MEMORANDUM OF LAW

DATE: April 8, 1997

TO: Committee on Public Safety and Neighborhood Services

FROM: City Attorney

SUBJECT: Proposed Ordinance Banning the Sales of Saturday Night Specials

INTRODUCTION

This Office has been asked to analyze certain legal issues concerning a proposed ordinance that would regulate the sale of handguns commonly known as "Saturday Night Specials." This Memorandum provides that analysis. We are quick to point out, however, that this analysis does not address all questions or issues arising from the adoption of the proposed ordinance. We stand ready to provide further advice if requested.

QUESTIONS PRESENTED

1. Would an ordinance prohibiting the sale of certain handguns known as "Saturday Night Specials" be either preempted by State law or otherwise invalid?

2. Is it possible to define "Saturday Night Special" in such a way that it would include those firearms, and only those firearms, that are used disproportionately in crime, or are designed or constructed in such a manner or with such materials as to make them unsafe or unreliable for home protection?

SHORT ANSWERS

1. The question of whether the proposed ordinance would be preempted is an open one, and a court could find support in existing precedent for ruling that the ordinance is preempted. We believe, however, that it is more likely that the proposed ordinance would not be found preempted by State law. The proposed ordinance would also likely survive certain other challenges to its validity.

2. It is unclear whether it is possible to define "Saturday Night Special" in such a way as to include only those types of firearms sought to be banned. There are great differences of opinion among known firearms experts as to (a) what specific features or characteristics make a gun "safe" or "unsafe"; (b) whether it is possible to construct a meaningful definition of "Saturday Night Special" (i.e., one that would not include numerous high quality, expensive, safe guns), and whether any of the firearms sold domestically, including those commonly referred to as "Saturday Night Specials," are unsafe. Regardless of the definition constructed, it will be subject to strong criticism by credible firearms experts. Without a ruling in the appeal pending on the West Hollywood ordinance, there is no appellate case law that determines whether the term "Saturday Night Special" can be defined to withstand a legal challenge.

BACKGROUND

The San Diego City Council's Public Safety and Neighborhood Services Committee is considering whether to propose an ordinance banning the sale of certain handguns, specifically those typically referred to as "Saturday Night Specials"[1] or "junk guns." At least twenty-eight (28) cities and three (3) counties in California have adopted such an ordinance, and several others are currently considering doing so. The City of West Hollywood's ordinance, adopted on January 16, 1996, has served as a model for other cities across the state. It is currently the only ordinance to have been challenged in court (although others are likely to follow), thereby providing an indication of the legal issues that likely would arise should San Diego adopt such an ordinance. The Appellate Department of the Los Angeles Superior Court rejected a legal challenge to the West Hollywood ordinance, holding that the ordinance was neither preempted by State law nor in violation of various constitutional rights. The ordinance challengers have filed a notice of appeal, but it will likely be several months before the First District Court of Appeal decides the case.

There are several theories upon which a legal challenge to the proposed ordinance might be based, including Equal Protection and Second Amendment grounds, but the primary obstacle is likely to be a challenge based upon the doctrine of preemption. Below we set forth the principles governing the preemption doctrine, an analysis of the application of that doctrine to the proposed ban, and analyses of two other possible legal challenges.

ANALYSIS

I. THE "MUNICIPAL AFFAIRS" DOCTRINE AND PREEMPTION

A. The Municipal Affairs Doctrine

Article XI, section 5, subdivision (a) of the California Constitution provides that "[i]t shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. . . ." Pursuant to this provision, a charter city such as the City of San Diego operates under the "home rule" doctrine, which gives the City supreme authority in the field of "municipal affairs." San Diego thus has all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter itself. Cal. Const., art. XI, 5(a); City of Grass Valley v. Walkinshaw, 34 Cal. 2d 595, 598 (1949). "The charter operates not as a grant of power but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation." Id. at 598-599. The rules of statutory construction governing charter provisions provide that:

> [T]he exercise of . . . power . . . [is favored] against the existence of any limitation or restriction thereon which is not expressly stated in the charter . . . . So guided, reason dictates that the full exercise of the power is permitted except as clearly and explicitly curtailed. Thus in construing the city's charter a restriction on the exercise of municipal power may not be implied.

Id. at 599. "A city charter is [thus] construed to permit the exercise of all powers not expressly limited by the charter or by superior state or federal law." Taylor v. Crane, 24 Cal. 3d 442, 450 (1979).

As to such superior state law:

> A charter city is constitutionally entitled to exercise exclusive authority over all matters deemed to be "municipal affairs." [Citation]. In such cases, the city charter supersedes conflicting state law. If the statute in question addresses an area of "statewide concern," however, then it is deemed applicable to charter cities. [Citations]. In deciding whether a matter is a municipal affair or of statewide concern, the Legislature's declared intent to preempt all local law is important but not determinative, i.e., courts may sometime conclude that a matter is a municipal concern despite a legislative declaration preempting home rule. [Citation].

DeVita v. County of Napa, 9 Cal. 4th 763, 783 (1995).

> As to matters which are of statewide concern, however, home rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters, if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation (the preemption doctrine).

Bishop v. City of San Jose, 1 Cal. 3d 56, 61-62 (1969).[2]

> In sum, a charter city may legislate or act on "municipal affairs" even if such activity conflicts with state law. Similarly, the state Legislature may not enact legislation affecting a charter city on a matter considered a municipal affair. Conversely, on a matter determined to be of "statewide concern" a charter city may not enact legislation that conflicts with state law. The charter city may, however, enact legislation on a matter of statewide concern which is not in conflict with state law unless the Legislature has intended to preempt that field.

Generally, the first step in determining whether a charter city's action is valid is to determine whether an actual conflict exists with state law. If not, no further analysis is needed. Johnson v. Bradley, 4 Cal. 4th 389, 398-399 (1992); California Fed. Savings & Loan Assn. v. City of Los Angeles, 54 Cal. 3d 1, 16-17 (1991); Bishop, 1 Cal. 3d at 62. But see Baron v. City of Los Angeles, 2 Cal. 3d 535, 539 (1970). If there is a conflict,

> "[i]t becomes necessary for the courts to decide, under the facts of each case, whether the subject matter under discussion is of municipal or statewide concern." In other words, "No exact definition of the term 'municipal affairs' can be formulated, and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case. The comprehensive nature of the power [to legislate on "municipal affairs"] is however, conceded in all the decisions . . . ."

Bishop, 1 Cal. 3d at 62 (quoting Butterworth v. Boyd, 12 Cal. 2d 140, 147 (1938); see also Cal. Fed., 54 Cal. 3d at 16; Johnson v. Bradley, 4 Cal. 4th at 399.

> If the subject is not of statewide concern the local legislation stands. If the state legislation, however, is of statewide concern it prevails provided it is reasonably related and narrowly tailored to the resolution of that concern. Johnson v. Bradley, 4 Cal. 4th at 399; Cal. Fed., 54 Cal. 3d at 17.

> > The phrase "statewide concern" is thus nothing more than a conceptual formula employed in aid of the judicial mediation of jurisdictional disputes between charter cities and the Legislature, one that facially discloses a focus on extramunicipal concerns as the starting point for analysis. By requiring, as a condition of state legislative supremacy, a dimension demonstrably transcending identifiable municipal interests, the phrase resists the invasion of areas which are of intramural concern only, preserving core values of charter city government. As applied to state and charter city enactments in actual conflict, "municipal affair" and "statewide concern" represent, Janus-like, ultimate legal conclusions rather than factual descriptions. Their inherent ambiguity masks the difficult but inescapable duty of the court to, in the words of one authoritative commentator, "allocate the governmental powers under

> consideration in the most sensible and appropriate fashion as between local and state legislative bodies."

Johnson v. Bradley, 4 Cal. 4th at 399-400 (quoting Cal. Fed., 54 Cal. 3d at 17) (italics, footnotes and citations deleted).

> While courts will give "great weight" to the purpose of the state Legislature in enacting general laws when deciding whether a matter is a municipal affair or of statewide concern, the Legislature's intent does not control. The Legislature may not determine what is a municipal affair or turn such affair into a matter of statewide concern. Bishop, 1 Cal. 3d at 63. Courts, on the other hand, are not to "compartmentalize" areas of governmental activity as either a municipal affair or of statewide concern. Cal. Fed., 54 Cal. 3d at 17-18. Very generally, a matter is of statewide concern if, "under the historical circumstances presented, the state has a more substantial interest in the subject than the charter city . . . . [T]he hinge of the decision is the identification of a convincing basis for legislative action originating in extramunicipal concerns, one justifying legislative supersession based on sensible, pragmatic considerations." Id. at 18.

The first step in the analysis, therefore, is whether a proposed ordinance would conflict with state law.

B. There Is No Conflict With State Law

A city ordinance conflicts with or contradicts state law when it is "inimical thereto." Sherwin-Williams Company v. City of Los Angeles, 4 Cal.4th 893, 898 (1993), citing Ex parte Daniels, 183 Cal. 636, 641-648 (1920). That is, a local ordinance conflicts with state law if it prohibits an act that the state law expressly authorizes, or authorizes an act that the state law expressly prohibits. Id. at 902.

The proposed ordinance here would not contradict state law. Although the state regulates through several statutes the sale or transfer of firearms in particular situations,[3] nowhere does it expressly authorize the sale of a particular class or type of handgun, such as a "Saturday Night Special." Nor does the state expressly (or implicitly, for that matter) prohibit the sale of handguns that would fit any definition of "Saturday Night Special." Therefore, the proposed ordinance would neither prohibit any act expressly authorized by state law, nor authorize any act expressly prohibited by state law.

It could be argued that the proposed ordinance would contradict Penal Code section 12026 by effectively prohibiting the possession of handguns. Under Penal Code section 12026, a city may not impose a permit or license requirement on the right to purchase, own, possess, keep, or carry a handgun within one's residence, place of business, or on one's property. There is some logic to this argument, if one believes that because the right to possess means nothing without an attendant right to acquire, prohibiting sales of certain handguns is tantamount to prohibiting possession of those handguns.

In Doe v. City and County of San Francisco, 136 Cal.App.3d 509 (1982), the court

addressed a local ban on handgun possession in light of Penal Code section 12026. The court, in dicta, suggested that such a ban would be impliedly preempted, and that section 12026 creates a right to possess handguns. The court stated:

> [W]e infer from Penal Code section 12026 that the Legislature intended to occupy the field of residential handgun possession to the exclusion of local governmental entities. A restriction on requiring permits and licenses necessarily implies that possession is lawful without a permit or license. It strains reason to suggest that the state Legislature would prohibit licenses and permits but allow a ban on possession. Id. at 518.

If one infers from this statement that there exists in section 12026 a right to possess a handgun, and also believes that an inability to purchase means a prohibition on possession, then one could conclude that an ordinance banning the sale of handguns directly conflicts with, or contradicts, section 12026. However, the court in Doe was considering an ordinance very different from the ordinance proposed here. Unlike the ordinance before the court in Doe,[4] the proposed ordinance would not on its face ban possession of all handguns; indeed, it doesn't address possession at all, and its application is limited to those handguns defined as "Saturday Night Specials." Even assuming a court would find the ordinance to be a ban on possession, it could not be said to ban possession of all handguns, but only a relatively small number of specified handguns. In short, the proposed ordinance would not make it illegal for any person merely to possess a handgun.

If a court were to determine that there was no conflict with state law, the inquiry would end and the ordinance would be valid under the "municipal affairs" doctrine. If, on the other hand, a court were to determine that a conflict existed, the inquiry would turn to whether the are of handgun regulation was of statewide concern or a municipal affair.

C. It Is Unclear If Handgun Regulation Is Of Statewide Concern Or A Municipal Affair

One court has held that there is no question but that the regulation of firearms is not a municipal affair but of statewide concern. Doe, 136 Cal.App.3d at 513. In that case, however, the court seemed to be relying on the admission of the defendant (City and County of San Francisco) that such was the case. Id. In truth, the issue may not be so clear cut, as a previous decision of the California Supreme Court implied that the area was not of statewide concern. Galvan v. Superior Court, 70 Cal.2d 851, 860 (1969).

Our best opinion at this time is that arguments can be made both ways, especially if the inquiry is limited to the possession of certain types of handguns, not an outright ban of all types of firearms as was the case in Doe. See, Discussion in Part II(D) and (E), below. It is unclear to us whether a court would follow the lead of the Doe court and find that the area of firearm regulation in total is of statewide concern and not a municipal affair or conduct an independent analysis of the issue as guided by the California Supreme Court in cases such as DeVita, CalFed and Johnson.

If it is determined that the area of firearm regulation, or, more narrowly, limited handgun possession is a municipal affair, the proposed ordinance would be valid under the municipal affairs doctrine. If the area is determined to be of statewide concern, the proposed ordinance may still be valid under some other municipal power.

II. THE POLICE POWER AND PREEMPTION

A. The Police Power

Pursuant to Article XI, section 7, of the California Constitution, "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." However, "[i]f otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." Sherwin-Williams, 4 Cal.4th at 897. This power, commonly known as the "police power," is distinct from the power of charter cities under the municipal affairs doctrine, although the analysis is similar in many respects.

For purposes of a police power analysis, a city law conflicts with state law if it a) duplicates state law; b) contradicts state law; c) enters an area that is fully occupied by state law, when the State Legislature has expressly manifested its intent to fully occupy the area (express preemption); or d) enters an area that is fully occupied by state law, when the State Legislature has implied an intent to fully occupy the area (implied preemption). Id. at 897-898.[5] We analyze each of these issues below.

B. The Proposed Ordinance Would Not Duplicate State Law

A city law duplicates state law when it is "coextensive therewith," that is, when it purports to impose the same criminal prohibition that state law imposed. Id. at 897, citing In re Portnoy, 21 Cal.2d 237, 240 (1942). An ordinance that is substantially identical to a state law is

invalid because it is an attempt to duplicate the state law. Pipoly v. Benson, 20 Cal.2d 366, 370 (1942), citing In re Sic, 73 Cal. 142 (1887). "The invalidity arises, not from a conflict of language, but from the inevitable conflict of jurisdiction which would result from dual regulations covering the same ground." Pipoly, 20 Cal. 2d at 371.

Although, there are myriad statutes dealing with firearm possession, licensing and sales, including a ban on "assault" weapons, no statute expressly or impliedly bans the sale of handguns fitting any definition of "Saturday Night Special."[6] As a result, the ordinance would neither be "coextensive" with, nor "substantially identical" to, any state law, and therefore, in our opinion, would not duplicate state law.

C. The Proposed Ordinance Would Not Contradict State Law

We have discussed in Part I(B), above, whether the proposed ordinance would contradict or conflict with state law. Our conclusion was that it would not. That analysis and conclusion apply here.

D. The Proposed Ordinance Would Not Be Expressly Preempted By State Law

If a local ordinance enters an area that is fully occupied by state law, when the State Legislature has expressly manifested its intent to fully occupy the area, the local ordinance is preempted by state law and is therefore invalid. Express preemption exists when the state passes legislation that expressly states that the state intends to fully occupy a given field, to the exclusion of local legislative action. In determining whether a statute by its terms expressly preempts a particular local ordinance, a court must first determine what field is preempted, and then whether the local ordinance falls within that field.

There are a great many statutes that deal with firearms, but only two expressly state a legislative intent to fully occupy an entire field of regulation. Government Code section 53071 embodies the State Legislature's intent to fully occupy the field of regulation of licensing and registration of firearms[7], and Government Code section 53071.5 expressly states the Legislature's intent to preempt local legislation in the area of regulation of imitation firearms. Any local ordinance having the effect either of regulating the licensing or registration of firearms, or of regulating imitation firearms, would be expressly preempted by one of these sections, and would therefore be invalid as being in conflict with state law.

Although neither of these sections on its face addresses the sale of a particular type of firearm, one could claim, as did the challengers of the West Hollywood ordinance, that a ban on the sale of "Saturday Night Specials" is expressly preempted by section 53071. One theory underlying this claim is 1) firearm dealers are required by the Penal Code to register every sale of a handgun, including those fitting any definition of "Saturday Night Special"; 2) Government Code section 53071 acts to preempt the field of regulation of firearm registration; and 3) an ordinance banning the sale of "Saturday Night Specials" enters this preempted area in that by prohibiting their sale, the ordinance also prohibits their registration by the dealer.

This claim has no merit. The State Legislature enacted what is now section 53071 in

direct response to an invitation extended by the California Supreme Court in Galvan, 70 Cal.2d 851. Galvan involved a challenge to the constitutionality of a San Francisco ordinance requiring registration of almost all firearms possessed within San Francisco. One of the bases for the challenge was a claim that the law directly conflicted with Penal Code section 12026, which provided that no license or permit would be required for one to purchase, own, possess, or keep any firearm in one's home.[8]

After determining that the registration requirement was not a license or permit requirement, and therefore did not directly conflict with section 12026, the court examined the statutory scheme relating to firearms to determine whether the ordinance was preempted. It found that although this scheme was extensive, and some areas of weapons control had been preempted, it could not "be said to show that the entire field of gun or weapons control has been so completely covered as to indicate an intent on the part of the Legislature to make gun registration exclusively a subject of state concern." Id. at 862-863.[9]

In response to Galvan, the state Legislature enacted Government Code section 9619, later recodified as section 53071, specifically preempting the area of regulation of licensing and registration. Significantly, the Legislature did not preempt the entire field of firearm regulation, despite the obvious opportunity. Subsequently, appellate courts have interpreted the preemptive effect of section 53071 in three cases. In Olsen v. McGillicuddy, 15 Cal.App.3d 897 (1971), the court addressed whether state law expressly or by implication preempted a Petaluma ordinance providing that a parent having the care of any minor shall not permit the minor to possess or fire a BB gun within the city. The court held there was no preemption, stating:

> Following Galvan, the Legislature in 1969 enacted Government Code section 9619 and made clear its intent to "occupy the whole field of regulation of the registration or licensing of . . . firearms . . . ." Despite the opportunity to include an expression of intent to occupy the entire field of firearms, the legislative intent was limited to registration and licensing. We infer from this limitation that the Legislature did not intend to exclude municipalities from enacting further legislation concerning the use of firearms.

Id. at 902.

> The Legislature again responded to this judicial "invitation" by enacting Government Code section 53071.5, preempting the area of regulation of imitation firearms, but once again did not go so far as to expressly preempt the entire field of firearms or weapons control. This is strong evidence of a legislative acceptance of the court's narrow construction of section 53071 and its relative preemptive effect.

Similarly, in Sippell v. Nelder, 24 Cal.App.3d 173 (1972), the court was asked to determine whether a pair of San Francisco ordinances, which together required anyone seeking to purchase a concealable firearm to obtain a permit from the city's police chief, were preempted by section 53071. The court held that the permit requirement was tantamount to a license requirement, and that, therefore, "the ordinance here involved, insofar as it purports to regulate the licensing or registration of firearms, is invalid." Id. at 177.[10] The court relied not upon a

finding of preemption of the field of firearm regulation, but rather upon the express preemption of firearm licensing, thereby supporting a narrow construction of section 53071's preemptive effect.

Finally, in Doe v. City and County of San Francisco, 136 Cal.App.3d 509, the court dealt with a San Francisco ordinance banning possession of all handguns, except by persons licensed to possess a handgun under Penal Code section 12050 (dealing generally with concealed weapons permits). Under the terms of the ordinance, a person wishing to possess a handgun in their residence could do so only if they had a license issued pursuant to Penal Code section 12050. However, because Penal Code section 12026 provided that no permit or license would be required for such possession, the court concluded that the ordinance in substance "creates a licensing requirement where one had not previously existed." Id. at 517. As a result, the ordinance acted in a field that was expressly preempted by Government Code section 53071.[11] The Doe court also concluded that the relevant case law, including the cases discussed above, suggests that "the Legislature has not prevented local governmental bodies from regulating all aspects of the possession of firearms." Id. at 516. That is, there is no express preemption of all firearm regulation.

The common thread woven through these court opinions and the related legislative action is one of limitation. Each of the three appellate courts that have interpreted the preemptive effect of Government Code section 53071 concluded that the section expressly preempts only the regulation of registration and licensing of firearms. These cases make clear that section 53071, as well as section 12026, will be strictly construed; unless a local ordinance imposes a license or permit requirement on the purchase, possession or carrying of a firearm, it will not be held invalid as expressly preempted by these sections. The proposed ordinance would not impose such a requirement, therefore would not be expressly preempted by state law.

E. The Proposed Ordinance Would Not Be Impliedly Preempted By State Law

If a local law enters an area that is fully occupied by state law, when the State Legislature has implied an intent to fully occupy the area, that law is preempted by state law. Sherwin-Williams, 4 Cal.4th at 897-898. The California Supreme Court has established a three-pronged test for judicial analysis of a claim of implied preemption. In re Hubbard, 62 Cal.2d 119, 128 (1964), overruled on other grounds by Bishop v. City of San Jose, 1 Cal.3d at 63, fn. 6. If the criteria of any one of the three prongs is met, the local legislation is impliedly preempted, and therefore invalid. The three prongs are:

(1) The subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern;

(2) The subject matter has been partially covered by general law couched in terms that clearly indicate a paramount state concern that will not tolerate further or additional local action; or

(3) The subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of the local ordinance on the transient citizens

of the state outweighs the possible benefit to the municipality.

None of the three prongs are met here, and therefore the proposed ordinance would not be preempted by implication. The three cases discussed above (Galvan, Olsen, and Doe) are the only published cases in which a California court addressed the issue of preemption of regulation of firearms. Not one of these courts found that the State Legislature intended to fully occupy the entire field of firearm regulation. Indeed, the reasoning and holdings of these cases, the response of the Legislature to these cases, and existing legislation in the area of firearms, strongly suggest just the opposite: that the Legislature intended to leave the field open to local regulation, except in expressly defined areas. The following is an analysis of the validity of the proposed ordinance under the three-pronged test for implied preemption.

1. Regulation of Sales of Firearms is not Exclusively a Matter of State Concern

In order for a court to invalidate the proposed ordinance under the first prong of the test, it would have to find that the area of firearm sales is exclusively a matter of state concern. There is little support for such a finding. In Galvan, discussed above, the plaintiff argued that San Francisco's ordinance requiring handgun registration was preempted because the field of handgun registration, although not independently preempted, fell within the broad field of gun or weapons control, which he argued was preempted. He based this argument on the "registration statutes . . . coupled with the large number of statutes dealing with guns and other weapons." Galvan, 70 Cal.2d at 860. The California Supreme Court rejected this argument, stating:

> Although Galvan cites a great number of statutes relating to weapons, these statutes do not show that the entire area of gun or weapons control has been so fully and completely covered by general law, in the words of Hubbard, "as to clearly indicate that [the subject] has become exclusively a matter of state concern." [Citations omitted.]

Id. at 860. Listing and referring to the dozens of statutes dealing with guns or other weapons, the court stated that their existence "does not by itself show that the subject of gun or weapons control has been completely covered so as to make the matter one of exclusive state concern." Id. at 861.

There was no question after Galvan that the field of gun or weapons control was not preempted as being exclusively a matter of state concern. As discussed above, the Legislature's response was to enact section 53071, expressing an intent to preempt not the entire field of gun or weapons control but the limited field of licensing and registration of firearms.

Appellate courts in subsequent cases have consistently limited section 53071's preemptive effect to just what it said it covered: the registration and licensing of firearms. The first court to do so inferred from this limited expression by the Legislature "that the Legislature did not intend to exclude municipalities from enacting further legislation concerning the use of firearms." Olsen v. McGillicuddy, 15 Cal.App.3d at 902. Because the local ordinance in Olsen

dealt with imitation firearms, and not registration or licensing, the court found that section 53071 did not preempt the ordinance. The court also noted that "[d]espite the wide coverage by the state on the subject of firearms, it does not follow that the state wished to exclude regulations by a municipality which considered more stringent regulation necessary in its particular community." Id. Once again, the Legislature's response was to enact legislation that expressly preempted a very narrowly defined field, that of imitation firearms.

When an appellate court did find preemption of a local firearm ordinance, it was because the local ordinance required a permit to purchase a handgun, which was expressly preempted by section 53071 (the permit was found to be tantamount to a license). Sippel v. Nelder, 24 Cal.App.3d at 177. Even the Doe court, which stated in dicta that regulation of residential handgun possession was preempted, invalidated San Francisco's ban on handgun possession based on a finding that it created a de facto licensing requirement, which was a field expressly preempted by section 53071.

In addition to the appellate courts' apparent unwillingness to stray from the California Supreme Court's holding in Galvan, that firearm control was not exclusively a matter of state concern, there are numerous indications in the statutory scheme dealing with weapons that strongly support this view. One such statutory indication was noted by the court in Galvan, which observed that "there are some indications that the Legislature did not believe it had occupied the entire field of gun or weapons control. Thus, the Legislature has expressly prohibited requiring a license to keep a concealable weapon at a residence or place of business. (Penal Code section 12026.) Such a statutory provision would be unnecessary if the Legislature believed that all gun regulation was improper." Galvan, 70 Cal.2d at 860.

In addition, several sections of the California Penal Code include language that strongly supports an inference that local action that is not merely ministerial, but discretionary, is not only permitted but expected. For example:

(a) Section 12071(a)(1)(B) provides that to fall under the statute's definition of "dealer" one must, among other things, have "any regulatory or business license, or licenses, required by local government." (Emphasis added.)

(b) Section 12071(a)(2) provides that the "duly constituted licensing authority of a city . . . shall accept applications for, and may grant licenses permitting, licensees to sell firearms . . . . " (Emphasis added.)

(c) Section 12071(a)(6)(C) provides that a license granted by the duly constituted licensing authority of any city shall be in one of several forms, including the following: "A letter from the duly constituted licensing authority . . . stating that the jurisdiction does not require any form of regulatory or business license or does not otherwise restrict or regulate the sale of firearms." (Emphasis added.)

(d) Section 12071(d) provides in part that the "licensing authority may grant an exemption from compliance" with another section's firearm storage requirements "if the licensee is unable to comply with those requirements because of local

ordinances . . . ."

The plain language in each of these sections is completely consistent with the case law discussed above, holding that the Legislature did not intend to exclude municipalities from enacting further legislation concerning firearms, particularly firearm sales. To hold otherwise would render the above provisions meaningless, indeed, nonsensical, which certainly was not the Legislature's intent.

Despite what we believe to be strong statutory and decisional evidence that state law has not so fully and completely covered the regulation of firearms as to "clearly indicate that it has become exclusively a matter of state concern," the California Attorney General has twice issued opinions that suggest otherwise. Although an opinion of the Attorney General is not binding on an appellate court, it is considered to be persuasive authority, and in the absence of applicable case law will be given great weight. California Assn. of Psychology Providers v. Rank, 51 Cal.3d 1, 17 (1990). Opinions of the Attorney General are sought and relied upon by numerous public and private entities across the state, on a multitude of issues. As a result, whatever the status of the case law, they must be considered.

The first opinion was issued by Attorney General George Deukmejian in 1982. In anticipation of the handgun ban in San Francisco that ultimately was the subject of the Doe case, State Senator Richardson requested an opinion on whether a California city has the legislative authority to prohibit the possession of operative handguns within the city, except by law enforcement officers. Applying the three-pronged test for implied preemption, the Attorney General found that the proposed ban on possession met all three tests for implied preemption, and would therefore be invalid.

With respect to the first prong, the Attorney General listed several state statutes dealing with possession of various weapons, stated that the licensing and registration schemes presuppose that buyers and sellers are permitted to possess guns, and then concluded that the field of possession of handguns was "so fully, completely and comprehensively covered by general state law as to clearly indicate a legislative intent to occupy the field." 65 Cal.Ops.Att'y Gen. 457, 464 (August 3, 1982). However, the Attorney General's analysis does not include a discussion of how the listed statutes amount to the subject of possession being "so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern." In re Hubbard, 62 Cal.2d at 128.

In finding that the second prong was met, the Attorney General reasoned that the Legislature's approach was to generally allow possession, with some exceptions, while the approach of the proposed ordinance was to generally disallow possession, with some exceptions. From this, he concluded not that state law clearly indicated a paramount state concern that will not tolerate further local action, but that a conflict in jurisdiction and enforcement would be inevitable. However, because the Attorney General did not discuss his analysis of the application of the second prong of the implied preemption test, it is difficult to determine how much weight, if any, to give his conclusion on this point.

Finally, the Attorney General found that the third prong was also met, based on a finding

that the ordinance would have adverse effects on transient citizens outweighing local benefits. The conclusion appears to be based on the assumption that if there is a burden on transient citizens, the local ordinance is invalid. Again, he does not discuss what the burdens and benefits would be, or how they weigh against each other. Although the Attorney General may be correct on this point when the question involves a ban on handgun possession, we believe it is less likely when the question involves a limited ban on handgun sales.

In 1994, Attorney General Dan Lungren was asked for an opinion on whether State law would preempt a local ordinance banning the sale of certain low caliber ammunition. 77 Cal.Ops.Att'y Gen. 147 (July 7, 1994). In the course of reaching his conclusion that such a ban was preempted, the Attorney General stated:

> Regarding the area of *firearms sales*, we find that the Legislature has enacted a comprehensive and detailed regulatory scheme [Penal Code] (12070-12084) which requires the licensing of firearms dealers, places numerous restrictions on firearms sales, and mandates the furnishing of identification information by each purchaser. The state has so thoroughly occupied this field that we have no doubt that regulating firearms sales is beyond the reach of local governments. [Citations omitted.] Cities and counties have been charged with the execution of the state's program for the licensing of firearms dealers, but their role is ministerial in nature.
> (12070.)

Id. at 150.

Although there is a logical nexus between firearms and ammunition, the question of preemption of firearm sales was not before the Attorney General. This may explain his fairly brief analysis of that issue. He does not discuss how he reaches the conclusion that a city's role is ministerial under the provisions of section 12070, when the language of those provisions, discussed above, defines a city's role in many instances as discretionary and not merely ministerial. Without such a discussion, it is difficult to evaluate how his conclusion would be applied to our City's proposed ban on "Saturday Night Specials."

As noted above, an opinion of the Attorney General will be given great weight in the absence of controlling case law. There is case law, however, addressing preemption of the regulation of firearms, and it is not in general agreement with either of these Attorney General opinions. Although we believe this case law is controlling, it is possible a court would disagree and follow the reasoning of the Attorney General. As a practical matter, an opinion of the Attorney General should be given serious consideration by a reviewing court. However, even assuming a court were to accept the Attorneys General's conclusions, the ordinance considered by Attorney General Deukmejian was a broad ban on possession. San Diego's proposed ordinance is much different in that would ban only the sale of a particular type of handgun, and would not make it illegal for any individual to possess a firearm.

In summary, there is an argument to be made that the sheer number of statutes dealing with firearm sales, bolstered by the opinions of two Attorneys General, is sufficient evidence to support a finding of legislative intent to fully occupy the field of firearm sales to the exclusion

local legislation. However, we believe the current case law and the language of those statutes discussed above do not support such a finding.

2. Regulation of Sales of Firearms is not a Paramount State Concern that will not Tolerate Further or Additional Local Action

In order for a court to invalidate the proposed ordinance under the second prong of the test, it would have to find that area of firearm sales has been partially covered by State law couched in terms that clearly indicate a paramount state concern that will not tolerate further or additional local action. It seems clear that firearm control, and firearm sales specifically, have been "partially" covered by state law. However, it is equally clear that this state law is not "couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action." In re Hubbard, 62 Cal.2d at 128 (emphasis added). Indeed, as discussed above, Penal Code section 12071 is couched in terms that clearly indicate that although there may be a state concern, it not only will tolerate additional local action, but provides for it.

As the California Supreme Court in Galvan stated:

> The issue of "paramount state concern" also involves the question "whether substantial, geographic, economic, ecological or other distinctions are persuasive of the need for local control, and whether local needs have been adequately recognized and comprehensively dealt with at the state level." [Citations omitted.] That problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority. [Citations omitted.]

Galvan, 70 Cal.2d at 863-864. The court went on to note that the laws of the state "may not be adequate to meet the demands of densely populated municipalities; so that it becomes proper, and even necessary, for municipalities to add to state regulations provisions adapted to their special requirements." Id. at 864.

> With the California Supreme Court clearly acknowledging that the need for firearms regulation will likely differ from community to community, it is unlikely that an appellate court would find that there exists a "paramount state concern." Moreover, even assuming a state concern, it is even less likely that a court would ignore the plain language of Penal Code section 12071 and find that the statutory scheme would not tolerate additional local action.

3. A Ban on the Sale of "Saturday Night Specials" is not of Such a Nature that the Adverse Effect of the Local Ordinance on the Transient Citizens of the State Outweighs the Possible Benefit to the City

A ban on the sale of a particular type of firearm would have little if any effect on the transient citizens of the state. Unlike a possession ban, which might affect some citizens as soon as they enter the banning city's boundary, a ban on the sale of certain firearms would have no real effect. An individual wishing to purchase a "Saturday Night Special" could simply go to a city or county where they were legally sold. Given that under current law the individual would have to wait fifteen days before taking the possession of the gun, the delay caused by having to go to a nearby city would be of no significance. In any event, such a ban would have no effect on the transient citizen that it did not also have on the local citizens.

Even if one were able to articulate an adverse effect on transient citizens, before the ban would be found invalid, this adverse effect would have to outweigh the possible benefit of the ban to the City. Given the likelihood that such a ban would be adopted pursuant to a finding of the City Council that it would benefit the City and its people, it is very unlikely that a court would find that the proposed ordinance would meet this prong of the test for implied preemption.

Based on the relevant case law, the statutes dealing with firearms, and the reasoning set forth above, we believe that the proposed ordinance would not be invalid as legislating in a field preempted by state law.

In sum, we are of the opinion that, while arguments can be made either way, the proposed ordinance would not be preempted either under the "municipal affairs" or "police power" doctrine.

III. CONSTITUTIONAL ARGUMENTS

A. The Right To Keep And Bear Arms Under The Second Amendment

The Second Amendment to the United States Constitution states: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." U.S. Const. amend. II. One may argue that the proposed ban on the sale of Saturday Night Specials would violate the Second Amendment by infringing on one's right to keep and bear arms. The basic theory of the argument is that the Fourteenth Amendment incorporates the Second Amendment such that it limits the actions of states as well as those of Congress, and that the right to bear arms exists to protect the individual as well as to assist in the common defense through a well-regulated militia. See, e.g, Fresno Rifle and Pistol Club, Inc. v. Van De Kamp, 965 F.2d 723 (9th Cir. 1992). This argument has no merit.

1. The Second Amendment Right to Keep and Bear Arms is Held by the States, Not by Individuals

It has been fairly well-settled by the courts that the right protected by the Second Amendment is one held by the states, and not by individual private citizens. In the seminal case

on this issue, in which the United States Supreme Court upheld a conviction under the National Firearms Act for transporting a sawed-off shotgun in interstate commerce, the defendant claimed that the Second Amendment protected his possession of the shotgun. The Court rejected his argument, finding that the right to keep and bear arms is meant to protect the right of the states to keep and maintain an armed militia. The court stated:

> In the absence of any evidence tending to show that possession or use of a [sawed-off shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

United States v. Miller, 307 U.S. 174, 178 (1939). Because the Amendment's second clause declares that the goal is to preserve the security of a free state, "it is only in furtherance of state security that 'the right of the people to keep and bear arms' is finally proclaimed." Hickman v. Block, 81 F.3d 98, 102 (9th Cir. 1996). Hickman challenged the denial of his application for a concealed weapons permit, arguing, among other things, that the permit issuance policy violated his Second Amendment right to bear arms. The court rejected this argument, stating "[w]e follow our sister circuits in holding that the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen." Id. at 101. The court concluded that "[f]ollowing Miller, it is clear that the Second Amendment guarantees a collective rather than an individual right." Id. at 102 (citations omitted).

2. The Second Amendment Limits the Actions of Congress, Not of the States

It is equally settled that the Second Amendment prohibits infringement by the United States government, and not by the governments of the various states. Regarding the right to bear arms, the United States Supreme Court has stated:

> The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government . . . .[Emphasis added.]

United States v. Cruikshank, 92 U.S. 542, 553 (1875). The Supreme Court confirmed this position eleven years later in Presser v. Illinois, 116 U.S. 252, 264-265 (1886). More recently, the Ninth Circuit Court of Appeal, in considering a Second Amendment challenge to California's Assault Weapons Control Act, stated: "Until such time as Cruikshank and Presser are overturned, the Second Amendment limits only federal action" and "stays the hand of the National Government only." Fresno Rifle and Pistol Club, Inc. v. Van De Kamp, 965 F.2d 723, 731 (9th Cir. 1992).[12] The Ninth Circuit Court of Appeal reaffirmed this position in April of 1996 in Hickman v. Block, 81 F.3d 98 (9th Cir. 1996).

> Although there will continue to be strong disagreement in this area, concerning the proposed ordinance banning Saturday Night Specials, the Second Amendment is

irrelevant.

B. The Equal Protection Clause

Both the California and United States Constitutions guarantee the right of equal protection of the laws.[13] Opponents to the ban could argue, as they did in West Hollywood, that the proposed ordinance violates the equal protection rights of firearms dealers in the City. This argument fails. In considering a challenge to a law based on an alleged equal protection violation, a court generally will apply one of three standards of review.[14] The first and most typical standard of review asks if the challenged classification bears a rational relationship to a governmental purpose that is not prohibited by the Constitution. This is the standard likely to be applied to an equal protection challenge to the proposed ordinance. Under this standard, such a challenge is very likely to fail, due to the ease with which the City could show that banning the sale of Saturday Night Specials by gun dealers is rationally related to protecting consumers from injury and citizens from crime.

A more strict standard of review applies when the challenged classification curtails a fundamental right, such as free speech, or imposes a burden on a suspect class, such as a minority race. Under this "strict scrutiny" standard of review, the question is whether the classification is necessary to further some compelling governmental interest. The proposed ban on the sale of "Saturday Night Specials" would not impose a burden on a suspect class, for it would make no distinctions based on race, national origin, religion, or the like. Instead, it affects all gun dealers in the same way, irrespective of whether as individuals they fall within a suspect class.

Further, the proposed ordinance would not likely be found to curtail a fundamental right, for there is no fundamental right to sell a specific type of firearm. Although one could argue that the ban infringes on the gun dealers' First Amendment right to free speech, in that the sale of a handgun necessarily involves some speech in addition to conduct, in our opinion it is unlikely that the First Amendment would be implicated.

IV. DEFINITION OF "SATURDAY NIGHT SPECIAL"

It becomes clear early in one's analysis of the various ordinances, definitions and opinions relating to "Saturday Night Specials," that there does not exist one ordinance, one definition, or one opinion, that will go unchallenged. The deep-seated ideological differences between those who support and those who oppose the adoption of the proposed ordinance are even more pronounced when the issue is whether or how one can define "Saturday Night Special."

The Public Safety & Neighborhood Services Committee used as a starting point the ordinance and definition used by West Hollywood. This was helpful in at least two ways. First, the drafters of the West Hollywood definition included Whit Collins, a firearms consultant who thoroughly and persuasively articulates the position of those supporting the "Saturday Night Special" sales ban. He and others in West Hollywood have been very helpful in providing us with technical, legal and historical support for the proposed ordinance.

Second, the West Hollywood ordinance is being challenged in court. As noted above, the challengers to the ordinance have filed a notice of appeal of the decision of the Los Angeles Superior Court's Appellate Department rejecting the opponents' arguments that the ordinance was invalid. They based their challenge on several theories, the most formidable being that it acts in a field preempted by State law. Once the appeal runs its course, we will have a binding appellate court decision, which will provide guidance to the Committee in its consideration of an ordinance for San Diego.

Below is an analysis of the West Hollywood definition, including the views both of its critics and of its supporters, a summary of the Federal import guidelines relating to "Saturday Night Specials," and a discussion regarding the definition proposed by some of the local firearms dealers.

A. The West Hollywood Definition and Roster

In February of 1996, the City of West Hollywood enacted an ordinance banning the sale of "Saturday Night Specials," with subsection (b) of the ordinance setting forth the definition of "Saturday Night Special."[15] This definition is divided into three sub-definitions. If a firearm comes within one or more of the three sub-definitions, it is placed on the "Saturday Night Special Roster," which is a list of all firearms the sale of which are banned under the ordinance. Opponents of the proposed ordinance have leveled a great deal of criticism at both West Hollywood's definition and the Roster, while the proponents of the ordinance, including the drafters and defenders of the West Hollywood ordinance, strongly argue that these criticisms are inaccurate, agenda-driven products of a NRA-based defense of gun manufacturers.

In attempting to construct a workable definition of "Saturday Night Special," this Office, in conjunction with the San Diego Police Department, held two public forums at which we sought input regarding how we should define "Saturday Night Special" for purposes of the proposed ordinance. To the first forum we invited more than one hundred firearms dealers, as well as others whom we believed were opposed to the proposed ordinance but interested in being heard on this issue. To the second forum we invited those persons whom we understood supported the proposed ordinance.

The disagreement between these two groups goes well beyond the question of whether it would be good policy for the City to adopt an ordinance banning the sale of a particular class of handgun, to the more fundamental question of whether it is even possible to meaningfully define "Saturday Night Special." Those opposed to the ordinance argue that a) the criteria set forth in the definition are meaningless as they relate to firearm safety, and manifest a lack of technical knowledge on the part of the drafters; b) none of the handguns on West Hollywood's Roster are unsafe, but rather merely have a shorter useful life than a more expensive firearm; and c) the definition encompasses not only the firearms on the Roster, but a great many high quality, expensive handguns, including some used by law enforcement officers. Those supporting the ordinance disagree, believing that the definition is technically precise and addresses exactly those guns that have proved to be dangerous to the user, and more likely to be used in crime.

Below we address whether "Saturday Night Special" can be defined, with reference to the

West Hollywood definition (separated into its three sub-definitions), as well as the arguments of the opposing camps.

1. Substandard Materials and Cast-Alloy Components

The first sub-definition provides that "Saturday Night Special" includes "pistol, revolver, or firearm . . . which contains a frame, barrel, breechblock, cylinder or slide that is not completely fabricated of heat treated carbon steel, forged alloy or other material of equal or higher tensile strength." The drafters' intended to target by way of this section those handguns built on a main frame made of materials having less combined tensile strength than carbon steel, especially those having a composite assembly of soft metal (e.g., zinc) castings, which need steel inserts (e.g., steel barrel inserts or breechblock faces), to contain the ballistic force created when the gun is fired. Proponents of the ban believe that although these modifications strengthen the gun, the gun is still susceptible to blowing apart, and the underlying soft metal will nevertheless degrade at a faster rate than would carbon steel, resulting in a shorter reliable and safe life of the gun. This in turn results in an increased risk of the gun jamming, misfiring, or exploding.

Opponents argue that this criterion is misleading and based on technical ignorance. They believe that heat treated carbon steel is not strong per se, since a very high carbon content can result in brittle steel, and carbon steel can be heat treated in various ways, not all of which increase the strength of the metal. As a result, one could make a gun out of heat treated carbon steel (and therefore not covered by the definition of "Saturday Night Special") that is of poor quality and low tensile strength. Further, they argue, allowing as an alternative to carbon steel any forged alloy is misdirected. While forging metal may or may not strengthen the metal, most modern firearms manufacturers do not forge the metal, but rather cast or stamp it. In addition, because an alloy can be made of a variety of metals, being an alloy does not in itself make a material strong, safe, or reliable, whether or not it is forged. Moreover, because "heat treated carbon steel" and "forged alloy" are not in themselves useful in determining material strength, and do not have a standard tensile strength, allowing the use of any "other material of equal or higher tensile strength" is meaningless.

The opponents further argue that, because this definition is meaningless as it relates to safety, it encompasses a number of handguns that even the proponents of the ban state they do not intend to target. These include all four of the primary duty weapons issued by the San Diego Police Department to its officers, due to their frames being made of aluminum,[16] as well as the Glock used by the Sheriff's Department, due to its frame being made of a nylon polymer.[17] Based upon the widely divergent technical interpretations of the terms used in this sub-definition, the committee is left with making a policy decision regarding whom to believe on the question of which guns are covered by this sub-definition.

2. High-Pressure Blow-Back Actions

The second sub-definition provides that "Saturday Night Special" includes any "semi-automatic pistol which is not originally equipped by the manufacturer with a locked-breech action," and is "chambered for cartridges developing maximum permissible breech pressures above 24,100 Copper Units of Pressure as standardized by the Sporting Arms and Ammunition

Manufacturers Institute." This sub-definition is intended by the drafters to address concerns regarding the expulsion of hot gases from a handgun when it is fired.

When a semi-automatic pistol is fired, a tremendous amount of pressure (sometimes measured in Copper Units) immediately builds within the chamber, propelling the round through and out of the barrel. During this fraction of a second, the pressure forces the slide back toward the shooter, opening the breech. If the breech opens when the pressure in the chamber is still high, the hot gases may be expelled at a high velocity into the face or eyes of the shooter. To lessen the likelihood of this happening, and to increase the power and propulsion of the round, the designs of most semi-automatics include some mechanism by which the opening of the breech is delayed just long enough to allow the gases to escape or dissipate. On a true locked-breech action, such as that of a bolt-action rifle, the breech will not open until the shooter manually opens it (or, with some handguns, propelled gas opens the lock). On a semi-automatic pistol, locked-breech action refers typically to an action where the breech is "locked" until the slide moves back and activates an unlocking mechanism. Mechanically, this can be effected in various ways, but the result is the same: the opening of the breech is delayed just long enough to let the gases dissipate and the pressure decrease.

The proponents of the "Saturday Night Special" ordinance argue that on a high-caliber semi-automatic pistol, anything short of the locked-breech action discussed above places the shooter at an unacceptable risk of injury from the escaping hot gases. They state that the semi-automatics that do not have locked-breech actions are built from designs intended for low-caliber firearms, not the high-caliber handguns we see them on today, such as some .40 caliber, .45 caliber, and 9 millimeter semi-automatics. As a result, when one of these guns is fired, it is less likely to be able to contain the higher breech pressure created by the larger caliber ammunition, because it was not designed to do so. This, they argue, creates an unacceptable risk of injury by way of the gun exploding or hot gases being blown into the shooters face.

The opponents of the ordinance argue that this sub-definition ignores alternatives to the locked-breech action that are just as safe or safer. Most of the semi-automatics that do not have a locked-breech action have what is called a blow-back[18] action. These inertia-locked actions rely upon resistance built into the design of the firearm to delay or slow down the initial backward movement of the slide when the firearm is discharged. This can be accomplished through various means, including the use of a slide constructed of a heavy metal, such as zinc; a heavier, higher-tensioned recoil spring; internal roller plates to directly slow the slide; or a combination of these types of mechanisms. The opponents argue that on higher caliber handguns, manufacturers simply utilize, or increase the use of, one or more of these alternative means. They believe that potential liability is sufficient incentive for the manufacturers to produce safe handguns that will not expel hot gas into the shooter's face or eyes.

There appear to be many high quality, expensive handguns that would fall within this sub-definition, including the Heckler & Koch VP70-Z, the Spanish Astra (Models 1921, M-400, and M600), and the Walther PPK .380. Once again, due to the strong disagreement between the experts in the field over this point, the committee is left to decide whom to believe.

3. Derringers and other Very Small Handguns

The third sub-definition provides that "Saturday Night Special" includes any pistol, revolver, or other concealable firearm that:

(a) uses an action mechanism which is substantially identical in design to any action mechanism manufactured in or before 1898 that was originally chambered for rimfire ammunition developing maximum permissible breech pressures below 19,000 Copper Units of Pressure as standardized by the Sporting Arms and Ammunition Manufacturers Institute; and

(b) is chambered to fire either center-fire ammunition or rimfire ammunition developing maximum permissible breech pressures above 19,000 Copper Units of Pressure as standardized by the Sporting Arms and Ammunition Manufacturers Institute; and

(c) is not originally equipped by the manufacturer with a nondetachable safety guard surrounding the trigger; or

(d) if rimfire, is equipped with a barrel of less than 20 bore diameters in overall length protruding from the frame.

This sub-definition is intended to cover those firearms that are very small, are chambered to fire relatively large caliber ammunition, and either lack a trigger guard or have a very short barrel. These guns are targeted because the drafters of the definition believe that these very small guns, such as derringers, are built using designs over a century old, and not suitable for anything but the low caliber ammunition originally used with these designs. The tremendous chamber pressure produced by the larger caliber ammunition will stress or crack the metal, and even make the firearm explode. They also believe that the short barrels make the firearm less accurate, therefore less suitable for protection, and more easily concealable for purposes of using the handgun for illegal purposes. The handguns that are on the West Hollywood Roster as a result of this sub-definition are primarily derringers that lack trigger guards, and very small medium caliber handguns with short barrels.

The opponents of the ordinance argue that this sub-definition is based on the false premise that these handguns are unsafe due to the described features. For example, although it is true that most of the derringers lack trigger guards, virtually none of the derringers can be fired without first pulling the trigger back into a cocked position. Of course, carrying a derringer in a pocket or holster after it was cocked would be very dangerous. However, that is a user safety issue, and not a handgun safety issue. Used improperly, or ignorantly, any firearm becomes a risk to the user and others.

Further, the opponents argue, the fact that the basic design was developed a century ago means nothing with regard to safety. Firearm manufacturers have accommodated the increase in maximum breech pressures (higher caliber ammunition) by either using stronger materials, or by increasing the amount of material, such as using more zinc alloy in the frame and slide so as to increase the bulk and weight of those parts of the handgun absorbing the pressure.

There are firearms experts in favor of the West Hollywood definition, and there are those opposed to it. Notably, Whit Collins, a nationally-known firearms consultant, assisted West

Hollywood in the preparation of its ordinance and was the primary drafter of its definition. He has assisted numerous other cities around the state with their efforts to ban "Saturday Night Specials," and provided information to our office on this issue. He is a strong supporter of the definitions discussed above, and would attest under oath to their accuracy. On the other hand, Eugene Wolberg, the Senior Firearms Examiner for the San Diego Police Department's Laboratory Firearms Unit, believes that the definitions are based on inaccurate assumptions regarding firearms and their safety, display a lack of technical expertise on the part of the drafter, and are worded so broadly that they would ban the sale of numerous high quality firearms.

Despite the disagreement, the City could choose to adopt the West Hollywood definition (or some variation thereof), and prepare a Roster. However, which handguns end up on the Roster will depend to a great degree upon who is applying the definition. With the positions of the relevant experts being diametrically opposed to each other, there is likely to be a challenge not only to the ordinance itself, but to any decision on which guns fit the definition and belong on the Roster. It is fair to say that if the proposed ordinance is passed, and we use our in-house expert, Mr. Wolberg, to establish and maintain the Roster, the Roster would include many high-quality handguns, including all four issued by the Police Department. Based upon his interpretation of the West Hollywood definition, he would have no choice but to include these firearms.

On the other hand, if the City chose to hire an outside consultant, such as Mr. Collins, to establish and maintain the Roster, and to appear in court in defense of the definition, the Roster would likely coincide with the West Hollywood Roster. This route would be expensive (due to consulting fees), and could put the City in the position of facing its own senior firearms expert in court, who could be subpoenaed for expert testimony by any challengers to the ordinance. Once again, the Committee is the position of having to decide upon which expert to rely on this very complex issue.

B. Federal Import Criteria

Federal law prohibits the import of certain firearms, including handguns, into the United States unless the Secretary of the Treasury has authorized their import (with some exceptions). 18 U.S.C. section 925(d)(3). The Secretary will authorize for import those handguns that it has determined are generally recognized as particularly suitable for, or are readily adaptable to, sporting purposes. Sporting purpose potential and importability are determined according to standards set by the Bureau of Alcohol, Tobacco and Firearms (ATF). These standards are based upon recommendations of recognized ordnance experts employed by ATF, and the Treasury Department's Firearms Evaluation Panel (composed of noted experts in the field). The Secretary uses ATF Form 4590, Factoring Criteria for Weapons, in classifying handguns for importation purposes.

ATF Form 4590 sets forth a point system by which a firearm may qualify for import by scoring the required number of points (75 for pistols; 45 for revolvers), meeting the applicable prerequisites, and, if a revolver, passing a drop safety test. The points are scored for features such as overall length, frame construction, weight, caliber, safety features, and miscellaneous equipment (such as would indicate a target shooting use). The test favors those firearms that are

obviously target pistols, or are relatively large, of higher caliber, constructed of cast or forged steel or alloy, and equipped with several manual or passive safety devices.

The import prerequisites for a pistol are: (1) it must be equipped with a positive manually operated safety device; and (2) the combined length and height must not be less than ten inches, with the height being at least four inches and the length being at least six inches. The prerequisites for a revolver are that it must (1) pass a drop safety test; (2) have an overall frame length of at least four and one-half inches; and (3) have a barrel length of at least three inches.

When this law was enacted in 1968, it was hailed by some as a means of keeping "Saturday Night Specials," and their attendant dangers, from being imported into the United States. It also was criticized by others as a protectionist law, shielding local firearms manufacturers from foreign competition. Whatever its intent, it has served to decrease the importation of a great many handguns, while at the same time, some argue, increasing the domestic production of "Saturday Night Specials." Indeed, it is likely that many of the handguns produced in the United States, including most of those on the West Hollywood Roster, would fail to secure authorization of import from the Secretary of the Treasury. Due to the small size and advanced nonmetal materials used in many of the more expensive domestically-produced handguns, it is also likely that many high-quality handguns not on the West Hollywood Roster would be prohibited from import.

The City could enact an ordinance similar to the Federal law, under which a gun manufacturer or dealer wishing to sell a particular handgun would first be required to submit a sample of the firearm to the City for scoring under a system similar to that used by the Secretary of the Treasury. Although it would face the same legal challenges, this approach is in some respects the opposite of the West Hollywood approach, in that rather than establish a roster of banned firearms, the City would establish a roster of approved firearms. Unfortunately, this would not eliminate the problem, discussed above, of the disagreement among the firearms experts regarding what factors would be relevant to whether a handgun is safe, and, even if a set of factors is agreed upon or adopted, how to interpret or apply the factors in evaluating a particular handgun. In addition, it likely would be time and labor intensive, especially when first being implemented, and would require permanent monitoring.

C. The Firearms Dealers' Proposed Definition

During the public hearing conducted on February 21, 1997, the local firearms dealers stated their belief that the West Hollywood definition was neither meaningful nor accurate, for all the reasons discussed above. In addition, they proposed an alternative definition, with the caveat that it may need some adjustments after further analysis. Because they believe that there is no such gun as a "Saturday Night Special," they consider their definition a more meaningful and useful description of firearms the sale of which would be prohibited. They would agree to prohibit the sale of:

Those handguns that have failed proof testing conducted in accordance with the standards and procedures established or utilized by the Sporting Arms and Ammunition Manufacturers Institute (SAAMI), or are not equipped with any safety device or feature.

The dealers would except from this ban certain firearms, such as relics, antiques, and the like. It was unclear who would conduct the testing, but there would be a requirement that each make and model of handgun sold would have to pass the proof test. Proof testing is conducted by loading a round with substantially more gunpowder than the firearm is intended to handle, and firing it. The goal is to subject the firearm to nearly twice as much breech pressure than it would be subject to during normal use. If it survives without any damage or metallurgical change, it is deemed to be able to safely handle the rounds it was designed to fire.

> Although the dealers include in their definition those handguns lacking any safety features or devices, they have a fairly expansive view of what constitutes a safety device or feature. They would find sufficient virtually anything that serves to make the handgun more safe than it would be without it. For example, if the trigger is particularly resistant, such that it requires a hard pull to fire the gun, this "passive safety device" would keep the handgun outside the scope of their definition. Similarly, a derringer may lack a trigger guard, and have a hair- trigger, but if one must cock the hammer in order to be able to fire, the derringer would pass muster under their definition.

Another significant aspect of their proposal is that the dealers claimed during our meeting that all of the guns that they sell, including those that are on the West Hollywood Roster, pass the proof testing standards set forth by SAAMI, and all contain some safety device or feature, whether passive or active. If this is true, it seems likely that an ordinance prohibiting the sale of handguns that meet their definition would have no practical effect; not one handgun would be banned for sale.

CONCLUSION

We believe that the City of San Diego may enact a legally valid ordinance banning the sale of "Saturday Night Specials" within the City. Such ordinance must also include a definition of "Saturday Night Special," from which a roster of handguns meeting the definition would be constructed. Because there are wide differences of opinion among firearms experts about how to define "Saturday Night Special," it is at this time unclear how best to do so. Finally, regardless of the language of the ordinance, the definition used, or the roster compiled, the strong commitment of the individuals involved in this issue makes it likely that there will be challenges to each.

CASEY GWINN, City Attorney

By
Michael T. Smyth
Deputy City Attorney

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