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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN TEIXEIRA, *et al.*,

No. C 12-03288 SI

Plaintiffs,

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS AND DENYING  
PLAINTIFFS' MOTION FOR A  
PRELIMINARY INJUNCTION**

v.

COUNTY OF ALAMEDA, *et al.*,

Defendants.

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Now before the Court are defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), and plaintiffs' motion for a preliminary injunction. Plaintiffs have filed an opposition to the motion to dismiss, defendants have filed an opposition to the motion for a preliminary injunction, and both parties have filed replies. In addition, both parties have submitted supplemental briefing pursuant to the Court's December 18, 2012 Order. Docket No. 30. Pursuant to Civil Local Rule 7-1(b), the Court determines that the matter is appropriate for resolution without oral argument. The defendants' motion to dismiss is GRANTED and the plaintiffs' motion for a preliminary injunction is DENIED for the reasons set forth below.

**BACKGROUND**

In 2010, John Teixeira, Steven Nobriga, and Gary Gamaza formed a partnership called Valley Guns and Ammo ("VGA") in order to open a gun store in Alameda County. Compl. ¶ 17. In April of 2011, Teixeira, Nobriga, and Gamaza located a property in San Leandro where they planned to open the store. *Id.* ¶ 25.

1 Under Alameda County Land Use Ordinance § 17.54.131 (“Ordinance”), a gun store cannot be  
2 located within 500 feet of residentially zoned areas and certain kinds of schools and businesses. *Id.*  
3 ¶21. As part of their preliminary preparations, Teixeira, Nobriga, and Gamaza obtained a survey which  
4 measured from the front door of their property to the front door of the nearest residential properties and  
5 found that the distance was over 500 feet. *Id.* ¶ 26-27.

6 The West County Board of Zoning Adjustments (“WBZA”) held a hearing on VGA’s application  
7 for a conditional use permit on December 14, 2011. *Id.* ¶ 30. The staff reports submitted to WBZA  
8 found that the distance from the proposed location to the nearest residence was less than 500 feet; this  
9 measurement was from the front door of the closest house in the neighboring residential zone to the  
10 closest part of plaintiffs’ building. *Id.* ¶ 31. Thus, WBZA found that the location did not meet the  
11 requirements of the Ordinance. However, WBZA granted VGA a variance and issued the conditional  
12 use permit in Resolution No. Z-11-70. *Id.* ¶ 32.

13 WBZA informed VGA that Resolution No. Z-11-70 would become effective on December 25,  
14 2011 unless an appeal was filed with the Alameda County Planning Department. *Id.* ¶ 33. The San  
15 Leandro Village Home Association filed an appeal. *Id.* ¶ 34. The Alameda County Board of  
16 Supervisors (“Board”) heard the appeal from the decision of the WBZA on February 28, 2012, and voted  
17 to overturn the decision of the WBZA. *Id.* ¶ 37. VGA did not appeal this decision to any state court.

18 On June 25, 2012, Teixeira, Nobriga, Gamaza and three non-profits — the CalGuns Foundation,  
19 Inc., Second Amendment Foundation, Inc., and California Association of Federal Firearms Licensees,  
20 Inc. — filed this suit alleging violations of due process and equal protection guarantees under the  
21 Fourteenth Amendment and alleging that the Ordinance on its face and as applied to the facts of this  
22 case violates the Second Amendment.

23 On September 27, 2012, defendants filed a motion to dismiss all four claims for failure to state  
24 a claim. On November 5, 2012, plaintiffs filed a motion for a preliminary injunction to enjoin  
25 defendants from prohibiting VGA from opening the proposed gun store. Plaintiffs subsequently  
26 stipulated to the dismissal of their claim alleging violation of due process of law. Pls.’ Supplemental  
27 Br., Docket No. 30, at 2.

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DISCUSSION

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2 **1. MOTION TO DISMISS**

3 **A. Legal Standard**

4 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it  
5 fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss,  
6 the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*  
7 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the plaintiff  
8 to allege facts that add up to “more than a sheer possibility that a defendant has acted unlawfully.”  
9 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although courts do not require “heightened fact pleading  
10 of specifics,” *Twombly*, 550 U.S. at 544, a plaintiff must provide “more than labels and conclusions, and  
11 a formulaic recitation of the elements of a cause of action will not do,” *id.* at 555. The plaintiff must  
12 allege facts sufficient to “raise a right to relief above the speculative level.” *Id.*

13 In deciding whether the plaintiff has stated a claim, the Court must assume that the plaintiff’s  
14 allegations are true and must draw all reasonable inferences in his or her favor. *Usher v. City of Los*  
15 *Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true  
16 “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.”  
17 *St. Clare v. Gilead Scis., Inc. (In re Gilead Scis. Sec. Litig.)*, 536 F.3d 1049, 1055 (9th Cir. 2008).  
18 Moreover, “the tenet that a court must accept as true all of the allegations contained in a complaint is  
19 inapplicable to legal conclusions.” *Iqbal*, 556 U.S. at 678.

20 If the Court dismisses a complaint, it must decide whether to grant leave to amend. The Ninth  
21 Circuit has “repeatedly held that a district court should grant leave to amend even if no request to amend  
22 the pleading was made, unless it determines that the pleading could not possibly be cured by the  
23 allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal  
24 quotation marks omitted).

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26 **B. Collateral Estoppel**

27 Defendants argue that both the legal and factual findings of WBZA and the Board must be given  
28 preclusive effect in this Court. In determining the preclusive effect of a state administrative decision,

1 federal courts follow the state’s rules of preclusion. *White v. City of Pasadena*, 617 F.3d 918, 926 (9th  
2 Cir. 2012). California has a two-part test to determine the preclusive effect of an administrative  
3 determination. *Eilrich v. Remas*, 839 F.2d 630, 633 (9th Cir. 1988). First, the proceeding must meet  
4 the fairness requirements set forth in *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966).  
5 *Id.* Under *Utah Construction*, collateral estoppel should be applied “[w]hen an administrative agency  
6 is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties  
7 have had an adequate opportunity to litigate.” *Id.* at 422. Second, the determination must satisfy  
8 traditional criteria for issue preclusion. *Eilrich*, 839 F.2d at 633. Under traditional collateral estoppel  
9 criteria, an issue cannot be relitigated if the identical issue was actually litigated and necessarily decided  
10 at the previous proceeding; the previous proceeding must have also resulted in a final judgment on the  
11 merits and involved the same parties. *Lucido v. Superior Court*, 51 Cal. 3d 335, 341–43 (1990).

12 Here, WBZA and the Board decided that VGA’s proposed gun store violates the Ordinance  
13 because its location is less than 500 feet from the closest residential zone. *See* Exs. A, B, & C, Request  
14 for Judicial Notice in Supp. of Def.’s Mot. to Dis.<sup>1</sup> Also, plaintiffs concede that the distance from the  
15 neighboring residential zone to the closest point of the proposed store is less than 500 feet and that the  
16 Court can give preclusive effect to this finding of fact. Pls.’ Supplemental Br. at 2:26–28.

17 However, the parties dispute whether plaintiffs are precluded from arguing that WBZA violated  
18 the Fourteenth Amendment’s equal protection guarantee in other ways. Defendants argue that VGA  
19 could have raised, but failed to raise, the core equal protection claim – that similarly situated businesses  
20 have been granted conditional use permits and variances, or were subject to measurement for zoning  
21 purposes unlike the measurement methodology applied in VGA’s case. Defendants argue that because  
22 plaintiffs failed to raise the equal protection claim in earlier proceedings, plaintiffs are estopped from  
23 raising it now. Defendants cite *Miller v. County of Santa Cruz*, 39 F.3 1030, 1034 (9th Cir. 1994), for  
24 this proposition.

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27 <sup>1</sup>In considering a motion to dismiss, the court may take judicial notice of matters of public record  
28 outside the pleadings. *See MGIC Indemn. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).  
Exhibits A, B, C & D attached to Defendants’ Request for Judicial Notice are matters of public record.  
Docket No. 24. Therefore, the Court takes judicial notice of them.

1           However, *Miller* does not so hold. In *Miller*, the plaintiff was a former employee of the county  
2 sheriffs' department who had been terminated for misconduct. He challenged his termination before  
3 the county civil service commission and, after an evidentiary hearing, lost. The commission issued  
4 findings of fact and concluded that his termination was appropriate. He did not pursue an available  
5 appellate procedure, so the findings became final. Thereafter he filed a federal § 1983 claim, restating  
6 the core allegations in his previously unsuccessful wrongful termination claim. *Id.* at 1034-35. The  
7 Ninth Circuit agreed with the district court that the factual findings of the civil service commission must  
8 be given preclusive effect and were dispositive of plaintiff's claim. The opinion did not discuss, or  
9 decide, whether other constitutional claims, premised on factual assertions not presented to the  
10 administrative agency, were precluded.

11           In this case, the unchallenged factual findings of the WBZA – that the proposed location violates  
12 the Ordinance – are not dispositive as to plaintiffs' equal protection claim, because the question raised  
13 is how similarly situated businesses have been treated. A review of the minutes of the meeting of the  
14 WBZA, the WBZA's subsequent resolution, and the brief summary of the decision of the Board shows  
15 no evidence that the parties litigated any of the facts at issue in the proposed equal protection claim.  
16 *See* Exs. A, B, & C, Request for Judicial Notice in Supp. of Def.'s Mot. to Dis. Nowhere does the  
17 record reflect any litigation regarding similarly situated businesses and whether they have been granted  
18 conditional use permits and variances, or were subject to measurement for zoning purposes unlike the  
19 measurement methodology applied in VGA's case. Accordingly, the Court finds that the factual issues  
20 underlying plaintiffs' equal protection claim are not precluded.

21           In addition, there is no indication that WBZA or the Board considered the constitutionality of  
22 Alameda's Ordinance under the Second Amendment or that the parties litigated that issue. Accordingly,  
23 the Court finds that plaintiffs' claims under the Second Amendment are not precluded.

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25           **C.     Equal Protection Claim**

26           A plaintiff can bring an equal protection claim as a "class of one." *Village of Willowbrook v.*  
27 *Olech*, 528 U.S. 562, 564 (2000). A "class of one" claim requires a showing that the government "(1)  
28 intentionally (2) treated [plaintiffs] differently than other similarly situated [businesses], (3) without a

1 rational basis.” *Gerhart v. Lake County, Montana*, 637 F. 3d 1013, 1022 (9th Cir. 2011) (citing *Olech*,  
2 528 U.S. at 564). In *Olech*, the Court held that the plaintiff’s allegations that the Village of  
3 Willowbrook intentionally demanded a thirty-three foot easement as a condition of connecting her  
4 property to the municipal water supply when the Village required only a fifteen-foot easement from  
5 other similarly situated property owners, that this demand was irrational and wholly arbitrary, and that  
6 the Village ultimately connected her property after receiving a fifteen-foot easement, were sufficient to  
7 state an equal protection claim. 528 U.S. at 565.

8 Here, the Court finds that plaintiffs have not alleged sufficient facts indicating that defendants  
9 intentionally treated plaintiffs differently from other similarly situated businesses without a rational  
10 basis. Plaintiffs’ conclusory assertions that “the [d]efendants have not engaged in unreasonable  
11 measurements against similarly situated businesses and/or the [d]efendants have granted conditional use  
12 permits and variances to similarly situated businesses” are not enough. Compl. ¶ 50. Plaintiffs fail to  
13 allege facts sufficient to show that defendants intentionally granted conditional use permits and  
14 variances to other similarly situated businesses that fell within 500 feet of a disqualifying property under  
15 the Ordinance or that defendants intentionally measured the distance to the buildings of similarly  
16 situated businesses differently.

17 Plaintiffs respond that facts regarding the different treatment of similarly situated businesses are  
18 uniquely in control of the defendants. Pls.’ Opp., Docket No. 22, ¶ 25. Rule 8 of the Federal Rules of  
19 Civil Procedure, however, requires the plaintiffs to allege facts sufficient to show they are entitled to  
20 relief. “Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than  
21 conclusions.” *Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-01531 RS, 2009 WL 2972374, at  
22 \*1 (N.D. Cal. Sept. 14, 2009).

23 Accordingly, the Court GRANTS defendants’ motion to dismiss plaintiffs’ equal protection  
24 claim with leave to amend.

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26 **D. Second Amendment Claims**

27 The Second Amendment confers an individual right to possess handguns in the home for self-  
28 protection. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008). This is a fundamental right and is

1 incorporated against states and municipalities under the Fourteenth Amendment. *McDonald v. City of*  
2 *Chicago*, 130 S. Ct. 3020 (2010). However, the “right secured by the Second Amendment is not  
3 unlimited,” and the Supreme Court has reaffirmed the longstanding presumptive lawfulness of  
4 regulatory measures forbidding the carrying of firearms in sensitive places such as schools or imposing  
5 conditions on the sale of arms. *Heller*, 554 U.S. at 626-27.

6 Neither the Supreme Court nor the Ninth Circuit has articulated the precise methodology to be  
7 to be applied to Second Amendment claims. See *Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir. 2012),  
8 *cert. denied*, 133 S. Ct. 840 (2013) (noting “we leave for another day” the scope of the Second  
9 Amendment). However, *Heller* and courts applying it have provided some guidance. In *Heller*, the  
10 Court specifically reaffirmed that “nothing in our opinion should be taken to cast doubt on longstanding  
11 prohibitions on . . . laws forbidding the carrying of firearms in sensitive places such as schools and  
12 government buildings, or laws imposing conditions and qualifications on the commercial sale of arms,”  
13 calling them “presumptively lawful regulatory measures.” *Heller*, 554 U.S. at 626-27, 627 n.26.  
14 Presumptively lawful restrictions, according to the Third Circuit, are those that “regulate conduct  
15 outside the scope of the Second Amendment” and “these longstanding limitations” should be understood  
16 as “exceptions to the right to bear arms.” *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010).  
17 Thus, the question of “what level of constitutional review the law must survive” only applies “[i]f a  
18 given regulation does not qualify as ‘presumptively lawful.’” *Hall v. Garcia*, No. C 10-03799, 2011 WL  
19 995933, \*3 (N.D.Cal. Mar. 17, 2011). In other words, *Heller* envisioned a process where courts first  
20 examine whether the regulation is presumptively valid and therefore excepted from Second Amendment  
21 coverage – a presumption that may be overcome by a showing that the regulation nonetheless places a  
22 substantial burden the “core protection of the Second Amendment,” which is the ability to defend  
23 “hearth and home.” *Marzzarella*, 614 F.3d at 94.

24 The Ninth Circuit endorsed this approach in its first opinion in *Nordyke v. King*, 563 F.3d 439,  
25 460 (9th Cir. 2009) (vacated and remanded, 611 F.3d 1015 (9th Cir. 2010)).<sup>2</sup> In *Nordyke*, plaintiffs

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27 <sup>2</sup>The first *Nordyke* opinion was issued after the Supreme Court’s *Heller* decision, but before  
28 *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). Prior to addressing the constitutionality of the  
county ordinance, the panel held that the Second Amendment was incorporated by the Due Process  
Clause of the Fourteenth Amendment. 563 F.3d at 457. The Ninth Circuit ordered that the case be

1 challenged an Alameda County ordinance that generally banned guns on County property, with an  
2 exception for certain events that did not include plaintiffs’ proposed gun show. The Ninth Circuit first  
3 analyzed whether the regulation at issue fit within the presumptively valid *Heller* exceptions, noting that  
4 open public spaces such as county fairground property are very similar to the “schools and government  
5 buildings” excepted in *Heller*. *Id.* at 460. In particular, the Court explained that all these places –  
6 schools, government buildings, and now open public spaces – are considered “sensitive places” by the  
7 Supreme Court because “possessing firearms in such places risks harm to great numbers of defenseless  
8 people (e.g., children).” *Id.* at 459. After rehearing in *Nordyke*, the Ninth Circuit eventually found that  
9 “[n]o matter how broad the scope of the Second Amendment . . . it is clear that, as applied to Plaintiffs’  
10 gun shows and as interpreted by the County, this regulation is permissible.” *See Nordyke v. King*, 681  
11 F.3d 1041, 1044 (9th Cir. 2012) *cert. denied*, 133 S. Ct. 840 (2013) (citing *Heller*, 554 U.S. at 626-27);  
12 *see also United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (relying on the same passage  
13 in *Heller* to find that the prohibition of felons from possessing handguns was presumptively lawful).

14 Here, plaintiffs allege that Alameda’s zoning Ordinance violates the Second Amendment, both  
15 facially and as applied to them. The zoning Ordinance places limited “qualifications on the commercial  
16 sale of arms” by restricting their sale within 500 feet of “sensitive places such as schools” and  
17 residences. The Ordinance is precisely the kind of presumptively valid restriction envisioned by *Heller*  
18 – it is a restriction on gun sales and purchases in or near sensitive places. The Ordinance is not a total  
19 ban on gun sales or purchases in Alameda County and therefore does not implicate the core right to  
20 possess a gun in the home for self-defense articulated in *Heller*. Moreover, there are no factual  
21 allegations in the complaint that this presumptively lawful Ordinance burdens, even slightly, plaintiffs’  
22 right to sell or purchase guns in Alameda County – a right which the U.S. Supreme Court has yet to  
23 recognize. At most, there are conclusory allegations that this particular gun store is “essential” to  
24 defendants’ ability to exercise their Second Amendment rights and that it is “essential to [defendants]

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26 reheard *en banc*, 575 F.3d 890 (9th Cir. 2009). After *McDonald*, the Ninth Circuit remanded the case  
27 back to the same panel. 611 F.3d 1015 (9th Cir. 2010). Although its original decision is vacated, the  
28 panel’s analysis of laws regulating guns in sensitive places has been recognized by other courts. *See*,  
*e.g., Brown v. United States*, 979 A.2d 630, 641 (D.C. 2009); *United States v. Masciandaro*, 648 F.Supp.  
2d 779, 790-91 (E.D.Va.2009).

1 assisting their patrons and customers in exercising their Second Amendment rights.” Compl. ¶¶ 43-44.  
2 Such conclusory allegations fail to demonstrate how the zoning prohibition as to *one* gun store  
3 substantially burdens the rights of defendants or their Alameda County patrons. Accordingly, the Court  
4 concludes that dismissal of defendants’ Second Amendment claims is warranted.

5 The Court need not decide what level of constitutional scrutiny to apply to the (as yet  
6 unarticulated) right to sell or purchase guns because as a threshold matter, there are simply no  
7 allegations sufficient to rebut the presumption of validity established in *Heller*. Moreover, even  
8 applying the strictest scrutiny – which this Court explicitly does not decide – courts in this district have  
9 upheld similar regulations. *See Hall v. Garcia*, 2011 WL 995933, at \*5 (N.D.Cal. Mar. 17, 2011)  
10 (upholding a regulation prohibiting gun possession within 1000 feet of a school under intermediate  
11 scrutiny, but noting that the regulation would survive “[u]nder any of the potentially applicable levels  
12 of scrutiny” because of the substantial government interest of protecting citizens from gun violence in  
13 sensitive spaces).

14 If the Court dismisses a cause of action, leave to amend may be appropriate unless the Court  
15 “determines that the pleading could not possibly be cured by the allegation of other facts.” *Lopez v.*  
16 *Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation marks omitted). In the  
17 ordinary course, where a motion to dismiss is decided on allegations in pleadings, without any relevant  
18 factual record, leave to amend may be appropriate. Here, however, while defendants’ motion to dismiss  
19 was pending, plaintiffs filed a motion for preliminary injunction. In support of their motion, plaintiffs  
20 submitted evidence which itself suggests that leave to amend may be futile. In particular, plaintiffs  
21 provided evidence that there are ten other gun stores in Alameda County, including the “Big 5 Sporting  
22 Goods” store located only 607 feet from plaintiffs’ proposed site. *See Nobriga Decl., Ex. O, Docket No.*  
23 *20-15* at 5, 6. According to defendants, these existing stores are in compliance with the Ordinance.  
24 Def’s. Rep. at 12 (Docket No. 24 at 18). Moreover, plaintiffs Teixeira and Gamaza previously operated  
25 another gun store in Alameda County before attempting to open this new one. *See Nobriga Decl. ¶ 5.*  
26 This suggests that Alameda County residents seeking to purchase guns have no shortage of options;  
27 merchants looking to sell guns have managed to do so lawfully, in compliance with this Ordinance; and  
28 any barrier to gun sales, purchases, or ownership presented by this Ordinance is *de minimis*.

