

1 Donald E.J. Kilmer, Jr. (SBN: 179986)
2 LAW OFFICES OF DONALD KILMER, A.P.C.
3 1645 Willow Street, Suite 150
4 San Jose, California 95125-5120
5 Voice: (408) 264-8489
6 Fax: (408) 264-8487
7 Email: Don@DKLawOffice.com

8 Attorney for Plaintiffs

9 SUPERIOR COURT OF CALIFORNIA
10 IN AND FOR THE COUNTY OF SAN MATEO
11 400 County Center, Redwood City, CA 94063

12 THE CALGUNS FOUNDATION,
13 INC., and GENE HOFFMAN,

14 Plaintiffs,

15 vs.

16 COUNTY OF SAN MATEO, and
17 DOES 1 TO 20,

18 Defendants.

Case No.: CIV 509185

PLAINTIFFS' OPPOSITION TO
DEMURRER

Date: April 24, 2012

Time: 9:00 a.m.

Dept.: Law/Motion

19 Plaintiffs THE CALGUNS FOUNDATION, INC., (CGF, Inc.) and GENE
20 HOFFMAN, hereby oppose the Defendants' Demurrer.

21 Unless the Court summarily overrules the demurrer, Plaintiffs request oral
22 argument pursuant to: *Medix Ambulance Service, Inc. v. Sup.Ct. (Collado)* (2002) 97
23 Cal.App.4th 109, 115, 118 Cal.Rptr.2d 249, 253.

24 Unless the Court summarily overrules the demurrer, Plaintiffs request a
25 written statement of decision pursuant to: California Code of Civil Procedure §
26 472d.

27 **INTRODUCTION | STATEMENT OF FACTS**

28 Defendants fundamentally misunderstand the nature of Plaintiffs' Verified
Complaint. San Mateo's Ordinance is not preempted by Penal Code § 26150 *et seq.*,

1 (formerly § 12050), which is after all only a licensing statute. The ordinance is
2 preempted by California Government Code § 53071 which states:

3 It is the intention of the Legislature to occupy the whole field of
4 regulation of the registration or licensing of commercially manufactured
5 firearms as encompassed by the provisions of the Penal Code, and such
6 provisions shall be exclusive of all local regulations, relating to
7 registration or licensing of commercially manufactured firearms, by any
political subdivision as defined in Section 1721 of the Labor Code.

8 California Labor Code § 1721 defines political subdivision to include: “*any county,*
9 *city, district, public housing authority, or public agency of the state, and assessment*
10 *or improvement districts.*”

11 It is undisputed that Penal Code §§ 26150 *et seq.*, is a state licensing regime.
12 It is found in Chapter 4. License to Carry a Pistol, Revolver, or Other Firearm
13 Capable of Being Concealed Upon the Person. Said Chapter is from Division 5,
14 Title 4, Part 6 of the California Penal Code. (See Request for Judicial Notice.)

15 Since the remaining facts plead in the complaint must be accepted as true
16 (i.e., Plaintiff GENE HOFFMAN has a validly issued state license to carry a
17 concealed firearm), the only issue before this Court is the purely legal issue of
18 whether the San Mateo Ordinance § 3.68.080(o) is preempted by Government Code
19 § 53071 as interpreted by the relevant case law.

20
21 **A. THE ORDINANCE IS STATUTORILY PREEMPTED.**

22 The plain language of Penal Code § 26150 *et seq.*, refers to the state
23 sanctioned, and locally issued permit for the carrying of concealed firearms as “a
24 license.” The equally plain language of Government Code § 53071, preempting
25 political subdivisions from intruding on the State’s prerogatives with regard to
26 firearm licenses – should be enough authority for this Court to overrule this
27 demurrer.

- 1 – “These cases are palpably distinguishable from the case before us. In
2 deciding *Great Western* and *Nordyke*, our Supreme Court was careful
3 to confine its preemption analysis to the question of whether state law
4 authorizing gun shows necessarily compelled counties to allow their
5 property to be used for this purpose. (*Great Western*, supra, 27 Cal.4th
6 at p. 858; *Nordyke*, supra, 27 Cal.4th at p. 884.)” *Fiscal v. City and
7 County of San Francisco*, 158 Cal. App. 4th 895, 917-918.
- 8 – “We wish to stress that the goal of any local authority wishing to
9 legislate in the area of gun control should be to accommodate the local
10 interest with the least possible interference with state law. As we have
11 seen, while courts have tolerated subtle local encroachment into the
12 field of firearms regulation (*CRPA*, *Great Western*, *Nordyke*), laws
13 which significantly intrude upon the state prerogative have been
14 uniformly struck down as preempted (*Doe*, *Sippel*). Therefore, when it
15 comes to regulating firearms, local governments are well advised to
16 tread lightly. (See California Dreamin', supra, 30 U.S.F. L.Rev. 395.)”
17 *Fiscal v. City and County of San Francisco*, 158 Cal. App. 4th 895, 920.
- 18 ● By seeking support for the proposition that their ordinance is not preempted
19 by state law pursuant to the case of *Galvan v. Superior Court*, 70 Cal. 2d 851
20 (1969), Defendants are apparently objecting to the *Fiscal* Court’s finding that
21 *Galvan* has been superceded by Government Code § 53071. *Fiscal v. City and
22 County of San Francisco*, 158 Cal. App. 4th 895, 907.
 - 23 ● Nor does *Nordyke v. King*, (2002) 27 Cal.4th 875¹ lend any weight to
24 Defendants’ arguments. First of all, the California Supreme Court limited its
25 holding to whether Counties could regulated gun shows on county property
26 and expressly stated: “*In sum, whether or not the Ordinance is partially
27 preempted, Alameda County has the authority to prohibit the operation of gun
28 shows held on its property, and, at least to that extent, may ban possession of*

¹ Curiously, Defendants cite the Ninth Circuit case that certified *Nordyke* to the California Supreme Court, rather than the Supreme Court’s actual opinion.

1 *guns on its property.*” *Nordyke* at 885. More importantly the Alameda
2 Ordinance under scrutiny contained its own exception for possession in
3 compliance with Penal Code § 12050. ALAMEDA ORDINANCE § 9.12.120(F)(3).
4 This is exactly the exception Plaintiffs are seeking with respect to the San
5 Mateo Ordinance at issue in this matter. (See Request for Judicial Notice.)
6 • Finally the cases of: *Olsen v. McGillicuddy*, 15 Cal. App. 3d 897 (1971) (“BB”
7 gun for minors), *California Rifle & Pistol Assn. v. City of West Hollywood*, 66
8 Cal. App. 4th 1302 (1998) (“Saturday Night Specials”) and *Suter v. City of*
9 *Lafayette*, 57 Cal. App. 4th 1109 (1997) (land use regulation of gun stores) are
10 similarly inapposite because these cases dealt with mere supplemental local
11 regulations that did not appear to contradict state law.

12
13 C. **FISCAL V. CITY & COUNTY OF SAN FRANCISCO IS FATAL TO THE ORDINANCE.**

14 Plaintiffs would direct this Court’s attention to the following passage –
15 directly on point – from *Fiscal v. City and County of San Francisco*, (2008) 158 Cal.
16 App. 4th 895 at 909:

17 While we have thus far focused on the relationship between
18 state law and section 3's ban on handgun possession on one's private
19 property, it is important to note that section 3 regulates in a much
20 broader field than just private property. Section 3 prohibits both public
21 and private handgun possession and thus effectively displaces
22 numerous state laws allowing private citizens to possess handguns for
23 self-protection and other lawful purposes. As the trial court noted,
24 “[t]he statute books contain almost one hundred pages of unannotated
25 state gun laws that set out a myriad of statewide licensing schemes,
26 exceptions, and exemptions dealing with the possession and use of
27 handguns.” We provide a brief overview of just a few of the state
28 statutes dealing with public handgun possession.

 Penal Code section 12050 provides that, upon a showing of good
cause, any law-abiding, responsible adult can obtain a license to carry
a concealed handgun. Even without a license, Penal Code sections

1 12025.5 and 12031, subdivision (j)(2) create special exceptions whereby
2 people who have been threatened and who have obtained restraining
3 orders may carry loaded and concealed handguns. Penal Code sections
4 12027, subdivision (a) and 12031, subdivision (b)(1) allow civilians to
5 possess concealed and loaded handguns when summoned by police to
6 assist police in making an arrest or to preserve the peace. Penal Code
7 section 12031, subdivision (k) permits possession of a loaded gun when
8 making a citizen's arrest. Penal Code section 12031, subdivision (j)(1)
9 allows possession of a loaded firearm when a person has a reasonable
10 belief that he or she is in immediate grave danger and the firearm is
11 necessary to protect person or property.

12 Certain classes of persons, while engaged in legitimate activities,
13 are exempted from the operation of most of the statutory prohibitions
14 governing handgun possession, including law enforcement agencies
15 and officers (see, e.g., Pen. Code, §§ 12027, subd. (a)(1)(A), 12201,
16 subds. (a), (b), 12287, subds. (a)(4), (5), 12302, 12031, subd. (b),
17 including retired peace officers [Pen. Code, § 12027, subd. (a)(1)(A)],
18 and the military [Pen. Code, § 12280, subds. (e), (f)(1)].

19 Additionally, special exemptions and licenses are granted to
20 certain individuals in the private sector, including the private security
21 industry (Pen. Code, § 12031, subds. (b)(7), (d)(1)-(6)), entertainment
22 industry professionals (Pen. Code, §§ 12072, subd. (a)(9)(B)(vi),
23 12026.2, subd. (a)(1)(8), 12305, subd. (a)), members of gun clubs
24 (Pen. Code, §§ 12027, subd. (f), 12026.2, subd. (a)(2)), and private
25 investigators (Pen. Code, § 12031, subd. (d)(3)). Any legal firearm may
26 be possessed in public for hunting or shooting at a target range, or
27 going to or from these places, one's home and business, and certain
28 other recognized activities (Pen. Code, § 12026.2, subd. (a)(3), (9).)

29 The broad language of Government Code section 53071, prohibiting
30 "all local regulations, *relating* to registration or licensing" of firearms,
31 indicates that the state has an interest in statewide uniformity of
32 handgun licensing. (*Italics added.*) In finding Government Code section
33 53071 expressly preempted Prop. H, the trial court pointed out that
34 the ordinance had the practical effect of "revoking or otherwise
35 invalidating existing state licenses," including those permitting the
36 possession of handguns. The trial court went on to conclude that "[a]

1 local regulation that invalidates existing licenses, but does not
2 affirmatively create new licensing schemes, 'relates' to the state's
3 regulatory scheme of licensing firearms" and, consequently, is
4 expressly preempted by Government Code section 53071. We agree.

5 While the City emphatically argues that Prop. H is a proper
6 response to crime because it is aimed at criminals who use handguns
7 in the commission of their unlawful acts, the City's arguments fail to
8 acknowledge that the ordinance will affect more than just criminals. It
9 will also affect every City resident who has not, through some
10 demonstration of personal disability or irresponsibility, lost his or her
11 right to possess a handgun. Although a precise assessment of the
12 impact of this ordinance is difficult to gauge because the ordinance has
13 never been enforced, at a minimum, section 3 of Prop. H would
14 invalidate all licenses possessed by City residents to carry a concealed
15 weapon issued under Penal Code section 12050, and it would prohibit
16 the possession of handguns by City residents even if those residents
17 are expressly authorized by state law to possess handguns for self-
18 defense or other lawful purposes.

19 If the preemption doctrine means anything, it means that a local
20 entity may not pass an ordinance, the effect of which is to completely
21 frustrate a broad, evolutionary statutory regime enacted by the
22 Legislature. Section 3 of Prop. H stands as an obstruction to the
23 accomplishment and execution of the full purposes and objectives of
24 the legislative scheme regulating handgun possession in this state. For
25 that further reason, it is preempted. (*Sherwin-Williams Co. v. City of*
26 *Los Angeles*, supra, 4 Cal.4th at pp. 897-898 [local legislation is
27 preempted if it is "inimical" to accomplishment of the state law's
28 policies].)

29 Anything Plaintiffs could dare to add to that analysis would merely clutter
30 this memorandum with surplusage.

31 CONCLUSION

32 To obtain a state sanctioned license to carry a concealable firearm under
33 Penal Code § 26150 *et seq.* (former § 12050) Plaintiff HOFFMAN already had to

1 demonstrate good cause and good moral character to a municipal police chief or a
2 county sheriff. That good cause does not evaporate in a county park.

3 Plaintiffs are not advancing a radical or novel theory. If San Mateo will not
4 bring its local ordinance into compliance with state law by simply rewriting it to
5 include a exception to SAN MATEO ORDINANCE § 3.68.080(o) for persons licensed to
6 carry a firearm under state law, then Plaintiffs are prepared to enlist the power of
7 this Court to accomplish that objective. This Court should overrule the Defendants'
8 Demurrer, and order them to answer the complaint. Furthermore, the Court should
9 order the parties to expedite preparation of a joint statement of undisputed facts
10 (e.g., whether HOFFMAN has a current and valid state license) and schedule a
11 hearing date for cross-motions for summary judgment.

12 RESPECTFULLY SUBMITTED,

13 Date: April 6, 2012

14 Donald Kilmer for Plaintiffs

15
16
17
18
19
20
21
22
23
24
25
26
27
28