President
Mark W. Pennak

Tuesday, November 15, 2016

(Via Email)
Council President Bernard C. Young
City of Baltimore City Council
100 Holliday Street
Suite 400
Baltimore, Maryland 21202

RE: COUNCIL BILL 16-0761: COMMENTS BY MARYLAND SHALL ISSUE ON THE BILL AS AMENDED

Dear Council President Young:

As you know, Maryland Shall Issue ("MSI") has filed two previous letters with the Council concerning Council Bill 16-0761. Those comments were dated October 20, 2016, and October 27, 2016. Those prior comments are incorporated herein by reference. We are now in receipt of the amendments to that bill as voted on by the Council in a preliminary vote taken on November 14, 2016. We are advised that the Council has scheduled a final vote on the bill for December 5, 2016. For the reasons set forth below and in the prior comments, we respectfully suggest that the Council should step back and reconsider this bill.

As previously noted, the City Council's original desire was to ban any toy gun that "could be reasonably be perceived" to be an actual firearm. Then MSI and the NRA sent letters to the Council pointing out all the flaws, including the reality that the City's proposed ban was preempted by federal law. Then the City Solicitor's office weighted in with an opinion that the proposed bill would survive the federal preemption by amending it to state that the ban on possession imposed by the bill would be "subject to federal law on imitation firearms. MSI responded with its October 27, 2016 letter, pointing out all the flaws associated with that approach.

The bill was thereafter substantially amended. Yesterday, the Council voted in favor of a new, amended bill. So what's the difference between the original bill and the amended bill? A lot on the surface, but the underlying illegality remains. The amended bill still purports to ban "any toy, imitation, facsimile or replica pistol, revolver, shotgun, rifle, air rifle, b-b gun, pellet gun, machine gun, or other simulated weapon, which because of its color, size, shape, or other characteristics, can reasonably be perceived to be a real firearm." But the amended bill then adds a series of "exclusions" to the ban.

Specifically, the possession ban does not apply to any toy gun that "is in compliance with U.S. Code title 15, chapter 76, § 5001, and "its implementing regulations in 15 C.F.R. § 272.3." Those implementing regulatory provisions cover toy guns that are specifically marked in the manner defined by the specified regulations. Yet, that doesn't even begin to fix the legal problem for the City because, as we pointed out to the City in our last letter, the Federal law, Section 5001, also expressly leaves unregulated "Traditional B–B, paint-ball, or pellet-firing air guns that expel a projectile through the force of compressed air, compressed gas or mechanical spring action, or any combination thereof." The Federal law **also** contains, in Section 5001(g), an express preemption provision under which a State (including the City) simply may not "prohibit the sale" of "B-B" guns, "paint ball guns", or "pellet-firing air guns." So, under the amendments, the City permits the possession of toys marked in

accordance with Federal regulations, but then continues to ban the very toys that Congress has expressly prohibited the City from regulating. Respectfully, that result cannot be sustained under Federal law. If the Council wishes to comply with Federal law, then it should make clear that the ban does not apply to "B-B" guns, "paint ball guns", or "pellet-firing air guns," the very items specifically mentioned in Section 5001(g). This bill, as amended, contains no such exclusion provision. The "in compliance" language of the amendment simply cites to Section 5001 (not Section 5001(g)) and is too vague to be reasonably read as containing any such exclusion. That is especially so as the clause then cites to a very specific regulatory section that addresses only toys marked in the manner specified in that provision. Read in context, the "in compliance" language was plainly intended to be thus limited. If that is incorrect, then the Council should make that clear. As previously explained, the Due Process Clause of the Fourteenth Amendment requires nothing less.

According to today's Baltimore Sun article, the City thinks it can ban these toys notwithstanding Federal law, because the Federal law only precludes the City from banning the "sale" and the City's bill does not ban "sales," it only bans "possession." See http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-replica-guns-20161114-story.html. Yet, the legal reality is that if the City may not ban the "sale" of a toy gun, it may not ban the "possession" of the toy gun thus sold. It is well established that a state law is preempted where the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). Where, as here, Congress has expressly protected the "sale" of these toys from State regulation, the State may not seek to avoid that prohibition by banning the very "possession" that results from the sale. Plainly, such a ban also effectively bans the "sale" as well, if only because the seller must "possess" the toy in order to effectuate the sale to a purchaser who then immediately "possesses" the toy thus sold. See also *Arizona v. United States*, -- U.S. --, 132 S.Ct. 2492, 2500-01 (2012) (noting that a State-law provision will be preempted if it conflicts with Federal law, either because (1) "compliance with both federal and state regulations is a physical impossibility" or because the provision (2) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" federal law). See *Coalition of New Jersey Sportsmen v. Florio*, 744 F. Supp. 602, 608 (D. N.J. 1990) (applying Section 5001(g) and invalidating a New Jersey statute that "create[d] a *de facto* prohibition on the sale of B–B and air guns"). The Council is setting up the City for an adverse result in a civil rights suit brought under 42 U.S.C. § 1983, and the associated liability for attorneys' fees under 42 U.S.C. § 1988. Respectfully, that is legally irresponsible.

The bill was amended in other ways, yet some of those amendments, while a nod to obviously legitimate uses, lead to still more problems. For example, the bill, as amended, now exempts replicas that are on "display or use on real property owned by the owner of a replica gun, provided the display or use complies with all applicable laws, rules, or regulations concerning the display or use." Yet, even with that exception, the ban on possession still reaches right into the sanctity of the home. See *Payton v. New York*, 445 U.S. 573, 601 (1980) (noting "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic"). Does the Council realize that his bill would authorize police swat teams to break down doors to seize illegal toy guns merely because the police may have probable cause to believe that an illegal toy gun may be present? Yet, that is precisely what this bill would permit. See, e.g., *United States v. Gooch*, 506 F.3d 1156 (9th Cir. 2007), *cert. denied*, 552 U.S. 1331 (2008) (forced entry into the home authorized to execute a misdemeanor bench warrant). Honestly, is this ban worth the risks associated with the obvious potential for enforcement abuse?

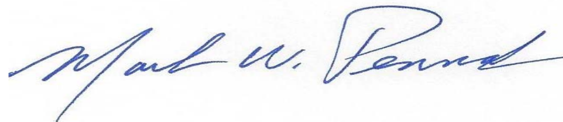
Moreover, the exception carved out for the home is facially discriminatory in that it only applies to replicas displayed or used "on real property owned by the owner of the replica gun." If the owner of the replica doesn't "own" the property, then no possession is permitted on that property. Likewise, if the possessor of the replica is not the "owner" of the replica, then the possession is banned, even if the possessor lives with the "owner" of the replica on the real property owned by the owner of the

replica in the family home. Indeed, renters are completely unprotected by this exception. That exclusion of rental property is little short of astonishing. The renter's home is still a constitutionally protected residence and is thus no less sacred or entitled to respect than a home owned in fee simple absolute. Indeed, State firearms law, MD Code, Criminal Law, § 4-203, expressly allows the "wearing, carrying, or transporting *of a handgun* by a person on real estate that the person owns *or leases or where the person resides*" without imposing any "ownership" requirement. Does the Council truly believe that a toy warrants more restrictions on possession than an actual handgun? In short, the bill's provision unjustifiably discriminates in favor of property "owners" (the wealthy) and creates a massive legal trap for the unwary. It would allow the City to prosecute a parent or an adult (as the owner of the replica) for allowing the mere possession of a replica by any other person within his or her family (including a spouse) in the home. Again, that is a vast overreach of the City's regulatory power.

The amended bill leaves unaltered the criminal penalties: "any person who violates any provision of this subtitle after having twice previously been found to have violated this subtitle is guilty of a misdemeanor and, on conviction, is subject to a fine of not more than $1,000 or to imprisonment for not more than 30 days or to both fine and imprisonment for each offense." The bill thus continues to create a new class of criminals for the mere possession of an article of commerce (a toy) that was otherwise originally legally purchased and legally owned. There is not even a "grandfather" clause for such items, such as contained in the Maryland's prospective-only ban on the sale of modern rifles enacted by the General Assembly in 2013. See MD Code, Criminal Law, § 4-303(b)(3)(i) ("A person who lawfully possessed, has a purchase order for, or completed an application to purchase an assault long gun or a copycat weapon before October 1, 2013, may: (i) possess and transport the assault long gun or copycat weapon"). Does the Council truly believe that toy guns are more dangerous than actual firearms so as to preclude even so much as a grandfather clause exempting existing owners? And if such an exemption is not practical, then is it not the better part of wisdom to rethink the ban rather than criminalize existing lawful owners who are otherwise law-abiding citizens? See, e.g., *Watson v. United States*, 552 U.S. 74, 84 (2007) (Ginsburg, J., concurring) ("Wisdom too often never comes, and so one ought not to reject it merely because it comes late.") (citation omitted).

In short, the proposed bill is both illegal under Federal law and bad public policy, even as amended. We reiterate: There are better ways to address the underlying concerns without flouting Federal law and without subjecting the citizens of the City to the threat of discriminatory arrests and prosecutions. We again respectfully suggest that the City should enforce existing law regulating replicas rather than illegally banning the possession of otherwise lawful replicas by every law-abiding resident in the City.

Sincerely,



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cc (via email): Council Members James B. Kraft, Brandon M. Scott, Robert Curran, Bill Henry, Rochelle "Rikki" Spector, Sharon Green Middleton, Nick Mosby, Helen Holton, William "Pete" Welch, Edward Reisinger, Eric Costello, Carl Stokes, Warren Branch, Mary Pat Clarke