THE CITY OF Fargo FAR MORE

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Testimony of Erik Johnson
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House Political Subdivision Committee
HB 1248
Rep. Jason Dockter, Chair

Mr. Chairman and Members of the Committee,

My name is Erik Johnson and I am appearing on behalf of the City of Fargo as its City Attorney. House Bill 1248 consists of two sections that are both related to regulations by cities of firearms and dangerous weapons but they apply in two totally different situations and, therefore, my comments are really divided into those separate parts.

EXECUTIVE SUMMARY. The City of Fargo is opposed to this bill because by allowing rioters to be lawfully able to carry, possess and use "dangerous weapons" , which will most likely cause harm to other citizens or potentially be used against law enforcement. Also, Fargo is opposed to this bill—a bill that would unreasonably restrict a city's ability to maintain the integrity of residentially-zoned neighborhoods and to require that retail gun sales occur in commercial or industrially-zoned areas. More specifically, this bill targets the City of Fargo but, in so doing, it throws the baby out with the bath water--this bill would do harm to the zoning regulatory authority of every city, township and county in the state.

SECTION 1 – AMENDMENT TO ADD "DANGEROUS WEAPONS". Cities are already precluded from prohibiting persons from carrying, possessing, using, et cetera (we'll say "carrying") firearms during any declared state of emergency under N.D.C.C. §37-17.1-29. This bill would also preclude cities from "carrying" "dangerous weapons" during a declared state of emergency. The rather extensive, but not exclusive, list of items included in the statutory definition of "dangerous weapon", attached to this testimony, is found at N.D.C.C. §62.1-01-01

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Sub. 1. The items on the list most alarming to me include the machete, sword, martial arts weapons; bludgeon, bow and arrow or crossbow, or "any projector of a bomb or any object containing or capable of producing and emitting any noxious liquid, gas, or substance".

Emergency situations are already chaotic enough without continuing to further minimize law enforcements ability to limit dangerous weapons, which will most likely cause harm to other citizens or potentially be used against law enforcement. An emergency would be declared in a riot/mob situation, not during a peaceful protest, therefore there is no necessity for persons to be so armed for self-protection purposes, as once an emergency is declared they must disperse. Law enforcement must have the ability to prohibit and enforce dangerous weapon possession in these instances and, therefore, this amendment should not be enacted.

SECTION 2. AMENDMENT TO PROHIBIT CITY ZONING RE FIREARMS ETC. The second part of this bill is a response to a situation in my city, in particular, to Fargo's home occupation zoning regulations. The sale of firearms and ammunition and the production of ammunition for sale or resale are very much permitted in the city of Fargo in Commercial and Industrial zoning districts. What Fargo's zoning law does—what this bill is intended to remedy--is the restricting of sale, et cetera, of firearms and ammunition out of one's house, apartment or condominium.

Fargo's home occupation zoning ordinances allow people living in houses, apartment units and condominium units to work and to make money out of their home. The general notion is that if your neighbors can't really detect any commercial activity being undertaken then why not allow someone to use their home as part of their job--their occupation. Fargo's home occupation zoning regulation says that as long as you're home occupation consumes less than one-fourth of the floor space of your home and so long as you do not have employees coming to the site and you have four or fewer customer visits per day and 12 or fewer per week, then your "home occupation" is permissible. You don't need any special permit from City Hall you can just do it. Now, if your home occupation will require employees coming to

your home or you have too much customer traffic (i.e. ≥ 5/day or 13/week) then you may need to "give notice" to your neighbors, have a public hearing at the planning commission and get approval for a "major home occupation". **There are; however, a few "home occupations" that are outright prohibited in Fargo's zoning law. They are car or truck repair shops, dispatch centers, animal care grooming or boarding facilities, adult entertainment activities, mortuaries, and—last but not least-- the sale of firearms and/or ammunition and the production of ammunition for sale or resale. F.M.C. §20-0403.C.5.e.**

One thing that really important to bear in mind, here, is that NO CITY in North Dakota is required to allow any "home occupations". In other words, any city could simply provide that all commercial (retail, office, etc.) and industrial uses must occur in commercial and industrially-zoned areas, period. Then there were be no "home occupations" and, therefore, there would be no list of prohibited home occupations. If that were the case, we might not be talking here today. Instead, what Fargo and presumably most cities have done is to create reasonable regulations that are designed to protect the quality of "residential living"—a place where people enjoy living, free of unnecessary commercial traffic, a safe area for children to play, a quiet area that is free of industrial noise or smells, while still allowing people to "work from home" with reasonable limitations. The proponents of this bill do not think that Fargo's home occupation law is reasonable and lawful and they want something done about it. They have asked the City Commission to "do something about it" and the City Commission has taken action on this. The City Commission has asked the Planning Department to include this very issue on the list of things to be considered in a project already underway by the Planning Department, with the assistance of professional consulting firms, of reviewing and "over-hauling" its 25-year-old zoning law. During the public meetings in Fargo over the past year, or so, some city leaders have urged that Fargo's prohibiting of firearm sales as a home occupation be repealed and others, including members of the public, members of our planning commission

and members of our city commission, said they want the prohibition retained for a number of reasons. Some simply don't want the sale of firearms and or ammunition in their neighborhood. Some say they are not worried about their next-door neighbor, himself or herself, but they worry about the strangers—customers—that come and go from their neighbor's home--they don't know the backgrounds of those customers. For whatever reason, there have been a significant number of people that would like this law that has been on the books for 20 years, to simply remain in place.

So, that is a bit of the background in Fargo, itself. Now, I would like to present a couple arguments. One thing should be very clear in all of this--Fargo permits firearms and ammunition sale, resale and manufacture, period. There are commercial and industrially zoned areas throughout the city where those activities may, and do, occur. There are several retail gun shops, repair shops, et cetera, in Fargo. That is not in issue, here. House Bill 1248 is designed to restrict how cities such as Fargo regulate commercial activities in residential neighborhoods and in apartments and condominiums. **We oppose this bill on two grounds:**

First, it is well established in state law that the business of organizing land development in a city should be left to each city. Our state statutes already contain a well-developed set of laws and procedures for each county, township and city that allow them to create zoning districts and to lay out and plat development. Cities <u>should</u> be able to prohibit commercial car and truck repair in your neighborhood and to prohibit the boarding of pets (think "barking dogs"!) in your neighborhood. Cities should be able to prohibit adult entertainment centers, mortuaries, and dispatch centers from being operated out of single family homes or apartments. And, YES, cities should be able to prohibit retail gun sales in your neighborhood. That is the province of counties, townships and cities and it should remain so.

My second argument is in direct response to those who say that this prohibition--this preemption—is necessary because of the guaranty provided by the Second Amendment--the right to bear arms. Let me say two important things about this argument:

A.) **Second Amendment Not Violated**. The argument that Fargo's home occupation restriction on gun sales, etc., violates the second amendment has been vetted through the courts already. The decisions of the courts reads like a common sense argument—it is rather simple, really. In reviewing a particular city's zoning regulations, the courts have said that so long as there are zoning districts within a city that permit commercial firearm sales activities, it is not a Second Amendment violation for a city to prohibit firearm sales activity in residential zoning districts. That is exactly what the city of Fargo has done. Fargo's zoning law passes Constitutional muster—it is not a violation of the Second Amendment. See generally: *District of Columbia v. Heller,* 554 U.S. 570 (2008); *McDonald v. City of Chicago,* 561 U.S. 742 (2010); *United States v. Bena,* 664 F.3d 1180, 1183 (8th Cir. 2011); *United States v. Seay,* 620 F.3d 919, 925 (8th Cir. 2020); *United States v. Fincher,* 538 F.3d 868, 873-74 (8th Cir. 2008); *Teixeira v. County of Alameda,* 873 F.3d 670, 678-80, 690 (9th Cir. 2017); *see also Illinois Ass'n of Firearms Retailers v. City of Chicago,* 961 F. Supp. 2d 928 (N.D. III. 2014).

B.) **Dangerous Unintended(?) Over-reach**. This bill creates an over-reach of state pre-emption of zoning authority--which includes building setbacks and building inspections regulations--that would have dangerous unintended consequences. As it is written, any activity pertaining to, or the construction or use of any building or structure for purposes of, the sale or manufacture of firearms, ammunition or other dangerous weapons could be done by any person or firm without any oversight, regulation or inspection. Buildings being used for firearm purposes, could not be required to provide adequate escape doors or windows as necessary for personal safety or be required to supply sprinkler systems for the fire suppression. Property owners would have no assurance as to what buildings--what uses--will pop up in their neighborhood. Taken to the extreme, neighboring property owners could be given no assurance that a big box retail firearm store might not be constructed right next door—because counties, townships, cities and other political subdivisions would be prohibited from enacting ANY ORDINANCE—ZONING OR OTHERWISE—that would regulate it.

While we believe that the above-described consequences of this bill were not intended by the bill's proponents, they are quite real and quite dangerous to property rights and property values not just in Fargo but in every city, township and county throughout the state.

CONCLUSION. For the reasons as described, the City of Fargo OPPOSES House Bill 1248 and respectfully urges a **DO NOT PASS** recommendation.

[“Dangerous Weapons” definition next page]

DEFINITIONS -- NDCC

N.D.C.C. §62.1-01-01. As used in this title, unless the context otherwise requires:

1. "**Dangerous weapon**" includes any switchblade or gravity knife, machete, scimitar, stiletto, sword, dagger, or knife with a blade of five inches [12.7 centimeters] or more; any throwing star, nunchaku, or other martial arts weapon; any billy, blackjack, sap, bludgeon, cudgel, metal knuckles, or sand club; any slungshot; any bow and arrow, crossbow, or spear; any weapon that will expel, or is readily capable of expelling, a projectile by the action of a spring, compressed air, or compressed gas, including any such weapon, loaded or unloaded, commonly referred to as a BB gun, air rifle, or CO2 gun; and any projector of a bomb or any object containing or capable of producing and emitting any noxious liquid, gas, or substance. "Dangerous weapon" does not include a spray or aerosol containing CS, also known as ortho-chlorobenzamalonitrile; CN, also known as alpha-chloroacetophenone; or other irritating agent intended for use in the defense of an individual, nor does the term include a device that uses voltage for the defense of an individual, unless the device uses a projectile and voltage or the device uses a projectile and may be used to apply multiple applications of voltage during a single incident, then the term includes the device for an individual who is prohibited from possessing a firearm under this title.

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3. "**Firearm**" or "**weapon**" means any device that expels or is readily capable of expelling a projectile by the action of an explosive and includes any such device, loaded or unloaded, commonly referred to as a pistol, revolver, rifle, gun, machine gun, shotgun, bazooka, or cannon.

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Notes to Decisions -- "Dangerous Weapon."

The word "includes" in the definition of "dangerous weapon" is not a word of limitation but of enlargement and the term "dangerous weapon" includes weapons other than those specifically named in subsection 1 of this section. *State v. Vermilya, 423 N.W.2d 153, 1988 N.D. LEXIS 100 (N.D. 1988)*.