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April 25, 2012

Councilmember Todd Gloria, Chair
Councilmember Carl DeMaio, Vice Chair
Council President Pro Tem Kevin Faulconer
Councilmember David Alvarez
Councilmember Marti Emerald
CITY OF SAN DIEGO
COMMITTEE ON BUDGET & FINANCE
202 C Street
San Diego, CA 92101
VIA EMAIL (PIson@sandiego.gov) & FAX AT (619)236-7012

**Re: Report to the City Council No: 12-044; Recommending Approval of
Proposed User Fees for Fiscal Year 2013**

Honorable Committee 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 individual and business members in California, including those who operate firearm businesses in the City of San Diego, to address concerns regarding the City of San Diego's consideration of a proposal to raise local fees for operating, *inter alia*, a firearm business.

It is our understanding that today, April 25, 2012 at the San Diego City Council Chambers, this Committee will be holding a discussion concerning the raising of Police Department regulatory fees, apparently mandated by San Diego Municipal Code Chapter 3, Article 3, Division 1. We vigorously attempted to locate the materials that will be considered at that discussion by searching the City's website and contacting City agencies, but were unsuccessful in finding anything until approximately 2:00pm yesterday (April 24). And, even the document we found did not provide the facts needed for meaningful public commentary on this matter.

Preliminarily, therefore, we respectfully request a statement from the San Diego City Attorney explaining the City's compliance with the Brown Act in bringing this report to this Committee. This request

should not be construed as an accusation that the City violated the Brown Act, but rather an attempt to understand what procedures were undertaken by the City to notify the interested parties of their proposed action on this matter.

More importantly, because we, on behalf of our many interested clients, have not had a real opportunity to review the City's reasons for the proposed fee increase, we respectfully request a continuance of the April 25 hearing on this matter until such time the reports and presentations referenced on pages 2-3 of the Report to the City Council NO: 12-044 are made available for public review. This is to allow our clients and other interested parties an opportunity to assess and comment on issues with the proposed fee increase, including its legality.

Though it is true cities have some authority to regulate firearm vendors, and even to charge them regulatory fees, that authority is not unlimited. To the contrary, both state and federal law place limitations on such regulatory fees.

First, California law makes clear that local regulatory fees are permissible, as long as they are reasonable and equitable, and commensurate with the actual costs incurred by the local government in conducting the regulation, not merely revenue generating. *United Bus. Com. v. City of San Diego*, 91 Cal. App. 3d 156, 165, 154 Cal. Rptr. 263 (Ct. App. 1979). Those fees are also subject to the criteria set forth in Proposition 26. (Cal Const art XIII C, §1(e).)

Likewise, the federal constitution demands that when constitutionally protected activity is being regulated, the government only impose a fee "as a regulatory measure and calculated to defray the expenses of policing the activities in question." *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). The U.S. Supreme Court held in its landmark decision, *District of Columbia v. Heller*, 554 U.S. 570 (2008), that 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. The fundamental right to arms necessarily protects the right to acquire firearms. See *Andrews v. State*, 50 Tenn. 165, 178 (1871), cited with approval, *Heller*, 554 U.S. at 614; see also *Bateman v. Purdue*, No. 5:10-265 (E.D. N.C., Mar. 29, 2012); and *Ezell v. City of Chicago*, No. 10-3525, 2011 WL 2623511, at *14 (7th Cir. July 6, 2011).

Firearm vendors 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*. Our clients are currently litigating this very issue with the State of California. See *Bauer v. Harris*, No. 11-01440 (E.D. Cal., filed Aug. 25, 2011).

Respectfully, we find it hard to believe it costs the City of San Diego over \$1,700 to legitimately regulate a lawfully licensed firearm vendor. The California DOJ only charges firearm vendors a \$115 fee for inspection costs, and that includes that agency's costs in maintaining a list of all current California firearm vendors. (See California Penal Code section 26720). And, most cities that we are aware of having

Honorable Committee Members

April 25, 2012

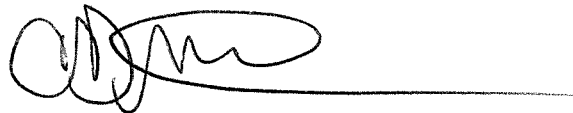
Page 3

such regulatory fees for firearm vendors only charge around \$500 more or less. Thus, San Diego's proposed fee of almost three times that amount appears suspiciously excessive and likely unlawful by any standard. As such, the NRA and CRPA believe a review of the City's justification for the proposed fee increase by interested parties is warranted before the City takes action on this matter.

Additionally, in regards to the City's reducing its fee for FFL employee background checks, though our members would admittedly prefer the proposed reduced rate over the current rate, it is our understanding that California law prohibits such a fee in any amount. (*See* California Penal Code section 26915(d), providing that nothing precludes a "local jurisdiction from conducting an additional background check . . . provided however, that the local jurisdiction may not charge a fee for the additional criminal history check). Thus, rather than lowering that fee, the City should be – and actually must be – acting to eliminate it as preempted by state law.

For all of the foregoing reasons, we ask that the City of San Diego allow our clients and their members time to review the City's reasons for its proposed fee increase on firearm vendors and to provide input accordingly before taking any action concerning this matter on April 25. 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.

A handwritten signature in black ink, appearing to read "C. D. Michel", is written over a horizontal line.

C. D. Michel

CDM/ca



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	Councilmember Carl DeMaio, Vice Chair	Fax: (619) 238-0915
	Council President Pro Tem Kevin Falconer	Fax: (619) 236-6996
	Councilmember David Alvarez	Fax: (619) 231-7918
	Councilmember Marti Emerald	Fax: (619) 238-1360
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	City Clerk	Fax: (619) 533-4045
	Council Committee Consultant Pamela Ison	Fax: (619) 533-4045

FIRM: CITY OF SAN DIEGO

FROM: C. D. Michel

DATE: April 25, 2012

RE: **Report to the City Council No: 12-044; Recommending Approval of Proposed User Fees for Fiscal Year 2013**

THIS FAX CONTAINS COVER PAGE PLUS 3 PAGES. IF YOU DO NOT RECEIVE ALL PAGES PLEASE CONTACT Claudia Ayala AT (562) 216-4444.

SPECIAL INSTRUCTIONS

Will also follow via email. Thank you

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