proposed ordinance is premature because there are currently several cases being litigated that will provide a definitive guidance on whether restrictions such as the one being proposed to the Council are constitutional. Likely the most relevant of those cases is *Nordyke v. King*, 229 F.3d 1266 (9th Cir. Cal. 2000) *appeal docketed*, No. 07-15763 (9th Cir. May 1, 2007)), which is currently under review by the 9th Circuit U.S. Court of Appeals in light of the *McDonald* decision. It is scheduled for oral argument on October 19, 2010. *Nordyke* concerns an Alameda County ordinance that bans firearms on County property. The Ninth Circuit originally upheld the ordinance in April of 2009, holding County property is a “sensitive place” where such restrictions are lawful. In July of 2010, however, it vacated that opinion and ordered the parties to file supplemental briefing regarding: 1) the impact of *McDonald* on the disposition of the *Nordyke* case, and 2) any other issues properly before the court, including the level of scrutiny that should be applied to the ordinance in question. *Nordyke v. King*, 611 F.3d 1015 (9th Cir. Cal. 2010) (order vacating the panel opinion and remanding to the panel for further consideration in light of *McDonald*). Plaintiffs have pointed out in their brief that “public places, where many people gather, like: parks, fairgrounds, public arenas, civic centers, and government buildings . . . are not longstanding examples of historically ‘sensitive places.’” FRAP 35(a) Br. of Appellants at 14, *Nordyke v. King*, No. 07-15763 (9th Cir. May 1, 2007). This assertion is correct. And since Alameda County has failed to provide any evidentiary support to the contrary, the Ninth Circuit is likely to rule in plaintiffs’ favor.

Likewise, despite the proposed ordinance’s assertion to the contrary, city parks are *not* sensitive places. Thus, a total ban on carrying firearms in parks cannot be logically justified. Significantly, the ordinance challenged in *Nordyke*, unlike the proposed ordinance, provides exceptions for carrying firearms as permitted by state law, and its constitutionality is *still* being challenged. (See Alameda County Code of Ordinances § 9.12.120(F)).

Also noteworthy are two other federal cases that seek to determine the scope of the right to *bear* (i.e., carry) firearms: *Sykes v. McGinness*, No. 09-01235 (E.D. Cal. filed May 5, 2009), and *Peruta v. County of San Diego*, No. 03-11542 (S.D. Cal. filed October 2009). The issue in these cases is whether state or local law can generally prohibit responsible, law-abiding people from carrying firearms in public by refusing to issue permits to carry concealed firearms. A motion for summary judgment on this very issue has already been filed by plaintiffs in *Peruta*, and a similar motion is expected to be re-filed by the plaintiffs in *Sykes* any day. The rulings in these cases are expected to support our position that the Second Amendment forbids broad prohibitions such as those the proposed ordinance seeks to place on the carrying of firearms by responsible, law-abiding people. (See *Peruta v. County of San Diego*, 678 F. Supp. 1046 (S.D. Cal. 2010).)

In light of the this, the Council should postpone consideration of the proposed ordinance until at least the three mentioned cases have been fully litigated, and the scope of constitutional restrictions on carrying firearms is more definite.

To do otherwise invites similar costly litigation against the City of Santa Clara.

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<sup>1</sup> In order to obtain a permit to carry a concealed handgun in public, an applicant must pass a criminal background check (Cal. Pen. Code § 12052), and successfully complete a handgun training course. (Cal. Pen. Code § 12050(a)(1)(E)).

## II. The Proposed Ordinance Violates California's Preemption Doctrine.

Aside from the question of constitutionality, the proposed ordinance is preempted by state law because several exceptions that are required of local ordinances by state law have been excluded. For example, the proposed ordinance fails to provide an exception for holders of a permit to carry a concealed handgun pursuant to Cal. Pen. Code section 12050. Local regulations are preempted by state laws under California Constitution, article 11, section 7, which limits local lawmaking to "all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws.*" (emphasis added). The California Supreme Court fairly recently explained how this doctrine works, stating:

[i]f otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. A local ordinance "duplicates" state law when it is coextensive with state law. A local ordinance "contradicts" state law when it is inimical to or cannot be reconciled with state law. A local ordinance "enters a field fully occupied" by state law in either of two situations—when the Legislature expressly manifests its intent to occupy the legal area or when the Legislature impliedly occupies the field. When the Legislature has not expressly stated its intent to occupy an area of law, the court looks to whether it has impliedly done so.<sup>2</sup>

Thus, a local ordinance prohibiting possession of firearms in City parks will be struck down for being either expressly or impliedly preempted. The proposed ordinance will not survive a preemption challenge because it directly contradicts state law. Specifically, California law allows for people to carry firearms in public for various purposes in various situations (*e.g.*, with a valid concealed handgun permit pursuant to Cal. Pen. Code section 12050).

The Council should take note of the *Fiscal* court's warning: "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."<sup>3</sup>

The proposed ordinance should be rejected in light of these flaws. We hope that the Mayor and Council will not waste taxpayer funds by inviting costly litigation challenging this ordinance.

If promoting public safety with respect to firearms is the City of Santa Clara's goal, instead of adopting ineffective and misguided ordinances that mainly affect the rights of law-abiding gun owners, our clients request that you consider implementing any of the many programs they help make available to local governments. These programs are sponsored by the firearms industry, government agencies, and groups such as the California Rifle and Pistol Association. These programs promote safety while respecting the civil rights of your residents, and are proven to be effective. Our clients are willing to discuss the merits of these programs and how to best implement them in the City of Santa Clara with the Council at its convenience.

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<sup>2</sup> *O'Connell v. City of Stockton*, 41 Cal. 4th 1061, 1066 (Cal. 2007), see also *Fiscal v. City and County of San Francisco*, 158 Cal. App. 4th 895, 903 (Cal. App. 1st Dist. 2008)

<sup>3</sup> See *Fiscal v. City and County of San Francisco* (2008) 158 Cal. App. 4th 895, 919.

Mayor Patricia Mahan  
September 16, 2010  
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If you have any questions, or if you would like any additional information, please do not hesitate to contact our office. Thank you for your consideration.

Sincerely,  
**MICHEL & ASSOCIATES, P.C.**  


C.D. Michel

CC: Elizabeth H. Silver, Interim City Attorney  
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**FAX TRANSMITTAL SHEET**

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Councilmember Will Kennedy  
Councilmember Joe Korneder  
Councilmember Jamie Matthews  
Councilmember Kevin Moore  
Councilmember Jamie McLeod

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**FROM:** C.D. Michel

**DATE:** September 20, 2010

**RE:** Opposition to Proposed Ordinance Prohibiting the Possession of Firearms in Santa Clara City Parks for all Non-Peace Officers.

THIS FAX CONTAINS COVER PAGE PLUS 4 PAGE(S). IF YOU DO NOT RECEIVE ALL PAGES PLEASE CONTACT

Valerie Pomella AT (562) 216-4444.

**SPECIAL INSTRUCTIONS**