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Mayor Bob Grassilli
Vice Mayor Matt Grocott
Councilmember Cameron Johnson
Councilmember Mark Olbert
Councilmember Ron Collins

San Carlos City Council
600 Elm Street
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cityclerk@cityofsancarlos.org
VIA E-Mail and Fax: (650) 595-6719

Re: Proposed Moratorium on Firearm Retailers—OPPOSITION

To the Honorable Members of the San Carlos City Council,

We write to you on behalf of our clients, the National Rifle Association of America, and the California Rifle & Pistol Association, Inc., as well as the hundreds of thousands of their members in California, including those members residing in the City of San Carlos.

Our clients oppose the adoption of any proposed moratorium on firearm retailers. For the following reasons, we ask the City Council reject adopting a moratorium, and instead consider the alternative programs offered by our clients that will better achieve the City's goals of promoting the public health, safety, and welfare of City residents.

I. FIREARM RETAILERS ARE ALREADY ONE OF THE MOST HEAVILY REGULATED BUSINESSES IN THE NATION

The analysis prepared by City staff includes a brief discussion regarding how firearm dealers are regulated by federal and state laws, and otherwise simply refers to the California Firearms Laws Summary prepared by the California Department of Justice ("DOJ"). While this document does address important aspects of the hundreds of laws regarding firearms here in California, it does not adequately explain the rules and requirements applicable to firearm dealers—largely because it was

written to only provide “a general summary of California laws that govern common possession and use of firearms.”

To better aid the City Council in making an informed decision—and to dispel the varying and often ill-informed opinions on the subject—we would like to take this opportunity to explain the numerous and comprehensive steps that must be taken to lawfully open and continue operating a firearm retail business in California.

As a threshold matter, the State of California imposes specific restrictions on the sale and transfer of firearms applicable to both retailers and prospective purchasers in addition to federal requirements.¹ Other than specific local licenses and restrictions, a lawful firearm business must possess and maintain all of the following at all times:

- A valid Federal Firearms License (“FFL”);
- A valid Seller’s Permit issued by the State Board of Equalization;
- A valid Certificate of Eligibility (“COE”) issued by the Department of Justice (“DOJ”);
- A listing on the DOJ Centralized List of Firearms Dealers.²

a. Federal Firearms License Requirement

In order to be eligible for a Federal Firearms License, the applicant must:

- Be at least 21 years of age;
- Not be prohibited from shipping, transporting, receiving, or possessing firearms or ammunition;
- Not have willfully violated the Federal Gun Control Act or its regulations;
- Not have willfully failed to disclose material information or made false statements on the application for a Federal Firearms License;
- Have a premises for conducting business;
- If the applicant is to be a licensed dealer, certify that the secure gun storage or safety devices will be available at any place in which the firearms are sold; and,
- Certify that (1) the business is not prohibited by State or local law, (2) within 30 days the business will comply with the requirements of State and local law applicable to conduct the business, (3) the business will not be conducted under the license until the requirements of State and local law applicable to the business have been met, and (4) the applicant has sent or delivered a form to the chief law enforcement officer where the premises is located notifying the officer that the applicant intends to apply for a license.³

¹ The majority of these restrictions can be found in Penal Code sections 26500 through 28490, as well as the applicable regulations from the California Department of Justice regarding these sections. See Cal. Code Regs., tit. 11, §§ 4001-5499.

² Cal. Penal Code § 26700.

³ 18 U.S.C. § 923(d)(1); 27 C.F.R. § 478.47(b).

a. Seller's Permit Requirement

Any person engaged in business in California who intends to sell or lease tangible personal property that would ordinarily be subject to sales tax must obtain a Seller's Permit. To apply for this permit, applicants must provide specific personal information, including their social security number, date of birth, Driver's License number, and additional information specific to the business itself.⁴

Permit holders are required to report and pay sales and use taxes, keep adequate records, and notify the California Department of Tax and Fee Administration of any change in address, ownership, partners, sale or purchase of a business, or the dissolution of a business.⁵

b. Certificate of Eligibility Requirement

In order to obtain the required COE, applicants must have their fingerprints taken by a certified Live Scan operator and submit an application along with a \$93 fee (\$17 FBI fingerprint processing fee, \$54 DOJ fingerprint processing fee, \$22 COE application fee) to DOJ. DOJ will then examine its records and any records available in the National Instant Criminal Background Check System in order to determine if the applicant is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm.⁶

After reviewing all available records, DOJ will only issue a COE to a person if DOJ determines that the applicant is not a person who is prohibited by state or federal law from possessing firearms.⁷

c. Centralized List of Firearms Dealers Requirement

DOJ also maintains a list of all California licensed firearms dealers it refers to as the Centralized List of Firearms Dealers ("CLFD"). In order to be listed on the CLFD, individuals are required to submit an application to DOJ which includes information regarding the business such as the planned hours of operation, as well as the required Federal Firearms License, Certificate of Eligibility, any required local license, and Seller's Permit.

At any time, DOJ is authorized to remove a business from the CLFD for grossly negligent violations of any of the provisions regarding the sale or transfer of firearms listed in Penal Code section 16575, or if the required Federal Firearms License has expired or been revoked for any reason.⁸ Once removed from the CLFD, DOJ will notify local law enforcement and licensing authorities in the jurisdiction where the business is located.⁹

⁴ See California Department of Tax and Fee Administration, *Your California Seller's Permit: Your Rights and Responsibilities Under the Sales and Use Tax Law*, <https://www.cdtfa.ca.gov/formspubs/pub73.pdf> (Oct. 2017).

⁵ *Id.*

⁶ Cal. Penal Code § 26710(b).

⁷ Cal. Penal Code § 26710(c).

⁸ Cal. Penal Code § 26715(b)(1-2).

⁹ Cal. Penal code § 26715(b)(3).

II. ADDITIONAL REQUIREMENTS APPLICABLE TO CALIFORNIA FIREARM DEALERS

The rules and restrictions applicable to firearm dealers do not end once all necessary license requirements have been met. California licensed firearm dealers must safely secure their inventory when not open for business, always follow specific rules and restrictions when transferring firearms, maintain adequate records of any firearm transaction, and be subject to routine audits from both the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) and the California Department of Justice, Bureau of Firearms (“BOF”) to ensure compliance with all federal, state, and local laws.

a. Firearm Storage

At any time when a California licensed firearms dealer is not open for business, all firearm inventory must be stored in the licensed location and secured using one of the following methods:

- Store the firearm in a secure facility that is part of, or that constitutes, the licensee’s business premises;
- Secure the firearm with a hardened steel rod or cable of at least one-eighth inch in diameter through the trigger guard of the firearm which is secured with a hardened steel lock that has a shackle that is protected or shielded from the use of a boltcutter and anchored in a manner that prevents removal of the firearm from the premises; or,
- Store the firearm in a locked fireproof safe or vault in the licensee’s business premises.¹⁰

As used in the above requirements, the term “secure facility” is defined as a building that meets all of the following specifications:

- All perimeter doorways shall meet one of the following:
 - A windowless steel security door equipped with both a dead bolt and doorknob lock;
 - A windowed metal door that is equipped with both a dead bolt and doorknob lock, and if the window has an opening of five inches or more in any direction, the window shall be covered with steel bars of at least one-half inch diameter or metal grating of at least nine gauge affixed to the exterior or interior of the door; or,
 - A metal grate that is padlocked and affixed to the licensee’s premises independent of the door and doorframe.
- All windows are covered with steel bars;
- HVAC and other service openings are secured with steel bars, metal grating, or an alarm system;
- Any metal grates have spaces no larger than six inches in any direction;
- Any metal screens have spaces no larger than three inches in any direction; and,
- All steel bars shall be no further than six inches apart.¹¹

¹⁰ Cal. Penal Code § 26890.

¹¹ Cal. Penal Code § 17110.

b. Restrictions on the Sale or Transfer of Firearms

In order to lawfully sell or transfer a firearm to an individual, all of the following requirements—at a minimum—must be satisfied:

- The purchaser must provide proof of identity and age¹²;
- The purchaser must complete Federal Form 4473¹³;
- The dealer must complete a Dealer’s Record of Sales (“DROS”) Form¹⁴;
- The purchaser must pass a background check¹⁵;
- The firearm must be registered to the person at the time of purchase;
- The purchaser must wait 10-days prior to the delivery of the firearm¹⁶;
- The purchaser must receive the required locking device and warnings¹⁷;
- The purchaser must satisfy California’s Firearm Safety Certificate (“FSC”) requirement¹⁸;
- The purchaser must perform a safe handling demonstration¹⁹; and
- The dealer must deliver the firearm unloaded and securely wrapped or in a locked case.²⁰

But these are the only restrictions regarding the sale or transfer of firearms in California which are generally applicable to dealers and prospective purchasers. As one of the most heavily restricted states regarding the ownership and possession of firearms, California generally prohibits the sale or

¹² Cal. Penal Code § 26815(c). Clear evidence of identity and age is defined as either a valid California Driver’s License or California ID issued by the Department of Motor Vehicles. Cal. Penal Code § 16400.

¹³ See U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *ATF E-Form 4473 (5300.9): Firearms Transaction Record*, <https://www.atf.gov/file/61446/download> (Oct. 2016).

¹⁴ The DROS Form is completed by the California licensed firearms dealer and submitted through DOJ’s DROS Entry System (“DES”). California licensed firearm dealers must follow DOJ rules and regulations when submitting DROS transactions through DES. See California Department of Justice, Bureau of Firearms, *DES Application — Firearms Dealership User Guide*, https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/dros_entry_guide.pdf (Dec. 2014).

¹⁵ See Cal. Penal Code § 26815(d) (stating that no firearm shall be delivered whenever the dealer is notified by the Department of Justice that the person is prohibited by state or federal law from processing, owning, purchasing, or receiving a firearm).

¹⁶ Cal. Penal Code § 26815(a).

¹⁷ See Cal. Penal Code §§ 23635(a); 23640. Federal law also requires licensed dealers to provide a “secure gun storage or safety device” when delivering a handgun to anyone who is not another FFL or otherwise exempt from the requirement. 18 U.S.C. § 922(z)(1-2).

¹⁸ Cal. Penal Code § 26840.

¹⁹ See Cal. Penal Code §§ 26850-26860.

²⁰ Cal. Penal Code § 26815(b)

transfer of certain firearms and firearm related equipment, with the mere possession of such items subject to felony convictions. These include:

- Flechette Dart ammunition or bullets containing or carrying an explosive agent²¹;
- “Assault Weapons”²²
- .50 BMG Rifles²³;
- Magazines capable of holding more than 10-rounds²⁴;
- Machineguns²⁵
- Multiburst trigger activators²⁶
- Short-barreled rifles and shotguns²⁷
- Silencers²⁸; and,
- Zip guns.²⁹

c. Recordkeeping and Inspection Requirements

California licensed firearm dealers are also subject to numerous recordkeeping requirements for the purposes of ensuring their compliance with all applicable federal, state, and local firearm laws.³⁰ In connection with these requirements, ATF routinely conducts inspections of FFLs who must produce records (in a permanently bound book kept on premises) to ensure FFLs comply with the Gun Control Act of 1968 prevent the diversion of firearms from lawful commerce to the illegal market, ensure

²¹ Cal. Penal Code §§ 30210-30290.

²² Cal. Penal Code §§ 30500-31115. The term “assault weapon” is defined a number of ways under California law, including firearms specifically listed by make and model as an “assault weapon,” certain firearms with specific characteristics and features, certain firearms with a fixed magazine capable of holding more than ten rounds, and rifles with an overall length of less than 30 inches. Cal. Penal Code §§ 30510-30515. Possession of any of these firearms by a dealer requires a special permit which is generally only issued for sole the purpose of sales or transfers to law enforcement.

²³ Cal. Penal Code §§ 30525-31115.

²⁴ Cal. Penal Code §§ 32310-32455.

²⁵ Cal. Penal Code §§ 32610-32750.

²⁶ Cal. Penal Code §§ 32900-32990.

²⁷ Cal. Penal Code §§ 33210-33320.

²⁸ Cal. Penal Code §§33410-33415.

²⁹ Cal. Penal Code §§33600-33690. A “zip gun” is any weapon or device that was not imported as a firearm, was not originally designed to be a firearm, was not subject to applicable firearm taxes, and was made or altered to expel a projectile by the force of an explosion or other form of combustion. Cal. Penal Code § 17360.

³⁰ See Cal. Penal Code §§ 28100-28490.

successful tracing of firearms, and to protect the public.³¹ BOF also conducts routine audits of California licensed firearms dealers separate from ATF inspections.³² The purpose of such on-site inspections is to determine compliance with California firearm laws, including firearm transfer requirements, record keeping requirements, and facility requirements.³³

All California licensed firearm dealers must ensure that the agent conducting the inspection has “reasonable access to all firearms transaction records, the firearms inventory, security features, and all areas within the business premises to which the DOJ representative may need access to conduct the inspection.”³⁴ What’s more, upon request by the agent, a California licensed firearms dealer must make available all dealer licenses and permits, locate firearms that are in the 10-day waiting period, clarify or explain any illegible, unclear, or conflicting entries in any records, and identify the type and location of security measures and devices used at the business premises.³⁵

III. PROPOSED TURNER’S OUTDOORSMAN FOR THE CITY OF SAN CARLOS

Turner’s Outdoorsman is a hunting, fishing and shooting sports chain with 20 stores in California from Salinas to San Diego. With over 500 employees, Turner’s Outdoorsman is one of the largest firearm retailers in California. As a California licensed firearms dealers, Turner’s Outdoorsman provides customers with a means of legally processing firearm transactions 7 days a week with longer hours than most other retail establishments. All of the above state and federal requirements apply to each of its 20 stores, including the proposed location in San Carlos. Even so, the proposed Turner’s Outdoorsman far exceeds those requirements as it will be equipped with external vehicle impact-resistant bollards, 32 camera CCTV coverage, and custom-made security showcases.

To date, Turner’s Outdoorsman has invested over \$118,000 in development of the proposed San Carlos location. Before making any investments, representatives for Turner’s Outdoorsman met with the City’s planning manager, staff, and the Chief of Police to ensure the proposed location would not conflict with any local restrictions. As noted by the staff report, the location in question is a commercially zoned area wherein retail sales—including hunting, fishing, and shooting sports—is considered a legal use. Only after meeting with local officials and reviewing local zoning restrictions did Turner’s begin investing in the proposed San Carlos location and proceed with signing a long term lease for the location.

Generally, when a permit has been properly obtained and in reliance on that permit a person has incurred a material expense, that person has acquired a vested property right.³⁶ And like many other cities, the process of obtaining a permit for the operation of a business in San Carlos is a multi-

³¹ See Bureau of Alcohol, Tobacco, Firearms and Explosives, *Fact Sheet — Federal Firearms Compliance Inspections and Revocation Process*, <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-federal-firearms-compliance-inspections-and-revocation-process> (March 2016).

³² Cal. Penal Code § 26720.

³³ Cal. Code Regs, tit. 11, § 4022(a).

³⁴ Cal. Code Regs, tit. 11, § 4022(b).

³⁵ Cal. Code Regs, tit. 11, § 4022(b)(1-4).

³⁶ *Santa Barbara Patients’ Collective Health Co-op v. City of Santa Barbara*, 911 F.Supp.2d 884, 892 (C.D. Cal. 2012) (citing *O’Hagen v. Bd. of Zoning Adjustment*, 19 Cal.App.3d 151, 158 (1971)).

step process.³⁷ While there is a recommended chronological order of approval from the various departments involved, some businesses may not need specific approval before proceeding, as is the case here. Turner’s Outdoorsman followed all applicable steps and procedures, and did so in good faith.

Notably, it wasn’t until after a small group of San Carlos residents expressed opposition to the proposed Turner’s Outdoorsman during the October 23, 2017, City Council meeting that the City first expressed concern over the proposed Turner’s Outdoorsman—nearly two months *after* it had begun investing in the location. And setting aside the rhetoric, none of the arguments raised by the proponents of the moratorium specifically address why Turner’s Outdoorsman—one of the state’s most well-known and respected retail businesses—should be prohibited from operating at the proposed location.

As stated in the City’s own guide, once the plans for construction have been approved, the business may “[b]egin work upon issuance of the Building Permit.”³⁸ Here, Turner’s Outdoorsman was not required to obtain any permits prior to starting its demolition and remodelling of the proposed location. In fact, the City was expressly made aware of the project, and informed representatives for Turner’s Outdoorsman that no permit was needed in order to proceed with construction. As a result, even though a permit has not been issued, Turner’s Outdoorsman has a vested property right in the proposed location.

IV. A MORATORIUM ON FIREARM RETAILERS WILL NOT PROTECT—AND MAY EVEN BE DETRIMENTAL TO—THE PUBLIC HEALTH, SAFETY OR WELFARE

State law permits local jurisdictions to adopt interim ordinances such as a moratorium prohibiting a use that is in conflict with a general plan, specific plan, or zoning proposal that the city plans to study within a reasonable time.³⁹ Such ordinances, however, may only be adopted following a four-fifths vote of the City Council, and must contain a finding that there is a current and immediate threat to the public health, safety, or welfare.⁴⁰ But a moratorium on firearm retailers for the City of San Carlos will not serve to protect the public health, safety, or welfare of San Carlos residents. In fact, it could be said that such a moratorium will actually be detrimental to those interests for a number of reasons.

For one, California law generally requires all firearm sales or transfers to be processed by a California licensed firearms dealer.⁴¹ As shown above, California licensed dealers are subjected to numerous and comprehensive restrictions relating to the sale or transfer of such firearms. California licensed firearm dealers, who are subjected to routine audits by ATF and DOJ, must ensure that all firearm transactions are processed in accordance with California law.

As stated in the staff report, there are only two California licensed firearm dealers in the City of San Carlos, one of which operates by appointment only. Should the city enact a moratorium and

³⁷ See City of San Carlos and the San Carlos Chamber of Commerce, *Doing Business in San Carlos*, <http://www.cityofsancarlos.org/civicax/filebank/blobdload.aspx?blobid=4216> (2004).

³⁸ *Id.* at 19.

³⁹ Gov. Code § 65858.

⁴⁰ *Id.*

⁴¹ Cal. Penal Code § 27545.

prohibit Turner’s Outdoorsman from opening, it will be stifling the options available to San Carlos residents to lawfully sell or transfer their firearms and ensure prospective purchasers pass the required background check.

What’s more, California licensed firearm dealers like Turner’s Outdoorsman can provide San Carlos residents with information regarding California’s numerous and complex firearm laws. They can serve as a key source of information for San Carlos residents regarding the skills, knowledge, and attitude necessary for the safe handling, storage, and use of firearms, and provide information on how prospective and current firearm owners can seek out additional training opportunities that exceed California’s requirements for the purchase of a firearm. As a result, enacting a moratorium is detrimental to the City’s purported goals of public health, safety, and welfare of San Carlos residents.

V. CONCLUSION

Our clients understand the need to combat the criminal misuse of firearms and to prevent accidental injuries. To that end, they have a number of programs available to the City upon request.⁴² These include firearm safety training,⁴³ the Eddie Eagle GunSafe® Program,⁴⁴ the National School Shield Program,⁴⁵ and youth-specific programs designed to teach firearm safety and responsibility.⁴⁶ Each of these programs have proven to reduce accidental gun deaths and promote public safety—more so than any gun-control law can hope to achieve. Instead of adopting a moratorium on firearm retailers, we ask the City of San Carlos to consider such alternatives.

For these reasons, we strongly encourage the City Council to reject the proposed moratorium on firearm retailers. If you have any questions or concerns regarding the content of this correspondence, please feel free to contact us at your convenience.

Sincerely,
Michel & Associates, P.C.



Matthew D. Cubeiro

⁴² <https://explore.nra.org/interests/safety-and-education/>.

⁴³ <https://explore.nra.org/interests/firearms-training/>. With roughly 1 million people attending NRA training courses annually, the NRA is recognized nationally as the Gold Standard for firearm safety training.

⁴⁴ <https://eddieeagle.nra.org/>. The Eddie Eagle GunSafe® program is a gun accident prevention program that seeks to help parents, law enforcement, community groups and educators navigate a topic paramount to our children’s safety, teaching children when they see a gun to “Stop! Don’t touch! Leave the Area, and tell an adult.”

⁴⁵ <https://www.nationalschoolshield.org/>. The National School Shield program is committed to addressing the many facets of school security, including best practices in security infrastructure, technology, personnel, training, and policy.

⁴⁶ <http://youth.nra.org/>.