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April 12, 2016

City of Kingston Planning Board
Mr. Wayne Platte, Chairman
Town Hall
420 Broadway
Kingston, New York 12401

VIA E-MAIL & REGULAR MAIL

RE: Application of Safeshoot, LLC for an Indoor Shooting Range: Memorandum in Address of Local Law #3 of 1984

Dear Chairman Platte and Board Members:

I have been requested by the City Counsel's Office to set forth the legal reasoning which would support the continuation of the above referenced Application before the City of Kingston Planning Board in light of the wording set forth within Local Law Number 3 of 1984.

As you know, the current Application has been granted Lot Line Revision Approval and is presently being held in abeyance as to continuing Site Plan review for retail store and commercial recreation uses pursuant to the City of Kingston Zoning Law. In this regard, your writer emphasizes that the temporary cessation of Application activities has been voluntarily imposed and, as such, is not meant to be interpreted as acceding to any official determination by the City of Kingston.

A) Question Presented: The question presented is whether the following statutory language, as set forth within Local Law #3 of 1984, prohibits the planned shooting range from obtaining Site Plan Approval from the City of Kingston Planning Board?

It is submitted that the answer to this question is to be answered in the negative for the following reasons.

B) Statutory Language: The statutory language at issue reads in relevant past as follows:

"Section 223

Discharge Restricted
No person, other than in self-defense or in the discharge of official duties, shall willfully discharge any species of firearm within the city limits or the City of Kingston, New York".

1) Pre-emption.

A municipality possesses the regulatory authority to enact Local Laws which protect the health, safety and welfare of the public, including the regulation of firearms. However, these regulations must be reasonable and the same may not be inconsistent with superseding New York State Law.

Section 265.35(3) of the Penal Law of New York State is a statewide general statutory directive which governs the discharge of firearms in a "public place" or any place where there is any person to be endangered thereby". Said statutory authority reads in pertinent part as follows:

> "Any person who, otherwise than in self-defense or in the discharge of official duty, (a) willfully discharges any species of firearms, air-gun or other weapon, or throws any other deadly missile, either in a public place, or in any place where there is any person to be endangered thereby, or, in Putnam County, within one-quarter mile of any occupied school building other than under supervised instruction by properly authorized instructors although no injury to any person ensues; (b) intentionally, without malice, points or aims any firearm or any other gun, the propelling force of which is gunpowder, at or toward any other person; (c) discharges, without injury to any other person, firearms or any other guns, the propelling force of which is gunpowder, while intentionally without malice, aimed at or toward any person; or (d) maims or injures any other person by the discharge of any firearm or any other gun, the propelling force of which is gunpowder, pointed or aimed intentionally, but without malice, at any such person, is guilty of a class A misdemeanor."

Cities derive authority to act beyond the specific statutory authorizations found within the General City Law of New York State to pass Local Laws pursuant to the Municipal Home Rule Law of New York State Kamhi v. Town of Yorktown, 74 NY2d423 (1989), see also, Municipal Home Rule Law, Section 10 and its specific supersession procedural/substantive requirements.

Through the "police power" inherent under the Municipal Home Rule Law, cities may, "within narrow confines," adjust provisions of the General City Law so that in its local application, it will have, "exactly the effect intended by the legislature under a local law," Kamhi, supra, at p.434. However, a city may not supersede the New York State Penal Law, as such Law exists as a state-wide General Statutory scheme.

The power derived from the Municipal Home Rule Law to amend or supersede New York State Law "can be exercised only upon substantial adherence to the procedures set forth in Municipal Home Rule Law and Section 22(2) of the Municipal Home Rule Law" Kamhi, supra, states that, "[n]o local law shall supersede any provision of a state statute except as authorized by the constitution, this chapter or any other state statute." Additionally, New York's preemption doctrine places limits on the home rule powers of a municipal entity. Albany Area Builders Association v. Town of Guilderland, 74 NY2d 372 (1989).

New York's body of case law regarding preemption would seem to dictate that even if the City of Kingston had passed the substantive and procedural hurdles of the Municipal Home Rule Law in enacting Local Law #3 in 1984, the attempt to lawfully supersede Sections 205.35(3) of the New York State Penal Law would nonetheless be illegal.

The preemption doctrine is a limit on home rule powers and it stands for "the untrammeled primacy of the Legislature to act … with respect to matters of State concern." Wambat Realty Corp v. State of New York, 41 NY2d 490 (1977). Preemption applies in cases of express conflict between Local Law and State Law, as well as instances where the State has evidenced its intention to "occupy the field". Wambat, supra, see also, Section 400 of the Penal Law of New York State as to regulation of "Firearms".

Based upon the foregoing, there is no authority for the City of Kingston to attempt to completely abrogate and

eliminate the power of New York State to regulate the sale and use of firearms pursuant to Sections 265.35(3) and 400 of the New York State Penal Law.

2) Statute of Limitations.

The Safeshoot, LLC Application was forwarded to the City of Kingston Planning Board and former City of Kingston Code Enforcement Officer, on or about September 23, 2015 for consideration. Thereafter, the Application was certified as complete by Ms. Sue Cahill, Planning Director, pursuant to Section 405-30(D) of the City of Kingston Zoning Law.

As a procedural consideration, any Appeal of the then Code Enforcement Officer's determination to permit the Application to proceed and the Planning Director's Certification is required to be taken within sixty (60) days of the date the project was determined complete under the City of Kingston Zoning Law [see Section 81-a(5)(b) of the General City Law, and Section 405-30(D)(4) of the City of Kingston Zoning Law].

Accordingly, the 60 day limitations period, as proscribed by statute, is long over. Iacone v. Building Department of Oyster Bay Cove Village, 32 AD3d 1026 (2006). Moreover, the then City of Kingston City Counsel's Office had ample notice of the pending Application and permitted the administrative review to continue. Spandorf v. Buulding Inspector v. Incorporated Village of East Hills, 193 AD2d 682 (1993), Cave v. Zoning Board of Appeals of the Village of Fredonia, 49 AD2d 228 (1975), lv. den. 38 NY2d 710 (1976).

Therefore, if the City of Kingston or an aggrieved person possessing standing to challenge the administrative determination to permit the Application to proceed had done so, an Appeal could have been timely commenced. Pansa v. Damiano, 14 NY2d 356 (1964). As such, an exhaustion of administrative remedies by said appellants did not timely occur, as required by law. Lehigh Portland Cement Company v. New York State Department of Environmental Conservation, 87 NY2d 136 (1995).

The doctrine of exhaustion of administrative remedies seeks to protect the integrity of the administrative record, as well as the participant's reliance thereon. Therefore at present, it would be untimely for the current Code Enforcement Officer to alter, limit or

withdraw from the previous completeness determination at this late date. Friends of Woodstock v. Town of Woodstock Planning Board, 152 AD2d 876 (3rd Dept. 1989), 340 West LLC v. Spring Street Garage Condominium, 31 Misc3d 1230 (2011).

3) Administrative Res Judicata.

Any change of position upon the administrative determination which was previously made by a former City Official is further prohibited under the doctrine of administrative res judicata; which bars a party from retroactively seeking different relief from an administrative agency as has been previously and finally determined. Jensen v. Zoning Board of Appeals of the Village of Hastings-on-the-Hudson, 130 AD2d 549 (1987), lv. den. 70 NY2d 611 (1987), Waylonis v. Baum, 281 AD2d 636 (2001), Kreisberg v. Scheyer, 11 Misc3d 818 (2006).

In this instance, the Code Enforcement Officer was vested by law to determine a question presented and said question, long ago, became final with my client relying thereupon. Therefore, administrative res judicata operates as a conclusive bar to subsequent adjudication at the administrative level. Jones v. Young, 257 AD 563 (3rd Dept, 1939), Goodkind v. WFS Investors Corp, 192 AD2d 694 (1993).

4) Statutory Ambiguity.

Local Laws are in derogation of common law and as such, are to be strictly construed against the municipality and in favor of the property owner or contract vendee in the event of any ambiguity Nicklin Mckay v. Town of Marlborough Planning Board, 14 AD3d 858 (3rd Dept, 2005).

In the instant matter, the operative words of Local Law #3 state, "other than in self defense". This phrase does not read, "in the act of self defense" [emphasis supplied].

It is clear that the persons who are planning to frequent the Safeshoot premises will be practicing shooting in a furtherance of self defense. In fact, my client plans to have each shooting participant sign a statement that they are utilizing the Safeshoot premises, at least in part, for self defense practices.

Admittedly, the wording, "in the practice of self defense" would make this particular statute clearer. However, it is the municipalities patent responsibility to make statutes understandable and clear. Accordingly, Local Law #3 cannot be extended by implication to prohibit a permitted commercial/recreational use and its interpretation must be limited to what is clearly proscribed. Offshore Restaurant Corp. v Linden, 30 NY2d 160 (1972); FGL&L Property Corp. v. City of Rye, 66 NY2d 111 (1985).

Even under a commonly understood definition the term self defense carries with it a plain meaning which includes practice as an affirmative form of self defense. To wit;

Merriam Webster Dictionary defines the term "self defense" as follows:

"Self Defense:

1. The act of defending yourself, your property, etc.
2. Skills that make you capable of protecting yourself during an attack. [Search Source: Wikipedia]."

Moreover, Local Law #3 is vague on its face as it is impossible to know what it meant by the phrase, "in the discharge of official duties…" Rhetorically speaking, what exactly does this passage mean to regulate? Is it in address of law enforcement personnel only? Does it purport to permit non law enforcement individuals to practice shooting in order to protect their businesses, homes and persons as part of their "official duties" as a business owner, employee, spouse or family member? What constitutes official duties anyway? The term is not defined within Local Law #3 and as a result, it is impossible to determine what is meant by the statute.

In order to survive a vagueness challenge in New York State a statute must undergo a two-part analysis. First, the law must provide clear and sufficient notice of what conduct or use is prohibited; and second, the law must not be written in such a manner as to permit or encourage arbitrary and discriminatory enforcement. People v. Bright, 71 NY2d 376 (1988), Carpinelli v. City of Kingston, 175 Ad2d 509 (3rd Dept, 1991). Local Law #3 completely fails under the foregoing test.

Any reasonable reading of Local Law #3 results in the inescapable conclusion that the passage grants unfettered

discretion to the City of Kingston to interpret what constitutes the "discharge of official duties". Therefore, the statute is void as a matter of law. Grayned v. City of Rochford, 408 US 104 (1972).

5) Local Law Context/Constitutionality.

The City of Kingston Planning Board has been provided with testimony and documentation of record which references the following remembrances by certain local citizens within the context of Local Law #3:

a) At least two indoor shooting ranges located at the Kingston Armory and the Andy Murphy Midtown Neighborhood Center were in existence when Local Law #3 was enacted.

b) The stated purpose of the Local Law has been expressed as an attempt at prohibiting the shooting of waterfowl proximate to the Hudson River [see the Kingston Freeman October 15, 2015 article which was circulated to the Planning Board].

c) There was no exception built into the law for the existing shooting ranges and this, at least anecdotally, leads one to surmise that the prohibited discharge of firearms was meant to apply to the outdoors.

d) There is a dearth of Legislative History concerning Local Law #3 and the purposes of its enactment.

e) Within the, "city limits of the City of Kingston", as stated within Local Law #3, was not meant to place a prohibition upon what persons may forward as part of a regulated shooting range on private property.

In light of the examination herein and specifically, sub-paragraph (e) above, it is submitted that an interpretation of Local Law #3 which purports to prohibit the discharge of firearms by licensed gun owners within the planned Safeshoot indoor shooting range, as a categorical ban, constitutes an unconstitutional regulation by way of violation of the 2nd Amendment to the Constitution of the United States. District of Columbia v. Heller, 554 US 570 (2008).

The United States Supreme Court's recognition of the peoples right to keep and bear arms for self-defense has further been extended to afford protection against local government infringement by operation of the 14th Amendment to the United States Constitution, McDonald v. City of Chicago, 561 US 742 (2010).

Under the Heller analysis, the framework for examination of a 2nd Amendment challenge involves a two-fold consideration:

a) A threshold inquiry into whether the regulated activity is protected by the 2nd Amendment, and,

b) If so, the level of scrutiny applicable to the governments stated justifications for regulating activity must be considered as stricter than a rational basis review in light of the public benefits the regulation seeks to achieve, Heller at 582.

Therefore, the breadth and burden of a challenged 2nd Amendment restriction is not merely based upon the activity affected, but in addition, who is affected. In the instant case, the law abiding population of the entire United States is to be prohibited from discharging a firearm within the City of Kingston [see Local Law #3 statutory address as set forth herein]. Moore v. Madigan, 702 F3d 933 (7th Cir. 2012), aff'd in part, Case #1:10-CV-05135, US District Ct., Illinois (2014), Kendall, J.

In this regard, owing to the constitutional effects involved, the burden falls upon the government to justify that Local Law #3 is not facially invalid. Therefore, although the shooting range use is permitted under the City of Kingston Zoning Law upon the lands of my client, subject to proper administrative review, the application of facts precedent to site plan approval may be found to be irrelevant to the issue of constitutionality, Ezell, at 697.

In light of all of the foregoing, the 2nd Amendment protections afforded to my client and the public at large in the pursuit of self defense and a lawful business enterprise are not merely precatory and the same are buttressed by the following immutable facts:

i) The purported ban on shooting ranges within the City of Kingston is total.

ii) The foregoing regulations apply to the entire population of the United States.

iii) There is no credible legislative history which justifies Local Law #3.

iv) There is no statutory rationale whatsoever within Local Law #3 which would provide a strict scrutiny basis for the total prohibitions which are being forwarded by certain members of the public on 2nd Amendment protections.

v) If followed, Local Law #3 would preclude the public from participating in firearms training anywhere within the City of Kingston, therefore also infringing on gun education. Ezell, Supra, Kleindienst v. Mandel, 408 US 753 (1972).

The required analysis pursuant to the Heller case and its progeny leads to the inescapable legal conclusion that Local Law #3 is invalid on its face as a matter of law. Therefore, any application of Local Law #3 as against my client would be a constitutional violation of the 2nd Amendment which could subject the taxpayers of the City of Kingston to substantial costs and liability. Town of Orangetown v. Magee, 88 NY2d 41 (1996).

6) Conclusion.

For all of the foregoing reasons, Local Law #3 cannot be utilized to prohibit the planned shooting range as proposed by Safeshoot, LLC. In this regard, the above analysis reveals the 1984 Law is incompletely written, devoid of any Legislative History and subject to multiple interpretations based upon its employment of vague and ambiguous terms which render it void as a matter of law.

In addition, it is important to note that the current City of Kingston Administration inherited the infirm procedural record. However, the above recited prohibitions at law to post-hoc and untimely enforcement of this Local Law should be observed.

Moreover, New York State Law dictates that Local Law #3 is superseded by a statewide general statutory scheme, as well as constitutional principles governing activities of citizens which cannot be lawfully prohibited on private property under the substantive protections afforded by the 2nd Amendment to the United States Constitution.

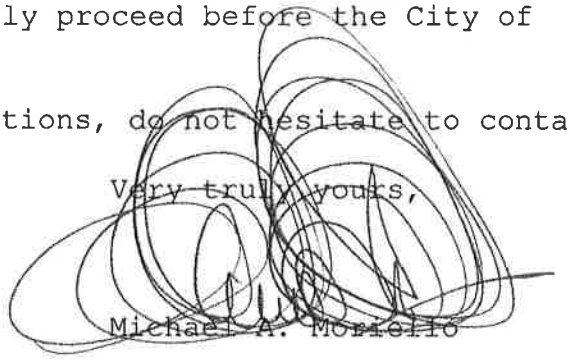
Finally, my client agrees to cooperate with City of Kingston Common Council efforts to Amend Local Law #3 pursuant

to Section 20 of the General City Law of New York and the Charter of the City of Kingston; if such efforts are ultimately forwarded. In light of all of the foregoing, said cooperation is being made with the express caveat that all of the foregoing procedural and substantive reasoning is hereby reserved for my client upon the administrative and legislative records.

The Safeshoot Project is critically important to the economic well being of the City of Kingston and will provide revenue, employment and a safe place for self defense related firearms shooting for duly licensed members of the public. Based upon all of the above, the Safeshoot, LLC Application should be permitted to lawfully proceed before the City of Kingston Planning Board.

Should you have any questions, do not hesitate to contact me.

Very truly yours,



Michael A. Morriello

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