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April 22, 2011

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Planning Commission Member Robert Abbott
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CITY OF PLEASANT HILL PLANNING COMMISSION
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Pleasant Hill, CA 94523
Fax: (925) 682-9327
VIA FAX & OVERNIGHT MAIL

**Re: Opposition to Proposed Zoning Ordinance Amendments
Regulating Firearm Dealers and Ammunition Vendors**

Honorable Planning Commission 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.

Our clients oppose the adoption of the proposed amendments to certain zoning ordinances ("the proposed amendments") concerning firearms and ammunition vendors ("Dealers") currently being considered by the Pleasant Hill Planning Commission ("PHPC"). The amendments are being considered at the urging of gun ban advocacy groups without accurate discussion on how they unlawfully burden businesses and violate constitutional protections such as the right to keep and bear arms and the right to equal protection under the law. With this letter we seek to provide the PHPC with accurate information as to the applicable law in this matter, and help to clear up distortions of the law asserted by gun control groups with an agenda not necessarily in the best interest of the City of Pleasant Hill ("City").

We understand that so far the only action taken by the PHPC regarding the proposed amendments was to discuss them at a PHPC study session, and that no official action was taken at that session. And, since that session, the PHPC Public Health and Safety Subcommittee has met with parties on both sides and now recommends the specific distance standards for Dealers should be stricken from the proposed amendments. We also understand that the PHPC requested additional legal analysis as to the lawfulness of the proposed amendments and received input in the form of a legal memorandum dated April 19, 2011 from the Legal Community Against Violence (“LCAV”).

A brief review of LCAV’s memorandum shows why it should *not* be relied upon. The legal issue with the proposed amendments is the prohibition on Dealers within significant distances of various entities. Yet, LCAV does not provide *any* support showing such restrictions to be lawful. Rather, it simply harps on the authority of local governments to regulate Dealers. But, as stated, that is not the issue here.

We recognize that local governments have been given authority to regulate firearm dealers, even requiring permits from local law enforcement and imposing certain other conditions to operate. But, that authority is limited by constitutional restraints, and the proposed amendments, for the reasons explained herein below, exceed what is legally permissible. Thus, the PHPC Public Health and Safety Subcommittee is correct to recommend striking the distance requirements.

A. The Proposed Amendments Unlawfully and Unduly Burden Legitimate Businesses.

If the PHPC were to adopt the proposed amendments, in order for a Dealer to conduct business in the City of Pleasant Hill, that Dealer, among other things, would have to:

- 1) procure a Use Permit; and
- 2) find a location for the business that is not:
 - a) within 500 feet of a residential land use designation;
 - b) within 800 feet of a school or park;
 - c) within 800 feet of a religious institution; and/or
 - c) within 1,000 feet of any other Dealer.

Regardless of the *practical* implications for Dealers in having to find a suitable location for their store that is not within any of the enumerated areas, the PHPC should refuse to adopt the proposed zoning amendments because they are legally deficient.

B. The Proposed Amendments Violate the Second and Fourteenth Amendments of the United States Constitution.

Significantly, LCAV has withheld critical information and compelling legal precedent from the City in claiming that localities have the authority to adopt these proposals. In fact, the proposed provisions present legal issues which *will* be resolved through litigation in light of the U.S. Supreme Court's ruling on the Second Amendment in *McDonald v. Chicago*.¹

LCAV relies on a 1997 California appellate court case as purported authority for the proposed amendments.² In that case, firearm dealers challenged a zoning ordinance on Equal Protection grounds that gave discretion to a city's planning commission to determine whether a proposed business was compatible in a certain location. Although the court upheld the ordinance in that case, the precedent is practically worthless, for two reasons: 1) it involved an ordinance merely conferring authority on a planning commission that could exercise its authority in a lawful manner, whereas here the proposed amendments outright ban Dealers from almost everywhere in the City; and more importantly, 2) it was decided *prior* to the U.S. Supreme Court's rulings in *Heller* and *McDonald*.

The fact that it was a pre-*Heller* and pre-*McDonald* decision is relevant as to the level of scrutiny the court applied. In *Suter*, the court applied rational basis scrutiny, finding the dealer's claim involved neither a suspect class *nor* a *fundamental right*. While firearm dealers may not be a suspect class in the eyes of the law, a fundamental right is most certainly involved when regulating the accessibility of firearms, through firearm dealers, to the general public. As mentioned, some courts have already determined the right to keep and bear arms "necessarily involves the right to purchase . . . them." See, e.g., *Andrews v. State*, 50 Tenn. 165, 178 (1871), which was cited approvingly by *Heller*.

Since a fundamental right is involved, the analysis under the *Suter* case is not applicable to the proposed zoning amendments. And, since the individual right aspect of Second Amendment jurisprudence remains in its infancy, there is little guidance on what analysis applies.

However, there is another fundamental right which has been analyzed thoroughly, and which shares similar accessibility issues with the right to keep and bear arms that may provide insight into courts' possible analysis: the right to abortion. Just as the ability of a woman to secure a safe abortion is "inextricably bound up with" the freedom of physicians to perform the abortions, so is the ability of

¹ The United States Supreme Court held in its landmark decision, *District of Columbia v. Heller* (2008) 128 S. Ct. 2783, 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, thereby restraining *local* governments from infringing on an individual's right to keep and bear arms.

² *Suter v. City of Lafayette*, 67 Cal. Rptr. 2d. 420, 426 (Cal.Ct.App. 1997).

people to secure a constitutionally protected firearm “inextricably bound up with” the freedom of firearm dealers to supply the firearms and buyers to purchase them.

A court in Ohio was faced with the question of whether a zoning ordinance relegating abortion providers with controlled use property was legal.³ After finding that the zoning ordinance was more than a *de minimis* “obstacle in the path of a woman’s freedom of choice,” the court ruled to overturn the ordinance. It 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.”⁴

Similarly, the proposed amendments before the PHPC place a more than *de minimis* obstacle in the path of residents of Pleasant Hill wanting to purchase a firearm, which is also a constitutionally protected fundamental right. And, although public safety is generally a legitimate government interest, continuing with the abortion analogy, that interest must be weighed against the nature and degree of the burden on the right to bear arms. Because a fundamental right is involved, Pleasant Hill must be able to show *facts* that support the concerns about the dangers of having Dealers in a certain area, not simple pronouncements of *possible* dangers.⁵

Even if the proposed zoning amendments were otherwise valid, regulations involving fundamental rights must employ the least restrictive means necessary to achieve the interest.⁶ A myriad of laws already exist prohibiting firearms from being carried in public while loaded without a permit, discharged in public, brandished, possessed within 1,000 feet of a school zone, etc. Enforcement of these laws constitutes a less restrictive and more efficient means of achieving the City of Pleasant Hill’s interest.

There are also Equal Protection issues involved. As already mentioned, the *Suter* case cited by gun control groups as authority that there are not any Equal Protection violations where a zoning ordinance singles out firearm dealers was pre-*Heller* and thus applied a now obsolete analysis. A

³ *Haskell v. Washington Township*, 635 F.Supp. 550 (1986), *reversed and remanded on other grounds by Haskell v. Washington Twp.*, 864 F.2d 1266 (6th Cir. 1988).

⁴ *Id.* at 557.

⁵ See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), holding that cities/counties may zone adult businesses if there is a reason unrelated to the content of the “speech” to do so, such as “to preserve the quality of urban life;” but that the cities/counties must support their reasons for doing so with facts. Although *Renton* held that a city or county need not conduct its own original study regarding the facts, they must still provide some factual showing from another city/county’s study or other source. This means the PHPC must show facts that Dealers make an area more dangerous, which it has failed to do.

⁶ See, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 54 (1983) (“strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution”).

proper analysis, under strict scrutiny, would require 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 there is no such requirement that they be zoned away from churches, schools, parks, etc.

C. The Proposed Zoning Amendments Violate Due Process Because They Are Motivated by a Political Animus for Firearms

The burden imposed on Dealers by the proposed amendments encouraged by the Brady Center is striking. And the impetus behind them seems to be a hostility toward firearm and ammunition dealers from gun control groups. Such discrimination is not tolerated by the law post-*McDonald*. Since the right to keep and bear arms (which includes having access to firearms) is a fundamental right that local governments cannot infringe, actively working to prevent firearm and ammunition vendors from operating legally in any locality would be akin to doing the same to abortion clinics, which has been deemed unlawful.⁷

We acknowledge that some of these legal issues are unsettled questions of first impression, due to the recent U.S. Supreme Court confirmation that the Second Amendment protects a fundamental, individual right to keep and to bear arms. But we remind the PHPC that these are issues that will need to be litigated in the near future, and that our clients are prepared to do so.

D. There is Little Support for the Proposed Ordinances in Other Localities.

In December of 2009, the County of San Mateo considered adoption of ordinances pushed by LCAV through the Association of Bay Area Governments (“ABAG”), some of which were similar to the proposed amendments before the PHPC. The San Mateo County Board of Supervisors, upon receiving a similar opposition letter submitted by our office, recognized that the proposed ordinances were problematic, and decided to forego their consideration.

The proposed amendments at issue are not a response to an issue of public safety in the City of Pleasant Hill, but rather are the result of gun control groups pushing their agenda in the Bay Area. Ordinances similar to the proposed amendments before the PHPC are being “shopped” to various local governments, including ABAG. On September 9, 2009, a memorandum was distributed to ABAG member cities, encouraging its members to adopt several ordinances identical to (and more encompassing than) the one currently before you.

E. There Are More Effective, Less-intrusive Means of Combating Firearm Crime.

⁷ See *Haskell v. Washington Township* (1986) 635 F.Supp 550.

Honorable Planning Commission Members

April 22, 2011

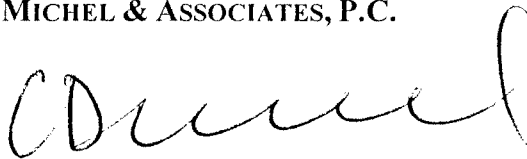
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In light of the potential liabilities imposed on Dealers by these ill-conceived proposed zoning amendments, the NRA, CRPA and their hundreds of thousands of members in California must oppose them in their present form. A California Court of Appeal recently court warned: "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 These proposed amendments ignore the court's admonishment, and unnecessarily subject the City of Pleasant Hill to litigation.

We suggest that, for all the reasons set forth in this letter, the City consult with Dealers and their representatives in order to understand the ramifications of implementing the proposed zoning amendments, and work with them, and our clients. The CRPA seeks to, among other things, promote firearms and hunting safety, protect hunting rights, enhance marksmanship skills of those participating in shooting sports, and educate the general public about firearms in order to reduce violence and encourage gun safety. As such, the CRPA is willing to work with the City to develop and implement policies in the City of Pleasant Hill that are proven to be effective in reducing gun violence and accidents without unduly burdening business or violating the constitutional rights of its residents.

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.



C. D. Michel

Enc. Memorandum re Proposed Zoning Ordinance Amendments

cc: Zoning Administrator
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Project Planner Troy Fujimoto
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Pleasant Hill, CA 94523

City Attorney Debra S. Margolis
100 Gregory Lane
Pleasant Hill, CA 94523

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

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FAX TRANSMITTAL SHEET

TO: Planning Commission Chair James Bonato
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CITY OF PLEASANT HILL PLANNING COMMISSION

FIRM:

FAX NO.: (925) 680-0294

TEL. NO.:

FROM: C.D. Michel

DATE: April 22, 2011

RE: Opposition to Proposed Zoning Ordinance Amendments Regulating Firearm Dealers and Ammunition Vendors

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

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