President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

Thursday, October 27, 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: FURTHER COMMENTS BY MARYLAND SHALL ISSUE

Dear Council President Young:

As you know, on October 25, 2016, the Baltimore City Council conducted a public hearing on the above referenced proposed ordinance that will impose a total ban on the mere possession of replica guns if the replica can "reasonably be perceived to be a real firearm." On October 20, Maryland Shall Issue and the NRA filed comments with the City, making numerous points why the proposal would be bad law and bad policy. Among other points, we advised that the City simply may not ban the sale or possession of replica guns that are otherwise permitted and regulated by federal law, 15 U.S.C. § 5001 and implementing regulations. After receiving our letter (and the NRA's), the City's Solicitor, in a letter dated October 24, has now told the Council the same thing, suggesting that City may still impose such a ban if the bill is amended to read the ban is "subject to federal law on imitation firearms." As set forth below, the City Solicitor's "fix" is legally unacceptable and should be rejected. Rather, the City should accept as controlling federal law and withdraw the proposed ordinance.

Federal law and the implementing regulations are exceptionally broad. The regulations, 15 C.F.R. § 272.2, provide that "[n]o person shall manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm ("device") covered by this part as set forth in § 272.1 unless such device contains, or has affixed to it, one of the markings set forth in § 272.3, or unless this prohibition has been waived by § 272.4." The coverage of the items banned by these provisions is set forth in subsection 271.1, which provides:

> This part applies to toy, look-alike, and imitation firearms ("devices") having the appearance, shape, and/or configuration of a firearm and produced or manufactured and entered into commerce on or after May 5, 1989, including devices modelled on real firearms manufactured, designed, and produced since 1898.

However, the subjection 271.1 then makes clear that **"[t]his part does not apply to:**

(a) **Non-firing collector replica antique firearms**, which look authentic and may be a scale

model but are not intended as toys modelled on real firearms designed, manufactured, and produced prior to 1898;

(b) **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,** as described in American Society for Testing and Materials standard F 589–85, Standard Consumer Safety Specification for Non–Powder Guns, June 28, 1985. * * *

(c) **Decorative, ornamental, and miniature objects having the appearance, shape and/or configuration of a firearm**, including those intended to be displayed on a desk or worn on bracelets, necklaces, key chains, and so on, provided that the objects measure no more than thirty-eight (38) millimeters in height by seventy (70) millimeters in length, the length measurement excluding any gun stock length measurement.

The excluded items are not subject to the federal regulations and thus remain fully lawful items for interstate commerce.

Moreover, Congress was not content to leave these excluded items unregulated under federal law. Rather, Congress enacted Section 5001(g) of Title 15 of the United States Code to establish that the States **likewise** may not regulate such items. Section 5001(g) states:

(g) Preemption of State or local laws or ordinances; exceptions
The provisions of this section shall supersede any provision of State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section **provided that no State shall**—
(i) **prohibit the sale or manufacture** of any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898, or
(ii) **prohibit the sale (other than prohibiting the sale to minors) of traditional B-B, paint ball, or pellet-firing air guns that expel a projectile through the force of air pressure**.

The plain language thus makes clear that the City simply may not "prohibit the sale" of "B-B" guns, "paint ball guns", or "pellet-firing air guns." In purporting to ban the mere possession of any replica gun that "can reasonably be perceived" as a real firearm, the Bill's language would do precisely what Congress has forbidden as it would ban antique firearms and "traditional B-B, paint ball, or pellet-firing air guns." In this respect, this federal preemption of City ordinances on "the sale" of such items also bars the City from banning other common attributes of ownership that normally occur upon such a "sale." Specifically, if a "sale" cannot be banned by the City, then ownership and possession and otherwise lawful uses of these items that commonly flow from such a "sale" likewise cannot be banned. See *Henderson v. United States*, 135 S.Ct. 1780, 1784 (2015) (addressing the "proverbial sticks in the bundle of property rights" associated with ownership). For example, the City may not ban otherwise lawful sporting uses of "paint ball" guns or the use of "pellet-firing air guns" at lawful Airsoft games. See https://en.wikipedia.org/wiki/Airsoft.

The cases cited by the Solicitor are consistent with these principles. For example, the Solicitor cites *New Jersey v. Rackis*, 755 A.2d 649 (2000), but the New Jersey state statute at issue in that case did not "constitute [ ] a prohibition against the **sale or possession** of a BB gun." 755 A.2d 649. Rather, the statute merely regulated the sales to one such item a month. See *Association New Jersey Rifle and Pistol Clubs v. Governor of New Jersey*, 707 F.3d 238, 240 (2013) (noting that the New Jersey statute "restricts the sale of these guns to one per person per month, and allows applications for exemptions from this restriction"). The Solicitor's reliance on *City of New York v. Job-Lot Pushcart*, 88 N.Y.2d 163, 666 N.E.2d 537, 643 N.Y.S.2d 94 (1996), is particularly misplaced as the court in that case expressly stated that "the plain language employed by Congress demonstrates that only State regulation of replicas of antique collector firearms, B–B guns, paint ball guns, or pellet-firing air guns is expressly

preempted under 15 U.S.C. § 5001(g)." 88 N.Y.2d at 168. *Job-Lot* thus **confirms** that any attempt by the City to regulate these items is preempted.

Job-Lot also stands for the proposition that a city ordinance is preempted by the Section 5001(g) to the extent that it "provide[s] for markings or identification inconsistent with" with federal regulations. Id. at 170. That holding **confirms** that the City may not ban replicas that are marked in a manner permitted by these regulations. See 15 C.F.R. § 272.3. See also 15 C.F.R. § 272.4 (providing for a waiver for "any toy, look-alike or imitation firearm that will be used only in the theatrical, movie or television industry"). See *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152–53 (1982) (federal regulations have no less preemptive effect than federal statutes). In short, as a matter of law, a replica cannot be banned if it is marked in accordance with federal regulations or is otherwise permitted under the waiver provisions. The "reasonably perceived to be" standard established by the proposed ordinance is flatly contrary to these federal regulations as it is perfectly possible that some law enforcement officer may "perceive" a properly marked federally regulated item to be a firearm. The "reasonably perceive" standard thus invites an unlawful arrest and seizure.

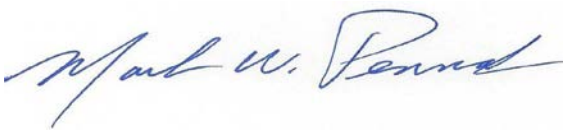
In this respect, the Solicitor's suggestion that these provisions of federal law may be respected by providing that the ban is "subject to federal law on imitation firearms" is wrong. First, the Solicitor's proposed amendment does not even identify or cite the "federal law," much the implementing regulations. An ordinance that imposes a complete ban on mere possession of replica firearms that can be "perceived to be" real firearms, but making the ban vaguely subject to unspecified federal law, will inevitably cause the police to enforce the ban rather than respect federal law. That reality will likely subject the individual police officer, as well as the City itself, to suits for wrongful arrests and seizures. A law authorizing the seizure of private property and criminal prosecution should expressly state what is prohibited and not rely on unspecified provisions of federal law of which the average citizen simply may have no knowledge. A failure to do so is bad public policy and a breach of the duty that the Council owes to the citizens of Baltimore to legislate in such a manner that gives fair notice of what is prohibited and what is not. The prospect of arbitrary and discriminatory enforcement is self-apparent.

Second, a failure to give fair notice would make the bill unconstitutional under the Due Process Clause of the Fourteenth Amendment. See e.g., *FCC v. Fox Television Stations, Inc*. 132 S.Ct. 2307, 2317 (2012) ("A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'") quoting *United States v. Williams*, 553 U.S. 285, 304 (2008). Similarly, the City simply may not shift the burden to the citizens to justify possession of a replica otherwise permitted by federal law. *Conley v. United States*, 79 A.3d 270 (D.C. 2013) (holding that a DC statute violated the Due Process Clause by "unconstitutionally shift[ing] the burden of persuasion from the prosecution to the defense"). The Solicitor's suggested proviso does not give fair notice and is thus constitutionally too clever by half.

In short, the proposed bill is simply illegal, even with the Solicitor's proposed amendment. There are better ways to address the underlying concerns without flouting federal law and without subjecting the citizens of the City to discriminatory arrests and prosecutions for violations of a vague law. For example, the City Code already addresses replica guns in providing that "[n]o person may sell, give away, or otherwise transfer a gas- or air-pellet gun or paintball gun to, or permit the use or possession of a gas- or air-pellet gun or paintball gun by, any individual whom that person knows or has reasonable cause to believe is a minor." City Code, Police Ordinance, Art.19 §59-26. The possession, discharge or use of such devices are likewise strictly regulated. (Id.). A violation of these provisions subjects a person "to a fine of not more than $1,000 or to imprisonment for not more than 12 months or to both fine and imprisonment for each offense." (Id.). We respectfully suggest that the City

should focus its efforts on enforcing these provisions rather than attempting to illegally ban the possession of otherwise lawful replicas by every law-abiding resident in the City.

Sincerely,



Mark W. Pennak, President
Maryland Shall Issue, Inc.
1332 Cape St. Claire Road #342
Annapolis, MD 21409
(410) 849-9197
www.marylandshallissue.org

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