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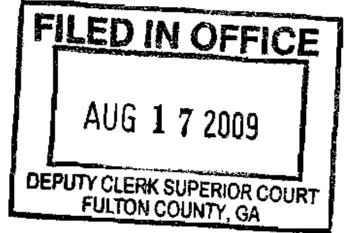
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGIACARRY.ORG, INC., JAMES CHRENCIK, et. al., Plaintiffs, v. FULTON COUNTY, GEORGIA, CITY OF ATLANTA, et al., Defendants.	)))))))))))	Civil Action No. 2007-CV-138552



CITY OF ATLANTA'S BRIEF IN RESPONSE TO PLAINTIFFS' SECOND MOTION FOR SUMMARY JUDGMENT

I.

FACTUAL AND PROCEDURAL SUMMARY

Plaintiffs filed this action on August 16, 2007 against the cities of Roswell, Sandy Springs, Milton, Union City, East Point, Atlanta and Fulton County. Plaintiffs alleged, inter alia, defendants' ordinances that regulated the carrying and possession of firearms in county and municipal parks were preempted by state law. The cities of Roswell, Sandy Springs, Union City, East Point and Fulton County repealed or amended their ordinances and have been dismissed by this court or the Plaintiffs. The City of Atlanta is the sole remaining defendant.

On December 7, 2007, the Georgia Court of Appeals in the *GeorgiaCarry Org., Inc. v. Coweta County, Georgia* held that O.C.G.A. § 16-11-173(b)(1) acted as a preemption on municipal regulation of firearms.

On December 31, 2007, Plaintiffs amended their complaint adding Counts VII and VIII to this action alleging defendant's ordinance violated Plaintiff's civil rights – Second and

Fourteenth Amendment. Plaintiffs subsequently dismissed Count VII which alleged a violation of Plaintiff's Second Amendment rights.

On May 9, 2008, this Court granted Plaintiff's First Motion for Summary Judgment against the City of Atlanta and issued a preliminary injunction restraining the City from enforcing its ordinance limiting the possession of guns in city parks – Atlanta Municipal Code § 110-66.

On May 14, 2008, Governor Sonny Perdue signed HB 89 which clarified the state's preemption of firearms regulation.[1] HB 89, inter alia, amended O.C.G.A. § 16-11-127 relating to the carrying and possession of firearms at public gatherings.

On July 7, 2008, after a public notice and three public readings, the Atlanta City Council amended § 110-66 of the Atlanta Municipal Code to conform to the requirements of Georgia law. § 110-66 now reads as follows:

> "Pursuant to O.C.G.A. § 16-11-127, it is unlawful to carry a firearm to or while at a public gathering, as defined by O.C.G.A. § 16-11-127."

See Exhibit 1: Atlanta Municipal Code § 110-66.

As more fully set forth in the affidavit of Ken Gillett, Director of Parks for the City of Atlanta, all park signs, web sites and post-dated brochures have been updated to reflect the amended ordinance and state law. *See* Exhibit 2: Affidavit of Ken Gillett.

In this motion, Plaintiff's second motion for summary judgment, Plaintiff's seek: 1.) to make permanent the preliminary injunction issued by this court on March 19, 2008; and 2) summarily adjudicate Plaintiff Chrencik's claims that the ordinance violated his Fourteenth Amendment rights as set forth in Count VIII of Plaintiff's Amended Complaint.

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[1] The City of Atlanta and other municipalities supported another version of the bill – HB 1122 – which would have allowed municipalities to regulate dangerous weapons and firearms in public parks in the interest of public safety. HB 1122 was defeated.

II.

ARGUMENT AND CITATION OF AUTHORITY

A. Plaintiff's Claims for Equitable Relief Are Moot Due to the Actions of the Atlanta City Council in Adopting an Amendment to the Ordinance.

On July 7, 2008, the Atlanta City Council amended Atlanta Municipal Code § 110-66 to conform to state law. The limitation imposed on firearms in City parks was removed from the ordinance. "A case is moot when events subsequent to the commencement of a lawsuit create a situation in which the court can no longer give plaintiff meaningful relief." *Jews for Jesus v. Hillsborough County Aviation Auth.*, 162 F.3d 627, 629 (11th Cir. 1998). "In *Chastain v. Baker*, 255 Ga. 432, 329 S.E.2d 241 (1986), this Court explained the doctrine [of mootness], holding that a cause 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 ground for dismissal." *Collins v. Lombard Corporation, et al*, 270 Ga. 120, 508 S.E.2d 653 (1998).

In this case, the City of Atlanta has repealed and amended the ordinance. The equitable relief sought by plaintiffs with respect to the ordinance in place *before* July 7, 2008 – to permanently enjoin enforcement of the ordinance -- is no longer necessary.

B. Plaintiff Chrencik Lacks Standing to Assert a Fourteenth Amendment Claim pursuant to 42 U.S.C. § 1983.

"Each element of standing 'must be supported in the same way as any other matter on which plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of litigation.'" *Florida Public Interest Research Group v. EPA*, 386 F.3d 1070, 1083 (11th Cir. 2004) (quoting *Bischoff v. Osceola County*, 222 F.3d 874 at 878 (internal quotations marks omitted) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992))). Accordingly when a question about standing is raised at the

motion to dismiss stage, "it may be sufficient to provide 'general factual allegations of injury resulting from the defendant's conduct.'" Id. (quoting *Bischoff*, 222 F.3d at 878). In contrast, when, as here, standing is raised at the summary judgment stage, "plaintiff can no longer rest on 'mere allegations.'" Id. (quoting *Bischoff*, 222 F.3d at 878 (internal quotation marks omitted) (quoting *Defenders of Wildlife*, 504 U.S.at 561, 112 S.Ct. 2130)). Although "general factual allegations of injury resulting from the defendant's conduct may suffice" at the pleading stage, a plaintiff "must 'set forth' by affidavit or other evidence 'specific facts'" to prove standing at the final stage of litigation. *Lujan*, 504 U.S. at 561, 112 S.Ct. at 2137.

1. Plaintiff has not shown by affidavit or other evidence any injury-in-fact to his firearms license.

In Count VIII, Plaintiff Chrencik argues that the ordinance was invalid because it violated the Fourteenth Amendment and damaged his property interest in his firearms license. Chrencik has never pled and does not argue here that the ordinance was ever enforced against him specifically. He has not provided any evidence that he was arrested or threatened with arrest, or that the ordinance effected his employment, or his right to follow a chosen profession or some specific damage or injury to his license. The due process clause is not violated merely because a law has a speculative adverse effect on one's property. *Nebbia v. New York*, 292 U.S. 502, 525, 54 S.Ct. 505, 510, 78 L.Ed. 940 (1934). Plaintiff must show by affidavit or other evidence an injury-in-fact to his firearms license. The injury-in-fact must be concrete and particularized, actual or imminent. "An 'injury-in-fact' requires the plaintiff to 'show that he personally has suffered some actual or threatened injury.'" *Granite State Outdoor Adver. Inc. v. City of Clearwater, Fla.*, 351 F.3d 1112, 1117, 1119 (11th Cir. 2003) (quoting *Valley Forge Christian Coll. V. Ams. United for Separation of Church and State* , 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982)); (see also *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343

(1975) where court held plaintiff's complaint "failed to show the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention." *Id.* at 516, 95 S.Ct., at 2214.)

2. Atlanta Municipal Ordinance § 110-66 did not permanently or totally deprive Plaintiff of any constitutionally protected property interest in his firearms license.

The 14th Amendment reads in part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law." To prevail on a procedural due process claim, Plaintiff Chrencik must show that (1) he has a constitutionally protected property interest in a firearms license, (2) the City ordinance § 110-66, prior to July 7, 2008, deprived Plaintiff of that property interest, and (3) the procedures attendant upon deprivation were constitutionally insufficient. *Arrington v. Helms*, 438 F.3d 1336, 1347 (11th Cir. 2006) (citing *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003)).

The Supreme Court has determined that "[p]roperty interests ... are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. Of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The United States Supreme Court has identified some types of licenses that qualify as property rights protected by the due process clause. See, e.g., *Barry v. Barchi*, 443 U.S. 55, 64, 99 S.Ct. 2642, 61 L.Ed. 2d 365 (1979) (horse trainer's license), *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed. 2d 90 (1971) (driver's license). From these cases, it appears that a license may be a protectable property interest where it is "essential in the pursuit of a livelihood.'" *Goldrush II v. City of Marietta*, 267 Ga. 683, 695, 482 S.E. 2d 347, 358 (1997) (alcoholic beverage license) (quoting

Bell, 402 U.S. at 539). Although there are some dicta in Georgia case law regarding property interests in other types of licenses, the Supreme Court of Georgia has not yet held that the owner of a firearms license has a constitutionally protectable property interest in a firearms license. *A priori*, there are no Georgia cases that determine what actions constitute a violation of the property interest in the license itself. Indeed, there are no Georgia cases that hold a gun owner has a constitutional right to a firearms license. Georgia citizens are not required to purchase a firearms license to own a gun. In a recent case, *Moore v. Cranford*, the Court of Appeals of Georgia held that the probate court was not required to automatically issue firearms license if the judge did not receive findings from local law enforcement within 50 days that bore on the applicant's eligibility for a license or renewal of a license. *Moore v. Cranford*, 285 Ga. App. 666, 647 L.Ed. 2d 295.

"Not every right or benefit based on a statute constitutes property for purposes of the due process clause. It is necessary to analyze the nature of the right or benefit to determine if it constitutes a protectable property interest." *Brescia v. McGuire*, 509 F. Supp 243, 248 (S.D.N.Y. 1981). In *Gun South, Inc v. Brady*, a case cited by Plaintiff, the court analyzed the Plaintiff's "property interests" to determine whether a ninety-day suspension of a permit to import a certain type of firearm violated Plaintiff's due process rights. In order to determine whether a violation to Plaintiff's constitutional rights occurred, the court looked at the deprivation's length and finality. The Court held that Plaintiff "... had not suffered a permanent loss ..." because the government "had not revoked Plaintiff's license or its permits." The Court went on to state that "the [government] had merely deprived [Plaintiff] of the ability to import the AUG-SA rifle for ninety days." *Gun South, Inc. v. Brady*, 877 F. 2d 858, 867 - 868. The Court held that the ninety-day import suspension did not violate Plaintiff's due process rights; the Government had

neither permanently nor totally deprived Plaintiff of any property interest. *Id.* at 869. *See also Pensylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158. In deciding whether there was a taking during the ninety-day period when the regulation was in effect, the Court held that there was no taking where the regulation did not unreasonably impair the value of the regulated property. *Id.* See also *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83, 84, 100 S.Ct. at 2042. *Gun South* is instructive here. In *Gun South*, the court rejected Plaintiff's due process attacks on the regulation.

In the case at bar, Plaintiff amended his complaint on December 31, 2007 wherein he alleged that Atlanta City Municipal Code § 1'0-66 violated his 14th Amendment property interest in his Georgia firearms license. After the Court of Appeals ruling and the enactment of HB 89 by the Georgia Assembly, the City of Atlanta amended § 110-66 on July 7, 2008. There is no showing that the ordinance had any impact on Plaintiff from the date Plaintiff filed his 14th Amendment claim to the date the ordinance was amended. During that six month period, Plaintiff has made no showing that there was any economic impact to Plaintiff's firearms license. The license was not revoked. During the six month period, Plaintiff's property interest in his firearms license was not constitutionally impaired. Plaintiff Chrencik had the same property interest in his firearm's license on July 8, 2008 that he had on December 31, 2007. *See Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970) (Due process only becomes relevant when property interests are "deprived" e.g., where welfare benefits are terminated.); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1970) (where public employees are discharged); or, *Bell v. Burson*, supra, where licenses are actually revoked.)

C. **Preemption or even violation of state law, does not, *per se*, render an ordinance unconstitutional.**

Plaintiff dismissed his Second Amendment claim (Count VII), but nevertheless states in this motion that the Atlanta Ordinance infringed on his "fundamental right to bear arms." Plaintiff claims that "this process deprived Plaintiff of a portion of the value of his GFL" and "violated Plaintiff's substantive due process rights." Relying on *McKinney v. Pate*, Plaintiff leaps to the conclusion that "[t]he violation is complete because it has already occurred." *McKinney* is not on point here. *McKinney* involved a former employee who brought a §1983 action alleging his termination by the county board of commissioners violated his substantive due process rights on the grounds that the facially adequate termination procedure was biased against him. Even in *McKinney* the court held the employee was not deprived of procedural due process. *McKinney v. Pate,* 20 F.3d 1550 (11th Cir. 1994).

In the motion at bar, Plaintiff attempts to reassert a claim (Count VII) that he has dismissed – his fundamental right to bear arms – and conflate the dismissed claim with his due process claim -- alleging that his property interest in his firearms license was impaired (Count VIII). As stated above, due process only becomes relevant when property interests are "deprived" -- where public employees are discharged, or where licenses are actually revoked. The City of Atlanta did not violate Plaintiff's Second Amendment rights. There has been no showing by this court or the Court of Appeals in the *Coweta* case that local ordinances regulating firearms are arbitrary, unreasonable, or unconstitutional. Preemption or even violation of state law does not, *per se*, render an ordinance unconstitutional. (Citations omitted.)

In addition, Plaintiffs have produced no evidence showing that the enactment of the ordinance by the Atlanta City Council was ultra vires. Plaintiffs have alleged that the ordinance,

before it was amended, was itself ultra vires because it was preempted by O.C.G.A. § 16-11-173(b)(1). Plaintiffs do not, however, allege that the enactment of the ordinance was ultra vires. The prohibition contained in O.C.G.A. § 16-11-173(b)(1) was enacted by the General Assembly in 1995 as § 16-11-184. *See* Ga. L. 1995 At 139. The City of Atlanta's enacted § 110-66 in 1977. The City of Atlanta's Ordinance was not ultra vires when it was enacted.

The state of Georgia places many limitations on the right to bear arms – guns are not permitted in airports, public buildings, courtrooms, public gatherings, etc. *See generally* O.C.G.A. §§ 16-11-126 et seq. Although the state sanctions all these regulatory limitations on the owner's right to bear arms, none are unconstitutional. Plaintiff attempts to bootstrap a second amendment claim onto a fourteenth amendment claim. Neither has merit. Neither Georgia, nor any other federal court, has held that a temporary limitation or restriction on a firearms license is unconstitutional. Plaintiff has not met his burden.

III.

CONCLUSION

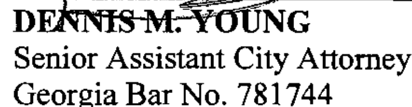
When enacted in 1977, Atlanta Municipal Code § 110-66 limited possession of guns in City-owned parks. The ordinance was drafted in the interests of public safety due to the rising rate of gun-related crime in the City. The City ordinance was similar to state statutes. State statutes prohibited or limited the possession of firearms in public places – airports, public buildings, courtrooms, public gatherings, etc. None of these statutes have ever been determined to be unconstitutional. None of the state statutes have ever been held to permanently infringe or impair the actual firearms license of the gun owner. Plaintiff's claims that the Atlanta City Municipal Code § 110-66 damaged his firearms license from December 31, 2008 to July 7, 2008. [The ordinance was amended on July 7, 2008.] Plaintiff's claims are specious and should be

rejected. Plaintiff's substantive rights to own and carry a firearm (his Second Amendment rights) have not been harmed. Plaintiff's property interest in the actual firearms license has not been damaged economically or otherwise. For a brief period of time, Plaintiff 's could not carry their guns into City – owned parks. During that same period of time, Plaintiff 's could not carry their guns into airports, public buildings, or courtrooms. By statute, Plaintiff's are legally prohibited from carrying their guns in many public places. State ordered restrictions on where a firearm can be legally carried should not be any more onerous than Atlanta's Code section. *A priori*, Atlanta's temporary limitation, vis-à-vis these Plaintiff's, until the state sorted out its preemption laws, should not be anymore unconstitutional than existing state statutes.

Defendant City of Atlanta respectfully requests this Court deny Plaintiff's Motion for Summary Judgment. In addition, the City of Atlanta respectfully requests the Court to treat the City's Response to Plaintiff's Motion for Summary Judgment as the City's Motion for Summary Judgment and to fully and finally resolve this matter without further waste of judicial resources.

Respectfully submitted this 17th day of August, 2009.

JERRY DELOACH
Deputy City Attorney
Georgia Bar No. 081673



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STATE OF GEORGIA

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Plaintiffs,	)	
v.	)	Civil Action No. 2007-CV-138552
FULTON COUNTY, GEORGIA, CITY OF ATLANTA, et al.	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2009, I served a true and correct copy of the foregoing CITY OF ATLANTA'S BRIEF IN RESPONSE TO PLAINTIFFS' SECOND MOTION FOR SUMMARY JUDGMENT by depositing the same with the United States Postal Service, adequate postage affixed thereto and addressed to the following:

John R. Monroe, Esq.
9640 Coleman Road
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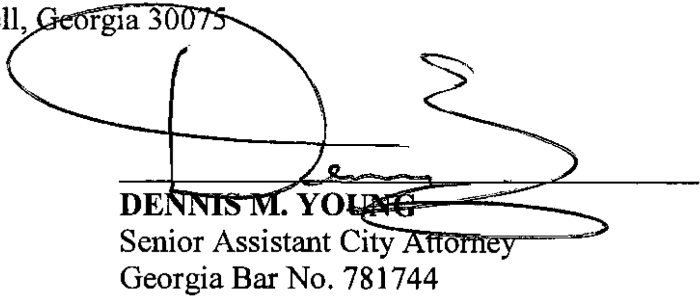

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