

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR LAKE COUNTY, FLORIDA

FLORIDA CARRY, INC., a Florida not for
profit corporation,

Plaintiff,

vs.

CASE NO. 2012 - CA - 001001
Division 7

CITY OF LEESBURG, FLORIDA, a
political subdivision of the State of Florida,
and JAY EVANS, City Manager of the City
of Leesburg, Florida,

Defendants.

DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

Defendants hereby move for Summary Judgment in this action, on the basis that there exists no genuine dispute as to any material fact, and Defendants are entitled to judgment as a matter of law. The basis for this Motion is set forth below:

1. This action is based wholly on an alleged violation by Defendants of §790.33, Fla. Stat., pertaining to City of Leesburg Ordinance §15 – 3.

2. §790.33 reads, in its entirety:

790.33 Field of regulation of firearms and ammunition preempted.—

(1) PREEMPTION.—Except as expressly provided by the State Constitution or general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or any administrative regulations or rules adopted by local or state government relating thereto. Any such existing ordinances, rules, or regulations are hereby declared null and void.

(2) POLICY AND INTENT.—

(a) It is the intent of this section to provide uniform firearms laws in the state; to declare all ordinances and regulations null and void which have been enacted by any jurisdictions other than state and federal, which regulate firearms, ammunition, or

components thereof; to prohibit the enactment of any future ordinances or regulations relating to firearms, ammunition, or components thereof unless specifically authorized by this section or general law; and to require local jurisdictions to enforce state firearms laws.

(b) It is further the intent of this section to deter and prevent the violation of this section and the violation of rights protected under the constitution and laws of this state related to firearms, ammunition, or components thereof, by the abuse of official authority that occurs when enactments are passed in violation of state law or under color of local or state authority.

(3) PROHIBITIONS; PENALTIES.—

(a) Any person, county, agency, municipality, district, or other entity that violates the Legislature's occupation of the whole field of regulation of firearms and ammunition, as declared in subsection (1), by enacting or causing to be enforced any local ordinance or administrative rule or regulation impinging upon such exclusive occupation of the field shall be liable as set forth herein.

(b) If any county, city, town, or other local government violates this section, the court shall declare the improper ordinance, regulation, or rule invalid and issue a permanent injunction against the local government prohibiting it from enforcing such ordinance, regulation, or rule. It is no defense that in enacting the ordinance, regulation, or rule the local government was acting in good faith or upon advice of counsel.

(c) If the court determines that a violation was knowing and willful, the court shall assess a civil fine of up to \$5,000 against the elected or appointed local government official or officials or administrative agency head under whose jurisdiction the violation occurred.

(d) Except as required by applicable law, public funds may not be used to defend or reimburse the unlawful conduct of any person found to have knowingly and willfully violated this section.

(e) A knowing and willful violation of any provision of this section by a person acting in an official capacity for any entity enacting or causing to be enforced a local ordinance or administrative rule or regulation prohibited under paragraph (a) or otherwise under color of law shall be cause for termination of employment or contract or removal from office by the Governor.

(f) A person or an organization whose membership is adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated or caused to be enforced in violation of this section may file suit against any county, agency, municipality, district, or other entity in any court of this state having jurisdiction over any defendant to the suit for declaratory and injunctive relief and for actual damages, as limited herein, caused by the violation. A court shall award the prevailing plaintiff in any such suit:

1. Reasonable attorney's fees and costs in accordance with the laws of this state, including a contingency fee multiplier, as authorized by law; and
2. The actual damages incurred, but not more than \$100,000.

Interest on the sums awarded pursuant to this subsection shall accrue at the legal rate from the date on which suit was filed.

(4) EXCEPTIONS.—This section does not prohibit:

(a) Zoning ordinances that encompass firearms businesses along with other businesses, except that zoning ordinances that are designed for the purpose of restricting or prohibiting the sale, purchase, transfer, or manufacture of firearms or ammunition as a method of regulating firearms or ammunition are in conflict with this subsection and are prohibited;

- (b) A duly organized law enforcement agency from enacting and enforcing regulations pertaining to firearms, ammunition, or firearm accessories issued to or used by peace officers in the course of their official duties;
 - (c) Except as provided in s. [790.251](#), any entity subject to the prohibitions of this section from regulating or prohibiting the carrying of firearms and ammunition by an employee of the entity during and in the course of the employee's official duties;
 - (d) A court or administrative law judge from hearing and resolving any case or controversy or issuing any opinion or order on a matter within the jurisdiction of that court or judge; or
 - (e) The Florida Fish and Wildlife Conservation Commission from regulating the use of firearms or ammunition as a method of taking wildlife and regulating the shooting ranges managed by the commission.
- (5) SHORT TITLE.—As created by chapter 87-23, Laws of Florida, this section may be cited as the "Joe Carlucci Uniform Firearms Act."

3. §15 – 3 of the Leesburg Code reads, in its entirety:

It shall be unlawful for any person to discharge any firearms within the corporate limits of the city except for the protection of person or property, unless authorized or permitted so to do by the chief of police. It shall be unlawful for any person to fire or discharge any air gun, which, for the purpose of this Code, is defined as any gun, rifle or pistol which is designed to expel a projectile by the action of compressed air or gas, or by the action of a spring or elastic, within the corporate limits of the city; provided, that such an air gun, rifle or pistol may be fired or discharged on any private grounds or residence under circumstances such that persons and property will not be endangered and also in such a manner as to prevent the projectile from traversing any grounds or space outside the limits of such grounds or residence and further provided that such air gun, pistols or rifle may be fired or discharged on a target range which has been approved by the chief of police of the city.

4. Although §790.33 is a somewhat lengthy statute, the acts it prohibits are described briefly and succinctly in subsection (3)(a): "Any person, county, agency, municipality, district, or other entity that violates the Legislature's occupation of the whole field of regulation of firearms and ammunition, as declared in subsection (1), by enacting or causing to be enforced any local ordinance or administrative rule or regulation impinging upon such exclusive occupation of the field shall be liable as set forth herein."

5. Plaintiff seeks to avail itself of the remedies which follow the above quoted prohibitions in the statute, all of which are available if the statute is violated in the manner described in subsection (3)(a). Thus, to be liable to the Plaintiff, the Defendants must have either enacted a local ordinance, administrative rule, or regulation, impinging on the exclusive

occupation of the field of firearms regulation by the State of Florida, or must have caused such an ordinance, rule or regulation to be enforced.

6. §790.33 first became effective in the year 1987. As shown by the certified copy of the City of Leesburg ordinance attached as Exhibit “A” to this Motion, §15 – 3 of the City Code, which Plaintiffs allege to be the violation of §790.33 by the Defendants, was adopted on March 14, 1955, over thirty years before the effective date of §790.33. Thus, Defendants could not have violated §790.33 through the enactment of §15 – 3, because the ordinance was in effect for over thirty years before the statute on which Plaintiff’s claim is based.

7. Plaintiffs allege that the failure by the Defendants to repeal §15 – 3 is, in itself, a violation of §790.33. However, nothing in the statute compels any local government to repeal a previously adopted ordinance which, if adopted after §790.33 took effect, would violate the statute. The word “repeal” does not even appear in the statute. Thus, the Defendants had no legal or statutory duty to repeal §15 – 3. Subsection (1) of the statute merely declares existing ordinances in conflict with the statute to be “null and void.” By exercising its lawful authority to nullify existing ordinances, the Legislature rendered repeal unnecessary.

8. Thus, the only basis on which the Plaintiff could recover would be enforcement or attempted enforcement of §15 – 3 by the Defendants. To determine whether Plaintiff has evidence to show Defendants enforced or attempted to enforce the ordinance, Defendants propounded interrogatories to Plaintiff, two of which (4 and 5) asked Plaintiff to list each instance where Defendants enforced, attempted to enforce, or threatened to enforce, this ordinance. In response the Plaintiff demurred to Defendants as to any enforcement or attempted enforcement, stating that “This information would be available from The City of Leesburg Police Department or the City

Manager.” It is thus clear that Plaintiff has no independent evidence of violation of §790.33 by Defendants through the enforcement or attempted enforcement of the ordinance.

9. Filed with this Motion is an Affidavit of Robert Hicks, Chief of Police of the City of Leesburg, attesting that based on the records of the Leesburg Police Department, Defendants have not enforced or attempted to enforce §790.33 since the date (June 2, 2011) the Governor signed Chapter 2011 – 109, Laws of Florida, which inserted the express prohibitions against enforcement or attempted enforcement of an ordinance in violation of the statute. The affidavit further attests that there has been no enforcement of, or attempt to enforce, the ordinance since July 1, 2008, when the City’s Police Department began keeping its records on its current electronic system. Because there has been no enforcement, or attempt to enforce §15 - 3, since well prior to the effective date of the statutory prohibition, there is no basis for the Plaintiff’s claim in that regard.

10. In its response to the Interrogatories, Plaintiff offers as a justification for this action that the Defendants “threatened” enforcement of the ordinance, even though the statute does not proscribe specifically a “threat” of enforcement. However, Plaintiff does not cite any specific instance of a specific threat of enforcement. Instead, Plaintiff attempts to set up a “threat” of enforcement by citing the City Charter in which the City Manager is given the task of seeing that the laws and ordinances of the City are enforced.

11. This would assume a violation of §790.33 by the mere wording of the City Charter, without any affirmative act on the part of the Defendants to enforce §15 – 3. It would also assume the Defendants violated, or would violate, State law by enforcing the ordinance even though it has been nullified by §790.33. Nothing in the statute suggests that it would apply to such a passive

situation based on nothing more than the wording of an ordinance already declared void by State law.

12. In any event, §790.33 does not prohibit “threatened” enforcement of an ordinance, only its actual enforcement or attempted enforcement, and certainly does not apply to an imagined, invented threat such as the one relied on by Plaintiff, based solely on the wording of the City Charter that the City Manager is to enforce all laws and ordinances. Since the ordinance in question has been rendered void by §790.33, in fact it no longer exists as a legal ordinance and so would not fall under the City Manager’s enforcement duties in any event, because those duties apply only to valid and enforceable laws and ordinances, not to those the legislature has declared void.

13. Plaintiff complains that the City Charter says all ordinances shall remain in effect until repealed by the City Commission. Once again, this risible argument ignores the plenary power of the legislature to occupy the entire field of firearms regulation and to nullify ordinances in violation of State law. Nothing in the City Charter can alter the statutory nullification of §15 – 3 under §790.33, and the argument of the Plaintiff in this regard is specious and wholly without merit.

14. In addition to the grounds set forth above, to the extent the Plaintiff seeks injunctive relief to compel the repeal of §15 – 3, or prohibit its enforcement, that relief has been rendered moot by the voluntary repeal of the ordinance as evidenced by the certified copy of the repeal previously filed with the Court.

15. Because the Defendants have not violated any prohibition within §790.33 by enacting, enforcing or attempting to enforce the City ordinance, §790.33 does not mandate the repeal of ordinances existing on its effective date, the ordinance in question was enacted way back in 1955 and has not since been amended, and the duties assigned to the City Manager by the City

Charter do not and cannot apply to ordinances rendered void by State law, and because the City already repealed the ordinance on its own motion, there is no basis whatsoever for the claim of the Plaintiff in this action, and Defendants are entitled to judgment as a matter of law.

WHEREFORE, Defendants pray that the Court grant them summary judgment as to all counts of the Plaintiff's claim, that the Plaintiff take nothing by this action, and that the Court reserve jurisdiction to award Defendants the costs of this action and to hear and decide the motion of Defendants for an award of attorneys' fees under §57.105, Fla. Stat. (2014).

/s/ Fred A. Morrison

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Mail on this 17th day of October, 2014, to Eric J. Friday, of Fletcher & Phillips, efriday@fletcherandphillips.com, and J. Patrick Buckley, III, buckley@jpbesq.com.

/s/ Fred A. Morrison

FRED A. MORRISON