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October 27, 2008

Sharon Schellin
Secretary
Zoning Commission
Suite 200-S
441 4th Street, N.W.
Washington, D.C. 20001

Re: Case No. 08-20 (Amendment To Regulate Firearms Retail Sales Establishments)

Dear Ms. Schellin:

I am writing to provide comments on behalf of the National Rifle Association of America concerning the Commission's proposed amendments to the Zoning Regulations with respect to Firearms Retail Sales Establishments.

CONSTITUTIONAL ISSUES

Before addressing the specific proposed amendments, I would note that the Commission should undertake its consideration of this question keeping in mind that it is the regulation of firearms that is at issue and that the Supreme Court has held that the right to keep and bear arms as guaranteed by the Second Amendment is a right of individuals. *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008). As such, like the rights guaranteed by the First Amendment, it is a fundamental right. See *San Antonio School District v. Rodriguez*, 411 U.S. 1, 33 (1973) (the key to discovering whether a right is "fundamental" "lies in assessing whether" the right is "explicitly or implicitly guaranteed by the Constitution.").

Further, while *Heller* was concerned with the possession of firearms in the home, one of the cases upon which it relied, *Andrews v. State*, 50 Tenn. 165, 8 Am. Rep. 8 (1871), held:

The right to keep arms necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair.

ZONING COMMISSION
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CASE NO. 08-20

EXHIBIT NO. 14

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50 Tenn. at 178, 8 Am. Rep. at 13.¹

Thus, the right to purchase firearms is protected by the Second Amendment.

In addition, while there are no cases applying zoning regulations in the light of the Second Amendment, there are cases applying zoning regulations in the light of the First Amendment. Those decisions are helpful in understanding the limitations on the Commission's authority to create zoning limitations on sales of firearms. In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) the Court upheld a city zoning ordinance because:

The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views.

475 U.S. at 48.

Moreover, the Court stated:

zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to "content-neutral" time, place,

¹ *Heller* referred three times to *Andrews*:

As the Tennessee Supreme Court recognized 38 years after Story wrote his Commentaries, "[t]he passage from Story, shows clearly that this right was intended . . . and was guaranteed to, and to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights." *Andrews v. State*, 50 Tenn. 165, 183 (1871).

"[T]he right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace." *Andrews*, 50 Tenn., at 178; see also *ibid.* (equating state provision with Second Amendment).

In *Andrews v. State*, the Tennessee Supreme Court likewise held that a statute that forbade openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances," 50 Tenn., at 187, violated the state constitutional provision (which the court equated with the Second Amendment). That was so even though the statute did not restrict the carrying of long guns. *Ibid.*

and manner regulations.

475 U.S. at 49.

In *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980), the Court noted that, if a "time, place, and manner" regulation "is based on the content of speech":

governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." (Citation omitted). As a consequence, we have emphasized that time, place, and manner regulations must be "applicable to all speech irrespective of content."

447 U.S. at 536.

The lesson from these cases is that the Commission may enact a zoning regulation concerning firearms dealers if the regulation, by its terms, is designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life. What the Commission may not do is enact regulations which suppress the sales of firearms because firearms sales may be unpopular with some. Moreover, any regulation must be applicable to all similar retail businesses.

COMMENTS ON PARTICULAR PROPOSED AMENDMENTS

1) A "firearms retail sales establishment" should be listed in § 701.4 as a retail establishment which shall be permitted in a C-1 district as a matter of right, particularly because hardware stores, hobby shops, and sporting goods stores are permitted in a C-1 district as a matter of right. Further, § 702.4 should not be amended to exclude firearms retail sales as an accessory use (as amendment 4 in the Notice proposes) because hardware stores, hobby shops, and sporting goods stores are appropriate places for firearms retail sales.

2) If a "firearms retail sales establishment" is not listed in § 701.4 as a retail establishment which shall be permitted in a C-1 district as a matter of right, and therefore, be permitted in a C-2 district as a matter of right (§ 721.3), a "firearms retail sales establishment" should be listed in § 721.3 as a retail establishment which shall be permitted in a C-2 district as a matter of right, particularly because department stores and dry goods stores are permitted in a C-2 district as a matter of right. Further, § 722.3 should not be amended to exclude firearms retail sales as an accessory use (as amendment 5 in the Notice proposes) because department stores and dry goods stores are appropriate places for firearms retail sales.

3) Amendments 6 and 7 would establish that firearm retail sales would be permitted as an accessory use by special exception in a C-3 district, if approved by the Board of Zoning Adjustment.² Further, the special exception would require that no portion of the establishment could be located within 600 feet of a Residence or Special Use District, or a church, school, library, or playground.

Both the grant of unfettered discretion to the Board of Zoning Adjustment, and the arbitrary limitation on the location of firearms retail sales, are inconsistent with the duty of the Commission only to enact zoning regulations which are designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life. Amendments 6 and 7 thus should not be enacted.

4) Amendment 8 would establish that firearm retail sales would be permitted as an accessory use in a C-4 district by special exception in accordance with the provisions of § 757. Amendment 9 creates a new § 757. There is, however, an inconsistency between Amendments 8 and 9 in that Amendment 8 refers to firearm retail sales as an accessory use, whereas Amendment 9 refers to firearms retail establishments.³ Further, the restrictions on firearms retail establishments in proposed § 757 (approval by the Board of Zoning Adjustment, and requiring that no portion of the establishment could be located within 600 feet of a Residence or Special Use District, or a church, school, library, or playground) are inconsistent with the duty of the Commission only to enact zoning regulations which are designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life. Amendments 8 and 9 thus should not be enacted.

5) Amendment 12 would prohibit firearm retail sales establishments as a commercial use in a C-M District, as is currently the case with establishments whose principle use is the administration of massages, and with sexually-oriented business establishments. The sale of a constitutionally protected product should not be equated with massages and sexually-oriented businesses, particularly as there is no evidence that the evils associated with such activities are associated with

² I would also note that § 741.2(a) provides that an "[a]musement enterprise, including penny arcade or shooting gallery" (emphasis added) is permitted in a C-3 district as a matter of right. Thus, as some firearms retail sales establishment stores have shooting ranges, firearms retail sales establishment should be allowed as in a C-3 district as a matter of right.

³ Amendment 9's reference to "firearms retail establishments" is also different than the term which is defined in Amendment 1, i.e., a "firearms retail sales establishment."

firearms sales. Thus, Amendment 12 should not be enacted.

6) Amendment 13 would prohibit firearm retail sales establishments as an accessory use in a C-M District. There is no basis for such a prohibition in that it is not designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life. Amendment 13 thus should not be enacted.

In sum, firearm retail sales establishments should be permitted as of right, or as an accessory use, in C-1, C-2, C-3, C-4, and C-M districts. Further, the location restrictions should be removed altogether.

Sincerely yours,



Richard E. Gardiner