



## NATIONAL SHOOTING SPORTS FOUNDATION, INC.

11 Mile Hill Road • Newtown, CT 06470-2359 • Tel (203) 426-1320 • Fax (203) 426-7182 • www.nssf.org

**LAWRENCE G. KEANE**  
SENIOR VICE PRESIDENT  
& GENERAL COUNSEL

### **VIA E-MAIL and FACSIMILE**

May 9, 2013

Los Angeles City Council  
CITY OF LOS ANGELES  
PUBLIC SAFETY COMMITTEE  
200 N. Spring Street  
Los Angeles, California 90012

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Re: Proposed Ordinance to Confiscate Large-Capacity Ammunition  
Magazines, Council File No. 13-0068

Dear City Council Members:

The National Shooting Sports Foundation ("NSSF") is the trade association for America's firearms, ammunition, hunting and recreational shooting sports industry. Its mission is to promote, protect and preserve hunting and the shooting sports. NSSF has a membership of more than 9,500 manufacturers, distributors, firearms retailers, shooting ranges, and sportsmen's organizations. Our manufacturer members make the firearms used by law-abiding California sportsmen, the U.S. military and law enforcement agencies throughout the state.

The NSSF opposes a draft ordinance currently before the Los Angeles City Council (“City Council”) prohibiting large-capacity magazines within the City (“Ordinance”). More specifically, the Ordinance provides that:

- “[A]ny large-capacity magazine,” as defined by California Penal Code sections 16740 and 32390 is a public nuisance;
- Large-capacity magazines are subject to confiscation and summary destruction by the Los Angeles Police Department; and
- Violations of the Ordinance are punishable as a misdemeanor, effective July 1, 2014.

The Ordinance is flawed in several respects and will not survive judicial scrutiny if adopted.

As an initial matter, the Ordinance is preempted by State law. Unlike the Ordinance, State law does not criminalize possession of large-capacity magazines lawfully acquired before January 1, 2000. Because of this conflict, the Ordinance violates Article XI, section 7 of the California Constitution.

The Ordinance’s public nuisance findings rest on (i) two extraordinarily rare events occurring in the City over a decade ago that predate the existing State law on large-capacity magazines and (ii) five similarly rare shooting incidents in other states. Absent empirical support for the City Council’s findings, the Ordinance will not survive any level of judicial scrutiny under federal and state Takings Clause jurisprudence or the Second Amendment of the U.S. Constitution.

#### **A. The Ordinance is Preempted by The Penal Code.**

“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” Cal. Const., art. XI, § 7. “If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.” *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal.4th 893, 897 (1993). A conflict exists if the local legislation “duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.” *Id.*

##### **1. State Law Preempts the Criminalization of “Grandfathered” Large-Capacity Magazines.**

Local legislation is preempted as “‘contradictory’ to general law when it is inimical thereto.” *Sherwin-Williams*, 4 Cal.4th at 898.

Existing State law does not criminalize possession of large-capacity magazines. Commencing on January 1, 2000 (and subject to certain exceptions), State law prohibits

any person in California from manufacturing, importing, selling, offering for sale, giving, and lending large-capacity magazines. Cal. Penal Code § 32310. Existing State law defines a “large-capacity magazine” to mean “any ammunition feeding device with the capacity to accept more than 10 rounds.” Cal. Penal Code § 16740. There are three exceptions: (a) a feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds; (b) a .22 caliber tube ammunition feeding device; and (c) a tubular magazine contained in a lever-action firearm. *Id.*

Section 32310 does not prohibit the possession or use of large-capacity magazines. As explained by the California Senate’s Committee on Public Safety:

This bill would make it a crime to do anything with detachable large capacity magazines after January 1, 2000 – except possess and personally use them – punishable as a misdemeanor/felony. Large-capacity magazines are defined to mean any ammunition-feeding device with the capacity to accept more than 10 rounds. . . . One could still possess those magazines after January 1, 2000, but could generally only transfer them to anyone but a licensed dealer or gunsmith (for modification) if the magazine "has been permanently altered so that it cannot accommodate more than 10 rounds."

Sen. Pub. Safety Comm., Analysis of SB 23 (1999-2000 Reg. Sess.), at 7 (Mar. 23, 1999).

The City Council’s Public Safety Committee requested that an earlier draft of the Ordinance be revised to “[m]ake the possession of a large-capacity ammunition magazine one year after the effective date of the adopted ordinance a misdemeanor.” L.A. City Council Pub. Safety Comm., Report on File No. 13-0068 (April 26, 2013).

Accordingly, the California Penal Code and the Ordinance directly conflict with each other. State law omits personal use and possession of large capacity magazines from criminal sanction, while the local law criminalizes this protected conduct. Under these circumstances, the Ordinance must give way to the Penal Code. *Action Apartment Ass’n., Inc. v. City of Santa Monica*, 41 Cal.4th 1232, 1244 (2007) (ordinance making landlords liable for filing unlawful detainer actions without probable cause preempted by statutory litigation privilege); *Ex parte Daniels*, 183 Cal. 636, 641-648 (1920) (ordinance setting lower maximum speed than maximum speed permitted by state law preempted).

## **2. The Ordinance’s Public Nuisance Provisions Duplicate State Law.**

“Local legislation is ‘duplicative’ of general law [and therefore preempted] when it is coextensive therewith.” *Sherwin-Williams*, 4 Cal.4th at 897.

Existing state law provides that, subject to certain exceptions, “any large-capacity magazine is a nuisance and is subject to [Cal. Penal Code] Section 18010.” Cal. Penal Code § 32390. In turn, Section 18010 provides that weapons classified as nuisances may

be enjoined by the Attorney General, district attorney, or city attorney and are “subject to confiscation and summary destruction whenever found within the state.” Cal. Penal Code § 18010(a)(20), (b).

Except for limiting the Ordinance’s geographic scope and specifying the agency responsible for its enforcement, the Ordinance is identical. Indeed, it expressly incorporates these Penal Code provisions. Under these circumstances, a court will have “no alternative” but to declare the Ordinance preempted as duplicative. *In re Portnoy*, 21 Cal.2d 237, 240 (1942) (ordinance criminalizing gambling preempted where “substantially the entire text” of ordinance duplicative of Penal Code).

### **3. The State Fully Occupies the Field.**

“Finally, local legislation enters an area that is ‘fully occupied’ by general law when the Legislature has expressly manifested its intent to “fully occupy” the area. *Sherwin-Williams*, 4 Cal.4th at 897.”

Government Code section 53071<sup>1</sup> provides:

It is the intention of the Legislature to occupy the whole field of regulation of the registration or licensing of commercially manufactured firearms as encompassed by the provisions of the Penal Code, and such provisions shall be exclusive of all local regulations, relating to registration or licensing of commercially manufactured firearms, by any political subdivision as defined in Section 1721 of the Labor Code.

“This section expressly preempts all local laws which attempt to regulate either licensing or registration of firearms.” *Fiscal v. City and County of San Francisco*, 158 Cal.App.4th 895, 907 (2008) (ordinance prohibiting city residents from possessing handguns preempted by Gov’t. Code section 53071).

In addition, the Legislature may be found to occupy the field impliedly, when, among other indicia of intent, “the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action.” *Sherwin-Williams*, 4 Cal.4th at 898.

An ammunition magazine is an integral part of a firearm. Here, Penal Code sections 18010 and 32390 give the City Attorney the authority to bring civil actions to enjoin the unlawful possession of large-capacity magazines as a public nuisance. Combined with Government Code section 53071, these statutes show that the State has already determined the City may enforce state-wide firearms laws, but may not enact laws itself. Indeed, the Ordinance does not incorporate by reference any of the statutory exemptions for large-capacity magazines – which would only serve to detract from a unified state law on the subject. *Fiscal*, 158 Cal.App.4th at 904, 911 (ordinance banning

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<sup>1</sup> By contrast, Government Code section 53071.5 grants the City the authority to license and regulate *imitation firearms*, including BB devices and air rifles, subject to criteria established by the State.

handguns preempted “as an obstruction to the accomplishment and execution of the full purposes and objectives of the legislative scheme” for statewide firearms possession laws).

**B. The Ordinance Infringes On Constitutional Rights Without Appropriate Findings Supporting The Exercise Of Police Power.**

A “legislative body may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.” *McKay Jewelers, Inc v. Bowron*, 19 Cal.2d 595, 601 (1942).

Moreover, "whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law." *See Sable Commc'ns. of CA, Inc. v. Federal Commc'ns. Comm'n.*, 492 U.S. 115, 129 (1989) (First Amendment rights). When fundamental rights are infringed, it is incumbent on courts to go beyond legislative findings and examine the circumstances to determine whether “the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.” *Landmark Commc'ns., Inc. v. Virginia*, 435 U.S. 829, 843-844 (1978). Were it otherwise, the Bill of Rights’ scope “would be subject to legislative definition.” *Id.*

Thus, courts will review a legislative body’s findings to determine whether the City properly exercises its police power to abate nuisances, or whether it crosses the line into unconstitutional conduct. *See, e.g., Leppo v. City of Petaluma*, 20 Cal.App.3d 711, 718 (1971) (municipalities’ authority to declare and summarily abate nuisances under Government Code subject to due process guarantees and judicial review prior to abatement).

**1. The Ordinance Lacks Adequate Findings Supporting A Declaration Of Public Nuisance.**

Here, the Ordinance declares “any large-capacity magazine” to be “an immediate threat to the public health, safety and welfare of the citizens of Los Angeles.” This declaration rests on the findings that such magazines were used in “recent high-profile shootings” and that firearms equipped with the magazines are able to fire multiple bullets without reloading.

However, the seven “recent high-profile shootings” identified in the Ordinance do not illustrate that City residents are in any danger whatsoever. The two incidents from within the City occurred in 1997 and 1999, and predate the State high-capacity magazine law enacted in 2000. The remaining incidents occurred outside of California. Given California’s existing laws and the temporal and geographical remoteness of these “recent high-profile shootings,” the City Council is unable to show that high-capacity magazines pose an “immediate threat” to City residents.

Notably, the Ordinance’s findings are unsupported by empirical evidence or data. A 2004 study commissioned by the U.S. Department of Justice concluded that “there is not a clear rationale for expecting” a large-capacity magazine ban “to reduce assaults and robberies with guns,” since criminal “offenders can substitute . . . small magazines” for large-capacity magazines. C. Koper, *et al.*, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003, Report to the National Institute of Justice, U.S. Dep’t of Justice*, 81 (June 2004). Although one might hypothesize that greater firepower enabled by large-capacity magazines results in more aggressive behavior in shooting incidents, there is no data to support such speculative hypotheses concerning “gun types and offender behavior.” *Id.* at 81 n.96.

Indeed, some of the Ordinance’s unsupported findings are expressly contrary to the existing data. The Ordinance finds that “the ability of large-capacity magazines to hold numerous rounds of ammunition significantly increases the lethal capacity of the automatic and semiautomatic firearms using them.” However, the data shows that since the enactment of state and federal assault weapons and high-capacity magazine laws, gun crimes “have been no less likely to cause death or injury than those before the ban.” Koper, *supra*, at 92.

## **2. The Ordinance Effects A Taking For Which Just Compensation Is Necessary.**

Absent supporting findings, the Ordinance’s declaration of public nuisance is unfounded, and the courts do not hesitate to require a municipality to justly compensate affected property owners to prevent such abuse of nuisance power. *Hurwitz v. City of Orange*, 122 Cal.App.4th 835, 854 (2004).

A “public entity cannot mask what is substantively a taking merely by invoking its nuisance power.” *Id.* at 853. The U.S. Supreme Court has held that “there [are] times when the ostensible abatement of a nuisance would be, in effect, a *taking*, requiring compensation” under the Fifth Amendment to the U.S. Constitution. *Id.* (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). By the late 1970’s, “the high court was clear that a city’s conclusion that an area is a nuisance is not absolute and could be challenged on its bona fides.” *Id.* (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 105 (1978)). California’s counterpart, Article I, Section 19, which is broader than the Fifth Amendment protection against takings and includes damage to property, requires the same result. *San Remo Hotel v. City & County of San Francisco*, 27 Cal.4th 643, 664 (2002).

“A property owner is entitled to recover just compensation measured by the fair market value of the property at the time of the taking.” *County of Ventura v. Channel Islands Marina, Inc.*, 159 Cal.App.4th 615, 628 (2008). Thus, for each and every large-capacity magazine confiscated by the City, it will be required to pay owners the magazine’s fair market value.

The costs to the City of confiscating these magazines from owners will be significant. Well-established precedent provides that the City's exercise of the police power is limited by the constitutional requirement of due process of law. *Leppo*, 20 Cal.App.3d at 718. The City may not summarily abate large-capacity magazines without first providing "a full and fair judicial hearing" to determine whether a given magazine is unlawful, followed by review by appellate courts. *See People ex rel. Camil v. Buena Vista Cinema*, 57 Cal.App.3d 497, 502 (1976) (due process requirements for nuisance actions affecting constitutional rights). Notably, the City could be responsible for paying the magazine owners' attorneys' fees if they can establish that the City took their property without just compensation. *See* Cal. Penal Code § 33885 (attorney's fees available to prevailing party in proceeding for return of firearm seized but not returned by law enforcement agency); *see also* Cal. Civ. Proc. Code § 1021.5 (attorneys' fees available against public entity where plaintiff sues to enforce important right).

### **3. As Drafted, The Ordinance Violates The Second Amendment.**

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the U.S. Supreme Court held that the Second Amendment to the U.S. Constitution confers an individual right to keep and bear arms, and that the "central component of the right" is the right of armed self-defense, most notably in the home. *Id.* at 592, 595, 599-600. In 2010, the Supreme Court applied *Heller* to the States in *McDonald v. City of Chicago*, 561 U.S. \_\_\_, 130 S. Ct. 3020, 3026 (2010), recognizing that the Fourteenth Amendment was expressly intended to protect citizens' right to bear arms against state and local government efforts attempt to disarm them. *Id.*, at 3038-3040. As such, the Second Amendment "is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values." *Id.* at 3046.

Under *Heller* and *McDonald*, courts review the strength of state and local governments' justifications for "restricting or regulating the exercise of Second Amendment rights." *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011). Because the Ordinance prohibits "law-abiding, responsible citizens" from possessing ammunition-feeding devices for semi-automatic rifles and handguns, which are otherwise "in common use" and "typically possessed by law-abiding citizens for lawful purposes," the most exacting level of scrutiny will apply. *Id.* at 708-709; *see Heller*, 554 U.S. at 624-25. As such, the City will be required to show a "close fit" between the Ordinance's City-wide ban on large-capacity magazines "and the actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights." *Ezell*, 651 F.3d at 708-709. In other words, the City must demonstrate that civilian possession and personal use of large-capacity magazines "creates such genuine and serious risks to public safety that prohibiting [possession and personal use of such magazines] throughout the city is justified." *Id.* at 709.

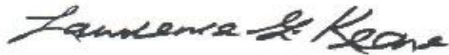
The Ordinance's findings and rationale do not satisfy this standard. Although the City has an interest in public safety and general crime prevention, it has not shown that large-capacity magazines pose an "imminent threat" to City residents using "actual,

reliable evidence.” *Ezell*, 651 F.3d at 709. Nor is the Ordinance supported by findings showing that a ban on such magazines is narrowly tailored to serve the City’s interest in public safety by targeting dangerous offenders while permitting law-abiding citizens to exercise their constitutional rights. *Bateman v. Perdue*, 881 F.Supp.2d 709, 716 (E.D.N.C. 2012).

Given the City’s inability to justify the Ordinance and *McDonald’s* emphasis on protecting citizens against disarmament and confiscation by state and local government, the Ordinance will not pass Second Amendment scrutiny.

For the reasons stated in this letter, we urge that the City Council reject the proposed Ordinance.

Sincerely,



Lawrence G Keane  
Senior Vice President & General Counsel  
National Shooting Sports Foundation