

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)

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)

Civil Action File No.
2007CV138552

**CITY OF ROSWELL'S MOTION TO DISMISS COMPLAINT AND VERIFIED
AMENDED COMPLAINT FOR MOOTNESS AND BRIEF IN SUPPORT**

COMES NOW the City of Roswell, Georgia (hereinafter "Roswell"), one the named defendants in the above-styled action and files its Motion To Dismiss Complaint and Verified Amended Complaint For Mootness and Brief In Support and shows the Court as follows:

Roswell moves the Court to dismiss Plaintiffs' Complaint and Verified Amended Complaint for mootness. The claims stated therein are moot as a result of the Court of Appeals decision issued December 4, 2007 entitled *GeorgiaCarry.Org v. Coweta County*, Case No. A07A2036 and because Roswell's Mayor & Council have initiated passage of a

new ordinance, which removes the language about which Plaintiffs complain from the Roswell Code.

The first of two required readings of the new ordinance, which is attached to this Answer as Exhibit "A," was passed by Mayor & Council at its regular meeting held on January 23, 2007. The second required reading will occur at Mayor & Council's next regularly scheduled meeting on February 4, 2007. After final passage, Roswell will amend its Answer to include a certified copy of the new ordinance.

In its initial ante litem notice to the City of Roswell, GeorgiaCarry.Org did not request or demand attorneys fees and therefore is barred by law from recovering those under state law. Plaintiffs state in their Verified Amended Complaint that it shall serve as ante litem notice that they seek to recover attorneys fees and costs. However, because Roswell has notified counsel for Plaintiffs within 30 days of said ante litem notice that it would not enforce the old ordinance and that it would initiate the change in the ordinance that Plaintiffs sought within 30 days of the filing of the Verified Amended Complaint, Plaintiffs are not entitled to recover attorneys fees and costs under state law.

Finally, Plaintiffs are not entitled to recover attorneys fees pursuant to 42 U.S.C. § 1983, because that issue is moot also. In addition, the § 1983 claim is expressly founded upon Roswell's alleged violation of Plaintiffs' right to bear arms pursuant to the Second and Fourteenth Amendment to the Constitution of the United States. However, the prohibition contained in the Second Amendment regarding the right to bear arms applies only to the federal government and is not one of the Bill of Rights the United States Supreme Court has incorporated into the Fourteenth Amendment to be effective

regarding the states. Further, an action pursuant to § 1983 requires some actual injury, which Plaintiffs do not allege.

Argument and Citation of Authority

“In *Chastain v. Baker*, 255 Ga. 432, 433, 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, 121, 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).


In their Complaint, Plaintiffs alleged that Roswell’s ordinance prohibiting carrying firearms in its parks had been preempted by state law and asked for a declaration by the trial court that the ordinance was null and void and for a temporary and permanent injunction against its enforcement. The amended complaint added a claim for alleged violation of 42 U.S.C. § 1983 and noted that the Court of Appeals had rendered its decision in the case of *GeorgiaCarry.Org v. Coweta County*, Case No. A07A2036, decided December 4, 2007, in which the Court of Appeals held that the state law at question in the instant case did preempt county and municipalities from regulating the carrying of firearms in their parks. In neither the Complaint or the Verified Amended Complaint did plaintiffs allege that Roswell ever enforced the ordinance against anyone.

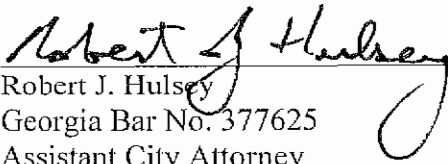
Before the Court of Appeals rendered its decision on December 4, 2007, the question of the applicability of O.C.G.A. § 16-11-173 (b) (1) was open to judicial interpretation. However, following that decision, with no further appeal by the parties

Second Amendment to the Constitution of the United States applies only to Congress, not the states, as recognized by the Georgia Supreme Court in the case of *Brewer v. State*, 281 Ga. 283 (2), 637 S.E.2d 677 (2006). “As this Court has long recognized, the construction given the Federal constitution by the United States Supreme Court is conclusive, *Strickland v. State*, 137 Ga. 1, 8-9, 72 S.E. 260 (1911), and under controlling opinions from that Court, the Second Amendment's “right to keep and bear arms” imposes a limitation on only Federal, not state, legislative efforts. *Id.* At 9, 72 S.E. 260. *See Presser v. Illinois*, 116 U.S. 252, 265, 6 S.Ct. 580, 29 L.Ed. 615 (1886); *United States v. Cruikshank*, 92 U.S. 542, 552, 23 L.Ed. 588 (1876). *See also Bach v. Pataki*, 408 F.3d 75, 84 (2nd Cir. 2005).” *Brewer* at 284. Second, Plaintiffs allege no actual injury implicating a protected federal right that would give rise to a § 1983 claim. Plaintiffs allege only the potential of an injury. It follows that there can be no recovery for attorneys fees pursuant to 42 U.S.C. § 1983, if there is no violation of § 1983.

For the reasons stated above, Roswell respectfully requests that this Court dismiss Plaintiffs’ Complaint and Verified Amended Complaint. Both are moot and present nothing for this Court to review or to decide.

This 30th day of January, 2008.


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CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION TO DISMISS COMPLAINT AND VERIFIED AMENDED COMPLAINT FOR MOOTNESS AND BRIEF IN SUPPORT of Defendant CITY OF ROSWELL, GEORGIA has been served upon counsel for Plaintiffs and counsel for the co-defendants by mailing a copy of said Motion and Brief in Support, postage prepaid, by United States Postal Delivery service, addressed as follows:

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(Counsel for Plaintiffs)
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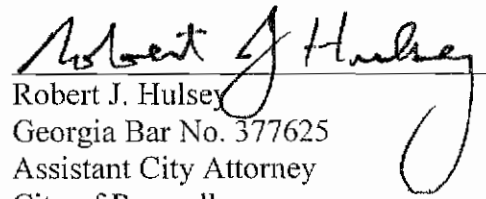
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This 30th day of January 2008.


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Attorney for Defendant City of
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thereto to the Supreme Court of Georgia, the question was settled. Promptly thereafter Roswell undertook legislatively to change its ordinance as Plaintiffs demanded. The new Roswell ordinance, attached to Roswell's Answer To Plaintiffs' Verified Amended Complaint as Exhibit "A," had the first of its required two readings to become law on January 23, 2008. Roswell's Mayor & Council passed the new ordinance unanimously. The second reading of the new ordinance will occur on February 4, 2008. Thereafter, Plaintiffs have no claim against Roswell. The issue raised by the Complaint and Verified Amendment Complaint regarding state law preempting Roswell's ordinance is moot. Therefore, this Court should dismiss Plaintiffs' Complaint and Verified Amended Complaint.

Roswell anticipates that Plaintiffs will argue that the issue of attorneys fees is not moot. However, the facts demonstrate otherwise. The record demonstrates that Plaintiffs gave no ante litem notice regarding attorneys fees and costs prior to filing the original complaint. State law requires that plaintiffs seeking recovery of attorneys fees and costs must comply with O.C.G.A. § 36-33-5 (ante litem notice) regarding those fees. With no prior notice regarding such fees and costs, a plaintiff may not recover them. *Dover v. City of Jackson*, 246 Ga. App. 524, 541 S.E.2d 92 (2000). Plaintiffs are not entitled to attorneys fees under state law regarding their Verified Amended Complaint, even though they state in their Verified Amended Complaint that it serves as ante litem notice regarding such fees and costs because Roswell has complied with the demands made of it pursuant to such notice, i.e., it changed the ordinance of which Plaintiffs complain.

Plaintiffs' claims regarding Roswell's alleged violation of 42 U.S.C. § 1983 fail for the reasons of mootness set out above, and for two additional reasons. First, the