IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

FLORIDA CARRY, INC. and
THE SECOND AMENDMENT
FOUNDATION, INC.,

Plaintiffs,

vs. CASE NO. 2014-CA-1168

CITY OF TALLAHASSEE, FLORIDA,
JOHN MARKS, NANCY MILLER,
ANDREW GILLUM and GIL ZIFFER,

Defendants.

DEFENDANTS' MOTION TO DISMISS
PLAINTIFFS' COUNTS II, III AND IV

Come now Defendants, the City of Tallahassee, John Marks, Nancy Miller, Andrew Gillum and Gil Ziffer (collectively "the City Defendants") and submit this motion to dismiss Counts II, III and IV of Plaintiffs' complaint.

I. Facts

Plaintiffs have brought this action alleging violation of Section 790.33 of the Florida Statutes. Section 790.33, amended in 2011, states as follows:

> 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.

Id. at 790.33(1).

Plaintiffs assert that although Section 790.33 expressly renders local regulations concerning firearms "null and void," that by failing to affirmatively repeal two longstanding local ordinances, that the City and individual commissioners have violated the statute.

Plaintiffs' claims are based on two provisions of the Tallahassee Code. The first provision is Section 12-61(a) which states as follows: "No person shall discharge any firearms except in areas five acres or larger zoned for agricultural uses." This provision of the Tallahassee Code was in effect in the 1957 version of the Tallahassee Code and has since been re-codified. See § 23-13 Tallahassee Code (1957). The second provision is Section 13-34(b) of the Tallahassee Code states as follows: "It shall be unlawful for any person to do one or more of the following in a park or recreational facility owned or controlled by the city: . . . (5) Discharge a firearm . . . unless such instrument or device is required for participation in an activity which is organized or sponsored by the department of parks and recreation." Section 13-34(b)(5) was adopted by the City Commission in 1988. See Ord. No. 88-O-167, adopted Dec. 14, 1988.

The City Defendants concede that the Legislature has the power to supersede a City ordinance. See, e.g., Florida Power & Light Co. v. City of Miami, 72 So. 2d 270 (Fla. 1954) (act of legislature superseded city charter provision); American Bakeries Co. v. Haines City, 180 So. 524 (Fla. 1938) (act of legislature superseded city ordinance). In Section 790.33(1), the Legislature has expressly stated that local regulations concerning firearms are "null and void" and no further action is required by a local government to give effect to this provision. See Florida Power & Light Co., 72 So. 2d at 271-73 (statute granted exclusive jurisdiction to state commission superseding local regulation).

Despite the enactment of Section 790.33, which expressly rendered local firearm regulations null and void upon the statute's effective date, Plaintiffs contend that the City Commission had an affirmative duty to expressly repeal any local ordinance which was rendered invalid by the state statute. Plaintiffs specifically contend that by declining to repeal Sections 12-61(a) and 13-34(b) of the Tallahassee Code, that the City, the Mayor and four Commissioners have violated the statute. Furthermore, Plaintiffs have asked the Court to assess individual fines and penalties against the Mayor and individual commissioners as well as award Plaintiffs' attorney fees.

II. Standard for Motion to Dismiss

A motion to dismiss tests whether a plaintiff has asserted a claim upon which relief may be granted. See Shahid v. Campbell, 552 So. 2d 321, 322 (Fla. 1st DCA 1989); Fla. R. Civ. P. 1.440(b). In assessing a motion to dismiss, the court looks to the four corners of the complaint and accepts the facts alleged in the complaint as true. See McKinney-Green, Inc. v. Davis, 606 So. 2d 393, 394 (Fla. 1st DCA 1992). Whether a complaint is sufficient to state a cause of action is an issue of law. See Sarkis v. Pafford Oil Co., Inc., 697 So. 2d 524, 526 (Fla. 1st DCA 1997).

III. Claim for Mandamus Relief

Despite the Legislature's pronouncement that the local ordinances are null and void and have no operation as a matter of law, Plaintiffs contend that this Court should issue a writ of mandamus ordering the City Commission to affirmatively repeal the ordinances or to have a City official strike any reference to the provisions from the Code.

Plaintiffs' complaint states as follows:

> Therefore, a repeal of the offending ordinances by the City Commission is the only remedy that will bring Tallahassee into compliance with both state law and city charter while protecting the citizenry and Plaintiffs' members.
>
> WHEREFORE, the Plaintiffs ask this Honorable Court for an injunction prohibiting the continued promulgation and enforcement of §12-61 and §13-34(b)(5) and a Writ of Mandamus ordering the Defendants to repeal/amend the provisions of§ 12-61 and§ 13-34(b)(5) . . . .

(Compl. at ¶ 87, Count IV).

"The writ of mandamus is intended to accomplish certain limited functions and not to redress every grievance or disagreement. Relief via the extraordinary writ of mandamus is available only where the pleader asserts a clear legal right to the performance of a clear legal duty by a public officer and that he has no other legal remedies available to him." James v. Crews, 132 So. 3d 896, 898 (Fla. 1st DCA 2014) (internal citations and quotation omitted). "Mandamus is defined as a remedy to command performance of a ministerial act that the person deprived has a right to demand, or a remedy where public officials or agencies may be coerced to perform ministerial duties that they have a clear legal duty to perform. A duty or act is defined as ministerial when there is no room for the exercise of discretion, and the performance being required is directed by law." Town of Manalapan v. Rechler, 674 So.2d 789, 790 (Fla. 4th DCA 1996) (internal citations omitted).

In this case, Plaintiffs have no clear legal right to compel the City Commission to repeal the ordinances or to compel a City official to strike the ordinances from the Code. The Legislature has rendered the ordinances invalid and nothing else is required. Although a law remains in print, when it has been rendered null and void, it has no effect. The Florida Supreme Court has explained: "Where a statute is judicially adjudged a statute to be unconstitutional, it will remain inoperative while the decision is maintained . . . ." Christopher v. Mungen, 55 So. 273, 280 (Fla. 1911); State v. White, 194 So. 2d 601, 604 (Fla. 1967) (same). The mere fact that

an ordinance has been superseded by a state statute does not require that any trace of the ordinance be erased. See, e.g., Boven v. City of St. Petersburg, 73 So. 2d 232 (Fla. 1954) (although statute superseded portion of city ordinance, other provisions of ordinance remained in effect).

As Plaintiffs have no clear right to compel the City Commission to repeal the ordinances, or to compel a City official to strike the ordinances from the Code, Plaintiffs' Count IV seeking mandamus relief is due to be dismissed.

IV. Claims for Injunctive Relief

In addition to seeking a writ of mandamus, Plaintiffs have asked the Court to "enjoin the City, its Mayor and its City Commission . . . requiring the repeal of § 12-61 and § 13-34(b)(5)." (Compl. at ¶ 57, Count II). Plaintiffs' Count II and Count III both seek injunctive relief against Defendants. Plaintiffs' seek to compel repeal of the ordinances -- duplicating the relief sought in their mandamus count.

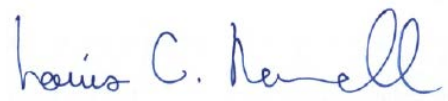
A party is not entitled to an injunction unless it can establish a clear legal right, an inadequate remedy at law and that irreparable harm will arise absent injunctive relief. See Horne v. Endres, 61 So.3d 428, 432 (Fla. 1st DCA 2011).

As discussed above, as a matter of law, Plaintiffs have no clear legal right to compel repeal of local ordinances.[1] Consequently, Plaintiffs' Counts II and III, seeking injunctive relief, are due to be dismissed.

[1] Additionally, Plaintiffs neither lack an inadequate remedy at low or the prospect of irreparable injury.

V. Conclusion

Based on the foregoing, Plaintiffs' Counts II, III and IV are due to be dismissed.



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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 2014, a copy of the foregoing pleading was served on the following via email:

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