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TO: Andrew Sheehan, Sudbury Town Manager (***By Electronic Mail Only)***

FROM: Janelle M. Austin, Esq.
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RE: Town Meeting Warrant; Citizen-Petitioned Zoning Article 55- Firearms

DATE: May 1, 2023

ATTORNEY-CLIENT PRIVILEGE- NOT A PUBLIC DOCUMENT

The Select Board has requested a legal analysis of a citizen-petitioned warrant article that seeks to ban firearms sales, assembly and manufacturing in the Town through a zoning bylaw amendment, as set forth below. Please find a legal analysis regarding the pertinent legal issues, as requested by the Board.

BACKGROUND

On January 25, 2023, a citizen-petitioned warrant article was submitted for Town Meeting consideration that would amend Part C of the Zoning Bylaw's Table of Principal Use Regulations. The proposed warrant article is attached to this memorandum as Exhibit A and states:

> "To see if the Town will vote to[,] [i]n Section 2230, Appendix A, Table of Principal Use Regulations, add a line after 'Marijuana Establishment' in Part C of the table which shows 'N' all the way across the table and call it 'Sales, Assembly, and/or Manufacturing of Firearms and/or Components thereof, Ammunition, and Explosives'. This amendment would make the Sales, Assembly, and/or Manufacturing of Firearms and/or Components thereof, Ammunition, and Explosives a prohibited use in all zoning district[s] in the Town of Sudbury."

As you know, Part C of the Table of Principal Use Regulations, Section 2230, Appendix A, addresses commercial uses. Currently, two types of commercial uses are expressly prohibited in all districts: ATMs and similarly sized service booths, and marijuana establishments. The Zoning Bylaw also specifies that "[u]ses not expressly provided for herein are prohibited." Section 2210.

ANALYSIS

1. *The state of applicable case law.*

Bruen Case:

In 2022, the Supreme Court addressed the Second Amendment to the United States Constitution in the case of New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111 (2022) (hereinafter, "Bruen"), although the Supreme Court did not explicitly address the sale or manufacture of firearms in that case.[1] The opinion is attached hereto as Exhibit B.

Bruen concerned New York's "may issue" gun-licensing law. According to the Court, "may issue" laws, as opposed to "shall issue" laws, are those "under which authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria, usually because the applicant has not demonstrated cause or suitability for the relevant license." The Court held that the law at issue violated the Second Amendment.

In doing so, it determined that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." The Court also clarified that the Second Amendment analysis is entirely historical in nature: "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."

As relevant in this context, in Bruen, the Supreme Court clarified the legal framework for Second Amendment challenges to government regulation. The Supreme Court held that, in lieu of the "two-step test" that courts had previously adopted for resolving Second Amendment claims, courts must now apply a standard "rooted in the Second Amendment's text, as informed by history." 142 S. Ct. at 2127. Therefore, in our opinion, now under Bruen, reviewing courts must determine whether "the Second Amendment's plain text" protects the conduct in which the plaintiff wishes to engage, and if it does, then decide whether the regulation "is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126. If challenged, the Town, as the government entity, has the burden of "demonstrat[ing] that the regulation is consistent" with historical tradition. *Id.* Therefore, in assessing that historical tradition, a reviewing court must engage in "analogical reasoning" to determine whether the challenged restriction on Second Amendment rights is "relevantly similar" to a historical regulation or tradition. *Id.* at 2132-33. Importantly, the Supreme Court held as follows:

> Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with Heller, which demands a test rooted in the Second Amendment's text, as informed by history. But Heller and McDonald do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.

[1] For a recent Supreme Judicial Court opinion that addresses Bruen in the context of firearm possession crimes, see Commonwealth v. Carlos Guardado, SJC-13315 (Apr. 13, 2023), available at https://www.mass.gov/files/documents/2023/04/13/e13315.pdf.

Accordingly, in our opinion, a Second Amendment challenge to government regulations in the firearms context will likely invoke the standard set forth above in Bruen. As this is an evolving area of law, the scope of its application is unknown at this time, in our opinion.

Heller Case:

Prior to the Bruen decision, in another Supreme Court case entitled District of Columbia v. Heller, 554 U.S. 570 (2008), the Supreme Court addressed a provision adopted by the District of Columbia generally prohibiting the possession of handguns, and providing further that no person could carry a handgun without a license. The Court held, in part, that the complete ban on handgun possession was inconsistent with the Second Amendment. However, the case also indicated that the Second Amendment is not "absolute" and does not "grant the right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose." The court noted several "presumptively lawful" regulatory measures, including prohibition of: carrying concealed weapons, felons and the mentally ill possessing firearms, and the carrying of firearms in "sensitive" places such as schools and government buildings. Of note, the Court also indicated that it was presumptively lawful to "impose conditions and qualifications on the commercial sale of arms."

Teixiera Case:

Another directly relevant case is Teixeira v. County of Alameda, which was heard by the 9th Circuit Court of Appeals, and then by the 9th Circuit "en banc" (meaning the entire court of appeals rather than a panel of the court). A zoning provision in Alameda County limited guns stores to locations more than 500 feet distant from a residentially zoned district; elementary, middle or high school; preschool or day care center; other gun store; or liquor store or establishment. For reference, Alameda County is 821 square miles and is home to more than 1,500,000 people.

In the 9th Circuit panel case, 822 F.3d 1047 (2016), the Court asked whether: (1) "the Second Amendment places any limits on regulating the commercial sale of firearms," (2) whether the case implicated the Second Amendment, and, if so, (3) what level of scrutiny should be applied. The Appeals Court panel determined that the right to bear arms would be meaningless if it did not also protect the right to acquire arms, and therefore that Second Amendment rights were implicated. The Appeals Court panel sent the case back to the lower court to determine the appropriate level of scrutiny.

Later, the case was reviewed by the full 9th Circuit Court of Appeals, 873 F.3d 670 (2017). The opinion is attached hereto as Exhibit C. In that case, which was decided before the Supreme Court's decision in Bruen, court noted that there were 10 gun stores in Alameda County, one of which was essentially down the street from the location denied a zoning permit. The Court concluded, "In any event, gun buyers have no right to have a gun store in a particular location, at least as long as their access is not meaningfully constrained." The Supreme Court declined to review that case.

2. Whether a complete prohibition is allowed.

In our opinion, the citizen-petitioned article seeking an amendment to the zoning bylaw would need to be approved by the Massachusetts Attorney General's Office. Based on the language set forth in the petitioned article, in our opinion, we cannot predict with any certainty whether approval would issue given the scope of the proposed regulation, the lack of definitions relative to same. In addition to uncertainty regarding the Attorney General's approval regarding a total ban of firearms sales, assembly or manufacturing, as written, in our opinion, it is highly likely that the zoning bylaw would be subject to constitutional challenge. As you are aware, firearms matters are of significant interest throughout the country, and therefore any municipality that seeks to prohibit gun sales may anticipate a well-financed challenge to such regulation, in our opinion.

3. Municipalities in Massachusetts that have prohibited gun sales.

There are many states where local entities are not authorized to regulate gun sales and, instead, such matters are addressed at the state level. In those states where regulation is permitted, such as Massachusetts, there are several types of regulation. The predominant types of regulations are zoning firearms businesses in certain districts, such as adult-use or other districts located at a distance from residential or park/playground uses; creating an overlay district; imposing a buffer area around certain sensitive places such as parks and health care facilities; and/or conditioning the grant of a permit for such use.

As far as we are aware, no municipality in Massachusetts has recently adopted a local zoning regulation entirely prohibiting the locating of firearms businesses therein. As you know, there is a comprehensive state scheme dealing with the licensure of firearms dealers, including, but not limited to, pursuant to G.L. c. 140, §§ 122 and 123. Specifically, the Massachusetts Gun Control Advisory Board, established by the Governor pursuant to G. L. c. 140, §131½, is responsible for advising the Executive Office of Public Safety and Security on matters relating to the implementation of the Commonwealth's gun laws, and therefore advising on what constitutes adequate safety measures. In practice, the Sudbury Chief of Police, as the local firearms licensing authority pursuant to G.L. c. 140, oversees ensuring that any store selling firearms is in compliance with security measures required by law. ATF is the federal agency responsible for ensuring compliance with additional federal regulations.

There are municipalities in Massachusetts that regulate the sale of firearms. Such regulation includes the creation of certain zoning districts for the sale of firearms or imposition of a buffer zone requirement. Based on our research, certain municipalities also prohibit pawn shops from selling guns. For example, Brookline, Dedham, and Newton have adopted zoning restrictions on firearm businesses in the last few years. In Brookline, "Firearm Business Uses" are permitted with a special permit in one business district. See Fall 2021 Annual Town Meeting Article 22, attached hereto as Exhibit D. In Dedham, "Firearms Businesses" are permitted with a special permit in the Adult Use Overlay District. See Dedham Town Code § 280-6.1, attached

hereto as Exhibit D. And in Newton, "Firearm Business Uses" are permitted with a special permit in three districts. See Newton Ordinances §§ 4.4.1, 6.10.4, attached hereto as Exhibit E.[2] As far as we know, these previously adopted regulations have not been challenged successfully on constitutional grounds. However, because these local enactments were passed before the Supreme Court's Bruen decision, if a similar zoning bylaw is passed by Town Meeting and approved by the Attorney General's Office, we cannot predict with certainty how a court would apply the facts and current law in a judicial review of same.

4. *Potential repercussions of adopting a total ban and then having the ban challenged successfully in court.*

Because this issue is case specific, it is impossible to anticipate or predict with certainty the particular mechanisms that will be used in such a challenge, or a reviewing court's determination with respect to such a challenge, if brought, including pursuant to the Second Amendment. A challenge to a zoning bylaw prohibition could include a request for a preliminary injunction prohibiting the Town from enforcing the bylaw during the pendency of the case. In the event that the reviewing court found that such prohibition violated protected Second Amendment rights and so was a violation of civil rights, it could award damages and attorneys' fees to the plaintiff(s). Importantly, if the firearms businesses ban was overturned, it would also mean that, unless other zoning amendments were adopted in the interim, firearms businesses would continue to be regulated under available use regulations pursuant to the current Zoning Bylaw and state firearms laws. Additionally, if a challenge to the firearms businesses ban reached a state or federal appellate court, then that court's ruling would potentially affect other municipal regulations throughout the Commonwealth or, perhaps, the throughout the country.

5. Potential vagueness issue with proposed warrant article.

In our opinion, the proposed warrant article, if passed, is also at significant risk of being deemed vague or judicially challenged on the ground of vagueness and, also, may pose enforcement issues for the zoning enforcement officer. Courts have long held that "an ordinance or by-law . . . ought not to stand when it is so vague and ambiguous that its meaning can only be guessed at." O'Connell v. City of Brockton Board of Appeals, 344 Mass. 208, 212 (1962). The proposed warrant article, unlike the bylaws and ordinances in Brookline, Dedham, and Newton discussed above, does not have any defined terms. Thus, the terms "Sales, Assembly, and/or Manufacturing of Firearms and/or Components thereof, Ammunition, and Explosives" are left to interpretation, including with respect to any non-commercial use. This omission might render the proposed warrant article, if it is passed, unconstitutionally vague.

[2] For additional context on the Newton zoning discussion regarding firearms dealers, please see: https://members.charlesriverchamber.com/blog/chamber-news-5220/post/giffords-law-center-urges-newton-not-to-ban-gun-shops-30281

6. Application to preexisting uses.

An additional issue is whether firearms businesses already in existence will be affected by the proposed warrant article if the article is passed. In our opinion, if the article is passed, a preexisting, lawful firearms business will be allowed to continue "provided that no modification of the use . . . is accomplished" without authorization. The Zoning Bylaw states that it "shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing required by G.L. c. 40A, s. 5 at which this Zoning Bylaw, or any relevant part thereof, was adopted. Such prior, lawfully existing non-conforming uses and structures may continue, provided that no modification of the use or structure is accomplished, unless authorized hereunder." See Section 2410.

If you would like to discuss the above analysis or have additional questions, please do not hesitate to contact us.

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