

SENIOR COUNSEL
C. D. MICHEL*

SPECIAL COUNSEL
JOSHUA R. DALE
W. LEE SMITH

ASSOCIATES
ANNA M. BARVIR
SEAN A. BRADY
SCOTT M. FRANKLIN
THOMAS E. MACIEJEWSKI
CLINT B. MONFORT
TAMARA M. RIDER
JOSEPH A. SILVOSO, III
LOS ANGELES, CA

*ALSO ADMITTED IN TEXAS
*ALSO ADMITTED IN DISTRICT OF
COLUMBIA

WRITER'S DIRECT CONTACT:
562-216-4444
CMICHEL@MICHELLAWYERS.COM



OF COUNSEL
DON B. KATES
BATTLEGROUND, WA

RUTH P. HARING
MATTHEW M. HORECZKO
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

July 16, 2013

Office of the City Clerk
CITY OF SUNNYVALE
P.O. Box 3707
Sunnyvale, CA 94088-3707
VIA FAX (408) 730-7696 & U.S. Mail

Office of the Mayor and City Council
CITY OF SUNNYVALE
456 W. Olive Ave.
Sunnyvale, CA 94088-3707
VIA FAX (408) 730-7699 & U.S. MAIL

Re: File No. 13-171: Resolution Calling a Special Election for November 5, 2013, for the Purpose of Submitting to the Voters a Measure to Adopt an Ordinance Establishing Gun Safety Regulations – OPPOSITION

Honorable Mayor and City Councilmembers:

We write on behalf of our clients, the National Rifle Association (“NRA”) and the California Rifle & Pistol Association (“CRPA”), as well as the hundreds of thousands of their members in California, including members residing in the City of Sunnyvale (“the City”).

Our clients oppose the proposed resolution calling for a special election for the purpose of submitting to the voters a package of gun measures mandating reports of firearm theft or loss within 48 hours, requiring the locked storage of firearms, banning the possession of standard-capacity ammunition magazines capable of holding ten or more rounds, and requiring burdensome record keeping of ammunition sales.

For the reasons described below, we urge you to oppose File No. 13-171 and prevent this ill-conceived package of gun measures from moving forward.

I. THE DUTY TO REPORT THEFT OR LOSS OF A FIREARM WITHIN 48 HOURS IS UNSOUND PUBLIC POLICY AND IT WILL DO LITTLE TO ACHIEVE ITS LAUDABLE GOALS

Proponents of reporting requirements like Proposed Sunnyvale Municipal Code Section 9.44.030 often claim that requiring firearm owners to report the theft or loss of firearms will encourage responsible gun ownership, assist in the investigation and prosecution of crime. While laudable goals, these claims are overstated.

A. Theft Reporting Ordinances Are Not Working in the Cities That Have Them

In 2006, the Sacramento Law and Legislation committee asked the Sacramento Police Department to research the effectiveness of theft-reporting requirements like this one. The evidence discussed in the report demonstrates that such ordinances are unused and ineffective in the cities that have adopted them.

An experienced inspector in the Weapons Unit of the San Francisco Police Department, who reads 3,000 reports every month, stated that he had not handled nor had he heard of any cases in which the ordinance was invoked.

When asked about the effectiveness of the ordinance, a San Francisco Assistant District Attorney stated, "I do not believe it will expand my ability to prosecute crime . . .," adding that "[i]t will take special circumstances for the ordinance to be useful in prosecution, in that the person charged under the ordinance would have to be proven cognizant of the burglary or theft of the firearm."

Even Councilwoman Lauren Hammond, when acknowledging that Sacramento is a city in the forefront of gun violence prevention, conceded that "on top of an ordinance that sounds really good, it hasn't done anything. Although I do support the concept, we've had an opportunity to see what it's done in other jurisdictions and it hasn't done a darned thing . . ."

B. The Ordinance Will Frustrate Police Investigations and Discourage Reporting

As a practical matter, the proposed measure will frustrate police investigations, as it impacts innocent people unaware of its obscure reporting requirement.¹ If a gun owner did not report the gun's loss or theft because he was unaware of the reporting requirement and is then approached by police investigating the gun after it is recovered at a crime scene, that owner faces possible criminal prosecution. The owner's self-interest dictates that he employ legal counsel rather than cooperating with police to quickly get them the information they need in order to investigate the crime and trace the firearm. And legal representation is appropriate not only when the firearm is found by police, but also when it is first discovered missing, because under the ordinance the owner can be prosecuted if the missing gun was not reported when the owner "should have known" the gun was missing.

Once an attorney is involved, that attorney then engages in a dialog with the police and often advises the victim to remain silent. This is not conjecture or hypothetical theory. This is currently

¹ Any attempt to prosecute under the ordinance is subject to the same due process notice problems which voided the Los Angeles ordinance involved in *Lambert v. California* (1957) 355 U.S. 225. That ordinance required any convicted felon in the city for more than five days to report her presence to the police. The court held its obscurity forbade prosecution of a person who had no knowledge of it though she had actually lived in the city for years.

happening in Los Angeles County, where this firm practices firearms law on a daily basis, and in San Francisco. Several individuals who were the victim of a firearm theft retained legal counsel in order to respond to inquiries from law enforcement agencies seeking information concerning a recovered firearm. The process inordinately bogs down negotiations while the possible liability of the victim for having the firearm stolen is evaluated. Meanwhile, the investigation of a crime involving the lost or stolen firearm is frustrated.

Further, the proposed measure will actually discourage reporting if the 48 hour window is missed. Most people already report the theft or loss of a firearm in hopes of getting it back if recovered by law enforcement or for insurance purposes. To mandate such a report and to attach a penalty for not complying amounts to little more than harassment of lawful residents. It further victimizes the victim of the crime. And because of the penalty, the ordinance will encourage those who miss the 48-hour window *to not report their loss at all* for fear of criminal penalty.

II. THE LOCKED-STORAGE MANDATE VIOLATES THE SECOND AMENDMENT, WHILE INCREASING THE RISK OF GUN ACCIDENTS

Proposed Sunnyvale Municipal Code section 9.44.040 requires firearms to be stored in a locked container or disabled with a trigger lock unless in that person's immediate control. This requirement makes it practically impossible for Sunnyvale residents to use their firearms for the core lawful purpose of self-defense – particularly in urgent, life-threatening situations when the need to exercise the Constitutional right to self-defense is most acute. The court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), explicitly noted that in such life-threatening situations, one has little time – if any – to fumble around and attempt to remove a trigger lock or open and retrieve a handgun from a safe to ward off a violent attack. As such, the proposed measure violates citizens' rights to defend themselves against such attacks by exercising their fundamental right to keep and bear arms under the Second Amendment.

Aside from being facially unconstitutional, both trigger locks and locked containers pose policy concerns as ineffective, dangerous, or both. Studies have shown that trigger locks often increase rather than decrease the potential for an accidental discharge. All firearms currently manufactured or imported into the United States can pass a "drop test." A loaded firearm that passes the "drop test" will not fire when it is accidentally dropped. However, when a trigger lock is applied, the loaded firearm may discharge when accidentally dropped. In essence, the application of a trigger lock to a loaded firearm increases rather than decreases the potential for an accidental discharge.

As with trigger locks, lock boxes also promulgate a false sense of security. Unlike safes, lock boxes are easily accessible and can be broken into with minimal effort by an adolescent. Consider *Wood v. Groh*, 7 P.3d 1163 (2000), where an adolescent gained access to a lock box with a screwdriver. Effective lock boxes that prevent most unwanted access are expensive and difficult to obtain. For this proposal to be effective, every firearm owner would be required to purchase an expensive, difficult-to-obtain lock box. The result will be homeowners expending enormous resources to fulfill the purpose of this proposal; an endeavor many working families and homeowners can scarcely afford.

III. THE BAN ON POSSESSION OF STANDARD-CAPACITY AMMUNITION MAGAZINES VIOLATES THE SECOND AMENDMENT

Our client opposes Proposed Sunnyvale Municipal Code section 9.44.050, a proposal that seeks to ban the possession of standard firearm magazines that are in common use by classifying them as “large-capacity magazines,” generally defined by the bill to include devices that have “a capacity to accept more than ten (10) rounds of ammunition.”² But because the term “large” is relative, because 10 rounds is arbitrarily designated, and because magazines holding more than 10 rounds are standard, such magazines are properly referred to as “standard-capacity magazines.”

The Supreme Court’s decision in *Heller*, 554 U.S. at 624-25, is clear that arms “typically possessed by law-abiding citizens for lawful purposes” or those “in common use” are protected by the Second Amendment. That protection surely extends to commonly used ammunition feeding devices – e.g., magazines – which are necessary for the meaningful exercise of the right. *Cf. Andrews*, 50 Tenn. at 178; *see also Bateman v. Perdue*, 881 F. Supp. 2d 709, 714 (E.D. N.C. 2012). Under any standard of review, a flat ban on items protected by the Second Amendment is unconstitutional. *See Heller*, 554 U.S. at 628-29 (finding D.C. ban on handguns, arms typically possessed by law-abiding citizens for lawful purposes, unconstitutional regardless of the standard of review applied).

The lawful use of ammunition feeding devices with a capacity of ten or more rounds is exceedingly common. Indeed, such magazines are “standard equipment” on firearms owned by millions of Americans. Due to the popularity of these magazines, and because of their effectiveness for personal defense, these items are widely used (and often preferred) for home defense. Accordingly, law-abiding citizens are guaranteed the right to acquire, possess, and use them for lawful purposes. *Heller*, 554 U.S. at 624. That guarantee prevents the City from banishing these items from its borders.

As the proposed measure banning possession of standard-capacity ammunition magazines violates the Second Amendment, its adoption will make the City a prime target for litigation. The City would be wise to refrain from moving forward with this proposal while this new field of law develops through litigation in other jurisdictions, especially given that our client is currently litigating the constitutionality of similar ammunition magazine bans throughout the country, including challenges in New York, Connecticut, and Colorado. Simply waiting the outcome of these cases will allow the City to fully consider the ramifications of this proposal, assured that whatever action it takes is supported by legal precedent.

² The proposed definition carves out exceptions for those devices that have been permanently altered to accept only 10 rounds, .22 caliber tube feeding devices, and tubular magazines contained in a lever-action firearm.

IV. THE AMMUNITION SALES RECORD-KEEPING REQUIREMENTS OVERLY BURDEN AMMUNITION RETAILERS AND GUN OWNERS, AND IT IS AN INEFFECTIVE POLICE TOOL

Proposed Sunnyvale Municipal Code section 9.44.060 will further burden an already over-regulated sector of the business community. If adopted, retailers will expend additional time with each sale of ammunition to explain the new law and its requirements, then spend more time obtaining the required information, filling out the necessary forms, storing the records in a database, and, when requested, transmitting the information to the police. All of this adds additional time to the already painstaking and time-consuming process of purchasing a firearm.

Additionally, requiring licensed ammunition sellers to maintain numerous, detailed records of customers who purchase ammunition will be perceived as an infringement on the customer's privacy rights and will alienate and drive off customers. In light of that burden, many customers will simply purchase ammunition elsewhere. Local businesses will suffer lost sales and revenue and the City will lose tax revenues on both the legal purchase of ammunition and the purchase of other items which, but for this ordinance, would have been purchased simultaneously.

Further, registration of ammunition sales will create an unnecessary backlog for the police department, and it wastes valuable law enforcement resources and taxpayer dollars. Consider the following experiences.

In 1997, the City of Pasadena examined the effectiveness of the ammunition sales registration ordinance that it had on the books for several years and found that the ordinance did not work. The record-keeping requirements were onerous to those who sell ammunition legally, and the ordinance provided no deterrent at all to those who peddle bullets on the street. As a crime-fighting tool, the ordinance was totally ineffective. The records never helped police to solve a crime.

Indeed, the Pasadena Police Department confirmed that ammunition registration had been of no use in reducing the rate of gun related violence and that, in the years it had been in effect, the law proved to be nothing more than a distraction and an ineffective tool for law enforcement. Pasadena ultimately voted to repeal the ordinance.

Similarly, through the 1980s, Congress considered repeal of a federal ammunition regulation package that required licensing of ammunition retailers, registration of ammunition sales, and a ban on the mail-order sale of ammunition. In 1986, the director of the Bureau of Alcohol, Tobacco and Firearms supported eliminating the record keeping requirement: "The Bureau and the [Treasury] Department have recognized that current *recordkeeping requirements for ammunition have no substantial law enforcement value*. In addition, their elimination would remove an *unnecessary recordkeeping burden from licensees*."³ As a result, the Firearms Owners Protection Act

³ *Legislation To Modify the 1968 Gun Control Act*, Hearing Report, Committee on the Judiciary, U.S. House of Representatives, October 30, Nov. 8, 1985, and February 19 and 27, 1986. The BATF was an agency of the Treasury Department until 2003.

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of 1986 repealed the ammunition restrictions, with little opposition despite heated debate over other provisions of the bill.

Undaunted by these failed experiments, the City of Los Angeles adopted an ammunition sales log ordinance several years ago. It has likewise accomplished nothing except to divert scarce police resources. In 2006, the Rand Report entitled "The Criminal Purchase of Firearm Ammunition," concluded that while ammunition sales records can provide information for generating leads on illegal firearm possession, because of the labor involved the information was not being used. The study shows that because of the manpower involved in monitoring the records and doing background checks, the Los Angeles Police Department was not doing so.

V. CONCLUSION

In light of the many practical and legal shortcomings of the proposed measures, as well as the significant potential liabilities imposed on gun owners and dealers, the NRA, CRPA, and their many members must oppose these measures.

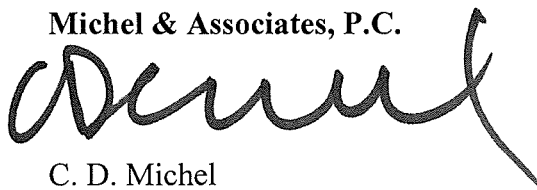
Our clients understand the need to fight the criminal misuse of firearms and gun violence, and it is not the intention of the NRA, CRPA, or individual gun owners to frustrate legitimate regulations. But as the *Fiscal* court admonished: "the goal of any local authority wishing to legislate in the area 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." *Fiscal v. City and County of San Francisco*, 158 Cal. App. 4th 895, 919 (2008).

The area of Second Amendment civil rights jurisprudence is evolving rapidly in the wake of the Supreme Court recognizing an individual Second Amendment right. The law, and not mere ideology, supports our positions. The City would be wise to refrain from presenting these measures to the voting public while this new field of law develops through litigation.

If you have any questions or concerns, please feel free to contact us.

Sincerely,

Michel & Associates, P.C.



C. D. Michel

cc: All City Councilmembers (council@ci.sunnyvale.ca.us)
Mayor Anthony Spitaleri (mayor@ci.sunnyvale.ca.us)