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10  
11 **UNITED STATES DISTRICT COURT**  
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
13

14 JOHN TEIXEIRA, STEVE  
15 NOBRIGA, GARY GAMAZA,  
16 CALGUNS FOUNDATION (CGF),  
17 INC., SECOND AMENDMENT  
18 FOUNDATION (SAF), INC., and  
19 CALIFORNIA ASSOCIATION OF  
20 FEDERAL FIREARMS LICENSEES,  
21 INC. (Cal-FFL),

22 Plaintiffs,

23 vs.

24 COUNTY OF ALAMEDA, ALAMEDA  
25 BOARD OF SUPERVISORS (as a  
26 policy making body), WILMA CHAN  
27 in her official capacity, NATE MILEY  
28 in his official capacity, and KEITH  
CARSON in his official capacity.

Defendants.

CASE NO.: 3:12-CV-03288 SI

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF A  
REQUEST FOR PRELIMINARY  
INJUNCTION

Date: December 21, 2012  
Time: 9:00 a.m.  
Place: United States District  
Court - San Francisco  
450 Golden Gate Ave.  
Court: Courtroom 10, 19<sup>th</sup> Floor  
Judge: Hon. Susan Illston

## INTRODUCTION

1  
2 The facts of this case are relatively undisputed. The law is drawn from well  
3 established precedent regarding pre-textual land use regulations that impinge on  
4 fundamental rights. The Seventh Circuit has dealt with similar issues in a recent  
5 case. Under either: (1) the traditional 4-part analysis for preliminary injunctions,  
6 or (2) the alternative sliding scale test, the Plaintiffs can meet their initial burden  
7 for a preliminary injunction and do not expect the Defendants to be able to proffer  
8 admissible evidence necessary to defeat that clear showing.  
9

## FACTS

- 10
- 11 1. A Civil Complaint was filed in this matter on June 25, 2012. As part of the  
12 packet of material served on the Defendants, a letter dated June 29, 2012  
13 was tendered to the County that indicated a willingness to engage in  
14 informal early discovery to resolve this matter. In addition counsel for the  
15 parties exchanged several emails discussing possible resolution short of  
16 formal litigation. On or about September 18, 2012 Plaintiffs received  
17 correspondence from the Defendants indicating that they had rejected  
18 Plaintiffs' offer to settle the matter.<sup>1</sup> Since then Plaintiffs have worked  
19 diligently to prepare this request for a preliminary injunction.
  - 20 2. The detailed facts for this matter are set forth in the following declarations  
21 filed concurrently with this memorandum:
    - 22 a. Declaration of Gene Hoffman in Support of Request for Preliminary  
23 Injunction. Doc #17.
    - 24 b. Declaration of Alan Gottlieb in Support of Request for Preliminary  
25 Injunction. Doc #18.
- 26

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27 <sup>1</sup> This fact is set forth herein because the County of Alameda has history of engaging civil  
28 rights plaintiffs in formal litigation for decades and then claiming that they wanted to settle the  
matter all along. See *Nordyke v. King*, 681 F.3d 1041 (9<sup>th</sup> Cir. 2012)(en banc).

- 1 c. Declaration of Brandon Combs in Support of Request for Preliminary  
2 Injunction. Doc #19.
- 3 d. Declaration of Steve Nobriga, John Teixeira, Gary Gamaza in Support  
4 of Request for Preliminary Injunction. (w/Exhibit A - T). Doc # 20.
- 5 3. STEVE NOBRIGA, JOHN TEIXEIRA and GARY GAMAZA want to open a  
6 gun store in San Lorenzo, California, which is situated in Alameda County.
- 7 4. JOHN TEIXEIRA used to own/operate a gun store for almost three decades.  
8 GARY GAMAZA worked for him for 10 of those years. STEVE NOBRIGA is  
9 a semi-retired general contractor with the skills and wherewithal to see to  
10 that buildings and be made to conform to building codes and land use  
11 regulations.
- 12 5. As part of their marketing plan for opening a gun store and selecting the site,  
13 NOBRIGA, TEIXEIRA and GAMAZA gathered feedback from approximately  
14 1,400 people indicating that a full-service gun store in San Lorenzo could be  
15 successful.
- 16 6. Plaintiffs began the process to applying for federal and state licenses to  
17 operate a retail firearm store. They also started looking for suitable  
18 properties and made contact with community leaders about their project.
- 19 7. A specific and detailed list of the steps they took, along with the documentary  
20 evidence supporting their positions, is set forth in the DECLARATION OF  
21 PLAINTIFFS: STEVE NOBRIGA, JOHN TEIXEIRA and GARY GAMAZA,  
22 filed concurrently with this memorandum. Doc #20.
- 23 8. The facts for this Request for a Preliminary Injunction are as follows:
- 24 a. The County of Alameda requires a Conditional Use Permit to open a  
25 gun store in that county. Alameda Municipal Code § 17.54.131.
- 26 b. The single point of law challenged in this case is § 17.54.131(B) which  
27 requires: *“That the subject premises is not within five hundred (500)*  
28 *feet of any [...] residentially zoned district [...].”*

- 1 c. Plaintiffs NOBRIGA, TEIXEIRA and GAMAZA found a suitable  
2 commercial property that met their needs and appeared to conform to  
3 the County's land use regulations. [i.e., they measured the distance  
4 from the only logical point of their building (the front door, there being  
5 no back door) to the neighboring "disqualifying properties" and found  
6 that distance was in excess of 500 feet.]
- 7 d. Plaintiffs NOBRIGA, TEIXEIRA and GAMAZA had set about trying to  
8 secure their firearm licenses and obtain their Condition Use Permit,  
9 when they discovered that the County, quite arbitrarily, used a  
10 different way of measuring distances between the properties and found  
11 that the proposed gun store was allegedly 446 feet from a  
12 "disqualifying property." The County then insisted that the Plaintiffs  
13 also apply for a Variance.
- 14 e. A hearing on the Conditional Use Permit and Variance was scheduled  
15 for November 16, 2011 and was continued to December 14, 2011.
- 16 f. It is undisputed that the Alameda Planning Department agrees that if  
17 distances are measured from the only accessible doors of the proposed  
18 gun store that face Lewelling Blvd to the "disqualifying properties"  
19 that the variance is not needed (i.e., the properties are more than 500  
20 feet apart). [See page 6 of Exhibit O (Staff Report for the Dec. 14, 2011  
21 Hearing) attached to the DECLARATION OF PLAINTIFFS: STEVE  
22 NOBRIGA, JOHN TEIXEIRA and GARY GAMAZA. Doc # 20.]
- 23 g. While "Staff" recommended denying the project, the West County  
24 Board of Zoning Adjustment approved the project in a December 14,  
25 2011 Resolution No.: Z-11-70. The Conditional Use Permit and  
26 Variance were conditionally granted upon the agreement that  
27 Plaintiffs would comply with the terms of Resolution No.: Z-11-70. [See  
28 P of the DECLARATION OF PLAINTIFFS: STEVE NOBRIGA, JOHN

1 TEIXEIRA and GARY GAMAZA. Doc # 20.]

2 h. Plaintiffs NOBRIGA, TEIXEIRA and GAMAZA indeed to comply with  
3 the terms of Resolution No.: Z-11-70, and they further pledge – by way  
4 of an undertaking if this Court grants their preliminary injunction – to  
5 deposit the necessary balance of sums with the County Planning  
6 Department so that the remaining building permits and inspections  
7 can be completed. Plaintiffs NOBRIGA, TEIXEIRA and GAMAZA  
8 contend on information and belief that this sum would be  
9 approximately: \$5,000.00.

10 i. After their Conditional Use Permit and Variance were granted, an  
11 untimely appeal was filed by the San Lorenzo Village Homes  
12 Association. The last date for filing under Alameda’s municipal code  
13 would have been December 26, 2011. Alameda Municipal Code §  
14 17.54.670. The only two date stamps on the “appeal” are December 29,  
15 2011 and January 3, 2012. [See R of the DECLARATION OF  
16 PLAINTIFFS: STEVE NOBRIGA, JOHN TEIXEIRA and GARY  
17 GAMAZA. Doc #20.]

18 j. The Board of Supervisors revoked the Conditional Use Permit and  
19 Variance for the gun store in a meeting on February 28, 2012. [See  
20 Exhibit S and T<sup>2</sup> of the DECLARATION OF PLAINTIFFS: STEVE  
21 NOBRIGA, JOHN TEIXEIRA and GARY GAMAZA. Doc # 20.]

### 22

### 23 SUMMARY OF ARGUMENT

24 9. The factual inquiry most likely to yield a definitive resolution to this matter  
25 is whether the Alameda Board of Supervisors acted beyond their jurisdiction  
26 when they entertained the late-filed appeal of the San Lorenzo Homes  
27

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28 <sup>2</sup> Exhibit T is a video. It was sent to the Court for filing separately.

1 Association. The law is clear, there is no legal authority for the Board of  
 2 Supervisors to entertain an appeal once the 10-day period set forth in  
 3 Municipal Code § 17.54.670 has lapsed. Based on the evidence presented by  
 4 the Plaintiffs in their declarations, the Defendants action revoking the  
 5 Conditional Use Permit and Variance at the February 28, 2012 meeting was  
 6 *ultra vires*. Resolution No.: Z-11-70 should be reinstated and Plaintiffs  
 7 should be free to get on with running a business.

- 8 10. A second inquiry – a mixed question of fact and law – is whether the County  
 9 acted in an arbitrary and capricious way, in derogation of a fundamental  
 10 right, when it began using wholly subjective endpoints to measure the  
 11 distance between the proposed gun store and the “disqualifying properties.”  
 12 This will require a two-part legal analysis:
- 13 a. Is a fundamental right at stake? (e.g., are gun stores like book stores?)
  - 14 b. Does the vague and ambiguous ordinance in question leave too much  
 15 discretion to the civil servant in charge of granting the permit?
- 16 11. The final inquiry is a direct challenge to the “500 foot rule” on constitutional  
 17 grounds and is pure question of law.

## 18 STATEMENT OF THE LAW

- 19
- 20 12. A plaintiff seeking a preliminary injunction 'must establish':
- 21 a. 'that he is likely to succeed on the merits';
  - 22 b. 'that he is likely to suffer irreparable harm in the absence of  
 23 preliminary relief';
  - 24 c. 'that the balance of equities tips in his favor'; and
  - 25 d. 'that an injunction is in the public interest.' *Winter v. Natural  
 26 Resources Defense Council, Inc.* (2008) 555 U.S. 7, 20.
- 27 13. Many courts utilized an alternative test, allowing preliminary injunctive  
 28 relief upon a showing of either:

- 1 a. a combination of probable success on the merits and the possibility of  
2 irreparable injury if injunctive relief is denied; or
- 3 b. the likelihood of success was such that 'serious questions going to the  
4 merits were raised and the balance of hardships tipped sharply in  
5 plaintiff's favor.' See: *Alliance for Wild Rockies v. Cottrell* (9th Cir.  
6 2011) 632 F.3d 1127, 1131-1132; see also *Citigroup Global Markets,  
7 Inc. v. VCG Special Opportunities Master Fund Ltd.* (2nd Cir. 2010)  
8 598 F.3d 30, 36, fn. 5 – noting that prior to *Winter*, majority of circuits  
9 applied 'sliding scale' approach.
- 10 14. The advantage of this 'sliding scale' test is that it provides flexibility; the  
11 trial court can 'balance' the requirements for a preliminary injunction 'so that  
12 a stronger showing of one element may offset a weaker showing of another.'  
13 For example, a stronger showing of irreparable harm to plaintiff may offset a  
14 lesser showing of likelihood of success on the merits. *Alliance for Wild  
15 Rockies v. Cottrell*, 632 F.3d at 1131.

## 17 ARGUMENT

### 18 I. Plaintiffs Will Prevail on the Merits of Their Claims.

- 19 15. As noted in the Summary, this really breaks down into three different  
20 questions ranging from factually dispositive to, a mixed questions of fact/law  
21 and a pure question of law. However for this Court to properly exercise  
22 Article III jurisdiction, it must be adjudicating a fundamental right.
- 23 16. *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*,  
24 561 U.S. \_\_\_, 130 S.Ct. 3020 (2010) resolved the status of the Second  
25 Amendment 'right to keep and bear arms' and its relationship to state and  
26 local government action that impinges on that right. It should not be  
27 controversial that gun stores (even though subject to federal and state  
28 licensing) are the Second Amendment analog to the First Amendment's book

1 stores. See generally: *Young v. American Mini Theatres, Inc.*, 427 U.S. 50  
 2 (1976); *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981); and *City of L.A. v.*  
 3 *Alameda Books*, 535 U.S. 425 (2002).

- 4 17. A law-abiding citizen’s fundamental right to “keep and bear arms” means  
 5 little if her ability to acquire the means of exercising that right in a well-  
 6 regulated manner is chilled or zoned out of existence by local government  
 7 regulations that bear no rational relationship to the states’ legitimate  
 8 interest in public safety.

9  
 10 A. The Board of Supervisors Wrongfully Considered the Appeal.

- 11 18. The County acted beyond its power when it entertained the late appeal and  
 12 revoked the Plaintiffs’ Conditional Use Permit and Variance.
- 13 a. Was the appeal tendered by the San Lorenzo Homes Association filed  
 14 late, in violation of the requirements of Alameda Municipal Code §  
 15 17.54.670?
- 16 b. This is a simple factual inquiry. If the answer is yes, then the Board of  
 17 Supervisors acted beyond their power when they revoked the Plaintiffs’  
 18 Conditional Use Permit and Variance as set forth in Resolution No.: Z-  
 19 11-70.
- 20 c. The Court can either grant an injunction, enter a declaratory judgment  
 21 or summarily adjudicate this issue on this undisputed fact – void the  
 22 action of the Board of Supervisors and reinstate Resolution No.: Z-11-  
 23 70. Much depends on the evidence offered by the Defendants in their  
 24 opposition.

25  
 26 B. The Defendants’ Measurements for the “500 Foot Rule” are Arbitrary.

- 27 19. The County’s wholly arbitrary and subjective criteria for selecting the  
 28 endpoints for the “500 foot rule” is an engraved invitation to a government



1 official who does not like the "right to keep and bear arms" and would use  
 2 their power to gerrymander the measurements to suit his/her policy  
 3 preferences about the utility of gun stores within their jurisdiction. Clearly  
 4 this kind of unfettered discretion would offend the First Amendment.

5 *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). See also:

- 6 a. A government regulation that allows arbitrary application is  
 7 "inherently inconsistent with a valid time, place, and manner  
 8 regulation because such discretion has the potential for becoming a  
 9 means of suppressing a particular point of view." *Heffron v.*  
 10 *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640,  
 11 649 (1981).
- 12 b. To curtail that risk, "a law subjecting the exercise of First Amendment  
 13 freedoms to the prior restraint of a license" must contain "narrow,  
 14 objective, and definite standards to guide the licensing authority."  
 15 *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969). See also  
 16 *Niemotko v. Maryland*, 340 U.S. 268, 271 (1963).
- 17 c. The reasoning is simple: If the permit scheme "involves appraisal of  
 18 facts, the exercise of judgment, and the formation of an opinion,"  
 19 *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940), by the licensing  
 20 authority, "the danger of censorship and of abridgment of our precious  
 21 First Amendment freedoms is too great" to be permitted, *Southeastern*  
 22 *Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

- 23 20. This Court should have no trouble finding that this kind of arbitrary practice  
 24 offends the Second Amendment when different government officials give  
 25 different definitions of endpoints for taking ordinary measurements relating  
 26 to land use regulations. Nor should this Court have any trouble finding that  
 27 Alameda Municipal Code § 17.54.131(B) does not provide the kind of narrow,  
 28 objective, standards necessary to regulate a fundamental right. Especially

1 since the County itself admits that “*The language of how that 500 feet is*  
 2 *measured is not quite so clear – that is from what point to what point is the*  
 3 *500 feet measured.*” [See Exhibit O attached to Declaration of Plaintiffs  
 4 Nobriga, Teixeira and Gamaza. page 4 at the bottom of the Staff Report.]  
 5

6 C. The “500 Foot Rule” Is Not Rational.

7 21. The County should be required to establish some kind of – at least – rational  
 8 basis for this rule. As noted in the Declarations of BRANDON COMBS of  
 9 Cal-FFL (Doc # 19) and GENE HOFFMAN of CGF (Doc # 17):

- 10 a. The employees, patrons and vendors of gun stores are, by definition,  
 11 law-abiding people. The symphony of federal and state laws that  
 12 regulate the firearms industry, and retail sales in particular, do not  
 13 need to be recounted here. It is enough that this Court be made aware  
 14 that the traffic through a properly licensed gun store cannot be  
 15 compared with the traffic that would attend: liquor stores, adult  
 16 bookstores, tattoo parlors, strip-clubs and other establishments that  
 17 have traditionally been subject to a *secondary effects* analysis. See:  
 18 *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and  
 19 *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).
- 20 b. Furthermore NOBRIGA, TEIXEIRA and GAMAZA agreed to operate  
 21 their store Tuesday through Saturday from the 10:00 a.m. to 5:00 p.m.  
 22 and remain closed on Sunday and Monday.
- 23 c. Nor can the County claim that “residential districts” are a sensitive  
 24 place because that would flatly contradict the holdings of *District of*  
 25 *Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561  
 26 U.S. \_\_\_, 130 S.Ct. 3020 (2010). It would also run afoul of the pair of  
 27 California cases that stand for the proposition that local governments  
 28 cannot regulate the law-abiding possession of firearms in a residence.

1            *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509 and  
 2            *Fiscal v. City and County of San Francisco*, 158 Cal. App. 4<sup>th</sup> 895.

3 22. These questions must be put to the County and they must provide answers  
 4 that would survive “almost strict scrutiny.” *Ezell v. City of Chicago*, 651 F.3d  
 5 684, 708-709 (7<sup>th</sup> Cir. 2011).

6 a. How does a gun store, that would be in compliance with Resolution  
 7 No.: Z-11-70, that is located across 12 lanes of Interstate 880 have  
 8 ANY effect on the homes located in the San Lorenzo Homes  
 9 Association? (The complainant in the appeal.)

10 b. How does a gun store, that would be in compliance with Resolution  
 11 No.: Z-11-70, that is located across 8 lanes of Hesperian Blvd., behind a  
 12 20 foot concrete wall of an adjacent building, have any effect on the  
 13 property located at 452 Albion Way. Especially when the resident of  
 14 that property has no objection to the gun store?

15 c. What is dangerous about a gun store located 450 feet away, but not  
 16 dangerous if located 500 feet away?

17 23. Finally, even if the County tenders some kind of justification for the “500 foot  
 18 rule” – that justification must be based on evidence. From *Ezell*, at 709:

19 [T]he government must supply actual, reliable evidence to  
 20 justify restricting protected expression based on  
 21 secondary public-safety effects. See *Alameda Books, Inc.*,  
 22 535 U.S. at 438 (A municipality defending zoning  
 23 restrictions on adult bookstores cannot "get away with  
 24 shoddy data or reasoning. The municipality's evidence  
 25 must fairly support the municipality's rationale for its  
 26 ordinance."); see also *Annex Books, Inc. v. City of*  
 27 *Indianapolis*, 624 F.3d 368, 369 (7th Cir. 2010) (affirming  
 28 preliminary injunction where a city's "empirical support  
 for [an] ordinance [limiting the hours of operation of an  
 adult bookstore] was too weak"); *New Albany DVD, LLC*  
*v. City of New Albany*, 581 F.3d 556, 560-61 (7th Cir.

1 2009) (affirming preliminary injunction where  
 2 municipality offered only "anecdotal justifications" for  
 3 adult zoning regulation and emphasizing the necessity of  
 4 assessing the seriousness of the municipality's concerns  
 about litter and theft).

5 **II. Plaintiffs will Suffer Irreparable Harm and the Equities Favor Them.**

6 24. The irreparable harm to the Plaintiffs takes two forms:

- 7 a. The denial of the Constitutional Right is the harm. Again Plaintiffs  
 8 would direct the Court to the *Ezell v. Chicago*, 651 F.3d at 697.  
 9  
 10 b. However there is a unique harm to civil rights litigants who bring  
 their claims under 42 U.S.C. § 1983, 1988. The latest trend in  
 11 defending municipalities is for the governments to changes their laws,  
 12 or merely the interpretation of its laws and then call "Olly, Olly, Oxen,  
 13 Free" to escape the consequences of their conduct under *Buckhannon*  
 14 *Board and Care Home, Inc., et al., v. West Virginia Department of*  
 15 *Health and Human Resources, et. al.* 532 U.S. 598 (2002). This was  
 16 precisely the gamesmanship employed by Alameda County in *Nordyke*  
 17 *v. King*, 681 F.3d 1041 (9<sup>th</sup> Cir. 2012)(en banc).<sup>3</sup>  
 18  
 19 c. And since this case is vulnerable to the same kind of "re-  
 20 interpretation" of how the "500 foot rule" is measured, the County of  
 Alameda has every incentive to "*Buckhannon*" this case if they begin to  
 21 see that an adverse ruling might be headed their way. If the County  
 22 pulls that stunt, then by definition monetary remedies will be  
 23 foreclosed and the Plaintiffs will be out any lost profits from the delay  
 24 in opening their gun store.

---

25  
 26  
 27 <sup>3</sup> Counsel for the Plaintiffs (Donald Kilmer) is also counsel of record of the Nordykes in  
 that case. This issue of ducking monetary liability via the *Buckhannon* case was addressed in a  
 28 Petition for Certiorari to the U.S. Supreme Court. Docket No.: 12-275. On October 10, 2012 the  
 U.S. Supreme Court ordered Alameda County to file a response in that matter.

- 1 25. The simplest place to look for how the equities favor the Plaintiffs is to read  
2 the Staff Reports set forth in Exhibits N and O attached to the Declarations  
3 of NOBRIGA, TEIXEIRA and GAMAZA. Except for the mantra about the  
4 “500 foot rule” the reports admit that there are no discernable adverse  
5 consequences to any properties adjacent to the Plaintiffs’ proposed gun store.  
6 26. In fact the tax receipts, DROS fees and licensing fees paid by the plaintiffs  
7 and their customers would be a net positive to a County and State struggling  
8 with loss of revenue. (i.e., It would be in the public interest to permit the gun  
9 store to open.)

10  
11 **CONCLUSION**

- 12 27. There is simply no downside to the Plaintiffs opening a gun store that  
13 complies with Resolution No.: Z-11-70. The County’s actions impinge on a  
14 fundamental right, the Plaintiffs are likely to prevail on the merits and they  
15 respectfully request an order from this Court granting them preliminary  
16 injunctive relief.

17 Respectfully Submitted on November 5, 2012,

18 /s/ Donald Kilmer

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