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-MJH

RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION OF DEFENDANTS, ROBINSON TOWNSHIP AND MARK DORSEY

Defendants, Robinson Township and Mark Dorsey, by and through their counsel, Litchfield Cavo, LLP, hereby file the instant Response in Opposition to Plaintiffs' Motion for Preliminary Injunction and respectfully request the Honorable Court deny Plaintiffs' Motion for the reasons set forth in Defendants' Memorandum of Law.

Respectfully submitted,

___*/s/ Trisha A. Gill*_____
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MEMORANDUM OF LAW IN SUPPORT OF RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION 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 Memorandum of Law in Support of their Response in Opposition to Motion for Preliminary Injunction, and in support thereof, aver as follows:

I. FACTUAL BACKGROUND

This matter arises out of a dispute between Plaintiff, William Drummond, and Robinson Township ("the Township"), relating to Mr. Drummond's desire to operate a commercial gun shop and shooting range on a property not zoned for such use. See Plaintiff's Complaint.

At all times material hereto, the operation of commercial shooting ranges in Robinson Township has been an allowed use within both *Special Conservation* and *Industrial* zoning

districts under the Robinson Township Zoning Ordinance. See *Zoning Ordinance* at Art. VI §602 – COMMERCIAL RECREATION, INTENSIVE; Art. II, §§202, Table 202A; §209, Table 209A (2017). Commercial shooting ranges are required to be located on lots greater than 50 acres. See *Zoning Ordinance* at Art. III §304, attached as Exhibit A.

At all times material hereto, the Zoning Ordinance distinguished between commercial shooting ranges and smaller shooting ranges owned or operated by non-profit conservation/sportsman's organizations. See *Zoning Ordinance* at Art. VI §602 – COMMERCIAL RECREATION, INTENSIVE; see also Art. III §311 (permitting Sportsman's Clubs to operate on lots as small as 40 acres). Sportsman's Clubs have been an allowed use in areas zoned as *Agricultural* districts, *Special Conservation* districts, and *Interchange Business Development* districts. See *Zoning Ordinance* at Art. II, §§202-03; 207-08 (2017).

On February 19 2018, the Township Board of Supervisors authorized the implementation of Resolution 08-2018 to take certain actions relating to the amendment of the Zoning Ordinance in three respects relating to Sportsman's Clubs. See *Resolution* 08-2018, a copy of which is attached hereto as Exhibit B.[1] First, the "Definitions" Section was to be amended to define the term "Sportsman's Club" as follows:

> SPORTSMAN'S CLUB – A nonprofit entity formed for conservation of wildlife or game, and to provide members with opportunities for hunting, fishing or shooting.

See *Ordinance* 01-2018, a copy of which is attached hereto as Exhibit C. Second, §311 was to be amended to add the following subsection:

[1] As discussed in greater detail below, pursuant to Pennsylvania's pending ordinance doctrine, "zoning ordinances that are pending before the City Council are treated as law even if they are not yet adopted." *Berger v. Cushman & Wakefield of Pennsylvania, Inc.*, 2014 WL 2892408, at *3 (E.D. Pa. 2014).

> A. Outdoor shooting activities shall be limited to pistol range, skeet shoot, trap and skeet, and rim-fire rifles.

Id. Third, Table 208(A) was amended so that the operation of a Sportsman's Club would be Conditional Use rather than Permitted Use. *Id*.

Plaintiffs' Complaint avers that on December 17, 2017, William Drummond entered into a lease with his uncle, Joseph Donald Freund, Jr. for a 265 acre parcel located at 920 King Road in Robinson Township. See Complaint at ¶¶11, 17 and 30. At all times material hereto, the property was zoned as an *Interchange Business Development* district. *Id*. at ¶ 12. The Complaint avers that Mr. Drummond leased the property "for purposes of operating a gun club, the retail sale of firearms, and operating a shooting range." *Id*. at ¶ 30. The gun range, which would be managed by Plaintiff, GPGC, LLC, would "sell memberships, range time, firearms, ammunition, targets, food and beverage, and other ordinary goods that might be found at any gun range, as well as shooting training and safety courses to the public." *Id*. at ¶ 31. The gun range, in turn, would permit patrons to shoot "ordinary firearms of all kind in common use for traditional lawful purposes, including pistols, shotguns, and center-fire rifles up to .50 caliber." *Id*. at ¶ 32. The Complaint does not aver that Mr. Drummond made any effort to pursue such a business venture within any *Special Conservation* or *Industrial* districts. *Id*.

On March 15, 2018, Mr. Drummond submitted an Application for Zoning Permit, representing to the Township that he intended to operate a Sportsman's Club on the premises. See Application for Zoning Permit, a copy of which is attached hereto as Exhibit D; See also Complaint at ¶ 40. The Application made no mention of operating a center-fire rifle range, or selling guns or ammunition.

On April 9, 2018, The Board of Supervisors enacted Ordinance 01-2018.

Plaintiffs have stipulated that there was no defect in the enactment thereof:

See Transcript of September 24, 2018 Teleconference at p. 6:10-21. A copy to the Transcript is attached hereto as Exhibit E.

On April 13, 2018, Defendant, Zoning Officer Marc E. Dorsey, wrote to Mr. Drummond advising that his Application for Zoning Permit had been denied, as it did not indicate that the club was organized as a not-for profit entity. See April 13, 2018 correspondence, a copy of which is attached hereto as Exhibit F; See Complaint at ¶ 53. Mr. Dorsey invited Mr. Drummond to resubmit his application with the appropriate documentation, but Mr. Drummond chose not to do so. Mr. Drummond did not file an appeal with the Robinson Township Zoning Hearing Board, but instead attempted to appeal the decision directly to the Washington County Court of Common Pleas. See May 8, 2018 Civil Action Complaint – Land Use Appeal, a copy of which is attached hereto as Exhibit G. On June 11, 2018, the Township filed Preliminary Objections based on, *inter alia*, lack of jurisdiction due to Mr. Drummond's failure to timely appeal the permit denial to the Zoning Hearing Board, as required under Pennsylvania's Municipalities Planning Code. See June 11, 2018 Preliminary Objections, a copy of which is attached hereto as Exhibit H. Thereafter, Mr. Drummond voluntarily discontinued the Land Use Appeal. See Exhibit E at pp. 4:22-5:1.

On August 27, 2018, Plaintiffs initiated the instant lawsuit, asserting various constitutional claims arising from the denial of Mr. Drummond's Application for Zoning Permit as separately seeking a preliminary injunction. As discussed in greater detail below, Plaintiffs cannot, as a matter of law, meet their burden in establishing that the extraordinary remedy of issuing preliminary injunction is necessary.

II. ISSUES

A. WHETHER PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS?

SUGGESTED ANSWER: NO.

B. WHETHER PLAINTIFFS WILL SUFFER IRREPERABLE HARM IF THE MOTION IS DENIED?

SUGGESTED ANSWER: NO.

C. WHETHER GRANTING RELIEF WILL NOT RESULT IN EVEN GREATER HARM TO THE NONMOVING PARTY?

SUGGESTED ANSWER: NO.

D. WHETHER THE PUBLIC INTEREST FAVORS SUCH RELIEF?

SUGGESTED ANSWER: NO.

III. STANDARD OF REVIEW

This Court has succinctly set forth the standard of review of a motion for preliminary injunction as follows:

> Preliminary or temporary injunctive relief is "a drastic and extraordinary remedy that is not to be routinely granted." *Intel Corp. v. ULSI Sys. Tech., Inc.*, 995 F.2d 1566, 1568 (Fed. Cir. 1993); *see also Hoxworth v. Blinder, Robinson & Company, Inc.*, 903 F.2d 186, 189 (3d Cir. 1990). In determining whether to grant a preliminary injunction, a court must consider whether the party seeking the injunction has satisfied four factors: "1) a likelihood of success on the merits; 2) he or she will suffer irreparable harm if the injunction is denied; 3) granting relief will not result in even greater harm to the nonmoving party; and 4) the public interest favors such relief." *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010) quoting *Miller v. Mitchell*, 598 F.3d 139, 145 (3d Cir. 2010). See also Fed.R.Civ.P. 65. Because a preliminary injunction is an extraordinary remedy, the party seeking it must show, at a minimum, a likelihood of success on the merits and that they likely face irreparable harm in the absence of

> the injunction. *See Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484 (3d Cir. 2000).
>
> If the record does not at least support a finding of both irreparable injury and a likelihood of success on the merits, then preliminary injunctive relief cannot be granted. *Marxe v. Jackson*, 833 F.2d 1121 (3d Cir.1987). Courts have "placed particular weight on the probability of irreparable harm and the likelihood of success on the merits." *Ortho Biotech Products, L.P. v. Amgen Inc.*, 2006 WL 3392939, at *5 (D.N.J.) quoting *Apollo Tech Corp. v. Centrosphere Indus. Corp*., 805 F.Supp. 1157, 1205 (D.N.J.1992). In fact, irreparable injury is the key: "a failure to demonstrate irreparable injury must necessarily result in the denial of a preliminary injunction." *Ace American Ins. Co. v. Wachovia Ins. Agency Inc*., 306 Fed.App'x 727, 732 (3d Cir.2009) quoting Instant *Air Freight Co. v. C.F. Air Freight, Inc*., 882 F.2d 797, 800 (3d Cir.1989).
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> * * *
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> Moreover, where the requested preliminary injunction "is directed not merely at preserving the *status quo* but ... at providing mandatory relief, the burden on the moving party is particularly heavy." *Punnett v. Carter*, 621 F.2d 578, 582 (3d Cir.1980). *See also Trinity Industries, Inc. v. Chicago Bridge Iron Co.*, 735 F.3d 131, 139 (3d Cir.2013). Mandatory injunctions should be issued only sparingly. *United States v. Price*, 688 F.2d 204, 212 (3d Cir.1982).

Pettaway v. Overton, 2014 WL 3747672, at *2 (W.D. Pa. 2014).

As set forth in greater detail below, Plaintiffs' Motion for Preliminary Injunction does not seek to maintain the status quo, but to provide mandatory relief in allowing an exception to the zoning ordinance well beyond that which Mr. Drummond applied for in the first place. As such, Plaintiffs cannot meet the heavy burden they face in pursuing the "drastic and extraordinary" remedy of a preliminary injunction.

IV. ARGUMENT

A. Plaintiffs are not Likely to Succeed on the Merits.

1. This Matter is not Ripe for Adjudication, as Mr. Drummond Failed to Appeal the Zoning Officer's Determination to the Zoning Hearing Board.

"The doctrine of ripeness is essentially viewed as a prudential offshoot to the Constitutional requirement that a 'case or controversy' be before the Court. *Chalfont Bus. Owners All. v. Borough of Chalfont*, 1997 WL 224980, at *1 (E.D. Pa. 1997) (citing *Acierno v. Mitchell*, 6 F.3d 970, 974 (3d Cir. 1993). "The basic rationale of the ripeness requirement is to prevent a court, through avoidance of premature adjudication, from entangling itself in abstract disagreements." *Id*. (citing *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). "In short, ripeness is a question of timing that addresses 'when ... it [is] appropriate for a court to take up the asserted claim.'" *Id*. (quoting *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 535 (3d Cir. 1988); *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 940 (D.C. Cir. 1986).

While exhaustion of administrative remedies is not always required before commencing an action in federal court, the question whether administrative remedies must be exhausted is conceptually distinct from the question whether an administrative action must be final before it is judicially reviewable. *Id*. at *2. "While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Id*. (citing *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192-93 (1985). The Third Circuit has also commented on the difference between ripeness and exhaustion of administrative remedies:

> the doctrines of ripeness for adjudication and of exhaustion of administrative remedies are distinct and not interchangeable. While exhaustion is sometimes a jurisdictional prerequisite to a civil suit in a district court, ripeness is a product of the concept of justiciability. Ripeness concerns whether the legal issue at the time presented in court is sufficiently concrete for decision.

Id. (quoting *United States v. Lightcap*, 567 F.2d 1226, 1232 (3d Cir. 1977).

"Courts have generally imposed a particularly stringent standard for ripeness in cases involving challenges to land-use or zoning decisions." *Mercer Outdoor Advert., LLC v. City of Hermitage, Pa.*, 2013 WL 6498266, at *3 (W.D. Pa. 2013).

In disputes arising from zoning decisions, "the zoning hearing board must make a determination on the plaintiff's application before the § 1983 claims are ripe, even if the land-use decision may cause constitutional injury." *Id*. at 4 (citing *Taylor Inv., Ltd. v. Upper Darby Twp.*, 983 F.2d 1285, 1287 (3d Cir. 1993)).

As set forth in greater detail above, Mr. Drummond failed to properly appeal the denial of his Application for Zoning Permit to the Zoning Hearing Board. As such, Plaintiffs' Second and Fourteenth Amendment claims are not ripe for adjudication, and therefore Plaintiffs are not only unlikely, but cannot succeed on the merits.

2. Counts I and II of Plaintiffs' Complaint Fail to State a Claim Under the Second Amendment on Behalf of Plaintiffs' Potential Customers and Members Because Plaintiffs Lack Standing to Assert These Claims.

Pursuant to 42 U.S.C. § 1983, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory [...] subjects, or causes to be subjected, any citizen of the United States [...] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]" 42 U.S.C. § 1983. "To state a claim under §

1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *Harvey v. Renewal, Inc.*, 2016 WL 183925, at *4 (W.D. Pa. 2016) (citing *Tatsch-Corbin v. Feathers*, 561 F. Supp. 2d 538, 543 (W.D. Pa. 2008); *West v. Atkins*, 487 U.S. 42, 48 (1988)).

The Second Amendment states: "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." U.S. Const. Amend. II. The Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) ("our central holding in *Heller* [was] that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home"). In the wake of *Heller* and *McDonald*, courts across the country have held that the Second Amendment also protects various "ancillary rights necessary to the realization of the core right to possess a firearm for self-defense." *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017), *cert. denied sub nom. Teixeira v. Alameda Cty.*, Cal., 138 S. Ct. 1988 (2018) (citing *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014); ("the right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them"); *Ezell v. City of Chicago* ("*Ezell I*"), 651 F.3d 684, 708 (7th Cir. 2011) ("the right to maintain proficiency in firearm use [is] an important corollary to the meaningful exercise of the core right to possess firearms for self-defense"). "As with purchasing ammunition and maintaining proficiency in firearms use, the core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much' without the

ability to acquire arms." *Id*. (quoting *Ezell I*, 651 F.3d at 704); *see also Illinois Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 930 (N.D. Ill. 2014) ("the right to keep and bear arms under the Second Amendment […] must also include the right to *acquire* a firearm, although that acquisition right is far from absolute") (emphasis in original). However, "as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense." *Sundowner Ass'n v. Wood Cty. Comm'n*, 2014 WL 3962495, at *10 (S.D.W. Va. 2014) (quoting *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011)).

In the case at hand, Mr. Drummond and GPGC, LLC seek to bring Second Amendment claims on behalf of their prospective customers and the Second Amendment Foundation seeks to do the same on behalf of its members in Pennsylvania. See Exhibit 1 at ¶¶ 1-3. "[V]endors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Teixeira*, 873 F.3d at 678 (quoting *Craig v. Boren*, 429 U.S. 190, 195, (1976)). Therefore, a "would-be operator of a gun store […] has derivative standing to assert the subsidiary right to acquire arms on behalf of his potential customers." *Id*. (citing *Carey v. Population Servs., Int'l*, 431 U.S. 678, 683, (1977); *Ezell I*, 651 F.3d at 693, 696). However, in order to do so, the would-be operator of the gun store must allege that residents are unable to otherwise exercise their Second Amendment rights to purchase firearms. *Id*. at 678-79.

In *Teixeira*, a prospective gun shop owner brought an action against Alameda County, arguing that a county ordinance prohibiting gun stores from being located within 500 feet of residential districts, schools, other gun stores, or establishments that sold liquor violated the

Second Amendment and the Equal Protection Clause. *Id*. at 673-76. The complaint alleged that the gun shop owner was unable to locate any other property within the county that satisfied the 500-foot rule, and was otherwise suitable for a gun shop. *Id*. at 676. The gun shop owner later commissioned a study to analyze the practical implications of the ordinance, which found it "virtually impossible" to open a new gun store in the county that complied with the 500-foot rule. *Id*. Notwithstanding these averments, the Ninth Circuit Court of Appeals held that the averments in the complaint were legally deficient to assert a Second Amendment claim on behalf of prospective customers:

> But Teixeira did not adequately allege in his complaint that Alameda County residents cannot purchase firearms within the County as a whole, or within the unincorporated areas of the County in particular. To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege in the complaint "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). We assume the factual allegations in Teixeira's complaint to be true. *See id.* But "[c]onclusory allegations and unreasonable inferences ... are insufficient to defeat a motion to dismiss." *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007).
>
> The operative complaint does not meet this standard with regard to whether residents can purchase guns in the County—or in unincorporated areas of the County—if they choose to do so. Teixeira alleges in general terms that the gun store he plans to open is necessary to enable his potential customers to exercise their Second Amendment rights. The complaint also states that the zoning ordinance amounts to a complete ban on new gun stores in unincorporated Alameda County because, according to a study commissioned by Teixeira, "there are no parcels in the unincorporated areas of Alameda County which would be available for firearm retail sales."

> Whatever the standard governing the Second Amendment protection accorded the acquisition of firearms, these vague allegations cannot possibly state a claim for relief under the Second Amendment. The exhibits attached to and incorporated by reference into the complaint, which we may consider, *see United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003), demonstrate that Alameda County residents may freely purchase firearms within the County. As of December 2011, there were ten gun stores in Alameda County. Several of those stores are in the non-contiguous, unincorporated portions of the County. In fact, Alameda County residents can purchase guns approximately 600 feet away from the proposed site of Teixeira's planned store, at a Big 5 Sporting Goods store.

Id. at 678–79.

As a preliminary matter, it bears noting that Mr. Drummond's Zoning Application Permit did not indicate that he intended to engage in commercial sales of firearms or ammunition on the subject premises. See Exhibit D. On the contrary, he merely applied to operate a Sportsman's Club, i.e. a non-profit entity. See Exhibit D; see also *Zoning Ordinance* at Art. XI § 602 – SPORTSMAN'S CLUBS. As such, Mr. Drummond was never denied permission to operate a for-profit business.

Having said that, even if he had requested the right to do so in his Application, like the complaint at issue in *Teixeira*, Plaintiffs' Complaint fails to aver that Plaintiffs' customers and members cannot purchase firearms within the county. Moreover, in contrast to the ten gun shops in Alameda County emphasized by the Ninth Circuit, it appears that Washington County presently has at least eighteen gun shops.[2] See Google Business Listings Printout, a copy of

[2] Given Washington County's population of approximately 200,000 and Alameda County's population of 1.6 million, the Washington County market is approximately fourteen times as saturated with gun shops as Alameda County.

which is attached hereto as Exhibit I. Accordingly, Count I of Plaintiffs' Complaint fails to state a Second Amendment claim on behalf of potential customers.

With respect to Plaintiffs' claims that the Zoning Ordinance improperly restricts Plaintiffs' prospective customers and clients from training with center-fire rifles (Count II),[3] at least one court has suggested that the Second Amendment does not extend to the right to operate a gun range. *See Sundowner Ass'n v. Wood County Comm'n*, 2014 WL 3962495, at *9-10 (S.D. W. Va. 2014) ("I am therefore not convinced that the Second Amendment extends to the right to operate a gun range"). Regardless, applying the reasoning of *Teixeira*, the Complaint is devoid of any averment that Plaintiffs' prospective customers/members are unable to train with center-fire rifles elsewhere in the County, or that doing so would impose even a minor inconvenience. See Complaint. As noted by the *Teixeira* Court, the failure to assert such averments renders such a claim legally deficient. *Id*. at 680 ("Teixeira does not make any allegations about how far his potential customers currently travel to purchase firearms, or how much the proposed store would shorten travel distances, if at all, or for whom. Nor does Teixeira make any argument as to what distance necessarily impairs Second Amendment rights"). Accordingly, Count II of Plaintiffs' Complaint likewise fails to state a Second Amendment claim on behalf of potential customers and/or members of Plaintiffs, and therefore Plaintiffs are unlikely to succeed on the merits thereof.

3. Count I and II of Plaintiffs' Complaint Fail to State a Claim Under the Second Amendment on Behalf of Plaintiffs, William Drummond and GPGC, LLC, Individually.

[3] Again, it is undisputed that Mr. Drummond did not apply to operate a center-fire rifle range.

Plaintiff's Complaint also appears to suggest that, independent of the rights of his potential customers, the Second Amendment grants him and GPGC, LLC a right to sell firearms. See Complaint at ¶¶ 1-2. The Third Circuit Court of Appeals has interpreted *Heller* as setting-forth a two-pronged approach to Second-Amendment Challenges:

> As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. *Cf. United States v. Stevens*, 533 F.3d 218, 233 (3d Cir.2008), *aff'd* —– U.S. ——–, 130 S.Ct. 1577, 176 L.Ed.2d 435 (recognizing the preliminary issue in a First Amendment challenge is whether the speech at issue is protected or unprotected).[4] If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.

United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 356 (3d Cir. 2016) (citing *Marzzarella* as establishing a two-step framework for analyzing both facial and as-applied Second Amendment challenges), *cert. denied sub nom. Sessions v. Binderup*, 137 S. Ct. 2323 (2017), *and cert. denied sub nom. Binderup v. Sessions*, 137 S. Ct. 2323 (2017). Applying the foregoing analysis, the Ninth Circuit held that "the Second Amendment does not confer a freestanding right, wholly detached from any customer's ability to acquire firearms, upon a proprietor of a commercial establishment to sell firearms. Commerce in firearms is a necessary prerequisite to keeping and possessing arms to self-defense, but the right of gun users to acquire firearms legally is not coextensive with the right of a particular proprietor to sell them." *Teixeira*, 873 F.3d at 682. (citing *Heller*, 554 U.S. at 626-27).

Mr. Drummond and GPGC, LLC's alleged rights to sell firearms to customers and to sell range time for center-fire rifles are not freestanding – they are contingent upon their customers' right to obtain such services. As set forth above, the Complaint does not aver that any customer or member's ability to fire center-fire rifles at a range have been limited or restricted in any way. Accordingly, Mr. Drummond and GPGC, LLC's individual Second Amendment claims are legally deficient, and therefore Plaintiffs are unlikely to succeed thereon.

4. Count III of the Complaint Fails to State a Claim Under the Second Amendment Based on the Designation of Sportsman's Clubs as Conditional Uses.

Count III of Plaintiff's Complaint challenges the Ordinance's modification of the classification of "Sportsman's Clubs" from permitted to conditional use. See Complaint at ¶¶ 66-70. The Complaint offers no explanation as to how this modification somehow infringes on the Second Amendment rights of Plaintiffs' prospective customers and members, or Plaintiffs themselves, beyond a conclusory averment. See Complaint at ¶ 70 ("Defendant's enforcement of Table 208A of its Zoning Ordinance, defining "Sportsman's Clubs" as a conditional rather than principal permitted use, as-applied against Plaintiffs, their members, and their customers, infringes the right to keep and bear arms"). Nor does the Complaint aver that this designation in any way affected the denial of Mr. Drummond's Application for Zoning Permit. See Plaintiffs' Complaint. "A conditional use is nothing more than a special exception that falls within the jurisdiction of the municipal governing body rather than the zoning hearing board." *In re AMA/Am. Mktg. Ass'n, Inc.*, 142 A.3d 923, 934 (Pa. Commw. Ct. 2016) (citing *In re Thompson*, 896 A.2d 659 (Pa. Commw. Ct. 2006)). "As in the case of special exceptions, the uses that may be established or maintained as conditional uses are prescribed by the zoning ordinance and the

standards to be applied to the grant or denial of those uses are set forth in the zoning ordinance." *Id*. (citing *In re Thompson*, 896 A.2d 659). "A special exception (or conditional use) is not an exception to the zoning ordinance, but rather a use to which the applicant is entitled provided the specific standards enumerated in the ordinance for the special exception (or conditional use) are met by the applicant." *Id*. As such, Count III fails to plead a cause of action under the Second Amendment, and therefore Plaintiffs are unlikely to succeed thereon.

5. Count IV of the Complaint Fails to State a Claim Under the Fourteenth Amendment Based on the Definition of Sportsman's Clubs as Non-Profit Entities.

Count IV of Plaintiffs' Complaint asserts a claim on behalf of Mr. Drummond and GPGL LLC only pursuant to The Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. This constitutional provision "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *One Three Five, Inc. v. City of Pittsburgh*, 951 F. Supp. 2d 788, 820 (W.D. Pa. 2013) (quoting *Vacco v. Quill*, 521 U.S. 793, 799 (1997). Courts are reluctant to overturn governmental action on the ground that it denies equal protection of the laws:

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Congregation Kol Ami v. Abington Twp., 309 F.3d 120, 133 (3d Cir. 2002) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979). This is particularly so in the context of zoning plans. "[T]he federal courts have given states and local communities broad latitude to determine their zoning plans. Indeed, land use law is one of the bastions of local control, largely free of federal intervention. As the Supreme Court stated in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981), "[t]he power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities.... [T]he courts generally have emphasized the breadth of municipal power to control land use." Like other economic and social legislation, land use ordinances that do not classify by race, alienage, or national origin, will survive an attack based on the Equal Protection Clause if the law is "'reasonable, not arbitrary' and bears 'a rational relationship to a (permissible) state objective.'" *Congregation Kol Ami*, 309 F.3d at 133 (quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974)).

Plaintiffs' Complaint avers that the Zoning Ordinance "singles-out" Sportsman's Clubs as the only uses within *Interchange Business Development* districts that are not permitted to operate for profit. See Complaint at ¶ 72. However, Sportsman's Clubs are not restricted to *Interchange Business Development* districts. As set forth in § 202, they are also permitted in Agricultural districts, as well as Special Conservation districts, along with other non-profit uses such as places of worship, essential services, and public parks and playgrounds. See *Zoning Ordinance* at §202-03. Accordingly, Plaintiffs' Complaint fails to aver that the law applies differently to different classes of people.

Further, it bears noting that Plaintiffs' Complaint does not express an interest in opening "Sportman's Club," which is defined as having been "formed for conservation of wildlife or game." See *Zoning Ordinance* at § 602. Rather, Plaintiffs seek to open a "commercial shooting range," which is classified under "Commercial Recreation, Intensive," along with go-cart raceways, auto raceways, motorsports participation or spectator opportunities, outdoor concert performances and similar pursuits, due to their intensive noise impacts on surrounding areas. See *Zoning Ordinance* at § 602 – COMMERCIAL RECREATION, INTENSIVE. Plaintiffs' Complaint is devoid of any averments challenging this designation under the Equal Protection Clause. Accordingly, Plaintiffs' Equal Protection claim is legally deficient, and therefore Plaintiffs are unlikely to succeed on the merits.

6. Count V of Plaintiffs' Complaint Fails to State a Substantive Due Process Claim Based on Defendants' Enactment of the Ordinance and Events Preceding Same.

Next, Mr. Drummond seeks to assert a substantive due process claim under the Fourteenth Amendment based on averments that (1) defendants persuaded him to delay the submission of his application, (2) Defendants enacted Ordinance 01-2018, and (3) the Defendants denied Mr. Drummond's application. See Complaint at ¶ 75.

"In order to justify substantive due process protection, the legal right to a permit must exist before the local agency denies the permit application—the claim of entitlement must come from 'an existing legislative or administrative standard.'" *Acierno v. Cloutier*, 40 F.3d 597, 619 (3d Cir. 1994) (citing *Dean Tarry Corp. v. Friedlander*, 826 F.2d 210, 213 (2d Cir. 1987).

Pursuant to Pennsylvania's pending ordinance doctrine, "zoning ordinances that are pending before the City Council are treated as law even if they are not yet adopted." *Berger v.*

Cushman & Wakefield of Pennsylvania, Inc., 2014 WL 2892408, at *3 (E.D. Pa. 2014) (citing *Casey v. Zoning Hearing Bd. of Warwick Tp.*, 328 A.2d 464, 467 (Pa. 1974) ("When there has been a 'sufficient public declaration' of an intent to amend the existing zoning ordinance, […] the pending amendment governs the issuance of such permits"). "An ordinance is 'pending' when the City Council 'has resolved to consider a particular scheme of rezoning and has advertised to the public its intention to hold public hearings on the rezoning.'" *Id*. (quoting *Casey*, 328 A.2d at 467; *Boron Oil Co. v. Kimple*, 284 A.2d 744, 747 (Pa. 1971)).

As noted above, the Township issued a Resolution qualifying the Ordinance as a pending ordinance on February 19, 2018. As admitted in the Complaint, the ordinance was already pending at the time Mr. Drummond submitted his application. See Complaint at ¶ 40. Moreover, Plaintiffs' counsel has stipulated that there was no defect in the procedure followed by the Township in enacting the amendment to the Zoning Ordinance. See Exhibit E at p. 5:6-11.

As such, the Complaint fails to plead a legal right to a permit to operate a commercial gun range on the subject property.

Even if the Complaint had sufficiently pleaded a legal right, the conduct at issue does not, as a matter of law, shock the conscience. This Court has previously discussed the shocks the conscience standard in the context of a zoning dispute as follows:

> The "shocks the conscience test" in land use cases was addressed by the Supreme in *Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). There, the Court wrote that the "criteria used to identify what is fatally arbitrary differ depending on whether [a legislative act] or a specific act of a government officer is at issue." *Id.* at 846.[1] Cases "dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct [is] 'arbitrary in the constitutional sense.' " *Id.* (*quoting Collins v. Harker Heights*, 503 U.S. 115, 129, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)). "[T]he cognizable

> level of executive abuse of power [is] that which shocks the conscience." *Id.* "While the measure of what is conscience shocking is no calibrated yard stick, it does ... 'poin[t] the way.' " *Id.* at 847 (*quoting Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.1973)).
>
> In *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392 (3d Cir.2003), the Court of Appeals for the Third Circuit considered the plaintiff's claims that Warrington Township and its Board of Supervisors had "complicated and delayed approval of United Artists' development plan, and thereby allowed a competitor to beat [it] in a race to build a movie theater." *Id.* at 394. The Court found that these allegations did not satisfy the "shocks the conscience" test. Adopting this test "[brought] the Court into line with several other Courts of Appeals that have ruled on substantive due process claims in land-use disputes" and "also prevent[ed the Court] from being cast in the role of a 'zoning board of appeals.' " *Id.* at 402 (*quoting Creative Env't's, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir.1982)). "Land use decisions are matters of local concern, and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper' motives.' " *Id.* (internal citation omitted).

Southersby Dev. Corp. v. Borough of Jefferson Hills, 2010 WL 1576465, at *2–3 (W.D. Pa. 2010).

In the case at hand, Plaintiffs' substantive due process claim is essentially the same as *United Artists'* arguments, discussed above – the Township acted with improper motive in delaying Mr. Drummond's permit application, to Mr. Drummond's financial detriment. As set forth above, such allegations are legally insufficient. Accordingly, Plaintiffs' Complaint fails to aver a cause of action sounding in substantive due process.

7. Count VI of Plaintiffs' Complaint Fails to State a Claim Under the Fourteenth Amendment Based on Plaintiffs' Inability to Operate a Commercial Shooting Range on the Subject Property.

The right "to follow a chosen profession free from unreasonable governmental interference comes within both the liberty and property concepts of the Fifth and Fourteenth Amendments." *McCool v. City of Philadelphia*, 494 F. Supp. 2d 307, 325 (E.D. Pa. 2007) (quoting *Piecknick v. Commonwealth*, 36 F.3d 1250, 1259 (3d Cir. 1994). However, "it is the right to pursue a calling or occupation, and not the right to a specific job, that is protected by the Fourteenth Amendment." *Id*. (quoting *Piecknick*, 36 F.3d at 1259; *Wroblewski v. City of Washburn*, 965 F.2d 452, 455 (7th Cir.1992)). "Thus, the Constitution protects only against state actions that threaten to deprive persons of the right to pursue their chosen occupation." *Id*. "Accordingly, 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." *Id*. (quoting *Bernard v. United Township High Sch. Dist. No. 30*, 5 F.3d 1090, 1092 (7th Cir. 1993)).

In the case at hand, the Complaint does not aver that Mr. Drummond and/or GPGC, LLC were deprived of the right to pursue their occupation, but rather a single business opportunity. As such, this claim is legally deficient and they are not likely to succeed on the merits of their claim.

B. Plaintiffs will not Suffer Irreparable Harm if the Motion for Preliminary Injunction is Denied.

"In order to demonstrate irreparable harm the [movant] must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial." *Hadeed v. Advanced Vascular Res. of Johnstown, LLC*, 2016 WL 7176658, at *3 (W.D. Pa. 2016) (quoting *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989)). In the absence of exceptional circumstances, economic loss does not qualify as irreparable harm. *Id*. (citing *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 255 (3d Cir. 2011)). And "[a]n inability to precisely measure financial harm does not make that harm irreparable or

immeasurable." *Acierno v. New Castle County*, 40 F.3d 645, 655 (3d Cir. 1994). Thus, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Id.* (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)).

In addition, more than a mere risk of irreparable harm must be demonstrated; "[t]he requisite for injunctive relief has been characterized as a clear showing of immediate irreparable injury, or a presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights." *Id.* (quoting *Cont'l Grp., Inc. v. Amoco Chems. Corp.*, 614 F.2d 351, 359 (3d Cir. 1980)).

As discussed above, the Second Amendment does not establish either a constitutional right to open a business selling firearms nor a constitutional right to operate a commercial shooting range. Further, Plaintiffs' fail to identify a single individual customer or member who would be affected, nor can they – commercial shooting ranges are plainly permitted to operate elsewhere within the township. To the extent Plaintiffs Drummond and GPGC, LLC may claim to have suffered economic injury, as set forth above, economic loss does not constitute irreparable harm.

As an additional matter, it bears noting that the relief sought in the Proposed Form of Order attached to Plaintiffs' Motion for Preliminary Injunction would not cure the harms alleged in Plaintiffs' Motion. The Motion seeks to enjoin the enforcement of §311(D), §601 and Table 208A, but does not seek to enjoin §602 – COMMERCIAL RECREATION, INTENSIVE; §202, Table 202A; or §209, Table 209A, which require that commercial shooting ranges be located on lots within *Special Conservation* and *Industrial* districts. See Plaintiffs' Proposed Order.

Further, the Proposed Order requests the mandatory relief of forcing the Township to "issue forthwith all permits necessary for the operation of said gun club." *Id*. However, as set forth above, it is undisputed that Mr. Drummond never applied for a permit to operate a commercial shooting range. As such, Plaintiffs have failed to demonstrate that denying the preliminary injunction would cause them irreparable harm.

C. Plaintiffs' Memorandum Fails to Demonstrate That Granting Relief will not Result in even Greater Harm to the Township and its Constituents or That the Public Interest Favors Such Relief.

Plaintiffs' sole argument with respect to the third element necessary to prove a right to a preliminary injunction is the conclusory assertion that "Injunctive relief will harm no one." See Plaintiffs' Memorandum of Law at p. 14. However, courts have repeatedly noted that a municipality's "interest in attempting to preserve the quality of urban life ... must be accorded high respect." *See, e.*g. *Peterson v. City of Florence, Minn.*, 884 F. Supp. 2d 887, 893 (D. Minn. 2012), *aff'd*, 727 F.3d 839 (8th Cir. 2013); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986)).

In the case at hand, the Zoning Ordinance is aimed at encouraging beneficial growth, while preserving the residential nature and quality of life of Robinson Township's citizens. See *Zoning Ordinance* at § 100.3. To that end, it bears noting that the property at issue is in close proximity to residentially zoned districts. *See Township Zoning Map and Google Earth printouts*, copies of which are collectively attached hereto as Exhibit I. When weighing these property owners' interests in the use and enjoyment of their homes against Plaintiffs' interest in making a profit selling guns and ammunition, it is clear that the greater harm would be to the Township's constituents. Nor does the public interest favor such relief. As set forth above, Plaintiffs have

failed to demonstrate that residents of Robinson Township and/or Washington County experience any difficulty or hardship purchasing firearms from other commercial establishments or training at other shooting ranges. Accordingly, Plaintiffs' Memorandum fails to establish the third and fourth elements necessary to establish a right to a preliminary injunction.

V. CONCLUSION

As set forth above, preliminary injunctive relief is a drastic and extraordinary remedy that is not to be routinely granted, particularly where the injunctive relief does not seek to preserve the status quo. With that in mind, Plaintiffs' Memorandum fails to establish a likelihood of success on the merits, as Plaintiffs have no constitutional right to operate a commercial shooting range. Of course, the Court need not even address that issue, as the matter lacks ripeness due to Plaintiffs' failure to appeal the denial of the Application for Zoning Permit. Similarly, Plaintiffs cannot establish irreparable harm if the injunction is denied, as they fail to establish that any prospective customers/members would be harmed, and Plaintiffs' interests in operating a commercial shooting range are strictly economic in nature. Finally, Plaintiffs have failed to demonstrate that granting relief will not result in even greater harm to the nonmoving party; and the public interest favors such relief, as the relief sought would be contrary to the purposes of the Zoning Ordinance. As such, Plaintiffs have failed to meet their burden in establishing any of the elements necessary to establish a right to a preliminary injunction.

For the reasons set forth above, the Defendants, Robinson Township and Mark Dorsey, respectfully request the Court deny Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

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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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response in Opposition to Plaintiffs' Motion for Permanent Injunction and Memorandum of Law in Support Thereof have been served via CM/ECF filing system on counsel of record, this, the 17th day of October, 2018.

Respectfully Submitted,

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