IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGIACARRY.ORG, INC.,	)	
TAI TOSON,	)	
JEFFREY HUONG,	)	
JOHN LYNCH,	)	
MICHAEL NYDEN, and	)	
JAMES CHRENCIK	)	
Plaintiffs,	)	
	)	Civil Action No. 2007 CV 138552
v.	)	
	)	
FULTON COUNTY, GEORGIA,	)	
CITY OF ATLANTA, GEORGIA,	)	
CITY OF EAST POINT, GEORGIA,	)	
CITY OF ROSWELL, GEORGIA,	)	
And	)	
CITY OF SANDY SPRINGS, GEORGIA,	)	
	)	
Defendants	)	

PLAINTIFFS' REPLY TO ATLANTA IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I.

INTRODUCTION

Plaintiffs brought this action for declaratory and injunctive relief against Defendant City of Atlanta because Atlanta unlawfully prohibits Plaintiffs (and Plaintiff GeorgiaCarry.Org's members) from carrying firearms in Atlanta's parks, in violation of O.C.G.A. § 16-11-173(b). Plaintiffs filed a Motion for Summary Judgment because no material facts are at issue and Plaintiffs are entitled to judgment as a matter of law. Atlanta ignores overwhelming legal authority, including a very recent Court of Appeals opinion directly on point, and boldly asserts that it has the power to do what the legislature in clear and unambiguous terms has told Atlanta it cannot do. Because Atlanta's position is completely at odds with all authority (most of which

Atlanta does not address ***at all*** in its Response) and because Atlanta's arguments are not the least bit tenable, Plaintiffs' Motion for Summary Judgment must be granted against Atlanta.

II.

ARGUMENT[1]

II.A. Atlanta Does not Address Case Law Directly On Point

Astonishingly, Atlanta fails to address the ***unanimous*** decision of the Court of Appeals in *GeorgiaCarry.Org, Inc. v. Coweta County*, 288 Ga. App. 748 (2007). In that case, brought by the same lead plaintiff against Coweta County on a virtually identical cause of action, the Court of Appeals said, "The plain language of [O.C.G.A. § 16-11-173(b)(1)] precludes a county from regulating 'in any manner the carrying of firearms….'"[2] *Id.* The Court of Appeals concluded that it was error for the trial court to fail to grant GeorgiaCarry.Org's Motion for Summary Judgment. *Id.* at 749.

Because the decision of the Court of Appeals in *Coweta County* was unanimous, it is binding precedent throughout the state. *See* Rule 33(a), Rules of the Court of Appeals. The Court of Appeals held that "the language of the statute is not doubtful," that "the preemption is express, and the trial court erred in holding otherwise." *Id.* This Court is bound by the *Coweta County* decision. In the absence of any argument from Atlanta that *Coweta County* somehow does not apply, there can be no outcome other than granting Plaintiffs' Motion.

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[1] Atlanta makes no attempt to refute any of Plaintiffs' facts, so those facts must be taken as true. In fact, Atlanta admitted the operative facts in its Answer, as Plaintiffs noted in their original brief. Clearly, there is no issue of fact at all, material or otherwise. This case presents a clear issue of law on undisputed facts, truly a rare event in litigation.

[2] O.C.G.A. § 16-11-173(b)(1) says, "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." Atlanta does not argue, nor can it, that it is situated differently from Coweta County, as the statute clearly applies equally to counties and cities.

II.B. Atlanta Inexplicably Confounds ***Discharging*** With ***Carrying***

Atlanta mistakenly confuses its power to regulate the ***discharge*** of firearms with its lack of power to regulate the ***carry*** of firearms. As discussed in Part II.A. above, O.C.G.A. § 16-11-173(b)(1) completely preempts Atlanta from regulating the ***carry*** of firearms, which is exactly what Atlanta's Ordinance illegally regulates. On the other hand, O.C.G.A. § 16-11-173(e) provides that the remainder of O.C.G.A. § 16-11-173 (including subsection (b)(1)) should not be read to preempt Atlanta from regulating the ***discharge*** of firearms. Atlanta somehow comes to the conclusion that its power to regulate ***discharge*** gives it the power to regulate ***carry.***

Atlanta's reading of subsection (e) has the effect of reading subsection (b)(1) right out of the statute. Under Atlanta's absurd interpretation, it must have the power to regulate ***carry*** in order to ban ***discharge***, despite the fact that the legislature plainly and unambiguously deprives from Atlanta the power to regulate ***carry*** and grants Atlanta the power to reasonably regulate or even reasonably prohibit the discharge of firearms.

Atlanta also attempts to create a nonexistent provision of state law when it declares, "The legislature clearly did not intend to completely preempt the field of gun regulation. Georgia law does not prohibit local governments from enacting their own gun regulations within *reasonable limits."* Atlanta's Brief, p. 2 [emphasis in original]. While it should not be necessary to say so, Atlanta is just plain wrong. Georgia law explicitly does prohibit local governments from enacting their own gun regulations, reasonable or otherwise, except for the three narrow exceptions contained in O.C.G.A. § 16-11-173(c), (d), and (e) (pertaining to the carry of firearms by local government employees, requiring heads of households to own firearms, and reasonably regulating discharge of firearms, respectively). *See Sturm, Ruger & Co. v. City of Atlanta*, 253 Ga. App. 713 (2002) ("[P]reemption can be inferred from the comprehensive nature of the

statutes regulating firearms in Georgia," "[T]he State has also expressly preempted the field of firearms regulation in O.C.G.A. § 16-11-184," and "[T]he State has reserved to itself the right to prescribe the manner in which firearms may be regulated.")[3]

It is well established (*especially* for the City of Atlanta, who was a party to the *Sturm, Ruger* case) that the inclusion of one implies the exclusion of others. The legislature made no statutory exception to preemption for municipal ordinances regarding possession of firearms on recreational facilities. "It is a well-established canon of statutory construction that the inclusion of one implies the exclusion of others." *Id.* at 721. "By expressly authorizing local governments" to exercise one power, "the legislature impliedly preempted all other" powers. *Id. See also City of Atlanta v. SWAN Consulting & Security Servs., Inc.*, 274 Ga. 277, 553 S.E.2d 594 (2001) ("By expressly authorizing additional local regulation . . . in that limited instance, the Act impliedly preempts the City's regulation" outside of that instance).

As is readily apparent in the captions of the two cases cited above, the City of Atlanta has a history of obstinately refusing to accept the provisions of state law that constitute comprehensive regulatory schemes, including O.C.G.A. § 16-11-173 and the remainder of the Firearms and Weapons Act. In *SWAN*, Atlanta sought to apply an ordinance that would have had the effect of regulating the private security industry, despite a comprehensive regulatory scheme of private security at the state level. The Supreme Court found Atlanta's ordinance unconstitutional and preempted as applied to SWAN Consulting & Security Services. In *Sturm, Ruger*, Atlanta attempted to regulate the distribution of firearms by filing court claims against firearms manufacturers. The Court of Appeals readily dismissed Atlanta's claims as preempted.

[3] O.C.G.A. § 16-11-184 was renumbered to the present-day O.C.G.A. § 16-11-173 by 2005 Ga. L. 613, S.B. 175.

Interestingly, Atlanta had been warned earlier that year that its claims were preempted in *Smith & Wesson Corp. v. City of Atlanta*, 273 Ga. 431 (2002) (Fletcher, concurring).

II.C. Atlanta Has No Power to Regulate Carry at Public Gatherings

Atlanta incorrectly concludes that its parks are "public gatherings" and that it has the power to regulate carry at a public gathering. Atlanta is wrong on both counts. O.C.G.A. § 16-11-127 prohibits carrying a firearm at a "public gathering." While the phrase "public gathering" is clumsily defined by a list of non-exclusive examples, it is clear that city parks are not "public gatherings." In addition to the places included on the list, the Court of Appeals has explained that the only other places that are "public gatherings" are places "when people *are* gathered or will be gathered for a particular function and not when a weapon is carried lawfully to a public place, where people *may* gather. Accordingly, the focus is not on the 'place' but on the 'gathering' of people…." *State v. Burns,* 200 Ga. App. 16 (1991) (holding that a restaurant that does not serve alcohol is not a public gathering) [emphasis in original]. See also Atty. Gen. Op. U-84-37, 1984 Op. Atty. Gen. Ga. 261, in which the Attorney General opined that the phrase "public gathering" in the statute must be strictly construed against the state, the statute being "clearly criminal in nature," and therefore a shopping mall is not a "public gathering."

Given the foregoing interpretations of the phrase, Atlanta is mistaken when it concludes that its parks are "public gatherings" because they are "a public space in which to conduct such gatherings," and "venues for a wide range of spiritual, political, cultural, and athletic events." Atlanta's Brief, p. 2. As the Court of Appeals ruled, the emphasis is on the "gathering" and not the "place." A park ***may*** be a public gathering, but only if there actually is a gathering "for a particular purpose," *see Burns,* at the time. Otherwise, a park is no more a public gathering than

a shopping mall. Unless and until it is a venue where the public is gathered for a particular function, a restaurant is just a restaurant and a park is just a park.

The entire discussion of public gatherings by Atlanta misses the point of preemption, however, as ordinances regulating public gatherings are not one of the three exceptions to express preemption. *See* subsections 173(c), (d), and (e). Therefore, even if Atlanta's parks were public gatherings (which they most certainly are not), Atlanta has no power to regulate the carry of firearms ***in any manner,*** including at a public gathering. Atlanta recklessly ignores the overwhelming authority against its position when it claims, absurdly, that "it is well established by legal precedent and public policy that many municipalities and counties *reasonably* regulate the possession and discharge of firearms at public buildings and gatherings, events, etc." Atlanta's Brief, p. 3. [Emphasis in original]. Atlanta cites not one scintilla of the "well established…legal precedent and public policy" to which it refers. That is because there is ***none***. Plaintiffs are unable to find any cases interpreting O.C.G.A. § 16-11-173 (or its predecessor) in which preemption of the local ordinance in question is not found. That is hardly surprising, given the broad wording of the express preemption statute. Courts rarely have the opportunity to review cases of express preemption, because most governments do not have to be sued to enforce clear and express preemption.

Moreover, Coweta County tried, and failed, to convince the Court of Appeals that Coweta County's ordinance "only serves to strengthen and augment O.C.G.A. § 16-11-127, as both serve the purpose of prohibiting the carrying of firearms on publicly owned premises." Affidavit of John Monroe, ¶ 8. The Court of Appeals flatly rejected Coweta County's argument and found the county's attempt to "augment" and "strengthen" state law to be expressly preempted. *Id.*

What is truly astonishing about Atlanta's position in this case is that Atlanta's argument is, essentially, that there is no preemption at all. Under Atlanta's logic, if it has the power to regulate carry in order to give effect to its power to regulate discharge (even in the face of an express preemption of the power to regulate carry), then it has the power to regulate possession, manufacture, sale, and transfer as well (all of which are expressly preempted). It only follows that discharge is less likely to occur if no one has a gun, no one can make a gun, no one can buy a gun, and no one can give anyone else a gun. That simply is not the law. One should consider the logical consequences of an argument prior to making it.

II.D. Atlanta's Public Policy Arguments Fall Flat

Fearing the ineffectiveness of its other arguments (and for good reason), Atlanta resorts to desperate public policy arguments in favor of its ordinance. Noting that ***currently*** it is illegal to carry a firearm into a state park (O.C.G.A. § 12-3-10), Atlanta decides that must mean the General Assembly did not understand what it was doing when it said that Atlanta cannot regulate the carry of firearms in Atlanta's parks. Atlanta goes so far as to argue that preemption, as applied to city parks, is "arbitrary" and "an absurd result." Atlanta's Brief, p. 3. Atlanta then attempts to create a burden on summary judgment for Plaintiffs to provide "evidence in the legislative history to support the proposition that the legislature intended to regulate the carrying of firearms only in state parks while leaving local law enforcement powerless to construct parallel legislation for county and municipal parks." *Id.*

No such burden exists. Atlanta again conveniently overlooks *Coweta County*, which says, "The 'golden rule' of statutory construction … requires that we follow the literal language of the statute…. And the plain language of the statute expressly precludes a county from regulating 'in any manner the carrying of firearms'." 288 Ga. App. at 749 (punctuation omitted).

The Court of Appeals also said, "The language of [O.C.G.A. § 16-11-173(b)] is not doubtful." *Id.* The Court of Appeals found it unnecessary to look to the legislative history to determine that Coweta County has no power to regulate carrying firearms in its parks. Atlanta likewise has no such power.

Moreover, Atlanta makes the claim that the Court of Appeals "failed to consider" the existence and effect of the State Park statute by which the General Assembly regulates the carry of firearms in State Parks. Doubtless this is because the effect of preemption is precisely the situation that the City of Atlanta finds "arbitrary" and "absurd." The General Assembly may regulate carry and possession (and does), but the City of Atlanta may not.[4] This is true even if the City of Atlanta believes that it is attempting to mimic any particular provision of state law, such as State Park statutes, because the "practical effect of the preemption doctrine is to preclude all other local or special laws on the same subject." *Sturm Ruger & Co., Inc. v. City of Atlanta*, 253 Ga. App. 713 (2002). Again, because the City of Atlanta was a defendant in that preemption case, this is not the first time Atlanta has heard this.

Atlanta's argument also overlooks the fact that the General Assembly was considering (and now has passed) a ***repeal*** of the ban on carrying firearms in State Parks. HB 89 creates a new O.C.G.A. § 16-11-127(e), which says, "A person [with a Georgia firearms license] shall be permitted to carry such firearm … in all parks, historic sites, and recreation areas and in wildlife management areas, notwithstanding Code Section 12-3-10…." HB 89, version LC 28 4343S, p. 4, lines 13-18. Thus, unless the governor vetoes HB 89, Atlanta's primary argument (that carry in State Parks is illegal, therefore Atlanta should be able to regulate carrying in city parks) will

[4] The public policy of this state is that the regulation of firearms is properly an issue of general ***statewide*** concern. *See* subsection 173(a). A confusing patchwork quilt of differing ordinances in various cities throughout this state was precisely the result the General Assembly was seeking to avoid.

lose its factual basis on July 1, 2008. Atlanta's argument already has no legal basis, however, and cannot stand either way.

Finally, Atlanta's attempt to paint its Ordinance as "reasonable" and "consistent with state law" is meaningless. Preemption is preemption. There is no "reasonableness" exception to the doctrine of preemption. If there were, there would be no need for a preemption doctrine at all, because ***all*** municipal ordinances must be reasonable. *DeBerry v. City of LaGrange,* 62 Ga. App. 74 (1940). It simply does not matter whether Atlanta's Ordinance is "reasonable." The Ordinance is preempted regardless.

II.E. There Is No Confusion Over Atlanta's Ordinance

Atlanta condescendingly claims to "understand" Plaintiffs' supposed "confusion on the proper interpretation of the City's Ordinance." [Atlanta's Brief, p. 4, Note 1]. Atlanta fails to explain what possible confusion exists about Atlanta's Ordinance. Both sides *agree* that Atlanta's Ordinance bans carrying firearms in parks. The only disagreement is whether the Ordinance is preempted. It is. There is no confusion about the "interpretation" of Atlanta's Ordinance.

Atlanta's reliance on a bill filed (supposedly to clear up the "confusion") in the legislature during the last session is misplaced. HB 1122 did not, as Atlanta dubiously claims, support the notion that the "Georgia State Legislature has recognized the confusion and is attempting to resolve the issue." It should be noted that HB 1122's chief sponsor represents House District 57, which includes the City of Atlanta. HB 1122 represents no more than Atlanta's success in getting its own representative in the House to introduce a bill that would have, if it had passed, undone Atlanta's fully anticipated loss in the present case. HB 1122 is, however, a dead letter. It never even came up for a hearing in committee. In fact, by wistfully

pointing to this bill, Atlanta may have unintentionally misled this Court. HB 1122 did not survive Crossover Day at the General Assembly on March 11, 2008, which occurred exactly two weeks ***before*** Atlanta filed its response brief.

Given the passage of HB 89 and the death of HB 1122, it is clear that the General Assembly does not perceive any ostensible confusion and sees no issue to resolve. Instead, the General Assembly now has authorized Georgia firearms license holders to carry firearms "in all parks." *See* HB 89, p. 4, lines 13-18. Atlanta cannot reasonably continue to insist that it can enforce special, local laws banning carrying firearms in its parks based on general state laws pertaining to State Parks.

II.F. Atlanta Has Engaged in Misleading and Dilatory Tactics

Although not related directly to Plaintiffs' Motion for Summary Judgment, Plaintiffs feel compelled to bring to the Court's attention the tactics Atlanta has employed in this case. On November 5, 2007, Atlanta filed a Motion to Stay Proceedings. As grounds for its Motion to Stay, Atlanta noted the pendency of *GeorgiaCarry.Org, Inc. v. Coweta County.* Without explicitly saying so, Atlanta's only implicit reason for filing the motion was that it believed a decision on the merits in *Coweta County* would be dispositive (or at least highly instructive) in the instant case. Logically, if GeorgiaCarry.Org, Inc. had lost in *Coweta County,* its position in the instant case would have been less tenable, and Atlanta surely would have relied upon *Coweta County* as precedent. Likewise, now that GeorgiaCarry.Org, Inc. won on the merits in *Coweta County,* it is clearer than ever that Defendants' ordinances are preempted and void.

Shockingly, Atlanta does not mention even once in its Brief the Court of Appeals' opinion in the case Atlanta believed would control the outcome in the instant case. The inescapable conclusion is that Atlanta never intended to permit the outcome of *Coweta County* to determine

its actions with respect to its preempted ordinance anymore than Atlanta had ever submitted to preemption as already expressed by state statute and the Georgia Constitution. Atlanta fully intended to defend its ordinance regardless of the outcome in *Coweta County*.[5] Atlanta's Motion to Stay was nothing more than a delay tactic, a waste of Plaintiffs' time to respond and misleading to this Court.

III.

CONCLUSION

Atlanta's stubborn litigiousness in this case is untenable. It is clear that the overwhelming authority is with Plaintiffs' position. Atlanta's Ordinance is plainly preempted by O.C.G.A. § 16-11-173(b) and by implication. The Court of Appeals reiterated the already obvious meaning of the statute just a few months ago. Atlanta's Ordinance likewise is repugnant to the Constitution of the United States and the Constitution of the State of Georgia. It is the duty of this Court to declare the Ordinance void and unenforceable. Plaintiffs' Motion for Summary Judgment should be granted.

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[5] Of the six Defendants that remained in the case as of the date the decision in *Coweta County* was released, five have modified or have begun the process to modify their Ordinances in an apparent attempt to avoid preemption (though not necessarily successfully). Atlanta stands alone in clinging to its Ordinance banning carrying firearms in parks and threatening to arrest Plaintiffs that are in full compliance with state law.