IN THE SUPREME COURT
STATE OF GEORGIA

GEORGIACARRY.ORG, INC, JAMES CHRENCIK, MICHAEL NYDEN, and JEFFREY HUONG, Appellants, v. CITY OF ATLANTA, CITY OF ROSWELL, and CITY OF SANDY SPRINGS, Appellees.	)	No. S08A1911

APPELLEE CITY OF SANDY SPRINGS' BRIEF

Now comes Appellee City of Sandy Springs (hereinafter referred to as "Sandy Springs") and files this its Brief in response to the Brief filed by the above-named Appellants and shows to this Honorable Court the following:

Judgments Appealed

Appellants are appealing in this one appeal three separate judgments entered by the Superior Court of Fulton County in the above-styled matter. (R-1-2). As only one of the judgments involves Sandy Springs, only that judgment and Appellants' enumerations of error and argument which deal with the Sandy Springs judgment shall be addressed herein.

The Sandy Springs judgment rules upon a Motion for Summary Judgment filed by Appellants and a Motion to Dismiss filed by Sandy Springs which the Superior Court converted to a Motion for Summary Judgment. The Superior Court denied Appellants' motion and granted Sandy Springs' motion and after determining there was no just reason for delay of entry of final judgment, directed that final judgment be entered in favor of Sandy Springs. (R-456-457).

Factual Background

The facts involved herein are quite straight forward. Appellants filed a Complaint for declaratory and injunctive relief against multiple defendants, including Sandy Springs. As regards their claim against Sandy Springs, Appellants were seeking a ruling as to the validity of an ordinance adopted by Sandy Springs relating to the carrying and/or possession of firearms within Sandy Springs' parks. Appellants argued that such an ordinance was preempted by O.C.G.A. § 16-11-173(b)(1).[1] (R-4-13).

At the time of the filing of the above-described complaint by Appellants, Sandy Springs' original ordinance provided:

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[1]O.C.G.A. § 16-11-173(b)(1): "No county or municipal corporation, by zoning or by ordinance, resolution, or other enactment, shall regulate in any manner gun shows; the possession, ownership, transport, carrying, transfer, sale, purchase, licensing, or registration of firearms or components of firearms; firearms dealers; or dealers in firearms components."

> "It shall be unlawful for any person to possess any firearm, air gun or any explosive substance (including fireworks) in any of the City parks, unless written permission for such has been authorized by the Mayor and City Council." Code of Ordinances of the City of Sandy Springs, Chapter 8, Article 2, § 4(g), since amended. (R-9-10)(T-27).

During the pendency of this case in the trial court, the Georgia Court of Appeals decided the case of GeorgiaCarry.Org, Inc. v. Coweta County, Georgia, 288 Ga. App. 748, 655 S.E.2d 748 (2007), which supported Appellant's preemption argument. Upon learning of this decision, Sandy Springs promptly began the process of addressing its ordinance so as to bring it into compliance with the Court of Appeals' decision. On February 5, 2008, approximately two months after the rendering of the decision by the Court of Appeals on December 4, 2007, the Sandy Springs City Council amended its ordinance to read as follows:

> "(g) Firearms.
>
> (1) It shall be unlawful for any person to possess any explosive substance (including fireworks) in any of the City parks, unless written permission for such has been authorized by the Mayor and City Council.
>
> (2) It shall be unlawful for any person to discharge any firearm within City parks unless authorized by the Mayor and City Council. Pursuant to O.C.G.A. §

> 16-11-127, it is unlawful to carry a firearm to a public gathering, as defined in O.C.G.A. § 16-11-127, within the City." Code of Ordinances of the City of Sandy Springs, Chapter 8, Article 2, § 4(g). (R-333-335).

Appellants' original complaint did not seek any monetary sums of any kind from Sandy Springs. (R-4-13). Following the decision by the Court of Appeals, Appellants amended their complaint and in so doing added a general prayer at the end for attorney's fees and costs. (R-187-192).

Subsequent to the filing of the Amended Complaint, a Motion to Dismiss was filed by Sandy Springs (R-232-233; 220-231)and a Motion for Summary Judgment was filed by Appellants. (R-264-273). On May 9, 2008, the Superior Court converted Sandy Springs' Motion to Dismiss to a Motion for Summary Judgment, heard the motions, and entered its Order dated May 19, 2008, granting Sandy Springs' Motion for Summary Judgment and denying that of Appellants. (R-456-457).

In so ruling, the Superior Court found that the second sentence of subsection (g)(2) (set forth above) of Sandy Springs' amended ordinance, identified as Chapter 8, Article 2, Section 4, Subsection (g), "merely cites the general statute as notice of State law", said State law being O.C.G.A. § 16-11-127, and "is not preempted under

State law as an expansion of the powers of COSS[2] to regulate the carrying of firearms within the city." (R-456-457).

Argument and Citation of Authority

1. The trial court did not err in denying Appellants' Motion for Summary Judgment against Sandy Springs and in granting Sandy Springs' Motion for Summary Judgment against Appellants. [3]

1.A Any issues which may have involved Sandy Springs are moot.

The Supreme Court in Chastain v. Baker, 255 Ga. 432 433, 339 S.E.2d 241, 242 (1986), explained:

> "'A moot case is one which seeks to determine an abstract question which does not arise upon *existing* facts or rights.' (Emphasis supplied). Black's Law Dict. (Revd. 4th ed.). '*Gober v. Colonial Pipeline Co., 228 Ga. 668, 670 (187 SE2d 275)(1972)*, held: This court will upon its own motion dismiss an appeal where it affirmatively appears that ... a

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[2]COSS refers to the City of Sandy Springs.

[3]For purposes of clarity, item number 1 herein and its subsections (1.A, 1.B, 1.C, and 1.D) in Sandy Springs' Brief correspond to enumerated item number 3 and its subsections (3.A, 3.B, 3.C, and 3.D) in Appellants' Brief. Please note that although 3.B and 3.C of Appellants' Brief address only Appellee Roswell directly, Appellants begin 3.D by stating that the arguments set forth in 3.B and 3.C apply equally to Sandy Springs, which is why Sandy Springs is addressing them herein.

decision would be of no benefit to the complaining party. *Mooney v. Mooney, 200 Ga. 395 (37 SE2d 195)*... The fact that the appellants might possibly derive some future benefit from a favorable adjudication on an abstract question ... will not require this court to retain and decide the case. *Abernathy v. Dorsey, 189 Ga. 72 (5 SE2d 39).*'... Of course, a case may be moot, but because the error is capable of repetition and yet evades review, the appeal will be considered."

This doctrine of mootness was more recently clarified in Collins v. Lombard Corporation, et al., 270 Ga. 120, 122, 508 S.E.2d 653, 655 (1998):

"Thus, *Chastain's* holding that a case is moot when its resolution would amount to the determination of an abstract question not arising upon existing facts or rights remains a correct statement of the doctrine of mootness so long as it is understood that a case which contains an issue that is capable of repetition yet evades review is not moot because a decision in such a case would be based on existing facts, or, rights, which affect, if not the immediate parties, 'an existing class of sufferers.' *In the Interest of I. B.*, supra."

Dean v. City of Jesup, 249 Ga. App. 623, 624, 549 S.E.2d 466, 468 (2001), addressed the applicability of the mootness doctrine to declaratory judgment actions:

"The Declaratory Judgment Act provides a means by which a superior court simply declares the rights of the parties or expresses an opinion on a question of law, without ordering anything to be done ... 'if an action

> for a declaration raises issues which are ... moot, the Georgia Statute is inapplicable, and the action must be dismissed as decisively as would any other action presenting the same non-justiciable issues.' *In the Interest of I. B.*, 219 Ga. App. 268, 269, 464 S.E.2d 865 (1995), citing *Felton v. Chandler*, 75 Ga. App. 354, 361, 43 S.E.2d 742 (1947)."

During the pendency in the Superior Court of the matter currently before this Court and in light of and in line with the decision in GeorgiaCarry.Org, Inc. v. Coweta County, 288 Ga. App. 748, 655 S.E.2d 748 (2007), Sandy Springs amended the ordinance with reference to which Appellants had sought a declaration. The result of this amendment was to moot the attacks made by Appellants upon the validity of the original ordinance. The language found offensive in GeorgiaCarry.Org, Inc. v. Coweta County, supra, was removed, thus making any question about the previous language an abstract question and not an issue capable of repetition.

One of the cases cited by Appellants, but accorded only one sentence in their brief, in fact, sheds much light on the factual circumstances before this Court and the course of action taken by Sandy Springs in amending its ordinance. In National Advertising Co. v. City of Miami, 402 F.3d 1329, 1331, 1333, 1334 (11th Cir. 2005), it was noted:

> "This Court and the Supreme Court have repeatedly held that the repeal or amendment of an allegedly unconstitutional statute moots legal

challenges to the legitimacy of the repealed legislation... '[g]enerally, a challenge to the constitutionality of a statute is mooted by repeal of the statute.' ... 'when an ordinance is repealed by the enactment of a superseding statute, then the 'superseding statute or regulation moots a case.'... Furthermore, the Supreme Court has many times held that amendments or revocation of challenged legislation renders the lawsuit moot and deprives the court of jurisdiction." Nevertheless, "for a defendant's voluntary cessation [of illegal conduct] to moot any legal questions presented and deprive the court of jurisdiction, it must be 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur....." As noted by Appellants, "voluntary cessation of offensive conduct will only moot litigation if it is clear that the defendant has not changed course simply to deprive the court of jurisdiction." "However, ' governmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities.' *Coral Springs*, 371 F.2d at 1328-29. Indeed, as we noted above, the cases are legion from this and other courts where the repeal of an allegedly unconstitutional statute was sufficient to moot litigation challenging the statute." "Mere speculation that the City may return to its previous ways is no substitute for concrete evidence of secret intentions...The City's purpose in amending the statute is not the central focus of our inquiry nor is it dispositive of our decision. Rather, the most important inquiry is whether we believe the City would re-enact the prior ordinance." "Furthermore, we are confident that the City does not contemplate

returning to its prior zoning ordinance, given our strict disapproval of this type of governmental "flip-flopping....In such an instance, the courthouse door would remain open for reinstatement of such a lawsuit." (See also, Action Outdoor Advertising JV, L.L.C. V. Town of Cinco Bayou, Florida, 363 F. Supp.2d 1321, 1326 (2005), which quotes extensively from National Advertising Company v. City of Miami, supra, in dismissing Action Outdoor's complaint on the grounds that the suit was moot in light of the municipality's passing an amended ordinance following commencement of the suit.)

The Court of Appeals rendered its decision in GeorgiaCarry.Org, Inc. v. Coweta County, Georgia, 288 Ga. App. 748, 655 S.E.2d 748 (2007), on December 4, 2007. On February 5, 2008, the Sandy Springs City Council adopted a new ordinance which specifically addressed objections covered by the Court of Appeals. This ordinance, as amended, now applies only to the discharge of firearms within Sandy Springs' parks, and is specifically authorized by O.C.G.A. § 16-11-173(e) which provides:

> "(e) Nothing contained in this Code section shall prohibit municipalities or counties, by ordinance, resolution, or other enactment, from reasonably limiting or prohibiting the discharge of firearms within the boundaries of the municipal corporation or county."

Nevertheless, Appellants proceeded to attack one sentence contained in Sandy Springs' amended ordinance which does nothing more than set forth the existing State law making it unlawful to carry a firearm to a public gathering and which specifically cites that existing State law, O.C.G.A. § 16-11-127(a) and (b)[4].

Contrary to what Appellants argue, referencing and citing a State law does not create a special law on the subject and does not in any way offend the State's preemption of this area of firearms as set forth in O.C.G.A. § 16-11-173. Had Sandy Springs' amended ordinance "made it unlawful to carry a firearm to a public gathering within the City", this Court, as well as the Superior Court, would be faced with a totally different set of facts, but that is not what the amended ordinance states. State statutes also on occasion reference federal law provisions, but this does not

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[4]O.C.G.A. § 16-11-127(a) and (b) throughout the pendency of this matter and until the definition of "public gathering" set forth in (b) was amended, effective July 1, 2009, (a) provided: "Except as provided in Code Section 16-11-127.1, a person is guilty of a misdemeanor when he or she carries to or while at a public gathering any explosive compound, firearm, or knife designed for the purpose of offense and defense; (b) for the purpose of this Code section, "public gathering" shall include, but shall not be limited to, athletic or sporting events, churches or church functions, political rallies or functions, publicly owned or operated buildings, or establishments at which alcoholic beverages are sold for consumption on the premises. Nothing in this Code section shall otherwise prohibit the carrying of a firearm in any other public place by a person licensed or permitted to carry such firearm by this part." The amendment, effective July 1, 2009, does not impact the matter before this Court, since the ordinance acknowledges and references the State statute and would thus, encompass any amendment.

offend any federal preemption.[5] Such references serve to notify the public that there is a federal law, regulation, and/or prohibition on the subject, just as the reference in Sandy Springs' ordinance serves to notify of a State law in effect, which given the impact of the recent amendment, underscores the importance of informing the public. Moreover, it is incumbent upon law enforcement of any municipality to enforce not only its own ordinances, but State statutes as well.

Appellants attempt to confuse this issue by focusing on comments made by Sandy Springs' counsel during the hearing. Needless to say, what counsel may say is not evidence and nothing counsel said or could say changes the written word of the amended ordinance, which is nothing more than an acknowledgment of a State law.

Moreover, regardless of what Appellants argue the intent of an Agenda Item Memo addressing the proposed ordinance amendment was, what the Sandy Springs Council in fact did in amending the ordinance was not what the Memo may be interpreted as suggesting. (R-384-389). The amended ordinance does not make it unlawful to carry a firearm to a "public gathering" as that term is defined by O.C.G.A.

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[5]See for example, O.C.G.A. § 16-11-171(2): "'Dealer' means any person licensed as a dealer pursuant to 18 U.S.C. Section 921, et seq. or Chapter 16 of Title 43;" O.C.G.A. §16-11-171(5): "'NICS' means the National Instant Criminal Background Check System created by the federal 'Brady Handgun Violence Prevention Act;'" O.C.G.A. § 16-11-172(d)(3): "Any firearm which is a curio or relic as defined by 27 C.F.R. 178.11."

§ 16-11-127. What it does do is state that pursuant to O.C.G.A. § 16-11-127, it is unlawful to carry a firearm to a "public gathering" as that term is defined by O.C.G.A. § 16-11-127. There is a big difference between the two, which is being overlooked by Appellants, but which was properly recognized by the Superior Court. (R-456-457) (T-54).

The ordinance as written does not transform its acknowledgment of State law into a new regulation affecting the carrying of a firearm solely by being set forth in the ordinance, which is ultimately what Appellants are urging this Court to accept. This ordinance, as written, does not create a new offense; it does not make penal an act preempted by state law[6]; and it does not conflict in any way with the existing general law - it is but a statement of that general law. Sandy Springs' ordinance does nothing more than say that pursuant to a specifically cited State law, it is unlawful to carry a firearm to a public gathering in the city, as defined by the cited State law.

[6] Jenkins v. Jones, 209 Ga. 758, 75 S.E.2d 815 (1953), holding that a municipal ordinance penalizing an act made penal by existing State law covering the same subject must yield to State law unless there is express authority to enact the ordinance.

I.B. The application of the Ante Litem Statute to Appellants is not unconstitutional.

Appellants filed an amended complaint on December 28, 2007, and added a general prayer, apparently against all of Appellees, asking for costs and attorney's fees. A cover letter forwarded with the amended complaint was the first notice Sandy Springs received of any claim for monetary damage and reads in relevant part as follows:

> "Also, this letter constitutes any necessary ante-litem notice of Plaintiffs' intentions to seek attorney's fees and non-taxable costs for Defendants' stubborn litigiousness and causing unnecessary delays and expenses in this case when faced with the legal certainty that their Ordinances are invalid." (R-410).

O.C.G.A. § 36-33-5 provides:

> "(a) No person, firm, or corporation having a claim for money damages against any municipal corporation on account of injuries to person or property shall bring any action against the municipal corporation for such injuries, without first giving notice as provided in subsection (b) of this Code Section.
>
> (b) Within six months of the happening of the event upon which a claim against a municipal corporation is predicated, the person, firm, or corporation having the claim shall present the claim in

writing to the governing authority of the municipal corporation for adjustment, stating the time, place, and extent of the injury, as nearly as practicable, and the negligence which caused the injury. No action shall be entertained by the courts against the municipal corporation until the cause of action therein has first been presented to the governing authority for adjustment.

(c) Upon the presentation of such claim, the governing authority shall consider and act upon the claim within 30 days from the presentation; and the action of the governing authority, unless it results in the settlement thereof, shall in no sense be a bar to an action therefor in the courts.

(d) The running of the statute of limitations shall be suspended during the time that the demand for payment is pending before such authorities without action on their part."

The arguments made by Appellants that the money damages sought were not "on account of injury to person or property" and that they could not know "the time, place, and extent of the injury" have all been made in the past and long settled against Appellants.

As far back as 1919, it was held in Maryon v. City of Atlanta, 149 Ga. 35, 99 S.E.116, 117 (1919), that:

"The purpose of the law was simply to give to the municipality notice that the citizen or property owner has a grievance against it. It is

> necessary only that the city shall be put on notice of the general character of the complaint, and in a general way of the time, place, and extent of the injury. The act recognizes, by the use of the words 'as near as practicable,' that absolute exactness need not be had. A substantial compliance with the act is all that is required; and when the notice describes the time, place, and extent of injury with reasonable certainty, it will be sufficient.... 'When the statute which makes the filing of a claim with the municipal authorities a condition precedent to the maintenance of an action thereon contains no specific requirement that the amount of the claim be set out, the requirement of the statute is satisfied by a statement of the facts upon which the claim is based. The addition of the amount is unnecessary, and if set forth, mere surplusage, and does not bar a recovery of a greater sum.'" (citations omitted)

Moreover, Appellants' contention the application of O.C.G.A. 36-33-5 creates two classes of plaintiffs which are treated differently is not sustainable, and their argument that an ante litem notice in an equity only case is not required even when attorney's fees and litigation costs are sought is not in fact supported by case law. When money damages of any kind are sought, including attorney's fees and litigation costs, O.C.G.A. § 36-33-5 requires the ante litem notice, and this is so even if the money claim for attorney's fees and litigation expenses is ancillary to the equitable claim. Dover v. City of Jackson, 246 Ga. App. 524, 541 S.E.2d 92 (2000).

Ehlers v. City of Decatur, 614 F.2d 54 (1980), cited by Appellants for the proposition that in a generic equity case no ante litem notice is required is not totally accurate. While noting in a footnote, "a litigant seeking injunctive relief is not bound by the requirements of the statute," the actual issue involved in Ehlers v. City of Decatur was whether the ante litem notice could be required in a 42 U.S.C. § 1983 action. The court therein found that since the ante litem notice provision of Georgia law is both a statute of limitations and a requirement of exhaustion of administrative remedies (suit must be postponed until either the municipality acts or 30 days elapses), it was inapplicable since "federal courts may not require exhaustion of state remedies in a s 1983 action for deprivation of a constitutional right. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 491(1961); *Wells Fargo Armored Serv. Corp. v. Georgia Public Serv. Comm'n*, 547 F.2d 938, 939-940 n.1 (5th Cir. 1977); *Bryant v. Potts*, 528 F.2d 621 (5th Cir. 1976)." Id. at pp. 55-56.

To the extent that the above letter addressing the amended complaint may be considered to be an adequate ante-litem notice, Sandy Springs did in fact proceed promptly and expeditiously to address the objectionable ordinance in light of the Court of Appeals' decision and having done so certainly was not being stubbornly litigious or causing any undue delay or costs.

Moreover, according to Appellants' letter accompanying their amended complaint, their claim for attorney's fees and costs was based on Sandy Springs' stubborn litigiousness and having caused unnecessary delay and expense. (R-410). O.C.G.A. § 13-6-11 reads:

> "The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them."

In Daniels, et al. V. Price Communications Wireless, Inc., 254 Ga. App. 559, 561, 562 S.E.2d 844, 846 (2002), it was held:

> the "claim for attorney's fees under OCGA § 13-6-11 fails because, although his prayer included a paragraph reading '[a]ttorney fees and costs of litigation,' he did not 'specially plead [ ]' for them as required by that statute. See *Rowell v. Rowell*, holding an award of attorney fees 'clearly erroneous' where 'the defendant in error *does not allege that the plaintiff in error was stubbornly litigious* and does not pray for the award of attorney's fees.' (*Emphasis supplied.*) *Id.* at 585(3), 94 S.E.2d 245; *Dept of Transp. v. Ga. Television Co.* 'A general request for attorney fees, *without reference to OCGA § 13-6-11 or the criteria set forth therein*, is not the specific pleading contemplated by the statute.' (*Emphasis supplied.*) *Id.* at 752, 536 S.E.2d 773." (See also, Lines, et

al. v. City of Bainbridge, 273 Ga. App. 420, 615 S.E.2d 235 (2005), wherein while there was a claim for attorney's fees in the complaint, there was no mention of OCGA § 13-6-11 or any other legal theory as a basis for recovering fees; Pipe Solutions, Inc. v. Inglis, 291 Ga. App. 328, 661 S.E.2s 683 (2008), wherein there was a prayer for attorney's fees in an amount to be proven, but no special pleading or prayer for damages as required by OCGA § 13-6-11).

Thus, a general request for attorney's fees and costs as reflected in the amended complaint filed by Appellants, without any reference to O.C.G.A. § 13-6-11 or to any of the criteria set forth in this statute, fails to meet the specific pleading requirements of this statute. Moreover, the application of the ante litem statute does not create two unequally treated classes as urged by Appellants: plaintiffs who have equitable claims plus a claim for litigation expenses and plaintiffs who have a claim for litigation expenses, as well as a claim for other monetary damages do not form two different classes. There is but one class of plaintiffs and the ante litem statute applies to all plaintiffs who seek any kind of monetary sum from a municipality.

1.C. The ante litem notice statute does apply to Appellants.

Appellants' contention that because they were originally seeking a declaration and an injunction, only later deciding to seek attorney's fees, O.C.G.A. § 36-33-5 does not apply to them is not sustainable.

Dover v. City of Jackson, 246 Ga. App. 524, 541 S.E.2d 92 (2000), specifically held that a claim for attorney fees and costs of litigation, even though ancillary to a claim for equitable relief, is nevertheless a claim for money damages within the ambit of O.C.G.A. § 36-33-5 and thus, subject to the ante litem notice requirements.

In other words, any time a claim is made for monetary sums against a municipal corporation on account of injuries to person or property, whether as a primary or ancillary claim, the ante litem statute requires the notice described therein be given.

I.D. Sandy Springs has not waived any right to object to lack of ante litem notice.

Contrary to what Appellants argue, the ante litem notice statute, O.C.G.A. § 36-33-5, is not a sovereign immunity statute. Indeed, in City of Forsyth v. Bell, et al., 258 Ga. App. 331, 332, 574 S.E.2d 331 (2002), in discussing this statute, it was noted: "'This time requirement is a statute of limitation, [cit.], and the giving of notice 'in the manner and within the time required by the statute is a condition precedent to the maintenance of a suit on the claim. (Cit.)' [Cit.]'"

The case cited by Appellants for the proposition that the ante litem notice statute provides a sovereign immunity defense, City of Atlanta v. Hudgins, et al., 193 Ga. 618, 19 S.E.2d 508 (1942), does not hold that this statute is a sovereign immunity statute. Immunity is mentioned only as a side issue by the Court when discussing the

general ante litem law and a special ante litem law enacted by the General Assembly solely for the City of Atlanta which was struck down as being in conflict with the general law and which improperly treated the City of Atlanta differently by conferring a greater degree of immunity upon that one municipality than other municipalities of the State of Georgia.

Moreover, the Preliminary Scheduling Order was dated December 5, 2007, and provided a time line for Appellants to file their amended complaint and for motions. (R-181). This order actually states with reference to those motions: "Defendants have raised various defenses in their answers concerning immunity, standing, and verification. Any motion regarding these defenses shall be filed no later than January 30, 2008." (R-181).

At the time of the scheduling order, Appellants had not filed their amended complaint, which sought for the first time against Sandy Springs monetary damages. Sandy Springs was not one of the defendants who had raised any kind of immunity defense, as such was not applicable to the allegations made against Sandy Springs in the original complaint.

Sandy Springs was not required to file any responsive pleading to the amended complaint. O.C.G.A. § 9-11-15(a) provides in relevant part: "A party **may** plead or move in response to an amended pleading..." (*Emphasis supplied*). O.C.G.A. § 9-11-

12(b) states in relevant part: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto **if one is required**.... If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief..." (*Emphasis supplied*).

Thus, Sandy Springs has not waived any defense in law or fact to Appellants' attempt to seek attorney's fees and litigation expenses.[7]

Conclusion

The Court of Appeals issued its decision in GeorgiaCarry.Org, Inc. v. Coweta County, supra, on December 4, 2007. Sandy Springs acted promptly and expeditiously to adopt a new ordinance which removed the language found offensive by the Court of Appeals in GeorgiaCarry.Org, Inc. v. Coweta County, supra, and this amended ordinance was adopted on February 5, 2008. This action taken Sandy Springs was sufficient to and did in fact moot any challenge Appellants had made to the original ordinance.

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[7]Appellants imply that Sandy Springs totally ignored any issue as to ante litem notice. This is not so as Sandy Springs did address this failure by Appellants in Sandy Springs' Brief in Opposition to Appellants' Motion for Summary Judgment. (RT-328-339).

The amended ordinance applies to the discharge of firearms in Sandy Springs' parks and is specifically authorized by O.C.G.A. § 16-11-173(e). This amended ordinance also sets forth the State law prohibition against carrying a firearm at a public gathering by specifically citing O.C.G.A. § 16-11-127. The ordinance as written does not make the behavior unlawful, but rather only acknowledges and cites the State's prohibition of such behavior, which the Superior Court properly recognized in granting Sandy Springs' Motion for Summary Judgment and denying that of Appellants.

O.C.G.A. § 36-33-5, the ante litem notice statute, does not create two unequally treated classes of plaintiffs. The required notice to a municipality must be given any time monetary damages on account of injuries to person or property are sought, whether as a primary claim or as an ancillary claim. This notice is not required to be exact, but need only state facts upon which the claim is based and absolutely does not require a specific dollar amount be set forth. Moreover, the time requirement for ante litem notice under O.C.G.A. § 36-33-5 has been recognized as being in the nature of a statute of limitations and a condition precedent to maintaining a claim against a municipality for monetary damages on account of injuries to person or property.

CERTIFICATE OF SERVICE

This is to certify that I have as of this date mailed a copy of the foregoing Appellee City of Sandy Springs' Brief by depositing a copy in the United States Mail in a properly addressed envelope with adequate postage thereon, to:

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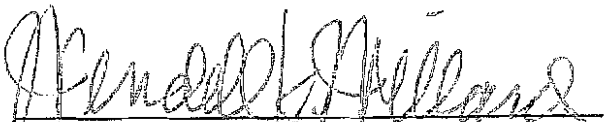

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