IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGIACARRY.ORG, INC., *et. al.* Plaintiffs,	)	
	)	Civil Action No. 2007 CV 138552
v.	)	
CITY OF ATLANTA, GEORGIA, Defendant	)	

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF PLAINTIFFS' SECOND MOTION FOR SUMMARY JUDGMENT

I.

INTRODUCTION

The City of Atlanta continues to regulate the carrying of firearms, even though this Court has found that Atlanta has no power to do so. Inexplicably, Atlanta has enacted an entirely new ordinance that purports to regulate carrying of weapons (presumably including firearms) at the airport. Atlanta fails to grasp the concept that it is prohibited from regulating the carrying of firearms ***in any manner.***

Atlanta further argues that Plaintiff Chrencik lacks standing to assert his Fourteenth Amendment claims for deprivation of a portion of his Georgia firearms license because he was not arrested. Atlanta mistakenly equates deprivation of property with deprivation of liberty, implicitly concluding that the former cannot happen without the latter.

Atlanta has failed to rebut Plaintiffs' Motion, which Plaintiff has shown to be well-grounded in fact and in law, and which should be granted.

II.

ARGUMENT

IIA. Plaintiffs' Claims Are Not Moot, Because Atlanta Still Regulates Carrying Firearms

Atlanta asserts in its Brief that Plaintiffs' claim for permanent injunctive relief is moot because while this case was on appeal Atlanta amended its ordinance and removed signage indicating firearms are banned in parks.[1] There are several problems with this assertion.

Although Atlanta's Director of Parks signed an affidavit on August 18, 2009, swearing that "The websites for the City of Atlanta no longer state that guns are prohibited in City of Atlanta parks," ***Atlanta's website still asserts that firearms are prohibited.*** As of the writing of this Brief, Atlanta's website contains excerpts of Atlanta's parks ordinances, including Sec. 110-66 saying, "No person in any park, except a police officer or other peace officer, shall possess a firearm of any size or description or any instrument, appliance, or substance designed, made or adapted for use primarily as a weapon."[2]

Most importantly, however, is the fact that ***Atlanta continues to regulate the carrying of firearms.*** Throughout this litigation, Atlanta has steadfastly insisted that it has the power to regulate the carrying of firearms. Early on in this case, Atlanta sought a stay of proceedings pending the outcome of the Court of Appeals case now reported as *GeorgiaCarry.Org, Inc. v. Coweta County*, 288 Ga. App. 748, 655 S.E.d2d 346 (2007). Atlanta implied to this Court that it would abide by the Court of Appeals' decision. That was pure subterfuge on Atlanta's part, however, because Atlanta promptly ignored the Court of Appeal's decision. In *Coweta County*,

[1] Plaintiffs are at a loss to understand why Atlanta is just now advising Plaintiffs that they have amended their ordinance, when they claim to have enacted the amendment more than a year ago.

[2] http://www.atlantaga.gov/government/parks/burparksrules.aspx. A copy of this web site has been printed as of August 21, 2009 and filed contemporaneously with this Brief for the Court's convenience.

the Court of Appeals found that local regulation of carrying firearms in parks is expressly preempted by O.C.G.A. § 16-11-173. While the *Coweta County* decision should have ended this litigation, Atlanta continued to insist that it was within its powers when it regulated carrying firearms in its parks.[3] At oral argument on the first round of summary judgment motions, the Court asked Atlanta's counsel how Atlanta reconciled its position (of not modifying its ordinance) with the holding of *Coweta County*. Tr., p. 47. Atlanta's counsel declined to do so, saying only that "public policy" considerations should prevail[4]. *Id.* This Court then granted Plaintiffs' Motion for Summary Judgment and enjoined Atlanta from enforcing its ordinance.

The revised ordinance as filed by Atlanta now purports to prohibit possession of a "dangerous weapon in any area of the airport." Sec. 22-110(a). The definition of "dangerous weapon" contained in the revised ordinance "includes, but is not limited to" a long list of weapon types, including knives. Sec. 22-110(b). Finally, Sec. 22-110(c) explicitly prohibits carrying a firearm at a public gathering and specifically declares the airport to be a public gathering.[5]

Atlanta's new ordinance is very different from the modifications Roswell and Sandy Springs made to their ordinances. The latter two cities merely referenced state law and left it at that, a move that the Court of Appeals said "serves no purpose," but which is nonetheless permissible. In particular, the declaration in the ordinance that the airport is a public gathering

[3] To this day Atlanta refuses to acknowledge the holding in *Coweta County* and this Court's ruling that Atlanta's (former) ordinance was preempted, arguing in its Brief that the preemption law (O.C.G.A. § 16-11-173) was unclear until the General Assembly passed HB 89, which took effect July 1, 2008.

[4] Somewhat shockingly, Atlanta now complains

[5] This is an odd declaration given that it is the public gathering law that the General Assembly chose to amend in 2008 to state that a licensed person "shall be permitted to carry . . . in public transportation notwithstanding Code Sections 16-12-122 through 16-12-127." See O.C.G.A. § 16-11-127(e). Code section 16-12-122 provides the definition of an aircraft, bus, or rail terminal, and 16-12-127 provides a criminal offense for carrying a weapon into an aircraft, bus, or rail terminal.

goes beyond merely reporting the state law. Furthermore, Atlanta fails to report the exception in the Public Gathering law for public transportation noted above in Footnote 4.

Atlanta, therefore, continues to regulate carrying firearms. While it now purports to have stopped regulating carrying firearms in parks, it asserts that it can regulate carrying firearms in airports. This assertion applies not just to the airport terminal building, however, but it includes "any area of the airport" and "vehicles using the airport." Sec. 22-110(a). Plaintiffs began this lawsuit two years ago because Atlanta was illegally regulating the carrying of firearms, and Atlanta continues to do so. Atlanta stubbornly has clung to the false hope that the law somehow does not apply to it. Until this Court tells Atlanta, once again, that Atlanta is prohibited from regulating the carrying of firearms ***in any manner,*** it is clear that Atlanta intends to continue to do just that.

"It has long been the rule that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *Secretary of Labor v. Burger King Corp.,* 955 f.2d 681, 684 (11th Cir. 1992). Moreover, changes to a challenged ordinance made while a case is on appeal do not necessarily moot the case. *Horton v. City of St. Augustine,* 272 F.3d 1318, 1326 (11th Cir. 2001) ("Where a superseding statute leaves objectionable features of the prior law substantially undisturbed and challenged aspects remain essentially as they were before the amendments, the case is not moot"). Finally, "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice…. The city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the

District Court's judgment were vacated." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

It is painfully apparent from Atlanta's actions throughout this case that it will do whatever it can to continue to regulate carrying firearms in whatever manner it thinks it can get away with it. Among the seven original defendants, only Atlanta refused to amend its ordinance in the face of overwhelming authority against it. Not until this Court entered an injunction against Atlanta did Atlanta take any measures at all towards complying with state law, and even then it still continues to regulate carrying of firearms. There is every reason to believe that Atlanta will continue to do so unless it is ordered to cease.

IIB. Plaintiffs Were Harmed by Atlanta's Ordinance

Atlanta mistakenly believes that its ordinances cannot violate the Fourteenth Amendment as long as no one is "arrested or threatened with arrest" and as long as the ordinances do not affect someone's employment. Atlanta Brief, p. 4. Atlanta cites *Nebbia v. New York*, 291 U.S. 502 (1934), a New Deal era case holding that a state may regulate prices of consumer goods, for the proposition that the due process clause is not violated "merely because a law has a speculative adverse effect on one's property." Atlanta's Brief at p. 4.

What Atlanta fails to appreciate is that Atlanta actually deprived Plaintiffs of the beneficial use of a portion of their GFLs. There is no speculation about it. Plaintiffs received firearms licenses pursuant to state law, licenses that Atlanta had no authority to modify. Those licenses permit their recipients to carry firearms anywhere not prohibited by ***state*** law. Yet Atlanta effectively modified the licenses by making them invalid in Atlanta's parks.

Atlanta tries to soften the effect its ordinances had by saying, "Georgia citizens are not required to purchase a firearms license to own a gun." Atlanta Brief, p. 6. While true, that statement has no bearing on this case. A license is needed in Georgia to "bear" arms, even if not to "keep" them. A person may not carry a pistol outside of his home, his own automobile, or his place of business without a license. O.C.G.A. § 16-11-128. A person may not carry a concealed firearm without a license. O.C.G.A. § 16-11-126. A firearm is considered "concealed" when carried in an automobile unless people whom the driver encounters are made aware of the firearm's presence. *Moody v. State*, 184 Ga. App. 768, 769 (1987). For all practical purposes, therefore, a firearm may not be carried in an automobile without a license. Other than in his own home or place of business, therefore, a license is required for a person to exercise his right to bear arms. By diminishing the extent of the license, Atlanta infringed on a fundamental constitutional right.

Whether a license is property for Fourteenth Amendment purposes depends on the extent of discretion that exists to revoke it. *Baer v. City of Wauwatosa,* 716 F.2d 1117, 1122 (7th Cir. 1983) (Property, for purposes of the Fourteenth Amendment, defined "as what you hold securely as a result of state or federal law"); *Kellogg v. City of Gary*, 562 N.E.2d 685, 695 (S.Ct. Ind. 1990). In Georgia, a firearms license issued pursuant to O.C.G.A. § 16-11-129 may not be revoked except upon certain criminal violations by the licensee and then only after a hearing. O.C.G.A. § 16-11-129(e). Thus, there is no discretion in revoking a license. There is likewise no discretion in granting a license, as an eligible applicant who does not receive a license in a timely manner may sue in mandamus to obtain one. O.C.G.A. § 16-11-129(j); *See also* 1989 Op.

Atty. Gen. U89-21, holding that a probate judge has no discretion in issuing a firearms license to an eligible applicant.

Even Atlanta's own cases, which it cites in an attempt to show that only certain types of licenses are "property" for Fourteenth Amendment purposes, support Plaintiffs' property rights in their firearms licenses. *Barry v. Barchi*, 443 U.S. 55, 64 (1979), which Atlanta cites to show that horse trainer's licenses are "property," says that such licenses are property because they "may not be revoked or suspended at the discretion of the racing authorities. Rather, suspension may ensue only upon proof of certain contingincies." *Id.*, FN 11. Also, *Bell v. Burson*, 402 U.S. 535, 539 (1971), which Atlanta cites to show that driver's licenses are "property," says, "This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.'" *Id.* Thus, Atlanta's assertion that licenses are "property" only if they are "essential in pursuit of a livelihood" is overly narrow. The test for whether a license is property is the discretion the government has in taking the license away, not what the license permits. It just so happens that most "licenses" issued by states have something to do with earning a living. That fact, however, does not make all other licenses not property.

Atlanta's other cases are inapposite. Atlanta relies heavily on *Gun South, Inc. v. Brady*, 877 F.2d 858, 867 (11th Cir. 1989). The only thing *Gun South* has in common with the case at bar is that it has something to do with firearms and the constitution[6]. *Gun South* involved a 5th Amendment takings claim and Fourteenth Amendment ***procedural*** due process claim. Plaintiffs

[6] Plaintiffs cited *Gun South* in their opening Brief for the narrow proposition that licenses are property for 14th Amendment purposes. *Gun South's* 14th Amendment analysis, however, is not helpful for the instant case because it discusses ***procedural*** and not ***substantive*** due process.

make neither claim in the instant case. It is not surprising that the length of the deprivation of the property interest was an issue in *Gun South,* as short deprivations may not constitute ***procedural*** issues at all. On the other hand, the instant case involves a ***substantive*** due process claim. The 11th Circuit has explained the significance of a ***substantive*** due process claim:

> A violation of a substantive due process right, for instance, is complete when it occurs; hence, the availability *vel non* of an adequate post-deprivation state remedy is irrelevant. Because the right is "fundamental," no amount of process can justify its infringement. By contrast, a procedural due process violation is not complete "unless and until the State fails to provide due process." In other words, the state may cure a procedural deprivation by providing a later procedural remedy….

McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994), *en banc.*

Atlanta also cites to *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922) and *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980). Both these cases are takings cases under the 5th Amendment. Neither discusses substantive due process rights and therefore neither is the least bit helpful in the instant case.

Although ***substantive*** due process does not depend on the length of the deprivation, as Atlanta mistakenly believes, it is worth pointing out further Atlanta's flawed use of this concept. Atlanta somehow comes to the conclusion that a violation only could have occurred ***after*** Plaintiffs amended their complaint to include the 14th Amendment claim. Quite the contrary, Plaintiffs could not have amended their complaint in anticipation of some future violation that had not yet occurred. Atlanta already had committed the substantive due process violation on the date the Complaint was amended. Rather than a window of six months between amendment of the Complaint and the alleged amendment to the ordinance, Atlanta should be looking at the 31-year period during which it was trampling the property rights of firearms license holders. Atlanta

claims it enacted its ban on carrying firearms in parks in 1977 and repealed that ban in 2008. During that entire period, Atlanta was wrongfully curtailing the rights of firearms license holders to carry firearms as otherwise permitted by their licenses.

IIC. Atlanta's Discussion of *Per Se* Unconstitutionality is Meaningless

Atlanta creates a straw man to attack by saying that its ordinance that the Court already has found to be preempted, *ultra vires*, and in violation of state law did not *per se* make the ordinance unconstitutional. Given that Plaintiffs never asserted any kind of *per se* unconstitutionality, Atlanta's argument is *non sequitur*. Furthermore, Atlanta compounds the issue by claiming, incorrectly, that Plaintiffs are attempting to reassert their Second Amendment claim. They are not. The significance of introducing the right to bear arms is to show that it is a fundamental right and one that is protected by substantive due process. Plaintiffs are not resurrecting an independent Second Amendment claim.

Finally, Atlanta belatedly argues that "Plaintiffs have produced no evidence showing that the enactment of the ordinance by the Atlanta City Council was *ultra vires*." The time for Atlanta to make this argument ended over a year ago. Plaintiffs' first Motion for Summary Judgment, which the Court granted on May 19, 2009, included Count II, which claimed that the ordinance was *ultra vires*. The Court already has entered a final judgment on that Count and the time for Atlanta to appeal it has passed. The ordinance is, therefore, *ultra vires*.

CONCLUSION

Atlanta infringed on Plaintiffs' fundamental property rights by wrongfully banning them from carrying firearms in city parks. Atlanta continues to say on its web site that firearms are banned in parks. Atlanta now attempts to regulate carrying of firearms at the airport. This infringement constituted a violation of Plaintiffs' substantive due process rights for which Plaintiffs are entitled to damages in an amount to be determined at trial. Furthermore, the interlocutory injunction issued against Atlanta should be made permanent and expanded to require Atlanta to cease all communications to the public that indicate firearms are prohibited in city parks. Finally, Atlanta has violated Plaintiffs' substantive due process rights by diminishing the value of their firearms licenses. This violation also should be enjoined and should be subject to damages in an amount to be determined at trial.

John R. Monroe,
Attorney for Plaintiffs
9640 Coleman Road
Roswell, GA 30075
678-362-7650
State Bar No. 516193

CERTIFICATE OF SERVICE

I certify that I served the foregoing on September 1, 2009 via U.S. Mail on:

Jerry DeLoach, Esq.
Dennis M. Young, Esq.
City of Atlanta Law Department
68 Mitchell Street, SW, Suite 4100
Atlanta, GA 30303

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John R. Monroe