

ADDRESSING GUN VIOLENCE THROUGH LOCAL ORDINANCES

A LEGAL RESOURCE MANUAL FOR
CALIFORNIA CITIES AND COUNTIES

1997 SUPPLEMENT

LEGAL COMMUNITY AGAINST VIOLENCE

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LEGAL COMMUNITY AGAINST VIOLENCE IS DEDICATED TO REDUCING GUN VIOLENCE THROUGH EDUCATION, LEGISLATION AND LITIGATION

This Supplement is designed for use with our 1996 publication, “Addressing Gun Violence Through Local Ordinances, A Legal Resource Manual for California Cities and Counties.” The views expressed herein are those of Legal Community Against Violence. This publication is not intended as legal advice to any person or entity, and should not be regarded as such.

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CHAPTER I

LOCAL ORDINANCE UPDATE

A. A LANDMARK YEAR

During 1996, an unprecedented number of California cities and counties enacted ordinances to reduce gun violence in their communities. In January of 1996, for example, when LCAV first published "Addressing Gun Violence Through Local Ordinances, A Legal Resource Manual for California Cities and Counties" ("the Local Ordinance Manual"), West Hollywood was the only local government to have banned the sale of "Saturday Night Specials" or "junk guns" - cheap, easily concealable handguns that are disproportionately used in crime and unreliable for self-protection or sporting purposes.

Just one year has brought dramatic change. In January of 1997, LCAV and the Campaign to Prevent Handgun Violence Against Kids completed a survey of all California cities and counties to determine what firearms-related ordinances have been enacted to date. The results were impressive. For example, prohibitions on the sale of junk guns have been adopted in thirty cities and four counties, and more are under consideration as we go to press. Among other developments, more than twenty jurisdictions have adopted strict regulations of gun dealers, including those which require local permits and call for such safeguards as liability insurance, employee background checks, restrictions on dealers in residential areas and the sale of a trigger lock with each firearm.

Many of the ordinances adopted during 1996 were the result of the coordinated efforts of local officials. The largest such effort was the East Bay Public Safety Corridor Partnership, a collaboration between 21 cities, 2 counties, 19 school districts and 23 law enforcement agencies in communities located along Interstate 80. Following the Partnership's May 1996 summit of local officials, cities and counties moved to adopt violence-prevention ordinances throughout the region. Similar efforts are currently

underway in Santa Clara County, through the leadership of the Santa Clara County Health Department, and in other regions of the state.

This local movement has received strong public support. For example, a September 1996 poll of registered voters in Santa Clara, Santa Cruz and Monterey Counties showed overwhelming support for a local ban on the sale of Saturday Night Specials. In Santa Clara County, 80 percent of those polled favored a local sales ban. In Santa Cruz and Monterey Counties, 74 percent supported such a measure. This support also extended to gun owners (66 percent in Santa Clara County and 59 percent in the other counties).¹

B. THE LOCAL ORDINANCE PROJECT

LCAV's Local Ordinance Project was extremely active over the past year, as the local gun control movement gained momentum statewide. LCAV has already provided over 2,000 Local Ordinance Manuals, free of charge, to county counsel, county health departments, police chiefs, city attorneys and mayors statewide. In addition, we have responded to hundreds of manual requests from members of boards of supervisors and city councils, as well as from law enforcement personnel, Justice Department officials and community leaders throughout the country.

During 1996, LCAV also responded to numerous requests for legal assistance from cities and counties considering firearms-related ordinances, as well as from localities facing legal challenges to such measures. LCAV's ongoing activities during this component of the Local Ordinance Project have included providing legal analysis and assistance to those involved in drafting ordinances, testifying at public hearings before local legislative bodies and coordinating *pro bono* litigation services when a city or county has been sued following the enactment of a violence prevention measure.

As another component of the Project, LCAV has held workshops throughout California to educate volunteer attorneys and local officials regarding the legal issues

¹ Campaign to Prevent Handgun Violence Against Kids. *Passion and Policy: As Facts Replace Feelings in the Handgun Debate, More Voters Support Efforts to Reduce Access to Handguns*. Poll summaries: Santa Clara County (September 1996) and Santa Cruz-Monterey Counties (September 1996). EDK Associates, New York, N.Y. Funded by a grant from the California Wellness Foundation.

which may arise in the context of firearms regulations. To date, such workshops have been held in Oakland, San Francisco, San Jose, San Diego and Los Angeles.

As a final component of the Local Ordinance Project, LCAV has maintained a growing library of firearms-related ordinances, together with a “brief bank” of the pleadings in cases involving legal challenges to such ordinances. Copies of these materials are available to local officials upon request.

This Supplement is designed to update the information contained in the 1996 Local Ordinance Manual. As discussed in Chapter II, 1996 brought several significant developments in federal and state law, such as the U.S. Supreme Court’s review of the Brady Act and California’s adoption of Proposition 218. In addition, important trial court rulings were rendered in each of the four lawsuits involving local firearms-related ordinances. Chapter III provides an update of those groundbreaking cases.

Chapter IV discusses several new types of ordinances currently being considered by California cities and counties, together with non-legislative approaches to reducing gun violence. Chapter V, prepared in consultation with West Hollywood’s attorney, Sayre Weaver, and the city’s firearms expert, Whit Collins, provides answers to the most commonly asked questions about junk guns. Finally, the Supplement provides an updated resource list, including the names of organizations available to provide assistance to local governments regarding firearms-related issues.

CHAPTER II

DEVELOPMENTS IN FEDERAL AND STATE LAW

A. FEDERAL LAW

1. The Brady Act

a. *Mack v. United States*

On December 3, 1996, the U.S. Supreme Court heard oral arguments in *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995), a Ninth Circuit Court of Appeals case which rejected a challenge to the background check requirement of the Brady Act. The Brady Act imposes a five-day waiting period for the purchase of a handgun and subjects purchasers to a background check. 18 U.S.C. § 922 (s)(1). Until 1999, background checks must be performed by the chief law enforcement official (“CLEO”) of the prospective purchaser’s place of residence. After that time, background checks will be performed instantaneously by the Department of Justice through a national automated system.

The Ninth Circuit’s decision involved the claims of two sheriffs charged with conducting background checks in Graham County, Arizona, and Ravalli County, Montana. The sheriffs argued that the Brady Act requirements violate the Tenth Amendment, which provides that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The Ninth Circuit rejected this argument, holding that the Brady Act does not embody a mandate to the states within the meaning of the Tenth Amendment:

It is true that, for a limited period of time, the Act requires state law enforcement officials, the CLEOs, to make reasonable efforts to assist in carrying out the federal program. But the CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations...Instead, they are directed to serve for a temporary period as law enforcement functionaries in carrying out a

federal program. Their activities are not alien to their usual line of work, and represent a minimal interference with state functions.

Mack, 66 F.3d at 1031.

Approximately six months after the Ninth Circuit issued its ruling in the *Mack* case, the Second Circuit Court of Appeals rejected a similar Tenth Amendment challenge to the Brady Act in *Frank v. United States*, 78 F.3d 815 (2nd Cir. 1996). Shortly thereafter, however, the Fifth Circuit issued a contrary ruling in *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996).

The Fifth Circuit found the background check requirements of the Brady Act to be unconstitutional because the “interim duties imposed on the CLEOs are tantamount to forced state legislation.” *Id.* at 458. The court held further, however, that the invalidated duties were severable from the other provisions of the Act, including the five-day waiting period, which the court found to be constitutionally permissible.

The Supreme Court’s decision in the *Mack* case will resolve the conflicting circuit court rulings regarding the validity of the Brady Act. However, the decision will have no direct impact in California, because this state has its own ten-day waiting period and background check requirements. Cal. Penal Code § 12072.

b. The Domestic Violence Offender Firearm Ban

In the fall of 1996, Congress expanded the scope of the Brady Act through passage of the Domestic Violence Offender Firearm Ban. 18 U.S.C. §§ 921(a), 922(d), 922(g), 925(a)(1). That law prohibits the purchase or possession of firearms by anyone convicted of a crime involving domestic violence, regardless of whether the crime is a felony or misdemeanor. California passed a similar law in 1994, requiring the relinquishment of all firearms by anyone subject to a domestic violence restraining order. Cal. Penal Code § 12028.5.

c. Brady Act Effectiveness

On February 25, 1997, the Justice Department released a study estimating that Brady Act background checks blocked more than 186,000 illegal firearm sales between February 28, 1994, the date the Act became effective, and June of 1996. Seventy two percent of the prospective purchasers were denied firearms because of a felony

conviction or indictment. In a sampling of handgun applications during the first six months of 1996, the overall rate of rejected applicants was 2.6 percent.²

2. The Second Amendment - *Hickman v. Block*

The Second Amendment to the U.S. Constitution provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.” As discussed at length in the Local Ordinance Manual, over 100 years of legal precedent make clear that the Second Amendment only protects the right to bear arms in the context of service to an organized state militia; it does not establish an unlimited private right of gun ownership or possession. (See Manual, pp. 5-9.)

Notwithstanding this well-settled legal principle, a federally-licensed firearms dealer recently asserted a Second Amendment claim in *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996). In that case, Hickman filed suit against the County of Los Angeles and City of San Fernando after he was denied a permit to carry a concealed weapon for purposes of entering the field of “executive protection.” Hickman argued that the Second Amendment requires the states to regulate gun ownership and use in a “reasonable manner,” and that his rights had been violated by the government’s failure to do so.

The Ninth Circuit Court of Appeal rejected this argument, holding that the Second Amendment is meant solely to protect the right of the *states* to keep and maintain armed militias:

The Amendment’s second clause declares that the goal is to preserve the security of “a free state,” its first clause establishes the premise that a “well-regulated militia” is necessary to this end. Thus it is only in furtherance of state security that “the right of the people to keep and bear arms” is finally proclaimed...Because the Second Amendment guarantees the right of the states to maintain armed militia, the states alone stand in the position to show legal injury when this right is infringed.

Hickman, 81 F.3d at 101-102.

² 186,000 Denied Guns Under 1994 Brady Law, San Francisco Examiner, Feb. 26, 1997, at A8.

Thus, the court found that Hickman lacked standing to sue. The court also observed (in footnote 10), that Hickman's suit would fail even if he did have standing to sue, because the Second Amendment is not incorporated against the states. *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992) (the Second Amendment only limits action by the federal government). The U.S. Supreme Court denied a petition for a writ of certiorari in the *Hickman* case in October, 1996.

3. Stricter Federal Laws Reduce Number of Firearms Dealers

Recent statistics from the Bureau of Alcohol, Tobacco and Firearms (ATF) indicate that the number of federal firearms license (FFL) holders has dropped dramatically over the past three years. According to Raymond Kelly, undersecretary for enforcement at the Treasury Department, the number has plummeted nearly 57 percent - from 286,531 in 1993 to 124,286 in January of 1997. Mr. Kelly attributes this change to a strengthening of federal laws (such as those increasing fees for a three-year license from \$10 to \$200), and increased efforts by ATF to eliminate dealers who are not in compliance with local, state and federal laws.³

In California, the number of gun dealers has fallen to 8,827, 15,000 less than it was three years ago. ATF expects the number of FFL holders nationwide to drop to between 100,000 and 115,000 by the fall of 1997, when the first cycle of renewal applications under the new laws will be complete.⁴

B. STATE LAW

1. California's Assault Weapons Ban

The California Legislature enacted the Roberti-Roos Assault Weapons Control Act (Cal. Penal Code § 12275 et seq.) in 1989 after a gunman wielding a semiautomatic weapon killed six people and wounded nearly thirty others at a Stockton schoolyard. The Act specifically bans two dozen weapons by name and provides that other weapons, "which are only variations of those weapons with minor differences,

³ *Stiffer Federal Licensing Rules Cut Number of Gun Dealers*, San Francisco Chronicle, Jan. 30, 1997, at A5.

⁴ *Id.*

regardless of the manufacturer,” can be added to the list by the Attorney General. Pursuant to this “add-on” procedure, the Attorney General must seek a superior court determination that a particular weapon falls within the Act and then notify manufactures, retailers and interested members of the public that the gun has been banned.

The Attorney General’s office has only attempted to add to the list once, in March of 1991, when it sought a court order determining that the Colt Sporter rifle was illegal. Colt challenged the Act on due process and equal protection grounds and the Attorney General’s office stipulated to an injunction barring further amendments pending the outcome of the case. (*Kasler v. Lungren*, Sacramento County Superior Court Case No. C017769.) The court finally issued an order in favor of the Government in November of 1993. However, the order was appealed and the Third District again barred further amendments to the list pending the outcome of the appeal.

Although both sides in the litigation completed their appellate briefing approximately two years ago (in March of 1995), the Court of Appeal has not yet issued a ruling in the case. In the meantime, manufacturers are able to make minor modifications to their weapons or introduce new weapons in an effort to avoid the ban. Moreover, although the Act provides, through a “grandfather” clause, for pre-Act owners of assault weapons to register those weapons until 1991, the Attorney General reportedly has contested that provision and continues to permit weapons registration.⁵

The California Supreme Court has granted review of two decisions with conflicting interpretations of the Assault Weapons Control Act. In the first, *Harrott v. County of Kings* (1996) 46 Cal. App. 4th 592, the Fifth District held that the Act only applies to weapons that are specified in the statute or added to the list by the Attorney General. In the second, *People v. Dingman* (1996) 47 Cal. App. 4th 1068, the Sixth District disagreed, holding that the interpretation of the Act is a function for the courts and not the Attorney General. The court found that the Attorney General’s list is advisory only and the Act is also applicable to the functional equivalent of the specified weapons. The California Supreme Court is expected to review these decisions this summer.

⁵ *Shooting Blanks on Gun Control*, The Recorder, Dec. 10, 1996, at 1.

2. Proposition 218

In November of 1996, California voters approved Proposition 218, the “Right to Vote on Taxes Act,” which adds Article XIII C to the California Constitution. Section 2(c) of that Article provides:

Any general tax imposed, extended or increased without voter approval on or after January 1, 1995,...shall continue to be imposed only if approved by a majority vote of the voters...within two years of the effective date of this article...

Section 2(d) provides that “[n]o local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote.”

As discussed below, Proposition 218 has now been raised by the plaintiffs in San Francisco’s gross receipts tax litigation. (See discussion *infra* at p. 20.) Some local governments have postponed their own gross receipts tax measures to ensure compliance with the new law.

CHAPTER III

LOCAL ORDINANCE LITIGATION UPDATE

Four groundbreaking lawsuits involving local violence prevention ordinances are currently pending before California courts. Those lawsuits present legal challenges to: 1) West Hollywood's Saturday Night Special sales ban; 2) Santa Clara County's gun show sales ban; 3) Lafayette's dealer ordinance; and 4) San Francisco's gross receipts tax.

These cases are being watched closely by local officials statewide. By the end of 1997 several appellate court decisions should exist to provide guidance to cities and counties regarding this rapidly-evolving area of California law.

A. WEST HOLLYWOOD'S SATURDAY NIGHT SPECIAL SALES BAN

1. The Ordinance

On January 16, 1996, the City of West Hollywood became the first California city to adopt an ordinance banning the sale of poorly made and easily concealable handguns known as "Saturday Night Specials" or "junk guns." West Hollywood adopted the ordinance after considering evidence demonstrating the threat to public health and safety presented by these firearms, which were banned from importation by the federal government as part of the Gun Control Act of 1968. Federal law permits the domestic manufacture of junk guns, most of which are produced in Southern California. (See Manual, pp. 35-37.)

Prior to beginning enforcement of the ordinance, West Hollywood notified the manufacturers of guns included on the draft roster of prohibited guns and invited their response to the list. After reviewing the objections of some manufacturers and consulting with firearms expert Whit Collins, the City amended the definition section of the ordinance. The City also adopted a resolution establishing a procedure by which

manufacturers could appeal the classification of a firearm as a junk gun. On July 22, 1996, West Hollywood published a final roster of banned handguns.

2. The Complaint and Motion for Summary Judgment

On February 16, 1996, the California Rifle and Pistol Association, National Rifle Association and four individual plaintiffs filed suit against the City of West Hollywood challenging the ordinance. (Los Angeles Superior Court Case No. BC 144600.) The suit alleged that the ordinance was expressly and impliedly preempted by state law, duplicative of state law and “unreasonable and arbitrary” in violation of plaintiffs’ due process and equal protection rights. The complaint was amended after the City amended the ordinance, but the essential claims remained the same.

On July 17, 1996, West Hollywood filed a motion for summary judgment in the case. The City argued first that a ban on the sale of Saturday Night Specials is not expressly preempted by state law because it does not establish any licensing or registration requirements in violation of Government Code Section 53071. Section 53071 expresses the Legislature’s intention to “occupy the whole field of regulation of the registration or licensing of commercially manufactured firearms” to the exclusion of all local regulation in that area. (See Manual, pp. 15-18.)

The City argued next that the ordinance is not impliedly preempted by state law because the regulation of firearm sales is not exclusively a matter of state concern. On the contrary, the City observed, state law unambiguously acknowledges that local governments *may* regulate the sale of firearms. For example, Penal Code section 12071(a)(6)(C) explicitly authorizes local dealer licenses and states that a dealer may comply with the licensing provisions by obtaining a letter from the duly constituted licensing authority stating that the jurisdiction “does not require any form of regulatory or business license or does not otherwise restrict or regulate the sale of firearms.” (Emphasis added.)

West Hollywood also argued that the ordinance is not impliedly preempted by Penal Code Section 12026 (which prohibits the imposition of permit or license requirements on individuals wishing to possess a concealable firearm in their home or place of business), because the ordinance does not impose a wholesale ban on the possession of firearms - it merely bans the sale of one particularly dangerous and unreliable type of handgun. (See Manual, pp. 13-15.) Finally, with respect to the

plaintiffs' due process and equal protection claims, the City argued that the evidence before the city council clearly demonstrated the existence of a rational basis for the council's decision to adopt the measure.

Plaintiffs' opposition to the motion raised a new legal theory - violation of plaintiffs' First Amendment rights. This theory appears to have been asserted in response to a July 8, 1996, ruling in the Santa Clara County case, discussed below, in which plaintiffs argued that gun sales at gun shows involved protected speech. (See *infra*, p. 13.)

3. The Trial Court Rules in Favor of West Hollywood

On November 15, 1996, Judge David A. Horowitz issued an order granting West Hollywood's motion for summary judgment and denying plaintiffs' cross-motion for summary adjudication. The court concluded that the Saturday Night Special sales ban is not expressly preempted by state law, does not conflict with or duplicate state law, and is not impliedly preempted by state law. With respect to plaintiffs' implied preemption claims, the court stated that:

The field of gun sales is not so fully and completely covered by state laws as to impliedly preempt a local, specific prohibition against the sale of a particular type of firearm...The giving of discretion to local licensing entities precludes a finding that the legislature will not tolerate additional local action. The Legislature has been given many opportunities but has failed to state an intent that gun control issues are of such statewide concern that no additional local regulation is allowed... (Order, p.3.)

The court held that the ordinance is not arbitrary or unreasonable and does not violate due process or equal protection principles. Finally, the court rejected plaintiffs' First Amendment claim, holding that the "incidental interaction and communication" between the participants to a gun sale "does not transform conduct into constitutionally protected speech." (Order, p. 4.) The court concluded that the ordinance satisfied the rational relationship test, because the evidence demonstrated the existence of a rational, legitimate means for addressing the stated harm.

The West Hollywood plaintiffs have appealed Judge Horowitz' decision. The briefs on appeal have not yet been filed and a ruling by the Court of Appeal is expected

sometime this year. Although the trial court ruling is not binding on other courts, an appellate court decision will be binding authority on trial courts throughout the state.⁶

B. SANTA CLARA COUNTY’S BAN ON THE SALE OF FIREARMS AT THE FAIRGROUNDS

The second lawsuit presenting a challenge to local violence-prevention efforts involves Santa Clara County’s ban on the sale of guns at the County Fairgrounds. As discussed below, the District Court held in a preliminary ruling that the ban violated plaintiffs’ rights under the First Amendment. This holding appears to contradict well-settled principles of constitutional law and is expected to be reversed on appeal.

1. The Lease Provision

On January 23, 1996, after public hearings regarding the significant public health risks posed by gun-related violence, the Santa Clara County Board of Supervisors unanimously adopted an addendum to the County’s lease for the Fairgrounds precluding the Santa Clara County Fairgrounds Management Corporation (“FMC”) from leasing space to vendors for purposes of holding gun shows. The Board subsequently sent a letter to FMC clarifying that the lease provision was only intended to prohibit the *sale of firearms at the Fairgrounds*, not to prohibit gun shows altogether.

On June 25, 1996, the Board of Supervisors held a public hearing to reconsider its adoption of the lease provision. After considering public testimony both in support of and in opposition to the provision, the Board reaffirmed the decision to ban firearm sales at the Fairgrounds.

2. The Complaint and Motion for Preliminary Injunction

On May 14, 1996, gun show promoters Russell Allen Nordyke and Sallie Ann Nordyke, dba Trade Shows, filed a complaint against Santa Clara County, FMC and the

⁶ The City of West Hollywood is represented by Sayre Weaver of Richards, Watson & Gershon. Terence R. Boga, also of Richards, Watson & Gershon, worked closely with expert Whit Collins to draft the amended definition of “Saturday Night Special” and the appeal procedure. Chapter V, prepared in consultation with Ms. Weaver and Mr. Collins, addresses the most commonly asked questions about the technical aspects of the West Hollywood ordinance.

individual members of the Board of Supervisors (“the County”) in the United States District Court for the Northern District. (Case No. C-96-20367 JW EAI.) The complaint sought damages, injunctive relief and a declaratory judgment, alleging that the lease provision violated plaintiffs’ constitutional rights of free speech, equal protection and due process. The complaint alleged further that the defendants’ actions were preempted by state law.

On July 8, 1996, Judge James Ware issued an order granting plaintiffs’ motion for a preliminary injunction, holding that the incidental speech accompanying a gun sale is commercial speech entitled to First Amendment protection:

The Court cannot agree with Defendants’ analysis regarding the addendum’s attempt to regulate only conduct, however, since it is undisputed that some type of speech is necessarily involved in the sale of any gun. A gun may not be sold in silence, without any exchange of verbal communication whatsoever. Therefore, the Court rejects the argument that the selling of guns constitutes pure conduct and does not involve any type of speech. (Order Granting Plaintiffs’ Motion for Preliminary Injunction, p. 6.)⁷

3. The Appeal

On appeal, the County argued that the District Court erred in testing the constitutionality of the lease provision under the test applicable to constitutionally protected commercial speech because the lease prohibits only conduct - the sale of guns at the Fairgrounds - and not speech. Thus, the County argued, the Court should have determined the validity of the provision under the rational basis test.

In support of this argument, the County relied on a line of cases holding that the sale of merchandise does not implicate the First Amendment unless the merchandise itself conveys a political, religious or philosophical message or is a medium of communication (e.g., a newspaper). See *Muhammad Temple of Islam-Shreveport v. City of Shreveport*, 387 F.Supp.1129 (W.D.La. 1974) (although restrictions on sale of literature by religious group violated First Amendment, restrictions on sale of fish by

⁷ The pervasiveness of the Second Amendment myth is evident in Judge Ware’s order, which characterizes the dispute between the parties as one which “involves one of the most controversial issues of our day: the right to bear arms and the authority of the government to control the exercise of that right.” (Order Granting Plaintiffs’ Motion for Preliminary Injunction, p.1.)

same group did not). The County observed that a gun itself does not convey a particular message, and that any discussion *about* the gun, e.g., regarding its attributes or price, would not be limited by the lease provision.

The County argued further that conduct is not transformed into constitutionally protected speech merely because there is some incidental interaction and communication between the parties to the conduct. See *Allendale Leasing, Inc. v. Stone*, 614 F.Supp. 1440 (D.R.I. 1985), *aff'd.*, 788 F.2d 830 (1st Cir. 1986) (rejecting First Amendment challenge to restrictions on Bingo games despite existence of interaction between runners and participants); *City of Dallas v. Stanglin*, 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed. 2d 18 (1989) (mere kernel of expression which exists in almost every activity a person undertakes is insufficient to bring the activity within protection of First Amendment). On the basis of these authorities, the County argued that the District Court erred when it found the First Amendment applicable to the sale of guns at the Fairgrounds merely because “some type of speech is necessarily involved in the sale of any gun.”

The County requested that the Ninth Circuit evaluate the validity of the lease provision under the rational basis test. To overturn legislation under this test, the court must find the legislation “so unrelated to the achievement of any combination of legitimate purposes that [it] can only conclude that the legislature’s actions were irrational.” *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 943, 59 L.Ed. 2d 171 (1979). Moreover, a city or county need not conduct its own studies or produce new evidence before it passes an ordinance; rather, it may rely on evidence from other communities so long as it “is reasonably believed to be relevant to the problem that the city addresses.” *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, 106 S.Ct. 925, 931, 89 L.Ed. 2d 29 (1986).

The County noted that the District Court’s own findings demonstrate that the lease provision was adopted in response to a legitimate governmental interest in addressing the public health and financial crisis created by the proliferation of guns. Because the lease provision banning the sale of guns at the Fairgrounds is rationally related to this interest, the provision should withstand review under the rational basis test.

The Ninth Circuit subsequently issued an order requesting supplemental briefs on the issue of preemption, which had not been addressed by the District Court’s

decision. (This issue is discussed, *infra* at page 24, in connection with an analysis of other gun show regulations currently under consideration.)

On February 13, 1997, the Ninth Circuit Court of Appeals heard oral arguments in the Santa Clara case. During the course of the hearing, the court questioned whether the lease provision could be read to limit commercial speech, since the letter to FMC clarifying the lease stated that the lease was intended to prohibit the sale of firearms at the Fairgrounds, as well as the “offering for sale” or “any acts initiating” the sale or offer to sell such firearms.

The County argued that the lease does not limit commercial speech because it does not prohibit speech *about* firearms or firearm sales - dealers remain free to display firearms at the Fairgrounds and to discuss the attributes and price of those weapons. Moreover, the lease does not limit a dealer’s ability to discuss the *future* sale of a firearm at another location, e.g., the dealer could give his or her business card to a potential buyer and ask the buyer to purchase firearms at the dealer’s store at a later date. In short, the lease was merely intended to prohibit sales from occurring *at the Fairgrounds*, as well as those acts necessary to complete such sales at a later date, such as an exchange of money or the completion of paperwork required to begin the background check.

In order to clarify this issue, the court asked the parties to submit supplemental briefs regarding the scope of the lease. The County expects a decision from the Ninth Circuit this year.⁸

C. LAFAYETTE’S DEALER ORDINANCE

The third case currently pending before the California Courts of Appeal involves a dealer ordinance adopted by the City of Lafayette on November 14, 1994. That ordinance was adopted in response to complaints the City received after a firearms dealer opened a business adjacent to a residential area and in close proximity to businesses commonly frequented by families and children, including a pizza parlor and an ice cream store. At the time, the Lafayette Municipal Code was silent with respect to

⁸ In response to the County’s request, LCAV coordinated *pro bono* representation of the County by Paul Bruno, Steve Ellenberg and Susan Roeder of the San Jose office of Thelen, Marrin, Johnson and Bridges.

the appropriate zoning of businesses engaged in firearms sales, although other retail land uses required a land use permit.

1. The Ordinance

The Lafayette ordinance has two components: a zoning component and a local police permit component. Under the zoning component, firearm sales businesses must be conducted in commercial areas with a land use permit. The local licensing component requires the prospective business operator to obtain a police permit. That permit will only be issued after the applicant has shown that: 1) the premises will be secure; 2) a trigger lock will be sold with each firearm; 3) the applicant will maintain a \$1 million liability policy; and 4) minors will not be permitted on the premises (if firearm sales is the primary business performed on the premises) unless accompanied by a legally responsible adult.

2. The Lawsuit

On December 21, 1994, 13 individuals, including local residential and commercial firearms dealers and persons allegedly wishing to patronize such dealers, sued the City of Lafayette in the Contra Costa County Superior Court. (Case No. C94-05444.) The suit challenged the ordinance on the basis of state preemption and violations of plaintiffs' rights of due process, equal protection and privacy. The complaint also alleged a "taking" without just compensation in violation of the Fifth Amendment of the United States Constitution.

On February 9, 1995, the Superior Court denied plaintiffs' motion for a preliminary injunction, holding that state law does not preempt the trigger lock or security provisions and the liability insurance requirement does not violate plaintiffs' equal protection rights. (See Manual, pp. 30-31, 44.) Thereafter, the Superior Court sustained the City's demurrer to plaintiffs' amended complaint. In an order dated November 3, 1995, the court rejected plaintiffs' equal protection challenge to the residential dealer prohibition, holding that the sale of firearms is not a fundamental right and the City had a rational basis for the regulation. The court also rejected plaintiffs' claim that the provision requiring a minor to be accompanied by an adult if firearms sales is "the primary business" performed was void for vagueness, finding that the term "primary" was clear when read in context. (See Manual, pp. 10-11, 28.)

Plaintiffs then filed a motion for attorneys' fees, alleging that a February 15, 1996, amendment to the ordinance (relating to the definition of "firearms" and clarifying other provisions of the ordinance) was made in response to the plaintiffs' complaint. The City opposed the motion, arguing that the amendments were made after the city attorney's office independently discovered the drafting errors. The court denied the motion.

On appeal, plaintiffs argue, for the reasons discussed previously, that the Superior Court erred in upholding the constitutionality of the ordinance. They also argue, for the first time on appeal, that the ordinance violates their rights under the First Amendment (presumably in response to the District Court ruling in the Santa Clara case). In respondent's brief, the City requests that the Court of Appeal affirm the lower court ruling. For reasons similar to those asserted by the City of West Hollywood and Santa Clara County, the City also argues that the dealer ordinance regulates conduct, and not speech, and thus does not implicate the First Amendment. A decision is expected this summer.⁹

D. SAN FRANCISCO'S GROSS RECEIPTS TAX

1. The Complaint and Motion for Preliminary Injunction

In May and July of 1994, the San Francisco Board of Supervisors and Mayor passed and approved amendments to the Payroll Expense and Business Tax Ordinance. The amendments excluded businesses selling firearms and ammunition from the Small Business Exemption and increased the gross receipts tax for those businesses to 3 percent, or \$300 of the first \$10,000 of gross receipts plus \$30 for each additional \$1,000 of gross receipts. The gross receipts tax is levied on all goods sold by businesses selling firearms and ammunition. Auction companies are not deemed to be engaged in this business and thus are not subject to the increased tax.

The business tax amendments went into effect on January 1, 1995. On December 28, 1995, the San Francisco Gun Exchange filed suit against the City and

⁹ The City of Lafayette is represented by Assistant City Attorney Teresa L. Highsmith of the law offices of Charles J. Williams, A.P.C. *Pro bono* litigation assistance is being provided by R. Morgan Gilhuly of Landels, Ripley & Diamond, Eric Gorovitz of the Trauma Foundation, Jamie O. Harris of Evans, Latham, Harris & Campisi and Eric Stein of Graham & James.

County of San Francisco for injunctive and declaratory relief. (San Francisco Superior Court Case No. 975-036.) The complaint alleged that the business tax amendments were void because they violated the mandate of Proposition 62 (requiring voter approval for local real property transfer taxes) and were preempted by state law. The complaint alleged further that the amendments were unconstitutional because they violated the commerce clause, equal protection clause and First Amendment.

On January 8, 1996, the Gun Exchange filed a motion for preliminary injunction. In opposition to the motion, the City argued that the imposition of local taxes is a municipal affair, and a charter city's power over a municipal affair cannot be limited by a statute, such as Proposition 62. The City argued further that state law does not preempt the business tax amendments because the business tax amendments do not impose firearm licensing or registration requirements (in violation of Government Code Section 53071) or in any way prohibit firearm ownership or possession (in violation of Penal Code Section 12026). Rather, they merely impose a tax on a retail business.

Turning to plaintiff's constitutional claims, the City argued that the tax does not violate the commerce clause because it cannot be construed as a "protectionist measure" which discriminates against non-local commerce. The City also urged the court to reject plaintiff's equal protection claim, arguing that the following rational bases exist for the tax and the exemption for auction companies: 1) the tax generates revenue for the City; 2) the tax will help defray the enormous costs of treating firearm-related injuries, the majority of which are absorbed by the City; and 3) the types of firearms and ammunition sold by retail businesses are more likely to be involved in firearms-related injuries than those sold by auction houses.

Finally, the City argued that the business tax amendments do not implicate the First Amendment because a generally applicable business tax, applied to those engaged in retail business activities, will not violate the First Amendment even where there is a distinction in tax rates. *Times Mirror Co. v. City of Los Angeles* (1987) 192 Cal. App. 3d 170.

On March 14, 1996, Judge William Cahill of the San Francisco Superior Court issued an order denying the motion for a preliminary injunction, rejecting each of plaintiffs' claims and finding that "there is little chance that plaintiffs will prevail on the merits." (Order Denying Plaintiff's Motion for an Order Granting a Preliminary

Injunction, p. 11.) Although plaintiff filed a notice of appeal of the ruling, the appeal was subsequently abandoned.

2. The Impact of Proposition 218

On December 20, 1996, the San Francisco Gun Exchange filed a First Supplemental Complaint for Injunctive and Declaratory Relief, asserting a new claim on the basis of Proposition 218, the “Right to Vote on Taxes Act”. As discussed *supra* at p. 9, that Act requires voter approval of general taxes imposed by a local government on or after January 1, 1995 (Section 2(c)), and approval by a two-thirds vote of special taxes imposed after the adoption of Proposition 218 (Section 2(d)). The Act defines “local government” to include charter cities.

At the time the supplemental complaint was filed, the parties had cross-motions for summary judgment on file with the court. In supplemental briefs regarding the issue of Proposition 218, the City argued that the law was inapplicable because: 1) the business tax amendments constituted general taxes which had been adopted in May and July of 1984, well before the January 1, 1995 cut-off date of Section 2(c); and 2) even if the business tax amendments qualified as special taxes, Section 2(d) would not invalidate the amendments because that provision applies prospectively and not retroactively.

Finally, the City argued that if the court found the business tax amendments to be general taxes which were imposed on or after January 1, 1995 (the effective date of the amendments, as opposed to the date they were adopted), the City could, under terms of the law, continue to collect the taxes for up to two years, until the measure could be put before the voters.

On February 21, 1997, the court issued an order granting summary judgment in favor of the City and against the Gun Exchange. With respect to the issue of Proposition 218, the court found that the business tax amendments constitute general taxes which were “imposed” on January 1, 1995 (the date the tax was first collected), and thus must be approved by the voters. However, the court ruled that the City could continue to collect the taxes until November, 1998. An appeal of the ruling is expected.

CHAPTER IV

OTHER VIOLENCE-PREVENTION MEASURES CURRENTLY UNDER CONSIDERATION

The Local Ordinance Manual discusses several types of ordinances designed to regulate firearms and ammunition at the local level. (See pp. 22-50.) At the time the manual was published, however, only a handful of cities and counties had enacted or considered such ordinances. One year later, this number has skyrocketed due to the dedicated efforts of local officials, community leaders and concerned individuals alike. As discussed below, some local leaders are now considering new types of violence-prevention ordinances, as well as non-legislative measures to address the threat to public health and safety presented by the proliferation of firearms.

A. SATURDAY NIGHT SPECIALS - CLOSING THE LOOPHOLE FOR PRIVATE TRANSFERS

The West Hollywood ordinance, and the other Saturday Night Special ordinances modeled after that law, prohibits the sale of junk guns by licensed firearms dealers. Private transfers of these weapons, however, remain lawful, even though such sales must be processed through a licensed dealer.

Encouraged by the preliminary legal victory in the West Hollywood case, some cities and counties are now considering an expansion of the ordinance to close this loophole. An opponent of an ordinance eliminating private transfers of junk guns might challenge the law on the same grounds asserted by the plaintiffs in the West Hollywood case - preemption, equal protection and due process. We believe such a challenge would be rejected, for the same reasons noted by the Superior Court in the West Hollywood case. (See discussion *supra*, at p. 10.)

An opponent of an ordinance prohibiting private transfers of junk guns might also allege that the law constitutes a “taking” of property without “just compensation” in violation of the state and federal constitutions.¹⁰ This argument should also fail. Regulations enacted in the exercise of the police power do not constitute a taking of property for public use for which compensation must be paid. *People v. Sakai Co.* (1976) 56 Cal. App. 3d 531 (statutes prohibiting sale of products of certain endangered species did not constitute a taking as applied against grocer who purchased legally imported whale meat). Although the exercise of the police power may diminish the value or utility of private property in certain circumstances, the very essence of that power is that the deprivation of individual rights and property without compensation cannot prevent its operation, so long as its exercise is proper and reasonable. *Id.*

In the West Hollywood case, the Superior Court found that a ban on the sale of Saturday Night Specials by firearms dealers was a rational, legitimate means of addressing the threat to public health and safety caused by these dangerous weapons. Similarly, we believe a court considering a challenge to an ordinance prohibiting the private transfer of junk guns would find the law to be a reasonable exercise of the police power, and not an unconstitutional “taking.”

B. GUN SHOWS

1. Banning the Sale of Firearms and Other Merchandise

As discussed above, existing authorities indicate that a narrowly tailored ban on the sale of firearms at gun shows is permissible under state and federal law, notwithstanding the lower court ruling in the Santa Clara County case. (See discussion, *supra* at p. 13.) Some local officials are now considering a ban on the sale of other gun show merchandise, such as ammunition, de-activated explosive devices (e.g., hand grenades, which are often sold adjacent to materials explaining how these weapons can be reactivated) and merchandise intended to convert lawful firearms into illegal machine

¹⁰ “No person shall be...deprived...of...property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V.; “Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.” Cal. Const. art.1, § 19.

guns. For the reasons discussed previously and below, these measures should be upheld as a rational means of reducing gun-related violence.

2. Regulatory Approach

Currently, no federal, state or local law enforcement agency is responsible for ensuring the legality of gun show activities. As a result, illegal sales occur at many gun shows, although they are difficult to document given the lack of enforcement efforts. (See “Gun Shows In America, Tupperware Parties for Criminals,” Violence Policy Center, 1996.) While some local officials have attempted to address this problem through a ban on the sale of firearms at gun shows, others are considering an alternative approach that would permit the sale of certain firearms and ammunition, but only under tightly regulated conditions.

Under the regulatory approach, gun show promoters could be assessed a fee to pay for special training and assignment of local law enforcement officers to oversee gun show operations. In addition, because there is currently no way to track the firearms sold at gun shows, vendors could be required to complete locally-generated forms which would identify the vendor, purchaser, gun make, model and serial number, location and date of the gun show, as well as the number of the Department of Justice “Dealer Record of Sale” form used for each transaction. A duplicate of each form would be submitted to the appropriate local law enforcement official at the end of each show. Transfer dealers (those involved in private firearms sales) would also be obligated to comply with these requirements.

Gun show promoters and vendors at some fairgrounds are already required to comply with certain regulations. For example, some promoters are required to check and clear (verify as unloaded) all firearms brought to the event by the general public. Nylon or plastic ties are then affixed to each firearm to lock the action in the “open” position, together with a readily visible identification tag. Similar rules sometimes govern the firearms brought to the show by each vendor. Other restrictions in existence at some fairgrounds include the following:

- no one under the age of 18 may attend a gun show unless accompanied by a parent or legal guardian;
- ammunition must be displayed in original, unopened boxes or in containers with tamper-resistant seals;

- the promoter must have liability insurance with limits of at least \$1 million;
- vendors cannot sell, display or possess certain hazardous items, such as loaded magazines, explosive powder, tear gas, pepper spray or other “antipersonnel sprays”, or parts intended for use in converting a weapon into a machine gun.

In light of the current lack of law enforcement efforts at gun shows, some local officials are now considering regulations similar to those discussed above in order to reduce illegal activities at, and improve the safety of, these events.

3. Legal Challenges

An opponent of the types of gun show regulations discussed might assert a challenge on the basis of the First Amendment, preemption and equal protection. We believe each of these challenges should fail.

a. The First Amendment

A court should not hold that the First Amendment is implicated by these types of gun show regulations, because the regulations involve conduct, and not protected speech. However, the First Amendment would be implicated by a ban on the sale of message-bearing merchandise, such as literature and descriptive T-shirts, and by any prohibition on advertising or other speech pertaining to legal merchandise.

b. Preemption

Local legislation conflicts with state law, and will be preempted by that law, if it duplicates, contradicts, or enters an area fully occupied by state law, either expressly or impliedly. *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal. 4th 893. (See Manual, pp. 11-21.) Preemption should not apply to invalidate the local gun show regulations discussed above.

Such measures should not be found to be preempted through duplication because state law does not currently regulate gun shows in this manner (e.g., it does not impose local fees for law enforcement training and oversight, local record-keeping requirements or restrictions on the sale of particularly dangerous merchandise).

Nor should these regulations be found to contradict state law. In supplemental briefs filed the Santa Clara case, plaintiffs argued that the County's firearm sales ban contradicts Penal Code Section 12071(b)(1)(B), which provides:

A person licensed pursuant to subdivision (a) may take possession of firearms and commence preparation of registers for the sale, delivery, or transfer of firearms at gun shows or events...A person conducting business pursuant to this subparagraph shall be entitled to conduct business as authorized herein at any gun show or event in the state without regard to the jurisdiction within this state that issued the license pursuant to subdivision (a), provided the person complies with (i) all applicable laws, including, but not limited to, the waiting period specified in subparagraph (A) of paragraph (3), and all applicable local laws, regulations and fees, if any. (Emphasis added.)

Plaintiffs argued that this statute permits the sale of firearms at gun shows and thus contradicts the County's sales ban. However, as noted by the County, the statute merely permits licensed dealers to conduct business at otherwise lawful gun shows where the dealer's license does not identify the location of the gun show as the dealer's place of business. Nothing in the law *requires* a local government to allow gun sales (or sales of other dangerous merchandise) on government property.

A challenge on the basis of implied preemption should also fail. Section 12071(b)(1)(B) explicitly authorizes local laws, regulations and fees with respect to gun shows. Preemption will not be found where the Legislature has expressed its intent to permit local regulation. *Candid Enterprises, Inc. v. Grossmont Union High School District* (1985) 39 Cal. 3d 878.

Finally, local gun show regulations should not be found to be expressly preempted by Government Code Section 53071 (as argued by the Santa Clara plaintiffs), because these measures do not in any way involve firearm licensing or registration.

c. Equal Protection

Equal protection of the laws is guaranteed by the state and federal constitutions. Cal. Const. art.1, § 7; U.S. Const. amend. XIV. Where a law does not involve a suspect class (such as race) or a fundamental right (such as freedom of speech or religion), it will be upheld against an equal protection challenge if it is rationally related to a legitimate governmental purpose. (See Manual, pp. 10-11.)

Gun show promoters and vendors clearly do not belong to a suspect class. Moreover, the types of gun show regulations under consideration do not involve a fundamental right. Accordingly, a challenge brought on the basis of equal protection should be unsuccessful.

d. Regulation of State-Owned Property

Because some county fairgrounds are owned by the state, the issue arises as to whether gun shows on such property can be regulated locally. Local regulation of state-owned property was discussed in *Board of Trustees v. City of Los Angeles* (1975) 49 Cal. App. 3d 45. In that case, the California State University at Northridge leased part of its property to a circus company. The University and circus company were cited for violation of a city ordinance requiring the issuance of a permit to anyone wishing to conduct a circus within the city. The University filed a declaratory relief action, contending that the ordinance was inapplicable to activities conducted upon University property.

The Court of Appeal rejected this argument, holding that the doctrine of sovereign immunity will not shield the state from local regulation unless the regulation impinges upon a governmental, as opposed to a proprietary, state function. The court found that the University leased the property in question as a revenue-producing activity, and the commercial activities of the circus company had no relation to the University's governmental function. Thus, the court concluded that the ordinance was enforceable against the state and its lessee.

Based on the holding of the *Board of Trustees* decision, a private party who leases state-owned property for purposes of holding a gun show will be immune from local regulation if the regulation impinges upon the governmental functions of the state/lessor. If, on the other hand, the state executes the lease in its proprietary capacity in order to raise revenue, and the activities of the gun show promoter are unrelated to the state's governmental function, the promoter will be subject to the regulation. This issue requires an analysis of the purpose of the state entity responsible for operating the fairgrounds in question.

If the gun show regulations were viewed as "building" or "zoning" ordinances, the analysis would be somewhat different because Government Code Sections 53090 and 53091 create an intergovernmental immunity for compliance with such ordinances.

Lawler v. City of Redding (1992) 7 Cal. App. 4th 778 (construction of sports complex by city on city-owned land in unincorporated area not subject to county's general plan); *Akins v. County of Sonoma* (1967) 67 Cal.2d 185 (county-owned fairgrounds exempt from city building code); *Regents of University of California v. City of Santa Monica* (1978) 77 Cal. App. 3d 130 (state exempt from city building and zoning codes).

Section 53090(b) defines "building ordinances" as those "regulating building and construction and removal of buildings...and ordinances relating to building permits and building inspection." Although the statute does not define "zoning ordinance", a zoning ordinance is generally understood as one that regulates the types of land uses or activities that may be conducted within designated areas or zones.

The types of gun show regulations under consideration (e.g., those requiring promoters to pay fees to cover law enforcement personnel and banning the sale of particularly dangerous merchandise) would not appear to qualify as "building" or "zoning" ordinances within the meaning of Section 53091. Instead, they would seem more analogous to the business permit requirements at issue in the *Board of Trustees* case, *supra*, which did not discuss Section 53091 immunity. However, even if the gun show regulations in question do constitute "building" or "zoning" ordinances, it is unlikely that any intergovernmental immunity enjoyed by the state could be extended to a lessee.

A 1985 opinion of Attorney General John Van De Kamp considered whether land leased to a private developer by the Board of Directors of the California Exposition and State Fair would be subject to local building and zoning regulations. 68 Ops. Cal. Atty. Gen. 114 (1985). The Attorney General concluded that Section 53091 immunity would only be extended to the lessee if the development furthered the purposes of the Board to conduct a state fair (other than merely to raise revenue). If, however, the development was solely for the private purposes of the lessee, local building and zoning ordinances would apply. Because the terms of the lease in question were not before the Attorney General, the opinion never resolved this issue.

Therefore, assuming that the gun show regulations under consideration do qualify as "building" or "zoning" ordinances, the issue would be whether the lease between the state entity and the gun show promoter furthers the purposes of the state entity or merely the private purposes of the promoter. This is a factual issue similar to that discussed by the Court of Appeal in the *Board of Trustees* case, which would again

require an analysis of the purpose of the particular state agency or entity responsible for leasing the fairgrounds.

C. NON-LEGISLATIVE APPROACHES TO REDUCING GUN VIOLENCE

1. Gunshot Location Systems

Redwood City is currently testing a unique system to pinpoint the source of gunfire. The Gunshot Location System, developed by Trillon Technology of Los Altos, uses acoustic sensors attached to rooftops and utility poles. When a gunshot is fired, the sound is detected by the sensors and sent to a central computer at the police department. The computer is able to determine the precise location of the gunfire so that officers can immediately be dispatched to the site.

City officials began testing the system in 1995 in an eastern Redwood City neighborhood that had been plagued by indiscriminate shooting. The tests have shown a significant reduction in the incidence of gunfire in the area. The city council is expected to vote on a proposal to buy the system sometime this year.

2. Shooting Ranges

During 1996, at least seven people committed suicide at shooting ranges in California. Four of the deaths took place within a matter of weeks at ranges located in South San Francisco, San Rafael and Stockton. Those who died varied in age and shooting experience, and some had a history of mental illness. All committed suicide with a rented handgun.

This recent rash of deaths has caused some range owners to reconsider the practice of renting guns. Under state law, persons renting handguns are not subject to the background check and waiting period requirements applicable to gun purchasers, as long as the loan occurs at a licensed facility and the weapons remain on the premises. (Cal. Penal Code § 12078 (k)(6).) Accordingly, shooting range employees have no way of knowing whether an individual wishing to rent a gun has a criminal record or a history of mental illness.

The owner of Target Masters in Milipitas, the site of six suicides since 1984, has adopted city-recommended regulations to improve the safety of the range. Those regulations require, among other things, that range employees be trained to take precautions against suicide and that the telephone phone number for the local suicide prevention hotline be posted near all telephones within the facility. Other range owners are considering ending the practice of renting guns altogether, or limiting the practice to range members.

3. Domestic Violence Paging Systems

During 1996, Berkeley began an innovative program to combat domestic violence. The program, modeled after successful programs on the East Coast, allows a small number of women to use an alarm, similar to a pager, to alert police to a potentially abusive situation. Berkeley police dispatchers are able to send a patrol officer to the residence within a minute after the alarm is activated.

The system is manufactured by Custom Business Solutions of Massachusetts. Because the alarm must be kept within remote distance of a control box installed in the home the system works best for those who live apart from their batterers, as the batterer would likely be aware of the control box and could disable it.

4. Boston's Approach to Youth Violence

In February of 1997, Boston officials announced that there had not been a single juvenile homicide in the city since July of 1995. This achievement has been credited to the dedicated efforts of numerous violence prevention groups, including community organizations, religious institutions, educators, human service agencies, business leaders and police and criminal justice groups, all working toward the common goal of reducing youth violence.

Boston began focusing on the problem of youth violence after an epidemic of juvenile homicides in the 1980s. Boston City Hospital has been particularly active in this area. One of its earliest programs was the Boston Program for High Risk Youths, started in 1982. That program applied public health techniques to adolescent violence and trained youth-serving professionals to focus on prevention strategies. The Hospital's Adolescent Wellness Program, begun in 1990, provides special counseling to

youths admitted to the hospital for gunshot or stab wounds. The Hospital also has a special program for children who witness violence.

The Boston Police Department also created a series of initiatives contributing to the decline in homicides. Those initiatives, which emphasize prevention, intervention and enforcement, include Operation Night Life, which sends police and probation officers on nightly visits to the homes of youths on probation, and the Boston Gun Project, which uses computers to trace guns sold illegally to young people. President Clinton has proposed a \$495 million anti-gang and youth violence plan modeled after this successful program.

CHAPTER V

ANSWERS TO THE MOST FREQUENTLY ASKED QUESTIONS ABOUT “JUNK GUNS” OR “SATURDAY NIGHT SPECIALS”

This Chapter was prepared by LCAV in consultation with Sayre Weaver, counsel for the City of West Hollywood, and Whit Collins, the City’s firearms expert, in response to the large volume of questions we have received regarding the City’s ban on the sale of “junk guns” or “Saturday Night Specials.” As discussed previously, over 30 California cities and counties have now adopted sales bans modeled after the groundbreaking West Hollywood ordinance.

1. *What is a "Junk Gun"?*

A "junk gun" is a handgun marked by inferior design, materials, or manufacturing methods, which allow manufacturers to keep down the costs of the final product. They are the handguns of choice for purchasers seeking a cheap handgun. The crime statistics on "junk guns" demonstrate that this class of handguns is 3.4 times as likely to be involved in crime than other handguns. The public health data demonstrates the tremendous costs to taxpayers of all handgun violence. In addition to their inordinate link to crime and violence, this class of handguns is unsafe to consumers. As a result of their intrinsic deficiencies, "junk guns" cannot be expected to perform reliably for their intended lawful purpose when used by a reasonably informed consumer. In short, the costs to society of this class of handguns far outweigh any possible benefits.

2. *Is there a set of government standards for handguns manufactured in this country that will enable a city to define what is a "junk gun"?*

No, there is no set of state or federal government standards applicable to handguns manufactured in this country to help a city define what is a "junk gun." This

lack of standards is a direct result of the fact that the design and manufacture of domestic handguns is completely unregulated.

Foreign handguns, however, may not be imported into this country unless they meet rigorous design, manufacture and performance standards ("factoring criteria") imposed by the Bureau of Alcohol, Tobacco and Firearms, Treasury ("ATF"). Domestic handguns are not subject to the ATF factoring criteria. The factoring criteria were developed approximately thirty years ago and are designed to be implemented by trained ATF personnel.

This country thus faces the anomalous situation in which foreign-made handguns, and for that matter, children's toys, are subject to consumer safety regulation by government, but domestic handguns are not. Yet handguns are, in essence, hand-held heat engines, designed to combust powerful chemical fuel, which burns at a temperature well over 5000 degrees Fahrenheit. The combustion of that fuel creates a tremendous thermodynamic pressure. In a few thousandths of a second, the bullet accelerates from zero to about 1000 feet per second. Enough heat exists at the mouth of the gun's chamber to vaporize a minute quantity of the barrel's steel every time the gun is fired.

A fired shot converts only about 20% of the fuel's potential power into the destructive force of the bullet. The remaining heat goes up the barrel or radiates to other parts of the weapon. Over time, these dynamics cause significant wear and tear on the weapon. These dynamics are some of the basic "physics" of all handguns that render certain design, component, and manufacturing characteristics more or less safe, even when the handgun is used for its lawful purpose.

The gun industry itself has developed certain discernible standards, albeit unpublished, in response to these basic dynamics and to the demand for reliable handguns by generations of civilian users and government procurement agencies. "Junk guns" do not meet one or more of these discernible standards. These are the standards implemented in the West Hollywood definition section of its ordinance proscribing the sale of "junk guns."

3. *Our city has a "junk guns" ordinance based on the West Hollywood ordinance. Someone told me that a Glock does not have a steel "frame" and is therefore a "junk gun" under the ordinance. Is that correct?*

No. A Glock is a common issue sidearm used by law enforcement agencies nationwide. A Glock does have a steel "frame." This type of comment demonstrates a misunderstanding of the term "frame." That term is used in the definition of the West Hollywood ordinance, which sets forth certain standards, including standards for the composition of the handgun frame. A handgun with a frame that does not meet these standards is a "Saturday Night Special" or "junk gun" under the ordinance, and subject to the sales ban.

The term "frame," like other technical terms used in the ordinance, derives from the definitions found in federal law in the federal licensing regulations imposed on dealers and manufacturers. The gun industry is well aware of the meaning of these terms, as defined by federal law. These definitions are found at 27 Code of Federal Regulations, Chapter 1, Section 178.11. The definitions state that a "firearm frame or receiver" is "[t]hat part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel."

The misunderstanding regarding the "frame" of the Glock arises from the way that handgun is constructed. The handgun is built on a steel frame, and the entire firearm is encased in a very strong polymer shell. None of the component parts of the "frame" are polymer, yet it is to the polymer shell that some people refer when stating the Glock does not have a "steel" frame. This type of comment is analogous to a statement that a tennis racket made of aluminum does not have an aluminum frame because it has a leather grip. Both statements depend upon a misconstruction of the term "frame."

4. *My city has a "junk guns" ordinance based on the West Hollywood ordinance. Is there any set of definitions I can point to that demonstrates the terms that are used in the ordinance, such as "frame" and "receiver" and "antique firearm," are terms well understood in the gun industry?*

Yes, all the terms set forth in this question are found in the Code of Federal Regulations, in connection with federal licensing regulations imposed on dealers and manufacturers. These definitions are found at 27 C.F.R., Chap. 1, Section 178.11.

5. *My city's "junk guns" ordinance requires a manufacturer who wishes the city to reconsider placement of its gun on the Roster to send the city a sample firearm. Do the restrictions in federal law related to the shipment of firearms in interstate commerce affect the requested shipment to the city?*

No. 18. U.S.C. Chapter 44 (the "Act") sets forth the applicable federal statutes pertaining to sale and delivery of firearms by licensed importers, manufacturers, and dealers ("licensees"). At Section 922 of Title 18, the Act generally prohibits the shipment of firearms in interstate commerce by licensees to nonlicensees, subject to certain exceptions and procedural requirements. However, the Act provides at Section 925(a)(1), that the provisions of the Act (and this includes Section 922) are NOT applicable to shipment or delivery of a firearm to any state or political subdivision of a state. Therefore, a municipality is exempt from the Act's restrictions related to firearms shipment and delivery.

6. *My city has a "junk guns" ordinance based on the West Hollywood ordinance. If one of our law enforcement officers sees a handgun that is on the Roster and that handgun is being offered for sale as "second hand" by a dealer, is that unlawful?*

Yes. The ordinance makes no distinction between new and second-hand rostered handguns. If a handgun is on the Roster, and it is offered for sale by a dealer within the terms of the ordinance, that is a violation of the ordinance. However, the West Hollywood ordinance does allow a dealer to process sales transactions between private parties pursuant to Penal Code Section 12072(d). Given the broad scope of the trial court decision upholding West Hollywood's ordinance against a number of constitutional challenges by the N.R.A. and California Rifle & Pistol Association, it appears that this exemption is not constitutionally mandated. Your city may wish to consider amending its ordinance to delete this exemption. (See discussion, *supra* at p. 21.)

7. *My city has a “junk guns” ordinance based on the West Hollywood ordinance. Our undercover officers plan to make spot undercover inspections of gun dealers to see whether they are displaying for sale handguns that are listed on the Roster. Is this permissible?*

Yes. If a commercial premises is open to the public, a law enforcement officer may enter the premises and observe whatever is in "plain view" without implicating any Fourth Amendment rights of the dealer. The fact that the ordinance relates to regulation of handguns does NOT mean that enforcement of the ordinance requires different treatment under the Fourth Amendment than any other local sales ban.

8. *My city has enacted a "junk guns" ordinance based on West Hollywood's and needs to draw up a Roster. City X, one of our large, neighboring cities, has adopted the same ordinance and has published a Roster compiled by its Chief of Police, who will also be responsible for updating the Roster semi-annually. My City wants to use the City X Roster and updates instead of reinventing the wheel. Is there any legal problem with this plan?*

The proposed delegation to City X of responsibility for compiling and updating the Roster that your city will use is permissible, provided that safeguards are in place to assure the Roster is not arbitrary and is consistent with the ordinance. In general, a city, as a legislative body, must itself resolve the truly fundamental policy issues of its legislation. It must also assure that such policy decisions are implemented appropriately.

In the definition section of the ordinance, the City Council has made the fundamental legislative policy decision by defining which handguns are "Saturday Night Specials." The ordinance itself also provides that the City Manager, or his or her designee, will compile, publish, and update the Roster. In West Hollywood, for example, the City Manager could select City X's Chief of Police as the designee, and this would be a permissible delegation, because West Hollywood's regulatory scheme also provides certain safeguards to assure that the

ultimate decision as to what handguns belong on the Roster is not made arbitrarily.

These safeguards are found in West Hollywood's companion administrative procedure for reconsideration of placement on the Roster, which sets forth a complete administrative appeals process, including notice and an opportunity to be heard. An appellant may then seek judicial review of an adverse decision to maintain the challenged handgun on the Roster.

These safeguards are certainly not the only safeguards that a city could employ to assure the legality of such a delegation, and they are used here by way of example.

9. *My city has a "junk guns" ordinance based on the West Hollywood ordinance. Does the ordinance apply to gun show sales?*

Yes. The West Hollywood ordinance prohibits a wholesale or retail gun dealer from "displaying for sale", "offering for sale", or selling handguns that are "Saturday Night Specials" under the ordinance. By its terms, the ordinance encompasses the prohibited activity, whether it occurs on the dealer's premises or elsewhere, and this would include gun shows, provided that the specific facts demonstrate the handgun is "displayed for sale," "offered for sale," or sold at a gun show. Because the actual delivery of the firearm does not take place at the gun show, a dealer may argue that a sale has not actually taken place. Such an argument should be irrelevant, given the fact that the ordinance prohibits the display and offer for sale of the rostered firearms, as well as the sale itself. For a discussion of the litigation involving Santa Clara County's ban on the sale of guns at gun shows, see pages 13-16, *supra*.

10. *In my city, we would like to have a civilian staff member responsible for reviewing requests for reconsideration of placement on the Roster. Is that a workable plan?*

Yes, assuming your city has adopted an administrative procedure for reconsideration of placement of a handgun on the Roster that is similar to the West Hollywood procedure. The West Hollywood ordinance itself is part of a three-part


regulatory scheme that was designed to be implemented by city staff after a brief training by a person with some expertise in firearms. The Roster, and the administrative procedure for reconsideration of placement on the Roster, form the other two parts of the regulatory scheme. The administrative procedure provides dealers and manufacturers the opportunity to have the city reconsider placement of a given handgun on the Roster, and a right to an administrative appeal from an adverse decision.


To seek reconsideration, the applicant must provide a sample handgun, and specific information regarding the design and material composition of the handgun, including the manufacturing specifications. This type of information is very difficult to obtain from the gun industry, absent court order. However, the administrative procedure places the burden of proof on the party seeking reconsideration to demonstrate that the handgun at issue does not fit any of the definitions of a "Saturday Night Special" as set forth in the ordinance. Thus, the specified materials must be submitted for the application to be considered at all.

West Hollywood's expert, Whit Collins, has created the following checklist to help staff process the applications. That checklist also makes reference to a checklist used by staff in enforcing the ordinance in the field. The use of such checklists will enable your City staff to process the applications for reconsideration without becoming firearms experts and they are reproduced here for you.

CHECKLIST FOR ANALYZING APPLICATIONS FOR RECONSIDERATION¹¹

TEST ONE: IS APPLICATION COMPLETE?

-  Is there a sample firearm which matches the accompanying material as to model, caliber and construction?

-  Is there a set of documents, including all affidavits and other pages clearly corresponding to each set of required information?

¹¹ © 1996 Whit Collins

TEST TWO: CAN APPLICATION DOCUMENTATION BE RECONCILED EASILY WITH DEFINITION SECTION OF THE ORDINANCE?

- ✎ Do the drawings clearly show that the gun is built of solid components; and that there is a breech-locking mechanism present for high-pressure cartridges?
- ✎ Do materials and strengths sheets show that no zinc or other non-ferrous castings are used?
- ✎ If rimfire, is the sample handgun's barrel length OK?
- ✎ Is there a full trigger guard present?
- ✎ Also review Sales Environment Checklist regarding coatings and serial numbers.
- ✎ If documentation or applicability of sample gun are unclear, staff may: notify respondent manufacturer of the deficiency, or refer to City's firearms consultant for further inspection.
- ✎ If documentation is internally inconsistent, staff may also refer to City's firearms consultant, who may in turn aid the City in obtaining a qualified metallurgical inspection or other additional expert analysis.

EVEN IF TESTS ONE AND TWO ARE MET, ARE THERE STILL SOME WARNING SIGNS THAT A NEW PRODUCT MAY BE A "SATURDAY NIGHT SPECIAL"?

- ✎ Again refer to the Sales Environment Checklist: If firearm remains questionable as to price, primitive design or lack of safety devices, it may be a product which is an attempt to evade the published Ordinance.
- ✎ Another particular area of concern would be a gun made with pressed, or stamped-out, steel sheet metal components. Such a gun might pass "on paper," but be deficient because it is made with crude wartime emergency methods of construction.

1996 SALES ENVIRONMENT CHECKLIST¹²

The following inspection notes are not in a specific order of importance. Any single handgun may not exhibit all these characteristics. Similar guns on sale as "second-hand" should also be reported, particularly if present in quantity.

1. Unusually low retail price for new handgun, approx.: At or Below
(including CA Tax & Excise Taxes)

¹² © 1996 Whit Collins

- | | | |
|----|---|----------|
| A. | If semi-automatic in calibers:
.22 Rimfires/.25 ACP/.32 ACP/.380 ACP | \$150.00 |
| B. | If semi-automatic in calibers 9mm/.38
Super/.45 ACP | \$225.00 |
| C. | If Double-action Revolver in Cals .22RF/
.32/.38-.357 | \$300.00 |
| D. | If any handgun, sold new for under | \$125.00 |
-
2. Outer surfaces that are obviously coatings or plated, not the original material of the frame or other exposed main assemblies.
 3. Obviously inserted metal parts in action area of pistol. Joints between main parts and reinforcements visible, even if under a plastic or plated outer coating.
 4. "False" molded-in shaping, i.e.: non-functional vents, ribs
 5. Serial numbers stamped directly into frames, with surface coating applied over the digits.

APPENDIX

The following changes and additions apply to the original listing of “Organizational Resources for Cities and Counties” in the Local Ordinance Manual.

For a comprehensive list of organizations working throughout California towards the prevention of gun violence, contact The Campaign to Prevent Handgun Violence Against Kids, 454 Las Gallinas Avenue, Suite 177, San Rafael, CA 94903-3618
Phone (415) 331-3337, Fax: (415) 331-2969.

CHANGES TO ORIGINAL LISTINGS

Legal Community Against Violence (LCAV)

NOTE: NEW PHONE NUMBER

268 Bush Street, #555

San Francisco, CA 94104

Phone: (415) 433-2062

Fax: (415) 433-3357

Jack Berman Advocacy Center

NOTE: NEW ADDRESS

703 Market Street, Suite 258

San Francisco, CA 94103

Phone: (415) 974-1287

Fax: (415) 974-1320

Women Against Gun Violence, Los Angeles

NOTE: NEW ADDRESS, PHONE & FAX:

8800 Venice Boulevard, Suite 302

Los Angeles, CA 90034

Phone: (310) 204-2348

Fax: (310) 204-6643

NEW LISTINGS

Whit Collins, Firearms Policy Consultant

Phone: (805) 642-6353

Fax: (805) 644-1865

Mr. Collins is a firearms and ammunition expert who has been a Congressional researcher on firearms violence abatement and related public policy issues. He currently serves as a litigation and legislative consultant to various states, counties and municipalities which are promulgating firearms regulations, including West Hollywood, CA and the East Bay Corridor Public Safety Partnership.

Orange County Citizens for the Prevention of Gun Violence

P.O. Box 2000-226

Mission Viejo, CA 92690

Phone: (714) 888-8740

Fax: (714) 888-8998

Performs education and advocacy for issues pertaining to the prevention of gun violence at local, state and national levels.

San Diego Committee Against Handgun Violence

705 12th Avenue

San Diego, CA 92101

Phone: (619) 235-9167

Fax: (619) 233-6682

Grassroots group committed to reducing firearms-related death and injury through legislation and community education.

Trauma Foundation

San Francisco General Hospital

Building One, Room 300

San Francisco, CA 94110

Phone: (415) 821-8209

Fax: (415) 282-2563

The mission of the Trauma Foundation is to reduce injuries and deaths due to injuries through prevention, improved trauma care, and improved rehabilitation.

Women Against Gun Violence, Santa Barbara

Project of Nuclear Age Peace Fdn.

1187 Coast Village Rd. Suite 123

Santa Barbara, CA 93108-2794

Phone: (805) 568-5583

Fax: (805) 568-0466

WAGV-SB coordinates area organizations for the development of strategies to prevent gun violence.