IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGIACARRY.ORG, INC.,	)	
TAI TOSON,	)	
EDWARD WARREN,	)	
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 MILTON, GEORGIA,	)	
CITY OF ROSWELL, GEORGIA,	)	
CITY OF SANDY SPRINGS, GEORGIA	)	
and	)	
CITY OF UNION CITY, GEORGIA,	)	
Defendants	)	

PLAINTIFFS' RESPONSE TO SANDY SPRINGS' MOTION TO DISMISS[1]

Introduction

Sandy Springs admits that it has, or had, an ordinance banning the carrying of firearms in Sandy Springs' Parks. Sandy Springs' attorney has advised it that, as a result of the Court of Appeals' decision in *GeorgiaCarry.Org, Inc. v. Coweta County*, ruling that state law preempts local governments from regulating the carry of firearms, Sandy Springs "must now take action with regard to [its ordinance] to make [it] consistent with the Court of Appeals' ruling and state law." Memo from Atty. Willard to Sandy Springs Mayor And Council, p. 1. For the convenience of the Court, the Memo is attached as Exhibit A. Inexplicably, however, Atty. Willard has advised Sandy Springs to enact a new ordinance regulating the carrying of firearms

[1] Sandy Springs and Union City filed a joint Motion to Dismiss. Plaintiffs and Union City have stipulated that Plaintiffs shall have until March 25, 2008 to respond to Union City's Motion, so this Response applies to Sandy Springs only.

to public gatherings. Sandy Springs took its attorney's advice, and now has a brand new, illegal, ordinance regulating the carrying of firearms. The new ordinance must be enjoined.

Argument

An Injunction is Appropriate

Sandy Springs claims that Plaintiffs should not be entitled to an injunction because O.C.G.A. § 9-5-2 says that equity cannot interfere with criminal proceedings. Sandy Springs overlooks, however, that there are no criminal proceedings afoot and that Plaintiffs are not seeking to enjoin a court of law. Plaintiffs are seeking to enjoin executive action, not judicial action.

As Sandy Springs points out, the Supreme Court of Georgia has said that the purpose of O.C.G.A. § 9-5-2 is "based upon the principle that equity is intended to supplement, and not usurp, the functions of the courts of law." *Hodges v. State Revenue Commission*, 183 Ga. 832, 833 (1937). The principle is not violated in this case because Plaintiffs are not asking this Court to interfere with any court of law. Rather, Plaintiffs are asking this Court to enjoin illegal activity by Defendants.

Moreover, contrary to Sandy Springs' claim, Plaintiffs have properly pleaded an exception to the rule of O.C.G.A. § 9-5-2. Sandy Springs acknowledges that the rule does not apply where there is "unlawfully taking [of] property" or "irreparable injury to the plaintiff." Brief of Sandy Springs, p. 4. Plaintiffs clearly have pleaded that they have a property interest in their firearms licenses and that Sandy Springs' illegal ordinance affects a taking of that property interest. Amended Complaint, ¶¶ 5-7.

Declaratory Judgment is Appropriate

Sandy Springs claims that declaratory relief is inappropriate because ***Union City*** has not enforced ***its*** ordinance against any Plaintiffs. Aside from the fact that Union City's actions are irrelevant to Sandy Springs, Sandy Springs loses sight of the fact that Plaintiffs have suffered, and are suffering, deprivation of their property rights in their firearms licenses because Sandy Springs illegally prohibits Plaintiffs from carrying firearms. It does not matter that Union City (or even Sandy Springs) has not prosecuted Plaintiffs. The ordinance exists, and, on its face, it prohibits carrying of firearms. This prohibition diminishes the value of Plaintiffs' property interests in their licenses.

Plaintiffs Have Standing as Taxpayers

Sandy Springs also claims that Plaintiffs have no standing as taxpayers, but rely solely on facts applicable to Union City for this position. Sandy Springs concedes that a taxpayer may challenge the enforcement of an illegal ordinance. The City insists, however, that standing must be based on a claim that enactment of the ordinance was *ultra vires.* Despite the clear wording in the Amended Complaint [¶ 15] that Sandy Springs' ordinance is *ultra vires,* Sandy Springs somehow concludes that "Plaintiffs have alleged no facts showing that the enactment of the ordinances … were *ultra vires.*" Brief of Sandy Springs, p. 7.

Sandy Springs draws a distinction between an ordinance that is *ultra vires* and the enactment (of the ordinance) being *ultra vires*. Sandy Springs' distinction is misplaced. Sandy Springs relies on *Newsome v. City of Union Point,* 249 Ga. 434 (1982). In *Newsome,* the plaintiff sued the city for an ordinance that was within the power of the city to pass, but which was passed with procedural irregularities that arguably made the ordinance invalid. The Supreme Court defined *ultra vires* as "it must appear that the action taken was beyond the scope

of the powers that have been expressly or impliedly conferred on the municipality." 249 Ga. 437. That is, the Supreme Court was drawing a distinction between an ordinance that the city never could pass, and one that it could pass but may have passed with legally insufficient process.

In the instant case, Plaintiffs are not attacking the process Sandy Springs used to enact the ordinance. Rather, Sandy Springs enacted an ordinance that it had no power, under any circumstances, to pass.[2]

The Case is Not Moot

Sandy Springs, claiming that its Mayor and Council have "expressed their intention" to amend its ordinance, suggests that this case is moot.[3] As an initial matter, Plaintiffs wonder how the City can express its intentions in any manner other than through legislative enactment, and Plaintiffs also note that Sandy Springs supplies no evidence of such an expressed "intention."

That said, Plaintiffs point the Court to Atty. Willard's Memo, in which he recommends that the city revise "the ordinance to make it a 'discharge' of firearm prohibition as opposed to a 'possession' of firearm prohibition ***and making it unlawful to carry a firearm to a 'public gathering.' "*** Earlier this week, Sandy Springs notified Plaintiffs that it followed its counsel's advice and has enacted yet another ordinance that is preempted, invalid, *ultra vires*, and unconstitutional. A party cannot make a claim moot by ceasing illegal behavior and replacing it with different illegal behavior. Sandy Springs cannot regulate the carry of firearms "in any manner," including in a manner already regulated by state law.

[2] Plaintiffs note that Sandy Springs cites to the history of the enactment of Union City's ordinance and claims that Union City's ordinance was not *ultra vires* at the time it was passed decades ago. Without commenting on the validity of a defense Union City might have, Plaintiffs note that one-year-old Sandy Springs cannot avail itself of the same defense.

[3] Plaintiffs point out that a Motion to Dismiss should not rely on matters outside the pleadings, for to do so converts the Motion to one for summary judgment. *Capes v. Morgan*, 235 Ga. 1, 4 (1975). While Plaintiffs must of necessity respond with additional material outside the pleadings, Plaintiffs request notice from the Court before this Motion is treated as one for summary judgment.

Conclusion

Sandy Springs concedes that its original was preempted, and now it has replaced the original illegal ordinance with another illegal ordinance. Plaintiffs have standing, are entitled to the relief they request, and the case is not moot. Sandy Springs' Motion to Dismiss should be denied.

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