IN THE SUPERIOR COURT FOR THE COUNTY OF FULTON
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 No 2007CV138552

DEFENDANTS' MOTION TO DISMISS

Comes now Defendants City of Union City and City of Sandy Springs in the above styled action and moves this Court to dismiss Plaintiffs' Complaint as amended by Plaintiffs' Verified Amended Complaint pursuant to O.C.G.A. Section 9-11-12, joining all similar motions by all co-defendants. In support of this Motion, the City of Union City and the City of Sandy Springs have filed a brief in support.

This 30th day of January, 2008.

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STATE OF GEORGIA

GEORGIACARRY.ORG, INC., TAI TOSON, EDWARD WARREN, JEFFREY HUONG, JOHN LYNCH, MICHAEL NYDEN, and JAMES CHRENCIK Plaintiffs,	)	
v.	)	Civil Action No. 2007CV138552
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	)	

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

COMES NOW Defendants Union City and Sandy Springs and file this their brief in support of Defendants' Motion to Dismiss, respectfully showing this Honorable Court as follows:

INTRODUCTION

Each of the Defendants is a county or municipality that owns certain property that is operated and maintained as a public park or recreation area. Within these areas, each Defendant prohibits certain activities that it views as damaging to the safety and well-being of its citizens as they use the recreational facilities. Examples of activities and/or items that are prohibited include alcoholic beverages, loud and boisterous conduct, pets unrestrained by leash, horses, and

littering. In addition, each Defendant also prohibits firearms and/or other weapons in city or county owned parks and recreation areas. The purpose of these prohibitions is to ensure that the Defendants' parks and recreation areas are attractively and safely maintained for the enjoyment of their residents. Therefore, certain activities that may be legal in other parts of the city or county are prohibited in city or county owned parks and recreation areas. The Plaintiffs contend that the aforementioned prohibitions against firearms in parks and recreation areas are preempted by State law because they seeks to regulate the carrying or possession of firearms. Thus, the Plaintiffs are seeking an injunction to prevent the Defendants from enforcing their ordinances, as well as a declaration from this court that the ordinances are unconstitutional, ultra vires, and void. The Plaintiffs are also seeking attorneys' fees and costs. The Plaintiffs' claim should be dismissed because the Plaintiffs are not entitled to the relief sought. An injunction is improper in this case, however, because such an injunction would seek to enjoin the enforcement of a criminal or quasi-criminal municipal ordinance. Furthermore, declaratory relief is improper in this case because, at least with regard to Union City, none of the plaintiffs have been prosecuted or threatened with prosecution for violating the ordinances. Injunctive and declaratory relief is also inappropriate because the Plaintiffs' challenge to the ordinances is or will be moot.

STATEMENT OF FACTS

Plaintiffs are seeking to enjoin the enforcement of several ordinances enacted by Defendants that restrict the carrying or possession of firearms in city or county owned parks and recreation areas. With respect to the City of Union City, the challenged ordinance is Section 12-38 of the City's Code of Ordinances. (Compl. ¶¶ 8, 41; Brief in Opp. to Motion for Interlocutory Injunction 2.) The Plaintiffs have pled no facts alleging that any Plaintiff has ever been cited,

arrested, prosecuted, or threatened with prosecution for carrying a firearm in a park or recreation area owned by the City of Union City. (See generally, Compl.)

ARGUMENT AND CITATION OF AUTHORITY

The Plaintiffs are requesting that this court grant an injunction to enjoin the enforcement of the Defendants' ordinances pending the outcome of this case, as well as a declaration that the ordinances are unconstitutional, ultra vires, and void. Plaintiffs are not entitled to such relief because they lack standing to challenge the ordinances in question. Injunctive relief is inappropriate with respect to criminal or quasi-criminal laws and would be in violation of O.C.G.A. Section 9-5-2. Declaratory relief is also inappropriate because the Plaintiffs have alleged no facts showing that the ordinances have been enforced against them or that a threat of enforcement has been made. Furthermore, the Plaintiffs are not entitled to standing as taxpayers because they have not alleged that the enactment of the ordinances were ultra vires actions by the Defendants. In addition, Plaintiffs are also not entitled to the relief sought because it is the intention of Defendants to amend their ordinances prohibiting the carrying of firearms in city-owned parks or recreation areas. Thus this challenge is or will be moot. Finally, Plaintiffs are not entitled to attorneys' fees or costs.

I. An Injunction is Inappropriate in the Present Case.

"Equity will take no part in the administration of the criminal law. It will neither aid criminal courts in the exercise of their jurisdiction, nor will it restrain or obstruct them." O.C.G.A. Section 9-5-2. "The same rule applies in quasi-criminal proceedings; and prosecutions for violations of municipal ordinances, which are punishable by fine or imprisonment, are of that nature." Thomas v. Mayor of Savannah, 209 Ga. 866, 866 (1953) (citing Mayor of Athens v. Co-

op. Cab Co., 207 Ga. 505 (1950)); see also Staub v. Mayor of Baxley, 211 Ga. 1 (1954). The only exception to this general rule is where there is a risk of injury to property. See Sarrio v. Gwinnett County, 273 Ga. 404, 405 (2001) (citing Thomas, 209 Ga. at 867); see also Harris v. Entertainment Sys., 259 Ga. 701 (1989); Wofford Oil Co. v. City of Boston, 170 Ga. 624 (1930). "[E]quity courts should not intervene unless it is shown that the prosecutions were for the sole purpose of unlawfully taking property, destroying the business of the plaintiff, or will result in irreparable injury to the plaintiff and that the plaintiff has no adequate remedy at law." Sarrio, 273 Ga. at 405 (citing Arnold v. Mathews, 226 Ga. 809 (1970); City of Atlanta v. State, 181 Ga. 346 (1935)). Furthermore, an injunction is not appropriate where the request is based on mere apprehension of arrest. See Corley v. City of Atlanta, 181 Ga. 381 (1935).

The Plaintiffs are seeking to enjoin the enforcement of ordinances passed by the Defendants that prohibit the bringing of firearms and/or other weapons onto parks or recreation areas owned and maintained by the Defendants. These ordinances are criminal or quasi-criminal in nature and are punishable by fine or imprisonment. Therefore, it would be inappropriate for this court to enjoin the enforcement of these ordinances. See O.C.G.A. Section 9-5-2; Thomas, 209 Ga. at 866; Sarrio, 273 Ga. at 405. The Plaintiffs also have no property interest in being able to bring firearms onto city or county owned parks or recreation areas, thus the exception to the rule above does not apply. See Sarrio, 273 Ga. at 405.

The Supreme Court in Hodges v. State Revenue Commission discusses the purpose of the rule contained within O.C.G.A. Section 9-5-2 as follows:

> This general rule is based upon the principle that equity is intended to supplement, and not usurp, the functions of the courts of law, and that to sustain a bill in equity to restrain or relieve against

> proceedings for the punishment of offenses would constitute an invasion of the courts of law; and on the fact that the party has an adequate remedy at law . . . by establishing as a defense to the prosecution that he did not commit the act charged, or that the statute on which the prosecution is based is invalid, and, in case of conviction, by taking an appeal.

183 Ga. 832, 833 (1937). Therefore, the proper means of challenging the validity of the Defendants' ordinances would be to raise the issue as a defense to a criminal prosecution for violating one of the ordinances. See id. Instead, the Plaintiffs are requesting that this court enjoin the enforcement of the ordinances and are therefore asking this court to usurp the functions of the courts of law. See id. As discussed above, an injunction under such circumstances is inappropriate and contrary to the rule contained in O.C.G.A. Section 9-5-2.

II. A Declaratory Judgment is Inappropriate in the Present Case.

"It is well settled in this state that the courts will not determine the mere abstract constitutionality of a law, and that in the absence of a showing by the petitioner that the enforcement of the alleged unconstitutional Act has been undertaken, or is about to be undertaken against it and that it is in imminent danger of losing some valuable and irrecoverable property right as a result of a threatened prosecution thereunder a petitioner has no standing to come into court and have the court declare a statute unconstitutional." Frances Wood Wilson Foundation, Inc. v. Bell, 223 Ga. 588, 588 (1967); see also Sarrio, 273 Ga. at 406. "Certainly until plaintiff can show either that the statute in question has been invoked against it, or that there is a direct threat by the authorities to invoke it, it has no standing to come into court and have the court declare the statute invalid." Id.

The ordinances that the Plaintiffs allege to be invalid have not been invoked against any

of the Plaintiffs, at least with regard to the City of Union City. None of the Plaintiffs have been cited or prosecuted for violating the ordinances, nor has any direct threat of prosecution been invoked against them by authorities on behalf of Union City. In addition, none of the Plaintiffs have a valuable and irrecoverable property right that would be threatened by enforcement of the ordinances. Therefore, a declaratory judgment by this court that the challenged ordinances are unconstitutional, ultra vires, and void would be inappropriate at this time. See id.

III. Plaintiffs' Are Not Entitled to Standing as Taxpayers

Plaintiffs' have filed an amended complaint in which they allege that at least one of the Plaintiffs is a resident and taxpayer in each of the Defendant cities or counties and that the Defendants have illegally spent public funds to enforce and defend their ordinances. (See Amend. Compl. ¶¶ 9-15.) To the extent that the Plaintiffs are attempting to claim standing as taxpayers, they are not entitled to such standing because they have alleged no facts showing that the enactment of the ordinances by the Defendants were ultra vires actions. See Newsome v. City of Union Point, 249 Ga. 434, 436 (1982). In Newsome, the Plaintiff attempted to challenge the enactment of an ordinance by the Defendant authorizing the sale of malt beverages and wine within the city. Id. at 435. The Plaintiff claimed to have standing under the principles of League of Women Voters v. City of Atlanta, in which the court held that ". . . it is established that a citizen and taxpayer of a municipality, without the necessity for showing any special injury, has standing to sue to prevent officials of the municipal corporation from taking actions or performing acts which they have no authority to do . . . ." Newsome, 249 Ga. at 436 (quoting League of Women Voters, 245 Ga. 301, 303 (1980)). The court in Newsome held, however, that "[i]n order to have such standing in equity, however, [Plaintiff] had to properly allege that the

enactment of the ordinance in question was an ultra vires action by the municipality." Id.

The Plaintiffs have alleged no facts showing that the enactment of the ordinances by the Defendants were ultra vires actions. Plaintiffs have alleged that the ordinances themselves are ultra vires because they are preempted by O.C.G.A. Section 16-11-173(b)(1). However, the Plaintiffs do not allege that the actual enactment of each ordinance was ultra vires. The prohibition contained within O.C.G.A. Section 16-11-173(b)(1) was enacted by the General Assembly in 1995 as Section 16-11-184. See Ga. L. 1995 at 139. With respect to the ordinance of Union City, the ordinance was enacted on November 17, 1992, three years prior to the enactment of the above code section. Therefore the city's ordinance was not ultra vires at the time it was enacted, nor was the enactment of the ordinance ultra vires. Because they cannot show that the enactment of Union City's ordinance was ultra vires, Plaintiffs are not entitled to taxpayer standing.

IV. Plaintiffs' Challenge to the Ordinances is Moot

Both the Mayor and Council for Union City and the Mayor and Council for Sandy Springs have expressed their intention to amend their Code of Ordinances so as to remove the prohibition on the carrying of firearms in city-owned parks and recreation areas. Union City plans to make this amendment at the regular meeting of the City's Mayor and Council, which is scheduled to be held on Tuesday, February 19, 2008. Because the Defendants' amendments to the ordinances will moot the Plaintiffs' challenge to the ordinances, no further relief from this court would be appropriate. See, e.g., Pawnmart, Inc. v. Gwinnett Co., 279 Ga. 19, 19 n.1 (2005).

CONCLUSION

The issue in the present case is not whether the challenged ordinances are preempted by State law, but whether the Plaintiffs have standing to challenge the ordinances by requesting injunctive relief. Therefore, the Plaintiffs' request for an injunction prohibiting the Defendants from enforcing their ordinances should be denied because such relief is inappropriate to enjoin the enforcement of a criminal or quasi-criminal municipal ordinance. In addition, the Plaintiffs' request for declaratory relief should be denied because no Plaintiff has alleged facts showing that he has been prosecuted or threatened with prosecution for violating any of the Defendants' ordinances. The Plaintiffs also are not entitled to taxpayer standing because they have alleged no facts showing that the enactment of the ordinances were ultra vires actions by the Defendants. Furthermore, no relief should be granted to the Plaintiffs because Defendants plan to amend their ordinances so as to remove any prohibition on the carrying of firearms in city-owned parks and recreation areas, thus making the Plaintiffs' challenge to the ordinances moot. Finally, the Plaintiffs are not entitled to attorneys' fees or costs.

This 30th day of January, 2008.

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VERIFICATION

I, Patrick A. Stough, being duly sworn according to law, depose and say that I have read Defendant's Motion to Dismiss and Brief in Support of Defendant's Motion to Dismiss and that I am authorized to make this verification on behalf of the City of Union City, Georgia and that the facts set forth herein are true and correct based on my information and belief.

PATRICK A. STOUGH, Assistant City Attorney
City of Union City, Georgia

Sworn to and subscribed before
me this 30 day of January, 2008.

NOTARY PUBLIC

DENNIS A. DAVENPORT NOTARY PUBLIC FAYETTE COUNTY GEORGIA EXPIRES OCT. 11, 2010

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing DEFENDANTS' MOTION TO DISMISS and BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS of Defendants City of Union City and City of Sandy Springs has been served upon counsel for Plaintiffs and counsel for the co-defendants by mailing a copy of said Response, postage prepaid, by United States Postal Delivery service, addressed as follows:

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This 30th day of January, 2008.

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