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INTER-OFFICE CORRESPONDENCE

MEMORANDUM NO. 2019-182

TO: Mayor Frank C. Ortis  
Members of the City Commission

CC: Charles F. Dodge, City Manager  
Aner Gonzalez, Assistant City Manager  
Christina Sorensen, Director of Recreation and Cultural Arts  
Steve Clark, General Manager - SMG

FROM: Samuel S. Goren, City Attorney *SSG*  
Jacob G. Horowitz, Assistant City Attorney *JGH*

DATE: September 4, 2019

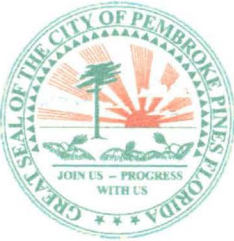
RE: City of Pembroke Pines ("City") / Gun Show Inquiry  
Supplement

This memorandum is intended to supplement our prior Legal Memorandum No. 2018-133, dated August 27, 2018, and Legal Memorandum No. 2019-090, dated May 9, 2019, related to the use of the Pembroke Pines City Center ("City Center" or the "Facility") for a gun show. Copies of these memoranda are attached for your convenience.

It is the further intent of this memorandum to provide an update and response to a number of the emails, conversations, and public comments which have recently occurred related to the gun show event that took place at the City Center August 10-11, 2019.

As we have previously advised, Section 790.33, F.S. (the "Statute"), preempts to the Legislature the "**whole field**" of regulation of firearms and ammunition." The Statute also provides severe and significant penalties for violations which apply to the City, as well as both elected and appointed officials and SMG employees acting on the City's behalf. These penalties include, but are not limited to, civil fines of up to \$5,000, cause for termination of employment and/or removal from office by the governor.

As detailed herein, there have been a number of significant developments in the past year which place the City in a stronger legal position to prevent future gun shows at the City Center. Nevertheless, until all appeals are exhausted in the pending lawsuits related to the Statute, there remains a risk associated with any action that the City may take which seeks to regulate firearms and/or ammunition.



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Notwithstanding the foregoing, the City Commission may consider a number of policy-driven options moving forward to prevent future gun shows, subject to an appreciation of the continued statutory risks associated with certain regulatory activity. As set forth in greater detail below, these options include:

- 1) Prohibit the rental of the City Center for all retail events, or events where a retail component exceeds a certain percentage threshold.
- 2) Make the determination that the City, in its proprietary capacity as the owner and operator of a venue, will no longer permit gun shows to be held at the City Center.
- 3) Seek additional relief through the Legislature, consistent with the action taken by the City Commission at its August 21, 2019 regular meeting.
- 4) Defer approving any future applications for gun show events while waiting for further judicial relief on matters currently pending in the appellate courts.

Additionally, please be advised that the City, through SMG, remains under contract for two (2) additional gun show events. Irrespective of any legal challenges related to the Statute, failure to honor these license agreements will likely result in a claim for a breach against the City and may expose the City to significant financial liability.

I. CHRONOLOGY

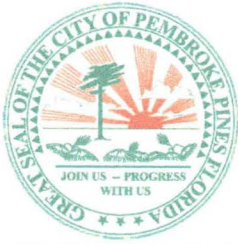
Prior to providing a supplemental legal analysis, which is set forth below, it is necessary to consider the recent chronology of this important issue.

**April/May 2017<sup>1</sup>** – The City received a request from Florida Gun Shows, Inc. (the “Promoter”) to conduct a number of gun shows at City Center. The Promoter’s initial inquiry contemplated several shows per year over multiple years.

**April 4, 2018** - In response to the tragic events at Marjory Stoneman Douglas High School which occurred on February 14, 2018, the City

<sup>1</sup> The Promoter had been seeking to hold gun show events at the City Center since it opened; however, there were ongoing conflicts with the use of the Facility by a church. Once the conflict resolved, the Promoter renewed their efforts to hold events at the City Center.





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and Mayor Ortis joined Coral Springs, Wilton Manors and Coconut Creek, and three of their elected officials, as co-plaintiffs in a lawsuit against the State of Florida challenging the penalty provisions of Section 790.33, F.S. (the "Preemption Lawsuit"). This case has been consolidated with two (2) similar cases filed by both Broward County and a group of other cities lead by the City of Weston.

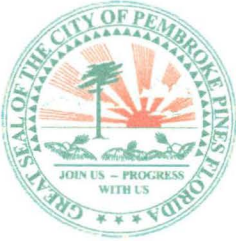
**August 27, 2018** – The City Attorney's Office, after conducting independent legal research and consulting with the City's outside counsel in the Preemption Lawsuit, issued Legal Memorandum No. 2018-133, advising that a decision to deny the Promoter the ability to conduct a gun show at the City Center based solely on their intention to engage in the sale of firearms and/or ammunition may be considered a policy or regulation which runs afoul of Section 790.33, F.S.

**January 7, 2019** – SMG enters into two (2) license agreements with the Promoter to hold gun shows the weekends of August 9-11, 2019 and September 27-29, 2019.

**February 19, 2019** – U.S. Magistrate Lurana Snow renders a "report and recommendation" in the Promoter's lawsuit against the City of Fort Lauderdale related to that city's decision not to renew the Promoter's lease and to deny the Promoter the use of War Memorial Auditorium for future gun shows. The report is limited to the Promoter's request for an injunction and does not opine on the Promoter's causes of action related to the First Amendment, Equal Protection and Section 790.33, F.S. Magistrate Snow does distinguish between a municipality acting in a proprietary capacity as opposed to a regulatory capacity. The attached Legal Memorandum No. 2019-090 examines this report in greater detail.

**June 21, 2019** – SMG enters into a third license agreement with the Promoter to hold a gun show at the City Center the weekend of January 17-19, 2020.

**July 26, 2019** – Circuit Court Judge Charles Dodson renders an order granting summary judgment in favor of the City and its co-plaintiffs in the Preemption Lawsuit. The decision affirms the Legislature's legal authority to preempt the regulation of firearms and accessories, but finds the penalty provisions to be unconstitutional.



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**July 30, 2019** – The defendants appeal Judge Dodson’s order granting summary judgment in favor of the City. As a matter of law, Judge Dodson’s order is stayed and the penalty provisions of Section 790.33, F.S., remain in effect while the appeal is pending.

While the recommendation of U.S. Magistrate Snow in the Fort Lauderdale lawsuit, and Judge Dodson’s order granting summary judgment in favor of the City in the Preemption Lawsuit, include language which may assist the City in preventing future gun shows, neither opinion is dispositive of the underlying challenges associated with the regulation of these events. Moreover, neither of these opinions had been rendered at the time the City Attorney’s Office opined on this issue in August 2018.

## II. FURTHER ANALYSIS

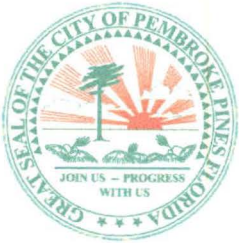
### A. *Florida Gun Shows, Inc. v. City of Fort Lauderdale*

The recommendation of U.S. Magistrate Snow highlights the distinction between a municipality acting in a proprietary capacity as opposed to in a law-making or regulatory capacity. It is important to note that this distinction is examined in the context of a request for an injunction and, more specifically, as it relates to the likelihood of success on the merits of the plaintiff’s First Amendment claim.

The recommendation states, in part:

The City [Fort Lauderdale] emphasizes the distinction between a municipality acting in its proprietary, rather than its law-making role in connection with its argument on the issue of pre-emption, but neither part addresses this distinction as it relates to the Plaintiff’s First Amendment claim...the Supreme court has recognized the “long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when ‘the governmental operating function...[is] not the power to regulate or license as a lawmaker...but, rather, as a proprietor to manage [its] internal operation[s]...’ *United States v. Kokinda*, 497 U.S. 720, 725 (1990) (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961)). When the Government operates in its proprietary capacity, its actions will be deemed valid, for First Amendment purposes, unless they are unreasonable, or are “arbitrary,





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capricious or invidious.” *Id.* at 725-26 (quoting *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974)).

The magistrate further recognized that the City’s decision, as a proprietary decision rather than a “new rule,” is consistent with the fact that other types of shows had been denied licenses at War Memorial Auditorium based on subject matter, as well as by the fact that gun shows are permitted elsewhere in the City.

Finally, in denying the plaintiff’s request for an injunction, the magistrate concluded, in part, that the City’s decision not to renew the plaintiff’s lease agreement for a gun show was made in its proprietary capacity and, therefore, the plaintiff failed to show a likelihood of success on the merits of its First Amendment claim, the only claim as to which the plaintiff could show irreparable harm.

As noted, the magistrate’s decision was a report and recommendation that was limited to the plaintiff’s motion for an injunction. It did not address the merits of the plaintiff’s claims under Section 790.33, F.S.

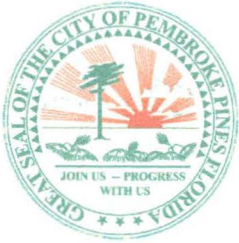
B. *City of Weston, Florida, et al. v. Honorable Ron DeSantis*  
(Preemption Lawsuit)

One of the cases consolidated with the Preemption Lawsuit (brought by Broward County and other plaintiffs) included a count for declaratory relief in which the county plaintiffs, in part, sought a request for declaratory judgment on their rights and obligations to take action as proprietors and employers.

Judge Dodson’s order granting summary judgment in favor of those plaintiffs states, in part, as follows:

The local governments may establish policies related to firearms in their capacities as employers and proprietors. The local governments’ authority to act as proprietors is limited to internal government operations (e.g. workplace rules under Section 790.33(4)(c)) and private market participation (e.g., leasing, contracting and operation of traditionally private business).

The language in Judge Dodson’s order clarifies the authority of a local government, in its proprietary capacity, to prevent future gun shows on city



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property. As noted, however, this order has been appealed by the defendants, and the order is effectively stayed while the appeal is pending. In the event that Judge Dodson's order is upheld, after all appellate options have been exhausted, the City will be in a better legal position to deny future applications for gun shows at the City Center in its proprietary capacity.

It is also important to note that the defendants, in their response in opposition to the plaintiffs' motion for summary judgment, conceded that Section 790.33, F.S., prohibits regulatory action and that action taken in a purely proprietary capacity falls outside the ambit of the statute. While only a pleading by the defendants, this acknowledgment does put the City in a better legal position in the context of enforcement by the named defendants in the Preemption Lawsuit should the City decide to prohibit future gun show events. However, it is unknown whether future occupants of these statewide offices will agree with the positions of these current named defendants. Thus, the pending appeal may provide more certainty on this issue.

### III. OTHER CONSIDERATIONS

During its consideration of this item, the City Commission has heard a number of comments, both publicly and by email, related to actions allegedly taken by other local governmental entities to prohibit gun shows at their facilities.

#### A. Broward County

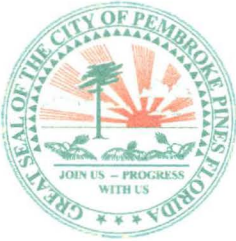
It has been stated that Broward County has a regulation or policy in place which prevents gun shows at the Broward County Convention Center. The City Attorney's Office has consulted with our counterparts at the county and confirmed that Broward County has no such policy.

We have also been advised that Broward County would process an application for a gun show in the same manner in which it would consider any other application seeking to utilize the convention center. It is our understanding, however, that the security checkpoints for the convention center, given its proximity and access to the port, may make it an undesirable location for that type of event.

#### B. City of Pompano Beach

It has also been suggested that the City of Pompano Beach has a policy in place which would prohibit guns shows at the Emma Lou Olsen Civic Center





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("ELOCC"). The City Attorney's Office has conferred with our counterparts in Pompano Beach to confirm the city's procedures related to gun show events.

Historically, Pompano Beach's parks department has administered the utilization of the ELOCC through the issuance of permits. A number of permits have been issued for gun shows in the past, and those events have been conducted without incident. During our discussion with the Pompano Beach City Attorney, we were advised that at least one, and possibly two, permits for future gun shows had already been issued and that the City would allow those events to occur.

Moving forward, Pompano Beach has amended the process for renting the ELOCC, and will no longer be issuing permits to use the facility. The City will now be utilizing leases and/or license agreements and will seek to prohibit future gun show events, in its proprietary capacity, consistent with the legal options detailed above.

In our opinion, while the recent court decisions do support this revised process, the city's action is not without risk, especially while the Preemption Lawsuit remains on appeal.

#### IV. OTHER OPTIONS

At the regular City Commission meeting on August 7, 2019, the City Commission requested a workshop to discuss the general utilization of the City Center. The City Attorney's Office remains ready and available to assist with this workshop once it is scheduled.

Among the options that the City may wish to consider regarding the use of the City Center could be a restriction on all retail uses, in general. In our opinion, a general policy prohibiting the renting of City Center for retail uses would not run afoul of Section 790.33, F.S. Such a policy may include and restrict the Home Show and the reptile convention, among other retail events that have been held at the City Center, including the gun show. Please be advised that the State may argue that such a policy is a subterfuge to regulate firearms and is, therefore, prohibited by the Statute. The City Attorney's Office is prepared to examine this option further, if directed by either the City Commission or the City Manager.

The City may also consider waiting until the appellate court has ruled in the Preemption Lawsuit before entering into any future agreements with the



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Promoter. A favorable appellate ruling will strengthen the City's legal position and ability to prevent future events in its proprietary capacity. Alternatively, the City may make the determination now, in its proprietary capacity, to prohibit future gun show events, aside from those currently under contract, with the clear understanding that a risk under the Statute remains while the appeal is pending in the Preemption Lawsuit.

Finally, at its regular meeting on August 21, 2019, the City Commission unanimously supported a proposed bill seeking to amend Section 790.33, F.S., which would give municipalities the option to regulate firearms and ammunition at facilities owned by the City. In the event that the bill was adopted by the Legislature, the City would have additional legal options related the regulation of such activity on City-owned property.

Please contact our office if there is any additional information that we can provide.