

ANNOTATED MINUTES

Tuesday, September 21, 1993 - 9:30 AM
Multnomah County Courthouse, Room 602

BOARD BRIEFINGS

- B-1a "What Works - Hopeful Strategies for Portland's Children", Lessons from other parts of the Country. Presented by Orin Bolstead, Campbell Institute.
- B-1b How to Make Partnerships Work. Presented by Chuck Dimond, Partners for Human Investment.

**PRESENTATION AND RESPONSE TO BOARD QUESTIONS
BY ORIN BOLSTEAD AND CHUCK DIMOND.**

Thursday, September 23, 1993 - 9:00 AM
Multnomah County Courthouse, Room 602

EXECUTIVE SESSION

- E-1 The Multnomah County Board of Commissioners Will Meet in Executive Session Pursuant to ORS 192.660(1)(h) for the Purpose of Consulting with Counsel Concerning Current Litigation.

EXECUTIVE SESSION HELD.

Thursday, September 23, 1993 - 9:30 AM
Multnomah County Courthouse, Room 602

REGULAR MEETING

Chair Beverly Stein convened the meeting at 9:30 a.m., with Vice-Chair Gary Hansen, Commissioners Sharron Kelley, Tanya Collier and Dan Saltzman present.

CONSENT CALENDAR

**UPON MOTION OF COMMISSIONER KELLEY, SECONDED
BY COMMISSIONER HANSEN, THE CONSENT CALENDAR
(C-1 THROUGH C-3) WAS UNANIMOUSLY APPROVED.**

DEPARTMENT OF HEALTH

- C-1 Ratification of Amendment No. 1 to Intergovernmental Agreement, Contract #201313, Between the State of Oregon Department of Human Resources, Adult and Family Services Division and Multnomah County Department of Health to Continue to Provide Medical Services for Refugees in the REEP Program, for the Period October 1, 1993 through September 30, 1994

C-2 Ratification of Amendment No. 1 to Intergovernmental Agreement, Contract #201523, Between the Oregon Department of Human Resources, Office of Medical Assistance and Multnomah County Department of Health to Provide State Clients with Medical and Dental Services, for the Period October 1, 1993 through January 31, 1994

DEPARTMENT OF ENVIRONMENTAL SERVICES

C-3 ORDER in the Matter of the Execution of Deed D940918 Upon Complete Performance of a Contract to TEEN CHALLENGE OF OREGON

ORDER 93-313.

REGULAR AGENDA

NON-DEPARTMENTAL

R-1 PUBLIC HEARING and Consideration of a RESOLUTION in the Matter of Filling the Vacancy in the Legislative Assembly, Senate Representative District No. 9

COUNTY COUNSEL, LAURENCE KRESSEL PRESENTED AND EXPLAINED PROCESS. UPON MOTION OF COMMISSIONER HANSEN, SECONDED BY COMMISSIONER KELLEY, IT WAS UNANIMOUSLY APPROVED TO HAVE A 5 MINUTE TIME LIMIT PER NOMINEE AND VOTE BY WRITTEN BALLOT. COMMISSIONER STEIN NOTED THAT IF A TIE VOTE, SECOND WRITTEN RUN OFF WITH TOP TWO ONLY.

PRESENTATIONS MADE BY NOMINEE NADIA MAY KAHL, RANDY LEONARD AND TOM NOVICK. COMMISSIONER COMMENTS PRESENTED.

VOTE: COMMISSIONER KELLEY, VOTES TOM NOVICK; COMMISSIONER HANSEN, VOTES RANDY LEONARD; COMMISSIONER COLLIER, VOTES RANDY LEONARD; COMMISSIONER SALTZMAN, VOTES RANDY LEONARD; AND CHAIR STEIN, VOTES TOM NOVICK.

CHAIR STEIN DECLARES RANDY LEONARD APPOINTED TO FILL THE LEGISLATIVE ASSEMBLY, SENATE DISTRICT NO. 9 POSITION. RESOLUTION 93-314 APPROVED.

RANDY LEONARD THANKED THE BOARD AND GAVE A STATEMENT REGARDING HIS APPOINTMENT.

R-2 PROCLAMATION in the Matter of Proclaiming The Uncensored Celebration and Celebrating the Library for Providing Access to Ideas

COMMISSIONER HANSEN MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF R-2. COMMISSIONER HANSEN PRESENTED AND REAFFIRMED SUPPORT FOR THIS PROCLAMATION AND THE FREE EXCHANGE OF IDEAS THAT IT REPRESENTS. PROCLAMATION 93-315 WAS UNANIMOUSLY APPROVED.

R-3 RESOLUTION in the Matter of Developing a Plan to Reallocate Administrative Savings for the Department of Social Services to Fund Three New Parent Child Development Centers

COMMISSIONER COLLIER MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF R-3. CHAIR BEVERLY STEIN AND CAROL WIRE PRESENTED EXPLANATION AND RESPONSE TO BOARD QUESTIONS. RESOLUTION 93-316 WAS UNANIMOUSLY APPROVED.

DEPARTMENT OF HEALTH

R-4 Request for Approval of a Notice of Intent to Submit a Request for \$20,000 in Funding to the Diabetes Research & Education Foundation

COMMISSIONER COLLIER MOVED AND COMMISSIONER HANSEN SECONDED, APPROVAL OF R-3. TOM FRONK AND RONNIE MYERS PRESENTED EXPLANATION AND RESPONSE TO BOARD QUESTIONS. VOTE ON MOTION WAS UNANIMOUSLY APPROVED.

PUBLIC CONTRACT REVIEW BOARD

(Recess as the Board of County Commissioners and convene as the Public Contract Review Board)

R-5 ORDER in the Matter of Exempting from Public Bidding a Contract with Telepage Northwest for the Leasing of Pagers on a Requirements Basis

COMMISSIONER KELLEY MOVED AND COMMISSIONER HANSEN SECONDED, APPROVAL OF R-5. JIM MUNZ AND BRIAN FOWLES PRESENTED EXPLANATION AND RESPONSE TO BOARD QUESTIONS.

RICK PUCKETT REPRESENTING PAGENET, PRESENTED TESTIMONY IN OPPOSITION TO THIS ITEM AND EXPLAINED WHY.

ORDER 93-317 WAS UNANIMOUSLY APPROVED.

(Recess as the Public Contract Review Board and reconvene as the Board of County Commissioners)

DEPARTMENT OF ENVIRONMENTAL SERVICES

R-6 PUBLIC HEARING and Consideration of an ORDER in the Matter of the Transfer of Tax Foreclosed Property to the Northeast Community Development Corporation for Low Income Housing [to be Used in the Nehemiah Housing Opportunity Program] (Continued from September 16, 1993)

COMMISSIONER HANSEN MOVED AND COMMISSIONER COLLIER SECONDED, APPROVAL OF R-6.

JAKI WALKER PRESENTED EXPLANATION AND RESPONSE TO BOARD QUESTIONS REGARDING THE NORTHEAST COMMUNITY DEVELOPMENT CORPORATION FOR LOW

INCOME HOUSING AND HOW THESE PROPERTIES WILL BE USED FOR THE NEHEMIAH HOUSING OPPORTUNITY PROGRAM.

FACILITIES AND PROPERTY MANAGEMENT STAFF, LARRY BAXTER AND BOB OBERST PRESENTED EXPLANATION AND RESPONSE TO BOARD QUESTIONS REGARDING THE TAX TITLE TASKFORCE AND WHEN THE REPORT WILL BE PRESENTED TO THE BOARD.

COUNTY COUNSEL, LARRY KRESSEL PRESENTED EXPLANATION AND RESPONSE TO BOARD QUESTIONS REGARDING COUNTY PROCESS TO CLEAR TITLE ON PROPERTIES IN THE FORECLOSURE PROCESS.

COMMISSIONER COLLIER MOVED AND COMMISSIONER KELLEY SECONDED, AMENDMENT TO THE SECOND PARAGRAPH TO READ: IT FURTHER APPEARING THAT AFTER HEARING OBJECTIONS TO THE TRANSFER AS BY LAW REQUIRED, IT IS DETERMINED THAT IT IS FOR THE BEST INTEREST OF THE COUNTY THAT THE TRANSFER BE MADE AND THAT A DEED BE GIVEN "AS SOON AS TITLE IS CLEARED." ORDER 93-318 WAS UNANIMOUSLY APPROVED.

COMMISSIONER COLLIER MOVED AND COMMISSIONER SALTZMAN SECONDED, THAT COUNTY COUNSEL CONVENE THE APPROPRIATE REPRESENTATIVES FROM COUNTY COUNSEL, FACILITIES & PROPERTY MANAGEMENT AND ASSESSMENT & TAXATION TO FORMALLY ADDRESS THE PROBLEM OF GAINING CLEAR TITLES AND REPORT TO THE BOARD OF COUNTY COMMISSIONERS BY NOVEMBER 1, 1993, A PLAN FOR HANDLING CURRENT PROPERTY WITHOUT CLEAR TITLE AND A STATEMENT OF HOW IT WILL BE HANDLED IN THE FUTURE. MOTION APPROVED, WITH COMMISSIONERS HANSEN, KELLEY, COLLIER AND STEIN VOTING AYE AND COMMISSIONER HANSEN VOTING NO.

PUBLIC COMMENT

R-7 Opportunity for Public Comment on Non-Agenda Matters.
Testimony Limited to Three Minutes Per Person.

NO PUBLIC COMMENT.

There being no further business, the meeting was adjourned at 11:28 a.m.

OFFICE OF THE BOARD CLERK
for MULTNOMAH COUNTY, OREGON

By *Carrie A. Parkerson*

0319C/1-4
cap

Executive Session
9-23-93
Handout #1
E-1

BACKGROUND

Court invalidated county prohibition on possessing assault weapons at Expo for purposes of sale (section IV (A)(4), Ordinance 646). Court said prohibition of sales at EXPO exceeds the county's power under state law (ORS 166.245).

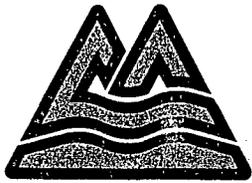
QUESTION

Should county appeal this portion of the ruling?

CONSIDERATIONS

- A. Consequences of letting ruling stand
 - 1. policy issue re: use of county facility for sale of assault weapons.
(Note: the city can still enforce its disassembly rules at EXPO.)
 - 2. precedent re: interpretation of ORS 166,245. Court interpretation of preemption statute is overly narrow as to county control over use of a county facility. Another statute explicitly bans possession of all firearms in public buildings unless manager of building consents.
 - 3. award of costs (approx. \$1,000) to plaintiffs.
- B. Chances of Prevailing
- C. Resources Required to Pursue Appeal





MULTNOMAH COUNTY OREGON

OFFICE OF THE BOARD CLERK
SUITE 1510, PORTLAND BUILDING
1120 S.W. FIFTH AVENUE
PORTLAND, OREGON 97204

BOARD OF COUNTY COMMISSIONERS
BEVERLY STEIN • CHAIR • 248-3308
DAN SALTZMAN • DISTRICT 1 • 248-5220
GARY HANSEN • DISTRICT 2 • 248-5219
TANYA COLLIER • DISTRICT 3 • 248-5217
SHARRON KELLEY • DISTRICT 4 • 248-5213
CLERK'S OFFICE • 248-3277 • 248-5222

AGENDA

MEETINGS OF THE MULTNOMAH COUNTY BOARD OF COMMISSIONERS

FOR THE WEEK OF

September 20 - 24, 1993

Tuesday, September 21, 1993 - 9:30 AM - Board Briefings . .Page 2

Thursday, September 23, 1993 - 9:00 AM - Executive Session. Page 2

Thursday, September 23, 1993 - 9:30 AM - Regular Meeting. .Page 2

Thursday Meetings of the Multnomah County Board of Commissioners are taped and can be seen at the following times:

Thursday, 10:00 PM, Channel 11 for East and West side subscribers

Thursday, 10:00 PM, Channel 49 for Columbia Cable (Vancouver) subscribers

Friday, 6:00 PM, Channel 22 for Paragon Cable (Multnomah East) subscribers

Saturday 12:00 PM, Channel 21 for East Portland and East County subscribers

INDIVIDUALS WITH DISABILITIES MAY CALL THE OFFICE OF THE BOARD CLERK AT 248-3277 OR 248-5222 OR MULTNOMAH COUNTY TDD PHONE 248-5040 FOR INFORMATION ON AVAILABLE SERVICES AND ACCESSIBILITY.

Tuesday, September 21, 1993 - 9:30 AM

Multnomah County Courthouse, Room 602

BOARD BRIEFINGS

- B-1a "What Works - Hopeful Strategies for Portland's Children",
Lessons from other parts of the Country. Presented by
Orin Bolstead, Campbell Institute. 9:30 AM TIME CERTAIN,
30 MINUTES REQUESTED.
- B-1b How to Make Partnerships Work. Presented by Chuck Dimond,
Partners for Human Investment. 10:00 AM TIME CERTAIN, 30
MINUTES REQUESTED.
-

Thursday, September 23, 1993 - 9:00 AM

Multnomah County Courthouse, Room 602

EXECUTIVE SESSION

- E-1 The Multnomah County Board of Commissioners Will Meet in
Executive Session Pursuant to ORS 192.660(1)(h) for the
Purpose of Consulting with Counsel Concerning Current
Litigation. 9:00 AM TIME CERTAIN, 15 MINUTES REQUESTED.
-

Thursday, September 23, 1993 - 9:30 AM

Multnomah County Courthouse, Room 602

REGULAR MEETING

CONSENT CALENDAR

DEPARTMENT OF HEALTH

- C-1 Ratification of Amendment No. 1 to Intergovernmental
Agreement, Contract #201313, Between the State of Oregon
Department of Human Resources, Adult and Family Services
Division and Multnomah County Department of Health to
Continue to Provide Medical Services for Refugees in the
REEP Program, for the Period October 1, 1993 through
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- C-2 Ratification of Amendment No. 1 to Intergovernmental
Agreement, Contract #201523, Between the Oregon Department
of Human Resources, Office of Medical Assistance and
Multnomah County Department of Health to Provide State
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DEPARTMENT OF ENVIRONMENTAL SERVICES

- C-3 ORDER in the Matter of the Execution of Deed D940918 Upon
Complete Performance of a Contract to TEEN CHALLENGE OF
OREGON

REGULAR AGENDA

NON-DEPARTMENTAL

- R-1 PUBLIC HEARING and Consideration of a RESOLUTION in the Matter of Filling the Vacancy in the Legislative Assembly, Senate Representative District No. 9 (9:30 AM TIME CERTAIN, 30 MINUTES REQUESTED)
- R-2 PROCLAMATION in the Matter of Proclaiming The Uncensored Celebration and Celebrating the Library for Providing Access to Ideas
- R-3 RESOLUTION in the Matter of Developing a Plan to Reallocate Administrative Savings for the Department of Social Services to Fund Three New Parent Child Development Centers

DEPARTMENT OF HEALTH

- R-4 Request for Approval of a Notice of Intent to Submit a Request for \$20,000 in Funding to the Diabetes Research & Education Foundation

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(Recess as the Board of County Commissioners and convene as the Public Contract Review Board)

- R-5 ORDER in the Matter of Exempting from Public Bidding a Contract with Telepage Northwest for the Leasing of Pagers on a Requirements Basis

(Recess as the Public Contract Review Board and reconvene as the Board of County Commissioners)

DEPARTMENT OF ENVIRONMENTAL SERVICES

- R-6 PUBLIC HEARING and Consideration of an ORDER in the Matter of the Transfer of Tax Foreclosed Property to the Northeast Community Development Corporation for Low Income Housing [to be Used in the Nehemiah Housing Opportunity Program] (Continued from September 16, 1993)

PUBLIC COMMENT

- R-7 Opportunity for Public Comment on Non-Agenda Matters. Testimony Limited to Three Minutes Per Person.

MEETING DATE: September 23, 1993
~~September 16, 1993~~

AGENDA NO: E-1

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: Executive Session Pursuant to ORS 192.660(1)(h)

BOARD BRIEFING Date Requested: September 23, 1993
~~September 16, 1993~~

Amount of Time Needed: 15 Minutes 9:00 a.m. TC

REGULAR MEETING: Date Requested: _____

Amount of Time Needed: _____

DEPARTMENT: Non-Departmental DIVISION: County Counsel

CONTACT: Laurence Kressel TELEPHONE #: 248-3138
BLDG/ROOM #: 106/1530

PERSON(S) MAKING PRESENTATION: Laurence Kressel

ACTION REQUESTED:

INFORMATIONAL ONLY POLICY DIRECTION APPROVAL OTHER

SUMMARY (Statement of rationale for action requested, personnel and fiscal/budgetary impacts, if applicable):

The Multnomah County Board of Commissioners Will Meet in Executive Session Pursuant to ORS 192.660(1)(h), for the Purpose of Consulting With Counsel Concerning Current Litigation. ~~Session to be Held in the Glass Conference Room, 15th Floor, Portland Building, 9:00 a.m., Thursday, September 16, 1993.~~ Session to be Held in Room 602 of the Multnomah County Courthouse.

SIGNATURES REQUIRED:

ELECTED OFFICIAL: _____

OR

DEPARTMENT MANAGER: 

MULTNOMAH COUNTY
OREGON
1993 SEP - 3 PM 4:41
BOARD OF
COUNTY COMMISSIONERS

ALL ACCOMPANYING DOCUMENTS MUST HAVE REQUIRED SIGNATURES

Any Questions: Call the Office of the Board Clerk 248-3277/248-5222

M E M O R A N D U M

TO: Beverly Stein, Chair, Board of
Commissioners

FROM: Laurence Kressel (106/1530) 
County Counsel

DATE: September 10, 1993

SUBJECT: Rescheduling of Executive Session

I scheduled an executive session for Thursday, September 16 to consult with the Board about the assault gun case (Oregon Shooters Assoc. v. Multco.). However, I should not have picked that date as it is a jewish holiday. I will be taking the day off to observe the holiday. I have rescheduled the session for 9 am September 23rd. I regret any inconvenience caused by the change.

cc Board of Commissioners

Clerk of the Board

BOARD OF
COUNTY COMMISSIONERS
1993 SEP 10 PM 12:02
MULTNOMAH COUNTY
OREGON



MULTNOMAH COUNTY OREGON

OFFICE OF COUNTY COUNSEL
1120 S.W. FIFTH AVENUE, SUITE 1530
P.O. BOX 849
PORTLAND, OREGON 97207-0849
(503) 248-3138
FAX 248-3377

BOARD OF COUNTY COMMISSIONERS
GLADYS McCOY, CHAIR
PAULINE ANDERSON
RICK BAUMAN
GARY HANSEN
SHARRON KELLEY

MEMORANDUM

TO: Board of County Commissioners
Gladys McCoy, Chair
Pauline Anderson
Rick Bauman
Gary Hansen
Sharron Kelley

FROM: Laurence Kressel
County Counsel

DATE: April 10, 1992

RE: County's Legal Brief in Oregon State
Shooting Associating v. Multco, et al,
(challenging County's regulations)

COUNTY COUNSEL
LAURENCE KRESSEL
CHIEF ASSISTANT
JOHN L. DU BAY
ASSISTANTS
J. MICHAEL DOYLE
SANDRA N. DUFFY
GERALD H. ITKIN
H.H. LAZENBY, JR.
STEVEN J. NEMIROV
MATTHEW O. RYAN
JACQUELINE A. WEBER

This case is in the Court of Appeals, as you know. Judge Snouffer upheld our position at trial.

I've filed a copy of our brief with the Clerk of the Board in case you wish to read it. The state constitutional "right to bear arms" issue is likely to be of interest in Appellate Court. I'll keep you posted.

cc: Clerk of the Board (with enclosure)
Sheriff Skipper (with enclosure)

G:\WP51\RITA\BCCLETTR.MEM\st

BOARD OF
COUNTY COMMISSIONERS
1992 APR 13 PM 2:49
MULTNOMAH COUNTY
OREGON

IN THE COURT OF APPEALS OF THE STATE OF OREGON

OREGON STATE SHOOTING
ASSOCIATION, JOHN NICHOLS, dba
Nichols Firearms, ROSE CITY
PROMOTIONS, INC., dba Rose
City Gun Collectors, and
KENNETH W. GLASS,

Plaintiffs-Appellants,

and

SECOND AMENDMENT FOUNDATION,

Plaintiff,

v.

MULTNOMAH COUNTY, a political
subdivision of the State of
Oregon, ROBERT G. SKIPPER, in
his capacity as Sheriff of
Multnomah County, THE CITY OF
PORTLAND, and RICHARD D.
WALKER, in his capacity as
Chief of Police of the City of
Portland,

Defendants-Respondents.

Trial Court
No. A9008-04628

Appellate Court
No. A72067

MULTNOMAH COUNTY
OREGON

1992 APR 13 PM 2:50

CLERK OF
COURT
COMMISSIONER

DEFENDANT-RESPONDENTS' BRIEF AND ABSTRACT OF RECORD

Appeal of decision of the Circuit Court of the State of Oregon for
the County of Multnomah by the Honorable William C. Snouffer,
Circuit Court Judge, dated August 22, 1991, relating to Multnomah
County Ordinance No. 646 and City of Portland Ordinance No. 163299

John DiLorenzo, Jr.
O'Connell, Goyak & DiLorenzo
Suite 800, One Financial Center
121 SW Morrison Street
Portland, OR 97204

Attorney for Plaintiff

Jeffrey L. Rogers
City Attorney's Office
1220 S.W. Fifth Avenue, Room 315
Portland, OR 97204

Attorney for Defendants-Respondents
The City of Portland and Richard D. Walker

Jacob Tanzer
Ball, Janik & Novack
1100 One Main Place
101 S.W. Main Street
Portland, OR 97204

Attorney for Oregonians Against Gun Violence, et al

Laurence Kressel
Multnomah County Counsel
P.O. Box 849
Portland, OR 97207-0849

Attorney for Defendants-Respondents
Multnomah County and Robert G. Skipper

W.G. Kelly Clark
Bouneff Chally Jorgenson
The Logus Building
529 S.E. Grand Avenue
Portland, OR 97214

Attorney for Legislators

Alan Gottlieb
James Madison Building
12500 N.E. Tenth Place
Bellevue, WA 98005

Second Amendment Foundation

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ABSTRACT OF RECORD A-1

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STATEMENT OF THE CASE

NATURE OF THE ACTION

Defendants accept plaintiffs' characterization of the action except for plaintiffs' inaccurate statement that the County ordinance regulates the sale of firearms. (Appellants' brief at 2.) The ordinance regulates public possession of firearms, not sales. It does prohibit use of a single public building (Expo Center) for sale of assault guns.

NATURE OF THE JUDGMENT

Defendants accept plaintiffs' statement, except for their characterization of the Trial Court's holding under Article 1 § 27. The Trial Court did not conclude that assault weapons are "arms" protected by Article 1 § 27.

STATUTORY BASIS FOR APPELLATE JURISDICTION

Defendants accept plaintiffs' statement.

QUESTIONS ON APPEAL

1) Was the Trial Court correct that Ordinance 646's restrictions on possession of assault weapons are consistent with Article 1, Section 27 of the Oregon Constitution because assault weapons are not "protected arms" under that constitutional provision?

2) Was the Trial Court correct in concluding that assault weapons regulated by Ordinance 646 are not covered by Article 1 § 27 because they are in essence military weapons, where the undisputed evidence was that they are designed for military combat and are presented for retail sale to the public in only slightly modified form?

3) Was the Trial Court correct in concluding that, even if assault weapons are protected "arms" under Article 1, Section 27, Ordinance 646 is nonetheless constitutional because it is a reasonable restriction of the right to bear arms?

4) Was the Trial Court correct that Ordinance 646's restriction on possession of assault weapons in the County Expo Center is consistent with ORS 166.245, rather than pre-empted by it, because the Expo Center is a "public place" and a "public building" under ORS 166.370(1) as those terms are defined in state law?

5) Was the Trial Court correct in finding that state law does not preempt the County from collecting fees to cover the costs of background checks on gun purchases?

SUMMARY OF ARGUMENT

Assault weapons regulated by the county ordinance are not "arms" within the meaning of Article 1 Section 27. They are not the modern equivalents of weapons commonly used by Oregon pioneers.

Moreover, assault weapons regulated by the county ordinance are not constitutionally protected "arms" because they are military weapons designed for the battlefield.

Even if assault weapons regulated by the ordinance are protected, the ordinance should be upheld because the regulations reasonably protect public safety; they do not unduly curtail the right to bear arms for self defense.

The prohibition on possession of assault weapons for purposes of sale at the Portland Exposition Center are not pre-empted by ORS

166.245. State law allows local governments to control possession of firearms in public buildings and public places. Further, the pre-emption language in ORS 166.245 was not designed to divest local government of power to regulate possession of firearms on public property.

The Sheriffs fee charged under ordinance 646 to cover the cost of the state mandated background checks on gun purchasers is not preempted by ORS 166.245 because it does not raise revenue nor regulate sales of weapons.

STATEMENT OF FACTS

Defendants do not accept plaintiffs' statement except as noted below.

The central dispute in this case is whether the County's restrictions on public possession of assault weapons violate the "right to bear arms" under the state constitution. The applicable caselaw, discussed infra, requires inquiry into whether assault weapons are advanced weapons of war or merely the modern equivalents of weapons "* * * used by [Oregon] settlers for both personal and military defense." *State v. Kessler*, 289 Or 359, 368 614, P2d 94 (1980).

Much of the evidence in the Trial Court record can be classified as historical in nature. The Trial Court considered this evidence and conducted independent historical research. The result is set forth in an extensive opinion. See Trial Court Findings and Conclusions, ("Snouffer Opinion").

Paragraphs 1-16 in plaintiffs' statement offer as "fact" the version of firearms history plaintiffs unsuccessfully advanced at trial. Except as later noted herein, defendants accept and rely on Judge Snouffer's historical analysis in his Findings and Conclusions. The evidence in the record clearly supports the Trial Court's analysis as shown by Judge Snouffer's own citations to the record and by citations appearing later in this brief.

The pertinent historical facts found by the Trial Court are as follows (footnotes by the court are omitted):

"22. Plaintiffs argue essentially that, because the intellectual concept of a repeating firearm was conceived as early as the 16th Century (9/6/90); 11:26:11-27:25; 11:53:35-54:15; 11:55:08-22), the weapons involved in this case must be given protection by the Oregon Constitution. They contend that this intellectual concept bore fruition in the 1850's. Plaintiffs assert that in the mid-1850's there was on the market a manually operated repeating rifle known as the Volcanic rifle (9/6/90; 11:35:25-37:00) and that some of those rifles supposedly were "exported" to the Oregon Territory. (9/6/90; 13:23:43-24:37; Leslie's Illustrated Newspaper (Oct. 9, 1858), quoted in R. McDowell, Evolution of the Winchester, 100 (1985) [Plaintiff Nichols' Affidavit, Ex. A]). In reality, however, the Volcanic apparently did not work very well due in large measure to its unreliable and under-powered cartridges. The manufacturer went bankrupt after producing firearms for only 2 years between 1855 to 1857. (Barnes Affidavit, p. 17) Plaintiffs' expert, Mr. Aitken, admitted that he did not know if there were any Volcanic rifles in Oregon in 1859. (9/6/90; 13:26:15-25) Plaintiffs have introduced no specific evidence that there were any such rifles in Oregon at the time of the Constitutional Convention, but I infer from the evidence and other authorities cited in the footnotes that it is probable that some volcanics were in Oregon during that era.

23. Even though some Volcanic rifles may have been in Oregon during territorial days, it is clear that manually operated repeating weapons were not "commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era or in 1859...." Delgado, supra at 400. They were not generally available

to Oregon settlers and members of the Oregon Constitutional Convention.

* * * * * [Paragraph 24 is omitted]

25. Automatic weapons, such as involved in this case, did not exist in Oregon during the territorial era. (See paragraphs 27-29, infra). Even repeating rifles were not "commonly used by individuals for personal defense: (Delgado, supra at 400) and there is scant evidence in the record of this case that repeating weapons were available or in use in Oregon in the 1850's. Plaintiffs' own expert admitted also that there were no true semi-automatic weapons available in Oregon in 1859. (9/6/90; 13:32:23-30)

26. The Oregon militia volunteer in 1859 would have possessed a smooth bore, one-shot musket rather than a repeating rifle. (9/6/90; 13:45:50-46:12) The average Oregon pioneer settler would have had a single shot muzzle loading rifle and a repeating pistol (9/6/90; 13:46:25-47:05) but would not have had a semi-automatic repeating rifle (9/6/90; 13:47:10-17). "Anything resembling these [Ordinance 646] weapons would not have been present" during the skirmishes of the 1850's between Oregon settlers and Indians (9/6/90; 13:52:10-31). Indeed even mechanical repeating rifles were not generally available for the major battles fought in the Civil War a few years later. (9/6/90; 13:52:45-53:10)

27. Defendants are correct that there was no such thing as an automatic firearm in the 1850's either in Oregon or elsewhere. The best the firearms industry could produce at the time were primitive, manually operated repeating weapons. The intellectual concept of a repeating weapon was transformed into reality only with the advent of a reliable metal cartridge. (E.g., 9/6/90; 11:29:34-30:10; 11:33:35-34:00; Barnes Affidavit, pp. 16-18) The metal cartridges that were being developed in the 1850's were rim-fire rather than center-fire, and their reliability was poor. The repeating rifle of the day was a "dangerous gadget or novelty item more than an acceptable firearm." (Barnes Affidavit, pp. 15-16) Once the metal cartridge became more reliable in the 1860's and 1870's the firearms manufacturers could develop weapons that used manual or lever action to chamber a bullet into position for firing. (9/6/90; 13:53:20-54:12; P. Cleator, supra at 142, 152-153) It was not until 1862 that this country "saw the first commercially available successful lever action repeating rifle using the improved Henry rimfire metallic cartridge." (Barnes Affidavit, p. 18) It is significant that this was 5

years after the Oregon Constitutional Convention, that there is no evidence in this record (obviously) that Henry rifles were in Oregon in 1857 or 1859, and that the Henry was in any event manually operated rather than automatic.

28. The first reasonably successful semi-automatic firearm was the Gatling gun and it was developed for military use. P. Cleator, supra at 158. It was first produced and patented in November, 1862, and only a very few of them were used late in the Civil War. It did not receive wider use until the 1870's. The Gatling was not automatic.

29. Automatic weapons operate by technology that was unknown to the Oregon settlers. They operate by the expanding gas emitted by the fired cartridge that automatically drives a piston (and other parts) to chamber the next round into position for firing. Plaintiff's expert admitted that the technology for this action was not developed until the turn of the twentieth century. (9/6/90; 11:48:56-29:05; see also P. Cleator, supra at 159; J. Ellis, supra n. 12, at 37-38) The technology was not "envisioned in 1859 by members of the firearms industry, let alone the western settlers." (Barnes Affidavit, p. 20) The gas-operated, automatic loading rifle, which started to be manufactured in the late 1890's, finally became perfected and put into widespread use with the M-1 Garand by the United States Army in 1936. (9/6/90; 11:51:01-52:10)

* * * * * [Paragraphs 30 and 31 are omitted]

32. The record in this case establishes that virtually all of the Ordinance 646 weapons originated as or evolved from military ordinance. Plaintiffs' expert said that the "original intent of probably two-thirds of the weapons on this [Ordinance 646] list was in military application." (9/6/90; 13:39:37-47) He agreed that the weapons are generally copies of military weapons and "are slightly modified and presented in civilian mode." (9/6/90; 13:39:50-40:04) This view is supported by defendant's experts, Barnes and McGuire. (Barnes Affidavit, pp. 8-10, 20-24; McGuire Affidavit, pp. 5-6, 8)

33. Plaintiffs' expert's opinion is buttressed by the United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms (BATF). The BATF was charged with deciding whether to permit assault rifles to be imported into this country. It made a comprehensive study of the features and uses of many of the Ordinance

646 assault weapons. It determined that "the modern military assault rifle contains a variety of physical features and characteristics designed for military applications which distinguishes it from traditional sporting rifles." Report and Recommendation of the ATF Working Group on the Importability of Certain Semiautomatic Rifles, 6 (7/6/89). (Plaintiffs' Ex. #4) These features and characteristics include such things as whether the weapon has a pistol grip and a folding or telescoping stock; whether it is able to accept a large, detachable magazine, a bayonet, a flash suppressor, a silencer, bipods for stability, etc; and whether the weapon is a semi-automatic version of a machine gun. (Many of these same features were considered by the Multnomah County Commissioners.) Attachment 11 to the BATF report, an evaluation of each rifle included in the BATF study, makes it clear beyond any reasonable question that the assault weapons regulated by Ordinance 646 originated as military weapons. The only real difference is that the civilian models supposedly are not capable of fully automatic fire. The manufacturers make them for the civilian market to try to recover their production and development costs. (9/29/90; 14:24:30-25:12) It is clear, however, that they can be converted readily back into the fully automatic, military configuration. (Barnes Affidavit, pp. 11, 13-14; McGuire Affidavit, Ex. E [Congressional testimony of Dr. Roxanne Roberts, p. 92]) The record in this case shows that the weapons listed in Ordinance 646 are military in origin and intent, and thus they are not protected by Article I, § 27.

34. Article I, sec. 27 gives Oregon citizens the right to bear arms for personal defense but not to bear what are essentially military weapons. The Ordinance 646 weapons were "designed for use by troops in the field to engage and destroy an enemy force." (Barnes Affidavit, p. 20; accord, McGuire Affidavit, p. 5: They "were designed for combat." Their "civilian" modification does not lessen their military utility: "Deliberate semiautomatic fire delivered at a sustainable rate...is usually preferable [to automatic fire] for combat." (Ibid.) The weapons are not primarily useful as weapons of self-defense. (Barnes Affidavit, p. 8) The Ordinance 646 weapons "are modern semiautomatic weapons of military warfare." (Barnes Affidavit, p. 27) "[A]utomatic weapons...of modern warfare...have never been intended for personal possession and protection." Kessler supra at 369. They are not the kind of weapons "commonly used by individuals for personal defense." Delgado, supra at 400. They are not protected by Article I, sec. 27. (Snouffer Opinion pp. 14-25).

Following the caselaw guidelines, the Trial Court also addressed whether the challenged regulations reasonably balance the public interest against individual rights to bear arms (here the court assumed arguendo that assault weapons are "arms" protected under Article 1 § 27). The court found these facts:

35. *** However, the parties presented considerable evidence weighing the reasonableness of Ordinance 646 against the dangerousness of the weapons. In order to avoid a remand for retrial, should an appellate court take a different view about the military/civilian nature of assault weapons, this court believes that defendants' evidence on reasonableness preponderates, and Dr. Trunkey's evidence is more convincing. Plaintiffs have failed to overcome their burden to persuade the court that Ordinance 646 is an unreasonable restriction on the right to bear arms. Ordinance 646 obviously imposes inconveniences, as demonstrated by Mr. Stolz. (9/6/90; 15:22:30-42:42) But the hindrances are constitutionally permitted and Ordinance 646 is a "permissibly limited form of intrusion on the right" to bear arms. Boyce, supra at 666.

The following facts (not cited by Judge Snouffer) bear on this question:

The most significant feature of the assault weapon is its capacity to rapidly deliver a massive number of high velocity projectiles. (Supplemental Affidavit of Dr. Donald Trunkey at 2-3, A 2-3.)¹ Each pull of the trigger will fire one round and

¹ Defendants have filed 19 exhibits in this case all of which are included in the record. The first 16 exhibits are so numbered and are included in a volume entitled "Exhibit Volume". The three additional exhibits unfortunately were never numbered. These three additional exhibits are all affidavits and are identified by the name of the affiant.

Included in the 19 exhibits are two affidavits from Dr. Donald Trunkey, M.D. One is numbered as Defendant's Exhibit 7. The second is unnumbered and defendants identify it as
(continued...)

instantly load the next. A typical semiautomatic weapon is capable of firing 21 rounds (bullets) in 4.6 seconds. (Preliminary Injunction Hearing Tape at 14:18:24-14:18:34.) Assault weapons are designed to be spray-fired from the hip (Affidavit of Phillip McGuire at 5-7).

The velocity of an assault weapon projectile is normally two to three times that of ordinary handgun or rifle fire. (Affidavit of Dr. Donald Trunkey, Defendants' Exhibit 7 at 2). Because of the greater velocity, the bullet will "tumble" upon entry into the body; this action greatly increases the destructive capabilities of the projectile. (Defendants' Exhibit 7 at 2). The semi-automatic weapon's rapid-fire capabilities further increases its destructiveness. (Ibid.).

The Portland Exposition Center is a public exhibition hall owned and occupied by Multnomah County. Plaintiff Rose City Gun Collectors were granted a temporary permit to use the facility for holding "swap meets."

The County Ordinance

The key provisions of the ordinance at issue are summarized below.

The public policy bases for the County measure are set forth in legislative findings in § I of Ordinance 646.

¹(...continued)

"Supplemental Affidavit of Dr. Donald Trunkey M.D." abbreviated as ("Sup. Aff. Trunkey.") a copy of which is included in the abstract section of this brief beginning at A-1).

Section III generally prohibits the carrying of any firearm in public buildings (defined in ORS 166.360(4)) and the carrying/discharge of loaded firearms in public places (defined in ORS 161.015(9)).

Ordinance 646 defines specific firearms as "assault weapons." The ordinance subjects assault weapons to special regulations when carried in public. The list of covered firearms is set forth in § II of the ordinance.

Section IV regulates the listed assault weapons. The ordinance does not ban these weapons. It has no bearing, for example, on the possession of assault weapons on private property. When assault weapons are carried in public, however, the measure establishes these limitations:

1. All ammunition must be removed from the chamber, cylinder, clip, or magazine;
2. The weapon must be disassembled into its major component parts; and
3. The weapon must be locked in a gun case and, if in a vehicle, locked in the trunk or area "least accessible to the occupants."

Ord 646 § IV.

Another provision of Section IV bars sale of assault weapons at the County's Exposition Center.

The remainder of the County Ordinance establishes (1) fees to cover the costs of conducting background checks of gun purchasers, as required by state law (§ V), (2) a voluntary firearm safety course (§ VII), and (3) civil penalties (fine and forfeiture) for

violations of the substantive restrictions in the ordinance (§ VIII).

ARGUMENT

I. ORDINANCE 646 IS CONSISTENT WITH ARTICLE 1, SECTION 27 BECAUSE ASSAULT WEAPONS ARE NOT PROTECTED "ARMS".

The Trial Court rejected Plaintiffs' claim that the County ordinance violates Article 1 § 27 of the State Constitution. The court concluded (1) the regulated assault weapons are not "arms" as that term is used in Article 1 § 27 because they are advanced weapons of war, not merely updated versions of arms traditionally used by civilians for self-defense, and (2) even if assault weapons qualify as "arms", the County's regulations reasonably balance the constitutional right against the public interest (public safety).

Plaintiffs' first assignment of error attacks the court's conclusion that assault weapons are not protected under Article 1 § 27. In essence, plaintiffs' ignore the basis for the Trial Court's ruling (that assault weapons are advanced weapons of modern warfare). Instead, they argue these weapons are constitutionally protected because they are merely "self-loading versions of the standard manually-operated rifle" which may have been known to Oregon pioneers at the time of statehood. Plaintiffs' br. at 15.

Preliminarily, it should be noted that the Trial Court must be affirmed on the constitutional issue if its ultimate conclusion that assault weapons are not "arms" under Article 1 § 27 is correct. Plaintiffs' version of the connection between these weapons and those of the 19th Century is beside the point if, as shown later in this brief, the Trial Court's characterization of

them as modern combat weapons is correct. See, State v. Kessler, 289 Or 395, 692 P2d 610 (1984) (discussed infra).

Plaintiffs' first assignment of error contains two critical flaws (apart from ignoring the combat-weapon issue): (1) it misstates the legal test for determining whether a non-combat weapon is an "arm" under Article 1 § 27 and (2) it vastly underplays the differences between modern assault weapons and the primitive firearms actually used by the pioneers.

A. The Legal Standard

Article I, Sec. 27, of the Oregon Constitution reads:

The people shall have the right to bear arms for the defence [sic] of themselves, and the State, but the Military shall be kept in strict subordination to the civil power.

Plaintiffs alleged the County's restrictions on assault weapons violate their right to bear arms for self-defense. To prevail, they had to establish (1) assault weapons are "arms" within the scope of Article 1, Sec. 27, and (2) the restrictions exceed the County's authority to reasonably regulate the manner of possessing assault weapons. State v. Kessler, 289 Or 359, 614 P2d 94 (1980) and State v. Delgado, 298 Or 395, 692 P2d 610 (1984). Plaintiffs prevailed on neither point.²

² In attacking this municipal legislation on constitutional grounds, plaintiffs had to overcome the presumption of validity. The presumption is at the core of the separation of powers doctrine. McQuillan, Municipal Corporations 3d, § 20.26 at 87 (1988); Lydo Enterprises v. City of Las Vegas, 745 F2d 1211, 1213 (9th Cir 1984). The burden was (and is) on plaintiffs to show this measure infringes a constitutional right. They have not carried this burden.

The leading cases on the scope of the term "arms" under Article I, § 27, are *State v. Kessler*, 289 Or 359, 614 P2d 94 (1980), and *State v. Delgado*, 298 Or 395, 692 P2d 610 (1984). Both involved convictions for violations of ORS 166.510 (illegal possession of a blackjack or switchblade knife). In each case the court held that the weapons in question (a club in *Kessler*; a switch-blade knife in *Delgado*) were "arms" and that Article I, § 27, prevented the state from banning "mere possession" of such arms. Critically, neither case involved a firearm or the constitutionally permissible restrictions on firearms. The present case does.

The only cases construing Article I, § 27, in the context of firearms involve conventional handguns, not semiautomatics like the AK47.³ In these cases, the courts assume without discussion that handguns are "arms," but uphold the governmental restrictions on their possession. See *State v. Boyce*, 61 Or App 662, 658 P2d 577 (1983) (upholding city's right to ban possession of loaded firearm in public); *State v. Cartwright*, 246 Or 120, 418 P2d 822 (1966) (upholding statute prohibiting possession of firearms by felons).

In *Kessler, supra*, (the billyclub case) the court discussed the scope of the term "arms" in Article I, § 27, stating:

³ Delgado included a footnote to the effect that handguns capable of several shots in succession are "arms". 298 Or at 400, n 4. In dicta, the court noted that revolvers are descendants of single shot handguns "carried by many men for self-defense." We argue in this case that assault guns, unlike revolvers, are not merely modern versions of firearms civilians once commonly used for self-defense but are instead designed as weapons of war.

The term "arms" is also subject to several interpretations. In the colonial and revolutionary war era, weapons used by militiamen and weapons used in defense of person and home were one and the same. A colonist usually had only one gun which was used for hunting, protection, and militia duty, plus a hatchet, sword, and knife. G. Neumann, *Swords and Blades of the American Revolution*, 6-15, 252-254 (1973). When the revolutionary war began, the colonists came equipped with their hunting muskets or rifles, hatchets, swords, and knives. The colonists suffered a severe shortage of firearms in the early years of the war, so many soldiers had to rely primarily on swords, hatchets, knives, and pikes (long staffs with a spear head). W. Moore, *Weapons of the American Revolution*, 8 (1967).

Therefore, the term "arms" as used by the drafters of the constitution probably was intended to include those weapons used by settlers for both personal and military defense. The term "arms" was not limited to firearms, but included several handcarried weapons commonly used for defense. The term "arms" would not have included cannon or other heavy ordnance not kept by militiamen or private citizens.

389 Or at 368 (emphasis added).

In Delgado, supra (the switchblade case), the court repeated the test:

The appropriate inquiry in the case at bar is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal self-defense during either the revolutionary and post-revolutionary era or in 1859 when Oregon's constitution was adopted. 298 Or at 400-401 (Footnote omitted.)

In Kessler, supra, the Supreme Court was aware of the danger that its historical-use constitutional test could be misconstrued to cover modern combat weapons having roots in 19th century firearms. The Court took pains to narrow the scope of its ruling, so as to exclude combat weapons from protection under Article 1 § 27. Kessler, supra at 369. Judge Snouffer agreed with defendants that

the assault weapons regulated by the county measure are excluded from Article 1 § 27 because they are modern weapons of war. Snouffer Opinion p. 26 ("However the Ordinance 646 weapons are in essence military weapons; they are not the kind of "arms" that Article 1, Sec. 27 protects.")

Where non-combat arms are involved, the central question under Article 1 § 27 is whether a given weapon is the modern equivalent of one commonly used by individuals for self defense around the time of statehood. Kessler, supra. After reviewing an extensive factual record developed by the parties and after considering outside historical sources, the Trial Court concluded that assault weapons do not fall in this category.

Judge Snouffer found, in pertinent part:

26. The Oregon militia volunteer in 1859 would have possessed a smooth bore, one-shot musket rather than a repeating rifle. (9/6/90; 13:45:50-46:12) The average Oregon pioneer settler would have had a single shot muzzle loading rifle and a repeating pistol (9/6/90; 13:46:25-47:05) but would not have had a semi-automatic repeating rifle (9/6/90; 13:47:10-17). "Anything resembling these [Ordinance 646] weapons would not have been present" during the skirmishes of the 1850's between Oregon settlers and Indians (9/6/90; 13:52:10-31). Indeed even mechanical repeating rifles were not generally available for the major battles fought in the Civil War a few years later. (9/6/90; 13:52:45-53:10)

27. Defendants are correct that there was no such thing as an automatic firearm in the 1850's either in Oregon or elsewhere. The best the firearms industry could produce at the time were primitive, manually operated repeating weapons. The intellectual concept of a repeating weapon was transformed into reality only with the advent of a reliable metal cartridge. (E.g., 9/6/90; 11:29:34-30:10; 11:33:35-34:00; Barnes Affidavit, pp. 16-18) The metal cartridges that were being developed in the 1850's were rim-fire rather than center-fire, and their reliability was poor. The repeating rifle of the day was a "dangerous gadget or novelty item more than an acceptable

firearm." (Barnes Affidavit, pp. 15-16) Once the metal cartridge became more reliable in the 1860's and 1870's the firearms manufacturers could develop weapons that used manual or lever action to chamber a bullet into position for firing. (9/6/90; 13:53:20-54:12; P. Cleator, supra at 142, 152-153) It was not until 1862 that this country "saw the first commercially available successful lever action repeating rifle using the improved Henry rimfire metallic cartridge." (Barnes Affidavit, p. 18) It is significant that this was 5 years after the Oregon Constitutional Convention, that there is no evidence in this record (obviously) that Henry rifles were in Oregon in 1857 or 1859, and that the Henry was in any event manually operated rather than automatic. (Snouffer Opinion, p. 19-20).

The Trial Court concluded, in pertinent part:

3. Plaintiffs have shown that the Ordinance 646 weapons bear some similarity to weapons known by the Oregon constitutional authors even though repeating rifles were not "commonly used" by Oregon settlers for personal self-defense. Ibid at 26. (Emphasis added).

Even if one assumes the 19th Century manually-operated repeating rifle is the historical antecedent of the semi-automatic assault weapon, the fact remains that the early repeaters were not commonly used by Oregon settlers for self defense. The settlers used single shot, muzzle-loading muskets for self defense and hunting; repeat fire weapons were "dangerous gadgets or novelty items" (Barnes Affidavit pp 15-16 A 27-28). Indeed, Plaintiffs do not contend otherwise. Their concession that Oregon pioneers did not commonly use repeating weapons warrants rejection of this assignment of error.

Under Kessler and Delgado, the common-use test is the relevant inquiry. Plaintiffs are wrong to argue, as they do, that because early repeat-fire weapons (the "Volcanic"; the "Henry") may have been known about or advertised in 19th Century Oregon, their so-

called descendants (assault guns) are "arms" under Article 1 § 27.

Plaintiffs' mistake can be traced to their reading of Delgado, supra. They read it to give constitutional protection to weapons that were "foreseeable in 1859." Plaintiffs' Br. at 17. They incorrectly believe their burden in this case is merely to establish that the evolution of semiautomatic fire was foreseeable when the state constitution was drafted.⁴

Delgado gave constitutional protection to the switchblade because (1) its historical antecedent (jackknife) was commonly used by Oregon pioneers and (2) the technological differences between the two knives were not so great that the switchblade " . . . could not have been within the contemplation of the constitutional drafters." 298 Or at 403. Manifestly, plaintiffs overlook two key points. First, it is undisputed that the weapons they say are the historical antecedents of modern assault weapons were not commonly used by Oregon pioneers. Second, this case, unlike Delgado, involves firearms; more particularly, firearms capable of such destruction that they are property classified as weapons of war.

Plaintiffs' attempt to dissect the caselaw into a simplistic "foreseeability" analysis should be rejected by this court.

Plaintiffs also contend the Trial Court followed their reading of Delgado and classified assault weapons as constitutionally

⁴ Even if Plaintiff's foreseeability theory was correct, the Trial Court concluded and the weight of the evidence provided that semi-automatic weapon technology was not "envisioned in 1859 by members of the firearms industry, let alone the western settlers." Snouffer Opinion at 21, quoting defendants expert Robert J. Barnes.

protected arms because they were foreseeable in 1859. Plaintiffs' Br. at 20. This is incorrect. The Trial court did not classify assault weapons as "arms" in the portion of its opinion cited by Plaintiffs. In pertinent part, Judge Snouffer stated,

"Therefore, to the extent that the assault weapons involved in this case are rapidly operating equivalents of weapons that were known by the Oregon pioneers, they are "arms" within the meaning of Article 1 Section 27."

Snouffer Opinion at 21-22. (emphasis added)

Whether or not the quoted text incorrectly converts the "common use" test established in the caselaw to a different formulation (arms "known to pioneers"), it cannot be construed as a ruling that assault weapons are constitutionally-protected arms. The emphasized words clearly signal the Trial Court's intent to make this a passing point, en route to the decisive determination that the weapons are not constitutional "arms" because they are modern weapons of war. This court should not be sidetracked by such dicta.

Apart from distorting the legal test to support their position, plaintiffs also grossly overstate the similarity between 19th century firearms and the high-power semi-automatics at issue here. As shown next, in connection with the combat-weapon question, semiautomatic assault weapons are categorically distinct from the primitive firearms of the mid 19th Century, including the early repeaters (e.g. the Volcanic).

The closest functional "equivalent" to the modern assault weapon from the 19th Century was the gatling gun, a military weapon

introduced during the Civil War. P.E. Cleator, *Weapons of War* at 158 (1967). (Defendants' Exhibit 14).

Plaintiff's own expert concluded the gatling gun (capable of firing hundreds of rounds per minute) was the only weapon from the Civil War period with a comparable rate of fire to semi-automatic weapons. (P.I. Hearing Tape at 13:48-13:49) There is no evidence that ordinary citizens commonly possessed gatling guns for personal self-defense in Oregon at the time the Constitution was adopted.

The first assignment of error should be rejected as meritless. Plaintiffs misstate the law and the facts. Assuming, arguendo, that assault guns are not combat weapons, they are nonetheless outside the scope of Article 1 § 27. No firearm reasonably classifiable as the historical antecedent of an AK-47 or similar weapon was commonly used for self defense in Oregon at the time of statehood.

II. THE TRIAL COURT CORRECTLY CHARACTERIZED ASSAULT WEAPONS AS ADVANCED WEAPONS OF WAR; THEREFORE, THEY ARE OUTSIDE THE SCOPE OF ARTICLE 1 SECTION 27.

In this assignment of error, plaintiffs maintain the Trial Court erred in concluding that assault weapons regulated by the County ordinance are outside the scope of Article 1 § 27 because they are essentially modern weapons of war. Judge Snouffer found:

34. Article I, Sec. 27 gives Oregon citizens the right to bear arms for personal defense but not to bear what are essentially military weapons. The Ordinance 646 weapons were "designed for use by troops in the field to engage and destroy an enemy force." (Barnes Affidavit, p. 20; accord, McGuire Affidavit, p. 5: They "were designed for combat." Their "civilian" modification does not lessen their military utility: "Deliberate semiautomatic fire delivered at a sustainable rate...is usually preferable [to automatic fire] for combat." (Ibid.) The weapons

are not primarily useful as weapons of self-defense. (Barnes Affidavit, p. 8). The Ordinance 646 weapons "are modern semiautomatic weapons of military warfare." (Barnes Affidavit, p. 27). "[A]utomatic weapons...of modern warfare...have never been intended for personal possession and protection." Kessler supra at 369. They are not the kind of weapons "commonly used by individuals for personal defense." Delgado, supra at 400. They are not protected by Article I, sec. 27. (Cite)

Preliminarily, it should be noted that the lower court's ruling on the constitutional issue must be affirmed if, as the Trial Court found (and the record supports) assault weapons are not the modern equivalent of weapons commonly used for self defense by settlers around the time of statehood. Plaintiff's failure to contest the Trial Court's findings on this point, or the evidentiary basis for them in the record, should make the second assignment of error moot. State v. Kessler, supra; State v. Delgado, supra.

The Supreme Court stated in Kessler:

The revolutionary war era ended at a time when the rapid social and economic changes of the so-called Industrial Revolution began. The technology of weapons and warfare entered an unprecedented era of change. P. Cleator, Weapons of War, 143-152 (1967). Firearms and other hand-carried weapons remained the weapons of personal defense, but the arrival of steam power, mechanization, and chemical discoveries completely changed the weapons of military warfare. The development of powerful explosives in the mid-nineteenth century, combined with the development of mass-produced metal parts, made possible the automatic weapons, explosives, and chemicals of modern warfare. P. Cleator, Weapons of War, 153-177 (1967).

These advanced weapons of modern warfare have never been intended for personal possession and protection. When the constitutional drafters referred to an individual's "right to bear arms", the arms used by the militia and for personal protection were basically the same weapons. Modern weapons used exclusively by the military are not "arms" which are commonly possessed by individuals for defense, therefore, the term "arms" in the constitution does not include such weapons.

289 Or at 369 (emphasis added).

The weapon at issue in Kessler was a spring-loaded pocketknife. The court held that such weapons were similar to those commonly possessed for self defense by Oregon pioneers. The above quoted language was the court's attempt to suggest that the "modern equivalent" approach has limits. Plaintiffs would stretch the limits way beyond breaking, to the point of absurdity. The spring-action of the modern switchblade may not make it so different from the bowie knife that the two deserve different constitutional treatment. This case is different. Semiautomatic weapons, such as the AK47 and the Uzi, were designed for the modern battlefield. If there are remote similarities to the manual-action Volcanic or Henry repeater of the late 19th century, these considerations merit no constitutional significance. They are, at most, matters of peculiar interest to weapons history enthusiasts.

The record supports the Trial Court's determination. As shown by the record citations below, as well as citations in the Trial Court's opinion, the regulated assault weapons are modern combat weapons, by virtue of their design, rate of fire and destructiveness.

A. The Military Features and Origins of Assault Weapons

The most significant feature of the assault weapon is its capacity to rapidly deliver a massive number of high velocity projectiles. (Supp. Aff. Trunkey at 10-11, A 10-11.) A semiautomatic is capable of very rapid fire because each pull of the trigger will fire one round and instantly load the next round.

See, Defendants' Exhibit 14 at 157-58.) Unlike conventional sporting firearms, which are designed to be fired from the shoulder and depend upon the accuracy of a precisely aimed bullet, assault weapons are designed to be spray-fired from the hip. (Affidavit of Phillip McGuire at 5-7.)

Assault weapons are characterized by their capacity to accept large, detachable ammunition magazines and to empty the magazine rapidly. The combination of these features gives these weapons the firepower suitable to military combat situations.⁵ These weapons are capable of firing as many as 21 rounds (bullets) in 4.6 seconds or up to 250-300 rounds per minute. (9/6/90 Preliminary Injunction Hearing Tape at 14:18:24-18:33 and 14:48:36 to 14:50:00.) A display of the massive power of an assault weapon is in the record in a video-tape viewed by the Trial Court. The enormous destructive power of these weapons is beyond reasonable debate. (See Defendants Exhibit 7, and Supp. Aff. Trunkey, A-1-11.)

The Trial Court concurred in the County Commission's legislative judgment that assault weapons should be distinguished from firearms traditionally used for hunting, target shooting, and self-protection. As Judge Snouffer noted, the Commission's findings follow those of the Bureau of Alcohol, Tobacco and Firearms ("ATF"), the agency responsible for enforcement of federal firearms laws.

⁵ One technical writer describes the FAMAS MAS 223, a listed rifle, as offering "an extremely high level of fire power." J. Lewis, *The Gun Digest Book of Assault Weapons* 165 (2d Ed 1989) ("Lewis 2d Ed").

In July 1989, ATF barred importation of various assault rifles, including virtually all of the imported assault rifles covered in Ordinance 646, because they do not meet the requirements of the Gun Control Act of 1968. That is, these guns are not "of a type [which is] generally recognized as particularly suitable for or readily adaptable to sporting purposes." 18 USC § 922(1). This determination, made after a comprehensive study of the features and uses of many of the same assault rifles covered by Ordinance 646, was based on ATF's conclusion that "the modern military assault rifle contains a variety of physical features and characteristics designed for military applications which distinguish it from traditional sporting rifles." (*Report and Recommendations of the ATF Working Group on the Importability of Certain Semiautomatic Rifles* at 6 (July 6, 1989), Defendants' Exhibit 4.)

Each of the assault rifles listed in Ordinance 646 has some or all of the military features cited by ATF. These include:

1. Ability to accept a large detachable magazine.

As ATF pointed out, "[v]irtually all modern military firearms are designed to accept large, detachable magazines" which provide a fairly large ammunition supply and the ability to rapidly reload, to be contrasted with semiautomatic sporting firearms, which are generally sold "with a relatively small magazine capacity." (Defendants' Exhibit 4 at p. 6.) ATF analysis of individual assault rifles confirms that the rifles affected by the Multnomah County ordinance are sold with large, detachable magazines. For example, 30-round magazines are standard with the AK Avtomat

Kalashnikov (AK) models, the Steyr AUG, and the Beretta AR-70, and a 20-round magazine is standard on the Springfield Armory SAR-48. Moreover, the magazine capacity of any of these rifles can be expanded to as many as 100 rounds with optional accessories. (Defendants' Exhibit 4, Attachment 11, Evaluation of Specific Rifles on Suspension List)⁶

2. Pistol grips.

Virtually all of the assault rifles covered by the ordinance have protruding pistol grips which allow the shooter to spray fire the weapon while maintaining its stability. (Defendants' Exhibit 4, Attachment 11) and (Defendants' Exhibit 8, pictures). In contrast, almost no sporting firearms feature such grips. They are shot from the shoulder, not spray-fired from the hip.

3. Folding/telescoping stocks.

Most assault rifles affected by the ordinance have folding or telescoping stocks. They sacrifice accuracy for concealability and mobility in close combat. (Defendants' Exhibit 4, Attachment 11.) This feature's "fundamental advantage is for military purposes, and it is usually not found in the traditional sporting rifle." (Defendants' Exhibit 4 at 7.)

4. Flash suppressors.

⁶ Attachment 11 to the ATF Report provides a description of the characteristics of each weapon studied, including many affected by the ordinance. For the court's convenience, the county has also assembled a series of photographs and diagrams (Defendants' Exhibit 8) depicting some of the features of the weapons regulated by the ordinance at issue.

Most rifles listed in the Ordinance have a threaded barrel to accommodate a flash suppressor (Defendants' Exhibit 4, Attachment 11). This feature allows the shooter to remain concealed at night, an obvious advantage in combat but of no particular benefit for traditional firearms uses. (Defendants' Exhibit 4 at 7.)

5. Other military features.

Many of the assault rifles listed in the ordinance also have a variety of other special military features which ATF found differentiated them from non-military firearms. Virtually all the listed assault rifles have the capacity to accept a bayonet, most have bi-pods for stability when firing from a prone position, some have night sights to aid in targeting in poor light, and some models even come equipped with grenade launchers. (Defendants' Exhibit 4, Attachment 11.)

The ATF found that many of the assault rifles listed in the ordinance were designed as semi-automatic versions of automatic machine guns designed for military combat. (Defendants' Exhibit 4 at 8, and Attachment 11.) As the Trial Court found, these weapons are inexpensively and easily convertible into machine guns. (Affidavit of Robert J. Barnes at 13-14, A-25-26.)

The Multnomah County Ordinance covers assault pistols as well. Like the rifles, the listed assault pistols come with large capacity magazines and are designed for rapid spray fire in combat situations. As one enthusiast has written, "[t]he assault pistol's forte is the capability of delivering an impressively large number of shots in a rapid, roaring staccato, without need to pause even

briefly to slam in a fresh magazine." (See, Excerpts from J. Lewis, The Gun Digest Book of Assault Weapons, 2ded, (1989). Defendants' Exhibit 6 at 49.)

The record shows the assault pistols covered by the ordinance, like the rifles, are simply semiautomatic versions of submachine guns. For example, the Uzi pistol, which accepts magazines holding between 20 and 32 rounds, is "a shortened and lightened modification of the Uzi submachine gun, with a mechanism permitting semiautomatic fire only." *Janes Infantry Weapons, 1988-89* at 29 (1988). (Defendants' Exhibit 9.) See also, Defendants' Exhibit 6, at 68.

Finally, the ordinance also covers several shotguns with enormous destructive power. A test report on the SPAS-12 shotgun states that its ammunition capacity of nine rounds "would * * * suggest that the gun is designed for violence" and concludes that "there is nothing sporting about the gun's configuration * * *." (Defendants' Exhibit 10, at 231, 233.)

The Multnomah County ordinance also includes a shotgun named the "Street Sweeper." The ominous advertisement for the "Street Sweeper" promises that it "delivers 12 rounds in less than three seconds," labels it "the machine designed to clean thoroughly on the first pass," and proclaims to potential buyers that it is time to use the "Street Sweeper" for "Spring Cleaning." See, Defendants' Exhibit 12.

Plaintiffs' own weapons expert, Terry Aitken, admitted at the preliminary injunction hearing: "The original intent of probably

two-thirds of the weapons on this list [Ordinance No. 646] was in military applications." (P.I. Hearing Tape at 13:39:37-39:47)

Mr. Aitken also stated under cross-examination:

Q So when they [assault weapons] wind up in the hands of civilians, they are generally copies of military weapons?

A These are products [weapons listed in Ord 646] here are slightly modified and presented in civilian mode, yes.

(P.I. Hearing Tape at 13:39:46-40:05) (Emphasis added.)

The assault rifles, pistols and shotguns regulated by the Multnomah County ordinance are plainly modern weapons of military warfare designed for one purpose: to kill or incapacitate as many people as possible as quickly as possible. Plaintiffs' own expert says they are only "slightly" modified from the original military issue. In terms of constitutional law analysis, the fact that some civilians find these combat weapons desirable for self-defense is irrelevant.

The common features among these weapons, such as bayonet lugs, flash suppressors, silencer capability, special grips (some even had grenade launchers), etc., are not merely "cosmetic." Plaintiffs would have the Court believe these features make the weapons merely "scary" to see, but not more lethal. All of these specialized features are designed to maximize destructive power. With a bi-pod support, an assault gun can function like a little cannon. (McGuire Affidavit at 5-9, Barnes Affidavit at 9-15, A 21-27.) The function, not the appearance, is the key legal point.

Plaintiffs' second assignment of error should be dismissed. The Trial Court correctly held that the regulated weapons are not "arms" under Article 1 § 27 because they are military weapons; "they are not the kind of "arms" that Article 1 § 27 protects." Snouffer Opinion at 26.

III. EVEN IF ASSAULT WEAPONS ARE "ARMS" UNDER THE STATE CONSTITUTION, THE COUNTY'S RESTRICTIONS REASONABLY BALANCE THE PUBLIC INTEREST AND PRIVATE RIGHTS.

A. The Legal Standard

Plaintiffs next argue the Trial Court erred in holding that, even if assault weapons are "arms" within the coverage of Article 1 sec. 27, the county regulations are constitutional because they are a permissibly limited intrusion on the right to bear arms. Plaintiffs' point in this assignment of error is that the regulations violate Article 1 sec. 27 because they effectively prevent use of these allegedly protected arms for self-defense.

The ordinance requires the weapons to be unloaded, disassembled (into major components) and locked in a case when carried in public. Ordinance 646 sec. IV. The Trial Court found:

35. Neither constitution nor statute prohibits Multnomah County from regulating assault weapons as defined by Ordinance 646. Therefore it is not essential that the court consider whether the Ordinance is a "reasonable" or balanced restriction of constitutional rights. See, e.g., Kessler, supra at 370; Delgado supra at 403; State v. Blocker, 291 Or 255, 259-260 (1981); and State v. Boyce, 71 Or App 662, 665-666 (1983). However, the parties presented considerable evidence weighing the reasonableness of Ordinance 646 against the dangerousness of the weapons. In order to avoid a remand for retrial, should an appellate court take a different view about the military/civilian nature of assault weapons, this court believes that defendants' evidence on reasonableness preponderates, and Dr. Trunkey's evidence is more

convincing. Plaintiffs have failed to overcome their burden to persuade the court that Ordinance 646 is an unreasonable restriction on the right to bear arms. Ordinance 646 obviously imposes inconveniences, as demonstrated by Mr. Stolz. (9/6/90; 15:22:30-42:42) But the hindrances are constitutionally permitted and Ordinance 646 is a "permissibly limited form of intrusion on the right" to bear arms. Boyce, supra at 666.

Plaintiffs seem to believe that Article 1 sec. 27 guarantees Oregonians the right to walk the streets with assembled, loaded AK47's (for example) because they might be needed for self defense, regardless of the public interest, and regardless of the other available means of self-defense. Fortunately, however, the constitutional guarantee is not so rigid.

As Judge Snouffer noted, the right to bear arms granted by Article I, § 27, is not absolute. Government may enact reasonable restrictions designed to balance the individual right against societal interests. In *Kessler, supra*, the court stated:

* * * The courts of many states have upheld statutes which restrict the possession or manner of carrying personal weapons. The reasoning of the courts is generally that a regulation is valid if the aim of public safety does not frustrate the guarantees of the state constitution. For example, many courts have upheld statutes prohibiting the carrying of concealed weapons, see, e.g., *State v. Hart*, 66 Idaho 217, 157 P2d 72 (1945); and statutes prohibiting possession of firearms by felons, see, e.g., *State v. Cartwright*, 246 Or 120, 418 P2d 822 (1966).

289 Or at 370.

In a case that followed *Kessler, State v. Blocker*, 291 Or 255, 630 P2d 824 (1981), the court took pains to note that the criminal statute challenged in both cases (ORS 166.510) was flawed because it banned mere possession of the weapon. The law did not

accommodate the constitutional right, but rather negated it. The court explained in *Blocker*:

What we held in *Kessler*, and iterate here, seems to raise concerns on the part of the state which we believe to be groundless. Our decision in neither case goes to the question of permissible legislative regulation of the manner of possession or of regulation of the use of the billy. Indeed, in *Kessler*, we expressly noted the possibility of that kind of regulation. See the discussion in 289 Or at 369-370, 614 P2d 94, 99.

This state has several such regulatory statutes, with which we are not concerned in this case: ORS 166.220(1) prohibiting possession of a dangerous weapon with intent to use such weapon unlawfully against another; ORS 166.240, prohibiting carrying certain weapons concealed about one's person; ORS 166.250, prohibiting carrying any firearm concealed upon the person or within any vehicle without a license to do so.

On the other hand, ORS 166.510, with which we are here concerned, is not, nor is it apparently intended to be, a restriction on the manner of possession or use of certain weapons. The statute is written as a total proscription of the mere possession of certain weapons, and that mere possession insofar as a billy is concerned, is constitutionally protected.

291 Or at 259-260.

In *State v. Delgado*, *supra*, 298 Or at 403, the court stated:

We stress again, as we have stressed before, that this decision does not mean individuals have an unfettered right to possess or use constitutionally protected arms in any way they please. The legislature may, if it chooses to do so, regulate possession and use.

See also *State v. Boyce*, 61 Or App 662, 665 n 2, 658 P2d 577, *rev den*, 295 Or 122 (1983), discussed below.⁷

⁷ The power of the state to regulate the "manner of possession" of arms protected under Article I, section 27 has been specifically delegated to local elected officials, at least with respect to possession of firearms and ammunition in public places. See ORS 166.245. This case involves the legitimate exercise of that delegated legislative authority by local officials.

The leading Oregon case involving the constitutionality of a firearm restriction is *State v. Boyce, supra*. Defendant was convicted for violating a Portland ordinance making it unlawful to carry a loaded firearm in public. Defendant relied on *Kessler, supra*, and *Blocker, supra*, to invalidate the ordinance. Judge Gillette distinguished those cases as follows:

The most important distinction between *Blocker* and this case is that the statute in *Blocker* and *Kessler* and the ordinance here are fundamentally different. The statute, ORS 166.510(1), proscribed the "mere possession" of certain weapons, and that was the characteristic that made it unconstitutional. The Portland ordinance, on the other hand, does not proscribe the mere possession of anything. Under it, an individual may possess both a firearm and ammunition. He may even possess a loaded firearm, so long as he is not in a public place. In a public place, he may possess both a firearm and ammunition, so long as the ammunition is not in the chamber, cylinder, clip or magazine. Thus, the quality that rendered ORS 166.510 unconstitutional is not present in the Portland ordinance.

61 Or App at 665.

The court went on to stress the qualified nature of the right granted under Article I, § 27:

1. The ordinance does regulate the manner of possession, something that *Kessler* and *Blocker* both recognize as permissible when the regulation is reasonable. In fulfilling its obligation to protect the health, safety and welfare of its citizens, a government body must sometimes pass legislation that touches upon a right guaranteed by the state or federal constitution. Such an encroachment is permissible when the unrestricted exercise of the right poses a clear threat to the "interests and welfare of the public in general," *Christian et al., v. La Forge*, 194 Or 450, 462, 242 P2d 797 (1952), and the means chosen by the government body do not unreasonably interfere with the right.

2. This is a case where a restrained exercise of the police power is permissible. As *Kessler* points out, and as we think obvious, firearms are extraordinarily dangerous. The danger is particularly severe when the

firearms are in public places and loaded. Portland has identified a need to protect its citizens from the hazards that are created when people are permitted to roam free with loaded guns at their sides. The City's assessment was reasonable, and it chose a permissibly limited form of intrusion on the right.

Section 27 was intended, in part, to enable people to protect their property and themselves. When a threat to person or property arises in the victim's home or other private place, the ordinance will not interfere at all with the victim's defense capacity. It is true, on the other hand, that, when the threat arises in a public place, the fact that a person must have any ammunition separated from his firearm will hinder him to the extent that he is put to the trouble of loading the weapon. However, given the magnitude of the City's felt need to protect the public from an epidemic of random shootings, we think that the hindrance is permissible.

61 Or App at 665-66. (Emphasis added; footnotes omitted.)

The Multnomah County ordinance regulates public possession of one type of dangerous firearm, assault weapons. It does not ban these weapons. The ordinance represents the County Commission's effort to balance public safety concerns against the interests of individuals who wish to possess these high power firearms in public. See Legislative Findings in § 1, Ord 646.

The County Commission's determination that public safety is jeopardized by unrestricted public possession of assault guns should not be judicially supplanted or second-guessed. See *State v. Boyce, supra*. See also, *Hale v. City of Columbus, Ohio*, No. 89AP-1365, slip op at 4-5 (Court of Appeals of Ohio, Franklin County, June 28, 1990) (upholding assault weapon ban by city and acknowledging "strong presumption" that legislative findings on public safety are valid) (Opinion has not been reported a copy is attached as Defendant's Exhibit 5). The balance struck by the

County Commission should be overturned only if it unreasonably interferes with plaintiffs' right of self-defense. *Boyce, supra*.

In applying the constitutional standard, the Court should note that it is permissible under *Boyce, supra*, for the County to take into account the dangerousness of the weapon (assuming it is an "arm" under Article 1 § 27) when it fashions a regulatory scheme. The following aspects of the County ordinance reflect the overall scheme:

1. Because of their great firepower and consequent danger assault weapons carried in public must be unloaded and disassembled in a case;

2. The ordinance applies to public buildings and public places only; not to private property;

3. Firearms that are not listed as assault weapons, of which there are many, may be carried fully assembled in public, so long as they are unloaded; e.g. semi-automatic handguns that take magazines of 20 rounds or less.

B. Evidence That Assault Weapons Threaten Public Safety

The decision by the Multnomah County Commission to regulate public possession of assault weapons was based on compelling evidence that the features and firepower of these weapons made them a serious public safety threat.

A study of criminal use of assault weapons was conducted by Cox Newspapers, based on a computer analysis of over 42,000 firearms trace requests from January 1, 1988, to March 17, 1989. *Assault Weapons Muscle in on Front Lines of Crime*, The Atlanta

Journal/Constitution, May 21, 1989, at A-1. (Defendant's Exhibit 13) The study found:

a. Although assault weapons account for only 0.5% of the privately used firearms in the United States, they were used in one of every ten crimes resulting in a firearms trace. An assault weapon is 20 times more likely to be used in crime than a conventional firearm.

b. The use of assault weapons in crime rose more than 78% in 1988 over 1987 and "[f]igures for the first three months of 1989 show the trend toward assault guns continues to grow."

c. Assault weapons accounted for nearly one of every three guns traced to organized crime.

d. Assault weapons count for 12.4% of all narcotics firearms traced.

The County concluded that the disproportionate use of assault weapons for criminal purposes endangered both the public and law enforcement personnel. See Ord 646, § I(K). See also, McGuire Affidavit Exhibits D-H, Barnes Affidavit at 14 A26.⁸ The exhibits to the Phillip McGuire Affidavit, which consist of physicians' and police officials' statements made to Congress in 1989, graphically describe the threat to public safety these weapons pose. For example, Dr. Roxanne R. Roberts, Trauma Surgeon and Associate

⁸ Mr. Barnes' points out the danger assault weapons pose to even someone wearing so-called "bullet proof" vests. Contrary to Mr. Nichol's testimony for plaintiffs, Mr. Barnes states that most assault rifle cartridges "experienced a high degree of success during tests conducted on several types of body armor" including the common level 2 and 2A routinely worn by most police officers. See, Barnes Affidavit at 14, A 26.

Director, Cook County Hospital Trauma Unit, Chicago, Illinois, states in part:

We serve an inner city population with a high rate of violent crimes, many of which are drug or gang-related. However, what has traditionally been labeled as urban violence is now being seen in communities formerly thought of as enclaves of safety. The slaughter of innocent school children in Stockton, California, is one such example.

In the nine years since I have been at Cook County Hospital, the profile of penetrating trauma has shifted. In the past, the typical victim would have sustained a single, medium-velocity handgun injury to an isolated body region. Many of the chest and extremity injuries just required a diagnostic work-up, some simple non-operative treatment, and observation alone. Only approximately 20 percent would actually need operative intervention.

* * * * *

Recently, we have observed a disturbing trend. Victims are now coming in with multiple bullet wounds through many different parts of their bodies, in shock, barely alive. Many times, it is difficult to decide which organ system to address first. It is not atypical to have several such victims come in, especially on a Friday or Saturday night, and require immediate lifesaving operative intervention.

* * * * *

The key that ties these victims together and has made a change in the penetrating trauma profile is the wounding agent. The most popular of these weapons in our city are the Tech-9, MAC-9, 10 and 11, and the Uzi. These are high-velocity, nine-millimeter weapons and cost approximately \$300 apiece on the streets of Chicago.

With an hour of time, a drill, and a screw, the Uzi can be turned into a fully automatic weapon that will discharge an entire 30 rounds with one touch of a finger. High-velocity weapons are much more deadly than the medium velocity handguns of old.

When a high-velocity bullet hits the body, it forms a temporary cavity and expands the cylindrical permanent cavity cut by the bullet to 10 to 15 times the diameter

of the bullet. Now, with these automatic weapons, this destructive power is further multiplied to 30 times.

We have been warned by the Chicago police that more and more of these weapons are being confiscated on our streets, so we can expect an increasing number of these catastrophic injuries. It will be a long, hot summer for us on the Cook County Trauma Unit and in other major inner city hospitals.

(Ex E to McGuire Affidavit) (Emphasis added).

At the Trial Court, Dr. Donald Trunkey, a colonel in the United States Army Reserve and trauma surgeon at Oregon Health Sciences University, provided two affidavits based on his experience treating victims of assault gun fire. Dr. Trunkey, who the Trial Court found more convincing than plaintiffs' expert, explained why these weapons' destructive capabilities are so great. In sum, Dr. Trunkey stated:

1. The velocity of an assault weapon projectile and its destructive power are normally two to three times greater than ordinary rifle or handgun fire. (Defendant's Exhibit 7 at 2-4).

2. Because of the greater velocity, the bullet will tumble upon entry into the body; this greatly increases the destructive capabilities of the projectile. (Ibid).

3. The weapons are capable of firing in rapid bursts, further increasing the capacity to do damage. (Ibid).

4. Based on field experience, assault weapon fire is more like than conventional fire to cause amputation of the extremity affected. (Ibid and Supp. Aff. Trunkey at 8-9, A8-9)

This evidence about the destructiveness of assault weapon fire is clearly relevant to the Article I, § 27, claim (assuming assault

weapons are "arms"). It provides a factual basis for balancing public interests versus private rights. This balance is expressly sanctioned by *Kessler, supra*, *Blocker, supra*, and *Boyce, supra*. In *Boyce, supra*, the court said:

Portland has identified a need to protect its citizens from the hazards that are created when people are permitted to roam free with loaded guns at their sides. The City's assessment was reasonable, and it chose a permissibly limited form of intrusion on the right.⁹

61 Or App at 665-66.

Plaintiff's expert Dr. Fackler, attempted to cast doubt on Dr. Trunkey's testimony that assault gun wounds are more serious than wounds from other firearms. His criticisms were given little weight by the Trial Court. Dr. Fackler relied on "simulated" tests of assault gun fire, not actual impacts on humans. As Dr. Trunkey noted in his supplemental affidavit, Dr. Fackler ignored the devastating impact on the body of "secondary missiles", i.e., bone fragments that tear through tissue and organs after the initial impact of high velocity bullets fired from assault guns.

Dr. Trunkey's position is based on his experience in Viet Nam, South Africa, and recently in the Persian Gulf. By contrast, Dr. Fackler relied heavily on "wound profile" data from gelatin models. Dr. Trunkey's criticisms of the wound profile approach can be found in Supplemental Trunkey Affidavit at 3-5, A 3-5.)

⁹ Dr. Trunkey's testimony further assists the analysis as to whether assault guns are "arms" under Art I, § 27, because it shows the difference in destructive power between these military weapons and conventional firearms used for self-protection.

In sum, there is ample evidence to support the Trial Court's conclusion that the County ordinance reasonably promotes public safety. The regulations do curtail assault guns when they are carried in public. But this curtailment is justified. Other means of self-defense remain. See, State v. Boyce, supra.

IV. THE TRIAL COURT WAS CORRECT IN HOLDING THE COUNTY ORDINANCE IS NOT PREEMPTED BY STATE LAW.

The County ordinance bars possession of assault guns for purposes of sale at the Exposition Center. Plaintiffs rely on a statutory preemption argument to attack the County's Exposition Center restriction.¹⁰ The Trial Court rejected the attack.

A. State Law Allows The County To Control Possession Of Firearms In Public Buildings

The statutory argument is based on ORS 166.245. It provides:

Authority of cities and counties to regulate possession. Except as otherwise provided by law, cities, counties and other political subdivisions of this state may regulate only the possession of firearms and ammunition in a public place, as defined in ORS 161.015.

In asserting that ORS 166.245 forbids the County from controlling possession of assault weapons for sale at a County-owned building, plaintiffs ignore one portion of the statute and grossly distort another.

The part of ORS 166.245 plaintiffs ignore is the first six words, i.e., "Except as otherwise provided by law * * *." This exception is important. Another state law, ORS 166.370(1),

¹⁰ The case law construing Art I, § 27, obviously allows government to reasonably restrict the time and place of commercial transactions in arms. See, Boyce supra. This restriction involves a single public building and a particularly dangerous type of weapon.

dictates strict rules about firearms in public buildings. ORS 166.370(1) defeats plaintiffs' argument vis-a-vis the Exposition Center.

ORS 166.370(1) generally prohibits the possession of "a loaded or unloaded firearm, on the person in or on a public building."

"Public building" means:

* * * a hospital, capitol building, a public or private school, college or university, a county courthouse, a city hall or the residence of any state official elected by the state at large, and the grounds adjacent to each such building. The term also includes that portion of any other building occupied by an agency of the state or a municipal corporation, as defined in ORS 297.405.

ORS 166.360(3) (emphasis added).

The Exposition Center is a County-owned and occupied building. County administrative offices are in the building. The remainder is exhibition space for which conditional permits are issued by the County. (See, Affidavit of William McKinley with attached "Agreement"; identified as Defendants Exhibit 15)

ORS 166.370 is obviously aimed at keeping firearms out of government buildings. The County government occupies the Exposition Center. It owns and controls the space. If this was not so, the County Fair (also at the Exposition Center) would be open to persons carrying firearms, as would other major public events.

Plaintiffs' citation to Attorney General Opinions regarding Housing Authority property is easily distinguishable. The nature of an agreement between a residential tenant and landlord is widely different than the short term agreement involved here. A

residential tenant lease is often long term, one year or longer. The tenant and landlord are obligated to comply with the Landlord/Tenant Act (ORS 90.100 - 90.940). In the quoted opinion, the Housing Authority was not considered to "occupy" the residential units. Op Att'y Gen 8196 (1988).

In the present case, Multnomah County owns and operates an exhibition hall, i.e., the Exposition Center. Organizations engage portions of the facility, or all of it, for short periods of time, usually two or three days. The promoters do not reside in the facility. Plaintiff Rose City Gun Collectors engaged only one or two exhibition halls at the facility. (P.I. Hearing Tape at 15:59:40-15:59:48)

The operation of the facility carries with it a multitude of safety and security concerns. It would be ludicrous to accept plaintiffs' interpretation of the County's rights under the state law. By way of example, under plaintiffs' theory, neither the operators of the Memorial Coliseum nor their counterparts at the Oregon Convention Center would be allowed to control the nature of the events held within their respective facilities because they do not "occupy" the entire structure. Plaintiffs would have this Court impose a rule that some minimum number of County staff must be present in all portions of the Exposition Center in order for it to qualify as a public building. This is absurd.

The Exposition Center is a "public place" under ORS 161.015 (9). The statutes defining "public building" and "public place" are not exclusive. The definition under ORS 161.015 (9) is very

broad. Therefore, the County could regulate possession of assault weapons within the facility and on the grounds because it constitutes a "public place" under the statute.

The prohibition in ORS 166.370(1), if standing alone, would prevent plaintiffs from putting on or participating in a gun show at the Exposition Center. However, the statute goes on to authorize local officials to permit gun possession in public buildings. ORS 166.370(2)(e) allows

(e) A person who is authorized by the officer or agency that controls the building to possess a firearm in that public building.

Under the authority of ORS 166.370(2)(e), Multnomah County has exercised its discretion to permit a gun show at the Exposition Center.¹¹ The permit is conditioned because of the perceived dangerousness of assault weapons. If the County could legally

¹¹ A copy of the permit issued to Plaintiff Rose City Gun Collectors for the September 1990 gun show is part of Exhibit 15. The permit, which is on a standard form, includes the following restrictions, among others:

8. Law Observance. PERMITTEE agrees that every person connected with PERMITTEE's use of said building shall abide by, conform to and comply with all the laws of the United States and State of Oregon, and of all the ordinances of Multnomah County and the rules and regulations of the EXPO CENTER for the government and management of the building, together with all the rules and regulations of Police and Fire Departments. If the attention of PERMITTEE is called to any violation on the part of PERMITTEE or any person employed by PERMITTEE or an Exhibitor, PERMITTEE will immediately desist from and correct such violation. See Ex 15.

Among the use restrictions encompassed by the foregoing language is the prohibition on possession of an assault weapon for purposes of sale at the Exposition Center. See Ord 646, § IV(A)(4). Plaintiffs insist this particular restriction is preempted by ORS 166.245. Their contention is groundless.

refuse to allow the entire gun show at the Exposition Center, surely it can restrict it with respect to possession for sale of certain types of firearms.

In sum, the County's Exposition Center restriction does not offend ORS 166.245. Rather, it complies with that statute by carrying out the directive ORS 166.370. Plaintiffs have no case for preemption. See Op of the Att'y Gen 8215 (1990) at 17-19 (using the foregoing rationale to conclude that ORS 166.245 does not preempt Multnomah County's ban on sales of assault weapons at the Exposition Center).

Plaintiffs' preemption argument is without merit for a second reason. Under the so-called Katz Bill, the legislature obviously did not intend to bind the hands of local officials with respect to activities inside County-owned buildings. That subject remains a matter of purely local control.

The intent of ORS 166.245 was clearly to distinguish between two facets of gun control: (1) the state's interest in controlling who could purchase firearms and (2) local interests in controlling the manner of possessing firearms in public. The state sought to occupy the field in the former area by controlling gun purchase procedures in various ways. See, e.g., Or Laws 1989, ch 839, §§ 2 and 3 (background check on handgun buyer). The thrust of the 1989 gun control statutes was to govern the process, not the location, of gun sales.

The Katz Bill left the subject of public-possession restrictions on firearms to local government, where conditions

vary. Logically, greater firearms restrictions might be justified in urbanized areas such as Multnomah County.

The County ordinance deals with the location, not the process, for firearms sales. It merely prevents possession of assault weapons for sale in one particular public building. Such a limited measure does not interfere with the state's plan under the Katz Bill.

B. State Law Allows The County To Collect Fees To Cover The Costs Of State-Mandated Background Checks On Gun Purchasers

Plaintiffs challenge provisions of the County ordinance imposing a \$15.00 dealer fee for background checks on purchasers of firearms. See Ord 646, § V(4). The checks are required by state law. See ORS 166.420. The County will dedicate the fees to cover the costs of conducting the background checks. Ord 646, § VI; see also Affidavit of David Bogucki, Ex 16.

The ordinance makes the fee the obligation of the dealer. Further, it specifically provides that:

The sheriff shall pursue all appropriate legal remedies upon failure of a dealer to submit a required fee, but shall not refuse to conduct a background check for that reason.

Ord 646, § V(6).

In other words, the purchase of firearms is not held up upon the dealer's failure to pay the required fee. Instead, the purchase is completed, and the County is left to pursue legal remedies to collect the fee, i.e., an action against the dealer in small claims court.

This feature of the ordinance is pertinent because it shows that enforcement of the ordinance will not impede gun purchases. There is no preemption of local fees which do not obstruct weapons sales. Defendant City of Portland has adopted a similar fee.

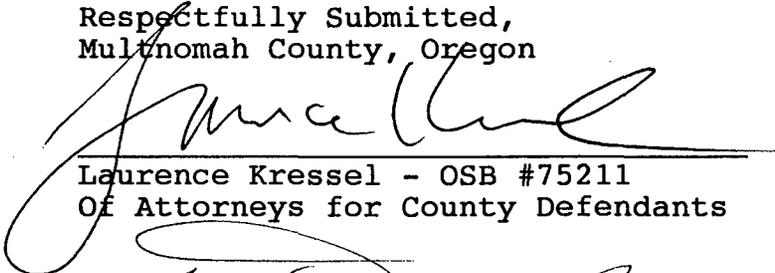
The County adopts the City's response to plaintiffs' challenge vis-a-vis the fee preemption issue and hereby incorporates by reference the City's argument in this brief.

CONCLUSION

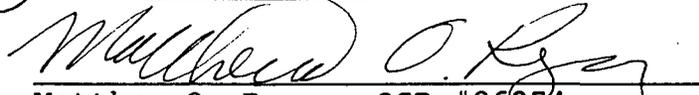
For all the reasons above stated, the Trial Court's decision should be affirmed and judgment entered in this court in favor of Defendants Multnomah County and Robert Skipper.

DATED this 9th day of April, 1992.

Respectfully Submitted,
Multnomah County, Oregon



Laurence Kressel - OSB #75211
Of Attorneys for County Defendants



Matthew O. Ryan - OSB #86274
Of Attorneys for County Defendants

CIRCUIT COURT OF OREGON

MULTNOMAH COUNTY

OREGON STATE SHOOTING
ASSOCIATION, et al.,

Plaintiffs,

v.

MULTNOMAH COUNTY, et al.,

Defendants.

No. 9008-04628

AFFIDAVIT OF DONALD
TRUNKEY M.D.

STATE OF OREGON)
County of Multnomah) ss.

I, Donald Trunkey M.D., being first duly sworn, depose and
say:

1. I am a medical doctor and physician. I am a trauma
surgeon at Oregon Health Sciences University. Before assuming my
post at Oregon Health Sciences University, I was Chief of Surgery
in San Francisco General Hospital. I am also a colonel in the
United States Army Reserve. My duties include teaching at the
Madigan Army Hospital and serving as a consultant to the United
States Army for education, research, and clinical care. Recently,
I have served as a consultant for the Ballistics Research
Laboratory at Aberdeen Proving Grounds. I have recently returned
to my post at Oregon Health Sciences University after four months
of active duty with the U.S. Armed Forces, of which two months was
in the Persian Gulf. I was the Chief of Professional Services and
Chief of Surgery for the 50th General Hospital in the Persian Gulf

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1 theater of operations. Much of the work I have done is classified,
2 however, the general theories regarding wound ballistics are not.
3 I am making this affidavit as a supplement to my previous affidavit
4 in this case, which was submitted in connection with the
5 preliminary injunction hearing. A true copy of my curriculum vitae
6 is attached to my previous affidavit.

7 2. As a result of my training experience as a trauma
8 surgeon, and as a colonel in the Army Reserves, including recent
9 active duty in the Persian Gulf, I have acquired significant
10 experience and expertise in the medical results of assault weapons
11 fire.

12 3. I have reviewed the affidavit of Martin L. Fackler, M.D.,
13 which was submitted by the plaintiffs in this case. I have also
14 reviewed the material attached to Dr. Fackler's affidavit. I have
15 many differences with Dr. Fackler's opinions on the killing and
16 destructive power of assault weapons.

17 4. Dr. Fackler contends in paragraph 3 that it is
18 inappropriate to state that "assault weapon fire has almost doubled
19 or tripled the killing and destructive power of ordinary handgun or
20 rifle fire" simply because assault weapon projectiles are allegedly
21 fired at "high velocity." Dr. Fackler is taking my statement out
22 of context. When I stated in my previous affidavit that the
23 assault weapon has doubled or tripled the killing and destructive
24 power of weapons generally, that statement was and is based on
25 several components of the assault weapon. As Dr. Fackler outlines
26 even in his own papers, killing and destructive power is a function

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MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
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1 of velocity, yaw, or tumble of the missile, and the type of
2 missile, as well as secondary missiles and multiple hits. This is
3 because assault weapons are weapons that can be fired rapidly,
4 either automatically or semiautomatically. Even bullet mass plays
5 a role in the killing and destructive power. Although Dr. Fackler
6 is correct that shape and construction also determine, to some
7 extent, how much tissue is disrupted and thus how much killing and
8 destructive power it has, this does not affect in any way the
9 inescapable conclusion about the increased destructive and killing
10 power resulting from assault weapons such as those regulated by
11 Multnomah County Ordinance No. 646. I believe my statements
12 regarding the increased killing and destructive power of assault
13 weapons are still accurate.

14 5. In paragraph 4 of his affidavit, on page 2, Dr. Fackler
15 seems to mount a defense of the wound profile method of using
16 gelatin to obtain data on bullet effects. Although this method is
17 useful in some respects, it cannot and does not provide a
18 definitive answer on wound profile. Although gelatin is similar to
19 human and living animal muscle, it totally ignores secondary
20 missiles caused when bone splinters, and it obviously does not take
21 into account elastic tissues such as in blood vessels or the softer
22 consistency of some parenchymal visceral organs such as the liver,
23 spleen, or even lung. Thus, experiments with gelatin, while
24 useful, can never be a complete substitute for actual clinical
25 experience treating the victims of assault gun weapons. My
26 clinical experience in treating many victims of these weapons leads

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1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

1 me to conclusions that are contrary to Dr. Fackler's statements.

2 6. In paragraphs 5 and 6, on page 3 of his affidavit,
3 Dr. Fackler discusses "permanent cavity," "bullet hole," and
4 "temporary cavity." There is nothing in this discussion which
5 negates any of the points that I have made in my previous affidavit
6 and that I am making now. These paragraphs simply document the
7 destructive elements of higher velocity assault weapons, including
8 the weapons listed on Multnomah County Ordinance No. 646.

9 7. In paragraph 7 of his affidavit, on page 3, Dr. Fackler
10 discusses projectile travel in tissue, states that AK-47 military
11 rounds typically travel about 26 centimeters forward before
12 beginning significant yaw, and concludes that most AK-47 shots will
13 pass through the body. I disagree strongly with Dr. Fackler's
14 conclusions on this point.

15 The "wound profile" study that Dr. Fackler refers to is a
16 "wound profile" gelatin model, not an actual clinical reference.
17 This theory does not necessarily stand up to scientific scrutiny in
18 actual animal tissue or human wounds. Furthermore, 26 centimeters
19 is equivalent to approximately 10.5 inches. In the article
20 attached to his affidavit analyzing the school children's wounds,
21 it is certainly possible that a single bullet may have passed
22 through one of these children without causing yaw. This is
23 somewhat problematic, since if the wound passed from an anterior to
24 posterior position, it is unlikely that many school children will
25 be more than 10.5 inches in that dimension. If, however, the
26 bullet passed from side to side through the torso, it might well be

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P.O. Box 849
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1 more than 10.5 inches. In many ways, Dr. Fackler is making a
2 specious argument, for he does not take into account all of the
3 other aspects of wounding, including the type of tissue and whether
4 or not there are secondary missiles, i.e., missiles caused by bone
5 fragments. I have had significant experience in South Africa
6 treating children who were the targets of AK-47 projectiles fired
7 on innocent people in the Township conflicts between the Inkatha
8 and ANC. My personal clinical experience in South Africa
9 overwhelmingly yielded the result that these children had
10 devastating wounds when hit by AK-47 type missiles. In many of
11 these children, perhaps the majority of traumatic amputations were
12 from bony injuries and secondary missiles caused by massive AK-47
13 fire. I disagree strongly with Dr. Fackler's statement that "most
14 AK-47 shots will pass through the body, causing no greater damage
15 than that produced by non-hollow point handgun bullets." This
16 statement is simply not borne out by actual clinical experience.

17 8. In paragraphs 9 and 10 of his affidavit, on page 4,
18 Dr. Fackler discusses the Stockton school yard shootings. Although
19 it is not clear to me what the Stockton school yard shootings have
20 to do with my general thesis, there are nevertheless a variety of
21 difficulties with Dr. Fackler's analysis. First of all, five young
22 children did die of their wounds in that case. The massive fire
23 power of an AK-47 fire in the hands of a disturbed person bent on
24 mass destruction only points out the increased dangerousness of
25 these types of weapons. Moreover, the bullets used by the
26 assailant, Purdy, were different than those used in Vietnam. I do

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P.O. Box 849
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1 not believe Dr. Fackler is qualified to conclude that "there was no
2 damage to any organ not hit directly by a bullet and the magnitude
3 of the tissue disruption from fatal wounds was no greater than that
4 normally produced by many common handgun bullets." (Emphasis
5 added.) Although Dr. Fackler is considered by many to be an expert
6 in ballistics, he is not a forensic pathologist, nor does he have
7 the clinical experience that I and many other trauma surgeons have
8 in the United States. I believe it is incorrect and fallacious to
9 state that an assault rifle wound does not cause more tissue
10 destruction than "common handgun bullets." My actual clinical
11 experience, as well as the clinical experience of many other trauma
12 surgeons, indicates that assault rifle wounds do in fact cause more
13 tissue destruction than "common handgun bullets." Dr. Fackler is
14 both incorrect and unqualified to reach this conclusion.

15 9. In paragraph 11 of his affidavit, on page 4, Dr. Fackler
16 states that assault weapons are designed to wound, rather than
17 kill. From a purely theoretical standpoint, the military would
18 like to have a weapon that does incapacitate and severely wound a
19 combatant for the reasons that Dr. Fackler states. It does in fact
20 use up the enemy's resources in order to care for these
21 individuals, but that was not the point of my statement. Assault
22 weapons, such as the type regulated by Multnomah County
23 Ordinance No. 646, were developed by arms manufacturers for
24 military purposes. They were not designed for sport, and, although
25 in theory it may be better to wound in a military situation, the
26 weapons currently regulated by Multnomah County Ordinance No. 646

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P.O. Box 849
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1 are far more destructive than Dr. Fackler is willing to admit. If
2 Dr. Fackler's theory is correct, one may ask why the military has
3 developed weapons such as the "daisy cutter" and "puff the magic
4 dragon." When one of these missiles hits a human being, there is
5 a far greater chance in 1991 of killing them than there was in
6 1941. In my opinion, Dr. Fackler is removing himself from the
7 reality of civilian urban areas when he states that "assault
8 weapons are specifically designed to wound, rather than kill,
9 because a wounded combatant places a far greater claim on an
10 enemy's resources than one who has been killed." What we are
11 discussing here is the military strategies behind such weapons,
12 which merely points out that they are designed for military, rather
13 than civilian usage. The mere fact that the weapons regulated by
14 Multnomah County Ordinance No. 646 are civilian semiautomatic
15 copies of military designed assault weapons does not change my
16 opinion in any respect. I simply do not understand Dr. Fackler's
17 logic, if he offers the "wound" rather than "kill" theory as a
18 defense for civilians to be able to transport such weapons in an
19 assembled state through Multnomah County.

20 10. In paragraph 12 of his affidavit, on page 4, Dr. Fackler
21 has already made the point that when a bullet hits a vital organ,
22 lethality may occur. I, too, have treated many nonlethal trunk
23 wounds from a variety of weapons, but it is patently wrong to say
24 that these are assault weapons. During the Vietnam conflict, there
25 were 183,257 battle related casualties. 25,342 were killed in
26 action, and 3,520 died of wounds. Obviously, not all of those who

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1 were killed died of AK-47 injuries, however, my study of the
2 Vietnam conflict leads me to conclude that the vast majority of
3 patients hit in the torso or the head by an AK-47 died immediately
4 on the battlefield, and only a few survived these injuries.
5 Patients with extremity injuries, by and large, did better, of
6 course, but this in no way means that these patients did not suffer
7 traumatic amputations as a result of AK-47 fire.

8 11. In paragraph 13 of his affidavit, Dr. Fackler states that
9 he has never had any experience with traumatic amputation caused by
10 assault weapon gunfire. If true, this would reflect Dr. Fackler's
11 relative inexperience in treating these wounds rather than the
12 apparent assertion that assault weapon gunfire does not cause
13 traumatic amputations. In Vietnam, upper limb wounds accounted for
14 13% of all casualties, and 4% had traumatic amputations. Lower
15 limb wounds in Vietnam constituted 22% of all casualties, and again
16 traumatic amputation occurred in 4%. In my opinion, the assertion
17 that assault weapon gunfire does not cause traumatic amputation is
18 simply not borne out by my extensive clinical experience in
19 treating the victims of these wounds. Specifically, as I mentioned
20 earlier, many of the children who suffered AK-47 caused wounds in
21 South Africa had traumatic amputations.

22 12. Additionally, in my recent experience in the Persian
23 Gulf, I also witnessed traumatic amputations as a result of assault
24 weapon fire. In one instance, I treated a Saudi Arabian soldier
25 who suffered a massive traumatic amputation as a result of assault
26 weapon fire. There is simply no valid clinical basis for the

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MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

1 assertion that assault weapon fire does not cause traumatic
2 amputations.

3 13. I have also reviewed the affidavit of Christopher P.
4 Vice, as well as the Journal article attached to it. Mr. Vice
5 seems to imply that because I was on the advisory panel that
6 reviewed Dr. Fackler's article entitled "Wound Ballistics" prior to
7 its publication in The Journal of the American Medical Association
8 that I agreed with everything that was in it. Nothing could be
9 further from the truth. The mere fact that I served on the
10 advisory panel does not in any way mean that I endorse or agree
11 with Dr. Fackler's views. In fact, as I have detailed in this
12 affidavit, I disagree with much of Dr. Fackler's statements.

13 14. Other researchers have also obtained results which differ
14 from Dr. Fackler's thesis in his affidavit. Although the results
15 necessarily vary from study to study and firearm to firearm, there
16 is a great deal of evidence linking velocity and "tumbling" to
17 wounding characteristics. For example, in "Wound Ballistics of
18 Swedish 5.56-mm Assault Rifle AK 5," Berlin et al, The Journal of
19 Trauma, January 1988, the researchers found that the deformation
20 and breakup rate of the AK 5 bullet were close to 100%, and
21 described the high incidence of total disintegration of the bullets
22 as "remarkable."

23 The researchers ascribed the reason for this breakup to the
24 relatively fast tumbling, high impact velocity, and insufficient
25 strength of the jacket. Although it may be argued that a steel
26 metal jacket will decrease deformation and therefore decrease

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P.O. Box 849
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1 tumbling, deformation of the projectile can also occur internally,
2 and also result in a significantly erratic path of the projectile
3 through tissue.

4 Other researchers have found that the degree and extent of
5 tissue damage after wounding by high velocity missiles such as
6 those fired by assault rifles is many times greater. "Gunshot
7 Wounds Caused by Modern Firearms in the Light of Our
8 Investigations," Domaniecki, et al, The Journal of Trauma, January
9 1988. In "Variations on a Ballistic Theme," Military Medicine,
10 September 1987, Col. Ronald F. Belamy reported on a variety of
11 casualties which occurred when members of a weapons platoon were
12 hit by a sudden burst of automatic weapons fire coming from a tree
13 line about 100 meters away. Three soldiers were killed in action.
14 One casualty was struck in the abdomen by a 7.62-mm round "which
15 must have tumbled somewhere along its trajectory as it was found
16 with its base forward." Dr. Belamy concluded that this 7.62-mm
17 round was probably fired from an AK-47 assault rifle. Thus, in
18 this instance a 7.62-mm projectile fired from an AK-47 did in fact
19 tumble, and Dr. Belamy noted that "this sort of behavior" is
20 "commonly seen."

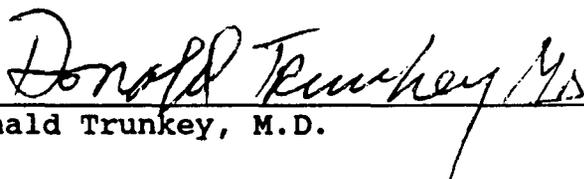
21 15. Finally, Dr. Fackler's insistence that projectiles fired
22 by assault weapons are less damaging than other types of
23 projectiles focuses completely on the damage of one projectile, in
24 isolation. This ignores the essential purpose of assault weapons,
25 i.e., to deliver a rapid rate of controlled fire. This means that
26 assault gun weapons will typically deliver far more projectiles per

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1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

1 minute than other types of handguns or rifles commonly used for
 2 sport or self-defense. One cannot assess the dangerousness of a
 3 particular weapon merely by viewing the effect of one projectile in
 4 isolation: what is dangerous about assault weapons is the massive
 5 number of high velocity projectiles that they can deliver in a
 6 controlled fashion. It is the combination of rapid fire with a
 7 number of other factors which makes these weapons desirable for
 8 military usage, and distinctly inappropriate for any legitimate
 9 civilian purpose.

10 16. Based upon ballistics and massive rapid fire, the assault
 11 weapon is a far more lethal and destructive weapon than a standard
 12 handgun, hunting rifle, or shotgun. Any argument to the contrary
 13 is simply not backed up by the clinical evidence that I and other
 14 trauma surgeons have seen and, frankly, defies common sense.

15
 16 
 17 Donald Trunkey, M.D.

18 SUBSCRIBED AND SWORN TO before me this 29 day of April,
 19 1991.

20 
 21 NOTARY PUBLIC FOR OREGON
 22 My Commission expires: February 3, 1994

23 K:\MBW\024MBW.PLD\MMK

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MULTNOMAH COUNTY COUNSEL
 1120 S.W. Fifth Avenue, Suite 1530
 P.O. Box 849
 Portland, Oregon 97207-0849
 (503) 248-3138

CIRCUIT COURT OF OREGON

MULTNOMAH COUNTY

OREGON STATE SHOOTING
ASSOCIATION, et al.,

No. 9008-04628

Plaintiffs,

AFFIDAVIT OF ROBERT J.
BARNES

v.

MULTNOMAH COUNTY, et al.,

Defendants.

STATE OF ARKANSAS)
County of Miller) ss.

I, Robert J. Barnes, being first duly sworn, depose and say:

1. I am an expert in firearms. I am currently an independent consultant on firearms and law enforcement issues. I make this affidavit on behalf of Multnomah County in the above-referenced case.

2. I worked for the United States Bureau of Alcohol, Tobacco and Firearms for 15 years. From 1971 to 1979, I was an ATF Regional Firearms Enforcement Officer. From 1979 until my retirement in July of 1986, I was ATF Senior Firearms Enforcement Officer assigned to the Bureau Headquarters in Washington, D.C. At the time of my retirement, my duties included providing technical information and assistance for the administration and coordination of the Gun Control Act of 1968. My primary responsibility was to assist in the enforcement of federal and state firearms laws and to

1 - AFFIDAVIT OF ROBERT J. BARNES

MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

1 provide information for use within the bureau headquarters, with a
2 secondary responsibility of providing information and assistance
3 for use in issuing licenses and permits and for regulating various
4 members of the firearms industry.

5 As part of my duties with ATF, I examined and evaluated all
6 types of firearms, prototypes, combinations of parts, accessories,
7 suspected firearms, descriptions, photographs, drawings and other
8 data on firearms and ammunition submitted for various
9 determinations, such as identification and/or classification under
10 the provisions of the federal or state firearms laws. This
11 frequently required disassembly, assembly and test firing. These
12 included conventional firearms, pistols, revolvers, rifles,
13 shotguns and combination guns, and a special group of weapons,
14 commonly referred to as National Firearms Act weapons (which
15 require federal registration) such as machine guns, silencers,
16 destructive devices, weapons made by altering or modifying
17 conventional firearms, and deceptive firearms. This included
18 commercially made firearms, firearms made from commercially
19 available "parts set," and homemade firearms including silencers.
20 My duties required determining if the weapon was subject to the
21 firearms laws, and if so, into what section it fell. I prepared
22 technical data on new, unusual or disguised firearms, and on the
23 nomenclature, design, construction, modification and operation of
24 firearms. I conducted tests with various weapons, including
25 machine guns and silencers, prepared official reports and testified
26 to my findings in state and federal court as a firearms expert.

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MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

1 I visited manufacturers, distributors, and importers to
2 discuss the provisions of the Gun Control Act of 1968 and ATF
3 policy, for training (formal and informal), to keep up with new
4 products, manufacturing methods, industry trends, and in
5 conjunction with investigations.

6 I have received training in measuring noise levels and
7 attended seminars where measuring silencer effectiveness was
8 discussed. I participated in military evaluation of silencers
9 submitted by designers, makers and distributors.

10 I was an instructor in firearms identification, modification,
11 function, origin, and use in new agent, advanced agent and
12 undercover agent training at the Federal Law Enforcement Training
13 Center. I also conducted similar training and seminars for
14 federal, state and local officers, and also for military personnel.
15 Several such instruction periods were in college-level law
16 enforcement courses or in courses in which college credits were
17 authorized. I also assisted in determining the history of specific
18 firearms.

19 I routinely provided information directly to members of the
20 firearms industry, other interested parties, and the general public
21 concerning the manufacture, distribution, importation, exportation,
22 and collecting of firearms; and in the registration and transfer of
23 National Firearms Act weapons. I have assisted other federal and
24 state agencies, including testifying before grand juries, at
25 pretrial hearings and in federal and state court.

26 3. Prior to my employment with the Bureau of Alcohol, Tobacco

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MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

1 and Firearms in 1971, I served in the United States Marine Corps
2 for 22 years, from 1948 to 1970. At the time of my retirement, my
3 position with the Marine Corps was as Marine Corps Marksmanship
4 Officer and Small Arms Training Coordinator (G-3) at United States
5 Marine Corps Headquarters in Washington, D.C. As part of my duties
6 with the marines, I monitored all small arms training and drafted
7 directives governing this training. This included individual
8 training with small arms, the training of personnel who maintained
9 the weapons, and other personnel who supported the marksmanship
10 training program. I provided information to personnel concerning
11 marksmanship skills, individual weapons, ranges, and support
12 facilities. I recommended or commented on other recommendations
13 for changes in small arms training, the training of small arms
14 repairmen, advanced gunsmiths, and training facilities. I drafted
15 replies to inquiries concerning small arms, marksmanship training,
16 ranges and related facilities, from both military and civilian
17 sources, including congressional correspondence.

18 I also assisted in the selection of competitive and support
19 personnel to be assigned to the Marine Corps shooting teams and the
20 United States shooting teams in Olympic and World competition.

21 I wrote and monitored tests to determine the capability and
22 limitations of weapons and ammunition, and to develop new training
23 methods. I monitored the development of standard and specially
24 configured long-range commercial and military rifles for use by
25 military snipers. I reviewed manuals and other publications per-
26 taining to small arms, their use and maintenance, and recommended

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MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
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1 revisions or rewrites as necessary. I assisted in the preparation
2 of training objectives for new courses of instruction to teach
3 small arms skills, their maintenance and repair, and in updating
4 existing training requirements.

5 I sat on boards or other groups, as a small arms expert, where
6 the use, development, modification or performance of weapons were
7 discussed. I was acquainted with such projects as new weapon
8 systems under development, including optic and night sights, sound
9 suppressors, and long-range planning for future infantry weapons.

10 During my Marine Corps career I received training in
11 individual weapons, rifles (automatic weapons), pistols, revolvers,
12 shotguns and light machine guns, and familiarization training in
13 crew served weapons, rockets, mortars, heavy machine guns, and
14 flame throwers. After receiving additional training, I worked as
15 a small arms instructor in both range and classroom training. This
16 was primarily the use, care and maintenance of standard military
17 small arms.

18 I received training in advanced marksmanship and specialized
19 individual weapons from .22 to .300 H&H Magnum calibers. This
20 training included the use, characteristics, care, and user
21 maintenance of standard military small arms, modified military
22 small arms, and commercial arms manufactured by Colt, Remington,
23 Winchester, Smith & Wesson, and foreign manufacturers such as
24 Anchutz and Hammerli.

25 I served as an instructor, range officer and officer in charge
26 of small arms training at both the basic and advanced levels. I

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MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

1 have tested and supervised testing of small arms to determine the
2 cause of malfunctions and taken a recommended corrective action.
3 I have also supervised the issue, test firing, and sighting-in of
4 weapons issued to marines in combat deployed units.

5 I have shot with, coached, and captained marine corps rifle
6 and pistol teams in all levels of competition up to and including
7 the intraservice matches and the national matches at Camp Perry,
8 Ohio. I won the Marine Corps Rifle and Pistol Matches in 1967. I
9 have also received recognition as a member of the President's 100,
10 as a distinguished and master competitor.

11 I was a member of the United States Olympic Shooting Committee
12 and a member of the working committee of the National Board for the
13 Promotion of Rifle Practice at the time of my retirement.

14 I served in the Korean conflict and the Vietnam war. I
15 supervised marines in combat operations including the use of
16 individual weapons, military assault rifles (capable of both
17 semiautomatic and automatic fire).

18 4. As the result of experience, study, and work with
19 firearms, I have become familiar with the technical and functional
20 aspects of most firearms, including historical and antique
21 firearms, and the development and history of many firearms.

22 5. My areas of specialization included determining if
23 firearms were subject to the provisions of the Gun Control Act of
24 1968 or fell within the definition of other Federal, State or local
25 laws or ordinances and if so, what section applied. I also
26 specialized in automatic firearms, military assault rifles, the

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MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

1 paramilitary semiautomatic commercial firearms made to resemble the
2 military assault firearms, machine guns made by modifying or
3 altering conventional firearms to fire automatically, and those
4 made from "kits" or "parts sets" or by "unlicensed makers." I also
5 specialize in the following areas: silencers or sound suppressors,
6 commercial or homemade, their design, manufacture, and use, their
7 installation and effectiveness with various firearms and
8 ammunition; disguised and improvised firearms such as cane guns,
9 pen guns, wallet holsters and various types of zip guns, including
10 new or antique devices whether commercial or homemade; the
11 identification and dating of the manufacture of commercial and
12 military firearms, foreign and domestic; ATF policies and
13 procedures relating to firearms, their manufacture, importation,
14 distribution and sale; the manufacture, registration and transfer
15 of National Firearms Act weapons; antique, curio or relic
16 determination under the provisions of the Gun Control Act; military
17 small arms, foreign and domestic, and marksmanship training, both
18 basic and advanced. My recreation and hobbies include repairing
19 old or antique firearms, reloading rifle, pistol and shotgun
20 ammunition, rifle practice, long-range, shotgun shooting, trap,
21 pistol competition, bull's eye, and bird hunting.

22 6. I have reviewed the video tape of the September 6, 1990
23 hearing on the plaintiffs' Motion for a Preliminary Injunction in
24 this case. I have also reviewed the affidavits submitted by the
25 plaintiffs, including that of Mr. John Nichols, one of the
26 plaintiffs. I have a variety of differences with many of Mr.

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MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
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(503) 248-3138

1 Nichols' statements, as well as with much of the statements of Mr.
2 Terry Aitken, the witness who appeared at the preliminary
3 injunction hearing for the plaintiffs.

4 7. First of all, Mr. Nichols states that he is a "member of
5 the board of the National Firearms Association." I am not familiar
6 with this organization nor could I locate it in publications
7 listing such organizations.

8 8. Mr. Nichols states that much of the testimony of Robert
9 Stewart, of the Oakland, California, Police Department was
10 erroneous. One of the examples that Mr. Nichols gives is Mr.
11 Stewart's statement that movies such as "Rambo" are a valid source
12 of information on the weapons portrayed in the movie. The outline
13 for the "Rambo" movie "First Blood" and the book by the same name
14 appear to have been taken from old Counter Insurgency Tactics or
15 Guerrilla Warfare Manuals primarily intended for training small
16 unit tactics. Some of these tactics were: use of natural obstacles
17 to delay pursuit; draw the enemy into unfavorable situations; use
18 evasive actions to gain time without committing to an adverse
19 action; travel light, no unnecessary arms or equipment; refuse
20 decisive combat under unfavorable conditions; be alert to enemy
21 movement; monitor his communications; when an objective is selected
22 create diversions that the enemy must deal with; isolate the
23 target; create favorable conditions for the advance; during the
24 final assault, advance by fire and maneuver, while maintaining fire
25 superiority. The firearms used by military force, the M-16 assault
26 rifles, the M60 machine gun, the M79 grenade launcher and the LAW

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1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

1 rocket are common in military units of that type. The firearms
2 used by the law enforcement agencies were in keeping with today's
3 practices. I am not a "Rambo" fan.

4 The AK-47 uses the M43 7.62mm x 39 Russian round; the 7.62mm
5 x 51 NATO round (.U.S., .308 Winchester) is several millimeters
6 longer. They are not interchangeable.

7 9. In paragraph 8 of his affidavit, beginning on page 2, Mr.
8 Nichols implies that the AK-47 is not a military weapon, and that
9 its "militaristic configurations" are shared by many "non-military"
10 weapons. The AK-47 Assault Rifle was adopted for issue to the
11 Soviet Army in 1947 and is probably the world's most widely used
12 assault rifle. It has been used by most Communist Block countries
13 and by irregular forces through the world. It has been
14 manufactured for military use in at least 10 countries besides
15 Russia. It possesses many of those characteristics common to
16 assault rifles:

- 17 a. Uses a center fire rifle cartridge shorter, and with less
18 range, than conventional rifles. This cartridge produces
less recoil allowing a higher volume of effective fire.
- 19 b. Accepts the larger capacity detachable box magazines, 20
20 to 30 rounds, significant for their military development
and use.
- 21 c. Designed to accept a bayonet which is an accessory.
- 22 d. Vertical hand grip (distinctive pistol grip), an aid in
23 delivering high volume fire and frequently necessitated
of the straight line design in assault rifles.
- 24 e. Capable of either semiautomatic or automatic fire, at the
25 option of the shooter.

26 These are basic configurations and characteristics developed for

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1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3136

1 the military employment of the rifles. They are also common in
2 many of the firearms listed in Ordinance No. 646, with the primary
3 exception of fully automatic fire. These are not characteristics
4 common to conventional sporting rifles.

5 Most of the firearms listed in the ordinance are copies of
6 military firearms modified to remove the automatic fire capability.
7 These modifications were made for the U.S. market. Their sale or
8 possession is usually prohibited by individuals in the country of
9 origin or other countries which permit the possession of sporting
10 rifles. Because they incorporate many of the basic military
11 assault rifle features they would be considered paramilitary
12 firearms, or for the want of a better definition semiautomatic
13 assault rifles, not conventional sporting rifles. An exception
14 being the M10 and M11 (SAP or SAC SM10 and the SM11A1) which were
15 held to be machine guns under ATF Ruling 82-8.

16 10. In paragraph 9 of his affidavit, on page 3, Mr. Nichols
17 states that flash suppressors are intended only to prevent night
18 blindness, not to keep down "climb." With the introduction of the
19 rapid firing, shorter barreled, military assault rifles, the flash
20 suppressor came into use primarily on the military assault rifles.
21 It is intended to disburse the muzzle blast. This is the hot gases
22 that propel the projectile and exit the muzzle behind the
23 projectile emitting considerable flash from the short barrel during
24 times of low light. In low light conditions this muzzle blast,
25 commonly referred to as muzzle flash, can adversely effect the
26 shooter's night vision and possibly compromise his position,

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P.O. Box 849
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1 particularly when a rapid fire technique is being employed. The
2 various designs of these devices are frequently such that the
3 muzzle blast is disbursed in such a way as to dampen the recoil and
4 reduce muzzle "climb". This gives the shooter better control of
5 the military assault rifle when the automatic mode of fire is used.
6 Usually these gases have cooled somewhat more, producing less
7 muzzle flash, before exiting the muzzle of the longer barrels of
8 conventional sporting rifles which are not designed to deliver a
9 high volume of sustained fire. This along with the customary use
10 of sporting rifles negates any need for these devices, on the
11 rifles. I cannot think of any major manufacturer that uses flash
12 suppressors on conventional center fire sporting rifles.

13 11. Mr. Nichols states in paragraph 10 of his affidavit that
14 semiautomatic Uzis are never used by police and military. The
15 semiautomatic UZI carbine was designed from the UZI submachine gun;
16 it has the minimum 16 inch barrel to make it legal in this country.
17 It was designed for the U.S. commercial market, as was the UZI
18 pistol. However, as many law enforcement agencies have gone to
19 semiautomatic pistols, some have also included 9mm rifles
20 (carbines) in their inventory including such as the H&K or the UZI.
21 This includes at least one Federal agency. With the exception of
22 the longer barrel and the two position safety/fire selector slide
23 on the UZI carbine it is almost identical to the UZI submachine
24 gun. Conversions of the carbine to automatic fire are not
25 uncommon, both legal and illegal. Frequently seized firearms, such
26 as the UZI, are put into service by various law enforcement

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1 agencies.

2 12. Paragraph 12 indicates a difference of opinion between
3 Mr. Stewart and Mr. Nichols as to the ammunition used by the
4 Striker 12 and the Street Sweeper special purpose shotguns, they
5 are both 12 gauge (2 3/4 inch), not 12 gauge (3 inch) magnums.
6 Both shotguns fire 12 gauge hunting and target ammunition as well
7 as some special police loads (tear gas). Shot sizes vary from
8 0.080 inch in No. 9 shot, through 0.332 inch in 00 Buck Shot, to a
9 single slug slightly less than 3/4 inch in diameter. Examples
10 being, BBs measure approximately 0.161 inches in diameter. In a
11 2 3/4 inch 12 gauge No. 6 shotgun shell there are approximately 281
12 pellets measuring approximately 0.110 inches in diameter. In No.
13 4 Buck there are 27 pellets measuring approximately 0.203 inches in
14 diameter, and in the 00 Buck there are 9 pellets measuring
15 approximately 0.332 inches in diameter. Both chamber 12 rounds in
16 a rather large rotating drum magazine and are capable of rapid
17 semiautomatic fire. The configuration of these shotguns, primarily
18 the large drum, make them impracticable for hunting and target
19 shooting. Additionally, Federal and many State Laws restrict the
20 magazine capacity of shotguns used to take migratory water fowl and
21 game to considerably less than 12 rounds. In trap and skeet
22 competition only two rounds are loaded.

23 13. The SPAS-12 Shotgun is made by Luigi Franchi, Brescia,
24 Italy and is advertised as a special police assault shotgun system.
25 The original SPAS-12 could be fired semiautomatically or by using
26 the slide (or pump action), it had a folding shoulder stock fitted

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1 with a hook to prevent the shooter from being easily disarmed, it
2 had a large heat shield on the lower part of the barrel, an
3 extended magazine tube and a vertical hand grip. It was designed
4 to be an assault shotgun, for use in close combat or against
5 multiple targets. Like the Striker 12, its configuration makes it
6 impracticable for hunting or target shooting.

7 14. In paragraph 14, Mr. Nichols states that the standard
8 Italian military weapon is a 7.62 variant of the M-1 Garand. The
9 BM 59 (a redesigned U.S. M-1 Grand) was the standard Italian
10 military rifle, it is no longer in production. They are switching
11 to a 5.56mm assault rifle, possibly the BM 70.

12 15. In paragraph 15, Mr. Nichols states that the AR-15 can be
13 converted into a machine gun only with great difficulty. This is
14 not true. The AR-15 semiautomatic rifle and the M-16 U.S. military
15 rifle are very similar, many of the parts are the same and others
16 are interchangeable. During the last seven months I worked in the
17 AFT Bureau Headquarters, I examined and wrote reports on thirty-
18 four AR-15 type firearms (like firearms, such as the E.A. Co. Model
19 J-15 which use Colt's parts, are also included in this number); of
20 that number thirty-two were modified or assembled to deliver
21 automatic fire. Most of the conversions were achieved by
22 substituting and/or altering parts without modifying the receiver
23 or using an automatic sear. Many of the firearms listed in the
24 ordinance have a history of similar conversions, some examples
25 being the UZI carbine, the FN/FAL, and the H&K 91 and 93. While
26 the conversions dealt with in my reports were illegal, during the

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1 same period legal conversions were also made. Production of the
2 early TEC-9, the KG-9, was stopped when that pistol was held to be
3 a machine gun because of malfunctions resulting in automatic fire
4 (ATF Ruling 82-3). The MAC M10/11 (MAC, SAP SM10 and SM111A1) at
5 one time would continue to fire (automatic fire) if a trigger stop
6 was used to hold the trigger part way back. Coins, erasers, and
7 other items of the proper thickness were used for that purpose.

8 16. I have a great deal of differences with many of the
9 assertions Mr. Nichols makes in paragraph 16 with respect to the
10 armor-piercing capabilities of assault weapons. First of all, Mr.
11 Nichols refers repeatedly to "bullet-proof vests." This is a
12 misnomer. While there are various types of body armor which have
13 varying degrees of resistance to firearm projectiles, practical
14 protective clothing has not reached that point. The protective
15 clothing or body armor routinely worn by most police officers
16 (threat level 2 and 2A) can be expected to defeat most pistol and
17 revolver projectiles, depending on the ammunition and condition of
18 the equipment, and some low velocity rifle or carbine projectiles.
19 This still leaves some handgun projectiles and the center fire,
20 high power, rifles. The vast majority of the rifles listed in
21 Ordinance No. 646 fall within the last category in that they fire
22 caliber .223 (5.56mm), .308 Winchester (7.62mm NATO), 7.62mm
23 Russian, and .30-06 ammunition. These cartridges experienced a
24 high degree of success during tests conducted on several types of
25 body armor. Few departments have or can afford the special purpose
26 body armor (threat level 3) designed to defeat center fire rifle

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1 ammunition. Additionally, it is heavy, cumbersome and impractical
2 for police work. The capabilities and limitations of this
3 equipment usually conform to established standards which are known
4 to the user.

5 Concerning the discussion on the sniper rifle, both the Army
6 and the Marine Corps are presently using the M40 or the XM40, a
7 version of the Remington Model 40X bolt action rifle.

8 17. Mr. Nichols' discussion of the historical development of
9 firearms and the arming of the country is interesting, although I
10 fail to see the relevance of much of the information. The national
11 armories, at Springfield, MA and Harpers Ferry, VA, were producing
12 the following primary military rifles in 1859:

13 Model 1855 U.S. Percussion Rifle-Musket, .58 caliber.

14 Model 1855 U.S. Percussion Rifle, .58 caliber.

15 Model 1855 U.S. Cadet Percussion Rifle-Musket, .58 caliber.

16 All were muzzle loaders and production continued until 1860-61.
17 While breech loading percussion rifles were being introduced during
18 this time, they were considered secondary military rifles for
19 various reasons. With few exceptions, such as the Sharps breech
20 loading percussion, pellet and tape primed, carbines and rifle, the
21 systems had not been perfected and had not been well accepted by
22 the public. The better known breech loading percussion rifles such
23 as the Spencer and Burnside had not yet come on the market.
24 limited production of breech loading single shot percussion rifles
25 was taking place in this country in 1859. Any early "repeating"
26 rifles are now and probably were then considered to be a dangerous

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1 gadget or novelty item more than an acceptable firearm. Production
2 of many of these was limited, those remaining today are rare and
3 their history is sketchy at best.

4 The introduction of the Paterson Colt percussion revolvers in
5 1837 was a major event in the development of handguns. The
6 manufacture of Colt's percussion revolvers continued into the
7 1870s. Limited production of similar pistols continue today
8 primarily as curios and relics.

9 The development of metallic cartridges and successful
10 repeating firearms, for particle purposes, began in this country
11 about 1849 with a series of rifles credited with being the
12 forerunner of the Winchester lever action repeating rifle, and is
13 outlined as follows:

- 14 a. The Hunt Repeating Rifle, used a projectile containing
15 the propellant powder called a "Rocket Ball." Three-
16 quarters (3/4) of the conical projectile was filled with
17 powder. The ignition system used a priming pellet which
18 was fed into firing position, along with the loaded
19 projectile, by a finger lever and slide. The tubular
20 magazine extended along the bottom of the barrel. It was
21 originally believed that only the patent model was made
22 in 1849. However, a second rifle was later found. At
23 this time only the second rifle is known to exist.
- 24 b. The Jennings Rifle, 1850-1851 and The Smith-Jennings
25 Rifle, 1851-1852. The successor to the Hunt rifle using
26 the same ammunition and pill-lock primer method. This

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P.O. Box 849
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(503) 248-3138

1 rifle transferred the loaded bullet from the tubular
2 magazine to the firing position and positioned a primer
3 with two motions of a finger lever. While approximately
4 500 of these rifles were made due to mechanical trouble,
5 frequent malfunctions and expenses, few of the rifles were
6 made as repeaters. Most were made as single shot rifles.

- 7 c. Smith & Wesson lever action repeating pistols and rifles.
8 Circa 1854-55. Their estimated production was 1000
9 pistols, and at least one experimental rifle. The action
10 was similar to the Jennings with the tubular magazine. By
11 this time the firearm was beginning to take on the
12 appearance now associated with the Winchester. A limited
13 number were made to use a special self-contained cartridge
14 which the machinery of that day could not produce. They
15 returned to the improved rocket ball ammunition containing
16 a primer at the end of the hollow loaded projectile.
- 17 d. Volcanic Repeating Arms, 1855 to 1857. This was also a
18 lever action tube feed firearm resembling the products of
19 their predecessor, Smith & Wesson. These firearms used a
20 special designed cartridge of the S&W type. As production
21 was slow and difficult only a limited number were believed
22 to have been made. The company went into receivership in
23 1857.
- 24 e. The Smith & Wesson .22 caliber rimfire revolver, Model No.
25 1 was introduced in 1857. This is widely accepted as being
26 the first fixed rimfire metallic cartridge revolver.

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P.O. Box 849
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(503) 248-3138

1 Factory records indicate that this model was produced
2 from 1857 to 1860 with a total production of about
3 11,671.

4 f. The New Haven Arms Co., producer of Volcanic lever action
5 pistols and rifles, 1857 to 1860. Their estimated
6 production was 3,200 firearms. the cartridge, action,
7 tube feed magazine and other basic features remained
8 about the same as in the earlier Volcanic firearms. As
9 trouble had been experienced in detonating the loaded bar
10 cartridge the firing mechanism was modified. The company
11 continued to experiment with ammunition during this time.

12 g. The Henry Rifle made by New Haven Arms Co., was not
13 introduced until 1860. They were lever action, tube fed
14 repeating rifles not offered commercially until 1862.
15 The rifle and the cartridge had been improved, and were
16 made in larger calibers, more acceptable to the public.

17 Thus, 1862 saw the first commercially available successful
18 lever action repeating rifle using the improved Henry rimfire
19 metallic cartridge. One of the reasons for the failure of the
20 early lever action rifles to gain public interest was the small
21 caliber of the S&W, (.30 and .38), the Volcanic (.38) and the
22 Volcanic made by the New Haven Co. (.30, .38 and .40). Their
23 competitors offered larger caliber firearms with more range
24 consistent with most firearms in use at that time. Conventional
25 center fire metallic ammunition did not come into being until after
26 1859.

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MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

1 The discussion by Mr. Nichols in paragraph 27 concerning
2 Colt's revolving firearms and the volume of fire does not mention
3 the weight of the arms carried by such a well-armed individual,
4 revolvers in excess of two pounds each, rifle approximately nine
5 pounds, plus extra cylinders, powder and container, percussion caps
6 and container, shot and container, and other accessories used, for
7 the care and maintenance of the firearms. Changing cylinders is
8 more complicated than changing magazines in a modern assault
9 weapon, as it required partial disassembly and would require
10 considerable skill in a stressful situation or at night. Because
11 of their limited range the handguns were ineffective against rifles
12 unless the opposing parties had closed to less than 50 yards.
13 Rifles of the day were effective at distances in excess of 200
14 yards. Additionally, the revolving rifle was awkward to shoot
15 because the debris forced from between the face of the cylinder and
16 the throat of the barrel when the weapon is discharged makes it
17 extremely uncomfortable to grasp the weapon forward of the
18 cylinder; this is still true of today's revolvers. The weapon was
19 also known to, on occasion, fire more than one chamber at a time
20 causing a hazardous situation for personnel in the immediate area.
21 During the Civil War use of the Colt revolving rifle was
22 discontinued by units of the Union Army and they were sold to the
23 highest bidder (42¢ each).

24 19. During this time (1859) firearms maintained by
25 individuals were for security, to provide food and for recreation.
26 As repair or replacement was frequently not readily available a

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P.O. Box 849
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(503) 248-3138

1 reliable, durable, accurate firearm with adequate range was required.
2 In 1859, the repeating rifle system had not been developed, and was
3 not yet acceptable for the general public. A working reliable
4 repeating rifle simply did not exist at that time.

5 20. This is particularly so since at that time the under-powered
6 S&W rimfire .22 short was the only available fixed metallic cartridge.
7 Center fire metallic ammunition was not developed until after 1859,
8 when the Civil War and the Indian Wars were still ahead.

9 21. It is highly doubtful that semiautomatic weapons of the type
10 listed in Multnomah County Ordinance No. 646 could have been
11 envisioned in 1859 by members of the firearms industry, let alone the
12 western settlers.

13 22. Mr. Nichol's remark in paragraph 29 about the Volcanic rifle
14 and the rocket ball ammunition being useless for taking game simply
15 reinforces my opinion that they were ineffective rifles (and too large
16 to be used as handguns).

17 23. The term "assault rifle" describes a military rifle designed
18 for use by troops in the field to engage and destroy an enemy force.
19 It is a weapon capable of delivering a high volume of fire when the
20 situation dictates, such as when multiple or obscure targets are being
21 fired upon, or when fire superiority or covering fire are needed.
22 This does not necessarily mean automatic fire, because automatic fire
23 is generally employed as "area" fire. Deliberate semiautomatic fire
24 delivered at a sustainable rate, or aimed fire delivered at targets
25 of opportunity, is usually preferable for combat. Assault weapons
26 must also be capable of delivering accurate damaging (capable of

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1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

1 reasonable penetration) fire at a range of several hundred yards.
2 In addition to being durable they should be simple to operate,
3 light and compact, so that they are easy to store, carry or use in
4 confined spaces. These needs resulted in the present family of
5 assault rifles, with many countries developing such firearms to
6 their specific needs and for the world arms trade.

7 Subsequently, some commercial manufacturers, both foreign and
8 domestic, and nationally controlled armories discovered a market
9 for such weapons in this country, and that in most cases with few
10 modifications such firearms could legally be imported and sold
11 commercially in this country. These modifications, if kept to a
12 minimum, were usually simple and relatively inexpensive. The more
13 realistic military look that was retained, the better the sales.
14 During my tour of duty in Washington, foreign nationals visited our
15 offices to discuss modifications and the importability of several
16 military assault rifles. I specifically remember discussing the
17 AK-47, the UZI carbine, the Galil, Deawoo K-1 and K-2, FAMAS
18 MAS223, and the Steyr AUG, which are all listed in Ordinance No.
19 646.

20 24. The features commonly associated with military assault
21 rifles are:

22 a. A large capacity quick detachable magazine. This
23 provides a large supply of ammunition (usually 20 rounds
24 or more) and the ability to reload quickly. They were
25 developed for military use and are common to assault
26 rifles. Sporting firearms use magazines that are of much

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1 less capacity, as there is no need for sustained high
2 volume fire and it would be an inconvenience using,
3 handling and storing the firearm. Oregon law restricts
4 hunting rifles to five rounds.

5 b. Folding or telescoping shoulder stock. Many military
6 rifles use these stocks to facilitate storage, and easier
7 handling and use in confined spaces. While they may be
8 convenient for storing and carrying, a worn or poor
9 fitting stock of this type will detract from accuracy.
10 They are also usually shorter than conventional shoulder
11 stocks and seldom found on sporting rifles.

12 c. Vertical hand grips. Many military firearms have
13 vertical hand grips. They are sometimes necessitated by
14 the design of the action used in the weapon or to give
15 the user better control of the weapon during rapid fire.
16 As the function and configuration of a sporting rifle is
17 different, a grip of this type would not present any
18 advantage.

19 d. Configured to accept a bayonet. Bayonets, a large
20 military knife, are common accessories for most military
21 rifles; they are a close combat weapon. I do not know of
22 any reason for attaching a knife to the muzzle of a
23 sporting rifle.

24 e. Flash suppressor. A flash suppressor usually serves two
25 purposes, to obscure the muzzle flash and disburse it in
26 such a way as to dampen the recoil and reduce muzzle

1 climb during rapid fire. As neither of these functions
2 are needed in sporting rifles, the device is not
3 desirable, particularly, since any alteration to the
4 muzzle of such a firearm may adversely effect its
5 accuracy.

6 f. Bipods. Most current military assault rifles have bipods
7 to help support the rifle primarily in the prone position
8 particularly when automatic fire is being used. They are
9 also used to provide support for the firearm when it is
10 held in the firing position for prolonged periods of
11 time. They are of little use on sporting firearms.

12 g. Grenade launcher. Grenade launchers are incorporated in
13 many military rifles to give the rifleman the ability to
14 launch small explosives. There is no sporting
15 application of these devices.

16 h. Night sights. Many military rifles are now fitted with
17 sights designed to improve the rifleman's ability to fire
18 effectively at night. The military and law enforcement
19 application of these devices are apparent. As these
20 sights are not particularly well suited for shooting
21 targets or taking game, and as it is illegal to take most
22 species at night, there is not a great demand for
23 sporting firearms equipped with these sights.

24 25. The above are characteristics common to military assault
25 rifles, although not all assault rifles possess all these
26 characteristics. Although they are machine guns by definition,

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MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

1 they are primarily used in combat to fire semiautomatic aimed fire
2 or deliver short controlled burst, rather than fully automatic
3 fire. This is because a rifleman in a tactical situation could
4 easily expend his supply of ammunition in an 8 to 10 minute
5 engagement. In fact, a rifleman in the position of being ambushed,
6 or an ambusher armed with an assault rifle, in the heat of the fire
7 fight, can expend his entire supply of ammunition in less than five
8 minutes and become an ineffective member of the unit and unable to
9 defend himself. To avoid instances such as this and still deliver
10 effective rapid fire, many assault rifles now incorporate a system
11 which will limit automatic fire to a two or three round burst with
12 each function of the trigger. Generally the most effective and
13 efficient use of the assault rifle in combat is in the
14 semiautomatic mode of fire, in support of the unit's automatic
15 weapons.

16 25. The commercial semiautomatic versions of the military
17 assault rifles, such as those regulated by Ordinance No. 646, as a
18 family or type are often referred to as "assault rifles," "assault-
19 type rifles," "military style rifles" or "paramilitary rifles."
20 More appropriately they are "semiautomatic assault rifles." They
21 are an identifiable family of weapons possessing the same
22 characteristics and capabilities as their military counterpart,
23 with the exception of automatic fire capability. The military
24 design features listed above identify them as assault rifles
25 designed and intended for military use and renders them impractical
26 and unsuited for sporting purposes.

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1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

1 27. Further, semiautomatic assault rifles are not suited for
2 self-defense. Rifles are not normally the weapon of choice for
3 self-defense. They have long been considered as weapons for
4 hunting, or for other offensive or aggressive actions. As they are
5 larger (longer) they may be slower and more difficult to get into
6 action at close quarters, where most acts of self-defense take
7 place. The effective range of most rifles is from 440 to 600 yards
8 depending on the caliber or millimeter. At that range the
9 projectile has sufficient velocity to easily penetrate objects such
10 as vehicles or buildings. They are unquestionably lethal at that
11 range. The "maximum range" of an unobstructed projectile is three
12 or four times the "maximum effective range." Projectiles of this
13 type traveling at approximately 30,000 feet per second could be
14 expected to penetrate several objects before coming to rest,
15 ricochets could be anticipated. Stray bullets could be lethal up
16 to the "maximum range." Citizens, police and the military have
17 traditionally looked to handguns as "personal weapons" for self-
18 defense, or personal security, with few exceptions. The shotgun,
19 because of the wide selection of ammunition, is the most versatile
20 since it can be used to take birds and game, makes a very popular
21 special police weapon, and is used by the military as both a
22 security and tactical weapon. Both the handgun and shotgun have
23 relatively short effective ranges, approximately 50 yards depending
24 on the gun and ammunition used.

25 28. Of the pistols listed in Ordinance No. 646, three of the
26 seven are already known to much of the law enforcement community as

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1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

1 being popular with the illegal drug trade: the TEC-9, the MAC 10
2 and the MAC 11. All three are made with externally threaded
3 muzzles which will readily accept muzzle mounted devices, such as
4 silencers.

5 The UZI pistol is approximately 9 1/2 inches long and
6 resembles the UZI submachine gun. The 20, 25 or 32 round magazine
7 feeds through the grip. It is 9mm.

8 The Encom MP-9 and MP-45 are approximately 10 1/2 inches long
9 with the 30, 32, 40 and 50 round magazine located forward of the
10 trigger. It resembles the MAC 10, and is made in 9mm and .45
11 caliber.

12 The MAC 10 (approximately 10 1/2") and MAC 11 (approximately
13 7 1/2"). The Military Armament Corp., M10 and M11 were submachine
14 guns. When the company went out of business RPB Inc. took over and
15 redesigned the firearms making them semiautomatic pistols. This
16 company also made and sold silencers, silencer parts, and other
17 accessories. It uses 12, 20 and 32 round magazines. They are made
18 in 9mm, .380 and 45 caliber.

19 The TEC-9, 9mm is approximately 11 1/2 inches long, a large
20 pistol with a vented barrel jacket and a largely plastic receiver.
21 These firearms are occasionally encountered with conversion kits
22 installed converting them to automatic fire. It uses a 20 and 36
23 round magazine.

24 The Spector Auto., is approximately 15 inches long. The 9mm
25 firearm is made by an Italian concern, which also makes a similar
26 submachine gun. It uses a 30 round magazine.

26 - AFFIDAVIT OF ROBERT J. BARNES

MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

1 The Sterling MK-70 is approximately 16 1/2 inches long. It is
2 very similar to the Sterling submachine gun, with a shorter barrel
3 and without the shoulder stock. It uses a variety of 9mm magazines
4 exceeding a 30 round capacity.

5 The Calico M-900 (950) 9mm is approximately 11 1/2 inches
6 long, and uses a 50 round helical magazine which attaches to the
7 top of the pistol.

8 With the exception of the UZI and Calico pistols, the above
9 firearms very closely resemble existing submachine guns, which are
10 military weapons used for close combat. The RPB SM10 and SM11A1
11 have been held to be machine guns and production stopped. Their
12 configurations lends itself well to the two hand grip used when
13 firing submachine guns. While I was with ATF I had numerous
14 occasions to examine large magazine capacity pistols that had been
15 fitted with illegal silencers or converted to automatic fire.
16 During the seven months preceding my retirement I had occasion to
17 examine and write reports on 65 illegal silencers, of that number
18 29 were on or with M10 and M11 type firearms. These pistols
19 possess characteristics, such as size, weight, long magazines, bad
20 balance and poor sights which render them unsuited for use as
21 handguns. They are also identifiable as paramilitary weapons,
22 rather than traditional weapons of sport or self-defense.

23 29. It is my conclusion and opinion that the firearms listed
24 in Ordinance No. 646 are modern semiautomatic weapons of military
25 warfare. They are also weapons commonly encountered in criminal
26

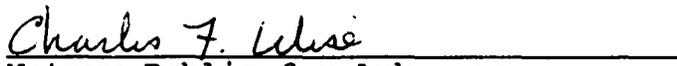
27 - AFFIDAVIT OF ROBERT J. BARNES

MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
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1 activity, particularly in drug trafficking. When fitted with
2 silencers, they are particularly suitable for defending a drug
3 dealer's stash or territory. These weapons are neither designed
4 for, nor practical as, sporting weapons or weapons of personal
5 self-defense.

6
7 
8 R. J. Barnes

9 SUBSCRIBED AND SWORN to before me this 25th day of April,
10 1991.

11 
12 Notary Public for Arkansas
13 My Commission expires: 8-28-95

14 K:\MBW\106MBW.PLD\mm

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28 - AFFIDAVIT OF ROBERT J. BARNES

MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

CERTIFICATE OF MAILING

I hereby certify that I served the within DEFENDANT-RESPONDENTS' MULTNOMAH COUNTY AND ROBERT SKIPPER BRIEF AND ABSTRACT OF RECORD on the following parties by mailing each a true copy thereof addressed as follows:

John DiLorenzo, Jr.
O'Connell, Goyak & DiLorenzo
Suite 800, One Financial Center
121 SW Morrison Street
Portland, OR 97204-3138
Attorney for Plaintiffs

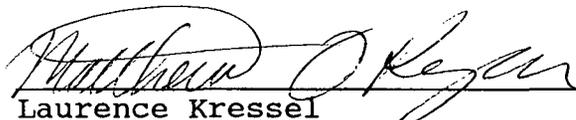
Jeffrey L. Rogers
City Attorney
Portland City Hall
1220 SW Fifth Avenue, Suite 315
Portland, OR 97204
Attorney for Defendant City of Portland

Jacob Tanzer
Ball, Janik & Novack
1100 One Main Place
101 SW Main Street
Portland, OR 97204

Kelly Clark
6320 Failing Street
West Linn, OR 97068

Alan Gottlieb
James Madison Building
12500 NE Tenth Place
Bellevue, WA 98005

on the 27th day of April, 1992. I further certify that said copies were placed in sealed envelopes, addressed as above, and deposited in the Post Office at Portland, Oregon, and that the postage thereon was prepaid.



Laurence Kressel
Of Attorneys for County Defendants

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