

Supplemental Materials for Cupertino Public Safety Commission Meeting

In Regards to the Draft Gun Safety Ordinance

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To be included in public record

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Introduction

I'm writing to express opposition to the so-called "gun safety measures" being considered by the Cupertino City Council. I hope that the Public Safety Commissioners will consider all factors related to these measures when deciding on a recommendation (or lack thereof) to the City Council Members. In this document, you will find an enlightening historical interpretation of the Second Amendment in addition to my arguments against these proposed measures.

The Second Amendment of the United States Constitution

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. [1]

There is perhaps no other constitutional amendment in the Bill of Rights that is more misunderstood than the second. In this section I intend to introduce a historical perspective in addition to citing some relevant court opinions.

The History of the Second Amendment

In the years before the United States Constitution was ratified, but after it was drafted, our founding fathers wrote a series of papers to make the argument for ratifying the Constitution. These papers are called the Federalist Papers.

Federalist Paper No. 29, titled *Concerning the Militia*, offers details about the intentions of the drafters of the Constitution.

Well-Regulated Militia

In modern times, the term well-regulated is often taken to mean closely controlled and supervised by the government. However, in its historical context, this couldn't be farther from the truth. From its usage in context, we can clearly tell that "well-regulated" means "well-functioning".

A tolerable expertness in military movements is a business that requires time and practice. It is not a day, or even a week, that will suffice for the attainment of it. To oblige the great body of the yeomanry, and of the other classes of the citizens, to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary to acquire the degree of perfection which would entitle them to the character of a well-regulated militia, would be a real grievance to the people, and a serious public inconvenience and loss. It would form an annual deduction from the productive labor of the country, to an amount which, calculating upon the present numbers of the people, would not fall far short of the whole expense of the civil establishments of all the States. To attempt a thing which would abridge the mass of labor and industry to so considerable an extent, would be unwise: and the experiment, if made, could not succeed, because it would not long be endured. Little more can reasonably be aimed at, with respect to the people at large, than to have them properly armed and equipped; and in order to see that this be not neglected, it will be necessary to assemble them once or twice in the course of a year. [2](Emphasis added.)

In this excerpt from paragraph six, Hamilton argues that having a well-regulated, or well-functioning, militia would have a high cost to society due to lost productivity. He argues that the solution is to have "the people at large...properly armed and equipped." [2] This supports the idea that the founders intended for all able-bodied men to have the right to keep and bear arms.

Further, it can be deduced that the founders intended people to have the right to possess military-grade weapons, which would be necessary for a militia to be well-functioning.

Modern Interpretations

In recent years, the Supreme Court of the United States has made landmark rulings regarding the Second Amendment of the Constitution.

The first of which came in 2008 with *District of Columbia v. Heller*. In this decision, the Supreme Court held that “The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes”. [3]

The second, equally important, ruling came as *McDonald v. Chicago*. This ruling relied heavily upon *District of Columbia v. Heller*, and concluded that “the Fourteenth Amendment incorporates the Second Amendment right, recognized in *Heller*, to keep and bear arms for the purpose of self-defense.” [4] This ruling requires state and local governments to recognize Second Amendment rights.

Arguments Against the Measures

Risk of Litigation

New ordinances will expose the City of Cupertino to additional risk of potentially costly litigation. As mentioned in the Staff Report from the February 2017 meeting, “Approximately 40 residents and local gun advocates” appeared to express opposition to the proposed measures. [5] In fact, so many people showed up, that a last-minute room change to a larger room was necessary. This is an indicator of a hot button issue.

With the advent of the Trump administration, the balance of the federal court system is expected to change in a way that is favorable to gun rights. Civil rights advocates see this as an opportunity to pursue litigation challenging existing laws which infringe upon the Second Amendment rights of law-abiding citizens.

With new ordinances on a hot button issue combined with a changing political climate, the City must recognize the increased risk of litigation. The burden of paying for this litigation will fall upon the taxpayers of Cupertino.

10.76.010. “Permit required”

I understand that this is an existing ordinance. Further, I understand that this does not affect the Sunnyvale Rod and Gun Club, as the club is located outside of city limits. However, I would like to comment that this ordinance does not have an exception for the discharge of a firearm at an established shooting range. I think such an exception should be provided. For example, this shortcoming prevents someone from opening an indoor shooting range in Cupertino. Having a safe place to practice shooting a firearm is very important for those who use firearms for hunting or self-defense. Having such a place near to one’s home increases the likelihood that one will partake in such positive activity. To exclude this possibility from Cupertino is a shame.

10.76.020. "Duty to report theft or loss of firearms"

With the passage of Proposition 63, state law requires lost or stolen firearms to be reported with 5 days of the time that the owner or possessor knew or reasonably should have known that the firearm was lost or stolen. This state law goes into effect on July 1, 2017. [6]

The proposed measure effectively shortens the amount of time to report to 48 hours. No data has been provided to show that shortening the reporting timeframe would improve public safety.

The proposed measure also requires that lost or stolen firearms be reported to the "Santa Clara County Sheriff's West Valley Patrol Division". This is poorly written. If the West Valley Patrol Division of the Sheriff's Office ever has a name change, it will be impossible to comply with this ordinance. If the City of Cupertino were to establish its own police department, this also may put residents in a sticky situation if they report theft or loss to the Cupertino police instead of the Sheriff's Office.

10.76.030. "Safe storage of firearms"

This proposed ordinance creates what is known as a victimless crime. A victimless crime is where a law or ordinance prohibits an activity that does not create a victim and where no party is injured.

It is plausible to imagine a scenario where this ordinance is violated safely. For example, a hunter cleaning her unloaded and disassembled shotgun in her locked home with no children present. If she were to momentarily leave her shotgun to wash cleaning chemicals off her hands, she would have committed a misdemeanor under this proposed ordinance, punishable by up to six months in prison. [7] I must ask: is it reasonable to impose such harsh restrictions and penalties on otherwise law-abiding citizens?

Another harmless violation: suppose someone is performing some gunsmithing, be it professional gunsmithing or as a hobby. A firearm could be disassembled to the point where even if a child were to obtain it, it would not be any more dangerous than a paperweight. Yet, because this proposed ordinance relies on the definition of a firearm as defined in the California Penal Code, even a disassembled frame is legally considered a firearm. [8] Once again, this person has not exposed anyone to harm, yet he or she could be charged with a crime.

Existing California law imposes harsh penalties if a child obtains an unsecured firearm. This offense can be punished as a misdemeanor or as a felony; the severity of the punishment is determined by whether or not injury was caused and the severity of the injuries sustained. [9] The existing state law is better than the proposed ordinance because it provides harsher penalties when necessary (e.g. if someone is physically harmed), but is much more accommodating for responsible firearm owners who simply want to live their lives without inadvertently becoming criminals.

As an affluent city, this measure could encourage more home invasions in Cupertino by sending a message to criminals that we're unarmed and defenseless. Rather than burglarizing homes in cities like Saratoga and Los Altos, criminals may find it safer to work in Cupertino instead. Simply put, guns act as a crime deterrent. All residents benefit from gun ownership in Cupertino, even those who do not have guns.

To summarize, safe firearm storage is already handled effectively by state law. The proposed ordinance is a heavy handed and inflexible approach to solving a problem for which no evidence has been presented to show that additional measures are needed.

10.76.040. "Possession of large-capacity ammunition magazines prohibited"

This proposed ordinance is exactly duplicated by state law. [10] As such, there is no purpose to this measure other than to make a political statement and further complicate the Cupertino Municipal Code.

This measure in particular is ripe for litigation. The measure amounts to confiscation of personal property without compensation. This is unconstitutional by the Fifth Amendment to the U.S. Constitution, which prohibits the government from confiscating personal property without just compensation. [1]

In addition, a Second Amendment case is likely to be made. While the 9th Circuit Court ruled that magazine capacity bans are legal [11], the Supreme Court has not yet weighed in on this issue. As mentioned previously, the changing political climate is expected to be favorable for gun rights. It should also be noted that the 9th Circuit Court is notorious for ruling against gun rights when compared to the other circuit courts and to the Supreme Court.

10.76.050. "Ammunition Sales"

This measure largely overlaps with state law effective January 1, 2018. The proposed measure adds the requirement of recording the right thumbprint of the purchaser. Collecting sensitive biometric data such as a thumbprint raises privacy concerns. Further, no data has been provided to show that this measure will improve public safety. This measure would serve to increase the burden on doing business in Cupertino.

Conclusion

In conclusion, these measures have little to offer, but have a high cost. Good people may find themselves becoming criminals by inadvertently violating these measures. The potential cost of litigation is unfair to the taxpayers. I hope that the Public Safety Commissioners will recommend that the City Councilors scrap these proposed measures.

References

- [1] J. Madison, "United States Bill of Rights," 1789. [Online]. Available: <https://www.archives.gov/founding-docs/bill-of-rights-transcript>. [Accessed February 2017].
- [2] A. Hamilton, "The Federalist Papers," 10 January 1788. [Online]. Available: <https://www.congress.gov/resources/display/content/The+Federalist+Papers>. [Accessed February 2017].

- [3] "District of Columbia et al. v. Heller," 26 June 2008. [Online]. Available: <https://www.supremecourt.gov/opinions/07pdf/07-290.pdf>. [Accessed February 2017].
- [4] "McDonald et al. v. City of Chicago, Illinois, et al.," 28 June 2010. [Online]. Available: <https://www.supremecourt.gov/opinions/09pdf/08-1521.pdf>. [Accessed February 2017].
- [5] "Public Safety Commission Staff Report," Cupertino, 2017.
- [6] *Proposition 63, Cal. Penal Code § 25250.*
- [7] *C.M.C. 1.12.010 Violation of Code..*
- [8] *Cal. Penal Code § 16520.*
- [9] *Cal. Penal Code § 25100 - 25140.*
- [10] *SB-1446, Cal. Penal Code § 32310.*
- [11] "Fyock v. City of Sunnyvale," 4 March 2015. [Online]. Available: <http://cdn.ca9.uscourts.gov/datastore/opinions/2015/03/04/14-15408.pdf>. [Accessed February 2017].