



THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

ZACHARY W. CARTER
Corporation Counsel

RICHARD DEARING
Assistant Corporation Counsel
(212) 356-2500
rdearing@law.nyc.gov

April 12, 2019

BY HAND

Honorable Scott S. Harris
Office of the Clerk
Supreme Court of the United States
1 First Street N.E.
Washington, DC 20543

Re: *N.Y. State Rifle & Pistol Ass'n, et al. v. City of N.Y., et al.*
No. 18-280

Dear Mr. Harris:

I am counsel of record for respondents the City of New York and the New York City Police Department, License Division. The Court granted the petition for a writ of certiorari in this case on January 22, 2019, and petitioners' merits brief is currently due on May 7, 2019.

I write to advise the Court of a proposed rulemaking. If adopted in accordance with established procedures, the proposed rule would render this case moot before the parties complete the merits briefing in this case. For this reason, I also write to request that the Court stay the current briefing schedule pending final action on the proposed rule.

Petitioners in this case are an association and three individuals who hold a premises license, which is defined as a restricted handgun license issued for the protection of a business or residence, from the City. Petitioners allege that § 5-23(a) of Title 38 of the Rules of the City of New York is unconstitutional because it prohibits them from transporting handguns possessed under this license from their residences in the City to a home, firing range, or shooting competition outside the City limits. Petitioners seek declaratory relief and injunctive relief from enforcement of the rule to the extent that it prohibits the transport of a licensed handgun to these locations. Petitioners do not seek money damages.

Today, the New York City Police Department forwarded a Notice of Public Hearing and Opportunity to Comment on Proposed Rule to the New York City Record for publication. A copy of the notice is attached to this letter. The proposed rule would amend § 5-23(a) to allow premises licensees to transport a handgun listed on their premises license directly to and from any of the following additional locations, provided that the handgun is transported unloaded, in a locked container, with the ammunition carried separately:


- Another premises of the licensee where the licensee is authorized to have and possess a handgun;
- A small-arms range/shooting club authorized by law to operate as such, whether located within or outside New York City; and
- A shooting competition at which the licensee may possess the handgun consistent with the law applicable at the place of the competition.

If the proposed rule is adopted, it would render this case moot. As amended, the rule would allow transport of licensed handguns to the locations sought by petitioners. Thus, the Court could not grant petitioners any effective relief. *See United States v. Microsoft Corp.*, 584 U.S. ___, 138 S. Ct. 1186, 1187-88 (2018); *U.S. Dep't of Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986).

Accordingly, respondents respectfully request that the Court stay the briefing schedule pending final action on the proposed rule. The City expects that any final rule would be adopted in mid-May, after a 30-day notice-and-comment period and a public hearing, and go into effect no later than 30 days after the publication of the final rule. *See* N.Y.C. Charter § 1043. Under the circumstances, then, a stay would best serve the interests of judicial economy and efficiency by enabling the Court to resolve threshold questions of jurisdiction prior to full merits briefing or, at the very least, by enabling the parties to address these issues in their merits briefs.

Thank you in advance for your consideration of this request. Respondents will notify the Court of any further developments.

Respectfully submitted,


Richard Dearing

Cc: Paul D. Clement, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street N.W.
Washington, DC 20005

NEW YORK CITY POLICE DEPARTMENT

Notice of Public Hearing and Opportunity to Comment on Proposed Rule

What are we proposing? The Police Department is proposing an amendment to an existing rule governing premises handgun licenses. The rule will allow the holder of a premises license to transport a handgun listed on that license to certain additional locations under certain conditions.

When and where is the Hearing? The Police Department will hold a public hearing on the proposed rule, which will take place at 10:00 am on May 17, 2019, in the Press Room located at One Police Plaza, Second Floor, New York, New York 10038.

How do I comment on the proposed rules? Anyone can comment on the proposed rule by:

- **Website.** You can submit comments to the Police Department through the NYC rules website: <http://rules.cityofnewyork.us>.
- **Email.** You can email written comments to nycrules@nypd.org.
- **Mail.** You can mail written comments to Commanding Officer, Legal Bureau, New York City Police Department, One Police Plaza, Room 1406, New York, New York 10038.
- **Fax.** You can fax written comments to New York City Police Department, Commanding Officer, Legal Bureau at (646) 610-8395.
- **Hearing.** You can speak at the public hearing. Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by calling (646) 610-4065, or you can sign up in the hearing room before the hearing begins on May 15, 2019. You can speak for up to three minutes.

Is there a deadline to submit written comments? Yes, you must submit written comments by 9:00 am on May 17, 2019.

What if I need assistance to participate in the Hearing? You must tell the Legal Bureau if you need a reasonable accommodation of a disability at the Hearing. You must tell us if you need a sign language interpreter. You can tell us by mail at the address given above. You may also tell us by telephone at (646) 610-4065. You must tell us by May 10, 2019.

Can I review the comments made on the proposed rule? You can review the comments made online on the proposed rule by going to the website at

<http://rules.cityofnewyork.us/>. A few days after the hearing, copies of all comments submitted online, copies of all written comments, and a summary of oral comments concerning the proposed rule will be available to the public at the Legal Bureau, One Police Plaza, Room 1406, New York, New York 10038.

What authorizes the Police Department to make this rule? Section 400.00 of the Penal Law, Sections 1043 and 435 of the City Charter, and Section 10-131 of the Administrative Code authorize the Police Department to make this proposed rule. This proposed rule was not included in the Police Department’s regulatory agenda for this Fiscal Year because it was not contemplated when the Police Department published the agenda.

Where can I find the Police Department’s rules? The Police Department’s rules are in Title 38 of the Rules of the City of New York.

What rules govern the rulemaking process? The Police Department must meet the requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made according to the requirements of Section 1043 of the City Charter.

Statement of Basis and Purpose of Proposed Rule

As the firearms-licensing officer for the City of New York, the Police Commissioner has promulgated rules governing the possession, carry, and transport of handguns by licensees. Section 5-01 of Title 38 of the Rules of the City of New York defines the types of available handgun licenses in the City and generally describes the restrictions imposed by the different types of licenses. Section 5-01(a) defines a premises license as a restricted handgun license issued for a specific business or residence. Section 5-23 sets forth in greater detail the restrictions and conditions imposed by the different types of handgun licenses available in the City. Subsection 5-23(a) (“the Rule”) governs the possession and transport of handguns by holders of a premises license. The Rule provides that any handguns listed on a premises license may not be removed from the address specified on the license except as provided in Chapter 5 of Title 38 of the Rules of the City of New York. Currently, the Rule authorizes a premises licensee to remove a handgun from the premises listed on the license to take it directly to and from one of the following destinations, provided that the handgun is transported unloaded, in a locked container, with the ammunition carried separately:

- An authorized small arms range/shooting club, to maintain proficiency in the use of a handgun; or
- An authorized area for hunting, provided that the licensee has requested and received an appropriate amendment to the handgun license from the Police Department.

Additionally, Chapter 16 of Title 38 of the Rules of the City of New York generally governs the transport or delivery of weapons into or within the City. As currently written, Chapter 16 appears to apply to the transport of handguns by premises licensees.

The requirement that premises licensees keep their handguns at their premises, along with these two exceptions to that requirement, seeks to balance public safety against the interests of licensees in maintaining proficiency in the use of their handguns and in using their handguns for hunting. Two legal developments have occasioned a reexamination of the balance struck by the Rule. The first is the New York Court of Appeals' decision in *Osterweil v. Bartlett*, 21 N.Y.3d 580 (2013), which held that the New York Penal Law permits the owner of a part-time residence in the state to apply for a handgun license in the jurisdiction of that residence, although the owner may be domiciled outside the state. Prior to the decision, the statute had been interpreted to require the applicant for a handgun permit to show that he or she was a domiciliary of the county (or city) where the application was filed. See, e.g., *Matter of Mahoney v Lewis*, 199 A.D.2d 734, 735 (3d Dep't 1993). Following the *Osterweil* decision, a New York City resident who owns a second home elsewhere in the state may apparently apply to the licensing officer in that jurisdiction for a license to possess a handgun at the second home. The Rule, however, does not currently authorize a premises licensee to transport a handgun listed on a New York City premises license to another premises where the licensee resides and is authorized to possess a handgun.

The second development is the *New York State Rifle and Pistol Association v. City of New York* lawsuit, which challenges the Rule's transport authorizations on Second Amendment and other constitutional grounds. One plaintiff in the case alleges that the Rule prevents him from transporting a handgun listed on his New York City premises license to a second home upstate. Several plaintiffs allege that the Rule prevents them from transporting their handguns to small arms ranges/shooting clubs outside of the City for purposes of firearms training or competitions. *New York State Rifle and Pistol Association v. City of New York*, 883 F.3d 45 (2d Cir. 2013) ("*NYSRPA*"). The United States Supreme Court has granted review of the decision.

The Police Department has strongly believed, and continues to maintain, that the present Rule furthers an important public-safety interest. However, in light of the *Osterweil* decision and the ongoing *NYSRPA* case, the Police Department has reviewed the Rule, and has determined that it is possible to modify it to reflect a carefully considered accommodation to the legitimate interests of licensees while also ensuring the safe transport of handguns by licensees between authorized locations. In furtherance of this determination, the amended Rule would allow premises licensees to transport a handgun listed on their premises license directly to and from any of the following additional locations, provided that the handgun is transported unloaded, in a locked container, with the ammunition carried separately:

- Another premises where the licensee is authorized to have and possess a handgun;
- A small arms range/shooting club authorized by law to operate as such, whether located within or outside New York City; or
- A shooting competition at which the licensee may possess the handgun consistent with the law applicable at the place of the competition.

The amended Rule will continue to recognize the importance of public safety. It requires that (1) a handgun listed on a premises license be kept at the premises when not being transported directly to or from, or possessed at, one of the authorized locations; (2) any handgun be transported unloaded and in a locked container, with the ammunition carried separately; and (3) transport of a handgun through the City of New York be continuous and uninterrupted. These requirements mean that a person who has not obtained a carry permit under Penal Law § 400.00(2) will continue to be unauthorized to transport a firearm in operable condition in public.

New material is underlined.

[Deleted material is in brackets.]

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. Subdivision (a) of section 5-01 of Chapter 5 of Title 38 of the Rules of the City of New York is proposed to be amended to read as follows:

§ 5-01 Types of Handgun Licenses.

* * *

(a) *Premises License – Residence or Business.* This is a restricted handgun license, issued for a specific business or residence location. The handgun shall be safeguarded at the specific address indicated on the license, except when the licensee transports such handgun pursuant to 38 RCNY § 5-23(a). [This license permits the transporting of an unloaded handgun directly to and from an authorized small arms range/shooting club, secured unloaded in a locked container. Ammunition shall be carried separately.]

§ 2. Subdivision (a) of section 5-23 of Chapter 5 of Title 38 of the Rules of the City of New York is proposed to be amended to read as follows:

§ 5-23 Types of Handgun Licenses.

(a) *Premises License – Residence or Business.* This is a restricted handgun license, issued for the protection of a business or residence premises.

(1) The handguns listed on this license may not be removed from the address specified on the license except as otherwise provided in this chapter.

(2) The possession of the handgun [for protection] is restricted to the inside of the premises which address is specified on the license or to any other location to which the licensee is authorized to transport such handgun in accordance with these Rules.

(3) [To maintain proficiency in the use of the handgun, the] The licensee may transport her/his handgun(s) [directly to and from an authorized small arms range/shooting club], unloaded, in a locked container, the ammunition to be carried separately, directly to and from the following locations:

(i) Another residence or place of business where the licensee is authorized to possess such handgun.

(ii) A small arms range/shooting club authorized by law to operate as such. Such range or club may be within or outside New York City.

(iii) A shooting competition at which the licensee is authorized to possess such handgun consistent with the law applicable at the place of such competition.

(4) A licensee may transport her/his handgun(s) directly to and from an authorized area designated by the New York State Fish and Wildlife Law and in compliance with all pertinent hunting regulations, unloaded, in a locked container, the ammunition to be carried separately, after the licensee has requested and received a "Police Department – City of New York Hunting Authorization" Amendment attached to her/his license.

(5) Transport within New York City pursuant to paragraph (3) or (4) of this subdivision shall be continuous and uninterrupted.

§ 3. Section 16-02 of Chapter 16 of Title 38 of the Rules of the City of New York is proposed to be amended by adding a new subdivision (c) to read as follows:

§ 16-02 Applicability.

This chapter shall apply to all persons who transport or deliver one or more weapons into or within any location in the City of New York, except that it shall not apply to:

* * *

(c) transport pursuant to 38 RCNY § 5-23(a)(3) or (a)(4).

**NEW YORK CITY LAW DEPARTMENT
DIVISION OF LEGAL COUNSEL
100 CHURCH STREET
NEW YORK, NY 10007
212-356-4028**

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Amendment of Rules Governing Gun Possession in New York City

REFERENCE NUMBER: 2019 RG 025

RULEMAKING AGENCY: New York City Police Department

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

Date: April 11, 2019

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS
253 BROADWAY, 10th FLOOR
NEW YORK, NY 10007
212-788-1400**

**CERTIFICATION / ANALYSIS
PURSUANT TO CHARTER SECTION 1043(d)**

RULE TITLE: Amendment of Rules Governing Gun Possession in New York City

REFERENCE NUMBER: NYPD-50

RULEMAKING AGENCY: New York Police Department

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period because a cure period is not practicable under the circumstances.

/s/ Francisco X. Navarro
Mayor's Office of Operations

April 11, 2019
Date