IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM DRUMMOND, GPGC LLC, and SECOND AMENDMENT FOUNDATION, INC. Plaintiffs, v. ROBINSON TOWNSHIP and MARK DORSEY, Robinson Township Zoning Officer, in his official and individual capacities, Defendants	)	Civil Action No. 2:18-cv-1127-MRH

BRIEF IN REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6) OF DEFENDANTS, ROBINSON TOWNSHIP AND MARK DORSEY

AND NOW COME Defendants, Robinson Township and Mark Dorsey, by and through counsel, Trisha A. Gill, Esquire, and Sean R. Riley, Esquire and the law firm of Litchfield Cavo, LLP, and file the following Brief in Reply to Plaintiffs' Opposition to their Motion to Dismiss pursuant to 12(b)(6) and, in support thereof, aver as follows:

I. PLAINTIFFS' MEMORANDUM FAILS TO SET FORTH A BASIS UPON WHICH PLAINTIFFS CAN MAINTAIN COUNTS I, II, IV AND VI

Plaintiffs' Memorandum acknowledges the general principles of the finality doctrine, but argues that the doctrine is not applicable to Counts I, II, IV and VI to the extent they assert facial challenges to the constitutionality of the zoning ordinance. See Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss ("Plaintiffs'

Memorandum") at pp. 4-8. As this Court has previously noted, the precise application of precedent with regard to the ripeness of facial challenges is "not unambiguous." *Harris v. Twp. of O'Hara*, 2006 WL 3231876, at *10 (W.D. Pa. 2006), *aff'd*, 282 F. App'x 172 (3d Cir. 2008). In *Peachlum v. City of York*, the Third Circuit Court of Appeals held that "[r]ipeness standards are most relaxed" in the context of a First Amendment facial challenge, though it took care to point out that "commercial speech may be subject to a stricter ripeness test than non-commercial speech." 333 F.3d 429, 432, n.5, 434 (3d Cir. 2003). Following *Peachum*, the Third Circuit Court of Appeals held that the finality rule was inapplicable to facial challenges to a zoning ordinance arising from Substantive Due Process, Equal Protection, or Takings Clause claims. *Cty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 164 (3d Cir. 2006). However, a stricter ripeness test should be applied to Plaintiffs' commercial Second Amendment claims.

Having said that, the Court need not determine the appropriate ripeness standard to apply to facial challenges asserted under Counts I, II, IV and VI, as no such claims are sufficiently pleaded. The Supreme Court has repeatedly admonished that "facial challenges are disfavored and should be considered sparingly." *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 624 (3d Cir. 2013) (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450, (2008)). "This is so because facial challenges seek the broad remedy of a complete invalidation of a law and because a ruling on the constitutionality of all possible applications of a statute necessarily 'rest[s] on speculation" and invites the "premature interpretation of statutes.' " *Id.* (quoting *Wash. State Grange*, 552 U.S. at 450). "It is, in fact, 'the most difficult challenge to mount successfully.' " *Lepre v. Lukus*, 602 F. App'x 864, 870 (3d Cir. 2015) (quoting *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir.2011)). To state a valid facial challenge under the Second Amendment, a plaintiff must demonstrate that the challenged law is invalid as to every

set of circumstances to which applied. *United States v. Barton*, 633 F.3d 168, 172 (3d Cir. 2011*), overruled on other grounds by Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336 (3d Cir. 2016)); citing *Wash. State Grange*, 552 U.S. at 449. "[L]aws imposing conditions and qualifications on the commercial sale of arms" are "presumptively lawful regulatory measures". *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) (citing *D.C. v. Heller*, 554 U.S. 570, 627, 128 S. Ct. 2783, 2817, 171 L. Ed. 2d 637 (2008)). Where a Complaint fails to plead facts demonstrating that the statute is unconstitutional under every set of circumstances, dismissal is warranted. *Lepre*, 602 F. App'x at 870–71.

In the case at hand, the Complaint fails to plead sufficient facts with respect to any of the facial challenges set forth in Counts I, II, IV and VI. Count I purports to assert both facial and as-applied challenges under the Second Amendment to the Ordinance's definition of a "Sportsman's Club" as a non-profit entity. See Complaint at ¶¶59-61. However, the averments related to Plaintiffs' facial challenge consist of a single conclusory averment that "[o]n its face […] Section 601 [*sic*] of Robinson Township's definition of a 'Sportsman's Club,' restricting the operation of so-called 'Sportsman's Clubs' to non-profit entities, infringes the right to keep and bear arms." See Complaint at ¶61. The facial challenge set forth in Count II is premised upon the virtually identical conclusory averment that "[o]n its face […] Section 311(D) of Robinson Township's Zoning Ordinance, barring the operation of center-fire rifles at so-called 'Sportsman's Clubs,' infringes the right to keep and bear arms." See Complaint at ¶65. With respect to Count IV, Plaintiffs' Equal Protection Clause claim rests on the conclusory assertion that "Sportsman's Clubs" are treated differently than other usages permitted within Interstate Business Development ("IBD") districts. Such conclusory averments are legally insufficient to maintain an Equal Protection claim. *See Cty. Concrete Corp.*, 442 F.3d at 171 (affirming

dismissal of equal protection clause claim where averments in the Complaint did not "suggest what 'similarly situated property' was not rezoned in the same manner, nor [did the complaint] offer any facts demonstrating how those properties were similarly situated") (citing *Ventura Mobilehome Cmtys. Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1054–55 (9th Cir. 2004). The averments underlying Plaintiffs' Right to Livelihood claim in Count VI are similarly conclusory: "Robinson Township Ordinance Section 601 [*sic*], barring a profit interest in the operation of a gun club, violates the right to pursue a livelihood on its face and as applied to Plaintiffs Drummond and GPGC, LLC." See Complaint at ¶79. As each of Plaintiffs' facial challenges is premised on purely conclusory arguments, the Complaint fails to adequately plead any facial challenge.

With respect to Plaintiffs' as-applied challenges, Plaintiffs concede that their claims in Counts I, II, IV and VI are generally subject to the finality rule. See Plaintiffs' Memorandum at p. 6. However, Plaintiffs' Memorandum argues that appealing the denial of the permit to the Zoning Board would be futile, as there is no dispute that the Zoning Officer, Mr. Dorsey, correctly applied the Zoning Ordinance. See Plaintiffs' Memorandum at p. 7. Plaintiffs cannot evade the issue of ripeness with a conclusory assertion of futility. The Zoning Ordinance requires the Zoning Officer "administer this Ordinance in accordance with its literal terms, and shall not have the power to permit any construction or any use or change or use, which does not conform to this Ordinance." See Zoning Ordinance at §701(B). However, the Zoning Hearing Board does have authority to grant variances and special exception permits. See Zoning Ordinance at §702(B)-(E). As set forth in Defendants' Memorandum of Law, Mr. Drummond applied for a permit to operate a "sportsman's club" on the subject premises. The Complaint does not aver that Mr. Drummond made any effort to pursue a variance or special use permit to operate a

commercial gun range, to operate a center-fire rifle range, or to engage in the commercial sales of guns, ammunition or other related products at any time. Nor does Plaintiffs' Memorandum argue that the Zoning Ordinance would prohibit the issuance of a variance under these circumstances - on the contrary, Plaintiffs argue that a variance *would be* a viable option. See Plaintiffs' Memorandum at p. 8. Plaintiffs maintain, however, that based on the Township and Mr. Dorsey's opposition to their Motion for Preliminary Injunction, seeking a variance would be futile. See Plaintiffs' Memorandum at p. 8. While the Township and Mr. Dorsey contest whether Plaintiffs can meet their burden in proving that they will suffer greater harm than their residential neighbors if the Motion for Preliminary Injunction is denied, this has no bearing whatsoever on what the three-person Zoning Hearing Board may decide to do after conducting a public hearing. See Zoning Ordinance at §700. As Plaintiffs' Memorandum fails to demonstrate that seeking a variance or otherwise appealing the denial of the permit would be futile, Plaintiffs' Memorandum fails to identify a basis upon which to find that Plaintiffs' as-applied claims, as set forth in Counts I, II, IV and VI, are ripe under the Finality Doctrine.

II. APPLICATION OF TEIXEIRA V. COUNTY OF ALAMEDA TO PLAINTIFFS' SECOND AMENDMENT CLAIMS.

The parties do not dispute that, under certain circumstances, a would-be operator of a gun store or shooting range may have derivative standing to assert the subsidiary right to acquire firearms on behalf of its potential customers. Rather, the issue is whether, and to what extent, Plaintiffs' Complaint must adequately aver that such customers cannot otherwise exercise their Second Amendment rights, as held by the Ninth Circuit Court of Appeals in *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 680 (9th Cir. 2017), *cert. denied sub nom. Teixeira v. Alameda Cty., Cal.*, 138 S. Ct. 1988, 201 L. Ed. 2d 249 (2018). Without citing any authority in support thereof,

Plaintiffs argue that the methodology for examining Second Amendment claims applied by the Ninth Circuit in *Teixeira* differs from that adopted by the Third Circuit Court of Appeals in *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). This is simply incorrect – the Ninth Circuit applied the same analysis as the Third Circuit, and in fact even cited *Marzzarella* in support thereof. *Id*. at 682, 687 ("Our holding does not conflict with *United States v. Marzzarella* [….] *Marzzarella* did not consider a situation in which the right of citizens to acquire and keep arms was not significantly impaired, yet commercial retailers were claiming an independent right to engage in sales").

Next, Plaintiffs take issue with *Teixeira*'s holding that the Second Amendment does not independently protect a proprietor's right to sell firearms. See Plaintiffs' Memorandum at p. 15-17. Plaintiffs rely on their own *ipse dixit*, asserting that it is somehow "common sense" that the Second Amendment encompasses an individual's right to sell firearms, independent of the rights of citizens to keep and bear arms. See Plaintiffs' Memorandum at pp. 15-17. Plaintiffs make no meaningful effort to dispute the Ninth Circuit's detailed textual and historical analysis, wherein it determined that no historical authority suggests that the Second Amendment protects an individual's right to sell a firearm unconnected to the rights of citizens to "keep and bear" arms. *Teixeira*, 873 F.3d at 683-87. To the extent Plaintiffs seek to dismiss the Ninth Circuit's holding in *Teixeira* as part of an ongoing conspiracy to subvert the Second Amendment,[1] it bears noting that the *Teixeira* decision is not an anomaly. As noted therein, at least two other courts have reached the same conclusion. *Teixeira*, 873 F.3d at 690, n.2 (citing *United States v. Chafin*, 423 Fed.Appx. 342, 344 (4th Cir. 2011) for the proposition that "no historical authority 'suggests

[1] See Plaintiffs' Memorandum at p. 12 ("The Ninth Circuit, however, maintained its perfect record of denying relief to Second Amendment plaintiffs…").

that, at the time of its ratification, the Second Amendment was understood to protect an individual's right to sell a firearm' "; *Mont. Shooting Sports Ass'n v. Holder*, 2010 WL 3926029, at *21 (D. Mont. 2010) ("*Heller* said nothing about extending Second Amendment protection to firearm manufacturers or dealers. If anything, *Heller* recognized that firearms manufacturers and dealers are properly subject to regulation by the federal government under existing federal firearms laws."). Simply put, Plaintiffs cannot evade the fact that every court to have considered the issue has determined that the Second Amendment does not independently protect a proprietor's right to sell firearms.

III. PLAINTIFFS' CHALLENGE TO THE RE-CLASSIFICATION OF SPORTSMAN'S CLUBS FROM PERMITTED USES TO CONDITIONAL USES.

As set forth in Defendants'' Memorandum, a conditional use is a use to which the applicant is entitled, provided the standards set forth in the ordinance are met. See Defendants' Memorandum at p. 15 (citing *In re Thompson*, 896 A.2d 659 (Pa. Commw. Ct. 2016). Without citing any authority in support thereof, Plaintiffs' Memorandum simply repeats the conclusory averment in the Complaint that the reclassification of a Sportsman's Club from a permitted use to a conditional use somehow constitutes a revocation of "a right," adding, without explanation, that "[t]he claim is obvious enough." See Plaintiffs' Memorandum at pp.17-18. As this argument is entirely non-responsive, Plaintiffs' Memorandum fails to identify a basis upon which Plaintiffs can maintain a Second Amendment Claim under the theory set forth in Count III of the Complaint.

IV. PLAINTIFFS' MEMORANDUM FAILS TO IDENTIFY A BASIS UPON WHICH PLAINTIFFS CAN MAINTAIN AN EQUAL PROTECTION CLAIM.

As set forth in Defendants' Memorandum, Defendants maintain that the Complaint fails to adequately plead an Equal Protection Claim, as the Complaint fails to aver facts suggesting that the Zoning Ordinance applies differently to similarly situated usages. See Defendants' Memorandum at pp. 16-17. Without citing any authority in support thereof, Plaintiffs' Memorandum argues that "[p]resumably, all properties in a particular zone are situated similarly to each other […]." See Plaintiffs' Memorandum at p. 19. However, this type of over-generalization has been expressly rejected by the Third Circuit Court of Appeals:

> if we were to conclude […] that all uses with a similar impact must be treated alike, regardless of the fact that such uses may be fundamentally distinct, we would turn zoning law on its head. That is, such a conclusion would mean not only that churches must be allowed in a zone where country clubs are allowed (based on the conclusion that country clubs impact light, traffic and noise as well), but also, by necessity, that a host of other uses that impact light, traffic and noise must also be permitted in such zones. But this would strip of any real meaning the authority bestowed upon municipalities to zone since the broad power to zone carries with it the corollary authority to discriminate against a host of uses that a municipality determines are not particularly suited for a certain district. Placing the burden on the complaining party first to establish that it is similarly situated with other, permitted uses preserves the clearly established local authority in the land use context.

Congregation Kol Ami v. Abington Twp., 309 F.3d 120, 139 (3d Cir. 2002). As set forth above, the Court need not conduct a rational basis review until Plaintiffs first establish that the proposed usage of the property is similarly situated to other permitted uses. As Plaintiffs' Memorandum fails to do so, dismissal of Plaintiffs' Equal Protection claim (Count IV) is warranted.

V. PLAINTIFFS' RESPONSE FAILS TO IDENTIFY A BASIS UPON WHICH PLAINTIFF CAN MAINTAIN A SUBSTANTIVE DUE PROCESS CLAIM BASED SOLELY ON A "COURSE OF CONDUCT" THEORY.

Plaintiffs' Memorandum concedes that Count V asserts a Substantive Due Process claim arising exclusively from Defendants' course of conduct in allegedly "slow-rolling" Mr. Drummond's permit application.[2] See Plaintiffs' Memorandum at pp. 21-22. Plaintiffs' Memorandum does not dispute that "the legal right to a permit must exist before the local agency denies the permit application." See Defendants' Memorandum of Law at pp. 17-18 (citing *Acierno v. Cloutier*, 40 F. 3d 597, 619 (3d Cir. 1994) (additional citation omitted). Rather, Plaintiffs appear to argue that if Mr. Drummond had not been persuaded to delay the filing of his application until after February 19, 2018, the permit would have been granted under the earlier version of the Ordinance. See Plaintiffs' Memorandum at p. 21 ("the property interest here inhered in decades of the Club's lawful operation"); Plaintiffs' Complaint at ¶¶ 33-36. It is unclear what Plaintiffs mean by "decades of lawful operation." As set forth in the Washington County Court of Common Pleas' April 24, 2017 Opinion and Order, "[t]he property's use as a gun club ceased in 2008 when the owners, Joseph Freund and his sister, Constance Freund, were indicted and convicted for criminal activity and were no longer permitted to possess, sell, or use firearms." See Plaintiffs' Complaint at Exhibit B, p. 1. Eight years later, the property was leased by Jason Doetzer, the principal owner of Iron City Armory, LLC. *Id.* Iron City Armory, LLC applied for, and was issued a permit, which required that Iron City Armory operate as a club and as such, was not permitted to sell guns or bullets, or to engage in other commercial activities. *Id.* at p. 2. Simply put, Mr. Drummond had no right to operate such a business under the Ordinance at any time material hereto. As he had no right to such a permit, either before or after the

[2] In light of this concession, Defendants concur with Plaintiffs' argument that the Finality Doctrine does not apply to Count V.

February 19, 2018 Resolution was passed, Plaintiffs have failed to state a Substantive Due Process Claim.

Plaintiffs' Memorandum further argues that Mr. Dorsey's conduct in allegedly suggesting to Mr. Drummond that he delay the filing of his permit application shocks the conscience in two respects: (1) it involved interference with an otherwise constitutionally protected activity, citing *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 286 (3d Cir. 2004), and (2) "ignoring the considered judgment of the Court of Common Pleas." See Plaintiffs' Memorandum at pp. 21-22. However, *Eichenlaub* is not helpful to Plaintiffs' position. In that matter, landowners brought a § 1983 suit alleging that township officials violated their substantive due process rights by denying or delaying authorization to develop their properties, and further that township officials violated their First Amendment rights by curtailing their speech during public meeting and removing him from the meeting. The trial court granted summary judgment on the landowners' First Amendment and Substantive Due Process claims, and the landowners appealed. The Third Circuit Court of Appeals affirmed, noting that averments that the township allegedly applied requirements to the landowners' property not applied to other properties, making unannounced and unnecessary inspections and enforcement actions, delaying permits and approvals, improperly increasing tax assessments, and "malign[ing] and muzzl[ing]" the appellants" were insufficient as a matter of law to rise to the level of shocking the conscience.

The *Eichenlaub* Court distinguished the facts at issue from *Assocs. In Obstetrics & Gynecology v. Upper Merion Twp.*, 270 F. Supp. 2d 633, 656 (E.D. Pa. 2003), wherein Judge Baylson denied a motion to dismiss a Substantive Due Process claim arising out of averments that the defendant selectively applied the zoning laws to the plaintiff abortion clinic so as to eliminate the provision of abortion services in the Township. In allowing the claim to proceed,

Judge Baylson noted that the shock the conscience test is consistent with the "undue burden" standard established by the Supreme Court for state regulation of abortion, as set forth in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877 (1992).

In contrast thereto, no undue burden is implicated in the facts pleaded in Plaintiffs' Complaint. "[G]un buyers have no right to have a gun store in a particular location, at least as long as their access is not meaningfully constrained. *Teixeira*, 873 F.3d at 680 (citing *Second Amendment Arms v. City of Chicago*, 135 F.Supp.3d 743, 754 (N.D. Ill. 2015) ("[A] slight diversion off the beaten path is no affront to ... Second Amendment rights."); *cf. Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2313, (2016), *as revised* (June 27, 2016) ("[I]ncreased driving distances do not always constitute an 'undue burden.' "); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228 (11th Cir. 2004) (holding that a zoning ordinance that limited churches and synagogues to residential districts did not violate the Religious Land Use and Institutionalized Persons Act (RLUIPA) because "walking a few extra blocks" is not a substantial burden). Accordingly, Plaintiffs' Memorandum fails to identify a basis upon which Plaintiffs can maintain a Substantive Due Process claim arising from Mr. Dorsey's alleged suggestion that Mr. Drummond delay the filing of his permit application.

VI. PLAINTIFFS' MEMORANDUM FAILS TO IDENTIFY A BASIS UPON WHICH PLAINTIFFS CAN MAINTAIN A RIGHT TO LIVELIHOOD CLAIM.

Plaintiffs' Memorandum does not dispute the proposition that "state actions that exclude a person from one particular job or job opening are not actionable in suits brought directly under the due process clause." *McCool v. City of Philadelphia*, 494 F. Supp. 2d 307, 325 (E.D. Pa. 2007) (quoting *Bernard v. United Township High Sch. Dist. No. 30*, 5 F.3d 1090, 1092 (7th Cir. 1993)). Rather, Plaintiffs argue that the Zoning Ordinance prohibits Mr. Drummond and GPGC,

LLC from their chosen profession of operating a "Sportsman's Club" (which they appear to define as a for-profit entity engaged in the retail sale of firearms and the operation of a center-fire rifle range) "anywhere in Robinson Township." See Plaintiffs' Memorandum at p. 22. This is simply inaccurate. As set forth in Defendants' Memorandum, the Zoning Ordinance explicitly permits such commercial gun ranges in Special Conservation and Industrial districts. See Zoning Ordinance at Art. VI §602; Art. II, §§202, Table 202A; §209, Table 209A. Accordingly, Plaintiffs' Memorandum fails to set forth a basis upon which Plaintiffs can maintain a claim under a right to livelihood theory (Count VI).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief in Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss have been served via CM/ECF filing system on counsel of record, this, the 12th day of November, 2018.

Respectfully Submitted,

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