

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

CASE NO. 2012-CA-001001

FLORIDA CARRY, INC., a Florida Not
For Profit Corporation,
Plaintiff,

vs.

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

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Plaintiff, by and through the undersigned counsel and files

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, moves for summary judgment in
favor of Plaintiff, and as grounds therefore states:

1. There are no disputed issues of material fact.
2. Sec. 790.33(3)(f) provides:

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:

3. As of 19 March 2012 Defendant City of Leesburg was promulgating Sec. 15-3 of the Leesburg Code, which prohibited the discharged of any firearms within the corporate limits of the City of Leesburg, Florida.

4. "Promulgate" as used in Chapter 790 relies on the dictionary definition of the term

and means:

"promulgate" as "to declare or announce publicly; to proclaim." Black's Law Dictionary 1231 (7th ed. 1999). Similarly, Webster's Third New International Dictionary defines "promulgate" as "to make known by open declaration; to announce officially." Webster's Third New Int'l Dictionary 1816 (1986)

State v. Watso, 788 So.2d 1026, 1028 (Fla. 2d DCA 2001).

5. Specifically *Watso* held that the term promulgate is distinct from the term enact.

6. Pursuant to the canons of statutory construction, effect must be given to every word in a statute.

7. Sec. 790.33, uses both terms, promulgate and enact, separately, and as distinct acts for which a entity subject to the statute may be held responsible. See, *Florida Carry, Inc. v. Univ. of N. Fla.*, 133 So. 3d 966 (Fla. 1st DCA 2013).

8. While the City may not have enacted the ordinance in question in violation of Sec. 790.33, the continued promulgation of the ordinance is also a prohibited act.

9. §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.

10. Sec. 15-3 of the Leesburg Code violates Sec. 790.33, Fla. Stat., by generally prohibiting the discharge of firearms within the jurisdiction of the City of Leesburg.

11. The City of Leesburg continued to promulgate Sec. 15-3 through at least 16 September 2014.

12. Sec. 790.33(3)(a), Fla. Stat., prohibits “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” and provides for liability for violation of the statute.

13. Sec. 790.33(f), Fla. Stat. Provides that “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,” as well as providing for an award of attorney’s fees and damages.

14. By email dated 15 December 2011, Defendant Evans acknowledged that Defendants were prohibited from “enacting, enforcing, or promulgating ordinances which regulate firearms and ammunition . . .”. (Exhibit A).

15. Defendant Evans admission and knowledge of the statute make his failure to comply with and violation of the statute knowing and willful.

16. As of 19 March 2012 the City of Leesburg continued to promulgate Sec. 15-3 of the Leesburg Code in clear violation of the statute. (Exhibit B).

17. Defendant Evans went so far as to contend that any future action on Sec. 15-3 would be taken at the “discretion, pleasure, and timing of the Leesburg City Commission”

18. Section 24 of the Leesburg City Charter states “that all ordinances and laws of the said municipality of the City of Leesburg shall continue to be in force until the same are re-enacted or repealed by the City Commission of the City of Leesburg.”

19. Sec. 28 of the Code of Ordinances of the City of Leesburg establishes the “Powers and Duties” of the City Manager, and requires the City Manager to see that the laws and ordinances are enforced.

20. The lack of actual enforcement does not bear any relevance to the goals, intent, and requirements of Sec. 790.33.

21. The purpose of the statute as set forth by the Legislature is to create a uniformity in the laws regarding the possession and use of firearms and ammunition. Sec. 790.33(2)(a), Fla. Stat., (“It is the intent of this section to provide uniform firearms laws in the state”)

22. After over twenty-seven years since the enactment of Sec. 790.33, with continued violations, including by the City of Leesburg, the Legislature chose in 2011 to create penalties to enforce the provisions of Sec. 790.33.

23. The enforcement provisions of the Leesburg Code of Ordinances when combined with the continued promulgation of Sec. 15-3 of the Leesburg Code, has a chilling effect on lawful conduct so long as illegal ordinances in violation of Sec. 790.33 are allowed to be promulgated.

24. Sec. 790.33, Fla. Stat. further provides that the Plaintiff has a right to an injunction to prohibit continued violation of the Section.

25. An right to an injunction is not mooted by the repeal of an illegal ordinance as nothing keeps a future similar ordinance from being enacted. *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (U.S. 1993)

(applying the "well settled" rule that "a defendant's voluntary cessation of a challenged practice does not deprive a [] court of its power to determine the legality of the practice).

26. Just because the City of Leesburg decided, after ignoring a warning, to repeal its illegal ordinance after this action was filed, does not mean it cannot reenact the ordinance in the future.

27. The City of Leesburg's continued promulgation and maintaining of a clearly preempted ordinance for over 25 years shows an intent to violate Sec. 790.33 at will until challenged.

WHEREFORE, Plaintiff requests the Court:

- a. Enter Summary Judgment in favor of Plaintiff;
- b. Find that the ordinance at issue, Sec. 15-3 of the Leesburg Code, was promulgated in violation of Sec. 790.33, Fla. Stat., from Oct. 1, 2011 until its repeal;
- c. Find that Defendant Evans knowingly and willfully violated the terms of Sec. 790.33, Fla. Stat., as the appointed local government official under whose jurisdiction Sec. 15-3 of the Leesburg Code was promulgated in violation of Sec. 790.33;
- d. Assess a civil fine of \$5000.00 against Defendant Evans personally;
- e. Enter an injunction prohibiting the City of Leesburg from reenacting any ordinance which purports to prohibit or regulate the discharge of firearms within the City Limits of Leesburg, Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished via e-service and facsimile this 30th day of December, 2014, to the following:

Fred Morrison
dredm@mclinburnsed.com
Fax: (352) 326-2608

/s/ Eric J. Friday
Eric J. Friday, Esq.
Florida Bar No.: 797901
FLETCHER & PHILLIPS
541 E. Monroe
Suite 1
Jacksonville, Florida 32202
(904) 353-7733 Phone
(904) 353-8255 Fax
familylaw@fletcherandphillips.com
efriday@fletcherandphillips.com

A

Firearm regulation in the City of Leesburg

Sean Caranna <sean@floridacarry.org>

From: Jay Evans
[<mailto:Jay.Evans@leesburgflorida.gov>] Sent:
Thursday, December 15, 2011 4:40 PM
To: 'rich@floridacarry.org'
Subject: Firearm regulation in the City of Leesburg Mr.

Nascak:

Let's not get over-zealous with the rhetoric. The City of Leesburg is well aware of FS 790.33. You will note the statute says specifically that local governments are prohibited from "enacting, enforcing, or promulgating ordinances which regulate firearms and ammunition...". None of these things has occurred since October 1, 2011. There is no requirement that we repeal said laws, as you seem to indicate is necessary. Any action taken in the future regarding the existence of these laws in our Code of Ordinances will be done at the discretion, pleasure, and timing of the Leesburg City Commission.

Sincerely,

Jay M. Evans City Manager
City of Leesburg, Florida
P (352) 728-9704 / F (352) 728-9706
<<http://www.leesburgflorida.gov/>>
www.leesburgflorida.gov bird logo png file
-----Original Message-----

From: <<mailto:rich@floridacarry.org>> rich@floridacarry.org [
<<mailto:rich@floridacarry.org>>
<mailto:rich@floridacarry.org>] Sent: Thursday,
December 15, 2011 12:27 PM

To: City Manager
Subject: Website Contact Form Submission Name: Richard Nascak Email:<<mailto:rich@floridacarry.org>>
rich@floridacarry.org Comments:
Reference:<<http://laws.flrules.org/2011/109>> <http://laws.flrules.org/2011/109>

Dear Mr. Evans,

Please forward this e-mail to the City Council and/or City Attorney as applicable.

2011 House Bill 45 was engrossed under Chapter 2011-109, Laws of Florida and became effective on October 1, 2011. This law prohibits local governments from enacting, enforcing, or promulgating ordinances which regulate firearms and ammunition, and authorizes considerable penalties for violations thereof.

The City of Leesburg Code of Ordinances contains the following:

Sec. 15-3. - Discharging firearms in city.

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.

Florida Carry, Inc. interprets this ordinance to be in violation of s. 790.33 Florida Statutes and respectfully demands immediate action on the part of the City of Leesburg to comply with state law. As a Florida registered non-profit organization representing firearms owners and carriers throughout the state, Florida Carry has statutory standing to initiate legal action on behalf of our membership with regards to this issue.

We expect to receive a prompt reply to this communication. Please include any action intended or taken by the city to come into compliance with statute. Failure to respond will be interpreted as willful intent to circumvent the law, and we reserve the option to pursue the matter in court.

Sincerely,
Richard A. Nascak Co-Executive Director Florida Carry, Inc.
<<http://www.floridacarry.org>> www.floridacarry.org IP Address: 172.22.1.11

Please Note: Florida has a very broad public records law. Most written communications to or from government officials regarding government business are public records available to the public and media upon request. Your e-mail communications may therefore be subject to public disclosure.

Think before you print.

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Leesburg, Florida - Code of Ordinances

CODE OF ORDINANCES OF CITY

SUPPLEMENT HISTORY TABLE

PART I - CHARTER

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CHARTER COMPARATIVE TABLE

CHARTER COMPARATIVE TABLE

PART II - CODE OF ORDINANCES

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Chapter 10 - FIRE PROTECTION

Chapter 10.5 - FLOOD DAMAGE

Chapter 11 - GARBAGE AND RECYCLING

Chapter 12 - HEALTH AND SANITATION

Chapter 13 - JUNKED, WRECKED

authority, any property of the city whether owned, borrowed, leased by, or dedicated to, or operated under the authority of the city.

(b) The penalty for violating this section shall be a fine of not more than five hundred dollars (\$500.00) and/or sixty (60) days in the city jail.

(Code 1953, § 18-4)

Sec. 15-3. - Discharging firearms in city.

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.

(Code 1953, § 18-8)

Sec. 15-4. - Fishing in Fountain Lake prohibited, exception.

From and after the passage of this chapter, it shall be unlawful for any person to take fish by any method from that certain pond or lake in the city commonly known as Fountain Lake lying North of Meadow Street and South of the Seaboard Coast Line Railway except that an annual fishathon sponsored by the recreation department of the city may be conducted in this lake, and such persons as authorized by the recreation department may use the pond or lake for such purposes during this annual fishathon.