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Testimony of Erik Johnson
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HOUSE BILL 1248

March 31, 2021
Senate Judiciary Committee
HB 1248
Sen. Diane Larson, Chair

Madam Chair 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 to testify about House Bill 1248 – in particular, Section Two of the bill. Fargo’s Police Chief Zibolski will be testifying about Section One of the bill.

I would like to make one thing very clear in all of this. The City of Fargo allows the sale, resale, transfer and manufacture of firearms and ammunition, period. There are many retail stores and shops in Fargo that sell guns, repair guns, sell ammunition, and the like. There are commercial and industrially-zoned areas throughout the city where those activities lawfully occur. That is not in issue, here. What is in issue, with Section Two of House Bill 1248, is to prohibit cities from having zoning ordinances that regulate the retail sale of guns and ammunition in residential neighborhoods—in houses, apartments and condominiums. **We oppose this bill on three grounds:**

First, so long as firearm sales may be lawfully conducted in commercial or industrial areas of a city, a city is not in violation of the 2nd Amendment right-to-bear-arms protections when it confines retail firearm sales to commercially-zoned (or industrially-zoned) areas. Thus, Fargo’s home occupation zoning ordinance does not violate the 2nd Amendment when it



prohibits retail gun sales in residentially-zoned areas. This is well-established law and has already been vetted through the courts.¹

Second, Section Two of House Bill 1248 is targeted at only one city in this state. That city is Fargo. I dare say every city in America has zoning regulations that limit uses in residential zones to “household living”. That is common sense. The idea, of course, is that retail sales, office uses and other commercial uses are not compatible with residential living. Most cities allow exceptions for “home occupations”. This allows people to work out of their homes so long as (a) the occupation doesn’t become the principal use of the home and (b) the activities surrounding the occupation don’t disturb the neighbors. No city is required to allow home occupations—it is not a property right. Fargo’s zoning regulations allow limited home occupations but Fargo lists six occupations that are prohibited from being operated out of one’s home, one of which is “firearm or ammunition sales”. The other five are “adult entertainment” (e.g. adult bookstore), automobile and small engine repair shops, mortuaries, animal care and animal boarding, and dispatch centers. Allow me to emphasize a point. Fargo’s prohibiting these six occupations as “home occupations” does not prohibit people from making a living in those occupations, only from their making a living out of their house, apartment or condominium. Fargo simply prohibits them as home occupations because the City Commission

¹ 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. Ill. 2014).

that approved the zoning regulations determined that such occupations are not compatible with residential living.

Third, 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 should 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.

City of Fargo is considering change in its home occupation ordinance. 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. 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. 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.

CONCLUSION. House Bill 1248 is directed at the home occupation zoning regulations of the City of Fargo but Fargo’s zoning law is not a 2nd Amendment violation, it is a reasonable limitation intended to protect the integrity of residential neighborhoods, and such zoning regulations must be left in the hands of cities (and counties and townships as applicable). For the reasons as described, the City of Fargo **OPPOSES** House Bill 1248 and respectfully urges a **DO NOT PASS** recommendation.