

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. KATIS
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

October 23, 2009

Mayor Gayle McLaughlin
Vice Mayor Ludmyrna Lopez
Councilmember Nathaniel Bates
Councilmember Tom Butt
Councilmember Jeff Ritterman
Councilmember Jim Rogers
Councilmember Maria Viramontes
CITY OF RICHMOND
450 Civic Center Plaza
Richmond, CA 94804
VIA FAX (510) 620-6824 & OVERNIGHT MAIL

City Attorney Randy Riddle
CITY OF RICHMOND
450 Civic Center Plaza
Richmond, CA 94804
VIA FAX (510) 620-6518 & OVERNIGHT MAIL

Re: **Pre-Litigation Demand**
To Repeal "Large-Capacity Magazine" Ordinance

Dear City Officials:

Richmond Municipal Code (RMC) section 11.98 et. seq., ("the ordinance") bans the possession of "large-capacity" (over ten rounds) magazines. We write on behalf of our clients, the National Rifle Association (NRA), the California Rifle and Pistol Association (CRPA), and gun owners in the City of Richmond and surrounding areas who own firearms that utilize magazines that accept over ten rounds, to demand that the ordinance be repealed in light of recent case law.

THE ORDINANCE IS INEFFECTIVE

Our clients have no interest in defending criminals who misuse firearms, or in making firearms available to those criminals. To the contrary, they are leaders in advocating for effective crime-fighting legislation and gun-safety measures. Our clients are interested in, and in fact dedicated to, defending the rights of their law-abiding members to participate in the shooting sports and to choose to own a gun to defend themselves and their families. Preliminarily, we note that this ordinance has done nothing to reduce violence in Richmond. There is no evidence that handguns capable of accepting magazines that accept over ten rounds of ammunition are misused in crime more often than the varieties of handguns that the ordinance leaves un-banned, or that the banned handguns are used less in crimes since the

ordinance was passed.

The ordinance was originally purportedly justified, at least in part, by its proponents as a means to fill in the gap between the state law that prohibits the sale of large-capacity magazines (but grandfathers in possession of magazines bought before the sales ban took effect) by prohibiting the possession of large-capacity magazines as well. But the legislature's decision to not ban possession was not a mere unintentional oversight. This is made clear by an examination of the handguns that the state has authorized for sale in California pursuant to California Penal Code section 12125, et seq. While the legislature intended to prohibit the sale of large-capacity magazines to prevent criminals from obtaining them, the legislature did *not* intend to prohibit the possession of such magazines bought prior to the effective date of the state law, nor the use of firearms already possessed that came with large-capacity magazines. Moreover, many of the firearms the state has determined not to be unsafe handguns do not have smaller-capacity magazines available for them.

Prohibiting the possession of large-capacity magazines by law abiding citizens who previously purchased a firearm that will be rendered inoperable without the large-capacity magazine that it came with will not reduce crime, nor will it prevent criminals from obtaining them. If a criminal is in possession of a large-capacity magazine, the possession of that item is already illegal.

THE ORDINANCE IS PREEMPTED BY STATE LAW

The City's "large-capacity magazine" ordinance runs afoul of California's preemption doctrine on multiple grounds. As you may be aware, a local firearms regulation will be struck down where a state law either *expressly* or *impliedly* preempts the local law. California's express preemption doctrine is codified in Government Code section 53071, which prohibits local governments from enacting legislation *relating to the registration or licensing* of commercially manufactured firearms. Alternatively, under California's implied preemption doctrine, a local regulation will be struck down where it duplicates state law, conflicts with a state law, or enters into a field wholly occupied by the state to the exclusion of local regulation.¹

The Ordinance Bans Firearms Specifically Approved by the State

As a recent Court of Appeals decision, confirmed by the California Supreme Court, makes clear, cities cannot ban the sale of firearms that are approved for sale within the state by the California Department of Justice (DOJ). In *Fiscal v. City and County of San Francisco*, the court carefully analyzed the law regarding the preemption of local firearms ordinances and the scope of local government authority to regulate firearms in general. In particular, the *Fiscal* court analyzed the provisions of the "Unsafe Handgun Act" (UHA) and ruled that any gun authorized for sale under state law could not be prohibited from sale by local governments.

The UHA is contained in Penal Code section 12125-12133 et. seq. The Richmond ordinance bans the possession of magazines capable of accepting more than ten rounds. Under the UHA, a

¹*Fiscal v. City and County of San Francisco*, (2008) Cal. App. 4th 895 [70 Cal.Rptr.3d 324].

number of handguns specifically tested and approved by the state that were not sold with magazines with ten or fewer rounds, or for which such magazines are not even available, are now effectively prohibited by the Richmond ordinance. A list of state-approved handguns is available through the California DOJ website. We have identified multiple firearms on the approved-for-sale list that are now prohibited under the City's ordinance. For many semi-automatic handguns which come with magazines capable of accepting over ten rounds, there is no California dealer who carries a magazine capable of accepting under ten rounds. Nor is there any other source for many handguns with magazines capable of accepting over ten rounds. The handguns of which this is true include: the Steyr GB; the H&K SP89; the Vector CP1 and SP 1 and 2.

As to the effect of the UHA on local ordinances, the legislature recognized that: "This bill would appear to preempt any such local ordinance, both those already in existence and any proposed locally in the future." *Senate Public Safety Committee Report on SB15, at p. 9*. Recognizing this, multiple cities seeking to maintain their (supposed) local power to ban subclasses of handguns and firearm components asked the Legislature to amend a non-preemption provision into SB15 (*See e.g., April 1, 1999 city of San Jose Newsletter to Senate Public Safety Committee Chairman Vasconcellos, and the proposed amendment. Copy available upon request.*) The Legislature did not adopt the language, or any other language recognizing or continuing local power to ban handguns.² The *Fiscal* court took note of this in reaching its decision.

Accordingly, Richmond's "large-capacity magazine" ordinance conflicts with state law by prohibiting the possession of firearms that were sold with large-capacity magazines pursuant to state law. Likewise, by passing an ordinance banning firearms and firearm components, the City of Richmond has entered into a field that is fully occupied by the state to the exclusion of local regulation.

The Ordinance is Preempted by State Laws Regulating Large-Capacity Magazines

As noted, the sale of large-capacity magazines is already prohibited pursuant to Penal Code section 12021(a)(2). The legislature's passage of this statute, along with its many exemptions, indicate an intention to occupy the field of regulating large-capacity magazines to the exclusion of local regulation. By enacting legislation that regulates large-capacity magazines, the City of Richmond is entering into an area already occupied by the state. Accordingly, the ordinance violates California's implied preemption doctrine.

Moreover, by passing a law prohibiting the possession of large-capacity magazines, Richmond passed a law that conflicts with the Legislature's intentions regarding the possession of large-capacity

² Where specific proposed language would have accomplished a specific result, the Legislature's failure to incorporate that language in the Act is probative of a contrary intent. *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 520. As to the value and admissibility of such legislative history see: *People v. Ledesma* (1997) 16 Cal.4th 90, 98, 100 (committee reports and analyses) and *Hutnick v. U.S. Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 465, fn. (same); *County of San Bernardino v. City of San Bernardino* (1997) 15 Cal.4th 909, 917, 926 (letters by proponents of the bill urging its enactment); *Moradi-Shalal v. Fireman's Fund Ins. Co.* (1988) 32 Cal.3d 211, 219, fn. 9 ("undated memo in Assemblyman Lockyer's files, furnished by the Legislative Intent Service").

magazines. While the state chose to prohibit the sale of large-capacity magazines, it did not choose to prohibit their possession. The *expressio unius* maxim requires that legislative omissions be considered intentional.³ Under this maxim, it is the intent of the Legislature to allow the possession of large-capacity magazines.

The legislature's intent is further exemplified when examined in conjunction with the state's prior certification of handguns (pursuant to the Unsafe Handgun Act) for which smaller-capacity magazines are not available. Not only that, the legislature specifically authorized the possession and importation of large-capacity magazines possessed prior to the passage of 12020(a)(2). Cal. Pen. Code section 12020(b)(23) provides:

"Subdivision (a) does not apply to any of the following ... the importation of a large-capacity magazine by a person who lawfully possessed the large-capacity magazine in the state prior to January 1, 2000, lawfully took it out of the state, and is returning to the state with the large-capacity magazine previously lawfully possessed in the state."

Surely the state did not intend to permit the importation of large-capacity magazines by persons who possessed them prior to the ban on the sale of these items, only to have the simultaneous and subsequent possession of the same magazines be made unlawful by a local regulation. Accordingly, local regulations of this type, including the Richmond ordinance, conflict with and are preempted by Penal Code sections 12020(a)(2) and (b)(23).

Finally, Cal. Pen. Code sections 12020(a)(2) and 12020(b)(24) through (b)(32) enumerate multiple circumstances wherein it remains lawful to transfer large-capacity magazines, including transfers made for the purposes of motion picture productions, the operation of armored vehicle businesses, transfers to and from gunsmiths, and transfers to licensed firearm dealers. As the possession of high capacity magazines is a right necessarily encompassed within the right to transfer high capacity magazines (i.e., one cannot transfer an item without first possessing it), the City's ordinance likewise conflicts with, and is preempted by, state law on these grounds as well.

The Ordinance is Preempted by State Laws Authorizing Special Weapons Permits

In addition to the preemption issues outlined above, the City's ban on the possession of "large-capacity magazines" also conflicts with the legislature's express authorization that these items may be lawfully possessed by holders of special weapons permits pursuant to Penal Code sections 12095, 12230, 12250, 12286, and 12305. Many firearms of the types authorized by these sections utilize large-capacity magazines. The state delineates the standards and procedures for who may possess these firearms and under what particular circumstances. The Richmond ordinance, however, completely

³ *Expressio unius est exclusio alterius*: the expression of one thing signifies the exclusion of others. (See e.g. *Lukhard v. Reed* (1987) 481 U.S. 368 [95 L.Ed.2d 328], *Omni Capital Int'l v. Rudolf Wolff & Co. Ltd.*, (1987) 484 U.S. 97, 106 [108 S.Ct. 404, 98 L.Ed.2d 415].); see also *People v. Jose A.* (1992) 5 Cal.App.4th 697 noting *People v. Norwood* (1972) 26 Cal.App.3d 148, 156; *People v. Rowland* (1999) 75 Cal.App.4th 61 [88 Cal.Rptr.2d 900].)

prohibits the possession of large-capacity magazines, despite the fact that the possession of these firearms and components may be specifically authorized pursuant to sections 12230, 12250, 12285, and 12305. The state's intention to authorize the possession of large-capacity magazines by holders of special weapons permits is made clear by the legislature's express inclusion of exemptions for the transfer of large-capacity magazines to these permit holders in Cal. Pen. Code section 12020. As noted, the right to possess an item is necessarily included within the right to transfer that item. Accordingly, the City's ordinance conflicts with state laws authorizing the possession and transfer of large-capacity magazines pursuant to special weapons permits.

The Ordinance Interferes with the State's Handgun Licensing and Registration Scheme

When the state authorized the sale of firearms with magazines capable of accepting more than ten rounds, it granted a license to possess these firearms as purchased, i.e. with large-capacity magazines.⁴ Indeed, many of the firearms that were lawfully sold with these "large-capacity magazines" do not have an alternative smaller-capacity magazine available for purchase. By passing a law that prohibits the possession of firearms and firearm components lawfully acquired and licensed pursuant to state law, the City has impermissibly adopted a regulation that relates to the registration or licensing of commercially manufactured firearms. As noted, Gov. Code section 53071 expressly forbids local governments from passing regulations "relating to the registration or licensing of commercially manufactured firearms." Accordingly, the City's large-capacity magazine ban is expressly preempted by state law and must be repealed.

The Ordinance Conflicts with the State's Concealed Carry Weapons (CCW) Statutes

California Penal Code section 12050 conveys to California Sheriffs the authority to issue to California firearm owners "a licence to carry concealed a pistol, revolver, or other firearms capable of being concealed upon the person." In issuing CCW permits to California residents, the State (via local law enforcement) specifically authorizes the concealed carry of particular handguns. Included among the various makes and models of firearms capable of being concealed upon the person are several handguns that are equipped with magazines capable of accepting over ten rounds. In fact, many of our clients' members throughout California are holders of CCW permits for handguns with large-capacity magazines. As Richmond's large-capacity magazine ban interferes with the state's CCW licensing scheme, the ordinance is expressly preempted by Government Code section 53071. Moreover, as the City's ordinance would prohibit the possession of a firearm authorized to be carried concealed pursuant to state law, the ordinance is impliedly preempted by Cal. Pen. Code section 12050.

THE ORDINANCE INFRINGES ON THE FUNDAMENTAL RIGHT TO SELF-DEFENSE

As you are no doubt aware, the United States Supreme Court recently confirmed that the Second Amendment of the United States Constitution guarantees every law abiding adult the right to possess operable handguns in the home for self defense.⁵ In reaching its decision, the Court stated that the Second Amendment protects the rights of individuals possess firearms commonly owned for self

⁴ See Cal. Pen. Code sections 12074, 12077.

⁵ *District of Columbia v. Heller*, (2008) 128 S.Ct. 2783.

defense and other lawful purposes. Many of the firearms the City's ordinance leaves banned, i.e., firearms with magazines capable of accepting over ten rounds, are commonly owned and possessed for self defense. Moreover, the Supreme Court specifically ruled in *Heller* that the municipal ordinance requiring handguns to be kept with an easily detachable trigger-lock, also violated that right. Likewise, a requirement that gun owners surrender a part that makes their handguns operable cannot be saved by a claim that they might be able to buy a replacement part. As the Richmond ordinance bans the meaningful use of firearms that were lawfully purchased under state law, and which are commonly owned for self defense, the ordinance impermissibly infringes on the Second Amendment right to keep and bear arms.

Conclusion

The ordinance should be repealed so that expensive litigation can be avoided. We hope that the City of Richmond will not waste taxpayer funds defending this useless, counterproductive ordinance in court. Our clients and their members urge Richmond to repeal this ordinance and avoid litigation. Unless the repeal process is initiated within the next thirty (30) days, we will file suit to have the ordinance invalidated.

If you are interested, our clients have a variety of firearm education and safety materials available to local officials, free of charge.

Sincerely,

MICHEL & ASSOCIATES, P.C.



C. D. Michel

CDM/cbm



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

FAX TRANSMITTAL SHEET

TO: Mayor Gayle McLaughlin

FIRM: City of Richmond

FAX NO.: (510) 620-6824

TEL. NO.

FROM: C. D. Michel

DATE: October 23, 2009

RE: Pre-Litigation Demand to Repeal "Large-Capacity Magazine" Ordinance

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(562) 216-4444
sblood@michelandassociates.com

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TO: Vice Mayor Ludmyrna Lopez

FIRM: City of Richmond

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FAX TRANSMITTAL SHEET

TO: Councilmember Nathaniel Bates

FIRM: City of Richmond

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FROM: C. D. Michel

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TO: Councilmember Jeff Ritterman

FIRM: City of Richmond

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TO: Councilmember Jim Rogers

FIRM: City of Richmond

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FAX TRANSMITTAL SHEET

TO: Councilmember Maria Viramontes

FIRM: City of Richmond

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Will follow via FedEx overnight mail. Thank you.

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

sblood@michelandassociates.com



OF COUNSEL
DON B. KATIE
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

October 23, 2009

Ms. Diane Holmes
City Clerk's Office
450 Civic Center Plaza
Richmond, CA 94804
VIA OVERNIGHT MAIL

Re: Enclosed Letters

Dear Ms. Holmes:

Please distribute the enclosed letters to the members of the City Council and the City Attorney. Feel free to contact me if you have any questions or concerns. I can be reached at (562) 216-4444, or by email at sblood@michelandassociates.com.

Thank you in advance for your cooperation.

Sincerely,
MICHEL & ASSOCIATES, P.C.

Sarah Blood
Legal Secretary

sb/s

From: Origin ID: LGBA (562) 216-4444
C.D. Michel
Michel & Associates
180 E. Ocean Blvd., Suite 200

Long Beach, CA 90802



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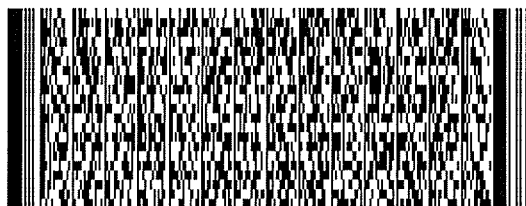
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Ms. Diane Holmes
City of Richmond
450 CIVIC CENTER PLZ

RICHMOND, CA 94804

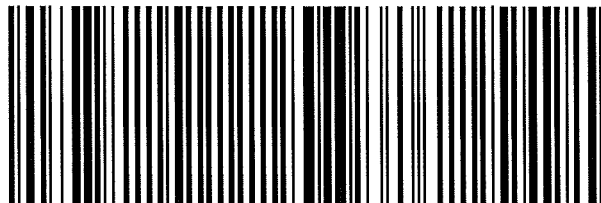
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