No. 24-

IN THE

Supreme Court of the United States

THE GUN RANGE, LLC,

Petitioner,

v.

THE CITY OF PHILADELPHIA, SPRING GARDEN CIVIC ASSOCIATION, PATRICIA FREELAND, JUSTIN NAVARRO, LAWRENCE RUST, REGINA YOUNG, BRYAN MILLER, HEEDING GOD'S CALL TO END GUN VIOLENCE AND SUSAN ANITA MURRAY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Since 2012, the City of Philadelphia's Zoning Code has prohibited a "Gun Shop"[1]—a business that provides Second Amendment-protected commercial goods and services—in over 96% of the city's land area including every commercial district. Instead, "Gun Shops" are relegated to remote limited industrial areas of the City with additional highly subjective zoning and distance regulations.

In *Heller*, this Court held the "right of the people to keep and bear Arms" protects "the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). *Heller* acknowledged these rights imply a need for "proper discipline and training" and the corresponding right to engage in the commercial sale of firearms when it described it, with "conditions and qualifications".

In *Bruen*, this Court held that the Second Amendment protects all conduct within its ambit, and places the burden on the government to prove that efforts to regulate such conduct are consistent with our Nation's historical traditions. *N.Y. State Rifle & Pistol Ass'n v. Bruen* 597 U.S. 1 (2022), and in *McDonald*, this Court held that the protections of the Second Amendment are extended to the states. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

The question presented is:

Whether prohibiting a business that provides Second Amendment-protected goods and services from operating in substantially all of a city's land areas—and all of its commercial areas—violates the Second Amendment.

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1. "Gun Shop" is defined as "any retail sales business engaged in selling, leasing, purchasing, or lending of guns, firearms, or ammunition." Phila. Code §14-100, etc.

PARTIES TO THE PROCEEDING

Petitioner is The Gun Range, LLC. Petitioner was Applicant before the Philadelphia Zoning Board of Adjustment, appellant in the Philadelphia Court of Common Pleas, appellant in the Pennsylvania Commonwealth Court, and Petitioner in the Pennsylvania Supreme Court.

Respondent is the City of Philadelphia. Respondent appeared at the Philadelphia Zoning Board of Adjustment and failed to create a record. Respondent was appellee in the Philadelphia Court of Common Pleas, appellee in the Pennsylvania Commonwealth Court, and respondent in the Pennsylvania Supreme Court.

Respondents are Spring Garden Civic Association, Patricia Freeland, Justin Navarro, Lawrence Rust, Regina Young, Bryan Miller and Heeding God's Call To End Gun Violence. Respondents appeared as protestants at the Philadelphia Zoning Board of Adjustment and were jointly represented. Respondents were intervenors in the Philadelphia Court of Common Pleas, appellees in the Pennsylvania Commonwealth Court, and respondents in the Pennsylvania Supreme Court though Respondents did not participate in the Pennsylvania Supreme Court matter.

Respondent is Susan Anita Murray who appeared as a protestant at the Philadelphia Zoning Board of Adjustment. Respondent was an intervenor in the Philadelphia Court of Common Pleas, appellee in the Pennsylvania Commonwealth Court, and respondent in the Pennsylvania Supreme Court though Respondent did not actively participate in the Philadelphia Court of

Common Pleas, Pennsylvania Commonwealth Court or Pennsylvania Supreme Court matters.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner states as follows:

Petitioner The Gun Range, LLC has no parent corporation and no publicly held company owns 10 percent or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- Zoning Appeal Re: 542-44 N. Percy Street, Philadelphia Zoning Board, Calendar # 25036 (Notice of Decision, October 6, 2015, Findings of Fact and Conclusions of Law, February 19, 2016) (Constitutional Challenge to Zoning Code raised); and

- *In Re: Appeal of The Gun Range*, Philadelphia, CCP, Philadelphia Court of Common Pleas Docket, October 2015, No. 03454 (Order, August 9, 2016) (Constitutional Challenge was Briefed and presented at Oral Argument though Court Did Not Address Constitutional Challenge in Opinion); and

- *In Re: Appeal of The Gun Range*, Commonwealth Court, 1529 CD 2016 (Argued May 2, 2017, Order, May 7, 2018); and

- *In Re: Appeal of The Gun Range*, Petition for Allowance of Appeal, Pennsylvania Supreme Court, 245 EAL 2018 (Re: Preemption issue, Denied) October 23, 2018; and

- *In Re: Appeal of The Gun Range*, Part of Case remanded to CCP to Address Constitutional Issues (Philadelphia, CCP, Philadelphia Court of Common Pleas Docket, October 2015, No. 03454) (Statement in Lieu of Opinion, July 29, 2021); and

- *In Re: Appeal of The Gun Range*, Commonwealth Court, 90 CD 2021 (Argued March 8, 2023, Order February 27, 2024); and

- *In Re: Appeal of The Gun Range*, Philadelphia Court of Common Pleas Docket, October 2015, No. 03454 (Regarding *de facto* exclusionary question-Pending); and

- *In Re: Appeal of The Gun Range*, Petition for Allowance of Appeal, Pennsylvania Supreme Court, 94 EAL 2024 (Order, September 9, 2024).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Since 2012, the City of Philadelphia's Zoning Code prohibited the operation of a "Gun Shop" business in every commercial district unless an applicant can meet the high and subjective standard for a variance. In doing so, the City curtails the fundamental and individual right to self-defense by limiting the ability to obtain "arms" and to acquire and maintain proficiency in their use. The government's requirement that an applicant meets its high burden to establish a "hardship" before engaging in a commercial use involving Second Amendment-protected goods and services within any commercial district in the City of Philadelphia is a severe restriction that ignores the Second Amendment's guaranteed rights.

It is unresolved whether there is a right to provide Second Amendment-protected goods and services in commercial districts; however, this Court in its opinions has expressed the right to keep and bear arms includes the right to acquire and maintain proficiency in their use. The acquisition of firearms inherently involves commerce. As such, a law that outright prohibits ordinary law-abiding citizens from acquiring firearms and maintaining proficiency in their use from every commercial district is unconstitutional because there is no historical tradition to support it.

OPINIONS BELOW

The Pennsylvania Supreme Court's September 9, 2024 order denying Petitioner's Petition for Allowance of Appeal is reported at 2024 Pa. LEXIS 1303 and reproduced at App. 1a.

The Pennsylvania Commonwealth Court's February 27, 2024 *en banc* opinion is reported at 311, A.3d 1242 and reproduced at App. 2a-36a.

The Philadelphia Court of Common Pleas' July 29, 2021 Statement in Lieu of Opinion denying the constitutional challenge to the Zoning Code is unreported and is reproduced at App. 37a-38a.

The Philadelphia Court of Common Pleas' January 5, 2021 Order with Explanation denying the constitutional challenge to the Zoning Code is unreported and is reproduced at App. 39a-41a.

The Pennsylvania Commonwealth Court's May 7, 2018 Opinion remanded in part as to the constitutional issues and denied in part as to a zoning question and question of state preemption is unreported and is reproduced at App. 42a-81a.

The Philadelphia Court of Common Pleas December 2, 2016 Opinion is reported at 2016 Phila. Ct. Com. Pl. LEXIS 480 and is reproduced at App. 82a-90a.

JURISDICTION

The Pennsylvania Supreme Court issued its order on September 9, 2024. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Second and Fourteenth Amendments to the United States Constitution and relevant portions of the Philadelphia Zoning Code are reproduced at App. 107a-129a.

STATEMENT OF THE CASE

A. Factual Background

Petitioner operates a shooting range at 542-44 N. Percy Street (the "Property") in Philadelphia, Pennsylvania. Under the Philadelphia Zoning Code (the "Zoning Code" or the "Code"), the Property is located within a CMX-2 commercial zoning district. Petitioner applied to the Philadelphia Department of Licenses and Inspections to include "gun sales" alongside Petitioner's existing use. The proposed expansion to include "gun sales" was denied as not being permitted in the underlying CMX-2 commercial zoning district. *See* Phila. Code § 14-602(2) at App. 121a-124a. Despite being a commercial use, a "Gun Shop" is not permitted in any commercial district in Philadelphia.

The Zoning Code defines a "Gun Shop" as "any retail sales business engaged in selling, leasing, purchasing, or lending of guns, firearms, or ammunition." *Id.* at § 14-601(6)(c)(.2); App. 114a. The activities that take place in a "Gun Shop" include acquisition of firearms and training in their use.

Specifically, the Zoning Code categorizes "Gun Shops" under "Retail Sales" of "Consumer Goods." *See id;* App. 111a-114a. The Table set forth at Section 14-602-2 of the Zoning Code, nonetheless, provides that "Gun Shops" are prohibited in *all* commercial districts inside the City of Philadelphia. App. 121a-124a. The Zoning Code further identifies a "Gun Shop" as a "regulated use," on which the Zoning Code places additional restrictions. *See id.* § 14-603; App. 128a. "Gun Shops" are lumped together with other regulated uses such as "[a]dult-oriented service[s]" and [d]rug paraphernalia stores." *Id.* § 14-603(13)(a); App. 128a.

Specifically, the Code imposes the following "Separation Requirements" upon "Gun Shops":

> **(.1) Separation Requirements**
>
> No regulated use may be located:
>
> (.a) Within a zoning district where such use is not expressly allowed; (.b) Within 1,000 ft. of any other existing regulated use;
>
> (.c) Within 500 ft. of any Residential district or SP-INS district; (.d) Within 1,000 ft. of any SP-ENT zoning district; or
>
> (.e) Within 500 ft. of the nearest lot line of a lot containing any protected use (see § 14-203(249) (Protected use))

Id. § 14-603-13(b)(.1); App. 129a.

Even though the sale of firearms is clearly a commercial use, the only way to obtain approval for a "Gun Shop" in a commercial district is for a proprietor to meet the highly subjective legal standard for a hardship in order to receive a zoning variance. *See* § 14-303(8)(e)(.1) and (.2). The Pennsylvania Supreme Court has held the criteria for a zoning variance can be boiled down into three key requirements: "(1) unique hardship to the property; (2) no adverse effect on the public health, safety or general welfare; and (3) the minimum variance that will afford relief at the least modification possible." *Marshall v. City of Phila.*, 97 A.3d 323 (Pa. 2014). The Zoning Code imposes the variance standard on constitutionally protected commercial activity in all districts zoned for commercial use. In addition, because "Gun Shops" are regulated uses under the Zoning Code, they are subject to the additional distance requirements required by § 14-603-13(b)(.1). App. 129a.

Variances are granted by a majority vote of the members of the Philadelphia Zoning Board ("Zoning Board")—who are appointed by the mayor. These unelected members have various backgrounds and include architects, heads of community organizations and lawyers. The Zoning Board determines whether an applicant has met all criteria for a variance pursuant to Sections 14-303(8)(e)(.1) and (.2) of the Zoning Code have been met.

The Zoning Code permits "Gun Shops", a *commercial* activity, in the I-3 Industrial District subject to distance regulations and in in the ICMX and I-2 industrial zoning districts subject to the Zoning Board's issuance of a highly subjective "special exception". App. 125-a-127a. A "special exception" is granted if it:

> will not cause the following specific detrimental impacts to the neighborhood beyond that which normally might be expected from the proposed use: (.a) Congestion in the public streets or transportation systems; (.b) Overcrowding the land; (.c) Impairing an adequate supply of light and air to adjacent property; (.d) Burdening water, sewer, school, park, or other public facilities; (.e) Impairing or permanently injuring the use of adjacent conforming properties; (.f) Endangering the public health or safety by fire or other means; or (.g) Inconsistency with the Comprehensive Plan of the City.

Phila. Code § 14-303(7)(e)(.2). Even if an industrial zoning applicant satisfies the Zoning Board that its "Gun Shop" meets these vague and subjective standards, the Zoning Board can nonetheless deny a special exception permit for an industrial area if any "objectors" show that the "Gun Shop" is "substantially likely to cause a detrimental impact on the health, safety, and welfare of the neighborhood exceeding that which normally might be expected from the proposed use." *Id;* Phila. Code § 14-303(7)(e)(.3).

As a result, "Gun Shops" are barely permitted anywhere in the City of Philadelphia. There are fewer than 20 licensed locations for federal firearms licensees ("FFLs") in the entire City of Philadelphia.[2]

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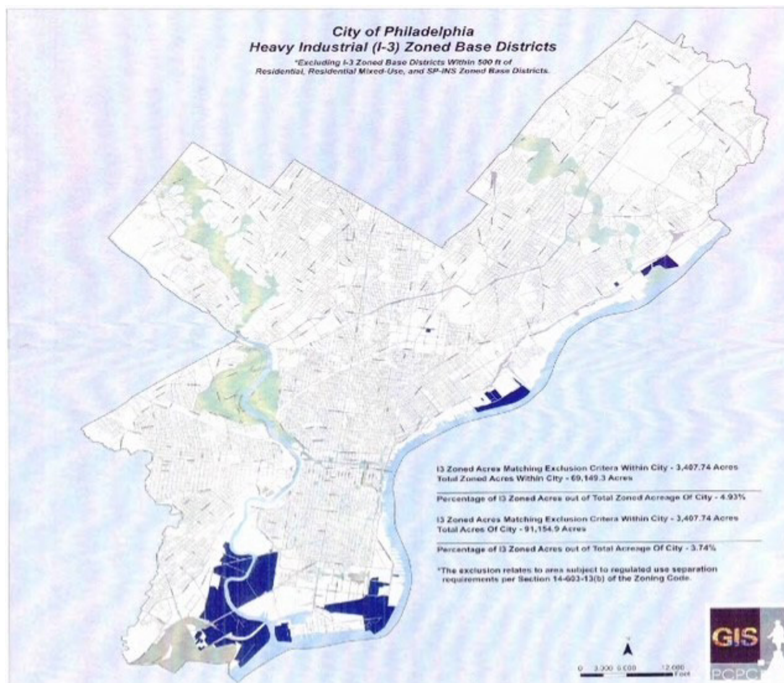
2. By contrast, Pittsburgh has 48 FFLs. Lancaster has 14. Easton has 29. Erie has 25. Reading has 14 and Allentown has 10. Reading has a population of 95,000 people and has basically the same number of gun stores as Philadelphia. *See* https://www.atf.gov/firearms/listingfederalfirearmslicensees/state?field_ffl_date_

Without a variance or “special exception”, such firearms businesses in Philadelphia are restricted to a handful of severely limited locations constituting, in the aggregate, a mere 3.74% of zoned acres within the City of Philadelphia as shown on the following map prepared by the Philadelphia City Planning Commission which is part of the Record. This map does not include the ICMX or I-2 zoning classification, each of which allows for a “Gun Shop” by “special exception”. The standard for “special exceptions” places its own restrictions on the subjective approval of a “Gun Shop”, though not as high as the standard for a variance.



value%5Bvalue%5D%5Byear%5D=2024&ffl_date_month%5Bvalue%5D%5Bmonth%5D=10&field_state_value=PA.

A hearing on Bill No. 110845 which became the 2012 Zoning Code was held on December 7, 2011. The proceedings, evidence and objections are contained fully and accurately in the stenographic notes taken by Michele L. Murphy. Throughout the 190 pages of the transcript from the committee hearing on the bill that became the new Zoning Code, there is no testimony on the record that addresses "Gun Shops". No governmental interest was placed on the record and in any event the firearms commerce restrictions embedded in Philadelphia's Zoning Code – having been adopted in 2011 – can hardly be considered the sort of long-standing laws entitled to deference under this Court's *Bruen* standard

Petitioner challenged the statute on behalf of itself and its customers as unconstitutional on its face and as applied. *See* App. 60a n. 10.

B. Procedural History

In 2015, Petitioner preserved its challenge to the constitutionality of the Zoning Code as it relates to guns at the Zoning Board hearing. Petitioner asserted that the Zoning Code is unconstitutional because it prohibits "Gun Shops"—a commercial business providing Second Amendment-protected goods and services—in every commercial district. The Zoning Code thus improperly infringes on Petitioner's right to sell firearms and on its customers' rights to acquire arms and maintain proficiency in their use.

From the beginning of this case, Petitioner has raised and briefed challenges to the constitutionality of the Zoning Code.

At the Zoning Board, the challenge to the constitutionality of the Zoning Code can be found in the notes of testimony and a written memorandum that was submitted; however, the Zoning Board lacks jurisdiction over constitutional issues.

The constitutional challenge to the Zoning Code was then briefed and presented at oral argument before the Philadelphia Court of Common Pleas but in its opinion, the Court of Common Pleas did not address the constitutional issues. On appeal, the Commonwealth Court denied in part (as to zoning and preemption issues) and remanded the case back to the Court of Common Pleas to address the constitutional issues. A Petition for Allowance of Appeal on the preemption issue was filed in the Pennsylvania Supreme Court, which subsequently denied the Petition.

On remand, the Court of Common Pleas denied Petitioner's constitutional challenge. A second appeal to Commonwealth Court ensued where the Commonwealth Court denied the constitutional challenge. In doing so, the Commonwealth Court recognized the Petitioner's ability to raise issues on behalf of its customers. The Commonwealth Court, nonetheless, denied the constitutional challenge to the zoning code for two reasons: (1) that there is no recognized right to sell arms; and (2) that "the government may regulate the commercial sale of firearms." (*Heller*, 554 U.S. at 626-27). App. 26a-30a. The Commonwealth Court remanded in part a second time to the Court of Common Pleas to address a question as to whether the Code is *de facto* exclusionary. The Court of Common Pleas has not yet ruled on the *de facto* exclusionary question. Petitioner filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court on the constitutional question. The Petition for Allowance of Appeal was summarily denied.

REASONS FOR GRANTING THE PETITION

This Court made clear that the Second Amendment guarantees a right to keep and bear arms for self-defense. This fundamental right includes the ability to acquire and maintain proficiency in their use; otherwise, the Second Amendment would be meaningless. This precept derives from reviewing the text and history of the Second Amendment, and the decisions of this Court in *Heller*, *McDonald* and *Bruen*. To that end, there must also be a corresponding right to the commercial sale of arms in order to realize the other rights enshrined in the Second Amendment. To deny the right to commerce in Second Amendment goods and services denies the fundamental rights of law-abiding Americans to acquire arms and maintain proficiency in their use. The right to possess and use a firearm cannot exist without the right to acquire a firearm.

The City of Philadelphia through its Zoning Code prohibits "Gun Shops", a commercial use, in every commercial district unless a "hardship" is shown. In doing so, it curtails the fundamental and individual right to self-defense by limiting the ability to obtain "arms" and to acquire and maintain proficiency in their use. The government's requirement to show a "hardship" for this commercial activity to be permitted in any commercial district is a severe restriction that ignores the Second Amendment's guaranteed right of individuals to acquire arms. *See* Phila. Code § 14-303(8)(e)(.1) and (.2).

The lower courts are in disagreement over the constitutionality of the prohibition of businesses providing Second Amendment-protected goods and services in

commercial districts. The Third Circuit Court of Appeals cited *Heller* and recognized in a zoning case involving firing ranges that self-defense "implies a corresponding right to acquire and maintain proficiency" with common weapons. A right to bear those weapons, after all, "wouldn't mean much without the training and practice that make [them] effective." *See Drummond v. Robinson Twp.*, 9 F.4th 217, 227, 229-230 (3d Cir. 2021). The Seventh Circuit found the restriction limiting firing ranges to manufacturing districts only (and prohibiting them from commercial districts) was unconstitutional. *See Ezell*, 846 F.3d 888 (7th Cir. 2017). To the contrary and in regards to Second Amendment-protected goods, the Ninth Circuit held that there is no right for commercial business owners to sell firearms. *Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017). Notably, the *Teixeria* opinion adds, although briefly, an important analysis of the *Ezell* case, stating that the subject ordinances in *Ezell* "directly, and meaningfully, interfered with the ability of city residents to maintain firearms proficiency, a right the Seventh Circuit found to be an "important corollary" to the core right to bear arms. *Teixeira*, 873 F.3d at 677, *citing Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) ("*Ezell I*") at 708.

The Pennsylvania Supreme Court left untouched the Commonwealth Court decision which found the Philadelphia Zoning Code constitutional even though "Gun Shops" were prohibited from every commercial district and permitted in industrial districts with additional regulations.

The result: The decision of Pennsylvania's highest court allowing the Commonwealth Court decision to stand conflicts with this Court's decision in *Bruen* because the Commonwealth Court's decision focused on the "commercial sale of arms" without addressing the customers' right to acquire arms and maintain proficiency in their use. Further, the Pennsylvania Supreme Court's decision is a direct conflict with the decision of the Seventh Circuit United States Court of Appeals. In *Ezell*, the Seventh Circuit determined that a complete ban on a business that provides Second Amendment protected service in every commercial district was unconstitutional.

The Pennsylvania Commonwealth Court *en banc* decision impacts not only the City of Philadelphia, the sixth largest city in the United States and the very place where the debate and ratification of the Second Amendment took place, but also serves as precedent to deny almost 13 million Pennsylvanians their fundamental and individual constitutional right to acquire arms. This Court should grant certiorari to resolve this lower court split regarding the ability to regulate Second Amendment-protected commercial goods and services.

I. The Pennsylvania Commonwealth Court Decision Conflates a Customer's Right to Acquire Firearms and Maintain Proficiency in Their Use With a Proprietor's Right to Sell Arms And Thus Conflicts With *Bruen*

This Court in *Bruen* expressly rejected the pre-*Bruen* two-step test and the accompanying means-end scrutiny widely adopted by courts analyzing Second Amendment challenges. In doing so, this Court announced that:

"[t]oday, we decline to adopt that two-part approach. *Bruen*, 597 U.S. at 18. This Court explained that "[d]espite the popularity of th[e] two-step approach, it is one step too many." *Id.* at 2127. This Court observed that means-end scrutiny is inappropriate because it allows courts to "defer to the determinations of legislatures." *Id*. at 2131. Although "judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here." *Id*. Citing *Heller*, 554 U.S. 570, 634 (2008). this Court refused to "engage in means-end scrutiny generally" and expressly rejected an "intermediate-scrutiny test that" the respondents and the United States government again urged this Court to adopt. *Id.* at 2129.

In rejecting means-end scrutiny, this Court clarified that the test set forth in *Heller* "**requires** courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *See id.* at 2131 (emphasis added). To do so, courts must consider if: (1) "the Second Amendment's plain text covers an individual's conduct... [then] the Constitution presumptively protects that conduct[;]" and, if so, the government can "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129-30. In offering justification for its regulation(s), the "government may not simply posit that the regulation promotes an important interest," but rather "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126; *see also id.* at 2150 (noting that Courts "are not obliged to sift the historical materials for evidence to sustain a statute", as that burden falls on the government).

Petitioner maintains that the Second Amendment protects its proposed course of conduct—the sale of firearms and ammunition, as well as lending firearms for use at Petitioner's on-site shooting range. Purchase and practice restrictions implicate Second Amendment protections because such restrictions have the "effect of depriving would-be gun owners of the guns and skills commonly used for lawful purposes." *See Drummond*, 9 F. 4th 217 (observing that, even prior to *Bruen*, "[i]f a zoning ordinance has the effect of depriving would-be gun owners of the guns and skills commonly used for lawful purposes like self-defense in their homes, strict scrutiny may be warranted."). Indeed, the Supreme Court has recognized the right to keep and bear arms for self-defense under the Second Amendment. *See Ezell v. Chicago*, 70 F. Supp. 3d 871 (N.D. Ill. 2014) (*Ezell II*), *citing Heller*, 554 U.S. at 570. The right to "acquire firearms and maintain proficiency in their use" is a core right. *Id.*

Bruen instructs that where the plain text of the Second Amendment covers the individual's conduct, then "the Constitution presumptively protects that conduct." *Bruen*, 597 U.S. at 25. The City, therefore, seeks to regulate conduct that is presumptively protected by the Second Amendment.

At that point "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."

In the instant matter, the Commonwealth Court failed to follow *Bruen's* historical precedent test and instead applied its own balancing or sufficiency test. For example, the Commonwealth Court reasoned that "'gun buyers had no right to a gun store in a particular location, at least as long as their access is not *meaningfully* constrained.'" App. 27a-28a. (emphasis added; internal citations omitted). Similarly, the Commonwealth Court indicated that it was testing whether "the Code interfered with citizens' *sufficient* access to firearms." App. 25a, n. 29 (emphasis added). In these quoted passages, the Commonwealth Court has acknowledged that a Second Amendment right to access firearms exists. It then improperly seeks to balance that right through its own subjective sufficiency test. In doing so, the Commonwealth Court has collapsed its Second Amendment inquiry into precisely the type of subjective balancing test which *Bruen* rejected and prohibits.[3]

A. The Philadelphia Zoning Code Regulates Conduct Within the Ambit of the Second Amendment

Through its Zoning Code, the City of Philadelphia prohibits "Gun Shops" from selling, leasing, purchasing, or lending guns, firearms, and/or ammunition within any commercial district. Phila. Code § 14-100, et seq. The

3. To the extent the Commonwealth Court is suggesting in footnote 29 that Gun Range did not make derivative rights arguments, that suggestion is unfounded. In addition to addressing the Second Amendment derivative issues in its various briefs to the Commonwealth Court in *Gun Range I & II*, Gun Range previously addressed (and preserved) these issues during the Zoning Board and lower court proceedings. App. 29a.

question of whether the Zoning Code covers matters that fall within the "plain text" of the Second Amendment is about more than just the right to sell guns. The challenged activities restricted by the Zoning Code, indisputably fall within the ambit of the Second Amendment. The activities that take place in a "Gun Shop" include the acquisition of firearms and the maintenance of proficiency in their use.

In not challenging whether other activities other than selling guns is protected activity under the Second Amendment, the City conceded that the zoning code regulates activity protected by the Second Amendment.

B. The City Failed to Meet its Burden to Show That Historical Tradition Permits the City to Ban "Gun Shops" From All Commercial Districts.

Because the City seeks to regulate conduct that is presumptively protected by the Second Amendment, it is the City's burden to "demonstrate that [its] regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 18. The City had the burden to show through traditional history that "Gun Shops" should be entirely banned from all commercial districts. A review of the Record shows the City has not met its burden nor can the City do so because it failed to place any evidence in the Record.

Using this Court's standards as set forth in *Bruen*, an analysis of the subject regulation reveals its unconstitutionality. As a threshold matter, the City only relegated firearms related businesses to a fraction of the City's zoned land area by adopting certain zoning

regulations in 2011. That modern adoption in and of itself dramatically undermines any sense that the City's severe regulations on firearms commerce are long standing or are linked to a historical tradition

Moreover, in *Bruen*, the Court found that "[b]ecause the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense," the State's licensing regime violates the Constitution. *Bruen*, 597 U.S. at 12. Accordingly, this Court found that a constitutional right cannot be denied on the whim of reviewing local officials.

The City's prohibition of "Gun Shops" by right in any commercial district means that applicants seeking to operate a "Gun Shop"—a commercial use—in a commercial district are required to demonstrate to the unelected officials of the Zoning Board that they meet the highly subjective legal standard to obtain a zoning variance as set forth in Sections 14-303(8)(e)(.1) and (.2) of the Zoning Code. *See Marshall*, 97 A.3d 323. The standard places a high burden upon applicants to obtain a variance. *See In re Larsen*, 532 Pa. 326 (1992); *Johnston v. East Greenville Borough Zoning Hearing Bd., 253 A.3d 840 (Pa. Cmwlth. 2021).*

Similar to *Bruen*, where the regulation granted "licensing officials discretion to deny licenses based on a perceived lack of need or suitability", applicants' requirement to meet the standard for a variance unconstitutionally opens the door to officials' discretion to deny a variance. *See Bruen*, 597 U.S. at 14. In essence, the Supreme Court, struck down legislation that required applicants to 'tell us why you should have

your constitutional right'. By imposing the equivalent of requiring "Gun Shops" to establish entitlement to a variance in commercial districts, the City has arguably imposed an even higher standard of proof than did the New York law which this Court in *Bruen* struck down.

Even though it is not part of the Record, the City sets forth the proposition (without citation for support to the Record or otherwise) that "Gun Shops" are properly barred from all commercial districts in order to keep them separated from residential areas. The City does not cite "sensitive places" as a basis for its regulation on "Gun Shops"; nonetheless, *Bruen's* discussion of "sensitive places" regarding a ban on firearms use is relevant in showing the City's total ban on "Gun Shops" in commercial districts is unjustifiable.

There are "laws forbidding the carrying of firearms in "sensitive places", such as schools and government buildings" to determine whether modern regulations are constitutionally permissible. *Bruen*, 597 U.S. at 4. The Supreme Court goes on to state " . . . there is no historical basis for New York to effectively declare the island of Manhattan a "sensitive place" simply because it is crowded and protected generally by the New York City Police Department." Similarly, the City of Philadelphia cannot ban "Gun Shops" in all commercial zoning districts simply to keep them separated from residential areas. While this Court has identified some locations as sensitive locations including schools, government buildings, court houses, polling places and legislative assemblies, this Court cautions "relatively few" sensitive locations exist. *See Bruen*, 597 U.S. at 31. To define an entire commercial

zoning district as a "sensitive place" would be to define the category far too broadly and beyond historical tradition.

Even before *Bruen* was decided, the Third Circuit Court of Appeals in *Drummond* held that as a matter of first impression, zoning restrictions lacked historical foundations. *See Drummond*, 9 F. 4th 217. The holding applies to Philadelphia zoning restrictions as well especially in light of the fact that the Philadelphia Zoning Code was established in 1933 and "Gun Shops" were not added to the Zoning Code until 2007, well after the adoption of the constitution and passage of the Second Amendment. Given that a zoning code, by its nature, is not based on historical foundations, the City's failure to proffer any evidence in support of its argument or in furtherance of its obligation to meet its burden imposed by *Bruen* is ultimately fatal.

II. This Court Should Resolve the Open and Acknowledged Split on Whether a City's Zoning Restriction Limiting A Business that Provides Second Amendment Goods and Services to Industrial Districts Violates the Second Amendment.

The text and history of the right to bear arms, and this Court's decisions in *Heller, McDonald* and *Bruen*, make clear that the Second Amendment protects not only the individual right to keep arms for protection, but also the individual right to acquire arms for protection and the right to train to maintain proficiency in their use. Government officials cannot severely restrict the fundamental Second Amendment right to acquire arms or train for self-defense, or relegate such rights to a remote area on the outskirts of society.

Lower courts are divided over whether local municipalities may enact laws prohibiting ordinary law-abiding citizens from providing and obtaining commercial goods and services vital to the Second Amendment. Some courts have determined that these types of zoning restrictions are irreconcilable with the right to keep and bear arms for self-defense. Other courts, like the Pennsylvania Commonwealth Court, have reached the opposite conclusion—ruling that such restrictions were constitutionally permissible so long as the ability to acquire firearms and to hone one's proficiency were not outlawed entirely. The Pennsylvania Supreme Court tacitly accepted this ruling in its refusal to hear the appeal. The division requires this Court's scrutiny.

In a number of cases, the courts have linked the right to training with the core component of the Second Amendment's right to bear arms and maintain proficiency. The Third Circuit Court of Appeals in *Drummond v. Robinson Township* analyzed zoning regulations restricting firing practice and ranges. *See Drummond*, 9 F.4th at 229-230.[4] The Court referenced *Heller* and noted that self-defense "implies a corresponding right to acquire and maintain proficiency" with common weapons. A right to bear those weapons, after all, "wouldn't mean much without the training and practice that make [them] effective." *Id*. at 227. The Seventh Circuit Court of Appeals held that a zoning ordinance violates the Second

4. The Commonwealth Court noted in its opinion, "Further, "[w]henever possible, Pennsylvania state courts follow the Third Circuit so that litigants do not improperly walk across the street to achieve a different result in federal court than would be obtained in state court."" App. 9a, n. 8.

Amendment where the ordinance prohibited firing ranges from being located in commercial districts because "the core individual right" of the Second Amendment "includes a corresponding right to acquire and maintain proficiency in their use." *Ezell v. City of Chicago*, 846 F.3d 886, 896-897 (7th Cir. 2017) ("*Ezell II*").

Contrary to the Third and Seventh Circuit, the Ninth Circuit held that there is no right for commercial business owners to sell firearms. *Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017). Notably, the *Teixeria* opinion adds, although briefly, an important analysis of the *Ezell* case, stating that the subject ordinances in *Ezell* "directly, and meaningfully, interfered with the ability of city residents to maintain firearms proficiency, a right the Seventh Circuit found to be an "important corollary" to the core right to bear arms." *Teixeira*, 873 F.3d at 677, *citing Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) ("*Ezell I*") at 708.

To the contrary, Pennsylvania's highest court denied a petition for allowance of appeal; accordingly, the Commonwealth Court's decision upholding the Zoning Code's prohibition of "Gun Shops" in every commercial district remains standing.

The split on this issue as to whether Second Amendment rights are implicated in zoning cases is clear. After almost ten years of appeals in the Pennsylvania Courts, only this Court can resolve this critical constitutional question. If the Commonwealth Court decision stands, the Philadelphia Zoning Code would be allowed to interfere improperly

with law-abiding Americans seeking to exercise their Second Amendment rights. The Zoning Code prohibits individuals from participating in Second Amendment commercial activities in any commercial district inside the City of Philadelphia. In order to purchase a firearm or to train how to use such a weapon, a resident of Philadelphia is required to drive to the outskirts of the City's remote industrial districts or beyond. This creates a chilling effect on the exercise of Second Amendment rights. Americans would be unable to acquire or train in any commercial district merely because the commercial activity involves a Second Amendment good or service. Given the historical foundation of the right to keep and bear arms and the right to commerce involving Second Amendment activities, the Court should ensure these Second Amendment rights are protected.

III. The City of Philadelphia's Requirement to Show "Hardship" to Permit a "Gun Shop" in a Commercial District Violates the Second Amendment.

This Court's review is critical because the lower court's decision impacts citizens in the sixth largest city in the United States and sets a precedent for others to follow suit. Philadelphians are being denied a textually guaranteed, fundamental right that was enshrined to secure their personal safety. Text, history and tradition readily confirm that the Second Amendment protects the commercial sale of firearms and the right to train to maintain proficiency in their use. It is not a right dependent upon a local, unelected zoning board deciding whether or not an applicant has met its burden of establishing a hardship such that the Zoning Board would issue a variance. The exercise of a constitutionally

protected right should not hinge on proof of a hardship. Philadelphia's Zoning Code severely limits constitutional rights instead of protecting them.

A. The Text, Structure and Purpose of the Second Amendment Confirm That the Right To Keep and Bear Arms Includes the Means Needed to Exercise That Right.

It is well-settled that the Constitution also protects the means needed to exercise an explicitly defined constitutional right, not simply the right itself: "[F]undamental rights, even though not expressly guaranteed [by the Constitution], have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). This constitutional principle sits at the heart of this case. The Second Amendment to the U.S. Constitution guarantees "the right of the people to keep and bear Arms, [which] shall not be infringed." In *District of Columbia v. Heller*, this Court held that the Second Amendment "protect[s] an individual right to use arms for self-defense," 554 U.S. 570, 616 (2008), and in *McDonald v. City of Chicago*, this Court held that the right to keep and bear arms applies to the States through the Fourteenth Amendment, recognizing it as a "fundamental right[ ] necessary to our system of ordered liberty," 561 U.S. 742, 778 (2010) (plurality opinion); *id.* at 806 (Thomas, J., concurring in part and concurring in the judgment). Here, the zoning restrictions challenged in this matter greatly infringe upon the ability of people in Philadelphia and its environs to exercise their guaranteed constitutional rights. Accordingly, the Zoning Board violated the Second Amendment when it denied the Gun Range's request for a permit to sell firearms to law-abiding citizens.

B. The History of the Second Amendment Confirms That the Right to Keep and Bear Arms Includes Buying Arms and Training to Maintain Proficiency in Their Use.

Historical tradition is firmly on the side of *protecting* the right to purchase arms and *against* restrictions on their sale. Nothing in the historical record supports a municipality's use of modern, late 20th and early 21st century zoning laws to impose restrictions specifically targeting "Gun Shops".

English history informs this discussion, as this Court recognized in *Heller*. Shortly after the Restoration, Charles II banned the importation of all firearms in order to control their distribution. *See* Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285, 299–300 (1983) ("*Malcolm I*"). Later, in 1666, the King proposed requiring "every man that had any gunpowder to sell" to obtain a license from officers of the King's Ordinance and Arms before offering any for sale, but Parliament, suspicious of the King's motives, laid the bill aside. *See* Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 64–65 (1994) ("*Malcolm II*"). Charles's successor, James II, used similar tactics, ordering his Irish commissioners to "regulat[e] the importation, sale and use of gunpowder" so as to achieve the redistribution of firearms from Protestants to Catholics. *Id.* at 96–97. Experiences such as these "caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms," leading to the enactment of the English Bill of Rights, which guaranteed to Protestants the right to "have Arms

for their Defence" and served as the "predecessor to our Second Amendment." *See Heller*, 554 U.S. at 592–93; *see also Malcolm II*, *supra*, at 116.

Indeed, more than a century after establishment of the English Bill of Rights, one commentator, noting the significance of the provision guaranteeing the right to have arms, suggested there were no meaningful restrictions on the right of Englishmen to purchase arms: "What law forbids the veriest pauper, if he can raise a sum sufficient for the purchase of it, from mounting his Gun on his Chimney Piece, with which he may not only defend his Personal Property from the Ruffian, but his Personal Rights, from the invader of them[?]" SOME CONSIDERATIONS ON THE GAME LAWS 54 (1796), https://goo.gl/tA25V7 (quoted in *Heller*, 554 U.S. at 583 n.7).

Restrictions on the sale of arms also played a significant role in the run-up to the American Revolution, since "what the Stuarts had tried to do to their political enemies, [King] George III had tried to do to the colonists." *Heller*, 554 U.S. at 594. In the fall of 1774, George III imposed a ban on the importation of firearms into the American colonies. *See* 5 ACTS OF THE PRIVY COUNCIL OF ENGLAND 401 (J. Munro & W. Fitzroy, eds. 1912), https://goo.gl/cE8unz. The ban remained in effect until the Anglo-American peace treaty ended the Revolutionary War in 1783. David B. Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 CHARLESTON L. REV. 283, 297 (2012). The American colonists viewed this as an attack on their right to keep and bear arms. As the South Carolina General Committee viewed the embargo:

> [B]y the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them; it was therefore recommended, to all persons, to provide themselves immediately, with at least twelve and a half rounds of powder, with a proportionate quantity of bullets.

1 JOHN DRAYTON, MEMOIRS OF THE AMERICAN REVOLUTION 166 (1821) (quotation marks omitted), https://goo.gl/JkXZYo. The embargo and other laws aimed at disarming the colonists "are precisely what turned a political argument into the American Revolution." Kopel, *supra*, at 327; *Heller*, 554 U.S. at 594–95.

Indeed, the Founders were accustomed to having few—if any—restrictions on the sale of arms, which is what made aberrations like the English embargo so outrageous to them. A century before the American Revolution, Virginia law recognized that "all persons have hereby liberty to sell armes [sic] and ammunition to any of his majesties loyall [sic] subjects inhabiting this colony." 2 THE STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 403 (W. Hening, ed. 1810), https://goo.gl/numtUH. The freedom to sell arms was so widespread in America at the time the Second Amendment was ratified that Thomas Jefferson, while serving as Secretary of State, observed that "*[o]ur citizens have always been free to make, vend and export arms*. It is the constant occupation and livelihood of some of them." 3 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 558 (H.A. Washington ed., 1853) (emphasis added), https://goo.gl/bcUoXL. Thus, the

history of England, the American colonies, and the early days of the American republic confirms that restrictions on the sale of arms were generally unknown and ardently resisted as encroachments on the right to keep and bear arms. *See Teixeira*, 822 F.3d at 1054–56. This history is not supportive of Philadelphia's zoning laws, as the City claims.

Notwithstanding this clear historical tradition, Judge Pellegrini, relying on the Ninth Circuit's *en banc* opinion in *Teixeira*, asserted in his dissent on the first Gun Range appeal to Commonwealth Court that "colonial governments routinely regulated the commercial sale of firearms." *The Gun Range, LLC v. City of Philadelphia, et al.*, 2018 WL 2090303, at *12 ("*Gun Range I*"). Presumably, Judge Pellegrini was referring to *Teixeira*'s description of colonial-era restrictions on the selling of firearms to Native Americans. *See* 873 F.3d at 865. But these, deeply racist laws, were based on the *racial status of the buyer*, not on some general or widely recognized power to regulate the location of arms sales to law-abiding citizens. In this shameful chapter in American history, Native Americans were viewed as a threat to public safety who could not be entrusted with firearms, and they were subject to the same prohibition on firearm ownership that applied to the equally shameful restrictions placed upon slaves. *See Binderup v. Attorney Gen. United States of America*, 836 F.3d 336, 368 (3d Cir. 2016) (Hardiman, J., concurring in part and concurring in the judgments); (2009 Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1562); Malcolm II, *supra*, at 140–41. These laws say nothing about the power to restrict arms sales generally. *See Teixeira*, 873 F.3d at 693 (Tallman, J., concurring in part and dissenting in part). Relying on racist laws from

an appalling period in American history is hardly a strong foundation upon which Philadelphia can base its modern restrictions on arms sales.

There is, therefore, no historical tradition that would support according a "longstanding" presumption of validity to the City's use of modern zoning laws to regulate the sale of firearms. Indeed, our historical tradition condemns them. *See generally* David B. Kopel, *Does the Second Amendment Protect Firearms Commerce*, 127 HARV. L. REV. F. 230 (2014). And even if there were a presumption of validity that attached to the City's zoning laws, that presumption would be rebutted by the heavy burden Philadelphia's laws place on the right to acquire a firearm and by the history described above. *See Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) (*Heller II*) ("A plaintiff may rebut this presumption [of validity] by showing the regulation does have more than a de minimis effect upon his right."); *Binderup*, 836 F.3d at 350–51 (Opinion of Ambro, J.) (*Heller*'s presumption of validity is rebuttable using historical evidence). Because there is no basis for excluding the zoning laws targeting firearm sales from Second Amendment scrutiny, the burden lies with the City to prove that its laws survive review. S*ee Binderup*, 836 F.3d at 353 (Opinion of Ambro, J.); *Ezell I*, 651 F.3d at 702–03. The City cannot meet that burden.

Besides buying and selling arms, training occurs in a "Gun Shop" as defined by the Zoning Code. The history of the Second Amendment "strongly confirm[s]" the right to bear arms includes the right to train. *Heller*, 554 U.S. 570. Dating back to English roots, Blackstone described "the right of having and using arms for self-preservation and defence," 1 William Blackstone, Commentaries 136, 140

(1765), as "one of the fundamental rights of Englishmen." *Heller*, 554 U.S. at 594. The "fundamental" right to use arms for self-preservation and defence" necessarily included the right to train to obtain the knowledge of how to survive and escape injury.

The legal scholar, Joseph G.S. Greenlee, traces the ancient laws and English History demonstrating that early English laws required arms possession and competency. See Greenlee, Joseph G.S. *The Right To Train: A Pillar of the Second Amendment*, William & Mary Bill of Rights Journal, Vol. 31:93, at pp. 96-106. As Greenlee notes, the history of the right to train is documented through the writings of prominent figures including Sir John Fortescue, the Chief Justice of the King's Bench, John Selden, and David Hume. *Id*. at 96, 102. British scholar, Granville Sharp, characterized England's laws at the time of America's founding as "requir[ing] the people to be armed, and not only to be armed, but to be expert in arms." *Id*. at 107.

Understanding this history is important toward gaining an understanding of the Americans' understanding of the scope of the right to bear arms at the time the Second Amendment was adopted. *Id*. at 107-131.

In the American colonial era, arms proficiency was required for survival: to secure food and for self and community defense. Laws were passed promoting competency with arms. *Id*. at 108-09. The importance of training and the competency with arms was documented in the writings of distinguished figures of the time including John Adams, his son, John Quincy Adams, James Madison, Thomas Jefferson and Benjamin Franklin. *Id*. at 110-12.

At the time the United States Constitution was debated, the assertion that an armed and trained populace was the best defense against a tyrannical government was undisputed. *Id.* at 126-128.

"The necessity of a trained populace was reflected in the Second Amendment itself." *Id.* at 129. "Well regulated" means trained and disciplined, and the militia includes the body of the people. *Id.* at 130. U.S. Const. amend. II. Thomas Cooley, a nineteenth century legal scholar, wrote, "to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms[.]" *Id.* at 133 (citing Cooley, The General Principles of Constitutional Law in the United States of America, at 217 (1880).

The overwhelming weight of historical authority thus compels the conclusion that the fundamental right to bear arms was understood to guarantee a right to purchase arms and train to use them.

C. *Heller*'s Reasoning Strongly Supports the Conclusion That the Second Amendment Protects a Right to Acquire Second Amendment-Protected Commercial Goods and Services in a Commercial District.

In upholding Philadelphia's zoning regulations, the Pennsylvania Supreme Court and Commonwealth Court misconstrued the holding of *Heller*. In *Heller*, this Court explained, "the inherent right of self-defense has been central to the Second Amendment right." *Heller*, 554 U.S.

at 628; see also id. at 599 ("[S]elf defense . . . was the central component of the right."); *McDonald*, 561 U.S. at 749050 ("the Second Amendment protects the right to keep and bear arms for the purpose of self-defense"). The law in *Heller* was unconstitutional because it made "it impossible for citizens to use [handguns] for the core lawful purpose of self-defense." *Id.* at 630. By prohibiting "Gun Shops" from operating in any commercial district inside the city, the Philadelphia Zoning Code also interferes with a citizen's lawful ability to use a firearm.

The Second Amendment is implicated by regulations that restrict one's ability to acquire or train in using firearms, as the need for self-defense requires acquisition and possession of firearms, and training in their usage. *Heller* did not mean to immunize all restrictions on the commercial sale of firearms from Second Amendment review, since doing so would permit the government to effectively ban the sale of firearms under the theory of "imposing conditions," and "[s]uch a result would be untenable under *Heller*." *United States v. Marzzarella*, *infra.*, 614 F.3d at 91, 92 n.8. Rather, under *Heller*, only those restrictions that have "longstanding" and "historical justifications" are permitted, *Heller*, 554 U.S. at 635, and the City has the burden of proving that its zoning laws are the kind of "longstanding" measures that have historically been imposed on the right to keep and bear arms. S*ee New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 257 n.73 (2d Cir. 2015); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell I*, 651 F.3d at 702–03. Here, the City did not present *any historical evidence at all* to carry that burden, and in any event the City adopted its current zoning restrictions on firearms sales only in 2011. No historical tradition supports the use of

zoning laws to specifically restrict the sale of firearms. *See Teixeira*, 822 F.3d at 1058.

"After *Heller*, [several] federal courts of appeals have held that the Second Amendment protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense." *Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (*en banc*). For example, the Ninth Circuit has recognized that the right to keep and bear arms entails the right to acquire and possess ammunition because "without bullets, the right to bear arms would be meaningless." *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014); *see also Kolbe v. Hogan*, 813 F.3d 160, 175 (4th Cir. 2016), *on reh'g en banc*, 849 F.3d 114 (4th Cir. 2017). Similarly, the Seventh Circuit has held that "[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use" at firing ranges because "the core right wouldn't mean much without the training and practice that make it effective." *Ezell I, supra.* 651 F.3d 684, 704; s*ee also Drummond*, 9 F. 4th 217. These holdings were straightforward applications of the "just and well-settled doctrine" that "a State cannot do that indirectly which she is forbidden by the Constitution to do directly." *Smith v. Turner*, 48 U.S. 283, 458 (1849); *see also Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1242 (11th Cir. 2004) ("restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item."). Because the government cannot forbid law-abiding citizens from exercising the right to keep and bear arms, it likewise cannot forbid them from engaging in or having access to means that are necessary to the exercise of the right.

Adhering to this doctrine, the Third and Ninth Circuits, as well as numerous federal district courts, have confirmed that "[t]he right to keep arms[ ] necessarily involves the right to purchase them" or otherwise "acquire arms[.]" *Teixeira*, 873 F.3d at 677-678 (first alteration in original) (quoting *Andrews v. State*, 50 Tenn. 165, 178 (1871)); *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010); *Mance v. Holder*, 74 F. Supp. 3d 795, 807 n.8 (N.D. Tex. 2015), *rev'd and vacated on other grounds by* 880 F.3d 183 (5th Cir. 2018); *Illinois Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 930 (N.D. Ill. 2014). The Second Amendment right "'wouldn't mean much'" without including these ancillary rights—in particular the right to acquire firearms. *Teixeira*, 873 F.3d at 677 (quoting *Ezell I*, 651 F.3d at 704). As one District Court noted, "[i]f the Second Amendment individual right to keep and bear a handgun for self-defense is to have any meaning, [then] it must protect an eligible individual's right to purchase a handgun, as well as the complimentary right [of "Gun Shops"] to sell handguns." *Radich v. Guerrero*, 2016 WL 1212437, at *7 (D. N. Mar. I. Mar. 28, 2016).

Because the Second Amendment protects a fundamental, individual right to acquire and train for self-defense, regulations like Philadelphia's Zoning Code—which differentiates commercial uses involving firearms from other commercial uses without any explanation and only serves to curtail rights—are categorically unconstitutional. Such laws flatly deny to ordinary law-abiding citizens the rights that the Second Amendment protects. By requiring a permit applicant to submit evidence of a "hardship" for a commercial use involving buying firearms or training with firearms, a standard that does not exist for other commercial uses

not involving firearms, the regulations are not merely an infringement, the regulations are antithetical to the constitutional freedom itself. The regulations fail under any level of constitutional scrutiny.

IV. The Question Presented Is Exceptionally Important

An important Second Amendment issue is whether the fundamental, individual right to self-defense includes the right to acquire and train with firearms.

The broad prohibition of these activities in every commercial district across the City is a flagrant effort to severely confine access to firearms and firearm-related businesses and impedes the rights enjoyed by all Americans. The nature of these regulations are not in the interest of the health, safety, morality and welfare of the community, but in the interest of advancing restrictions so onerous that the protected right to bear and access firearms is all but obliterated within the Zoning Code's jurisdiction. By attempting to limit the ownership and sale of guns within the City of Philadelphia, the very place where the debate and ratification of the Second Amendment took place, the Code violates these inherent rights of citizens.

In a case where the City of Philadelphia failed to provide any justification whatsoever as to why the commercial sale of firearms is not permitted in any commercial district, the regulation cannot stand. The commercial sale of firearms is a constitutionally protected activity and deserves to be reviewed in its own right and cannot be denied based on describing a seller of the goods or services versus focusing on the buyer or user of the service or activity.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant review.

Respectfully submitted,

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December 9, 2024

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APPENDIX A — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT, DATED SEPTEMBER 9, 2024

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Case No. 94 EAL 2024

IN RE: APPEAL OF THE GUN RANGE, LLC

PETITION OF: THE GUN RANGE, LLC

Dated September 9, 2024

Petition for Allowance of Appeal from the
Order of the Commonwealth Court

ORDER

PER CURIAM

AND NOW, this 9th day of September, 2024, the Petition for Allowance of Appeal is **DENIED**.

APPENDIX B — OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA, FILED FEBRUARY 27, 2024

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 90 C.D. 2021

IN RE: APPEAL OF THE GUN RANGE, LLC

APPEAL OF: THE GUN RANGE, LLC

Filed: February 27, 2024
Argued: March 8, 2023

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE LORI A. DUMAS, Judge
HONORABLE STACY WALLACE, Judge

OPINION

The Gun Range, LLC (Gun Range) appeals from an order of the Court of Common Pleas of Philadelphia County (trial court), entered January 6, 2021, which affirmed the decision and order of the Philadelphia Zoning Board of Adjustment (Board) and denied its application

to operate a gun shop on its property. Gun Range asserts that the Philadelphia Zoning Code[1] violates its Second Amendment, U.S. Const. amend. II, right to operate a gun shop in the commercial districts of the City of Philadelphia (City). For the reasons stated below, we conclude that these zoning provisions, which regulate the commercial sale of arms, are not subject to the robust protection of the Second Amendment right to keep and bear arms. Therefore, we affirm in part the order of the trial court, albeit on different grounds. However, Gun Range further asserts that the Code is unconstitutional because it is *de facto* exclusionary. Upon review, it is apparent that the trial court has yet to review this claim. Accordingly, we vacate its order in part and remand with instructions for the trial court to address this claim in the first instance.

I. BACKGROUND[2]

Gun Range operates a shooting range located in the City. In 2015, the owner of Gun Range sought to open a gun shop on its premises and, to that end, filed an application with the Board of Licenses and Inspections (L&I). L&I

1. Phila., Pa., Zoning Code, Title 14 (2015) (Code).

2. The recitation of facts is derived from the Board's decision, which is supported by the record. *See* Bd. Op., 10/6/15, at 1-5. This matter has previously been before this Court; accordingly, we need not revisit the prior history of the case in detail. *See Gun Range, LLC v. City of Phila*. (Pa. Cmwlth., No. 1529, 189 A.3d 28 (*Gun Range I*). Additionally, Yuri Zalzman is the owner/principal of the subject property, and for ease of reference, we will refer collectively to Zalzman and Gun Range as "Gun Range."

denied the application on two grounds. First, the Code only permitted gun shops by right in I-3 zoning districts and by special exception in ICMX and I-2 districts,[3] but Gun Range is located in a CMX-2 commercial district. Second, gun shops are a "regulated use" not permitted within 500 feet of a residential district, and Gun Range was located within 53 feet of a residential district on one side, and 85 feet on another.[4]

Gun Range appealed to the Board. Initially, Gun Range sought a variance but later informed the Board that it would instead appeal solely on the ground that L&I had erred in denying its application. *See* Appl. for Appeal, 4/23/15; Notes of Testimony (N.T.) Hr'g, 8/12/15, at 3-5. The Board denied the appeal, and the trial court affirmed. Gun Range then appealed to this Court. Recognizing that the trial court had neglected to address the Second Amendment arguments raised by Gun Range, a panel of this Court remanded with instructions to address those arguments. Rather than address those arguments substantively, the trial court concluded *sua sponte* and in summary fashion that Gun Range lacked standing to raise any Second Amendment claims. *See* Trial Ct. Order, 1/5/21, at 1-2.

Gun Range timely appealed again to this Court. During the pendency of this appeal, the United States Supreme Court issued its decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 142

3. *See* Code § 14-602.

4. *See* Code § 14-603(13).

S. Ct. 2111, 213 L. Ed. 2d 387 (2022), which altered the analytical framework in which we may address Second Amendment claims. Following supplemental briefing from the parties to address *Bruen*, this matter is now ready for our consideration.

II. ISSUES[5]

Gun Range asserts that the trial court erred in concluding that Gun Range lacked standing to challenge the Board's decision on Second Amendment grounds. *See* Appellant's Br. at 30-31. Second, Gun Range contends that the Code regulates conduct within the ambit of the Second Amendment and, therefore, runs afoul of the *Bruen* Court's decision. *See* Appellant's Suppl. Br. at 2-9. Finally, Gun Range contends that the Code is *de facto* exclusionary because gun shops are only permitted within industrial areas constituting three percent of the City, and not in any commercial district. *See* Appellant's Br. at 21-28.

5. We discern the following issues set forth in Gun Range's original and supplemental briefs to this Court, arranged herein for ease of analysis.

III. DISCUSSION[6]

A. Standing

Initially, we consider the trial court's *sua sponte* determination that Gun Range lacked standing to challenge the Code on Second Amendment grounds. In our view, the trial court erred for two reasons. First, the trial court may not raise the issue of standing *sua sponte*, and second, Gun Range possessed derivative standing to bring these claims on behalf of its customers.

Generally, a party seeking redress from the courts must establish standing to bring and maintain an action. *Firearm Owners Against Crime v. City of Harrisburg*, 218 A.3d 497, 505 (Pa. Cmwlth. 2019), *aff'd sub nom. Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467 (Pa. 2021). To establish standing, a person must show that they are adversely affected and aggrieved by the matter they seek to challenge. *See, e.g., Fumo v. City of Phila.*, 601 Pa. 322, 972 A.2d 487, 496 (Pa. 2009) (recognizing that state

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6. The parties presented no additional evidence to the trial court. Therefore, our review is limited to determining whether the Board committed an abuse of discretion or an error of law. *German v. Zoning Bd. of Adjustment*, 41 A.3d 947, 949 n.1 (Pa. Cmwlth. 2012). The Board abuses its discretion if its findings are not supported by substantial evidence. *Arter v. Phila. Zoning Bd. of Adjustment*, 916 A.2d 1222, 1226 n.9 (Pa. Cmwlth. 2007). "'Error of law' in this instance is used in its broad sense and includes questions of constitutionality." *Gaudenzia, Inc. v. Zoning Bd. of Adjustment of City of Phila.*, 4 Pa. Commw. 355, 287 A.2d 698, 701 (Pa. Cmwlth. 1972).

legislators had standing to seek judicial review of a city license issuance to the extent that it had interfered with their legislative duties).

However, it is well settled that a court may not raise a party's standing *sua sponte*. *Commonwealth v. Koehler*, 658 Pa. 658, 229 A.3d 915, 940 (Pa. 2020) (rejecting standing concerns raised by the dissent as "not available for *sua sponte* consideration"); *Rendell v. Pa. State Ethics Comm'n*, 603 Pa. 292, 983 A.2d 708, 717 (Pa. 2009) (similarly rejecting concerns voiced in a concurring opinion as "within the umbrella of the standing doctrine" and "not available for consideration at this time, since they have not been raised by any of the parties"); *In re Nomination Pet. of DeYoung*, 588 Pa. 194, 903 A.2d 1164, 1168 (Pa. 2006). Indeed, if a court does raise the issue of standing *sua sponte*, it will constitute grounds for reversal. *See DeYoung*, 903 A.2d at 1168 n.6.

For example, in *DeYoung*, a qualified elector filed a petition objecting to the statement of financial interests attached to the nomination petition of a candidate for state-level office. *See id.* at 1166. This Court *sua sponte* dismissed the petition for lack of standing, opining that only the State Ethics Commission could challenge the adequacy of a candidate's statement. *See id.* In support of its *sua sponte* dismissal, this Court reasoned that the concept of standing was interwoven with subject matter jurisdiction and, thus, became a jurisdictional prerequisite to the action. *See id.* at 1166-67.

Upon review, the Pennsylvania Supreme Court soundly rejected this reasoning. "This [Supreme] Court

has consistently held that a court is prohibited from raising the issue of standing *sua sponte*." *Id.* at 1168 (citing cases and clarifying that standing is not a jurisdictional question); *accord Bisher v. Lehigh Valley Health Network, Inc.*, 265 A.3d 383, 403 (Pa. 2021) ("Pennsylvania . . . does not view standing as a jurisdictional question.").

Instantly, the City has not challenged Gun Range's standing to bring a Second Amendment challenge. *See* Appellee's Br. to Trial Ct., 3/6/20. Rather, the City has rejected consistently the substantive merits of Gun Range's constitutional arguments. *See id.* at 6-15; *see also, e.g.*, Appellee's Br., 5/5/22, at 10-27; Appellee's Suppl. Br., 2/6/23, at 5-20.[7]

Nevertheless, the trial court *sua sponte* reasoned that Gun Range was not a proper party to raise a Second Amendment challenge. *See* Trial Ct. Order, 1/5/21, at 1-2. According to the trial court, "[t]he Second Amendment rights raised in [Gun Range's] arguments, such as firearm proficiency and certification, are individual rights that are not held by a commercial shooting range and thus cannot be asserted by [Gun Range], as a commercial entity." *See id.* The trial court concluded that "[t]his is a matter of standing." *Id.* at 2.

Standing was not at issue before the Board or raised by any party before the trial court. Thus, as in *DeYoung*, the court erred by addressing *sua sponte* Gun Range's standing. 903 A.2d at 1167-68.

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7. Even following the trial court's standing analysis, the City did not assert a lack of standing on appeal. *See* Appellee's Br. at 16 n.4; Appellee's Suppl. Br. at 13 n.6.

Moreover, contrary to the trial court's analysis, federal case law suggests that the operator of a gun store has derivative standing to assert the subsidiary right to acquire arms on behalf of potential customers. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 526, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017) (*en banc*); *Ezell v. City of Chicago*, 651 F.3d 684, 702-704 (7th Cir. 2011) (*Ezell I*).[8]

In *Pierce*, two private schools brought suit to enjoin the enforcement of an education act in Oregon, which essentially compelled children's attendance at public school. 268 U.S. at 529-31. One of the schools argued that the act contravened rights guaranteed it by the Fourteenth Amendment.[9] *See id.* at 533. The Supreme Court noted

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8. We are bound by decisions of the Supreme Court of the United States. *NASDAQ OMX PHLX, Inc. v. PennMont Secs.*, 2012 PA Super 145, 52 A.3d 296, 303 (Pa. Super. 2012) (*NASDAQ*). Although we are not bound by the decisions of federal district courts, federal circuit courts, or the courts of other states in applying federal substantive law, we may cite such decisions when they have persuasive value. *Desher v. Se. Pa. Transp. Auth.*, 212 A.3d 1179, 1186 (Pa. Cmwlth. 2019). Further, "[w]henever possible, Pennsylvania state courts follow the Third Circuit so that litigants do not improperly walk across the street to achieve a different result in federal court than would be obtained in state court." *NASDAQ*, 52 A.3d at 303 (cleaned up). We may cite to Superior Court or non-precedential federal cases for their persuasive value. *Commonwealth v. Monsanto Co.*, 269 A.3d 623, 653 n.20 (Pa. Cmwlth. 2021); *Regester v. Longwood Ambulance Co.*, 751 A.2d 694, 699 n.2 (Pa. Cmwlth. 2000); *Bienert v. Bienert*, 2017 PA Super 255, 168 A.3d 248, 255 (Pa. Super. 2017).

9. Section 1 of the Fourteenth Amendment states, in relevant part: "[N]or shall any state deprive any person of life, liberty, or

that the schools were corporations and generally could "not claim for themselves the liberty which the Fourteenth Amendment guarantees." *Id.* at 535. However, because the Act would cause "arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property," the schools had a "clear and immediate" interest to bring suit. *Id.* at 536. Thus, albeit in a different context, *Pierce* stands for the proposition that a private business may bring suit on behalf of its customers.

In *Teixeira*, a prospective gun store operator brought an action alleging that a county ordinance restricting the location of gun shops violated his Second Amendment rights, as well as those of his potential customers. *See Teixeira*, 873 F.3d at 673. In its decision, the Ninth Circuit recognized that Teixeira had "derivative standing to assert the subsidiary right to acquire arms on behalf of his potential customers." *Id.* at 678. According to the *Teixeira* Court, "vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Id.* (quoting *Craig v. Boren*, 429 U.S. 190, 195, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976)).[10]

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property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

10. In *Craig*, the Court permitted a beer vendor to challenge an alcohol regulation based on its patrons' equal protection rights. 429 U.S. at 195.

Finally, in *Ezell I*, the plaintiffs, which included individual residents, a corporation, and two advocacy groups, challenged a Chicago ordinance that banned firing ranges within the city but mandated an hour of range training as a prerequisite to lawful gun ownership. *See Ezell I*, 651 F.3d at 689-92. The district court held that while the individual plaintiffs had standing, "the organizations [did] not have the necessary standing to demonstrate their irreparable harm." *Id.* at 696. On appeal the Seventh Circuit rejected this holding, noting that the corporate plaintiff, a supplier of firing-range facilities, was harmed by the ban but additionally was permitted to "act as an advocate of the rights of third parties who seek access to its services." *See id.* (citing *Craig* and *Pierce*).[11]

We find these cases instructive and persuasive. Gun Range is a private business that may bring suit on behalf of its customers. Just as the private schools in *Pierce*, the prospective gun shop owner in *Teixeira*, and the corporate firing range in *Ezell I*, Gun Range has derivative standing to challenge the City's zoning ordinances on Second Amendment grounds. *Pierce*, 268 U.S. at 535-36; *Teixeira*, 873 F.3d at 678; *Ezell I*, 651 F.3d at 696.

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11. With regard to the advocacy groups, the Seventh Circuit further observed that both associations had members residing in Chicago and could meet requirements for "associated standing." *See Ezell I*, 651 F.3d at 696. Specifically, the *Ezell I* Court noted that: "(1) their members would otherwise have standing to sue in their own right; (2) the interests the associations seek to protect are germane to their organizational purposes; and (3) neither the claim asserted nor the relief requested requires the participation of individual association members in the lawsuit." *Id.*

B. The Second Amendment[12]

1. Introduction

The Second Amendment provides that "[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. The precise meaning and scope of the rights encompassed by the Second Amendment has long been a subject of controversy, robust debate, and litigation. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 598-600, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (discussing debate surrounding ratification of the Second Amendment). There can be little doubt that our public discourse shall continue. *See, e.g., Barris v. Stroud Twp.*, 257 A.3d 209 (Pa. Cmwlth. 2021) (*Barris I*), *rev'd*, __ A.3d __, 2024 WL

12. Generally, there is a strong presumption in the law that legislative enactments are constitutional. *Caba v. Weaknecht*, 64 A.3d 39, 49 (Pa. Cmwlth. 2013). To prevail, a petitioner must show that the legislation "clearly, palpably, and plainly" violates the United States or Pennsylvania constitutions. *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Cmwlth.*, 583 Pa. 275, 877 A.2d 383, 393 (Pa. 2005) (*Gambling Expansion Fund*). "All doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster." *Caba*, 64 A.3d at 49. As will be seen, however, in cases where regulated conduct is covered by the plain text of the Second Amendment, the government bears the burden of proof. *See Bruen*, 597 U.S. at 24.

There are two ways to challenge the constitutionality of a legislative enactment: either the enactment is unconstitutional on its face or as applied in a particular circumstance. *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10, 16 (Pa. Cmwlth. 2012) (*en banc*).

696822 (Pa. 2024) (*Barris II*);[13] *Drummond v. Robinson Twp.*, 9 F.4th 217, 222 (3d Cir. 2021) ("[W]hile the right to bear arms may no longer present a 'vast *terra incognita*,' uncharted frontiers remain.").[14],[15]

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13. In *Barris*, the Pennsylvania Supreme Court considered and approved an ordinance that limits target shooting to certain non-residential zoning districts under the standards announced in *Bruen*. *Barris II*, 2024 WL 696822 at *30.

14. The Second Amendment applies to the states and local governments through the Due Process Clause of the Fourteenth Amendment. *See McDonald v. City of Chicago*, 561 U.S. 742, 791, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (plurality); *see also* U.S. Const. amend. XIV. Further, where the state constitution provides no broader protections than the federal constitution, it is "unnecessary to provide a separate analysis under each constitution." *See, e.g., Paz v. Pa. Hous. Fin. Agency*, 722 A.2d 762, 765 (Pa. Cmwlth. 1999). Article I, section 21 of the Pennsylvania Constitution states: "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned." Pa. Const. art. I, § 21. Both Constitutions "guarantee an individual a right to keep and bear arms, especially for purposes of self-defense, and this right exists outside the home." *Crawford v. Commonwealth*, 277 A.3d 649, 674 (Pa. Cmwlth. 2022). Further, Gun Range presents no argument that Pennsylvania provides broader protection than the federal constitution. Therefore, we proceed with a single analysis.

15. We find the quote from *Drummond* insightful. Nevertheless, we note that the *Drummond* Court issued its decision pre-*Bruen*. Moreover, we would be remiss if we did not further acknowledge that the *Drummond* Court applied the two-step framework adopted by the United States Court of Appeals for the Third Circuit in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), *abrogation recognized, Range v. AG United States*, 69 F.4th 96 (3d Cir. 2023) (*en banc*). *See Drummond*, 9

In *Heller*, the United States Supreme Court considered a challenge to a District of Columbia law that effectively banned the possession of handguns inside the home. 554 U.S. at 573. The *Heller* Court examined the text of the Second Amendment, referenced analogues adopted in several states that codified an individual right to bear arms, and considered the historical understanding of the amendment in the century that followed its ratification. *See id.* at 576-626. Following this exhaustive review, the Court recognized that the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation."[16] 554 U.S. at 592. Therefore, the *Heller* Court concluded, a "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."[17] *Id.* at 635.

F.4th at 226-34. As mentioned, *infra*, the *Bruen* Court accepted the first step of the two-step framework as largely consistent with *Heller*; therefore, cases like *Drummond* retain some value in our analysis. We will limit our reliance on *Drummond, Marzzarella*, and other pre-*Bruen* precedent to the extent those cases comport with *Bruen* and remain persuasive.

16. Finding parallels with the First and Fourth Amendments, U.S. Const. amends. I, IV, the *Heller* Court reasoned that the text of the Second Amendment "implicitly recognizes the *preexistence* of the right" that "shall not be infringed." *Id.* (emphasis added) (citing *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L. Ed. 588 (1876) (opining that the right is not dependent upon the Constitution for its existence)).

17. In reaching this conclusion, the *Heller* Court did not identify or apply any particular standard of scrutiny. *Id.* at

Importantly for our current purposes, the *Heller* Court also recognized that "the right secured by the Second Amendment is not unlimited." *Id.* at 626. The Court specifically identified four categorical exceptions to the broad scope of the amendment's protection, declaring that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by [1] felons and [2] the mentally ill, or [3] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or [4] laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27. According to the *Heller* Court, such laws are "*presumptively lawful* regulatory measures." *Id.* at 627 n.26 (emphasis added).

Thereafter, the Court revisited the Second Amendment in *McDonald*. The *McDonald* Court examined the handgun bans and related ordinances of the City of Chicago and a nearby suburb, ultimately holding that the Second Amendment right to keep and bear arms is fully applicable to the States by virtue of the Fourteenth Amendment.[18] *See McDonald*, 561 U.S. at 791. Notably,

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628-29 ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, . . . [the law] would fail constitutional muster."). However, the Court expressly rejected rational basis, reasoning that "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Id.* at 628 n.27.

18. This portion of Justice Alito's opinion was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. *See McDonald*, 561 U.S. at 748.

a plurality of the Court reaffirmed the *Heller* Court's endorsement of the four categorical exceptions, assuring that such longstanding regulatory measures were not imperiled.[19] *Id.* at 786 ("Despite . . . doomsday proclamations, incorporation [of the Second Amendment] does not imperil every law regulating firearms.").

In the years following *Heller* and *McDonald*, the lower federal courts adopted a two-step framework in addressing the merits of a Second Amendment challenge. *See, e.g., Teixeira*, 873 F.3d at 682-83; *Ezell I*, 651 F.3d at 701-04; *Marzzarella*, 614 F.3d at 89; *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010). State courts, too, would come to address Second Amendment claims in this way. *See, e.g., Barris I*, 257 A.3d at 219-20.

In the first step, the court would inquire "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Marzzarella*, 614 F.3d at 89. This required "a textual and historical analysis of the amendment." *Teixeira*, 873 F.3d at 682. If the regulated conduct fell outside the scope of the Second Amendment, the judicial inquiry was complete. *See, e.g., id.* at 690 (ending its analysis after concluding that "the Second Amendment does not independently protect a proprietor's right to sell firearms").

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19. This portion of Justice Alito's opinion was joined by Chief Justice Roberts and Justices Scalia and Kennedy. *See McDonald*, 561 U.S. at 748.

When a court determined that the regulated conduct fell within the scope of the Second Amendment right, it would proceed to a second step and "evaluate the law under some form of means-end scrutiny."[20] *Marzzarella*, 614 F.3d at 89. Drawing on First Amendment jurisprudence, "the rigor of the judicial review [would] depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Ezell I*, 651 F.3d at 703. For example, the *Ezell I* Court found a city-wide prohibition on firing ranges was 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." *Id.* at 708 (thereafter applying something less than strict scrutiny before enjoining a city-wide ban on firing ranges).

2. The *Bruen* Court's impact on Second Amendment analysis

Recently, the United States Supreme Court further clarified its analysis in *Heller* and *McDonald* to hold

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20. "Means-end scrutiny is an analytical process involving examination of the purposes (ends) which conduct is designed to serve and the methods (means) chosen to further those purposes." Russell W. Galloway, Jr., Means-End Scrutiny in American Constitutional Law, 21 Loy. L.A. L. Rev. 449, 449 (1988). When government conduct is subject to a constitutional limit, means-end scrutiny provides a "method for evaluating the sufficiency of the government's justification for its conduct." *Id.* The level of scrutiny will vary, based on the nature of the conduct and the protected interest in question, from deferential (*e.g.*, rational basis) to more intense (*e.g.*, intermediate and strict scrutiny). *See id.* at 450-57.

that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *Bruen*, 597 U.S. at 10. At issue was a New York state licensing regime, which required an applicant to demonstrate "proper cause" by proving a "special need for self-protection." *See id.* at 12-13. The denial of an application was subject to limited and deferential judicial review, with courts upholding the denial, provided there was some rational basis to support it.[21] *See id.* at 13.

In reaching its decision, the *Bruen* Court rejected expressly the two-step framework adopted by the lower courts as "one step too many." *Id.* at 19. The Court observed that step one was "broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history." *Id.* However, the *Bruen* Court criticized efforts to balance competing interests or engage in an assessment of the costs and benefits of firearms restrictions. *See id.* According to the *Bruen* Court, neither *Heller* nor *McDonald* supported means-end scrutiny.[22] *Id.*

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21. The *Bruen* Court characterized the proper cause standard as demanding because living or working in a high-crime area was insufficient; rather, the state courts would "generally require evidence of particular threats, attacks, or other extraordinary danger to personal safety." *Bruen*, 597 U.S. at 12-13. The Court also distinguished New York's "may issue" regime from the majority of states that had adopted "shall issue" regimes, which limited the discretion of licensing officials to deny an application based on a perceived lack of need or suitability. *Id.* at 13-15.

22. The *Bruen* Court reasoned that "the very enumeration of the right takes out of the hands of government—even the

The *Bruen* Court then summarized the appropriate constitutional standard:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.

Id. at 24. Thus, the Court hoped to provide a standard that "accords with how we protect other constitutional rights," such as those ensconced in the First and Sixth Amendments, U.S. Const. amend. VI.[23] *Id.* at 24-25.

Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon." *Bruen*, 597 U.S. at 23 (emphasis removed). Further, in rejecting an interest-balancing inquiry, the Court "necessarily rejected intermediate scrutiny." *Id.* Expanding upon this point, the Court criticized courts' frequent "defer[ence] to the determinations of legislatures." *Id.* at 26. Rather, according to the Court, "[t]he Second Amendment is the very product of an interest balancing by the people," and "it is this balance—struck by the traditions of the American people—that demands our unqualified deference." *Id.* (quoting *Heller*, 554 U.S. at 635).

23. The *Bruen* Court offered further insight into a proper, historical inquiry. *See id.* at 26-31 (advising that analogical reasoning was an appropriate method to ascertain "whether modern and historical regulations impose a comparable burden

Importantly, as the Court had previously professed in *Heller* and *McDonald*, the *Bruen* Court asserted that "individual self-defense is the central component of the Second Amendment right," *id.* at 29 (cleaned up), but also reiterated that "the right secured by the Second Amendment is not unlimited." *Id.* at 21 (quoting *Heller*, 554 U.S. at 626), 80-81 (Kavanaugh, J., concurring) (suggesting that the Second Amendment allows a variety of presumptively lawful regulatory measures, including "laws imposing conditions and qualifications on the commercial sale of arms").

To summarize, if the plain text of the Second Amendment covers an individual's conduct, then the government is restricted from regulating that conduct and is subject to the amendment's "unqualified command," *i.e.*, the individual's conduct is protected, absent historical evidence demonstrating a tradition of identical or analogous regulations. *Id.* at 24. In other words, government

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on the right of armed self-defense and whether that burden is comparably justified"). The depth of the Court's inquiry was substantial, including evidence originating in medieval England and stretching into the early-20th century. *See id.* at 34-70. However, the Court also cautioned that "when it comes to interpreting the Constitution, not all history is created equal" and stressed that "[h]istorical evidence that long predates either [the Second or Fourteenth Amendments] may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years." *Id.* at 34. At the other end of the temporal spectrum, the Court cautioned, modern evidence "cannot provide much insight into the meaning of the Second Amendment . . . ." *Id.* at 66; *see generally Lara v. Comm'r Pa. State Police*, 91 F.4th 122, 134-36 (3d Cir. 2024).

regulations that infringe upon an individual's right to armed self-defense are presumptively unconstitutional. *Id.* But this fundamental rule is tempered by the Court's consistent recognition that certain categories of regulations are rooted in this Nation's historical tradition. Such regulations, including "laws imposing conditions and qualifications on the commercial sale of arms," are "presumptively lawful regulatory measures . . . ." *Heller*, 554 U.S. at 626-27 & 627 n.26; *McDonald*, 561 U.S. at 786; *Bruen*, 597 U.S. at 80-81 (Kavanaugh, J., concurring).

3. The parties' arguments

With this background in mind, we turn to the parties' arguments concerning the impact of *Bruen* on the City's zoning regulations. Gun Range contends that the Code regulates conduct "within the ambit" of the Second Amendment. Appellant's Suppl. Br. at 4. It describes this regulated conduct as "selling, leasing, purchasing, or lending of guns, firearms, or ammunition."[24] *Id.* at 1. Drawing a comparison to the "purchase and practice" restrictions addressed by pre-*Bruen* federal courts in *Drummond* and *Ezell I*, Gun Range reasons that the City's

24. This is consistent with the Code's definition of a gun shop. *See* Code § 14-601-6 (defining a gun shop as "[a]ny retail sales business engaged in selling leasing, purchasing, or lending of guns, firearms, or ammunition"). For ease of analysis, we will refer to this conduct as the commercial sale of arms. Also, we acknowledge Gun Range's assertion that the City has waived any defense of the full enumerated list of regulated conduct except for selling. *See* Appellant's Suppl. Br. at 5-6. In our view, the City has adequately defended and briefed this issue; we discern no waiver.

regulation of the commercial sale of arms implicates the Second Amendment because it deprives "would-be gun owners of the guns and skills commonly used for lawful purposes . . . ." *Id.* at 4 (quoting *Drummond*, 9 F.4th at 230).[25]

Therefore, according to Gun Range, the Second Amendment presumptively protects this conduct, and the City "must demonstrate that its regulation is consistent with our Nation's historical tradition of firearm regulation." *Id.* at 6 (quoting *Bruen*, 597 U.S. at 17). Gun Range notes that the City has failed to introduce any historical evidence in this matter. *See id.* at 8-9. Moreover, according to Gun Range, there is an absence of relevant, historical support because the Code was not established until 1933, and "gun shops" were not included in the Code until 2007. *See id.* at 9. Thus, Gun Range concludes that the City failed to meet its burden under *Bruen* and asks

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25. We acknowledge that the *Drummond* Court referenced purchase and practice restrictions collectively. *See Drummond*, 9 F.4th at 226, 230. However, at issue were two zoning restrictions specifically targeting gun ranges, not gun shops engaged in the commercial sale of arms. *See id.* at 224.

that this Court declare unconstitutional the gun-related provisions in the Code.[26],[27] *See id.*

In response, the City suggests that the *Bruen* Court left in place a threshold, textual inquiry into whether the Second Amendment encompasses an individual's conduct. *See* Appellee's Suppl. Br. at 5-6. If it does, the City concedes that the Second Amendment presumptively protects the conduct, and the government must justify

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26. There are two ways to challenge the constitutionality of a legislative enactment: either the enactment is unconstitutional on its face or as applied to a particular person under particular circumstances. *Johnson*, 59 A.3d at 16. Throughout this litigation, Gun Range has not specified whether it presents a facial or as-applied constitutional challenge to the Code. *See* Appellant's Mem. to Bd., 8/12/15, at 1, 6-9 (unpaginated); *see generally* N.T. Bd. Hr'g, 8/12/15; Appellant's Br. to Trial Ct., 4/11/16, at 17-20; Appellant's Br., 2/24/22, at 13-21, 32. However, Gun Range now asks that this Court declare the Code is "unconstitutional on its face and as applied." Appellant's Suppl. Br. at 9. This lack of clarity is concerning. Constitutional "challenges to a statute's application . . . must be raised before the [local] agency or are waived for appellate review." *Lehman v. Pa. State Police*, 576 Pa. 365, 839 A.2d 265, 275 (Pa. 2003). Ultimately, however, we reject the premise of Gun Range's Second Amendment claim. Therefore, we need not further parse its arguments to determine the appropriate scope of relief.

27. Additionally, Gun Range asserts that a restriction on the locations in which a *gun shop* may operate infringes on a protected right of individuals to practice firearm proficiency at a *shooting range. See* Appellant's Suppl. Br. at 4. We reject this assertion summarily as we have previously determined that "[a] shooting range and a gun shop are different uses of property." *Gun Range I*, 189 A.3d 28, 2018 Pa. Commw. Unpub. LEXIS 248, *14.

its regulation with evidence demonstrating that the regulation is consistent with historical tradition. *Id.* at 6. If it does not, the City asserts that it bears no such burden. *See id.*[28]

Further, the City maintains that the *Bruen* Court did nothing to displace "longstanding or common firearm regulations." *Id.* at 8. In particular, the City directs our attention to the concurring opinion filed by Justice Kavanaugh in *Bruen*, which highlighted the four categorical exceptions to the broad right to bear arms defined by the Supreme Court in *Heller* and *McDonald*, including "laws imposing conditions and qualifications on

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28. The City also reasons that the *Bruen* Court's use of "conditional phrasing" in describing the constitutional inquiry places the initial burden, *i.e.*, to establish that certain conduct is covered by the Second Amendment's plain text, with the claimant. Appellee's Suppl. Br. at 7. For example, the City notes that there is a presumption of constitutional protection "*when* the Second Amendment's plain text covers an individual's conduct. *Id.* (quoting *Bruen*, 597 U.S. at 17) (emphasis added by the City). Similarly, a respondent bears a burden to demonstrate historical consistency "*because* the Second Amendment's bare text covers petitioners' public carry[.]" *Id.* (quoting *Bruen*, 597 U.S. at 44 n.11) (emphasis added by the City). According to the City, "if the burden were on the government throughout, the [*Bruen*] Court would not have used this conditional phrasing in describing when it applies." *Id.* We will not address this argument in detail. It is plainly evident that a claimant bears some initial burden to define the claim, and this initial burden coincides with the principles that, generally, laws are presumed to be constitutional and a claimant must prove otherwise. *Caba*, 64 A.3d at 49; *Gambling Expansion Fund*, 877 A.2d at 393.

the commercial sale of arms." *Id.* at 8 (quoting *Bruen*, 597 U.S. at 81 (Kavanaugh, J., concurring)). According to the City, such laws remain "presumptively lawful" and do not implicate the Second Amendment. *Id.* at 13.

Proceeding within this framework, the City asserts that its regulation of the location of gun shops is constitutionally sound. *Id.* This is because, according to the City, "the claimed right in this case to sell guns at a particular location is far afield from the core individual right to possess and carry weapons." *Id.* at 9. Pointing to precedent from other jurisdictions, both pre- and post-*Bruen*, the City maintains that no court has ever recognized a Second Amendment right to sell firearms in a particular location. *See id.* at 10-12 (citing, *e.g.*, *United States v. Tilotta*, No. 3:19-cr-04768-GPC, 2022 U.S. Dist. LEXIS 156715, 2022 WL 3924282, at *6 (S.D. Cal. filed Aug. 30, 2022); *Drummond*; and *Teixeira*).[29]

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29. We acknowledge a further argument from the City, *i.e.*, Gun Range has not offered a meaningful analysis, consistent with *Bruen*, that focuses on Gun Range's derivative right to pursue a Second Amendment claim on behalf of its current or potential customers. We agree. Apart from drawing a passing comparison to "purchase and practice" restrictions that impact an individual's right to self-defense, Gun Range does not argue that the Code has interfered with citizens' sufficient access to firearms. *See* Appellant's Suppl. Br. at 1-9. Further, it has conceded that there are gun shops located throughout the City. *See* N.T. Bd. Hr'g, 8/12/15, at 13.

4. The Second Amendment does not protect the proposed course of conduct

We are largely in agreement with the City's arguments on this issue. *Bruen* instructs that we must first consider whether the plain text of the Second Amendment covers Gun Range's proposed course of conduct, *i.e.*, the commercial sale of arms. *See Bruen*, 597 U.S. at 24. We conclude that it does not. Further, we reject the assertion by Gun Range that the *Bruen* standard applies to all conduct that falls "within the ambit" of the Second Amendment and decline to extend *Bruen* to rights merely implied by the plain text.

The plain text of the Second Amendment provides that "the right of the people to keep and bear arms . . . shall not be infringed" and guarantees an individual right to possess arms for the purpose of self-defense. *See generally Bruen*; *McDonald*; *Heller*. This right necessarily encompasses and/or requires that a law-abiding individual or enterprise be permitted to acquire arms (and ammunition) and maintain proficiency in their use, else the right to self-defense would be meaningless, *i.e.*, "the core right wouldn't mean much without the training and practice that make it effective." *Ezell I*, 651 F.3d at 704; *Drummond*, 9 F.4th at 227. The right of acquisition implies a further right, that a law-abiding individual must be permitted to supply arms commercially.

However, in our view, while this series of inferences is perhaps logically sound, it lacks legal support. The *Bruen* Court focused its analysis on the plain text of the Second

Amendment, and there is no obvious textual link between the right to keep and bear arms and a right to sell them. In other words, the plain text does not define an explicit, individual right to engage in the commercial sale of arms; there is no constitutional right to *provide* arms. Further, the *Bruen* Court cautioned that "the right secured by the Second Amendment is not unlimited," suggesting that even a logically inferred right may not warrant the robust constitutional protection defined in *Bruen*. *Bruen*, 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 626); *McDonald*, 561 U.S. at 786. Finally, and perhaps most importantly, the Court has consistently noted that certain categories of regulations, including "laws imposing conditions and qualifications on the commercial sale of arms," remain "presumptively lawful . . . ." *Heller*, 554 U.S. at 626-27 & 627 n.26; *McDonald*, 561 U.S. at 786; *Bruen*, 597 U.S. at 80-81 (Kavanaugh, J., concurring).

We are aware of no case in which the Supreme Court has addressed a Second Amendment challenge to laws regulating the commercial sale of arms. However, there exists persuasive guidance from the lower federal courts, both pre-and post-*Bruen*, that supports our conclusion that the Second Amendment does not protect Gun Range's proposed course of conduct.

In *Teixeira*, a case that preceded *Bruen*, the United States Court of Appeals for the Ninth Circuit considered a challenge to zoning laws that restricted where the plaintiffs could open a gun shop. *Teixeira*, 873 F.3d at 674. Following a textual and historical review, the Ninth Circuit concluded that the Second Amendment does not

independently protect an individual's right to sell arms. *See id.* at 682-90;[30] *accord Drummond*, 9 F.4th at 230. The court also considered a derivative claim on behalf of the plaintiffs' customers but reasoned that "gun buyers have no right to a gun store in a particular location, at least as long as their access is not meaningfully constrained." *Teixeira*, 873 F.3d at 680. Upon reviewing the plaintiffs' allegations, the court discerned no plausible claim to relief. *Id.* at 680-81 (noting, *e.g.*, that the plaintiffs had not alleged that residents were prevented from acquiring firearms within the local jurisdiction).

Post-*Bruen*, several federal district courts have held similarly. For example, in *United States v. King*, 646 F. Supp. 3d 603 (E.D. Pa. 2023), a defendant challenged his criminal indictment for unlawfully engaging in firearms commerce. The defendant asserted that his alleged conduct, *i.e.*, buying and selling firearms, was "protected by the Second Amendment because it is an inescapable pre-condition of keeping and bearing arms . . . making the implicit right to buy and sell firearms a necessary complement protected by the plain text of the Second

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30. The *Teixeira* Court declined to rely solely on the exclusionary language in *Heller* and so conducted an independent textual and historical analysis. For example, according to the *Teixeira* Court, "the colonial governments substantially controlled the firearms trade." *Teixeira*, 873 F.3d at 685 (citing Solomon K. Smith, *Firearms Manufacturing, Gun Use, and the Emergence of Gun Culture in Early North America*, 49th Parallel, vol. 34, at 6-8, 18-19 (2014)). The court also cited evidence that at least two colonies restricted *where* settlers could sell arms. *See id.* (citing evidence from Connecticut and Virginia).

Amendment." *Id.* at 607 (cleaned up). The district court rejected this argument, asserting "it [would] not consider 'implicit' rights that may be lurking beneath the surface of the plain text." *Id.* Further, the court reasoned, even if there were an implicit right, the *Heller* Court confirmed that "the government may regulate the commercial sale of firearms." *Id.* (citing *Heller*, 554 U.S. at 626-27).[31]

Based on this precedent, we conclude that the plain text of the Second Amendment does not presumptively protect Gun Range's proposed course of conduct. *Cf. Bruen*, 597 U.S. at 33 (concluding that the amendment's plain text "presumptively guarantees" the right to bear arms publicly for self-defense). Thus, an inquiry into

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31. *See also, e.g., United States v. Flores*, 652 F. Supp. 3d 796, 802 (S.D. Tex. 2023) (concluding that regulations on commercial sellers were presumptively lawful and rejecting an implication "by logical necessity a right to commercially deal in firearms"); *United States v. McNulty*, No. CR 22-10037-WGY, 684 F. Supp. 3d 14, 2023 U.S. Dist. LEXIS 129888, 2023 WL 4826950, at *4-6 (D. Mass. July 27, 2023) (holding that the commercial sale of firearms falls outside the Second Amendment and, therefore, *Bruen*'s historical tradition analysis was unnecessary); *Oakland Tactical Supply, LLC v. Howell Twp.*, No. 18-CV-13443, 2023 U.S. Dist. LEXIS 27686, 2023 WL 2074298, at *4 (E.D. Mich. Feb. 17, 2023) (holding that the plain text of the Second Amendment does not cover the construction and use of an outdoor, open-air shooting range, and therefore declining to engage in the second part of the *Bruen* analysis); *Tilotta*, 2022 U.S. Dist. LEXIS 156715, 2022 WL 3924282, at *6 (declining to require the government to justify its regulation of the commercial sale of arms with historical evidence because the right to keep and bear arms does not include the right to sell or transfer firearms without restriction).

the historical tradition of this Nation's zoning laws is unnecessary. *Cf. id.* at 34-70 (examining history of public carry laws). Further, we decline to extend *Bruen* to an implied right to engage in the commercial sale of arms because it is too attenuated from the right of law-abiding individuals to keep and bear arms for self-defense. *See generally Teixeira*; *King*; *Flores*. Finally, even if an implied right exists, *Heller, McDonald*, and *Bruen* have instructed that laws regulating the commercial sale of arms are presumptively lawful. For these reasons, we conclude that the gun-related provisions of the Code do not violate the Second Amendment.

C. *De Facto* Exclusion

1. The parties' arguments

Gun Range contends that the Code is unconstitutional because it is *de facto* exclusionary.[32] Appellant's Br. at 21. According to Gun Range, the Code impermissibly restricts the geographic area in which the commercial sale of arms may occur.[33] *See id.* at 22.

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32. "Zoning ordinances that exclude uses fall into one of two categories—*de jure* or *de facto*. In a *de jure* exclusion case, the challenger alleges that an ordinance on its face totally excludes a use. In a *de facto* exclusion case, the challenger alleges that an ordinance appears to permit a use, but under such conditions that the use cannot in fact be accomplished." *Twp. of Exeter v. Zoning Hr'g Bd. of Exeter Twp.*, 599 Pa. 568, 962 A.2d 653, 659 (Pa. 2009) (cleaned up).

33. Gun Range asserts that the sale of firearms is permitted in "a mere three percent (3%)" of the City. Appellant's Br. at 22.

Gun Range suggests the consideration of several factors in evaluating the Code's gun-related zoning restrictions, including (1) the size of the area allocated to the use, (2) whether the municipality is a logical place for the development to take place, (3) the history of zoning in the municipality, and (4) the presence or absence of an exclusionary intent. *Id.* (citing Ryan on Pa. Zoning, § 3.5.3).[34] Then, in rather conclusory fashion, Gun Range asserts the following: the City is the largest city in the Commonwealth; it is a logical place for the development of gun shops; the City has regulated zoning since 1933; and the "drastically" small area available for gun shops "clearly exhibits an exclusionary intent . . . ." *Id.* at 23.[35]

In response, the City first contends that this issue is not properly before the Court as it is beyond the scope of this Court's remand, which directed the trial court to

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It is unclear whether the Board credited this assertion. *See* Bd. Op., 10/6/15, at 1-5.

34. Robert S. Ryan, *Pennsylvania Zoning Law & Practice* (2023).

35. Thereafter, Gun Range references several cases in which parties challenged local zoning laws on the basis that those laws violated the Second Amendment. *See* Appellant's Br. at 23-28 (citing, *e.g.*, the *Ezell* line of cases, *Teixeira*, and *Barris I*). It remains unclear whether these cases are helpful in the context of a *de facto* exclusionary claim, which falls within "the broader confines of a substantive due process analysis pursuant to the Fifth and Fourteenth Amendments to the United States Constitution[, U.S. Const. amends. V, XIV,] and in keeping with [a]rticle [I], [s]ection 1 of the Pennsylvania Constitution." *KS Dev. Co., L.P. v. Lower Nazareth Twp.*, 149 A.3d 105, 110 n.4 (Pa. Cmwlth. 2016).

consider Gun Range's Second Amendment arguments. *See* Appellee's Br. at 27 (quoting *Gun Range I*, 189 A.3d 28, 2018 Pa. Commw. Unpub. LEXIS 248, slip op. at 26-27). Alternatively, the City invokes the "fair share" test, asserting that Gun Range has failed to prove that the firearms needs of the community's residents are not being adequately served. *See id.* at 28 (citing *Macioce v. Zoning Hr'g Bd. of Borough of Baldwin*, 850 A.2d 882 (Pa. Cmwlth. 2004)).[36]

2. The trial court did not address this issue

We reject the City's contention that we may not address this issue because it is beyond the scope of our prior remand. When this matter was previously before the Court, we identified four issues: (1) whether the Board capriciously disregarded evidence; (2) whether the Code is preempted by state law; (3) whether the Code is unconstitutional because it violates the Second Amendment, as well as article I, section 21 of the Pennsylvania Constitution; and (4) whether the Code is unconstitutional because it is *de facto* exclusionary. *Gun*

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36. The "fair share" test was developed to analyze zoning ordinances that "effect a partial ban that amounts to a *de facto* exclusion of a particular use." *Macioce*, 850 A.2d at 889 (quoting *Fernley v. Bd. of Supervisors of Schuylkill Twp.*, 509 Pa. 413, 502 A.2d 585, 587-88 (Pa. 1985)); *see also Surrick v. Zoning Hr'g Bd. of Upper Providence Twp.*, 476 Pa. 182, 382 A.2d 105 (Pa. 1977). The most relevant inquiry is "whether the provision for a particular use in the ordinance at issue reasonably accommodates the immediate and projected demand for that use . . . ." *Macioce*, 850 A.2d at 889 (quoting *Fernley*, 502 A.2d at 588).

Range I, 189 A.3d 28, 2018 Pa. Commw. Unpub. LEXIS 248, slip op. at 8-9.

The Court disposed of the first and second issues. *See id.* at 9-13. Upon reaching the third issue and reviewing the relevant arguments, the Court observed that "[t]he trial court simply failed to address the constitutional issues raised by [Gun Range]." *Id.* at 14. We therefore ceased our appellate review and remanded to the trial court with instructions that it conduct an analysis.[37] *See id.* at 15-17.

Following remand, the trial court addressed the Second Amendment claims of Gun Range, and we have reviewed those claims on appeal. However, it is now clear that the trial court also neglected to address whether the Code is unconstitutional because it is *de facto* exclusionary. *See* Trial Ct. Order, 1/6/21; Trial Ct. Op., 12/2/16. Gun Range preserved this claim before the Board and is entitled to a review of its merits by the trial court.[38] *See* Appellant's Mem. to Bd. at 9-12 (unpaginated); *see also* Appellant's Br. to Trial Ct., 4/11/16, at 20-23. Accordingly,

37. The Court specifically directed the trial court "to address the constitutional issues raised by [Gun Range] under the Second Amendment of the United States Constitution, as well as under article I, section 21 of the Pennsylvania Constitution." *Gun Range I*, 189 A.3d 28, 2018 Pa. Commw. Unpub. LEXIS 248, *22.

38. As noted in *Gun Range I*, the Board declined to address preemption or the constitutional issues because it determined that it lacked authority to do so. *See* Bd. Op. at 7; *see also* Section 8 of the First Class City Code, Act of May 6, 1929, P.L. 1551, *as amended*, 53 P.S. § 14759.

we are constrained to remand again with instructions that the trial court address whether the Code is *de facto* exclusionary. *See Zoning Bd. of Adjustment of the City of Phila. v. Woods Assoc.*, 112 Pa. Commw. 24, 534 A.2d 862, 866 (Pa. Cmwlth. 1987) ("[S]ince the question of the constitutionality of the [Code] . . . was properly submitted to the [Board], we now remand this matter to the trial court for a determination on the constitutional issue."); *London v. Zoning Bd. of Adjustment* (Pa. Cmwlth., No. 2256 C.D. 2014, filed July 7, 2016), 145 A.3d 825, 2016 Pa. Commw. Unpub. LEXIS 484, *13 ("[T]he trial court's order denying [a]pplicant's appeal is vacated[,] and the matter is remanded to the trial court for consideration of the constitutional issues.").

IV. CONCLUSION

In this case, Gun Range has challenged gun-related provisions of the Code on constitutional grounds. Following a remand to the trial court for further analysis, we have reviewed the Second Amendment claims asserted by Gun Range and conclude as follows. First, the trial court erred in raising Gun Range's standing *sua sponte* and, further, Gun Range has derivative standing to bring Second Amendment claims on behalf of its customers. Second, the plain text of the Second Amendment does not define an explicit, individual right to engage in the commercial sale of arms. Thus, the *Bruen* standard is inapplicable.

Gun Range has also asserted that the Code is unconstitutional because it is *de facto* exclusionary. Upon review, the trial court has not addressed this claim.

Accordingly, we remand to the trial court for further analysis consistent with this opinion.[39]

/s/ Lori A. Dumas
Lori A. Dumas

39. The trial court shall decide this issue on the record before it and shall not take any additional evidence.

Appendix B

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 90 C.D. 2021

IN RE: APPEAL OF THE GUN RANGE, LLC

APPEAL OF: THE GUN RANGE, LLC

Filed: February 27, 2024

ORDER

AND NOW, this 27th day of February, 2024, the order entered by the Philadelphia County Court of Common Pleas (trial court), on January 6, 2021, is AFFIRMED in part and VACATED in part, and this matter is REMANDED for the trial court to address the claim advanced by The Gun Range, LLC, that the Philadelphia, Pennsylvania, Zoning Code, Title 14 (2015), is unconstitutional because it is *de facto* exclusionary.

Jurisdiction relinquished.

/s/ Lori A. Dumas
LORI A. DUMAS, Judge

APPENDIX C — STATEMENT IN LIEU OF OPINION IN THE COURT OF COMMON PLEAS, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, CIVIL TRIAL DIVISION, FILED JULY 29, 2021

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENSYLVANIA
CIVIL TRIAL DIVISION

Commonwealth Court Case No. 90 CD 2021
Court of Common Pleas No. 151003454

IN RE APPEAL OF THE GUN RANGE, LLC
(542-544 PERCY STREET)

FROM THE DECISION OF THE PHILADELPHIA
ZONING BOARD OF ADJUSTMENT

Filed July 29, 2021

STATEMENT IN LIEU OF OPINION

On May 7, 2018, the Commonwealth Court partially remanded the above-captioned matter to this Court to address the constitutional issues raised by Gun Range LLC under the Second Amendment of the United States Constitution and Article 1, Section 21 of the Pennsylvania Constitution. On November 21, 2018, the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal, and this Court subsequently ordered the parties to file supplemental briefs and scheduled oral argument for March 27, 2020. The parties submitted their briefs; however, the Court was unable to proceed with oral argument, as scheduled, because of the COVID-19

pandemic. On December 30, 2020, this Court conducted oral argument via Zoom technology and subsequently issued its January 5, 2021 Order and Opinion affirming the decision of the Philadelphia Zoning Board of Adjustment. Gun Range LLC has appealed this Court's January 5, 2021 Order and Opinion. The record shall be transmitted as the reasons for this Court's Order already appear of record, pursuant to Ra.R.A.P 1925(a).

BY THE COURT:

/s/ Illegible
CARPENTER J.

APPENDIX D — ORDER OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY TRIAL DIVISION — CIVIL SECTION, DATED JANUARY 5, 2021

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION—CIVIL SECTION

Case No. 151003454

IN RE APPEAL OF THE GUN RANGE, LLC
(542-544 PERCY STREET)

Dated January 5, 2021

FROM THE DECISION OF THE PHILADELPHIA
ZONING BOARD OF ADJUSTMENT

ORDER

AND NOW, this 5th day of January, 2021, it is hereby **ORDERED** that, following remand to this Court, the decision of the Philadelphia Zoning Board of Adjustment is **AFFIRMED**.

In June 2016, this Court heard oral argument based upon the briefs submitted by the parties. At the time of the June 2016 argument, this Court accepted that the Philadelphia Zoning Code was not preempted and was not unconstitutional on its face, for the reasons set forth in the City of Philadelphia's original brief to this Court. While this Court does accept that Appellant The Gun Range, LLC's rights

could be implicated,[1] this Court found that, as applied, Appellant—who operates a shooting range in a commercial district under a special exemption from 1984—was not a proper party to raise a challenge to the Philadelphia Zoning Code's provisions regarding gun shops in commercial districts because its circumstances were unique. Additionally, to the extent that Second Amendment rights are at issue, Appellant did not show that it suffered any Second

1. The City argued that the rights protected by the Second Amendment are not unlimited and relied upon *United States v. Marzzarella,* 614 F.3d 85 (3d Cir. 20 I0), wherein the Third Circuit analyzed *District of Columbia v. Heller*, 554 U.S. 570 (2008) and held that gun sales were exceptions to the protections afforded by the Second Amendment. In discussing *Heller,* the Third Circuit cited that:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. (internal citations omitted)

The Third Circuit further noted that the *Heller* Court "explained that this list of 'presumptively lawful regulatory measures' was merely exemplary and not exhaustive." *Marzzarella,* 614 F.3d at 91. This Court does not necessarily agree with the City's argument that gun sales do not come within the ambit of protections of the Second Amendment; however, this Court nonetheless determined that The Gun Range did not establish that it had suffered a violation under the Zoning Code.

Amendment violation, as it was allowed and continues to be allowed to operate a gun range in a commercial district. The Second Amendment rights raised in Appellant's arguments, such as firearm proficiency and certification, are individual rights that are not held by a commercial shooting range and thus cannot be asserted by Appellant, as a commercial entity. This is a matter of standing. The Second Amendment right implicated by Appellant is a purely commercial right, no different than a deli that wishes to sell take-out beer. This Court finds that heightened scrutiny does not apply to commercial sales; thus, the City need only show a rational basis for its decision. This Court held on the record in June 2016, as well as in its August 6, 2016 Order, that the City had met its burden. In addition, at the hearing before the Zoning Board, private citizens presented ample evidence establishing the public safety reasons for not allowing commercial gun sales from a shooting range located within 500 feet of residences and houses of worship.

BY THE COURT:

/s/ J. Carpenter
CARPENTER, J.

APPENDIX E — MEMORANDUM OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA, FILED MAY 7, 2018

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

Case No. 1529 C.D. 2016

THE GUN RANGE, LLC,

Appellant,

v.

CITY OF PHILADELPHIA, PHILADELPHIA ZONING BOARD OF ADJUSTMENT, SPRING GARDEN CIVIC ASSOCIATION, PATRICIA FREELAND, JUSTINO NAVARRO, LAWRENCE RUST, REGINA YOUNG, BRYAN MILLER, HEEDING GOD'S CALL TO END GUN VIOLENCE AND SUSAN A. MURRAY

BEFORE: HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE DAN PELLEGRINI, Senior Judge

OPINION NOT REPORTED

Filed May 7, 2018
Argued May 2, 2017

Appendix E

MEMORANDUM OPINION

The Gun Range, LLC (Appellant) appeals from the August 11, 2016 order of the Court of Common Pleas of Philadelphia County (trial court), which affirmed the October 6, 2015 decision of the Philadelphia Zoning Board of Adjustment (ZBA) and which denied Appellant's statutory appeal of the ZBA's refusal to permit a proposed gun shop on its property within a CMX-2 zoning district.[1]

FACTS AND PROCEDURAL HISTORY

In 2012, Appellant began leasing space on the second floor of a building on the property at 542-44 Percy Street in the City of Philadelphia (City), which is classified as a CMX-2 commercial zoning district, to operate a shooting range. That property had been used as a shooting range since 1985, when the ZBA approved an application for a certificate for operation of a 2nd floor shooting range. (Reproduced Record (R.R.) at 207a-10a, 241a-72a; ZBA's Findings of Fact Nos. 9-12.)

On March 20, 2015, Appellant filed an application with the City's Department of Licenses and Inspections (L&I) for a zoning use registration permit, seeking approval of a change from "gun range" to "gun range & gun sales." The application confirmed that the Percy Street site is located in an area zoned CMX-2. L&I denied the proposed use on April 22, 2015, citing non-compliance with the Philadelphia

1. A CMX-2 zoning district represents a small-scale neighborhood commercial and residential mixed use.

Zoning Code (Zoning Code) Table 14-602-2 and section 603(13), and finding that, "The proposed use, gun shop, is prohibited in this zoning district and prohibited within 500 ft. of residential district." (R.R. at 32a-33a.) Additionally, a Regulated Use Inspection Report issued by L&I on April 2, 2015, indicated that Appellant was within 53 feet of residences on the 900 block of Green Street and within 85 feet of residences at 915 Spring Garden Street. (ZBA's Finding of Fact No. 3.)

On April 22, 2015, Appellant appealed the denial of the application to the ZBA, asking for a variance and arguing that "granting the requested variance will obviate an existing hardship and will not be contrary to the public interest." (R.R. at 34a.) Appellant also alleged, "[t]he requested variance represents the least modification of the [Zoning] Code to provide relief," and "[t]he granting of the variance will not increase congestion in the public streets nor in any way endanger public safety." (R.R. at 34a-35a.)

The ZBA held a hearing on August 12, 2015. At the outset of the hearing, Appellant's counsel informed the ZBA that Appellant was "amending" its reasons for the appeal and that it would not be pursuing a variance. (R.R. at 41a.) In lieu thereof, Appellant's counsel stated that Appellant was appealing on the basis that L&I's refusal of the proposed gun shop was in error and, as set forth in said counsel's Memorandum to the ZBA, that state law preempted the City's ability to regulate guns, that the Zoning Code's gun regulations are unconstitutional violations of the Second Amendment

to the U.S. Constitution and article 1, section 21 of the Pennsylvania Constitution, and that the Zoning Code as it relates to guns is also unconstitutional as being *de facto* exclusionary. (R.R. at 40a-41a, 160a-71a.)

The ZBA allowed Appellant to amend its appeal because none of the other parties objected. (R.R. at 39a-45a.) The ZBA also accepted the Memorandum submitted by Appellant's counsel and afforded opposing counsel 30 days to submit a written response thereto, as well as permitting Appellant's counsel 15 days thereafter to supplement her initial submission. (R.R. at 109a-11a.)

Appellant offered two witnesses: Bindu Mathew, the L&I Plans Examiner who denied the application, and Yuri Zalzman, the principal for Appellant. Appellant's first witness, Ms. Mathew, testified:

> The application came in for a gun shop and the gun shop is an illegal use, and that is why I issued a refusal. Now, a part of that, when I reviewed the application, we checked the history on the appeal form from 1985 that clearly says they do not do the retail of gun sales in this location. . . . So that means that Permit is only for a shooting range and not for a gun shop. And you're asking for a gun shop as part of [Appellant's application in the present case], and that is a prohibitive [sic] use.

(R.R. at 89a-90a.)

Ms. Mathew also testified that there was a separate zoning classification for a "gun shop," which she stated was allowed in only one zoning district by right, I-3. The "gun shop" classification was not permitted at all in CMX-2 and was allowed only as a special exception in other zoning districts. Her testimony confirmed that the refusal was also based on the fact that the proposed gun shop was located within 500 feet of a residential district. (R.R. at 99a-100a.)

Appellant's next witness, Mr. Zalzman, testified that Appellant operated an "indoor gun range" that also sold ammunition, targets, and cleaning supplies, and rented guns for use at the shooting range only. (R.R. at 102a, 121a-22a.) He described the Appellant's neighborhood as:

> It's mostly commercial. There is a building adjoining me that is an industrial building. There is a construction company across the street. The original Reading Terminal, which is an artist colony now, is directly across the street. Behind there is a railroad trestle, barbed wire. Around the corner on Spring Garden there are multiple shops. There's a police continuing education [building] there at 10th and Spring Garden.

(R.R. at 103a.)

He testified that there were some residential units near Appellant's site, as well as a Buddhist temple and St.

Paul's Baptist Church. (R.R. at 130a-37a.) Mr. Zalzman also testified that Appellant was "the only indoor shooting range in Philadelphia that does not have a gun retail [sales] aspect to it." (R.R. at 118a.) He testified further that he believed that the ZBA permitted the sale of guns at Appellant's site since 1985. (R.R. at 126a.)

Following Mr. Zalzman's testimony, Ed Panek testified on behalf of the Logan Square Neighborhood Association, which opposed Appellant's application. State Representative W. Curtis Thomas also testified as the legislator in whose district Appellant's business is located, and he noted his opposition. Other neighbors, as well as a representative of the Buddhist temple and the Pastor of St. Paul's Baptist Church, also stood to oppose the application (without testifying). (R.R. at 139a-45a.)

Appellant also offered a map identifying those parts of the City in which a gun shop could open for business as of right, which are located in the I-3 zoning district, comprising approximately 3.74% of the total area of the City of Philadelphia. (R.R. at 282a-83a.) Further, as the ZBA noted, Appellant argued that "state law preempts Philadelphia's ability to regulate guns" and that "The [Zoning] Code as it relates to gun sales is unconstitutional." (ZBA's Finding of Fact No. 19.) More specifically, Appellant argued that the Pennsylvania Uniform Firearms Act of 1995 (Firearms Act)[2] preempted the City's Zoning Code and that the Zoning Code infringes on a person's right to keep and bear arms under the

2. 18 Pa.C.S. §§6101-6187.

United States and Pennsylvania Constitutions.[3] *See* R.R. at 163a-68a.

On October 6, 2015, the ZBA voted to deny Appellant's appeal, concluding that "the retail sale of guns is not permitted at the property and that L&I acted correctly in issuing [Appellant] a refusal." (ZBA's Finding of Fact No. 8; Conclusion of Law No. 14.) Specifically, the ZBA found that the 1985 approval was for a "certificate" to allow the shooting range and that a "certificate" was the equivalent of a special exception. (ZBA's Finding of Fact No. 12; Conclusion of Law No. 11.) Further, the ZBA found that Appellant's present site is located within the CMX-2 zoning district, and that, as such, use as a gun shop is specifically prohibited under the current Zoning Code. Further, the ZBA found that "the proposed sales [of firearms] would represent an expansion of the use previously approved by the [ZBA] and that retail sales of guns did not fall into the same category as shooting range at the time the 1984 [sic] Certificate was granted." (ZBA's Finding of Fact No. 3; Conclusion of Law No. 2.)

Additionally, the ZBA found that the Zoning Code did not allow gun sales on the property because Appellant's site is within 500 feet of a residential district, citing the Zoning Code at section 14-601(6)(c)(.2). (ZBA's Conclusions of Law Nos. 3-4.) Finally, the ZBA ruled that it lacked jurisdiction to address any preemption or constitutional arguments. (ZBA's Conclusion of Law No. 15; Exhibit C to Appellant's brief at 7.)

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3. Appellant later reiterated these issues before the trial court. *See* R.R. at 521a-26a, 697a-776a.

Appellant filed a timely appeal of the ZBA's October 6, 2015 decision to the trial court on October 29, 2015. On December 3, 2015, and December 31, 2015, the following parties intervened in the matter to oppose the appeal: Spring Garden Civic Association, Patricia Freeland, Justino Navarro, Lawrence Rust, Regina Young, Bryan Miller, Heeding God's Call to End Gun Violence, and Susan A. Murray (collectively, Intervenors). (R.R. at 21a.) On April 5, 2016, Appellant filed a motion to quash, seeking to dismiss Intervenors from the appeal. (R.R. at 25a.) The trial court denied that motion on May 3, 2016. (R.R. at 27a.) On June 28, 2016, Mr. Zalzman filed his own petition to intervene, which was denied as untimely by the trial court's order of July 25, 2016. (R.R. at 29a.)

With respect to the appeal, the trial court allowed briefing and convened oral argument on June 29, 2016, but no additional evidence was presented. (R.R. at 493a-502a, 697a-777a.) By order of August 9, 2016, the trial court affirmed the ZBA's decision. Appellant filed an appeal to this Court on September 7, 2016. On December 2, 2016, the trial court filed an opinion in support of its August 9, 2016 order. The trial court's opinion rejected Appellant's arguments, holding that the City's Zoning Code: (1) did not permit the addition of retail gun sales at Appellant's shooting range; (2) was not preempted by Pennsylvania law concerning firearms; and (3) was not unconstitutional as it pertained to sales of firearms. (Trial court op. at 4.)

With respect to the first argument, Appellant argued that its proposed gun sales were already a permissible use within the City's CMX-2 zoning district, contending that because the specific term "shooting range" was absent

from the Zoning Code, and because ammunition was sold and guns were loaned to customers at the shooting range, the terms "shooting range" and "gun shop" must therefore "be read to be synonymous." (Trial court op. at 5.) The trial court rejected Appellant's argument, explaining that Table 14-602-2 of the Zoning Code "delineates the permissible and impermissible uses for property designated within a Commercial district. The Table clearly established that a gun shop was not permissible within a CMX-2 district . . . ." (Trial court op. at 5.)

Moreover, according to the trial court, Table 14-602-2 showed "that a gun shop is 'expressly prohibited' within *any type* of Commercial district in the City of Philadelphia and references Section 14-603(13), which designates a gun shop as a regulated use and renders it subject to specific separation requirements," including a ban on its location within 500 feet of any residential district. *Id.* Because Appellant was located within 53 feet of residences, Appellant's proposal failed. The trial court noted that "a variance would be required to operate a gun shop, unless the property's existing certificate would permit such use, which it did not." (Trial court op. at 5-6.)

Appellant's second argument was that state law concerning firearms preempts local zoning regulations. The trial court disagreed, stating that "this Court rejects any argument that state law pre-empts [sic] reasonable local zoning regulations even where, as here, constitutional rights are implicated in the regulations." (Trial court op. at 6.) The Zoning Code provisions challenged by Appellant "merely seek to regulate the *location* of gun sales and do not in any way seek to regulate or impinge upon the ownership, possession, or transfer of guns." (Trial court

op. at 6) (emphasis in original). In a related vein, the trial court held that Appellant failed to demonstrate that the Zoning Code was "clearly arbitrary and unreasonable," or that the provisions of the Zoning Code had no "substantial relation to the public health, safety, morals or general welfare," because the proposed sale of firearms "*is less than 60 feet away from a concentrated residential district near downtown Philadelphia*, and, as such, the City has an important governmental objective in limiting retail gun sales in such district." (Trial court op. at 6-7) (emphasis in original). The trial court did not address Appellant's arguments regarding the constitutional concerns about the Zoning Code as it pertained to gun sales.

DISCUSSION

Appellant filed a timely appeal to this Court,[4] arguing that: (1) the ZBA capriciously disregarded evidence when

4. When the trial court does not take additional evidence, our scope of review is limited to determining whether the zoning board committed an abuse of discretion or an error of law. *Society Created to Reduce Urban Blight (SCRUB) v. Zoning Board of Adjustment of the City of Philadelphia*, 814 A.2d 847, 850 (Pa. Cmwlth. 2003). The zoning board abuses its discretion when it makes material findings of fact not supported by substantial evidence. *Id.* Substantial evidence is such relevant evidence as a reasonable mind might find adequate to support a conclusion. *Teazers, Inc. v. Zoning Board of Adjustment of the City of Philadelphia*, 682 A.2d 856, 858 n.3 (Pa. Cmwlth. 1996). Where a party asserts capricious disregard of evidence as a ground for appeal, this Court must address that concern. *Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe)*, 571 Pa. 189, 812 A.2d 478, 487-88 (Pa. 2002).

determining that the requested use as a gun shop was not permitted; (2) the ZBA's decision was erroneous because the City's Zoning Code attempts to regulate firearms in a manner preempted by state law; (3) the ZBA's decision was erroneous because the City's Zoning Code attempts to regulate firearms in a manner that is unconstitutional; and (4) the City's Zoning Code is unconstitutional because it is *de facto* exclusionary.

CAPRICIOUS DISREGARD OF EVIDENCE

Appellant first argues that the ZBA capriciously disregarded evidence of "the manner of classification of uses under the current Zoning Code." (Appellant's brief at 15.) The Zoning Code uses a system of land use categories and "use subcategories" that are broken down further to "specific use types." Zoning Code, §14-601. The Zoning Code classifies a "gun shop" under a use category ("Retail Sales"), a use subcategory ("Consumer Goods"), and a specific use ("Gun Shop"). Zoning Code, §14-601(6)(c)(.2).

According to Appellant, because there is no equivalent classification for "shooting ranges," the most appropriate classification in the current Zoning Code would be "gun shop" and that, accordingly, use as a "gun shop" is currently permitted at the site. (Appellant's brief at 21.) Specifically, Appellant takes a leap of logic and equates "shooting range" (the property's use since 1985) with "gun shop" (a use Appellant freely admits is not the business presently conducted on the property), rationalizing that: (1) the closest classification in the Zoning Code is "gun shop"; and (2) other shooting ranges in the City feature retail sales of firearms.

In response, the City argues that the Zoning Code prohibits issuance of the use permit sought by Appellant. The certificate issued in 1985 allowed a shooting range in the same way that a special exception would be approved today, and there is nothing in that certificate, express or implied, that allows Appellant to ignore the Zoning Code's prohibition against gun shops in the CMX-2 zone. Zoning Code, §14-602(2)(d) and 14-602(5). Further, the gun shop located at Appellant's site cannot be considered a pre-existing non-conforming use, because the only use pre-dating the inclusion of a "gun shop" class in the Zoning Code was the use as a shooting range. Permitting the retail sale of firearms would represent an improper expansion of the site's existing approved use as a shooting range. The City asserts that a shooting range is simply not the same as a gun shop under the Zoning Code, even if other shooting ranges in the City also have retail firearms sales.

The Zoning Code was revised in 2007 to include zoning regulation of "gun shops." When these amendments were passed, the only use at Appellant's site was that of a shooting range. Appellant cannot now assert a new, non-conforming use which did not exist at the time the applicable zoning ordinance was enacted. *Hanna v. Zoning Board of Adjustment of the City of Philadelphia*, 408 Pa. 306, 183 A.2d 539, 543-44, 54 Mun. L Rep. 55 (Pa. 1962).

Appellant conflates definitions with exclusions and ignores the basic fact that gun shops, *i.e.*, the retail sales of firearms, are prohibited in the CMX-2 zone in which its shooting range is located. A shooting range and a gun shop are different uses of property. Gun shops are not banned in Philadelphia; rather, they are allowed as of

right in the I-3 zone and allowed by special exception in the ICMX and I-2 zones.[5]

Appellant offered no evidence to support its argument that the ZBA capriciously disregarded evidence of the manner of classification of uses under the current Zoning Code beyond equating the site's present use as a shooting range with its proposed use as a gun shop. As such, the trial court did not err in affirming the ZBA on this issue.

PREEMPTION

Appellant next argues that because "the transfer of firearms is what occurs at a gun shop," the Zoning Code is preempted by the Firearms Act to the extent the Zoning Code seeks to regulate gun shops. (Appellant's brief at 22.) The Firearms Act reads in pertinent part:

> No county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components when carried or transported for purposes not prohibited by the laws of this Commonwealth.

18 Pa.C.S. §6120(a).

Appellant cites *Ortiz v. Commonwealth of Pennsylvania*, 545 Pa. 279, 681 A.2d 152 (Pa. 1996), for

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5. An I-2 zone represents a medium industrial use. An I-3 zone represents a heavy industrial use. An ICMX zone represents a mixed industrial and commercial use.

the proposition that "[b]ecause the ownership of firearms is constitutionally protected, its regulation is a matter of statewide concern. . . . Thus, regulation of firearms is a matter of concern in all of Pennsylvania, not merely in Philadelphia and Pittsburgh, and the General Assembly, not city councils, is the proper forum for the imposition of such regulation." *Id.* at 156.

On the other hand, the City argues that the Firearms Act does not preempt its Zoning Code. While section 6120(a) of the Firearms Act preempts the "regulation" of firearms, Pennsylvania courts have held that such preemption of a local regulation does not result in the preemption of local zoning regulations unless specifically provided for in the statute. *Good v. Zoning Hearing Board of Heidelberg Township*, 967 A.2d 421, 428-29 (Pa. Cmwlth.), *appeal denied*, 601 Pa. 704, 973 A.2d 1008 (Pa. 2009). Applying *Good*, the City argues that Pennsylvania precedent distinguishes between local ordinances that regulate how a particular activity is conducted (which may be preempted), on the one hand, and local zoning ordinances that regulate where a particular activity can be conducted (that is, a property's use, which may not be preempted), on the other hand. *Id.* at 429. If the General Assembly had intended to preempt local zoning of retail firearms sales, concluded the City, it could have done so, just as it passed legislation in 2012 to modify what is commonly known as the Oil and Gas Act[6] to include section 3304(b)(3),[7] which preempted local restrictions on drilling in the Marcellus Shale Formation.

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6. Act of February 14, 2012, P.L. 87, No. 13, *as amended*, 58 Pa.C.S. §§2301-3309.

7. 58 Pa.C.S. §3304(b)(3).

Pennsylvania's Constitution reads in pertinent part, "[a] municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time."[8] Philadelphia has a home rule charter, which is governed by the First Class City Home Rule Act of 1949 (Home Rule Act).[9] As applied to a city of the first class such as Philadelphia, section 18 of the Home Rule Act states: "Notwithstanding the grant of powers contained in this act, no city shall exercise powers contrary to or in limitation or enlargement of, powers granted by acts of the General Assembly which are . . . [a]pplicable in every part of the Commonwealth . . . [or] [a]pplicable to all the cities of the Commonwealth." 53 P.S. §13133. Our Supreme Court has held that matters of the ownership, possession, transfer, or transportation of firearms, and of their use for personal protection or for the defense of the state, are not the proper subjects of regulation by municipalities, including Philadelphia. *Ortiz*, 681 A.2d at 156.

Here, the case turns on whether section 6120(a) of the Firearms Act preempts zoning action by municipalities where the business of the retail sales of firearms is not prohibited (either *de facto* or *de jure*) by a local government, but is kept within one zoning district by right (the I-3 zone) and is allowable by special exception in two other zones (ICMX and I-2). Because the Zoning Code regulates the location of uses such as a "gun shop," and does not restrict how the business is conducted or whether it may be conducted within the City limits, its

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8. PA. CONST., art. 9, §2.

9. Act of April 21, 1949, P.L. 665, *as amended*, 53 P.S. §§13101–13157.

zoning regulations as to the retail sales of firearms are not preempted by the Firearms Act. *Good*, 967 A.2d at 429.

Indeed, in the present case, there is no evidence that the City has burdened any citizen's right to the "ownership, possession, transfer or transportation of firearms," as protected by section 6120(a). Accordingly, the trial court did not err when it acknowledged important constitutional rights, as well as the Commonwealth's statewide interest in firearms rights as evidenced in section 6120(a) of the Firearms Act, but found nonetheless that the Zoning Code was not preempted by the same. (Trial court op. at 6-7.)

CONSTITUTIONALITY

Appellant asserts as its third issue that the City's Zoning Code is unconstitutional as it relates to firearms because it violates the Second Amendment to the United States Constitution, as well as article 1, section 21 of the Pennsylvania Constitution. Appellant maintains that because the City's zoning law seeks only to regulate, not restrict, the acquisition of firearms and the maintenance of proficiency in their use, such regulation should be upheld if it passes "intermediate scrutiny," which requires more than "rational basis" review but less than "strict scrutiny." (Appellant's brief at 26.) According to Appellant, the City failed to provide any justification "for the severe limitation on the ability to sell and acquire firearms to a very limited zoning district." (*Id.*) Thus, Appellant contends that under any level of scrutiny, the City's regulation of firearms through the Zoning Code must fail.

The City counters that this is not a Second Amendment case because the Zoning Code does not impose a burden

on conduct falling within the scope of the Second Amendment. Instead, the City posits that the Zoning Code is a presumptively lawful regulatory measure that does not interfere with the Second Amendment's core tenant of protecting the right of law-abiding citizens to use firearms to defend "hearth and home." (Appellee's brief at 33-34.) The City also asserts that Appellant failed to demonstrate that the Zoning Code burdened the Second Amendment rights of City residents and Appellant. The City further argues that even if Appellant had shown that the Second Amendment is implicated, its Zoning Code is "appropriate" because it "ensures harmonious development." (Appellee's brief at 33.)

The trial court simply failed to address the constitutional issues raised by Appellant. It opaquely acknowledges that Appellant raised the argument that "the Philadelphia [Zoning] Code is unconstitutional as it relates to gun sales" at page 4 of its opinion and then adds the following cryptic passage, "This Court has rejected such argument and instead accepted the Findings and Conclusions of the [ZBA]." (Trial court op. at 4.)

However, the "Conclusions of the [ZBA]" do not address the claims on unconstitutionality raised by Appellant. On the contrary, as noted *supra*, the ZBA expressly stated that Appellant's "preemption and constitutional arguments are not within the [ZBA's] jurisdiction and therefore are not addressed here." (ZBA's Conclusion of Law No. 15). Given that the trial court "accepted" the ZBA's conclusions, including this one, and does not devote any substantive portion of its opinion to Appellant's claims of unconstitutionality, it can only be concluded that the trial court passed on addressing these

issues. That the trial court failed to address these issues is even more obvious by the fact that it expressly addressed Appellant's preemption arguments even though the ZBA had demurred on addressing that issue as well.

Because the trial court failed to address the constitutional arguments preserved and presented for review, the matter must be remanded to the trial court to do so. *See Zoning Board of Adjustment of the City of Philadelphia v. Willits Woods Associates*, 112 Pa. Commw. 24, 534 A.2d 862, 866 (Pa. Cmwlth. 1987) ("[S]ince the question of the constitutionality of the Philadelphia Zoning Code . . . was properly submitted to the ZBA, we now remand this matter to the trial court for a determination on the constitutional issue."); *London v. Zoning Board of Adjustment*, 145 A.3d 825, 2016 Pa. Commw. Unpub. LEXIS 484 (Pa. Cmwlth., No. 2256 C.D. 2014, filed July 7, 2016) ("[T]he trial court's order denying [a]pplicant's appeal is vacated and the matter is remanded to the trial court for consideration of the constitutional issues.").

CONCLUSION

Appellant offered no evidence to support its argument that the ZBA capriciously disregarded evidence of the manner of classification of uses under the current Zoning Code. Nor did Appellant establish that the Zoning Code was preempted by the Firearms Act. Hence, the trial court did not err to the extent that it rejected these arguments by Appellant.

However, the trial court erred to the extent that it did not address the constitutional arguments raised by Appellant. Indeed, a restriction on an individual's ability to lawfully purchase guns is not insulated from

constitutional scrutiny merely because it is cloaked within the imprimatur of the Zoning Code.

In this case, the ZBA did not address the constitutional issues based upon its conclusion that it lacked authority to address the same and the trial court simply failed to address the constitutional concerns raised by Appellant. While such issues may or may not be beyond the jurisdiction of the ZBA, these issues were properly preserved by Appellant on appeal to the trial court. Accordingly, the decision of the trial court is affirmed to the extent it rejected Appellant's argument that the ZBA capriciously disregarded evidence of the manner of classification of uses under the current Zoning Code and that the Zoning Code was preempted by the Firearms Act. However, we remand this case to the trial court to address the constitutional issues raised by Appellant under the Second Amendment of the United States Constitution, as well as under article 1, section 21 of the Pennsylvania Constitution.[10] In so doing, we direct the trial court to

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10. Contrary to the Dissent, a remand to the trial court is warranted herein. As the Dissent notes, Appellant raised both a facial as well as an-applied constitutional challenge to the City's Zoning Code. However, the ZBA concluded that "constitutional arguments [were] not within [its] jurisdiction and therefore [were] not addressed [in its decision]." (ZBA's Conclusion of Law No. 15.) More specifically, Appellant argued first before the ZBA, and later before the trial court, that the restriction on the location of gun shops within the City's Zoning Code constitutes "a serious encroachment on the right to acquire firearms." *See* R.R. at 167a, 525a. Moreover, the Dissent mischaracterizes Appellant's argument in its brief regarding the Pennsylvania Constitution as consisting of a single paragraph that merely lists the constitutional provisions at issue and sets forth "a bare conclusion that those provisions are violated." (Dissent, slip op.

decide these issues on the record that is before it and to not take any additional evidence.[11]

/s/ Patricia A. McCullough
PATRICIA A. McCULLOUGH, Judge

Judges Cohn Jubelirer, Simpson and Fizzano Cannon did not participate in this decision.

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at 17.) However, the Dissent ignores that Appellant's state and federal constitutional arguments are intertwined throughout its brief, *see* Appellant's brief at 25-34, similar to the merger of state and federal constitutional issues this Court encountered in *Caba v. Weaknecht*, 64 A.3d 39 (Pa. Cmwlth.), *appeal denied*, 621 Pa. 697, 77 A.3d 1261 (Pa. 2013), a case cited by Appellant.

11. The Dissent would have us affirm the trial court as to these constitutional issues, but since the trial court did not address them, there is nothing to affirm. The Dissent also leaps to the conclusion that Appellant's constitutional arguments should be rejected on the basis of the Ninth Circuit's decision in *Teixeira v. County of Alameda*, 873 F.3d 670 (9th Cir. 2017). The Dissent contends that this case should "inform" the decision in this case and further notes that *Teixeira* is not discussed herein.

It is not discussed for two reasons. First, it is premature for this Court to rule on Appellant's constitutional issues as these are to be addressed by the trial court. Second, *Teixeira* is not only not binding upon this Court, it is from a court whose jurisdiction, unlike that of the Third Circuit, does not even encompass the territorial confines of Pennsylvania. While the Dissent may posit that *Teixeira* should be adopted, the same could just as readily be said about *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017), which has been cited for authority by Appellant in support of its constitutional claims.

Appendix E

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

Case No. 1529 C.D. 2016

THE GUN RANGE, LLC,

Appellant,

v.

CITY OF PHILADELPHIA, PHILADELPHIA ZONING BOARD OF ADJUSTMENT, SPRING GARDEN CIVIC ASSOCIATION, PATRICIA FREELAND, JUSTINO NAVARRO, LAWRENCE RUST, REGINA YOUNG, BRYAN MILLER, HEEDING GOD'S CALL TO END GUN VIOLENCE AND SUSAN A. MURRAY

Filed May 7, 2018

ORDER

AND NOW, this 7th day of May, 2018, the order of the Court of Common Pleas of Philadelphia County (trial court), dated August 11, 2016, is hereby affirmed in part and vacated in part, and the matter is remanded consistent with this opinion.

Jurisdiction relinquished.

/s/ Patricia A. McCullough
PATRICIA A. McCULLOUGH, Judge

Appendix E

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

Case No. 1529 C.D. 2016

THE GUN RANGE, LLC,

Appellant,

v.

CITY OF PHILADELPHIA, PHILADELPHIA ZONING BOARD OF ADJUSTMENT, SPRING GARDEN CIVIC ASSOCIATION, PATRICIA FREELAND, JUSTINO NAVARRO, LAWRENCE RUST, REGINA YOUNG, BRYAN MILLER, HEEDING GOD'S CALL TO END GUN VIOLENCE AND SUSAN A. MURRAY

BEFORE: HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE DAN PELLEGRINI, Senior Judge

OPINION NOT REPORTED

Filed May 7, 2018
Argued May 2, 2017

DISSENTING OPINION

While I agree with the majority's resolution of the other issues in this case, I disagree with the majority that

we need to remand this matter to the Court of Common Pleas of Philadelphia County (trial court) to examine the constitutional issues regarding the Second Amendment because it is unnecessary since we are not reviewing the trial court's decision but that of the Philadelphia Zoning Board of Adjustment (Zoning Board).

This case is informed by an *en banc* Ninth Circuit decision in *Teixeira v. County of Alameda*, 873 F.3d 670 (9th Cir. 2017), which held that there is no right guaranteed under the Second Amendment that gives a person the right to sell guns, but that there is a "core Second Amendment right to keep and bear arms for self-defense [that] 'wouldn't mean much' without the ability to acquire arms." *Teixeira*, 873 F.3d at 677 (citations omitted). It recognized that firearms' dealers may assert that right on behalf of their potential customers. Because The Gun Range does not have an independent Second Amendment right to sell guns and also failed to establish that the zoning restrictions here unreasonably burden gun owners' rights to acquire guns, I would affirm the trial court.

I.

A short summary of the law regarding rights guaranteed by the Second Amendment is needed to give context to *Teixeira* and how *Teixeira* applies to the facts of this case.

A.

The Second Amendment provides: "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. In *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (*Heller I*), the United States Supreme Court held, for the first time, that the Second Amendment protects the individual right of law-abiding citizens to possess an operable handgun in the home for self-defense.

The Supreme Court cautioned, however, that this Second Amendment right is "not unlimited" and does not confer a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller I*, 554 U.S. at 626. The Court noted, for example, that courts historically have concluded that "prohibitions on carrying concealed weapons were lawful under the Second Amendment," and it identified a non-exhaustive list of "presumptively lawful regulatory measures," including "longstanding prohibitions on the possession of firearms by felons and the mentally ill," laws forbidding guns in "sensitive places" like schools and government buildings, and "conditions and qualifications" on the commercial sale of firearms. *Id.*

In 2010, in *McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010), the Supreme Court found rights secured under the Second Amendment to be "fundamental rights" and, through the 14th Amendment, those rights apply to and limit state and local governments' regulations of firearms. While invalidating a Chicago law entirely prohibiting the possession of handguns, the Court in *McDonald* reiterated that a broad spectrum of gun laws remain constitutionally permissible.

B.

In cases challenging gun restrictions, courts have adopted a two-step inquiry,1 which "(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny."[2] (Footnote added).

As to the first step of whether the challenged law "imposes a burden on conduct falling within the Second Amendment's guarantee,"[3] this generally turns on "whether the regulation is one of the 'presumptively lawful regulatory measures' identified in *Heller I*[4] or whether

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1. *See, e.g., United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013); *United States v. Chester,* 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800 (10th Cir. 2010).

2. *Chovan*, 735 F.3d at 1136 (citations omitted).

3. *Chester*, 628 F.3d at 680.

4. *See Marzzarella*, 614 F.3d at 91 (finding that based on the text and the structure of *Heller I*, "the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment."). In *Heller v. District of Columbia*, 670 F.3d 1244, 399 U.S. App. D.C. 314 (D.C. Cir. 2011) (*Heller II*), the District of Columbia Circuit Court, in upholding new District of Columbia regulations regarding firearms, stated that *Heller I* "tells us 'longstanding' regulations are . . . presumed not to burden conduct within the scope of the Second Amendment. . . . This is a reasonable presumption because a regulation that is 'longstanding,' which necessarily means it has long been accepted by the public, is not likely to burden a constitutional right; concomitantly the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment." *Heller II*, 670 F.3d at 1253.

the record includes persuasive historical evidence establishing that the regulation at issue" is the type of longstanding law historically understood as consistent with the Second Amendment. *Jackson v. City and County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (citations omitted).[5]

If a court finds at the first step that a challenged law does, in fact, burden conduct protected by the Second Amendment, it proceeds to step two, and applies "an

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5. In examining how long a restriction has to be in existence to be considered "longstanding" and consistent with the Second Amendment, courts have observed that the examples *Heller I* itself identified as "longstanding" and constitutional date not to the Founding Era, but only to the 20th Century. *See Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015) ("Gun laws 'need not mirror limits that were on the books in 1791' or 1868 to qualify as presumptively lawful. . . . To the contrary, the laws *Heller [I]* itself identifies as "longstanding" and presumptively lawful are of the same '20th Century vintage' as California's law."); *National Rifle Association of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 196 (5th Cir. 2012) (*NRA*) ("*Heller [I]* considered firearm possession bans on felons and the mentally ill to be longstanding, yet the current versions of these bans are of mid-20th [C]entury vintage."); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (*en banc*) ("legal limits on the possession of firearms by the mentally ill also are of 20th Century vintage . . . [s]o although the Justices have not established that any particular statute is valid, we do take from *Heller [I]* the message that exclusions need not mirror limits that were on the books in 1791.").

appropriate form of means-end scrutiny."[6] In determining the appropriate level of scrutiny, courts have generally focused on the challenged law's burden on Second Amendment rights.[7] Where the regulation at issue does not prevent law-abiding, responsible individuals from possessing an operable handgun in the home for self-defense, almost all of the federal circuits have held that it should be analyzed under intermediate scrutiny.[8] "Intermediate scrutiny"

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6. *Chester*, 628 F.3d at 680 ("If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny."). *See also Heller II*, 670 F.3d at 1252 ("We ask first whether a particular provision impinges upon a right protected by the Second Amendment; if it does, then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny.").

7. *See NRA*, 700 F.3d at 195; *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) (explaining that the level of applicable scrutiny should be determined by "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right").

8. *See Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678 (6th Cir. 2016) (*en banc*); *Baer v. Lynch*, 636 Fed. App'x 695 (7th Cir. 2016); *NRA of Am., Inc. v. McCraw*, 719 F.3d 338 (5th Cir. 2013); *Chovan; Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012); *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011); *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011); *Heller II*; *Marzzarella*; *Reese*.

examines whether a law is reasonably related to an important or significant governmental interest.[9]

Now to *Teixeira*.

II.

A.

At issue in *Teixeira* was a zoning ordinance that required businesses seeking to sell firearms to obtain a permit. A permit for a firearms store could not be granted if, as relevant here, the planned firearms store would be within 500 feet of a residentially-zoned district.

Teixeira and two other individuals wanted to open a gun store in Alameda County. The county planning department informed Teixeira that because he intended to sell firearms, he would need to obtain a conditional use permit. Teixeira was also informed that to receive a conditional use permit for his proposed gun store, he had to comply with a zoning ordinance which, among other

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9. *United States v. Virginia*, 518 U.S. 515, 524, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). Other levels are on a "rational basis" which presumes the law is valid and asks only whether the statute is rationally related to a legitimate state interest, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985), and "strict scrutiny" which asks whether the law is narrowly tailored to serve a compelling government interest. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).

things, required that businesses selling firearms be located at least 500 feet away from schools, day care centers, liquor stores or establishments serving liquor, other gun stores, and residentially-zoned districts.

Teixeira then applied for a conditional use permit. Although staff identified a public need for a licensed firearms dealer and determined that the proposed use was compatible with other land uses in the area and would not adversely affect the health or safety of persons living or working in the vicinity, it also found that the site of the proposed gun shop did not satisfy the zoning ordinance's distance requirement because it was approximately 446 feet from two residential properties in different directions. Based on this finding, staff recommended that the permit application be denied.

Notwithstanding this recommendation, the county zoning board granted Teixeira a variance from the zoning ordinance and approved his application for a conditional use permit. A neighborhood association appealed that decision to the board of supervisors. The board voted to sustain the appeal, overturning the zoning board's decision and revoking the conditional use permit.

B.

Teixeira then filed a complaint in the U.S. District Court challenging the board of supervisors' decision to deny him a variance and conditional use permit. Brought on behalf of Teixeira and potential customers, the complaint alleged that the county's actions violated the

Second Amendment by preventing would-be customers from buying a gun and by prohibiting Teixeira from selling firearms.

The District Court dismissed the Second Amendment claim, but a panel of judges for the Ninth Circuit revived it by a 2-1 vote. The Ninth Circuit then elected to rehear it *en banc*.

Again, Teixeira argued that the county's zoning ordinance unconstitutionally infringed upon the rights of prospective gun buyers. The Ninth Circuit rejected this argument because gun buyers have "no right to have a gun store in a particular location . . . as long as their access is not meaningfully constrained," *Teixeira*, 873 F.3d at 680, and the county's actions did not meaningfully constrain access to guns. The court noted that there were at least ten gun shops already operating in Alameda County, including a sporting goods store located just 600 feet from Teixeira's planned retail establishment. Because county residents could freely purchase firearms within the county, the court concluded that Teixeira had not plausibly alleged that the county's ordinance impeded any resident of Alameda County who wished to purchase a firearm from doing so. The court noted that it did not need to define the precise scope of any such acquisition right under the Second Amendment to resolve the case because, whatever the scope of that right, Teixeira failed to state a claim that the ordinance impeded Alameda County residents from acquiring firearms.

The Ninth Circuit then turned to Teixeira's main argument that the county's zoning ordinance infringed

on his Second Amendment right to sell firearms. He argued that even if there was a gun store on every square block in unincorporated Alameda County and, therefore, prospective gun purchasers could buy guns with exceeding ease, he would still have a right to establish his own gun store somewhere in the jurisdiction. He alleged that the zoning ordinance infringed on that right by making it virtually impossible to open a new gun store in unincorporated Alameda County. The court rejected this claim as well, finding that the Second Amendment does not confer an independent right to sell firearms.

The court began its analysis by quoting *Heller I*, the U.S. Supreme Court decision establishing an individual right to bear arms, which stated that "[n]othing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms . . . [which are] . . . presumptively lawful regulatory measures." *Teixeira*, 873 F.3d at 682 (quoting *Heller I*, 554 U.S. at 626-27). *Heller I's* assurance that laws imposing conditions and qualifications on the commercial sale of firearms are presumptively lawful made the court reject Teixeira's claim that retail establishments can assert an independent, freestanding right to sell firearms under the Second Amendment.

Nonetheless, the Ninth Circuit went on to conduct "a full textual and historical review" of the Second Amendment. *Teixeira*, 873 F.3d at 683. Starting with its text, the Ninth Circuit concluded nothing in the specific language of the Second Amendment suggests that sellers fall within the scope of its protection. In its

historical review, the court analyzed the 1689 English Bill of Rights, the precursor to our Second Amendment, as well as William Blackstone's influential commentaries on English law. It found that those documents all framed the right to bear arms as one held by individuals, with no attendant right to engage in gun commerce. It went on to find that so did colonial laws in America - which, like the Second Amendment itself, were designed to preserve state militias, not to safeguard a freewheeling arms trade. Moreover, colonial governments routinely regulated the commercial sale of firearms. The court went on to point out that this was consistent with the Fourth Circuit's determination in its unpublished decision in *United States v. Chafin*, 423 Fed. App'x 342, 344 (4th Cir. 2011), that no historical authority "suggests that, at the time of its ratification, the Second Amendment was understood to protect an individual's right to *sell* a firearm." (Emphasis in original.)

After this lengthy historical analysis, the Ninth Circuit concluded that at the time of its ratification, the Second Amendment was not understood to create a commercial entitlement to sell guns if the right of the people to obtain and bear arms was not compromised. The court rejected an analogy to the First Amendment for booksellers because bookstores and similar retailers that sell and distribute various media, unlike gun sellers, are themselves engaged in conduct directly protected by the First Amendment. It held that Teixeira could not state a Second Amendment claim based solely on the ordinance's restriction on his ability to sell firearms.

The Ninth Circuit went on to hold, though, that "the core Second Amendment right to keep and bear arms for self-defense wouldn't mean much without the ability to acquire arms." *Teixeira*, 873 F.3d at 677 (citations omitted). It recognized that firearms dealers may assert that right on behalf of their potential customers. The court explained that Teixeira had not alleged that the inability to open a new firearms store interfered with the ability of Alameda County residents to acquire firearms. Notably, the court recounted that evidence established that without the new gun store, Alameda County residents may freely purchase firearms within the county, given that the county was already home to ten gun stores, including one that stood 600 feet away from the proposed site of the new store. Because Teixeira and his partners could not show that the zoning ordinance burdened county residents' right to acquire firearms, the court declined to determine the precise scope of the right to acquire firearms and the appropriate level of review to analyze claims of a deprivation of that right.

Furthermore, in explaining its ruling, the Ninth Circuit distinguished the Alameda County ordinance from the law at issue in *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), the case relied on by The Gun Range, because the Chicago ordinance effectively barring firing ranges likely burdened the Second Amendment's core right to possess a firearm for self-defense. These cases differed because, the Ninth Circuit stated, the Chicago ordinance effectively precluded nearly any shooting range from operating within the city's boundaries and, thus, severely limited the city residents' Second Amendment right

to maintain firearm proficiency. In *Teixeira*, the court reasoned, Alameda County residents had many available, local options to exercise their right to acquire firearms without the new store. I would adopt the reasoning of the Ninth Circuit in *Teixeira* that led to its holding that the Second Amendment does not independently protect a proprietor's right to sell firearms, as well as its holding that for a firearms seller to make out a derivative claim on behalf of gun owners, there has to be a showing that prospective gun owners' access to guns was impeded by the ordinance.

Now to the facts of this case.

III.

A.

The Gun Range applied to the Department of Licenses & Inspections (L&I) to add the use of "gun sales" to the existing "gun range." Gun shops[10] are permitted in 1-3 zoning districts, and the ICMX and 1-2 zoning districts by special exception as long as they are not within 500 feet of a residential district. New Zoning Code, New Zoning Code, CODE § 14-603(13)(b)(.1)(.c). However, a gun shop is not permitted in a CMX-2 zoning district. L&I denied the application because a "gun shop" was not permitted in a CMX-2 commercial district and, even if the use was

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10. The Zoning Code defines a "gun shop" as a "retail sales business engaged in selling, leasing, purchasing, or lending of guns, firearms, or ammunition." New Zoning Code, CODE § 14-601(6)(c)(2).

permitted, it still would be prohibited within 500 feet of a residential district.

The Gun Range presented two witnesses: the L&I examiner who explained why the application was denied and Yuri Zalzman, a principal of The Gun Range, who discussed his existing business and his efforts to open a gun shop. The Gun Range also submitted a "packet" of documents to the zoning board. Those documents included a map reflecting that the portions of the 1-3 district that is open to gun shops, taking into consideration the residential restriction. It showed that 3.74% of the city, or about 3,400 acres, were open to gun shops. It did not provide any evidence about ICMX and 1-2 zoning districts where gun shops were permitted by special exception.

At the hearing, The Gun Range admitted that there were a number of gun shops already operating in the city. The Gun Range's counsel conceded there were "about six or seven" shooting ranges that also sold guns. Mr. Zalzman also testified that there were other, stand-alone gun shops without shooting ranges in the city. He testified that there were "a couple" of such shops. Including both gun shops with an adjoining shooting range and stand-alone gun shops, there were around ten gun shops in the city operating at the time of the hearing.

The Gun Range also presented no evidence that it could not build a gun shop elsewhere in the City in compliance with the City's zoning laws or even that it faced any difficulties in doing so. No gun owner discussed the impact of the city's zoning laws on his ability to buy

a gun. The Board did not preclude The Gun Range from offering any evidence.

B.

Constitutional challenges are of two kinds: facial challenges or as-applied challenges. *Lehman v. Pennsylvania State Police*, 576 Pa. 365, 839 A.2d 265, 275 (Pa. 2003). "[A]n as-applied attack . . . does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right." *Weissenberger v. Chester County Board of Assessment Appeals*, 62 A.3d 501, 505 (Pa. Cmwlth. 2013) (quoting *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir. 2011)).

While an issue must be raised before an administrative agency to be preserved for appellate review, Pa.R.A.P. 1551(a), an exception to this rule exists for a facial challenge to the constitutionality of a statute. "In a facial challenge, a party is not required to exhaust administrative remedies because 'the determination of the constitutionality of enabling legislation is not a function of the administrative agencies thus enabled.' *Borough of Green Tree v. Bd. of Prop. Assessments*, 459 Pa. 268, 328 A.2d 819, 825 (1974). Accordingly, facial challenges to a statute's constitutionality need not be raised before the administrative tribunal to be reviewed by an appellate court . . . ." *Lehman*, 839 A.2d at 275.

While facial challenges can be raised at any time, as-applied constitutional challenges must be raised before the agency because, rather than the constitutionality of the statute itself, the issue is how the constitutional provision, as applied to the individual making the challenge, has an unconstitutional result. *Lehman*.

In this case, The Gun Range made a facial as well as an "as-applied" challenge. In its facial challenge, it contended that the Second Amendment gives it the right to sell guns in any zone that permits anything to be sold. For the same reasoning set forth in *Teixeira*, I would hold that the Second Amendment does not give a person the right to sell guns.

In its "as-applied" challenge, it argues that the zoning restrictions here unreasonably burden a gun owner's right to acquire guns by limiting where gun shops could be located. As the advancing party, The Gun Range holds the evidentiary burden. That evidentiary burden had to be met before the Zoning Board. *Lehman*. Before the Zoning Board, The Gun Range did not contend that anyone's right to acquire weapons was unduly restricted, only that The Gun Range's right to sell guns was unduly restricted, a right not protected by the Second Amendment.

However, on appeal to us, it does make an argument that the ten gun shops that its owner said existed in Philadelphia are not enough to serve those persons who desire to purchase guns. Other than the argument, there is no evidence that ten stores are inadequate to meet the needs of those in Philadelphia who want to purchase

guns. Absent such a showing that existing gun shops in Philadelphia, other nearby gun shops located outside of Philadelphia, and gun shows are insufficient to serve those in Philadelphia who want to buy weapons, a derivative Second Amendment claim has not been established.

Because nothing in this case showed that the City's ordinance in any way violated anyone's Second Amendment right by impeding a city resident who wished to purchase a firearm from doing so, I would hold that The Gun Range did not make out its "as-applied" challenge.

C.

As to its argument that the zoning restrictions violate the Pennsylvania Constitution, The Gun Range just lists the Pennsylvania Constitutional provisions that it suggests apply and then concludes that the zoning restrictions violate those provisions. Its entire argument regarding the state constitution is as follows:

> Additionally, these rights are specifically protected by the Pennsylvania Constitution. Pursuant to Pa. Const. art. I, § 1, citizens of the Commonwealth have an inherent right of "acquiring, possessing and protecting property." Further, pursuant to Pa. Const. art. I, § 21, "[T]he right of the citizens to bear arms in defense of themselves and the State shall not be questioned," which is made inviolate by

> § 25.[11] By attempting to limit the ownership and sale of guns within the City of Philadelphia, the Code violates these inherent rights of citizens of the Commonwealth and the Pennsylvania Constitution and therefore, this portion of the Code is unconstitutional.

(The Gun Range's Brief at 30) (footnote added). This argument does not offer a different methodology to be used in interpreting article 1, section 21 of the Pennsylvania Constitution than the one adopted by the United States Supreme Court in *Heller I*, used to determine whether a state action unconstitutionally infringed on a gun owner's right to self-defense. All that it does is set forth a bare conclusion that those provisions are violated.[12] Since

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11. Article 1, section 25 of the Pennsylvania Constitution provides:

> To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.

Pa. Const. art I, § 25.

12. Pa.R.A.P. 2119(a) provides:

> The argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part—in distinctive type or in type distinctively displayed—the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent.

Heller I, the Superior Court has used that analysis in deciding whether a state gun restriction violated our Constitution. *See Commonwealth v. McKown*, 2013 PA Super 282, 79 A.3d 678, 687 (Pa. Super. 2013).

Following the scholarly and well-reasoned opinion of the Ninth Circuit in *Teixeira* that strictly followed the methodology that the Supreme Court set forth in *Heller I*, I would not remand and would hold that The Gun Range has not made out that the regulation here infringes upon anyone's Second Amendment rights, or any right under the Pennsylvania Constitution, and would affirm the trial court.

Accordingly, I respectfully dissent.

/s/ Dan Pellegrini
DAN PELLEGRINI, Senior Judge

A mere claim of unconstitutionality, without more, cannot be addressed. The Gun Range has simply failed to explain to the Court, as required by Pa.R.A.P. 2119(a), how the Code infringes upon the individual rights guaranteed by article I of the Pennsylvania Constitution. *See Bruce L. Rothrock Charitable Foundation v. Zoning Hearing Board of Whitehall Township*, 651 A.2d 587, n.9 (Pa. Cmwlth. 1994). We do not consider the article I claims because they have not been presented adequately to the Court. *Wert v. Department of Transportation, Bureau of Driver Licensing*, 821 A.2d 182, 184 (Pa. Cmwlth. 2003).

APPENDIX F — OPINION OF THE COURT OF COMMON PLEAS, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, CIVIL TRIAL DIVISION, FILED DECEMBER 2, 2016

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

COMMONWEALTH COURT
1529 CD 2016

COURT OF COMMON PLEAS
CASE NO. 151003454

IN RE APPEAL OF THE GUN RANGE, LLC
(542-544 PERCY STREET)

FROM THE DECISION OF THE PHILADELPHIA
ZONING BOARD OF ADJUSTMENT

OPINION

CARPENTER, J. DECEMBER 2, 2016

Appellant The Gun Range, LLC appeals this Court's August 11, 2016 Order affirming the October 6, 2015 decision of the Philadelphia Zoning Board of Adjustment to deny Appellant's appeal from the Philadelphia Department of Licenses and Inspections' refusal of a use variance from the CMX-2 Commercial zoning classification for the proposed gun shop at the property located at 542-544 N. Percy Street in the City of Philadelphia. For the reasons that follow, the Commonwealth Court should affirm.

Appendix F

FACTUAL AND PROCEDURAL BACKGROUND

Gun Range, LLC ("Gun Range") is situated on the second floor of the property located at 542-544 N. Percy Street in the City of Philadelphia, wherein it is classified as a CMX-2 Commercial zoning district. On March 20, 2015, Yuri Zalzman applied to the City of Philadelphia Department of Licenses and Inspections ("L&I") for a zoning/use permit to expand Gun Range's current use as a gun range to become a gun range and a gun shop on the second floor. L&I issued a Notice of Refusal on April 22, 2015, citing noncompliance with the Philadelphia Zoning Code Table 14-602-2 and Section 14-603(13). Specifically the Notice stated that "[t]he proposed use, gun shop, is prohibited in this zoning district and prohibited within 500 ft of residential district." Moreover, the April 2, 2015 Regulated Use Inspection Report completed by L&I indicated that Gun Range was within 53 feet of residences on the 900 block of Green Street and within 85 feet of the residences at 915 Spring Garden Street. Counsel for property owner James Colosimo subsequently filed an appeal to the Philadelphia Zoning Board of Adjustment ("Board").

On August 12, 2015, the Board conducted a hearing, wherein counsel clarified that Colosimo had abandoned his request for a variance and that the sole basis for the appeal was L&I's error in refusing the proposed gun shop use. Following the hearing, the Board permitted the parties to submit supplemental memoranda and, on October 6, 2015, the Board voted to deny the appeal.[1]

1. The Board's Findings of Fact indicate that the Board voted to deny the appeal on October 26, 2015, however, the Notice

On October 29, 2015, Gun Range appealed to this Court from the Board's October 6, 2015 decision. On December 2, 2015, December 3, 2015, and December 31, 2015, the following parties intervened in the matter to present opposition to the appeal before this Court: Spring Garden Civic Association, Patricia Freeland, Esq., Justine Navarro, Lawrence Rust, Regina Young, Bryan Miller (as an individual and as the Executive Director of Philadelphia non-profit Heeding God's Call to End Gun Violence), Susan Murray, Esq., and the City of Philadelphia (collectively "Intervenors"). On April 5, 2016, Gun Range filed a Motion to Quash, seeking to dismiss Intervenors from the appeal, which this Court denied on May 3, 2016. On June 28, 2016, Yuri Zalzman and Justin Mateer filed an untimely Petition to Intervene, which this Court denied on July 25, 2016. Gun Range and Intervenor City of Philadelphia submitted their respective briefs and this Court heard oral argument on June 29, 2016. Following argument, this Court held the matter under advisement and subsequently issued an Order, docketed on August 11, 2016, affirming the October 6, 2015 decision of the Board. On September 7, 2016, Gun Range filed a Notice of Appeal to the Commonwealth Court.

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of Decision in the certified record before this Court indicates that the decision was made on October 6, 2015. The discrepancy does not raise any issue of timeliness of the appeal to this Court, but this Court notes the discrepancy to avoid any confusion in appellate review.

ANALYSIS

Standard of Review

This court's review herein is limited to a determination of whether constitutional rights have been violated, an error of law has been committed, or findings of fact necessary to support the adjudication are not supported by substantial evidence.[2] "Substantial evidence" is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[3] In order to reverse the decision of the agency the findings of the agency must be totally without support in the record."[4] In agency proceedings where there is a complete record, the Board is the factfinder and matters of credibility and evidentiary weight are within the factfinder's province.[5]

Review of Board's Findings and Conclusions

On appeal to this Court, Gun Range presented three arguments as to why the Board's decision was erroneous:

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2. *Lewis v. Civil Service Comm.*, 542 A.2d 519, 522 (Pa. 1988); 2 Pa.C.S. § 754(b).

3. *Valley View Civic Ass'n v. Zoning Bd. of Adjustment*, 462 A.2d 637, 640 (Pa. 1983).

4. *Republic Steel Corp v. Workers Comp Appeal Bd*, 421 A.2d 1060 (Pa. 1980).

5. *Dale v. Phila. Bd. of Pensions & Retirement*, 702 A.2d 1160, 1164 (Pa. Commw. Ct. 1997).

first, that the Philadelphia Code permits the addition of a gun shop at the property based upon the premise that "gun shop" and "shooting range" are synonymous terms within the Code; second, that the City's attempt to regulate guns in Philadelphia is preempted by Pennsylvania state law; and finally, that the Philadelphia Code is unconstitutional as it relates to gun sales. This Court has rejected such arguments and, instead, accepted the Findings and Conclusions of the Board.

In assessing Gun Range's first argument, the zoning/use history of the property provided this Court with the necessary context for evaluating the relevant provisions of the Code. In or about 1984-85, the City granted the at-issue property a certificate to allow the second floor of the property to be used as a shooting range, despite its commercial zoning designation. Without such certificate, the shooting range would not have been allowed to operate at the property and efforts to expand the shooting range beyond the second floor have been unsuccessful in the past. The instant appeal stems from L&I's refusal of a subsequent application for a proposed gun shop on the second floor of the property.

Chapter 14-600 of the Philadelphia Code addresses use regulations for property within the City and Section 14-601 sets forth the use categorization system for classifying principal uses within the Code. Within Section 601, Subsection (6) pertains to retail sales use, wherein the Code defines a "gun shop" as "[a]ny retail sales business

engaged in selling, leasing, purchasing, or lending of guns, firearms, or ammunition."[6]

Here, the proposed use was for the addition of a gun shop, fitting squarely within the definition of Section 14-601(6)(c)(.2), thus the proposal is subject to the relevant Code provisions governing such retail use. Specifically, Table 14-602-2 delineates the permissible and impermissible uses for property designated within a Commercial district. The Table clearly establishes that a gun shop is not permissible within a CMX-2 district, which is the zoning classification of the property located at 542-544 N. Percy Street. Moreover, the Table indicates that a gun shop is "expressly prohibited" within any type of Commercial district in the City of Philadelphia and references Section 14-603(13), which designates a gun shop as a regulated use and renders it subject to specific separation requirements. Section 14-603(13)(b) lists such separation requirements and, relevant to the instant matter, prohibits a regulated use "within 500ft. of any Residential district." Here, Gun Range is located within 53 feet of residences on the 900 block of Green Street and within 85 feet of the residences at 915 Spring Garden Street in the Spring Garden neighborhood of the City. In consideration of such provisions and circumstances, a variance would be required to operate a gun shop, unless the property's existing certificate would permit such use.

With regard to the scope of the existing certificate, Gun Range argued that the proposed gun shop is already

6. Phila. Code § 14-601(6)(c)(.2).

a permissible use in the property's CMX-2 zoning designation, averring that the term "shooting range" is absent from the Code and because ammunition is sold and guns are lent to participants at the range, the terms "shooting range" and "gun shop" must be read to be synonymous. This Court does not agree with such interpretation and, instead, determined that the retail sale of guns at the property would be an impermissible expansion of the certificated use and, thus, would require a variance. Section § 14-303(6)(a)(.2) of the Philadelphia Code provides that:

> L&I shall have authority to issue the permits and approvals [. . .] [r]egardless of whether the existing lot, structure, or use is currently the subject of a variance, permit, certificate, special exception, or proviso issued by the Zoning Board, provided that the application shall be consistent with the terms of the current Zoning Code and that variance, permit, certificate, special exception, or proviso. *If the application is not consistent with or would require a modification of the terms of a variance, permit, certificate, special exception or proviso approved by the Zoning Board, or otherwise not consistent with this Zoning Code, the application* ***shall be denied*** *and referred to the Zoning Board for action pursuant to the applicable section.*[7] (emphasis added)

7. Phila. Code § 14-303(6)(a)(.2).

Here, the record evidence clearly demonstrates that guns have never been retailed at the property under its existing certificate and, as such, the proposed gun shop would require a modification to the terms of the certificate. Moreover, the sale of ammunition for use at the range, *whether or not even permissible under the certificate*, does not confer the right to sell guns at the property. Accordingly, this Court found no error in L&I's refusal of the proposed gun shop and affirmed the findings and conclusions of the Board.

Further, this Court rejects any argument that state law pre-empts reasonable local zoning regulations even where, as here, constitutional rights are implicated in the regulations. The Code provisions at issue merely seek to regulate the location of gun sales and do not in any way seek to regulate or impinge upon the ownership, possession, or transfer of guns. Moreover, Gun Range has not sustained its burden to demonstrate that the Code provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. Here, the proposed use—a gun shop—*is less than 60 feet away from a concentrated residential district near downtown Philadelphia* and, as such, the City has an important governmental objective in limiting retail gun sales in such district. Upon review of the proceedings below, this Court concluded that no error of law was committed, and accordingly, affirmed the decision of the Board.

CONCLUSION

For the reasons set forth in this Opinion, the Commonwealth Court should affirm this Court's decision to affirm of the October 6, 2015 decision of the Board.

BY THE COURT:

/s/________________________
Carpenter, J.

APPENDIX G — ORDER OF THE COURT OF COMMON PLEAS, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, CIVIL TRIAL DIVISION, FILED AUGUST 9, 2016

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

CASE NO.: 151003454

IN RE: APPEAL OF THE GUN RANGE, LLC
(542-44 PERCY STREET)

v.

FROM THE DECISION OF THE
ZONING BOARD OF ADJUSTMENT

ORDER

AND NOW, this 9th day of August, 2016, it is hereby **ORDERED** and **DECREED** that the decision of the Zoning Board of Adjustment, which denied The Gun Range, LLC's request to add a retail use (a gun shop) to the property's existing use (a shooting range), is **AFFIRMED**.[1]

1. In or about 1984-85, the City granted the at-issue property a certificate to allow the second floor of the property to be used as a shooting range, despite its commercial zoning designation. Without such certificate, the shooting range would not have been allowed in the property. Efforts to expand the range beyond the second floor have been unsuccessful in the past. In the instant appeal, Appellants aver that, because of its certificate, the proposed

BY THE COURT

/s/______________________
Carpenter, J.

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use—a gun shop—is already legally allowed in the CMX-2 zone, apparently because ammunition is sold and guns are lent to participants at the range. This Court rejects such arguments and accepts the Findings and Conclusions of the Board. Quite simply, the retail sale of firearms is an impermissible expansion of the certificated use and, thus, would require a variance. Further, this Court rejects any argument that state law pre-empts reasonable local zoning regulations even where, as here, constitutional rights are implicated in the proposed regulations. Here, the proposed use—a gun shop—is less than 60 feet away from a concentrated residential district near downtown Philadelphia. Accordingly, the City has an important governmental objective in limiting retail gun sales in such district.

APPENDIX H — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE COURT OF COMMON PLEAS, CIVIL DIVISION, FILED FEBRUARY 19, 2016

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October Term, 2015
No. 03454

GUN RANGE, LLC,

Appellant,

v.

PHILADELPHIA ZONING BOARD OF ADJUSTMENT, AND CITY OF PHILADELPHIA,

Appellees.

Filed February 19, 2016

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE PIDLADELPHIA ZONING BOARD OF ADJUSTMENT

This appeal is taken from a Decision of the Zoning Board of Adjustment of the City of Philadelphia ("Zoning

Board" or "Board"), at Calendar No. 25036, denying an appeal of the Philadelphia Department of Licenses and Inspections' ("L&I" or "Department") issuance of a refusal for a proposed gun shop at 542-44 North Percy Street (the "Property"). In support of its decision, the Board makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On March 20, 2015, Yuri Zalzman ("Applicant") applied to L&I for a zoning/use registration permit for a proposed expansion of the Property's use from "gun range" (its current use) to "gun range & gun sales." *See* Application for Zoning/Use Registration Permits No. 597443.

2. On April 6, 2015, Applicant's attorney, Dawn Tancredi, Esquire, wrote to the L&I examiner reviewing the application to clarify the proposed change, stating:

   > The first floor use remains the same (appealrs to be warehouse/storage).The gun range is on the second floor and this is where the retail sale of guns will be added.

   See Email from Dawn Tancredi to Bindu Mathew, dated 3/26/2015.

3. L&I determined that the proposed gun shop was prohibited both because gun sales are not permitted in the Property's CMX-2 Commercial zoning district and because the use would be within 500 feet of

a residential district. With regard to the spacing requirement, the Department conducted an inspection on April 2, 2015, and determined that the proposed use would be located within 53 feet of residences on the 900 block of Green Street and within 85 feet of a residential use at 915 Spring Garden Street. The Department accordingly issued Applicant a notice of refusal on April 22, 2015. *See* Notice of Refusal, dated 4/22/2015; Regulated Use Inspection Report, dated 4/2/2015.

4. Applicant appealed the Department's refusal to the Zoning Board on April 23, 2015. In the submitted appeal form, Applicant indicated he was seeking a variance, and contended he was entitled to the requested relief because "granting of the requested variance will obviate an existing unnecessary hardship and will not be contrary to the public interest." *See* Applications for Appeal, dated 4/23/2015.

5. A hearing on the matter was held before the Board on August 12, 2015. At the hearing's start, Applicant's attorney, Dawn Tancredi, Esquire, advised the Board that her client was abandoning his request for a variance and instead appealing solely on the ground that L&I had erred in refusing the proposed gun shop use. 8/12/2015 N.T. at

6. Attorneys Andrew Ross, Esquire, representing the City, and Joseph Beller, Esquire, representing opponents of the proposed gun shop, appeared at the hearing and argued in opposition to the appeal.

7. At the hearing's conclusion, the Board held the record open for submission by the parties of legal memoranda supporting their respective positions.

8. On October 26, 2015, following receipt of the requested materials, the Board voted to deny the appeal.

Zoning History

9. In 1984, property owner James Colosimo applied to L&I for a zoning/use registration permit to covert the second floor of the Property, which was then zoned C-2 Commercial, to use as a "shooting range." Colosimo indicated that the first floor would continue to be used for storage and repair of automobiles. *See* Application No. 87141 at Applicant's Exhibit 6.

10. L&I determined that the proposed shooting range required "a certificate" from the Zoning Board. It accordingly issued a referral to the Board on December 28, 1984. *See* Referral to ZBA at Applicant's Exhibit 6.

11. Colosimo appealed the Department's referral to the Zoning Board. In his petition of appeal, he described the proposed use as "shooting range" and noted that he owned "a retail business next door where [he was] in the business of selling firearms." He said that his customers wanted " a place to test the firearms when they are purchased" and that "the proximity of this building makes it an ideal location for this use." *See* Petition of Appeal, dated 12/28/1984.

12. The Zoning Board granted the requested certificate on February 19, 1985. *See* Notice of Refusal, dated 4/22/2015 (Notes re zoning history).

13. In September 1985, Colosimo applied to L&I to expand the existing shooting range to both floors of the Property. A subsequent appeal related to that application was, however, dismissed. *See* Application No. 98542 and Notice of Refusal, dated 4/22/2015 (Notes re zoning history).

ExistingProposed Use

14. At the August 12, 2015, zoning hearing, Applicant, who was described by his attorney as "the principal of the gun range," testified that he had operated the shooting range at the Property for three years. He said his lease was limited to the second floor. 8/12/2015 N.T. at 9, 63, 68, 75.

15. Describing the existing business, Applicant said clients pay a daily fee to use the shooting range and can rent a gun for the duration of their visit. He said he sells ammunition but not firearms at the site. 8/12/2015 N.T. at 84-86

16. In response to questioning by the City's attorney, Mr. Ross, Applicant confirmed that he was seeking to add gun sales to the existing shooting range. When asked by Board Member Sam Staten whether he had applied for a "gun shop," Applicant answered "correct." 8/12/2015 N.T. at 76.

17. L&I Zoning examiner Bindu Mathew appeared at the zoning hearing and testified regarding her review of Applicant's zoning application. She stated:

> The application came in for a gun shop and the gun shop is an illegal use, and that is why I issued a refusal. Now, as part of that, when I reviewed the application, we checked the history, and on the history on the appeal form from 1985 that clearly says they do not do the retail of gun sales at this location. .. So that means that permit is only for a shooting range and not for a gun shop. And you're asking for a gun shop as part of it, and that is a [prohibited] use.

8/12/2015 N.T. at 53-54.

Arguments Presented

18. Having abandoned his request for a variance, Applicant's arguments on appeal were limited to the issue of whether L&I had erred in refusing to issue a permit allowing gun sales at the Property.

19. Applicant's attorney, Ms. Tancredi, argued three independent grounds for her client's appeal:

    1) A shooting range and a gun shop are synonymous under our zoning code and no additional approval is therefore required to conduct gun sales at the existing shooting range.

2) State law preempts Philadelphia's ability to regulate guns.

3) The Code as it relates to gun sales is unconstitutional.

See Memorandum dated 8/12/15 at Applicant's Exhibit 1; 8/12/2015 N.T. at 10-12.

20. With respect to Applicant's argument that the proposed gun shop is permitted under the existing permit for a shooting range, Ms. Tancredi said L&I is required to determine what "use category" a proposed use falls into. *Id.*

21. Ms. Tancredi argued that the proposed gun shop and the existing gun range fell into the same use category and, as a result, no further approval was required in order to conduct gun sales at the Property. Expanding on this point, she stated:

> The "Gun Shop" category is the only category in the Code where a shooting range or the retail sales of guns would fit. There is no smaller category or more specific use than a "gun shop" that would allow only a shooting range. Therefore, no variance is required.

See Legal Memorandum at Applicant's Exhibit 1.

22. Ms. Tancredi submitted two permits for an unrelated property as evidence that L&I had treated gun ranges and gun sales as one-and-the-same in the past.

The subject of both permits was a wireless services facility at 1530 South Front Street. The first, issued in 2008, identified other existing uses at the site to include a "shooting range." The second, issued in 2013, described other existing uses to include a "gun shop (range)." *See* Permits at Applicant's Exhibit 17.

23. Responding to Applicant's contention that no permit was required, Mr. Ross noted:

> [T]he very reason for the current application is to expand or allow for a new use of retail sale of guns. Applicant here is seeking a "Gun Shop" use. . . . Where Applicant applies for a "Gun Shop" use, the appropriate – not to mention self-evident – use category is Gun Shop. Even Applicant admits that a Gun Shop use is prohibited in this district.

See City of Philadelphia Legal Memorandum.

24. Speaking to the same point, Mr. Beller noted:

> [T]he contention that the use as a gun shop is permitted because of statutory construction is totally without merit. First, there is no ambiguity that requires the tests to be applied. The Code is explicit with regard to the category of "gun shop." There is no need to guess where this use is meant to be since it is an actual category.

See Memorandum from Joseph Beller, Esquire, to ZBA

25. Both Mr. Beller and Mr. Ross argued that the Board's prior approval of a gun range at the Property was limited to the specific use approved. Any expansion of that use – such as the proposed addition of gun sales – would, they contended, require further Board approval. *See* Letter from Joseph Beller, Esquire, to ZBA, dated 9/28/2015; 8/12/2015 N.T. at 41.

26. Mr. Ross also addressed the permits submitted by Ms. Tancredi for 1530 North Front Street, permits he characterized as "irrelevant to the matter at hand." The subject of each permit was, he noted, that property's use as a "wireless services facility;" the references to "shooting range" and "gun shop (range)" were included only in the description of other existing uses at the site. Mr. Ross stated:

    > Two different L&I examiners issued permits for structural changes to an existing antenna and services facility and, therefore, reviewed the application and issued the permits for that purpose only. A minimal difference in how they phrased the description of the other uses on that lot has no legal significance whatever, and is not a "gotcha" demonstrating that the City considers gun shops and shooting ranges as the same.

    See Memorandum of the City of Philadelphia.

27. With regarding to the existing business at the Property, Mr. Ross and Board member Greg Pastore

questioned whether ammunition sales were permitted under the prior approval for a gun range. 8/12/2015 N.T. at 34-35, 90.

Community Opposition

28. The Board received letters from area residents, community and political institutions and local charitable organizations that oppose the proposed gun shop at the Property. *See* Letters in Opposition.

CONCLUSIONS OF LAW

1. Applicant is seeking approval to sell guns at the existing shooting range at the Property. He contends that the existing use is in the same use category as "gun shop" and that the 1984 certificate for operation of a shooting range therefore also allows gun sales.

2. The Board concludes that applicant is proposing a gun shop, that gun shops are a specifically defined use under the Code, that the use is prohibited in the Property's CMX-2 zoning district, and that L&I acted properly in issuing a refusal. The Board additionally concludes that the proposed sales would represent an expansion of the use previously approved by the Board and that retail sale of guns did not fall into the same category as shooting range at the time the 1984 Certificate was granted.

3. The Zoning Code defines "Gun Shop" as "any retail sales business engaged in selling, leasing, purchasing,

or lending of guns, firearms, or ammunition. Code at §14-601(6)(c)(.2).

4. Gun shops are prohibited in CMX-2 Zoning district and within 500 feet of residentially zoned properties. The Property is located both in a CMX-2 district and within 500 feet of residences; the proposed gun shop is therefore prohibited on two independent grounds.

5. At the zoning hearing, Applicant acknowledged that guns are not currently sold at the Property and that he is seeking an expansion of the existing use. Zoning examiner Bindu Matthews additionally confirmed that she had reviewed the property's zoning history prior to issuing a refusal and that the "appeal form from 1985 [regarding the shooting range] clearly says they do not do the retail of gun sales at this location."

6. Under these circumstances, the Board concludes that the proposed retail sale of guns is a new use that was properly denied.

7. The Board also concludes that the proposed gun sales exceed the use approved by certificate in 1984 and that, for this reason too, the application was properly denied.

8. Code Section 14-303(6)((a)(.1), which addresses the circumstances under which L&I is authorized to issue zoning permits, provides:

> Regardless of whether the existing lot, structure, or use is currently the subject of a

variance, permit, certificate, special exception, or proviso issued by the Zoning Board, provided that the application shall be consistent with the terms of the variance, permit, certificate, special exception, or proviso. If the application is not consistent with or would require a modification of the terms of a variance, permit, certificate, special exception or proviso approved by the Zoning Board, or otherwise not consistent with the Zoning Code, the application shall be denied and referred to the Zoning Board for actions pursuant to the applicable section.

9. In keeping with the requirements of Section 14-303(6)(a)(.1), the Board concludes that the proposed expansion of the existing use to include gun sales is inconsistent both with the certificate issued in 1984 and with the Code's use requirements, which prohibit the proposed retail sale of guns. A variance for the proposed use is therefore required.

10. The Board finally notes that Applicant's contention that the "Gun Shop category is the only category in the Code where a shooting range or the retail sales of guns would fit" appears to be inconsistent with the approach taken by L&I in its review of the application submitted in 1984.

11. In reviewing the 1984 application for a shooting range, the Department determined that the proposed use required a certificate (under the old code, the

equivalent of a special exception), not a variance. In other words, it concluded that the proposed use fell under one of the specific use categories permitted by certificate in the Property's C-2 Zoning classification. Although shooting ranges were not identified as a certificated use, "Amusement arcades," which were defined to include "shooting galleries," were. Uses "of the same general character" as the specified certificated uses were also permitted by certificate. 14-303(3) (Repealed by Bill 110845, Effective 8/22/12)

12. Aside from "amusement arcades," no use permitted by certificate in C-2 districts was remotely similar to the proposed shooting range. In addition to shooting galleries, amusement arcades were defined to include establishments providing entertainment in the form of pinball machines, ping-pong tables and darts. The proposed retail sale of guns clearly is not "of the same general character" as such benign uses.

13. L&I's classification of the existing shooting range as a certificated use in 1984 may call into question the legality of ammunition sales at the Property; it does not, however, support a finding that the existing operation may be expanded to include gun sales as a matter of right.

14. For all of the above reasons, the Board concludes that the retail sale of guns is not permitted at the Property and that L&I acted correctly in issuing Applicant a refusal.

15. Applicant's preemption and Constitutional arguments are not within the Board's jurisdiction and therefore are not addressed here.

Respectfully submitted,

/s/______________________
Tanya Sunkett
Zoning Board Administrator

VOTE OF THE BOARD

Julia Chapman	Appeal denied
Samuel Staten, Jr.	Appeal denied
Greg Pastore	Appeal denied
Gary Masino	Appeal denied

APPENDIX I — STATUTES

Second Amendment

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

Fourteenth Amendment

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1

CHAPTER 14-600. USE REGULATIONS

(1) **General.**

This section contains a description of the use categorization system used to classify principal uses in this Zoning Code.

(a) **Use Categories.**

This Zoning Code classifies principal land uses into 10 major groupings (described in § 14-601(2) through § 14-601(11)), which are referred to as use categories:

(.1) Residential. See § 14-601(2).

(.2) Parks and Open Space. See § 14-601(3).

(.3) Public, Civic, and Institutional. See § 14-601(4).

(.4) Office. See § 14-601(5).

(.5) Retail Sales. See § 14-601(6).

(.6) Commercial Services. See § 14-601(7).

(.7) Vehicle and Vehicular Equipment Sales and Services. See § 14-601(8).

(.8) Wholesale, Distribution, and Storage. See § 14-601(9).

(.9) Industrial. See § 14-601(10).

(.10) Urban Agricultural. See § 14-601(11).

(b) **Use Subcategories.**

Each use category is further divided into more specific "subcategories." Use subcategories classify principal land uses and activities based on common functional, product,

or physical characteristics, such as the type and amount of activity, the type of customers or residents, how goods or services are sold or delivered and site conditions.

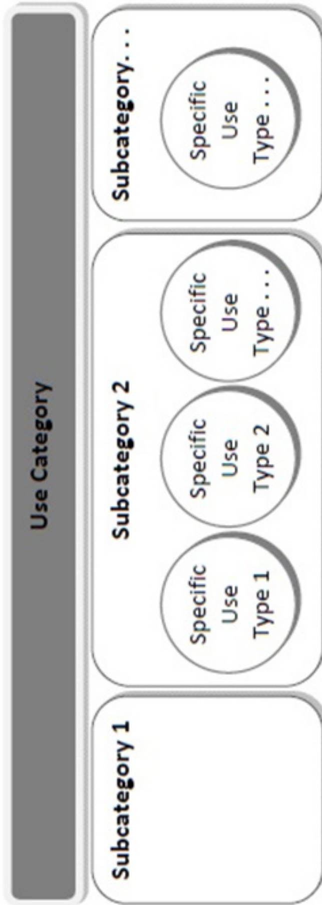
(c) **Specific Use Types.**

Some use subcategories are further broken down to identify specific use types that are regulated differently than the subcategory.

(d) **Use Tables.**

A series of use tables identify allowed land uses in Residential, Commercial, Industrial, and Special Purpose districts. See § 14-602(3) (Residential Districts); § 14-602(4) (Commercial Districts); § 14-602(5) (Industrial Districts); and § 14-602(6) (Special Purpose Districts) respectively. The structure of the use tables (see Sample Use Table below) reflects the hierarchical nature of the use categorization described in this section. See § 14-602(2) (Understanding the Use Tables) for a further explanation of the use table structure.

Appendix I



(e) **Determination of Use Categories and Subcategories.**

(.1) L&I is authorized to classify uses on the basis of the use category, subcategory, and specific use type descriptions of this § 14-601 (Use Categories).

(.2) When a use cannot be readily classified into a use category, subcategory, or specific use type, or appears to fit into multiple categories, subcategories, or specific use types, L&I is authorized to determine the most similar, and thus most appropriate, use category, subcategory, or specific use type based on the actual or projected characteristics of the principal use or activity in relationship to the use category, subcategory, and specific use type descriptions provided in this section. In making such determinations, L&I may consider:

(.a) the types of activities that will occur in conjunction with the use;

(.b) the types of equipment and processes to be used;

(.c) the existence, number, and frequency of residents, customers, or employees;

(.d) parking demands associated with the use; and

(.e) other factors deemed relevant to a use determination.

(.3) If a use can reasonably be classified in multiple categories, subcategories, or specific use types, L&I shall categorize the use in the category, subcategory, or specific

use type that provides the most exact, narrowest, and appropriate "fit."

(.4) If L&I is unable to determine the appropriate use category for a proposed use, L&I shall deny the zoning permit request. This decision may be appealed to the Zoning Board in accordance with § 14-303(15) (Appeals).

(6) **Retail Sales Use Category.**

This category includes uses involving the sale, lease, or rental of new or used goods to the ultimate consumer within an enclosed structure, unless otherwise specified. The retail sales subcategories are

(a) **Adult-Oriented Merchandise.**

Any retail sales use or establishment having as 20% or more of its floor area or its stock-in-trade:

(.1) Books, magazines, videos, CD-ROMs, or other periodicals or visual production materials that are distinguished or characterized by their emphasis on matter depicting, describing, or related to "specified sexual activities," or "specified anatomical areas;" or

(.2) Any devices, commonly known as sex toys, designed or marketed as useful primarily for the stimulation of human genital organs.

(b) **Building Supplies and Equipment.**

Uses that sell or otherwise provide goods to repair, maintain, or visually enhance a structure or premises, including, but not limited to, hardware stores, paint and wallpaper supply stores, and garden supply stores.

(c) **Consumer Goods.**

Uses that sell or otherwise provide furniture, appliances, equipment, and similar consumer goods, large and small, functional and decorative, for use, entertainment, comfort, or aesthetics. This use subcategory shall include establishments that sell cigarettes and other lawful smoking tobacco products. The following are consumer goods specific use types:

(.1) **Drug Paraphernalia Stores.**

Any retail store selling paraphernalia commonly related to the use of any drug or narcotic, the sale, use or possession of which drug or narcotic is subject to the provisions of "The Controlled Substance, Drug, Device and Cosmetic Act," 1972, April 14, P.L. 233, No, 64, 51 et seq., 35 P.S. §§ 780-101 et seq., including, but not limited to, water pipes, pipe "screens," hashish pipes, "roach" clips, "coke" spoons, "bongs," and cigarette rolling paper, except that this term does not include the sale of cigarette rolling paper by a store that also sells loose tobacco or the sale by prescription of implements needed for the use of prescribed drugs or narcotics.

(.2) **Gun Shop.**

Any retail sales business engaged in selling, leasing, purchasing, or lending of guns, firearms, or ammunition.

(d) **Food, Beverages, and Groceries.**

Uses that sell or otherwise provide food or beverages for off-premise consumption, including grocery stores and similar uses that provide incidental and accessory food and beverage service as part of their primary retail sales business. The following are food, beverage, and groceries specific use types:

(.1) **Fresh Food Market.**

Either of the following:

(.a) An establishment in which the sale of fresh fruits and vegetables to the general public occupies at least 50% of the display area; or

(.b) An establishment primarily engaged in the sale of grocery products and that provides all of the following:

(.i) at least 5,000 sq. ft. of customer-accessible floor area used for display and sales of a general line of food and nonfood grocery products such as dairy, canned and frozen foods, fresh fruits and vegetables, and fresh and prepared meats, fish, and poultry, intended for home preparation, consumption, and use;

(.ii) at least 50% of such customer-accessible sales and display area is used for the sale of a general line of food products intended for home preparation and consumption;

(.iii) at least 25% of such customer-accessible sales and display area is used for the sale of perishable goods, which must include dairy, fresh fruits and vegetables, and frozen foods and that may include fresh meats, poultry, and fish; and

(.iv) at least 750 sq. ft. of such customer-accessible sales and display area is used for the sale of fresh fruits and vegetables.

(.2) **Farmer's Market.**

An area for the sale of food crops and non-food crops (e.g., flowers) directly to consumers within an enclosed structure or outdoors on a lot.

(e) **Pets and Pet Supplies.**

Uses that sell or otherwise provide household pets and pet supplies.

(f) **Sundries, Pharmaceuticals, and Convenience Sales.**

Uses that sell or otherwise provide goods for personal grooming and for the day-to-day maintenance of personal health and well-being.

(g) **Wearing Apparel and Accessories.**

Uses that sell or otherwise provide goods to cover, protect, or visually enhance the human form. This use subcategory shall include establishments that sell jewelry, watches, and other related goods and may provide repair, custom fabrication, and cleaning, provided that such activity is clearly incidental to the principal use of the establishment.

601(7) Commercial Services Use Category

(c) **Assembly and Entertainment.**

Uses that provide gathering places for participant or spectator recreation, entertainment, or other assembly activities. Assembly and entertainment uses may provide incidental food or beverage service for on- or off-premise consumption. The following are assembly and entertainment specific use types:

(.1) **Amusement Arcades.**

An establishment that offers to patrons four or more mechanical or electrical devices or games, such as pinball machines, ping pong, darts, shooting galleries or similar devices or games, excluding juke boxes and amusement devices in the establishments regulated by the Liquor Control Board of the Commonwealth and vending machines for the dispensing of goods.

(.2) **Casino.**

A licensed gaming facility as authorized by the Commonwealth of Pennsylvania, pursuant to 4 Pa. C.S. Part II, the "Pennsylvania Race Horse Development and Gaming Act" (the "Act"). A "casino" may also be referred to as a "licensed gaming facility."

(.3) Nightclubs and Private Clubs.

An establishment where 50 or more people regularly congregate primarily for entertainment purposes in the form of dancing or live or recorded music. The establishment may serve food or beverages to patrons for on- or off-premise consumption or may have one or more temporary or permanent area(s) set aside for the purpose of dancing by the patrons of the establishment. Such establishments may include, but are not limited to, discotheques, cabarets, private clubs, banquet halls, and similar places of assembly.

(.4) Pool or Billiards Room.

An establishment that provides three or more tables for the playing of pool or billiards.

(.5) **Movie Theater.**

An enclosed building where patrons gather to view motion pictures. This specific use type shall not include adult motion picture theaters.

(10) **Industrial Use Category.**

This category includes uses that produce goods from extracted and raw materials or from recyclable or previously prepared materials, including the design, storage, and handling of these products and the materials from which they are produced. The industrial subcategories are:

(a) **Artist Studios and Artisan Industrial.**

Spaces used by artists for the creation of art or the practice of their artistic endeavors, as well as uses that produce consumer goods by hand manufacturing, involving the use of hand tools and small-scale, light mechanical equipment in a completely enclosed building with no outdoor operations, storage or regular commercial truck parking/loading.

(b) **Limited Industrial.**

Uses that process, fabricate, assemble, treat, or package finished parts or products without the use of explosive or petroleum materials. This subcategory does not include the assembly of large equipment and machinery and has very limited external impacts in terms of noise, vibration, odor, hours of operation, and traffic.

(c) **General Industrial.**

Uses that process, fabricate, assemble, or treat materials for the production of large equipment and machines as well as industrial uses that because of their scale or method of operation regularly produce odors, dust, noise, vibration,

truck traffic or other external impacts that are detectable beyond the property lines of the subject property.

(d) **Intensive Industrial.**

Industrial uses that regularly use hazardous chemicals or procedures or produce hazardous byproducts, including the following: manufacturing of acetylene, cement, lime, gypsum or plaster-of-paris, chlorine, corrosive acid or fertilizer, insecticides, disinfectants, poisons, explosives, paint, lacquer, varnish, petroleum products, coal products, plastic and synthetic resins, and radioactive materials. This subcategory also includes petrochemical tank farms, gasification plants, smelting, animal slaughtering, oil refining, asphalt and concrete plants, and tanneries. Intensive industrial uses have high potential for external impacts on the surrounding area in terms of noise, vibration, odor, hours of operation, and traffic.

(e) **Junk and Salvage Yards and Buildings.**

An area or building where waste or scrap materials are bought, sold, exchanged, stored, baled, packed, disassembled, or handled for reclamation, disposal or other like purposes, including but not limited to scrap iron and other metals, paper, rags, rubber tires, and bottles. A junk or salvage yard or building includes an auto wrecking yard or building.

(f) **Marine-Related Industrial.**

Uses such as docks, wharves, piers, and related facilities,

used in connection with the transfer, storage-in-transit and incidental processing of commercial cargo from or to waterborne craft, including, but not limited to, pipelines and conveyors that transfer equipment or materials to or from the Delaware River or the Schuylkill River.

(g) **Mining/Quarrying.**

The extraction of mineral or aggregate resources from the ground for off-site use. Examples include quarrying or dredging for sand, gravel or other aggregate materials; and mining.

(h) **Research and Development.**

Uses engaged in scientific research and testing leading to the development of new products and processes.

(i) **Trucking and Transportation Terminals.**

Uses engaged in the dispatching and long-term or short-term storage of large vehicles. Minor repair and maintenance of vehicles stored on the premises is also included.

(4) **Commercial Districts.**

Principal uses are allowed in Commercial districts in accordance with Table 14-602-2. Uses classified as accessory uses, such as home occupations, are not regulated by the use table. Accessory uses are permitted in conjunction with allowed principal uses, provided they

comply with all applicable regulations of § 14-603 (Use-Specific Standards) and § 14-604 (Accessory Uses and Structures).

(a) **Notes for Table 14-602-2.**

[1] When the proposed use is in an attached or semi-detached building, the household living use regulations of the residential district to which it is attached apply. Otherwise, the residential use regulations of the most restrictive adjacent residential district apply.

[2] A maximum of two dwelling units are permitted for lots less than 1,440 sq. ft. in area. A maximum of three dwelling units are permitted for lots that are 1,440 sq. ft. to 1,919 sq. ft. in area. A minimum of 480 sq. ft. of lot area is required per dwelling unit for the lot area in excess of 1,919 sq. ft. Whenever the calculation of permitted number of dwelling units results in a fraction of a dwelling unit, then the number of permitted dwelling units shall be rounded down to the nearest whole number.

[3] In order to promote active uses at the street level, an attached building in the CMX-2 district must contain a non-residential use along 100% of the ground floor frontage and within the first 30 ft. of building depth, measured from the front building line.

[4] Residential uses are prohibited along the ground floor frontage of buildings within the CMX-2.5 district.

[5] Office, retail, and commercial service uses may not be located above the ground floor and may not occupy more than 2,000 sq. ft. of gross floor area.

[6] In CMX-4 and CMX-5 districts, underground parking garages are permitted; otherwise any portion of a parking garage located above ground level requires special exception approval.

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ZONING AND PLANNING THE PHILADELPHIA CODE

Table 14-602-2: Uses Allowed in Commercial Districts[206]

Previous District Name	**C-1**	**C-2/ RC-2**	**(/NCC)**	**C-3/ RC-3**	**C-4**	**C-5**	**C-7/ NSC**	**ASC**	
District Name	**CMX-1**	**CMX-2**	**CMX-2.5**	**CMX-3**	**CMX-4**	**CMX-5**	**CA-1**	**CA-2**	**Use-Specific Standards**
Y = Yes permitted as of right | S = Special exception approval required N = Not allowed (expressly prohibited) | Uses not listed in this table are prohibited See § 14-602(4)(a) (Notes for Table 14-602-2) for information pertaining to bracketed numbers (e.g., "[2]") in table cells.									
Residential Use Category									
Household Living	[1][2]	Y[2][3]	Y[2][4]	Y	Y	Y	N	N	
Group Living (except as noted below)	N	N	N	Y	Y	Y	N	N	
Personal Care Home	N	S	S[4]	Y	Y	Y	Y	N	§ 14-603(11)
Single-Room Residence	N	N	N	Y	Y	Y	N	N	
Parks and Open Space Use Category									
Passive Recreation	Y	Y	Y	Y	Y	Y	Y	Y	
Active Recreation	S	S	S	Y	Y	Y	Y	Y	
Public, Civic, and Institutional Use Category									
Day Care (as noted below)									
Family Child Care	Y	Y	Y	Y	Y	Y	N	N	§ 14-603(5)
Group Child Care	Y	Y	Y	Y	Y	Y	Y	Y	§ 14-603(5)
Day Care Center	S	Y	Y	Y	Y	Y	Y	Y	§ 14-603(5)
Educational Facilities	N	Y	N	Y	Y	Y	N	Y	
Fraternal Organization	N	Y	S	Y	Y	Y	N	Y	
Hospital	N	Y	Y	Y	Y	Y	N	Y	
Libraries and Cultural Exhibits	Y	Y	Y	Y	Y	Y	Y	Y	
Religious Assembly	Y	Y	S	Y	Y	Y	N	Y	
Safety Services	Y	Y	Y	Y	Y	Y	Y	Y	
Transit Station	Y	S	S	Y	Y	Y	S	Y	
Utilities and Services, Basic	S	S	N	S	S	S	S	S	
Wireless Service Facility (as noted below)									
Freestanding Tower	S	S	S	Y	Y	Y	S	Y	§ 14-603(16)

206. Amended, Bill No. 120774-A (approved January 14, 2013); amended, Bill No. 120917-AA (approved April 2, 2013); amended, Bill No. 130804 (approved December 18, 2013); amended, Bill No. 130855 (approved January 20, 2014); amended, Bill No. 150264 (approved June 16, 2015).

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Building or Tower-Mounted Antenna	Y	Y	Y	Y	Y	Y	Y	Y	§ 14-603(17)
Office Use Category									
Business and Professional	Y[5]	Y	Y	Y	Y	Y	Y	Y	
Medical, Dental, Health Practitioner (as noted below)									
Sole Practitioner	Y[5]	Y	Y	Y	Y	Y	Y	Y	
Group Practitioner	S[5]	S	S	Y	Y	Y	Y	Y	
Government	Y[5]	Y	Y	Y	Y	Y	Y	Y	
Retail Sales Use Category									
Building Supplies and Equipment	Y[5]	Y	Y	Y	Y	Y	Y	Y	§ 14-603(3)
Consumer Goods (except as noted below)	Y[5]	Y	Y	Y	Y	Y	Y	Y	
Drug Paraphernalia Sales	N	N	N	N	N	N	N	N	§ 14-603(13)
Gun Shop	N	N	N	N	N	N	N	N	§ 14-603(13)
Medical Marijuana Dispensary	N	Y	Y	Y	Y	Y	N	Y	§ 14-603(20)
Food, Beverages, and Groceries	Y[5]	Y	Y	Y	Y	Y	Y	Y	
Pets and Pet Supplies	Y[5]	Y	Y	Y	Y	Y	Y	Y	
Sundries, Pharmaceuticals, and Convenience Sales	Y[5]	Y	Y	Y	Y	Y	Y	Y	
Wearing Apparel and Accessories	Y[5]	Y	Y	Y	Y	Y	Y	Y	
Commercial Services Use Category									
Animal Services (except as noted below)	Y[5]	S	S	Y	Y	Y	Y	Y	
Boarding and Other Services	N	N	N	N	N	N	N	N	§ 14-603(14)
Assembly and Entertainment (except as noted below)	N	S	S	S	Y	Y	S	Y	
Amusement Arcade	N	N	N	N	N	N	N	N	§ 14-603(13)
Casino	N	N	N	N	N	N	N	N	
Nightclubs and Public Entertainment Venue	N	S	N	S	Y	Y	N	Y	§ 14-603(18)
Pool or Billiards Room	N	N	N	N	N	N	N	N	§ 14-603(13)
Building Services	N	N	N	Y	Y	Y	N	Y	
Business Support	Y[5]	Y	Y	Y	Y	Y	Y	Y	
Eating and Drinking Establishments (as noted below)	N	S	N	S	Y	Y	N	Y	
Prepared Food Shop	S[5]	Y	Y	Y	Y	Y	Y	Y	

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Take-Out Restaurant	N	S	S	Y	Y	Y	S	Y	§ 14-603(6)
Sit Down Restaurant	N	Y	Y	Y	Y	Y	Y	Y	
Financial Services (except as noted below)	Y[5]	Y	Y	Y	Y	Y	Y	Y	
Personal Credit Establishment	N	N	N	N	N	N	N	N	§ 14-603(13)
Funeral and Mortuary Services	S[5]	Y	N	Y	Y	Y	Y	Y	
Maintenance and Repair of Consumer Goods	Y[5]	Y	Y	Y	Y	Y	Y	Y	
On-Premise Dry Cleaning	Y[5]	Y	Y	Y	Y	Y	Y	Y	
Marina	N	N	N	Y	Y	Y	N	N	
Parking, Non-Accessory (as noted below)									
Surface Parking	N	S	N	S	N	N	S	Y	§ 14-603(10)
Structured Parking	N	S	S	Y	[6]	[6]	S	Y	§ 14-603(10)
Personal Services (except as noted below)	Y[5]	Y	Y	Y	Y	Y	Y	Y	
Body Art Service	S	S	Y	Y	Y	Y	Y	Y	§ 14-603(2)
Fortune Telling Service	N	N	N	Y	Y	Y	Y	Y	
Radio, Television, and Recording Services	N	Y	Y	Y	Y	Y	Y	Y	
Visitor Accommodations	N	N	N	Y	Y	Y	N	Y	
Commissaries and Catering Services	N	Y	Y	Y	Y	Y	Y	Y	
Vehicle and Vehicular Equipment Sales and Services Use Category									
Commercial Vehicle Sales and Rental	N	N	N	N	N	N	N	S	
Personal Vehicle Repair and Maintenance	N	N	N	S	N	N	N	N	§ 14-603(7)
Personal Vehicle Sales and Rental	N	N	N	S	S	S	N	S	
Vehicle Fueling Station	N	N	N	S	N	N	S	Y	§ 14-603(8)
Vehicle Equipment and Supplies Sales and Rental	N	Y	N	Y	Y	Y	S	S	
Wholesale, Distribution, and Storage Use Category									
Moving and Storage Facilities	N	N	N	N	N	N	N	Y	
Wholesale Sales and Distribution	N	N	N	N	N	N	N	Y	
Industrial Use Category									
Artist Studios and Artisan Industrial	N	Y	Y	Y	Y	Y	N	Y	
Research and Development	N	Y	Y	Y	Y	Y	Y	Y	
Urban Agriculture Use Category									
Community Garden	Y	Y	Y	Y	Y	Y	Y	Y	§ 14-603(15)
Market or Community-Supported Farm	Y	Y	Y	Y	N	N	Y	Y	§ 14-603(15)

(5) Industrial Districts.

Principal uses are allowed in Industrial districts in accordance with Table 14-602-3. Uses classified as accessory uses, such as home occupations, are not regulated by the use table. Accessory uses are permitted in conjunction with allowed principal uses, provided they comply with all applicable regulations of § 14-603 (Use-Specific Standards) and § 14-604 (Accessory Uses and Structures).

(a) **Notes for Tables 14-602-3.**

[1] Sale of used automotive parts is prohibited.

[2] Storage of parts must be in an enclosed structure and storage of vehicles being serviced must be on a surface parking lot or in a parking garage.

[3] In the IRMX district, an industrial use must account for a floor area (located anywhere in any building on the same lot) equal to at least 50% of the total ground floor area of all buildings on the lot. or a use other than residential and other than parking must account for a floor area (located anywhere in any building on the same lot) equal to at least 60% of the total ground floor area of al! buildings on the lot.

[4] In the IRMX district, retail sales uses are prohibited on any floor other than the ground floor of a building.

Table 14-602-3: Uses Allowed in Industrial Districts[207]

Previous District Name	New	L4/L-5	L1/L2/L3	G1/G2	LR	PI	
District Name	IRMX [3]	ICMX[3]	I-1	I-2	I-3	I-P	Use-Specific Standards
Y = Yes permitted as of right | S = Special exception approval required N = Not allowed (expressly prohibited) | Uses not listed in this table are prohibited See § 14-602(5)(a) (Notes for Table 14-602-3) for information pertaining to bracketed numbers (e.g., "[2]") in table cells.							
Residential Use Category							
Household Living (as noted below)							
Multi-Family	Y	N	N	N	N	N	
Caretaker Quarters	Y	Y	Y	Y	Y	Y	
Group Living	Y	N	N	N	N	N	§ 14-603(11)
Parks and Open Space Use Category							
Passive Recreation	Y	Y	Y	Y	Y	Y	
Active Recreation	Y	Y	N	N	N	N	
Public, Civic, and Institutional Use Category							
Day Care	Y	Y	N	N	N	N	§ 14-603(5)
Detention and Correctional Facilities	N	S	N	S	Y	N	§ 14-603(13)
Educational Facilities	Y	Y	N	N	N	N	
Fraternal Organization	Y	Y	N	N	N	N	
Libraries and Cultural Exhibits	Y	Y	N	N	N	N	
Re-Entry Facility	N	S	S	S	Y	S	§ 14-603(12)
Religious Assembly	Y	Y	N	N	N	N	
Safety Services	Y	Y	Y	Y	Y	Y	
Transit Station	Y	Y	Y	Y	Y	Y	
Utilities and Services, Basic	Y	Y	Y	Y	Y	Y	
Utilities and Services, Major	N	N	N	Y	Y	Y	§ 14-603(1)
Wireless Service Facility	Y	Y	Y	Y	Y	Y	§ 14-603(16); § 14-603(17)
Office Use Category							
Business and Professional	Y	Y	Y	Y	N	N	
Medical, Dental, Health Practitioner (as noted below)							

207. Amended, Bill No. 120774-A (approved January 14, 2013); amended, Bill No. 120917-AA (approved April 2, 2013); amended, Bill No. 130804 (approved December 18, 2013); amended, Bill No. 130768 (approved April 23, 2014); amended, Bill No. 150168 (approved April 21, 2015); amended, Bill No. 150264 (approved June 16, 2015).

Sole Practitioner	Y	Y	Y	N	N	N	
Group Practitioner	Y	Y	Y	Y	Y	N	
Government	Y	Y	Y	Y	N	N	
Retail Sales Use Category[4]							
Adult-Oriented Merchandise	N	S	N	S	Y	N	§ 14-603(13)
Building Supplies and Equipment	Y	Y	Y	Y	Y	Y	§ 14-603(3)
Consumer Goods (except as noted below)	Y	Y	N	N	N	N	
Drug Paraphernalia Sales	N	S	N	S	Y	N	§ 14-603(13)
Gun Shop	N	S	N	S	Y	N	§ 14-603(13)
Food, Beverages, and Groceries (except as noted below)	Y	Y	N	N	N	N	
Fresh Food Market	Y	Y	N	N	N	N	§ 14-603(7)
Pets and Pet Supplies	Y	Y	N	N	N	N	
Sundries, Pharmaceuticals, and Convenience Sales	Y	Y	N	N	N	N	
Wearing Apparel and Accessories	Y	Y	N	N	N	N	
Commercial Services Use Category							
Adult-Oriented Service	N	S	N	S	Y	N	§ 14-603(13)
Animal Services (except as noted below)	Y	Y	Y	Y	Y	N	
Boarding and Other Services	N	N	S	S	N	N	§ 14-603(14)
Assembly and Entertainment (except as noted below)	S	Y	N	N	N	N	§ 14-603(18)
Amusement Arcade	N	S	N	N	Y	N	§ 14-603(13)
Casino	N	N	N	N	N	N	
Pool or Billiard Room	N	S	N	N	Y	N	§ 14-603(13)
Building Services	Y	Y	Y	Y	Y	N	
Business Support	Y	Y	Y	Y	Y	N	
Eating and Drinking Establishments (except as noted below)	Y	Y	N	N	N	N	
Take-Out Restaurant	S	Y	N	N	N	N	§ 14-603(6)
Financial Services (except as noted below)	Y	Y	Y	Y	Y	Y	
Personal Credit Establishment	N	S	N	S	Y	N	§ 14-603(13)
Funeral and Mortuary Services	Y	Y	N	N	N	N	

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Maintenance and Repair of Consumer Goods	Y	Y	Y	Y	Y	Y	
Marina	N	Y	Y	Y	N	N	
Parking, Non-Accessory	S	S	Y	Y	Y	Y	§ 14-603(10)
Personal Services	Y	Y	N	N	N	N	
Body Art Service	S	S	N	N	N	N	§ 14-603(2)
Radio, Television, and Recording Services	Y	Y	Y	Y	Y	N	
Visitor Accommodations	Y	N	N	N	N	N	
Commissaries and Catering Services	Y	Y	N	N	N	N	
Vehicle and Vehicular Equipment Sales and Services Use Category							
Commercial Vehicle Repair and Maintenance	N	N	Y	Y	Y	Y	§ 14-603(7)
Commercial Vehicle Sales and Rental	N	S[1]	Y	Y	Y	Y	
Personal Vehicle Repair and Maintenance	N	S[2]	Y	Y	Y	N	§ 14-603(7)
Personal Vehicle Sales and Rental	N	S[1]	N	Y	Y	N	
Vehicle Fueling Station	N	Y	Y	Y	Y	N	§ 14-603(8)
Vehicle Equipment and Supplies Sales and Rental	N	S[1]	N	N	N	N	
Vehicle Paint Finishing Shop	N	N	Y	Y	Y	N	
Wholesale, Distribution, and Storage Use Category							
Equipment and Materials Storage Yards and Buildings	S	Y	Y	Y	Y	Y	
Moving and Storage Facilities	N	Y	Y	Y	Y	Y	
Warehouse	Y	Y	Y	Y	Y	Y	
Wholesale Sales and Distribution (except as noted below)	S	Y	Y	Y	Y	Y	
Distributor of Malt or Brewed Beverages							
Industrial Use Category							
Artists Studios and Artisan Industrial	Y	Y	Y	Y	Y	N	
Limited Industrial	Y	Y	Y	Y	Y	N	
General Industrial	N	N	N	Y	Y	N	
Intensive Industrial	N	N	N	N	Y	N	
Junk and Salvage Yards and Buildings	N	N	N	S	Y	N	§ 14-603(9)
Marine-Related Industrial	N	N	N	N	Y	Y	

Mining/Quarrying	N	N	N	N	Y	N	
Research and Development	Y	Y	Y	Y	Y	N	
Trucking and Transportation Terminals	N	N	Y	Y	Y	Y	
Urban Agriculture Use Category							
Community Garden	Y	Y	Y	Y	Y	N	§ 14-603(15)
Market or Community-Supported Farm	Y	Y	Y	Y	N	N	§ 14-603(15)
Animal Husbandry	N	Y	Y	Y	Y	N	§ 14-603(15)
Horticulture Nurseries and Greenhouses	Y	Y	Y	Y	Y	N	

(13) **Regulated Uses.**

(a) **Designation of Regulated Uses.**

The following uses arc designated as regulated uses;

(.1) Adult-oriented merchandise:

(.2) Adult-oriented service;

(.3) Drug paraphernalia stores;

(.4) Gun shops;

(.5) Detention and correctional facilities;

(.6) Personal credit establishments;

(.7) Amusement arcades;

(.8) Pool or billiards rooms, except as provided in § 14-603(13)(a)(.10), below.

(.9) Body art services.

(.10) In the area bounded by Chestnut Street, 12th Street, 13th Street, and Sansom Street, a pool or billiards room establishment regulated by the Pennsylvania Liquor Control Board shall not be considered a regulated use if the pool and billiard tables are not coin-operated. This provision shall expire six months after the effective date of this Zoning Code.

(b) **Regulations and Standards.**

(.1) **Separation Requirements.**

No regulated use may be located:

(.a) Within a zoning district where such use is not expressly allowed;

(.b) Within 1,000 ft. of any other existing regulated use;

(.c) Within 500 ft. of any Residential district or SP-INS district;

(.d) Within 1,000 ft. of any SP-ENT zoning district; or

(.e) Within 500 ft. of the nearest lot line of a lot containing any protected use (see § 14-203 (Protected Use)).

(.2) **Discontinuance of Operations.**

If a regulated use ceases or discontinues operation for a continuous period of 90 days or more, the regulated use may not resume, or be replaced by any other regulated use unless it complies with the regulated use requirements of this section.

APPENDIX J — PETITION FOR ALLOWANCE OF APPEAL IN THE SUPREME COURT OF PENNSYLVANIA, FILED MARCH 28, 2024

IN THE SUPREME COURT OF PENNSYLVANIA

94 EAL 2024

IN RE: APPEAL OF THE GUN RANGE, LLC FROM A DECISION OF ZONING BOARD OF ADJUSTMENT RE: 542-44 N. PERCY STREET

Filed March 28, 2024

PETITION FOR ALLOWANCE OF APPEAL OF THE GUN RANGE, LLC

Petition for Allowance of Appeal of The Gun Range, LLC from the February 27, 2024 Order of the Commonwealth Court of Pennsylvania, No. 90 C.D. 2021, affirming in part, and denying in part, the January 6, 2021 Order of the Philadelphia Court of Common Pleas, October Term 2015, No. 03454, affirming the October 6, 2015 Adjudication of the Zoning Board of Adjustment of the City of Philadelphia, Calendar # 25306

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[TABLES INTENTIONALLY OMITTED]

I. REFERENCE TO OPINIONS BELOW

The Gun Range, LLC (“Gun Range”) seeks allowance of appeal from the Commonwealth Court’s Order and Opinion dated February 27, 2024. *See* Appendix A. This Order affirmed in part and vacated in part the Court of Common Pleas’ Order dated January 5, 2021 (s*ee* Appendix B and also Appendix C, Statement in Lieu of Opinion), affirming the Zoning Board’s October 6, 2015 denial of Gun Range’s application for a permit to operate a gun shop at its commercial location. *See* Appendix F (Zoning Board of Adjustment Notice of Decision dated 10/6/15) and Appendix G (Zoning Board of Adjustment Findings of Fact and Conclusions of Law, dated 2/19/16). Collectively, these proceedings will be referred to as *Gun Range II*.

II. TEXT OF THE ORDER IN QUESTION

AND NOW, this 27th day of February, 2024, the order entered by the Philadelphia County Court of Common Pleas (trial court), on January 6, 2021, is AFFIRMED in part and VACATED in part, and this matter is REMANDED for the trial court to address the claim advanced by the Gun Range, LLC, that the Philadelphia, Pennsylvania, Zoning Code, Title 14 (2015), is unconstitutional because it is *de facto* exclusionary.

Jurisdiction relinquished.

Appendix A (last page).

III. QUESTIONS PRESENTED FOR REVIEW

Gun Range seeks review under Pa. R.A.P. 1114(b) (1), (2), (3), (4), (5), & (6) of the following questions.

1. Whether, pursuant to the United States Supreme Court's holding in *Bruen*, Gun Range customers' rights to acquire firearms and maintain proficiency in their use is a protected right deserving of its own analysis of whether there is any analogous historical precedent permitting the blanket prohibition of acquiring firearms in every commercial district, whereas the Commonwealth Court's Opinion conflicts with the holding in *Bruen* and instead applied a balancing test; or, alternatively, whether this is a case of first impression?

Suggested Answer: *Yes.*

2. Whether the Commonwealth Court erred and departed from accepted judicial practice when it failed to address Gun Range's well preserved argument that, even if the Code does not infringe on protected Second Amendment rights, the Code is nevertheless unconstitutional under the Pennsylvania Supreme Court's analysis in *Beaver Gasoline Co. v. Zoning Hearing Bd.*, 285 A.2d 501 (Pa. 1971), which held that a municipality's ordinance cannot target and entirely prohibit a legitimate commercial use throughout every commercial district, without evidence of any interest to be protected?

Suggested Answer: *Yes.*

3. Whether the Commonwealth Court's decision is one of substantial public importance deserving of review because, in concluding that the City is permitted to prohibit commercial sales from commercial districts, the decision runs afoul of the most basic purpose of zoning regulations and sets a standard where the City can target and prohibit other types of commercial sales (i.e., the sale of abortion pills, beer, or even the sale of hoagies from Wawa) without any reason whatsoever?

Suggested Answer: *Yes.*

IV. STATEMENT OF THE CASE

A. Procedural and Factual History

Gun Range is the lessee of the property located in Philadelphia at 542-44 North Percy Street (the "Property"). The Property is made up of a two (2) story building approximately 4,500 square feet in size and zoned for commercial use in a CMX-2 district which is a zoning classification allowing for commercial mixed-use. (R. 151a-154a). The Property is situated on a block with commercial, industrial and residential uses, located just North of Spring Garden Street near 9th Street. In 1985, the owner of the property obtained approval for a shooting range on the second floor of the Property. (R. 4a, ¶ 12).

On March 20, 2015, Gun Range filed a zoning application to add sales of guns to its business as a shooting range. (R. 2a). The Department of Licenses and Inspections issued a Refusal. (R. 2a-3a). Gun Range filed an appeal to the Zoning Board. (R. 3a).

On August 12, 2015, the Zoning Board held a hearing. (R. 3a). At the hearing, the Gun Range, *inter alia*, challenged the constitutionality of the Philadelphia Zoning Code's ("the Code") blanket prohibition on the commercial sale and right to acquire firearms in commercial districts. Gun Range argued the Code was unconstitutional because it did not permit a "Gun Shop," which is a defined commercial use in any commercial district, and instead restricted "gun shops" to certain, limited industrial districts constituting a miniscule percentage of the city. (R. 156a).

It is undisputed that, of the thirty-six districts listed in Section 14-602 of the Code, only one district (District I-3) permits the opening of a gun shop as of right, and only three districts (Districts ICMX, I-2, and I-3), permit the opening of a gun shop under any circumstances. See Phila. Code section 14-602. Further restrictions appear in section 14-603(b)(1), which together with section 602, limit around 3% of the City's total acreage for gun shops, none in a commercial district, where citizens can engage in the constitutionally protected right of acquiring firearms. See Appendix A, at p. 22, n. 33.

At the Zoning Board level, Gun Range argued the Code was, on its face, unconstitutional based on the Code's failure to permit "Gun Shops", a commercial use, in any Commercial Districts. As such the Code violated the Second Amendment as well as the rational basis test because at the hearing the City offered no justification for these restrictions. Gun Range also argued the Code was unconstitutional because of the *de facto* exclusion of Gun Shop use under the zoning scheme of the City

of Philadelphia ("City" or "Philadelphia") through restricting such use to a minimal area (less than 3%) of the City classified as industrial. Gun Range submitted maps prepared by the Philadelphia Planning Commission showing the areas where a "gun shop" would be permitted (R. 141a-142a), submitted the relevant sections of the Zoning Code as they relate to guns; (R. 143a-160a), submitted the transcripts from the committee hearing on the bill that became the new zoning code and which show there is no testimony on the record that addresses "Gun Shops". (R. 79a-126a). The City of Philadelphia was notified that constitutional challenges were being made in advance of the Zoning Board hearing (R. 305a), but at the hearing failed to put on any evidence regarding the constitutional challenges. (R. 161a-283a). In addition to supporting its position at the Zoning Board hearing, Gun Range also supported its position in its Memorandum of Law. (R. 129a-140a).

On October 6, 2015, the Zoning Board issued a Notice of Decision on October 6, 2015. (R. 1a, 3a, ¶ 8). On October 29, 2015, Gun Range filed a timely appeal to the Court of Common Pleas ("the Trial Court"). (R. 59a). On February 19, 2016, the Zoning Board issued its Findings of Fact and Conclusions of Law. Although the constitutional issues were raised and preserved before the Zoning Board, the Zoning Board declined to address these issues stating they were outside its jurisdiction. (R. 8a, ¶ 15).

After briefs were submitted, the Trial Court heard oral argument on June 29, 2016; no additional evidence was heard. (R. 66a). On August 9, 2016, the Trial Court

issued an order affirming the decision of the Zoning Board. (R. 9a). Gun Range then filed a timely appeal to the Commonwealth Court on September 7, 2016. The Trial Court submitted an opinion in support of its August 9, 2016 order on December 2, 2016. (R. 10a-16a). The Trial Court's opinion focused on its rejection of Gun Range's argument that Code was pre-empted by the Firearms Act. Further, the Trial Court held that the Code was constitutional with respect to firearms, but it did not offer any explanation or analysis for this aspect of its opinion. (R. 10a-16a).

On appeal, the Commonwealth Court issued an Order and Opinion dated May 7, 2018. The Commonwealth Court affirmed in part and vacated in part the Trial Court's Order (R. 17a-51a). The Commonwealth Court affirmed the Trial Court's ruling on the preemption issue,[1] but remanded the matter back to the Trial Court because it did not meaningfully consider or address the constitutional arguments which Gun Range preserved. Specifically, the Commonwealth Court directed the Trial Court to address the constitutional issues raised by The Gun Range under the Second Amendment of the United States Constitution, as well as under Article I, Section 21 of the Pennsylvania Constitution. (R. 17a-51a).

The Trial Court issued a briefing schedule and held oral argument on December 30, 2020. (R. 72a, 74a, 75a). On January 5, 2021, the Trial Court issued an order affirming the decision of the Philadelphia Zoning Board because it believed Gun Range lacked standing to derivatively assert

1. Gun Range filed a Petition for Allowance of Appeal as to the preemption issue, which this Court denied on October 23, 2018.

constitutional claims on behalf of its customers. (Appendix B, at p. 2; R. 52a) ("This Court does not necessarily agree with the City's argument that gun sales do not come within the ambit of the Second Amendment. . . . [T]his Court nonetheless determined that the Gun Range did not establish that it had suffered a violation under the Zoning Code."). Gun Range then filed an appeal to the Commonwealth Court. (R. 77a-78a).

During the pendency of this second appeal to the Commonwealth Court, and after the parties had already submitted their briefs, the U.S. Supreme Court issued its opinion in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). In turn, the Commonwealth Court asked the parties to file supplemental briefs to address *Bruen's* impact on the Second Amendment issues in the case.

On March 8, 2023, oral argument was held before the Commonwealth Court *en banc*.

On February 27, 2024, the Commonwealth Court entered an Order and *en banc* Opinion, vacating in part and granting in part the lower court's order. The Commonwealth Court held that the lower court should not have *sua sponte* raised the issue of standing because "it is well settled that a court may not raise a party's standing *sua sponte*." Appendix A, at p. 4. Further, the City had never contested Gun Range's standing (*Id*. at 5). On the issue of standing, the Commonwealth Court held that:

> [C]ontrary to the trial court's analysis, federal case law suggests that the operator of a gun store has derivative standing to assert the

> subsidiary right to acquire arms on behalf of potential customers. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 526 (1925); *Teixeria v. Cnty. Of Almeda*, 873 F.3d 670, 678 (9th Cir. 2017) (en banc); *Ezell v. City of Chicago*, 651 F.3d 684, 702-704 (7th Cir. 2011) (*Ezell I)*.

Id. at p. 6. Therefore, the Commonwealth Court held that "Gun Range has derivative standing to challenge the City's zoning ordinances on Second Amendment grounds." *Id*. at p. 8 (internal citations omitted).

Notwithstanding Gun Range's derivative standing to assert constitutional claims on behalf of its customers, the Commonwealth Court proceeded to dismiss Gun Range's Second Amendment claims. *Id*. at pp. 13-21. The Commonwealth Court based this part of its decision on a balancing test, and without citing to any analogous historical support. *Id*. Further, the Commonwealth Court did not address Gun Range's separate claims based on *Beaver Gasoline Co. v. Zoning Hearing Bd.*, 285 A.2d 501 (Pa. 1971), where this Court held that any blanket restriction on the sales of any commercial product in all commercial districts was unconstitutional in the absence of any justification by the local government.

The Commonwealth Court ultimately remanded the case back to the Trial Court to address Gun Range's derivative *de facto* exclusionary claim, only. *Id*. at 22-25.[2]

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2. Unlike *Bruen's* Second Amendment historical precedent analysis, the *de facto* exclusionary test involves a balancing of factors. *Id*. at p. 22.

V. REASONS FOR ALLOWANCE OF APPEAL

Gun Range believes that the following points of law or fact warrant an allowance of appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1114:

1. Pursuant to the United States Supreme Court's holding in *Bruen*, Gun Range customers' rights to acquire firearms and maintain proficiency in their use is a protected right deserving of its own analysis of whether there is any analogous historical precedent permitting the blanket prohibition of acquiring firearms and maintaining the proficiency of their use in every commercial district, whereas the Commonwealth Court applied a balancing test.

2. Even if no 2nd Amendment right is implicated, the Commonwealth Court at the very least should have reached a substantive decision on Gun Range's constitutional challenge to the prohibition of a legitimate commercial use from every commercial district in line with our Pennsylvania Supreme Court decision in *Beaver Gasoline Co. v. Zoning Hearing Bd.*, 285 A.2d 501 (Pa. 1971) where this Court found that a municipality's blanket restriction on the sale of a commercial product in all commercial districts was unconstitutional in the absence of any justification by the local government.

3. In concluding that the City is permitted to prohibit commercial sales from commercial districts, the decision runs afoul of the most basic purpose of zoning regulations and sets a standard where the City can prohibit other types of commercial sales (ie., sale of abortion pills, beer or sale of hoagies from Wawa) without any reason whatsoever.

1. Pursuant to the United States Supreme Court's holding in *Bruen*, Gun Range customers' rights to acquire firearms and maintain proficiency in their use is a protected right deserving of its own analysis of whether there is any analogous historical precedent permitting the blanket prohibition of acquiring firearms in every commercial district, whereas the Commonwealth Court instead applied a balancing test.

The Commonwealth Court, in applying *Bruen*, disregarded the long-standing Second Amendment right to acquire and maintain proficiency in the use of firearms through its "plain text" analysis of the Second Amendment, and, on that basis, concluded it did not have to point to any analogous historical precedent for the City's severe infringement on the Second Amendment derivative rights of Gun Range's customers to acquire firearms. *Id*. at pp. 18-21. Instead of considering whether there was any analogous historical precedent for preventing citizens from acquiring firearms at any commercial location with the City, the Commonwealth Court merely cited generally

to "laws imposing conditions and qualifications on the sale of arms". *Id*. at 14, 18-21. In further support of its opinion, the Commonwealth Court engaged in a sufficiency or balancing test (Id. at p. 18, n. 29), which *Bruen's* historical precedent test does not permit.

A. The Commonwealth Court erred when it misapplied the "plain text" Second Amendment analysis required by *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

In *Bruen*, the United States Supreme Court held that:

> When the *Second Amendment's* plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the *Second Amendment's* "unqualified command."

Bruen, 597 U.S. at 24 (emphasis in original). Citing to *Bruen's* "plain text" analysis rule, the Commonwealth Court framed the Second Amendment issue as:

> Whether the plain text of the Second Amendment covers Gun Range's proposed course of conduct, i.e., the commercial sale of arms.

Appendix A at p. 18. The Commonwealth Court then stated:

> We conclude it does not. Further, we reject the assertion by Gun Range that the *Bruen* standard applies to all conduct that falls "within the ambit" of the Second Amendment and decline to extend *Bruen* to rights merely implied by the plain text.

Id.

The Commonwealth Court's application of *Bruen's* "plain text" analysis requirement is gravely flawed. It infringes on the Second Amendment right to self-defense because it fails to acknowledge the long-standing rights of citizens to access firearms and maintain proficiency in their use, without which the right to self-defense is meaningless. *See Drummond v. Robinson Twp.*, 9 F.4th 217, 224 (3d Cir. 2021) (involving claims that plaintiff's customers' constitutional rights "to acquire and maintain proficiency in firearms" were restricted); *Ezell I*, 651 F.3d at 704 (the core right to possess firearms for self-defense "wouldn't mean much without the training and practice that make it effective"); *Ezell v. City of Chicago*, 846 F.3d 888, 896 (7th Cir. 2017) (*Ezell III*) (City ordinance limiting shooting ranges to manufacturing districts, and related distancing restrictions, are unconstitutional because they infringe on the Second Amendment rights); *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) ("the Second Amendment protects ancillary rights necessary for the realization of the core right to possess a firearm

for self-defense."); *see also Franklin Armory, Inc. v. Callahan*, 2021 U.S. Dist. LEXIS 228148 (D.N.J. 202 1) (same); *Lynchburg Range & Training, LLC v. Northam*, 105 Va. Cir. 159, 162, 2020 Va. Cir. LEXIS 57, *6 (Va. Cir. 2020) (the operative and core rights of the Second Amendment cannot be separated); *Kole & Ghost Indust., LLC v. Vill. of Norridge*, 2017 U.S. Dist. LEXIS 178248, * 28 (N.D. Ill. 2017) (the right to keep arms necessarily includes the right to acquire them, subject to historical restrictions).

As the cases cited above demonstrate, the Second Amendment right of access to firearms and the right to maintain proficiency in the use of firearms are rights derived from the plain text of the Second Amendment. These rights pre-date *Bruen,* and nowhere does *Bruen* dispose of these protected Second Amendment rights. Post-*Bruen* cases also make it clear that the Second Amendment protects these rights. *Renna v. Bonte*, 667 F. Supp. 3d 1048 (S.D. Ca. 2023) ("'the right to keep arms necessarily involves the right to purchase them'") (quoting *Teixeira*, 873 F.3d at 678); *see also Gazzola v. Hochul*, 88 F.4th 186, 196 (2d Cir. 2023) ("It follows that commercial regulations on firearms dealers, whose services are necessary to a citizen's effective exercise of Second Amendment rights, cannot have the effect of eliminating the ability of law-abiding, responsible citizens to acquire firearms.).

The Commonwealth Court has likewise recognized the long-standing Second Amendment right to acquire and maintain proficiency in the use of firearms. *See Barris v.*

Stroud Twp., 257 A.3d 209, 223 (Pa. Cmwlth. 202 1) (citing *Ezell I*, supra). Although the Commonwealth's decision in *Barris* was later reversed by this Honorable Court, in doing so this Court stated it saw "no need to decide in this case whether ancillary rights, including training with arms . . . are protected by the Second Amendment." *Barris v. Stroud Twp.*, 2024 Pa. LEXIS 240, * 69 (Pa. 2024).

In the instant matter, the Commonwealth Court erred by failing to give due recognition to citizens' rights to acquire firearms and maintain proficiency in their use, rights which fall within the ambit of the Second Amendment both before and after *Bruen*. Accordingly, this Court's review is warranted.

B. The Commonwealth Court failed to follow the derivative rights constitutional analysis required by the United States Supreme Court in *Craig v. Boren*, 429 U.S. 190 (1976), which required it to focus on the restriction on citizens' constitutional right to acquire firearms and not, as it did, on the vendor's right to sell.

The Commonwealth Court stated: "there is no obvious textual link between the right to keep and bear arms and the right to sell them . . . there is no constitutional right to *provide* arms.") (emphasis in original). Appendix A, at p. 19. Here, the Commonwealth Court disregarded the very same derivative right which it found Gun Range had standing to assert – the right of citizens to acquire firearms and maintain proficiency in their use. Appendix

A, at p. 8. Instead, the Commonwealth Court focusing on a vendor's right to sell or provide arms.

By focusing on the vendor's right to sell, and not on the customer's constitutional right to acquire and maintain proficiency in the use of firearms, the Commonwealth Court ignored long-standing Supreme Court precedent with regard to how derivative constitutional claims must be analyzed. *See Craig v. Boren*, 429 U.S. 190, 208-210 (1976) (upholding a vendor's right to derivatively assert constitutional claims on behalf of customers harmed by a statute prohibiting the sale of beer to males under the age of 21 and females under the age of 18; concluding that the statute unconstitutionally infringed on the customers' protected activities); *see also Pierce v. Soc 'y of Sisters*, 268 U.S. 510 (1925) (allowing private schools to assert parents' rights to direct the education of their children and citing "other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers").

The Commonwealth Court erred by not properly considering the derivative constitutional rights of Gun Range's customers under *Bruen*. Review is therefore warranted.

C. The Commonwealth Court erred when it applied a subjective balancing test and not the historic precedent test required by *Bruen* in Second Amendment cases.

In *Bruen*, the United States Supreme Court held once it has been determined that a Second Amendment

right exists, the courts should not engage in a means-end balancing test when determining whether an ordinance infringes on that Second Amendment right. *Bruen*, 597 U.S. at 23. *Bruen* rejected the use of a subjective means-end, interest-balancing inquiry because a "constitutional guarantee subject to future judges' assessments of its usefulness in no constitutional guarantee at all." *Id.* at 23. Here, the critical word is "guarantee."

Under *Bruen's* analytical framework for addressing guaranteed Second Amendment rights, the burden falls on the government to demonstrate that its restriction on those rights "is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the *Second Amendment's* 'unqualified command.'"). *Id.* at 24 (emphasis in original). Under *Bruen*, absent proof that the restriction "is consistent with the Nation's historical tradition of firearm regulation," the regulation is deemed, *per se*, to be unconstitutional. *Id.* at 24.

No longer, after *Bruen*, should courts seek to subjectively balance the constitutional infringement on guaranteed Second Amendment rights against the value of those rights or otherwise consider "'on a case by case basis whether the right is *really* worth insisting upon." *Id.* at 23 (emphasis in original) (citing *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008)). Instead, the *Bruen* historical precedent test is an absolute test, which does not permit any sort of balancing or sufficiency test. *Id.*

In the instant matter, the Commonwealth Court failed to follow *Bruen's* historical precedent test and instead

applied its own balancing or sufficiency test. For example, the Commonwealth Court reasoned that "'gun buyers had no right to a gun store in a particular location, at least as long as their access is not *meaningfully* constrained.'" Appendix A, at p. 20 (emphasis added; internal citations omitted). Similarly, the Commonwealth Court indicated that it was testing whether "the Code interfered with citizens' *sufficient* access to firearms." *Id.* at p. 18, n. 29 (emphasis added). In these quoted passages, the Commonwealth Court has acknowledged that a Second Amendment right to access firearms exists! It then seeks to balance that right through its own subjective sufficiency test. In doing so, the Commonwealth Court has collapsed its Second Amendment inquiry into precisely the type of subjective balancing test which *Bruen* has disallowed.[3]

Significantly, *Bruen* explained that when assessing whether historical precedent exists for the government's restriction on a protected Second Amendment right, the government need not necessarily point to an exact match, but it should at least point to "a well-established historical analogue". *Bruen*, 597 U.S. at 30. The Commonwealth Court violated *Bruen's* mandate because it did not cite to any historical precedent analogous to the City's

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3. To the extent the Commonwealth Court is suggesting in footnote 29 that Gun Range did not make derivative rights arguments, that suggestion is unfounded. In addition to addressing the Second Amendment derivative issues in its various briefs to the Commonwealth Court in *Gun Range I & II*, Gun Range previously addressed (and preserved) these issues during the Zoning Board and lower court proceedings. *See e.g.*, R. 12a, 15a, 129a, 134-137a, 297a, 356a, 394-395a, 401a, 404a, 406-407a.

blanket prohibition on citizens' right to acquire guns at any location at any commercial district. Instead, the Commonwealth only cited to general regulations on firearms, thus falling well short of the sort of historical match required by *Bruen*. The Commonwealth Court merely stated that, generally, the Second Amendment "allows a variety of presumptively lawful regulatory measures, including "'laws imposing conditions and qualifications on the sale of arms.'" Appendix A, at p. 14. It then stated that an "inquiry into the historical tradition of this Nation's zoning laws is unnecessary." *Id*. at p. 21 (internal citations omitted). By acknowledging it is not going to consider whether analogous historical precedent exists, the Commonwealth Court erred.

The inquiry into whether there is any analogous historical precedent for the Code's restrictions on citizens' Second Amendment right is necessary. It is expressly required by *Bruen*. That is because not every regulation on the commercial sale of arms is presumptively lawful. *See U.S. v. Marzzarella*, 614 F.3d 85, 91 n.8 (3d Cir. 2010) ("In order to uphold the constitutionality of a law imposing a condition on the commercial sale of firearms, a court necessarily must examine the nature and extent of the imposed condition. If there were somehow a categorical exception for these restrictions, it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller*.").

Thus, the Commonwealth Court erred when it improperly relied upon general propositions rather than

performing the requisite, more specific, closely-tied, historical analogue test required by not just *Breun*, but Supreme Court decisions prior to *Bruen*, such as *Heller*. In fact, as the above discussion demonstrates, the Commonwealth Court erred each step of the way in its analysis of Gun Range's Second Amendment claims. Thus, review is warranted in order to correct the Commonwealth Court's numerous gross departures from the law.

D. Alternatively, relative to *Bruen*, this case involves matters of first impression deserving of review.

In the alternative, review is warranted because this case, relative to *Bruen*, involves questions of first impression. As this Court stated in *Barris*, many courts have struggled in applying *Bruen*, and, ultimately, this Court declined to base its decision on *Bruen*. *Barris*, 2024 Pa. LEXIS 240, at *28-30. Now, however, the issue is ripe for this Court's consideration, because there is no other way of properly resolving Gun Range's Second Amendment claims.

Notably, this Court in *Barris* recognized the "numerous signs pointing" to the reasonable conclusion that *Bruen* did not disturb pre-existing Second Amendment rights. *Id*. at * 67-68 (citing to both *Heller* and to Justice Thomas' concurring opinion in *Luis v. U.S.*, 578 U.S. 5, 26 (2016), where he stated: "The right to keep and bear arms, for example, implies a corresponding right to obtain bullets necessary to use them, . . . and to acquire and maintain proficiency in their use".). Thus, this Court recognized

that *Bruen* may simply be instructing courts to consider whether historic precedent exists for Second Amendment restrictions (as opposed to applying a balancing test), and not abrogating the long-standing right of citizens' to acquire firearms and maintain proficiency in their use. *Id*. at *67-69.

Here, because this case presents questions of first impression relative to *Bruen*, involving important public Second Amendment rights, review is warranted.

2. The Commonwealth Court erred and departed from accepted judicial practice when it failed to address Gun Range's well preserved argument that, even if the Code does not infringe on protected Second Amendment rights, the Code is nevertheless unconstitutional under the Pennsylvania Supreme Court's analysis in *Beaver Gasoline Co. v. Zoning Hearing Bd.*, 285 A.2d 501 (Pa. 1971), which held that a municipality's ordinance cannot target and entirely prohibit a legitimate commercial use throughout every commercial districts, without evidence of any interest to be protected.

The Commonwealth Court failed to address Gun Range's argument that even if the Code did not infringe on Second Amendment rights, the Code was nonetheless unconstitutional under *Beaver Gasoline Co. v. Zoning Hearing Board*, 285 A.2d 501 (Pa. 1971), due to the lack of any justification by the City for its blanket restrictions on a valid commercial business.

Here, the rights which are being infringed upon are specifically protected by the Pennsylvania Constitution. Pursuant to Article I, Section 1 of the Pennsylvania Constitution, citizens of the Commonwealth have an inherent right of "acquiring, possessing and protecting property." Further, pursuant to Article I, Section 21, "[T]he right of the citizens to bear arms in defense of themselves and the State shall not be questioned," which is made inviolate by Article I, Section 25.

In *Beaver*, the Pennsylvania Supreme Court held that if an ordinance prohibits a commercial use in all the commercial districts throughout the entire municipality, it is unconstitutional, without evidence being presented of any interest to be protected. *Beaver*, 285 A.2d 504-505. In *Beaver*, the Osborne Borough zoning ordinance prohibited gasoline service stations in the commercial zoning district. The Pennsylvania Supreme Court remanded the case to the Zoning Board after finding the borough offered no evidence to establish the validity of the regulation and, therefore, failed to establish the regulation bore a relationship to the public health, safety, morals and general welfare, therefore making the ordinance unconstitutional. *Id*.

Throughout these proceedings, Gun Range has argued because the City failed to present any evidence at the Zoning Board level to justify the challenged Code provisions, the Code is unconstitutional, no matter what standard of constitutional review was applied. R. 297, 396, 403-404; *see also* Gun Range's Brief in *Gun Range II* at pp. 15-21 and its Supplemental brief at p. 9. Here, just as

in *Beaver*, the City has failed to present any justification for its restrictions on Gun Range's valid commercial business. Thus, the City cannot even meet the rational basis test let alone the higher level of scrutiny that applies to an ordinance involving a right protected by the Second Amendment.

The Commonwealth Court, however, failed to address Gun Range's argument that even if the Code did not infringe on Second Amendment rights, it was nonetheless unconstitutional under *Beaver* due to the lack of any justification by the City for its blanket commercial restrictions on a valid commercial business. Failure to address an issue is the very reason the Commonwealth Court remanded the case to the Court of Common Pleas on two occasions. Most recently the Commonwealth Court stated in its Opinion, "Gun Range preserved this claim before the Board and is entitled to a review of its merits by the trial court." Appendix A, at p. 24. The same principle applies to the Commonwealth Court's own failure to address.

Because Gun Range preserved its challenge to the Code's prohibition of a legitimate commercial use in every commercial district, the issue should be reviewed under a rational basis test at the very least. In failing to address Gun Range's argument, the Commonwealth Court failed to follow Pennsylvania Supreme Court precedent and departed from accepted judicial practice. Accordingly, for this reason as well, review is warranted.

3. The Commonwealth Court's decision is one of substantial public importance deserving of review because, in concluding that the City is permitted to prohibit legitimate commercial sales from every commercial district, the decision runs afoul of the most basic purpose of zoning regulations and sets a standard where the City can target and prohibit other types of commercial sales (i.e., the sale of abortion pills, beer, or even the sale of hoagies from Wawa) without any reason whatsoever.

Review of the Commonwealth Court's *Bruen* analysis is warranted because important public matters pertaining to Second Amendment constitutional rights are at stake. The Code's blanket commercial district prohibitions have a chilling effect on all gun shops or prospective gun shops and constitutional rights of their customers to acquire firearms and maintain proficiency in their use for their self-defense. Restrictions on the ability to purchase an item is tantamount to restrictions on the use of that item. *See Williams v. Attorney General*, 378 S. 3d 1232 (11th Cir. 2004).

Review is also warranted under *Beaver* because if the Code's unconstitutional blanket firearm restrictions in commercial districts are allowed to continue, this opens the door for similar unconstitutional treatment of other legitimate businesses in the City, violating the rights of the businesses and the derivative rights of their customers. By concluding that the City is permitted to target and prohibit commercial sales in commercial districts, the

Commonwealth Court's decision runs afoul of the most basic purpose of zoning regulations and sets a standard where the City can target and prohibit other types of commercial sales (i.e., sale of abortion pills, beer, or even the sale of hoagies from Wawa) without any reason whatsoever.

Accordingly, Gun Range seeks this Court's review on the basis that the questions presented are of such substantial public important as to require prompt and definitive resolution by this Court.

CONCLUSION

For the foregoing reasons, Gun Range respectfully requests allowance of appeal.

Respectfully submitted,

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