

**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 ROSWELL, GEORGIA,)
CITY OF SANDY SPRINGS, GEORGIA)
and)
CITY OF UNION CITY, GEORGIA,)
Defendants)

**DEFENDANT CITY OF SANDY SPRINGS, GEORGIA'S
BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT
FILED BY PLAINTIFFS**

COMES NOW, the City of Sandy Springs, Georgia (hereinafter "Sandy Springs"), one of the named Defendants in the above-styled action, and files its Brief in Opposition to Motion for Summary Judgment Filed by Plaintiffs and shows the Court as follows:

I. INTRODUCTION AND STATEMENT OF FACTS

Plaintiffs' brought an action for declaratory and injunctive relief against Sandy Springs and other Defendants seeking a ruling from the Court as to the validity of ordinances adopted by the Defendants relating to the carrying and/or possession of firearms within the Defendants' parks and recreation facilities, including the ordinance adopted by Sandy Springs contained in Chapter 8, Article 2, Section 4, Subsection (g) of the Sandy Springs Code of Ordinances (hereinafter the "Ordinance"). Plaintiffs' original

Complaint alleges that the Ordinance, in prohibiting the possession of firearms, air guns or any explosive substance (including fireworks) within Sandy Springs' parks, is preempted by the terms of O.C.G.A. § 16-11-173(b)(1).

During the pendency of the instant action, the Georgia Court of Appeals addressed the preemption issue which is central to these proceedings in GeorgiaCarry.Org., Inc. v. Coweta County, Georgia, 288 Ga. App. 748, 655 S.E.2d 748 (2007). The Court of Appeals issued its opinion on December 4, 2007, and supported Plaintiffs' position that O.C.G.A. § 16-11-173(b)(1) acted as a preemption on municipal regulation of the possession and carrying of firearms. Upon learning of the decision of the Court of Appeals, Sandy Springs began the process of considering how to modify the Ordinance to comply with the Court's opinion. On February 5, 2008, approximately sixty (60) days following the decision in Coweta, the Sandy Springs City Council adopted an amendment to the Ordinance, a certified copy of which is attached hereto as Exhibit A.

II. ARGUMENT AND CITATION OF AUTHORITY

A. **Plaintiffs' claims are moot due to the actions of the City Council of Sandy Springs in adopting an amendment to the Ordinance.**

The Sandy Springs City Council adopted an amendment to the Ordinance that removes the prohibition on the carrying of firearms within Sandy Springs' parks that is in question in the instant litigation. After the Court of Appeals rendered its opinion in Coweta on December 4, 2007, the Sandy Springs City Council expeditiously began the process of considering an amendment to the Ordinance. The amendment was adopted on February 5, 2008, approximately sixty (60) days following the Coweta decision. The Ordinance, as amended, now applies only to the discharge of firearms within City parks, as is specifically permitted pursuant to O.C.G.A. § 16-11-173(e). Consequently,

Plaintiffs' assertions as to Defendant Sandy Springs are now moot. "In Chastain v. Baker, 255 Ga. 432, 339 S.E.2d 241 (1986), this Court explained the doctrine [of mootness], 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, and that mootness is a mandatory ground for dismissal." Collins v. Lombard Corporation, et al, 270 Ga. 120, 508 S.E.2d 653 (1998). The doctrine of mootness applies equally to actions for declaratory judgment. Dean v. City of Jesup, 249 Ga. App. 633 (1), 549 S.E.2d 466 (2001).

B. Defendant Sandy Springs' Ordinance is not pre-empted by State law.

O.C.G.A. § 16-11-173(e) states that "Nothing contained in this Code section shall prohibit municipalities or counties, by ordinance, resolution, or by other enactment, from reasonably limiting or prohibiting the discharge of firearms within the boundaries of the municipal corporation or county." It is clear from this Code section that the Legislature did not intend to completely preempt gun regulation. Plaintiffs ignore the clear and unambiguous language and intent of the Legislature to provide municipalities with the power to enact reasonable laws to prohibit the discharge of firearms.

C. Plaintiffs are not entitled to attorney's fees from Defendant Sandy Springs.

Plaintiffs' Amended Complaint as filed on December 28, 2007, asserts a claim for attorney's fees; however, the ante-litem notice originally sent to Defendant Sandy Springs in this matter does not address attorney's fees. A copy of the original ante-litem notice is attached hereto as Exhibit B. Plaintiffs may not recover attorney's fees without prior ante-litem notice. Dover v. City of Jackson, 246 Ga. App. 524, 541 S.E.2d 92 (2000). A cover letter forwarded with the Amended Complaint was the first notice that Sandy Springs received of a claim for attorney's fees.

In any event, assertions by Plaintiffs that their Amended Complaint serves as ante-litem notice which entitles them to recovery of attorney's fees must fail because Sandy Springs undertook the actions requested by Plaintiffs in a timely and expeditious manner. The Sandy Springs City Council voted to adopt Ordinance No. 2008-02-06 amending the Ordinance approximately thirty-six (36) days from the date of service of Plaintiffs' Amended Complaint. Sandy Springs, by acting so expeditiously to amend its Ordinance, could not be considered to have acted stubbornly litigious or to have created undue delay or expense in this matter.

D. Plaintiffs fail to support their allegations of standing with affidavits.

Plaintiffs' Motion for Summary Judgment is lacking in that it relies solely upon its original Complaint and Amended Complaint, without affidavits to support allegations that each of the Plaintiffs has standing. Plaintiffs argue that the allegations of a verified complaint are "tantamount to an affidavit." (Footnote 3, page 3 of Brief In Support of Plaintiffs' Motion for Summary Judgment). However, Plaintiffs overlook the fact that Sandy Springs has filed verified Answers to the Complaint and the Amended Complaint, which state that it does not have knowledge sufficient to respond to allegations regarding standing, and therefore can neither admit nor deny same. Pursuant to O.C.G.A. § 9-11-8(b), such responses are considered denials. Therefore, summary judgment is not appropriate based upon the record before the Court.

III. CONCLUSION

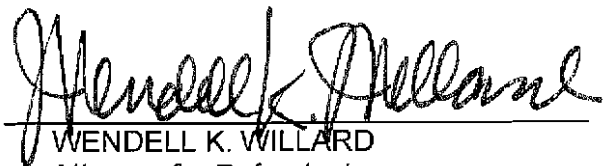
The Sandy Springs City Council adopted an amendment to the Ordinance on February 5, 2008 that removes the prohibition on the carrying of firearms within Sandy Springs parks that is in question in the instant litigation. The amended Ordinance now applies only to the discharge of firearms, as is specifically permitted pursuant to

O.C.G.A. § 16-11-173(e). Because the language to which Plaintiffs objected has now been removed from the Ordinance, Plaintiffs' assertions as to Defendant Sandy Springs are moot. Granting Plaintiffs' request for summary judgment as to this matter would be inappropriate.

Summary judgment would also be inappropriate as to Plaintiffs' claims for attorney's fees, as proper ante-litem notice as to such attorney's fees was never provided to Defendant Sandy Springs. To the extent it may be deemed that proper ante-litem notice may have been provided to Defendant Sandy Springs through service of Plaintiffs' Amended Complaint, Defendant Sandy Springs did in fact amend the Ordinance in accordance with Plaintiffs' request in an expeditious manner that neither exhibited stubborn litigiousness nor any intent to cause undue delay or cost to Plaintiffs.

Finally, Plaintiffs' Motion for Summary Judgment is lacking because it relies solely upon the Complaint and Amended Complaint, without affidavits to support allegations that each of the Plaintiffs have standing. Therefore, summary judgment is not appropriate based upon the record before the Court and Plaintiffs' request for summary judgment in this matter should be denied in its entirety.

Respectfully submitted this 10th day of April, 2008.



WENDELL K. WILLARD
Attorney for Defendant,
City of Sandy Springs
Georgia Bar No. 760300

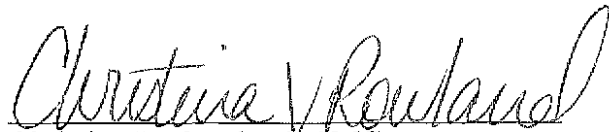
Two Ravinia Drive
Suite 1630
Atlanta, Georgia 30346
770-481-7100

H:\Wpdocs\WKW\Sandy Springs\Litigations\GeorgiaCarry v. COSS\Response to MSJ

CERTIFICATE

I, Christina Rowland, City Clerk and Custodian of Records for the City of Sandy Springs, certify that the attached 2 page(s) is a true and correct copy of Ordinance No. 2008-02-06, An Ordinance To Amend Chapter 8, Article 2, Section 4, Subsection (g) of the Code of Ordinances of Sandy Springs, Georgia, Relating to the Possession of Weapons in City Parks, approved and adopted by the Mayor and City Council of the City of Sandy Springs on February 5, 2008.

This 9th day of April 2008.



Christina V. Rowland, CMC
City Clerk



EXHIBIT

A

AN ORDINANCE TO AMEND CHAPTER 8, ARTICLE 2, SECTION 4, SUBSECTION (g) OF
THE CODE OF ORDINANCES OF SANDY SPRINGS, GEORGIA, RELATING
TO THE POSSESSION OF WEAPONS IN CITY PARKS

WHEREAS, Chapter 8, Article 2, Section 4, Subsection (g) of the Code of Ordinances of Sandy Springs currently provides that it is unlawful for any person to possess any firearm, air gun or any explosive substance in any of the City parks; and

WHEREAS, the Court of Appeals of the State of Georgia has found that state law preempts the City's ability to regulate the possession of firearms;

NOW, THEREFORE, BE IT ORDAINED by the Mayor and City Council of the City of Sandy Springs, and it is hereby ordained by authority of the same, that Chapter 8, Article 2, Section 4, Subsection (g) of the Code of Ordinances of Sandy Springs, Georgia, shall be amended by deleting said subsection in its entirety and inserting, in lieu thereof, a new subsection which shall provide 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.

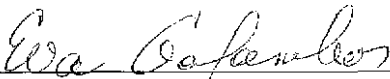
(2) It shall be unlawful for any person to discharge any firearm within City parks unless expressly authorized by the Mayor and City Council. Pursuant to O.C.G.A. § 16-11-127, it is unlawful to carry a firearm to a public gathering, as defined in O.C.G.A. § 16-11-127, within the City.

BE IT FURTHER ORDAINED that all Ordinances or parts of Ordinances in conflict herewith are hereby repealed.

BE IT FURTHER ORDAINED that this Ordinance shall become effective upon the date of its adoption by the Mayor and City Council of Sandy Springs, Georgia.

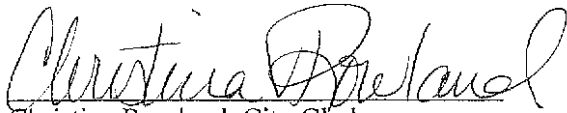
SO ORDAINED, this 5th day of February, 2008.

Approved:

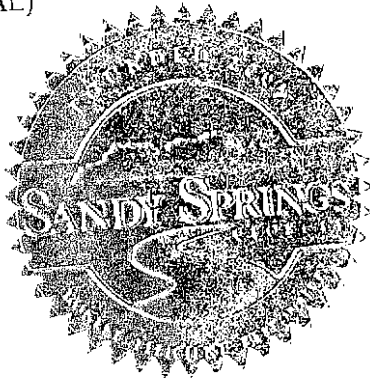


EVA GALAMBOS, Mayor

Attest:



Christina Rowland, City Clerk
(SEAL)



JOHN R. MONROE
ATTORNEY AT LAW

July 19, 2007

Mr. Wendell K Willard, Esq.
Attorney at Law
Two Ravinia Drive, Suite 1630
Atlanta, GA 30346

RE: City ordinance banning firearms in parks

Dear Mr. Willard:

I am writing on behalf of my client, the organization [Georgiacarry.org](http://www.georgiacarry.org) (<http://www.georgiacarry.org>) to bring to your attention one of Sandy Springs' city ordinances, Chapter 8, Article 2, Section 4(g). Section 4(g) states that, "[i]t shall be unlawful for any person to *possess any firearm...in any of the City parks...*" Sandy Springs, Ga. Code Ch. 8, Art. 2, § 4(g) (2007) (emphasis supplied). This ordinance is in violation of the Georgia General Assembly's well established preemption of firearm regulations and the State Constitution.

Sandy Springs is prohibited by the laws of the State of Georgia from either enforcing or enacting such an ordinance. It is important to note that there already exists a comprehensive state regulatory scheme for the possession of firearms. Many of the activities that were undoubtedly in the minds of the City Council members of Sandy Springs when the ordinance was enacted are already made illegal or highly regulated by the laws of the State of Georgia. The State of Georgia does not require and, in fact, has specifically prohibited municipalities from exercising their police powers in this particular sphere.

GCO asks that Sandy Springs repeal Section 4(g) because it is in violation of state law. I will point you to three sources of law supporting the contention that this ordinance is preempted by state law. These sources of law are:

- (1) a state statute and the state constitution,
- (2) case law, and
- (3) the opinion of the Attorney General for the State of Georgia.

The state statute expressly forbids the ordinance at issue. The State Constitution provides for a right and only gives the General Assembly the ability to circumscribe that right. The case law declares that, even without such a statute, the city is without authority to pass such an ordinance because the field of firearms has been preempted by the General Assembly's extensive regulation on the subject. The Attorney General opinion reinforces those points in response to a question from a county on the legality of a firearms ordinance.

1. THE STATUTE

The General Assembly has, by law, prohibited counties and municipal corporations from engaging in the regulation of firearms. Nowhere is the intent more clearly stated than

in the first sentence of the state preemption statute, "It is declared by the General Assembly that the regulation of firearms is properly an issue of general, state-wide concern." O.C.G.A. § 16-11-173(a)(1) (2006). Specifically counties and cities are restricted by the following language:

"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, purchasing, licensing, or regulation of firearms or components of firearms; firearms dealers; or dealers in firearms components." O.C.G.A. § 16-11-173(b)(1) (2006) (emphasis supplied).

The language of the statute is clear and unambiguous. By the passage of the statute, the General Assembly excluded counties and cities from regulating the possession and carrying of firearms. The ordinance at issue prohibits possession of firearms. It cannot be denied that through the ordinance Sandy Springs intends to regulate the possession of firearms and that the General Assembly specifically prohibits any municipal corporation from regulating the possession of firearms.

Further, Section 16-11-173 *did* set forth three specific instances in which cities and counties are permitted to regulate firearms. Sandy Springs *is* permitted to (1) "*regulate the transport, carrying, or possession of firearms by employees of the local unit of government while in the course of employment* with such local unit of government," (2) "require the ownership of guns by heads of household," (3) limit or prohibit the *discharge* of firearms within city boundaries. O.C.G.A. § 16-11-173(c)-(e) (2006) (emphasis supplied). The ordinance at issue here does not fall within any of the three narrowly defined exceptions set out by the General Assembly. The ordinance is not (1) limited to city employees, (2) a regulation requiring the ownership of firearms, or (3) a regulation on the discharge of firearms within city limits.

Applying the well-established canon of statutory construction that the inclusion of one implies the exclusion of others it is clear that the ordinance is preempted by state law. Here, the inclusion of the "one" is clear from Section 16-11-173 which includes not just "one" but three specific instances where cities have the right to regulate firearms. Clearly, if the General Assembly's intent was to allow unspecified additional regulations it would have enacted a provision that gives cities and municipalities additional powers. However, the exact opposite of this intent is evidenced from the first statement in the statute. No where does Section 16-11-173 make exceptions for instances where the issue pertaining to firearms affects property owned by the municipality or any other reason, except for, of course, where the regulations falls within the three narrowly defined exceptions.

In addition, the State Constitution recognizes that, "The right of the people to keep and bare arms shall not be infringed, but the *General Assembly shall have power to prescribed the manner in which arms may be borne.*" GA. Const. art. 1, § 1, Par. VIII (emphasis supplied). In this sentence the State Constitution recognizes the rights of citizens to keep and bare arms. More, importantly it specifies how and by whom that right can be restricted. Generally speaking, the State Firearms and Weapons Act does not violate the state constitution. *Carson v. State*, 241 Ga. 622, 627 (1978). The State Firearms and Weapons Act is a legitimate exercise of the *state's* police powers. *Id.* at 628. Nowhere in the State Constitution are Georgia's counties and cities given the power, police or otherwise, to infringe upon the rights of the people to keep and bare arms. A clear, constitutional

regulatory scheme can be evidenced by the mass of legislation codified in the State Firearms and Weapons Act. Not only does the State Constitution prohibit the ordinance in question, but also the very act the State Constitution allows for prohibits the ordinance as well.

2. CASE LAW

State courts have routinely upheld the scope of Section 16-11-173 and its predecessors in actions both by and against counties and cities.

In 1999 the City of Atlanta brought suit against fourteen gun manufacturers and three trade associations for alleged damages brought on by the business practices of the defendants. *Sturm, Ruger & Co. v. City of Atlanta*, 253 Ga.App. 713, 713 (2002). The Court of Appeals found that the Atlanta's suit was preempted by state law, not only because of the preemption statute, but also because of the clear grant of powers in the constitution and the comprehensive nature of firearms laws in Georgia. *Id.* at 718.

The Court of Appeals found that preemption precludes all other local or special laws in the subject area. *Id.* (citing Ga. Const. Art. III, § 6, Par. IV(a)). This preemption applies regardless of whether the regulation is attempted through a lawsuit (as in *Sturm, Ruger*) or an ordinance (as here). *Id.* The General Assembly has broad powers to limit a city's powers of home rule. *Id.* at 720 (citing O.C.G.A. § 36-35-3).

In addition, the Supreme Court of Georgia recognizes that the General Assembly has the *sole* power to regulate firearms. *Id.* at 717 n.1 (citing *Smith & Wesson Corp. v. City of Atlanta*, 273 Ga. 431, 435 (2001) (Fletcher, P.J., concurring)).

Here, the ordinance at issue is a regulation of firearms, the judicially recognized sole dominion of the General Assembly. The General Assembly possesses the power to restrict the rights of cities and counties and has done so through statutorily and constitutionally granted powers. The General Assembly alone has the power to regulate firearms.

Under the State Firearms and Weapons Act it is a misdemeanor for a person to carry a firearm to a "public gathering," a term which includes publicly owned and operated buildings. O.C.G.A. 16-11-127 (2006). It is important to note that the ordinance at issue goes beyond the regulations contained in Section 16-11-127. The ordinance at issue prohibits the possession of firearms in city parks. This includes locations not contemplated by Section 16-11-127. Per the language of the statute not all public places are off limits to those carrying firearms. O.C.G.A. § 16-11-127(b) (2006). The ordinance at issue exposes GFL holders to criminal liability under the code of ordinances of Sandy Springs that does not exist under the State Firearms and Weapons Act. This is in contravention of state law.

Finally, "state law can preempt local law expressly, by implication, *or by conflict.*" *Franklin County v. Fieldale Farms Corp.*, 270 Ga. 272, 273 (1998) (emphasis supplied).

3. THE ATTORNEY GENERAL OPINION

The Attorney General for the State of Georgia routinely gives legal opinions to local governments on matters of law. The Attorney General has previously authored an opinion concerning Section 16-11-173. The opinion, requested by the City Attorney of Columbus, found that a proposed ordinance regulating the placement of firearms in homes, buildings, trailers, vehicles, or boats was *ultra vires* because it conflicted with the general laws of the state and the aforementioned preemption statute. Ga. Op. Atty. Gen. No. U98-6, available at <http://www.state.ga.us/ago/read.cgi?searchval=firearm&openval=U98-6>. The Attorney General reasoned that by enacting the predecessor to Section 16-11-173, "the General

July 19, 2007

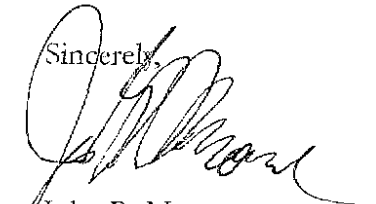
Assembly appears to have codified with certain exceptions its intent to preempt the regulation of firearms." *Id.* The Attorney General also found that the three exceptions were the only allowable ways in which a city or county can regulate firearms. *Id.* The Attorney General determined that because the proposed Columbus ordinance did not fall within any of the three exceptions and it regulated the possession, ownership, transport, and carrying of firearms it was preempted by state law. Further, the proposed Columbus ordinance conflicted with the State Firearms and Weapons Act's provisions concerning the carrying of firearms by those licensed to carry firearms. *Id.*

The ordinance at issue is substantially similar to the proposed Columbus ordinance at issue in the Attorney General opinion. The Sandy Springs ordinance at issue is *ultra vires*. It conflicts with the general laws of the state and the preemption statute the same as the proposed Columbus ordinance. As previously discussed, none of the three narrowly defined exceptions give Sandy Springs the ability to enforce the ordinance. The ordinance at issue concerns the possession of firearms and is in conflict with the rights given to those with GFIs.

The ordinance at issue is not a necessity of city governance. In Fulton County, the cities of Alpharetta, College Park, Hapeville, Mountain Park, and Palmetto do not have similar ordinances in their respective code of ordinances. In addition, numerous counties and cities across the state do not have similar ordinances in their code of ordinances either.

GCO asks that you recommend to Sandy Springs that the ordinance at issue, Section 4(g), be repealed. If a recommendation to repeal the ordinance has not been made within the next three weeks, GCO will seek legal action against Sandy Springs in Fulton County Superior Court.

Sincerely,



John R. Mouroe