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lawyers working for the environment

TO: Jefferson County Board of County Commissioners

FROM: Alex Sidles, Bricklin and Newman LLP on behalf of the Tarboo Ridge Coalition

DATE: February 11, 2020

RE: Tarboo Ridge Coalition supplemental comments

The Tarboo Ridge Coalition offers this supplemental comment, to address certain remarks we heard during the February 10 hearing.

We continue to support Alternative 4, with an amendment to include non-commercial shooting facilities in the regulation. That amendment would be constitutional and would not prohibit "backyard shooting."

I. Constitutionality of Regulating Non-Commercial Facilities

The County is not precluded by the Constitution from regulating non-commercial shooting facilities.

In *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) ("*Ezell I*"), the Seventh Circuit found unconstitutional a city ordinance that required firearms owners to train on a gun range, and also banned gun ranges from city limits. The Court found this to be an impermissible intrusion on the right to bear arms.

The Court began its analysis by noting that local governments have the right to regulate guns outside of the home. *Id.* at 703. Thus, the authority of Jefferson County to regulate gun use at gun ranges to some reasonable degree is a given. The issue is whether the specific regulations are legitimate given the severity of the restraints it imposes on gun users balanced against the public interest benefits. *Id.* at 708.

In Ezell I, the court struck issued a preliminary injunction after finding that the ordinance would impose a drastic restraint on the right to bear arms:

> The City's firing-range ban is not merely regulatory; it *prohibits* the "law-abiding, responsible citizens" of Chicago from engaging in

> target practice in the controlled environment of a firing range. This is a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense. That the City conditions gun possession on range training is an additional reason to closely scrutinize the range ban.

Id.

Needless to say, the regulation of non-commercial shooting facilities is nothing like the *Ezell I* ordinance. Gun ranges will not be banned in Jefferson County and no one in Jefferson County is compelled to train on gun ranges.

In *Ezell I,* the city attempted to justify the public safety concerns of gun ranges with evidence that rang hollow:

> The City maintains that firing ranges create the risk of accidental death or injury and attract thieves wanting to steal firearms. But it produced no evidence to establish that these are realistic concerns, much less that they warrant a total prohibition on firing ranges.

Id. at 709.

As later summarized by the same court in *Ezell II:*

> We held [in *Ezell I]* that banishing firing ranges from the city was a **severe encroachment** on the right of law-abiding, responsible Chicagoans to acquire and maintain proficiency in firearm use, "an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." *Id.* at 708. Accordingly, we applied a strong form of intermediate scrutiny and **required the City to demonstrate "a close fit between the range ban and the actual public interests it serves**, and also that the **public's interests are strong enough to justify so substantial an encumbrance** on individual Second Amendment rights." *Id.* at 708–09. The City did not carry this burden, so we instructed the district court to enjoin the firing-range ban. *Id*

Ezell v. City of Chicago, 846 F.3d 888, 893 (7th Cir. 2017) (emphasis supplied).

Unlike that situation, here Jefferson County has ample evidence that gun ranges in forest zones create a host of problems. These include soil contamination, as seen at the defunct gun range at Discovery Bay; conversion of forest land to uses incompatible with forestry; and noise complaints, including from the unpermitted range at Tarboo Lake. (The ranges in Ezell were all indoors.)

Chicago's inability to justify its draconian, unjustified ordinance sheds no light on the legitimacy of Alternative 4's balanced approach, supported by substantial evidence of public harm that can be avoided by this approach.

The limited scope of *Ezell I* has been recognized in many cases. For instance, the ruling in *Ezell I* would not apply to an ordinance banning guns stores in certain areas:

> . . . *Ezell* is inapposite because, as the Seventh Circuit noted, "[t] he City's firing-range ban is not merely regulatory; it *prohibits* the law-abiding, responsible citizens of Chicago from engaging in target practice." *Ezell*, 651 F.3d at 708. *Ezell* recognized the difference between a ban and "laws that merely regulate rather than restrict, and modest burdens ... may be more easily justified." *Id.*

Teixeira v. Cty. of Alameda, 2013 WL 4804756, at *6 (N.D. Cal. Sept. 9, 2013), *aff'd in part, rev'd in part and remanded*, 822 F.3d 1047 (9th Cir. 2016), *on reh'g en banc*, 873 F.3d 670 (9th Cir. 2017), and *aff'd*, 873 F.3d 670 (9th Cir. 2017).

For similar reasons, *Ezell I* provides no useful direction here. Alternative 4 does not "prohibit" law abiding citizens from using gun ranges. It does not impose a "severe encroachment" on the right to bear arms. It merely would assure that the gun ranges are located in areas that are compatible for such uses. Nothing in Alternative 4 would run afoul of the ruling in *Ezell I.*

In *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017) ("*Ezell II*"), the Seventh Circuit found unconstitutional an ordinance that restricted publicly accessible shooting facilities to manufacturing zones (thereby excluding ranges from commercial zones) because the city failed to explain why gun ranges were incompatible in commercial zoning—in fact, there were several private and government ranges in commercial zones that had operated without problems. The Court noted that only 2.2% of the city was zoned industrial. Moreover, while the city did not provide evidence as to how much of that 2.2% was suitable for a gun range, the absence of any gun ranges permitted after the law went into effect was suggestive that the restrictions were severe, perhaps acting to prohibit gun ranges altogether. *Id.* at 893 – 94.

The city argued that public interest concerns justified the restrictions, but the court readily determined that the city had no evidence to substantiate that the restrictions would address those concerns:

> The City claims that confining firing ranges to manufacturing districts and keeping them away from other ranges, residential districts, schools, places of worship, and myriad other uses serves important public health and safety interests. Specifically, the City cites three concerns: firing ranges attract gun thieves, cause airborne lead contamination, and carry a risk of fire.

> The City has provided no evidentiary support for these claims, nor has it established that limiting shooting ranges to manufacturing districts and distancing them from the multiple and various uses listed in the buffer-zone rule has any connection to reducing these risks.

Id. at 895.

Ezell II is no more on point than *Ezell I.* Under Alternative 4, the exclusion of gun ranges from the forest zones is supported by the need to protect the environment from noise and lead contamination, plus the need to preserve forest lands for timber purposes. As evidenced by the example of the former gun range in the forest lands at Discovery Bay, a gun range in a forest zone can leave behind hundreds of thousands of dollars in clean-up costs and may take decades to be cleaned up. As evidenced by the noise complaint from Tarboo Lake, residents are already adversely affected even from the unpermitted range there. The County is well within its police powers to regulate (and indeed, under the GMA, it must regulate).

Moreover, gun ranges under the proposed Alternative 4 are not confined just to manufacturing zones, but rather are allowed in both manufacturing and commercial zones (the very zoning the Seventh Circuit supported for gun ranges in *Ezell II*). As the staff report's review of parcels indicates, there are ample undeveloped parcels available for gun ranges in those zones. If we also include developed parcels that could be re-developed to gun ranges, the number of available parcels is even higher. The facts are strikingly different from those in *Ezell II* where the zoning left at most 2% of the land available for gun ranges and, perhaps effectively, none at all.

Nothing in the Ezell cases prohibits the regulation of non-commercial ranges solely because they are non-commercial. It is irrelevant, for constitutional purposes, whether a gun range's customers are paying money for the privilege of shooting. If commercial ranges can be regulated (which they can), then non-commercial ranges can also be regulated.

In fact, it is probably more defensible to regulate both commercial and non-commercial ranges than to regulate commercial ranges alone. The *Ezell II* court faulted the City of Chicago for prohibiting ranges in zones where private or police ranges were already allowed. The court reasoned that the adverse impacts from public ranges are no different from those of private or police ranges, so the court found no basis for the city's prohibition of one class of gun range but not the other. Here, we are asking the County to treat all classes of gun ranges—commercial and non-commercial—the same. *Ezell II* encourages exactly this kind of even-handedness.

II. No Prohibition Against Backyard Shooting

Alternative 4, including the regulation of non-commercial shooting facilities, does not prohibit "backyard shooting." It is a land use ordinance, not a shooting ordinance. It regulates the construction of gun ranges, including non-commercial gun ranges. It does not prohibit the shooting of guns.

The staff report correctly notes that shooting can occur without gun ranges on the Forest Service and DNR lands, as well as in the Rural Residential zones (other than the designated no-shooting areas). Nothing in Alternative 4, including the regulation of non-commercial ranges, in any way limits these lawful shooting activities.

It is important not to conflate gun ranges with dispersed shooting. Gun ranges are subject to land use regulation, because they concentrate a large volume of noise, land conversion, and soil and water contamination, over a sustained period of time, into a particular area. By contrast, occasional, dispersed "backyard shooting" has far fewer of these impacts. The difference between a gun range and backyard shooting is equivalent to the difference between a restaurant and a backyard barbeque. The restaurant is subject to land use regulation. The barbeque is not.

Conclusion

We remain grateful to the County staff and the Planning Commission. We hope these supplemental comments will clarify that Alternative 4, and the regulation of non-commercial ranges, is good policy, consistent with the Growth Management Act, and allowable under the Constitution.