

Statement to The Zoning Commission

Case #08-20

Text Amendment to Regulate the Establishment of a Firearm Retail Sales Establishment Use

Dear Chairman Hood and members of the Zoning Commission:

My name is Mitchell Berger. From 1992 until 1999 I was a lawyer in the Enforcement Division at DCRA. During my tenure there, I regularly worked on cases involving the District's Zoning Regulations; mostly in the Civil Infractions Program. In particular, I spent close to three years applying the District's zoning codes and regulations to Solid Waste Facilities also known as Trash-Transfer Stations. During that time I think I gained a fairly good grasp of, and a great deal of respect for the District's zoning scheme. I am proud to say that I member of that obscure club who know what the term "parking" really means in the District. It is because of my respect for the propriety and necessity for zoning that I am here today to speak in opposition to the proposed firearm retail sales text amendments.

First, I fear that the text amendments were drafted without looking at the history of retail gun sales in the District. Currently, the regulations at DCMR 11 701.4 (w) allow for "Sporting goods stores" as a matter of right in C-2 zones. As my exhibit, the result of a mere hour of research, shows, in the past, at least one sporting goods store in the District sold firearms. I have been given to understand that this was the rule, not an exception. The same may be true for hardware stores, pawn-brokers, and even department stores, as Sears was once one of the largest retailers of firearms in the United States. Yet, the proposed text amendment ignores that history. And, if we ignore that history then we don't ask questions that we should ask such as:

If District-based businesses were prohibited from selling firearms by a statute that has now been declared unconstitutional, can those businesses honestly be described as abandoning the use of retail gun sales, or do they have non-conforming use rights that were revived by the holding in Heller? Do they have the legal right to renew firearms sales again as long as they comply with federal and local licensing laws?

In addition, what are the obligations of the Zoning Commission to inform those whose land use rights were unconstitutionally impaired, that they may be able to begin using those rights again? Clearly, there may only be a handful of businesses that were selling firearms prior to the ban that are still in existence today, but if even there is only one, the Zoning Commission must resolve the question of what use rights remain.

Second, the proposed regulations range far beyond the legitimate purpose of zoning: gauging the actual impact of a use, whether it be traffic, noise, odors, parking and other similar considerations to an area where that use will not disturb the established character of a neighborhood. To put it bluntly, I think the proposed regulations confuse the dislike that some, maybe even a majority of the citizens of the District, have for firearms with the actual impact that retail establishments selling firearms would actually have. I have not been able to find a single study which claims, let alone shows, a causal link between retail firearms establishments and decreased property values. This is in contrast to the clearly established fact that sexually oriented businesses and solid waste facilities will reduce neighboring property values. Yet, the buffer zones in the text amendment assume that gun stores have a similar adverse impact. On this point alone, the proposed regulations invite litigation, and a diminution of respect for this body.

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Similarly, the requirement for special exception approval assumes the likelihood of adverse impacts when none has been shown. Such a process, which experience shows can take considerable time and money, may impose a constitutionally impermissible burden on good-faith applicants. As the District learned much to its chagrin when it initially tried to combat wildcat solid waste operators; a hastily constructed regulatory scheme invites judicial intervention. As the person who quite literally had to clean up the mess after those first efforts were enjoined by the Courts, I can tell you that it took much longer than it should have, because we had to do so with one hand judicially tied behind our backs.

In contrast, when an adult video store attempted to open in Friendship Heights, DCRA resisted pressure to act precipitously. Instead, through a slow-but-steady application of current and proposed regulations, it became clear to the business that it had not chosen an appropriate site. It closed voluntarily and because we made no significant errors we gave the business no grounds to sue the District for violating its constitutional rights. It bears pointing out here, that the business was represented by the same law firm that ultimately defeated New York City's adult business zoning scheme – which is the same kind of high-powered representation the District can expect to face if the current proposed text amendments are adopted.

Finally I think the District has taken the wrong tack. If the Zoning Commission wants to use its lawful authority to make sure that firearms are sold safely in the District, which in the long run is its only real choice, why not draft regulations which require firearms establishments to be within a specified distance of a Police District Headquarters or substation? Such a requirement would mean that firearms retailers could be more easily monitored and assisted by the police. While such a requirement would also limit the number of potential locations, I think its public safety objectives would be so obvious that it would easily pass constitutional muster.

As someone who has seen gunshot victims laid out on autopsy tables, I know first-hand the evil you are trying to prevent. However as I hope I have made it clear, the proposed text amendments are not the way to do it. Frankly, they seem designed to prevent the opening of a gun store almost anywhere in the District through means that stray far from core zoning principles, have little basis in fact and ignore the prior zoning regulation of retail gun sales in the District. Such a well-meaning but wrong-headed scheme invites further litigation, which the District is bound to lose, or worse yet, provide justification for further congressional or judicial intervention.

Should the Zoning Commission decide to table the proposed text amendments and instead begin drafting realistic, yet legitimately protective regulations, I offer my assistance.

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