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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

COVER SHEET

Plaintiff(s)

Allegheny County Sportsmen's League, et al.

Vs

Defendant(s)

City of Pittsburgh

CIVIL DIVISION

Case Number : GD - 94 - 001499

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Reply Brief and Exhibit in Support of Pet for Contempt

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Allegheny County Sportsmen's League

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IN THE COURT OF COMMON PLEAS OF ALLEGHNEY COUNTY
PENNSYLVANIA – CIVIL DIVISION

ALLEGHENY COUNTY SPORTSMEN'S LEAGUE, *et al*.,	:	
Plaintiffs	:	
v.	:	CIVIL ACTION NO. GD-94-1499
CITY OF PITTSBURGH,	:	
Defendant.	:	

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF PETITION FOR CONTEMPT OF COURT

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I. ARGUMENT

A. *Contrary to Defendant's Assertion, the Stipulation and Order are Enforceable*

Although the City, *after 24 years*, now for the first time claims that the terms of the 1995 Stipulation and Order that it willingly entered into are not enforceable (Def. Brief at 12-21), it fails to address that it is barred from raising such arguments, and even if, *arguendo*, it were not barred, the argument is meritless.

i. Laches and the Public Reliance Doctrine Bar the City's Argument

In *Stilp v. Hafer*, the Pennsylvania Supreme Court, in holding that an eight year delay in challenging an enactment was precluded by laches, declared "[l]aches is an equitable doctrine that bars relief when a complaining party is guilty of want of due diligence in failing to promptly institute an action to the prejudice of another." *Stilp v. Hafer,* 553 Pa. 128, 132 (Pa. 1998) (*citing Sprague v. Casey*, 520 Pa. 38, 45 (Pa. 1988)). For laches to apply, there must exist (1) a delay arising from a party's failure to exercise due diligence and (2) prejudice to the non-moving party resulting from the delay. *Id*. As the Court explained, "the test for due diligence is not what a party knows, but what he might have known by the use of information within his reach" and the expenditure of "time and money in reliance on the validity of [an enactment]" was sufficient prejudice. *Id.* at 135 (*citing Sprague* at 45).

In this matter, the City has waited over 24 years – compared to the eight years in *Stilp* that the Court found to be sufficient to bar a claim under laches – to challenge the

Stipulation and Order. Moreover, this challenge comes after the prior litigation in 1996 occurred regarding this Stipulation and Order, as discussed *infra*, where the City did *not* raise this challenge. Furthermore, the City did not even raise its argument that "obey the law" provisions are unlawful in its Answer or New Matters and as such, the argument should be deemed waived. Even if, *arguendo*, the Court were not to deem the City's argument waived, there is no dispute that the Plaintiff and the City, through its solicitor, entered into the Stipulation on or about February 27, 1995, and thereafter, sought a court order approving it, which was issued on February 27, 1995. Def. Answer ¶¶ 2-5; Def. Brief at 4-5. Thus, there cannot be any basis for the City's failure to immediately challenge any putative improper provision, as the City entered into the Stipulation, requested the court order, and has had within its possession the Stipulation and Court Order since their execution. Moreover, Plaintiff has expended considerable amounts of time and resources seeking compliance with and enforcement of the Stipulation and Order, even before filing suit. *See*, Pet. for Contempt ¶¶ 22, 29; Exhibits F and J to Pet. for Contempt; Def. Answer ¶¶ 22, 29. Since filing suit, Plaintiff has continued to incur substantial amounts of time, attorney fees and costs in enforcing the Stipulation and Court Order. Thus, the doctrine of laches precludes Defendant's argument

A separate, albeit closely related doctrine – the public reliance doctrine – also bars the Defendant's challenge. In *Sernovitz v. Dershaw*, 127 A.3d 783, 792 (Pa. 2015), the Pennsylvania Supreme Court, in affirming that the public reliance doctrine can preclude challenges, even where a party diligently acts in a timely manner, declared that

> The amount of time that has passed since enactment is a material consideration because the longer … [it has been] relied on by the public and the government, the more disruption to society and orderly governance is likely to follow from its invalidation. Where, as here, such reliance has continued for more than 20 years,

> a presumption naturally arises that any process challenge is too stale to be cognizable regardless of whether the challengers exercised reasonable diligence.

As discussed *supra*, it is undisputed that in this matter, the Stipulation and Order have been in place for over 24 years. As the Stipulation and Order have been relied upon not only by the Parties but also the public, [1] the public reliance doctrine bars the Defendant's argument.

* * *

Accordingly, under both the doctrine of laches and public reliance doctrine, the Defendant's argument is barred.

ii. Estoppel

Under contractual/equitable and judicial estoppel doctrines, the City is estopped from contending that the Stipulation and Agreement are not enforceable.

It is internationally accepted that when parties enter into a contract, acknowledging their respective rights, duties, and obligations, they are estopped from later claiming that they are not bound by the terms of the agreement. *See e.g.*, *Peekay Intermark Ltd v. Australia and New Zealand Banking Group Ltd.*, [2006] EWCA 386, ¶¶ 56-57. As held by the Pennsylvania Supreme Court in *Blofsen v. Cutaiar,* 460 Pa. 411, 417 (1975), "[e]quitable estoppel applies to prevent a party from assuming a position or

[1] For example, the Plaintiffs in *Anderson, et al. v. City of Pittsburgh, et al.*, GD-19-005308, who are not Plaintiffs in this matter, have relied upon the Stipulation and Court Order in their arguments that the City is precluded from enacting 2018-1218, 2018-1219, and 2018-1220. *See*, *Anderson* Compl. ¶¶ 28, Exhibit B to the Complaint, Pltf. Brief in Support at 7.

asserting a right to another's disadvantage inconsistent with a position previously taken ... the person inducing the belief in the existence of a certain state of facts is estopped to deny that the state of facts does in truth exist, over a different or contrary state of facts as existing at the same time, or deny or repudiate his acts, conduct or statements."

In turning to judicial estoppel, [2] it applies where (1) a party assumed an inconsistent position in an earlier action; and (2) the party's contention was successfully maintained. *Marazas v. Workers' Compensation Appeal Board (Vitas Healthcare Corp.),* 97 A.3d 854, 859 (Pa. Cmwlth. 2014). The Pennsylvania Supreme Court has held that averments contained in the pleadings and stipulations are usually regarded as "judicial admissions" and cannot be later contradicted by the party who made them. *Tops Apparel Mfg. Co. v. Rothman*, 430 Pa. 583, 587 (1968). In a case involving the same Defendant, the Commonwealth Court held that the purpose of judicial estoppel is to uphold the integrity of the courts by preventing litigants from "playing fast and loose" with the judicial system by changing positions to suit their legal needs. *Gross v. City of Pittsburgh,* 686 A.2d 864, 867 (Pa. Cmwlth. 1996). [3]

In this matter, not only did the Parties enter into a Stipulation and thereafter seek a court order approving it, but, as discussed *infra*, the City relied on the Stipulation and Order's validity before the Commonwealth Court in order to argue in 1996 that the grant it was seeking was not in violation of such order. *Covey, et al. v. City of Pittsburgh*, 1299 C.D. 1996 (April 24, 1997).

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[2] Judicial estoppel appears to have consumed what was previously referred to as "estoppel by matter of record." *Converse v. Colton*, 49 Pa. 346, 352 (1865); *Baily v. Baily*, 44 Pa. 274, 275 (1863).

[3] See also, *Bienert v. Bienert,* 168 A.3d 248, 255 (Pa. Super. 2017)

Accordingly, the City is contractually/equitably and judicially estopped from contending that the Stipulation and Order, as executed, are not enforceable.

iii. The Stipulation to Which the City was a Willing Party can Form the Basis for a Finding of Contempt

Even if, *arguendo*, the Defendant's argument was not barred and the City did not waive it by failing to raise it in the 1996 litigation, discussed *infra*, and in their Answer and New Matter, Plaintiff is entitled to benefit of the bargain agreed upon and enforcement of the Stipulation and Order.

As recounted in the Def. Brief

> In 1994, Plaintiffs initiated this case by filing a Complaint in Equity against the City. Plaintiffs alleged that the passage of the 1993 Ordinance violated 18 PA. C.S. § 6120(a) ("Section 6120"), the Second Class City Act, 53 PA. C.S. § 23101 et seq., various provisions of the Pennsylvania Constitution, the Second Amendment of the United States Constitution, and "the common law of the Commonwealth of Pennsylvania". Plaintiffs sought to enjoin the enforcement of the 1993 Ordinance.
>
> In early 1995, the parties settled the case by entering into the Stipulation.

Def. Brief at 4. (internal citations omitted); *see also*, Def. Answer ¶¶ 2-5.

The City claims that the only relevant language in the stipulation is a "boilerplate provision" [4] that "[a]ll parties agree to abide by and adhere to Pennsylvania law," and string cites to a laundry list of case law to support the proposition that an "obey the law" order or injunction is unenforceable, after conceding that there exists no Pennsylvania state court decisions supporting the proposition. *See* Def. Brief at 12-13. Unfortunately

[4] This claim by the Defendants is unsubstantiated as they fail to submit any evidence supporting that the text of this provision is "boilerplate" and go on to admit that the provision is an "operative clause" to the Agreement, which is also not ambiguous. Def. Brief at 16.

for the City, unlike the non-precedential, non-state court case law it cites, this matter involves a stipulation – an agreement between the parties, *i.e.* a contract – that it *willingly entered into,* for which both parties received consideration [5] by the terms of the Agreement, and which thereafter was approved by an order of court at the request of the Parties so that it would be enforceable for purposes of future contempt. In fact, the City readily admits that the consideration received by Allegheny County Sportsmen's League – that the City agrees "to abide by and adhere to Pennsylvania law" – is an "operative clause" of the Agreement and that it "is not ambiguous." Def. Brief at 16. Pursuant to the Pennsylvania Supreme Court's holding in *Mowry v. McWherter*, 365 Pa. 232, 238 (1950), "[w]here parties, *sui juris*, enter into an unambiguous agreement, with knowledge of the facts, the courts will not relieve them of their contractual obligations because of the questionable wisdom of the bargain." *See also*, *Guenther v. Kutz*, 270 Pa. 144, 145 (1921)(declaring that where a party "made a bad bargain [] 'the mere fact that a contract is improvident is no ground for setting it aside.'")(citing *Nace v. Boyer et al.*, 30 Pa. 99, 110 (1858); *Imperial Rolling Screen Co. v. Steinfeld Bros.*, 232 Pa. 399, 402 (1911)(declaring that "it is evident that [Defendants] got the worst of a bad bargain …

[5] As acknowledged by the Pennsylvania Supreme Court, the surrender or cessation of a disputed claim is proper and sufficient consideration. *Cohen v. Sabin*, 452 Pa. 447, 453, (1973) (citing *Lombardo v. Gasparini Excavating Co.*, 385 Pa. 388, 391 (1956); accord, *Kefover v. Potter Title and Trust Co.*, 320 Pa. 51, 181 A. 771 (1935); *Miller's Estate*, 279 Pa. 30 (1924), *Island Block Corp. v. Jefferson Const. Overseas, Inc.*, 349 F.2d 322, 327 (3d Cir. 1965)).

In this particular matter, Allegheny County Sportsmen's League agreed to discontinue the pending litigation – where, as discussed *infra*, in the underlying matter, it sought complete injunctive relief, precluding the City from enacting any future ordinances in violation of 18 Pa.C.S. § 6120, which would have precluded the City from enacting the Ordinances in dispute – in exchange for the City agreeing to follow the law and Allegheny County Sportsmen's League's ability, if the City failed to comply with the terms of the agreement, to file for contempt.

enter[ing] into the contract without sufficient investigation, and failed to guard themselves by proper specifications … [b]ut the result is of their own doing, and the legal consequences of their action must be accepted."); 13 Williston on Contracts, § 1577 (3rd ed. 1970).

Put another way, the City's longwinded argument has no bearing on the current matter before the Court, as the City received the benefit of its bargain, after voluntarily executing the Agreement and requesting that this Court approve the Agreement. Unlike the non-precedential, non-state court case law cited to by the Defendant, this Court did not order that the City be required to comply with Pennsylvania law without the City's consent nor did this Court order an injunction against the City to prevent it from enacting future ordinances. Rather, the City knowingly entered into a contract with the Plaintiffs in order to discontinue the litigation that was pending against it at the time, where the sole benefit or consideration received by Allegheny County Sportsmen's League was the City's agreement "to abide by and adhere to Pennsylvania law," which it could, thereafter, enforce through contempt proceedings, if the City failed to comply.

The City states

> [t]he Stipulation's directive to "abide by and adhere to Pennsylvania law" improperly puts "the whole conduct" of the business of the City of Pittsburgh "at the peril of a summons for contempt"—in perpetuity...The Stipulation therefore does not allow the City and its elected representatives to "look within the four corners" of the Stipulation and know precisely what it is they are prohibited from doing

Def. Brief at 14. In other words, it seems to argue that the Stipulation is ambiguous as to its terms, but immediately thereafter, takes a contradictory position stating that

> …under Pennsylvania law, "recitals in a contract will not control the operative clauses thereof unless the latter are ambiguous." Here, however, the relevant operative clause—"All parties agree to abide by and adhere to

> Pennsylvania law"— *is not ambiguous at all*. While it is overly broad and non-specific, there is *nothing ambiguous about it*.

Def. Brief at 16. (internal citations omitted)(emphasis added). Put simply, the City seeks to interpret the Stipulation as ambiguous or overly broad, depending on which suits its argument. Further, as discussed *supra*, Defendants admit that the "operative clause" is a specific term of the Agreement. *Id*.

If the City seeks to look within the "four corners" of the Agreement (Def. Brief at 14), it has no legitimate argument that it does not know that the Stipulation prevents it from violations of Pennsylvania law, in particular violations of Section 6120, which "*reiterates, reaffirms, and codifies the state preemption of local ordinances and local action regarding firearms generally*…" *See* Exhibit A to the Pet. for Contempt. (emphasis added). As the City so eloquently stated "[w]hen the words of a contract are unequivocal, they speak for themselves, and a meaning other than that expressed cannot be given to them." Def. Brief at 16-17. (internal citations omitted). After all, it agreed to be bound to such and cannot now disclaim the benefit of the bargain that it negotiated. *Mowry*, 365 Pa. at 238.

The City argues that even if the Stipulation was narrowly read – that being only in relation to Section 6120 – that it would not be binding because it is merely an "obey the law" order. Def. Brief at 18. Yet, the City again fails to cite any Pennsylvania state case law in support of this proposition and forgets that it willingly entered into a contract in which it agreed not to break the law for the benefit of the cessation of litigation. Altering the terms of the Stipulation to render it meaningless – thereby eviscerating any

consideration received by Plaintiffs and unjustly enriching the Defendant [6] – would be unconscionable and contrary to the law.

Additionally, the Defendant states

> …it strains common sense to interpret the Stipulation to mean that the City settled this lawsuit by accepting a condition that it may be hauled into court and subject to contempt proceedings for any and every future violation of Pennsylvania law, or even Section 6120. This would afford the Plaintiff far more relief than it asked for (which was that the ordinance be struck down and enjoined as void and unenforceable (see Ex. D)) or could have achieved had the City simply litigated this case through summary judgment or trial and lost.

Def. Brief at 19. However, the City misstates what Plaintiffs asked for in the initial litigation. Count I requested preliminary and permanent injunctive relief which, in part, would "enjoin[] the defendant, its officers, agents, elected officials, and employees *from enacting or in any way regulating* the ownership, possession, transportation, or transfer of firearms and other weapons in contravention of the Pennsylvania Uniform Firearms Act." Defendant's Exhibit D at 13 (emphasis added). While Count I was in relation to Plaintiff Preston Covey, who is not a party to this current action, Count IV incorporated the demand for an injunction in relation to Allegheny County Sportsmen's League. Thus, contrary to the City's assertion, Allegheny County Sportsmen's League would receive *exactly* the kind of relief, which it had previously requested, much to the City's chagrin.

Perhaps more embarrassing for the Defendant is the untenable position it takes in relation to the current ordinances at issue and the comparison to the 1993 ordinance that led to the original lawsuit and Stipulation. Defendant boldly asserts that the current ordinances are different and more narrowly tailored than the 1993 ordinance. Def. Brief at 21-22. This argument also fails, as Defendant, by its own admission, states that the

[6] *See e.g.*, *DA Hill Co. v. Clevetrust Realty*, 524 Pa. 425 (1990).

1993 ordinance regulated, *inter alia*, the "use" of "assault weapons" and "large capacity ammunition belt" (Def. Brief at 3; Def. Exhibit B referencing § 607.08) and that Ordinance 2018-1218 restricts the "'use' of any assault weapon" (Def. Brief at 6) and Ordinance 2018-1219 restricts the "use" of "large capacity magazines" (Def. Brief at 8). Moreover, the 1993 ordinance, including the "use" provision, as discussed *infra*, was ruled unlawful by the Pennsylvania Supreme Court in *Ortiz v. Commonwealth,* 545 Pa. 279, 283, 287 (1996).

If there is any doubt left, then most persuasive is this Court's September 6, 1996 Opinion, which enforced the Stipulation and Order when the City applied for a grant that would have enabled it to create a gun registry in violation of 18 Pa.C.S. § 6111.4. In the Opinion, this Court stated

> The parties entered into a stipulation that acknowledged state preemption of local ordinances and local action regarding firearms. The stipulation *also stated that all parties agree to abide by and adhere to Pennsylvania law.*

(emphasis added). Thereafter, the City appealed and the Commonwealth Court, after acknowledging the legitimacy of the Agreement and Court Order, [7] reversed, solely on the grounds that the matter was not judicially ripe, because the underlying application's review had been suspended indefinitely, thus mooting the matter. *Covey, et al. v. City of Pittsburgh*, 1299 C.D. 1996 (April 24, 1997).

Thus, as this Court and the Commonwealth Court previously acknowledged that the Stipulation and Order were enforceable in relation to other actions the City had taken in violation of state law, this matter should be no different.

[7] *See*, pg. 2, fn. 3, pg. 3, fn. 6, pg. 5.

* * *

Simply put, the City seek to alter the terms of the Stipulation that it willingly entered into in order to escape liability for its actions, which were in direct contravention to the Agreement and this Court's Order. To hold otherwise would be to eviscerate all consideration that Allegheny County Sportsmen's League received in agreeing to cease the prior litigation.

B. *The City Acted Unlawfully*

Defendants argue that even if the Stipulation is a basis for contempt, that they did not act unlawfully. To support this proposition, the City argues that

> All of the Ordinances comply with State preemption law: they do not regulate in any of the four spheres (ownership, possession, transfer or transportation) preempted by the State in 18 PA. C.S. § 6120(a) and 53 PA. C.S. § 2962(g), but rather narrowly focus on preventing "use," which is not covered by the preemption laws, and, in the case of the CAP/Extreme Risk Ordinance, "storage" and the granted authority to "prevent" dangerous firing and discharge, none of which is preempted by the state law.

Def. Brief at 22.

Unfortunately for the City, for the reasons set-forth *ad nauseum* in Plaintiff's Brief in Support of Its Petition for Contempt, which, for brevity, the Plaintiff incorporates by reference herein, the Defendant's Ordinances are unlawful. Plaintiff will merely respond to the newly raised issues by the City.

i. The City Lacks The Power To Regulate, In Any Manner, Firearms and Ammunition

The City contends that pursuant to 53 P.S. § 23131 and 53 P.S. § 3703, it is authorized to regulate firearms consistent with the enacted Ordinances (Def. Brief at 21-24); however, it fails to advise this Court of the Rules of Statutory Construction and even if, *arguendo*, the Rules of Statutory Construction did not apply, the extremely limited grant of power provided by those code sections.

First, 53 P.S. 23131, was enacted by the General Assembly in 1901, March 7, P.L. 20 and 53 P.S. 3703 was enacted by 1921, May 10, P.L. 430. In comparison, 18 Pa.C.S. § 6120 was enacted by the General Assembly in 1974, Oct. 18, P.L. 768 and most recently amended in 1999, Dec. 15, P.L. 915. Similarly, 53 Pa.C.S. § 2962 was enacted by the General Assembly in 1996, Dec. 19, P.L. 1158.

As provided for by Pennsylvania's Statutory Construction Act, "the statute latest in date of final enactment shall prevail." 1 Pa.C.S. § 1936. In this matter, as Section 23131 was enacted in 1901 and Section 3703 was enacted in 1921, they are both invalidated by the enactments of Section 6120 in 1974 (and thereafter amended in 1999) and Section 2962 in 1996.

Second, with the enactment of the Uniform Firearms Act ("UFA"), 18 Pa.C.S. § 6101, *et seq*., in 1972, pursuant to 1 Pa.C.S. § 1971(b), Sections 23131 and 3703 would have been repealed, as they relate to firearms and ammunition. Section 1971(b) specifically provides,

> Whenever a general statute purports to establish a uniform and mandatory system covering a class of subjects, such statute shall be construed to supply and therefore to repeal pre-existing local or special statutes on the same class of subjects.

Third, no enactment of the General Assembly can invalidate the "inviolate" [8] "right of the citizens to bear arms in defense of themselves" as specified in Article 1, Section 21 of the Pennsylvania Constitution and the Pennsylvania Supreme Court has already held that municipal regulation of firearms is preempted by Article 1, Section 21 in *Ortiz,* 545 Pa. at 287 (declaring that pursuant to Article 1, Section 21, the "regulation of firearms is a matter of concern in all of Pennsylvania, not merely in Philadelphia and Pittsburgh, and the General Assembly, not city councils, is the proper forum for the imposition of such regulation.") Furthermore, consistent with the Pennsylvania Supreme Court's holding in *Commonwealth v. Wanamaker*, 450 Pa. 77, 89 (1972), "the failure of the legislature, subsequent to a decision of this Court in construction of a statute, to change by legislative action the law as interpreted by this Court creates a presumption that our interpretation was in accord with the legislative intendment."

Fourth, even if, *arguendo*, this Court were to ignore the dictate of the Pennsylvania Supreme Court and the Statutory Construction Act, Sections 23131 and 3703 do not authorize the City to regulate firearms and ammunition as provided for in Ordinances 2018-1218, 2018-1219 and 2018-1220. Specifically, at most, Section 23131 permits the City to "regulate, prevent and punish the discharge of firearms… in the streets, lots, grounds, alleys, or in the vicinity of any buildings"; [9] however, the

[8] *See*, Article 1, Section 25 of the Pennsylvania Constitution.

[9] Although 23131 also mentions a putative ability to regulate the "carrying of concealed deadly weapons," this would have been repealed, to the extent it covered firearms, by the enactment of 18 Pa.C.S. § 6109. Furthermore, any such proscription would violate the explicit holding of the U.S. Supreme Court finding that the definition of bear arms is to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *D.C. v. Heller*, 554 U.S. 570, 584 (2008)(*citing Muscarello v. United States*, 524 U.S. 125, 143 (1998)).

Commonwealth Court has already ruled in *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172 (Pa. Cmwlth. 2016), *appeal denied*, 642 Pa. 64, 169 A.3d 1046 (2017) and *Dillon v. City of Erie*, 83 A.3d 467 (Pa. Cmwlth. 2014) that a municipality cannot regulate discharge, pursuant to Article 1, Section 21 and 18 Pa.C.S. § 6120. Moreover, the Commonwealth Court in *Firearm Owners Against Crime v. Lower Merion Twp.* explicitly held that a municipality may not regulate even on its own property. 151 A.3d at 1180. Even if, *arguendo*, this Court were to ignore the binding precedent, the Ordinances at issue, as discussed in Plaintiff's Brief in Support of Its Petition for Contempt and *supra*, regulate *far* more than the discharge or carrying of concealed weapons [10] "in the streets, lots, grounds, alleys, or in the vicinity of any buildings" [11] and therefore are unlawful pursuant to Article 1, Section 21 and Section 6120.

In turning to 53 P.S. § 3703, the Ordinances yield the same fate, as it too only authorizes the regulation of "discharge of firearms in or into the highways and other public places thereof" and the Ordinances neither limit their application to "in or into the highways and other public places thereof" nor to merely discharge.

Accordingly, neither Section 23131 nor 3703 provide the City with any authority to enact or enforce the Ordinances.

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[10] *See e.g.*, Section 1104.02 regulating the loading of Armor Penetrating Ammunition into a magazine, Section 1104.03 regulating the loading of a Large Capacity Magazine and all of Ordinance 2018-1220 implementing the issuance of Extreme Risk Protection Orders.
[11] *See e.g.*, 1104.03, C., defining "public place" as including "streets, parks, open spaces, public buildings, public accommodations, businesses and other locations to which the general public has a right to resort."

ii. Regulating "Use" Is Preempted

As the City acknowledges, albeit hidden in a footnote, the Pennsylvania Supreme Court in *Ortiz*, 545 Pa. at 283, and the Commonwealth Court in *Dillon*, 83 A.3d 470, have already ruled that "use" of firearms and ammunition is preempted. [12, 13] Def. Brief at 23, fn. 7. In fact, in *Ortiz*, the Pennsylvania Supreme Court reviewed the City's 1993 Ordinance, which explicitly prohibited in Section 607.08, *inter alia*, the "use" of any "contraband weapon, accessory or ammunition." *See*, Def. Exhibit B. The definition of "contraband weapons, accessories and/or ammunition" is found in Section 607.01(h), where it specifies that such includes, *inter alia*, any "assault weapon," "large capacity ammunition belt" and "device, accessory or ammunition." Act 30 also defined "Ammunition," [14] "Assault Weapon," [15] and "Large Capacity Ammunition Belt."[16] As discussed further *infra*, as the Pennsylvania Supreme Court has already ruled not only is the regulation of "use" preempted, but so to is the regulation of ammunition, assault weapons, large capacity feeding devices and devices and accessories, as well as,

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[12] Defendants fail to advise the Court that the Commonwealth Court also addressed the "use" of "assault weapons," "large capacity magazines" and "accessories" in *Nat'l Rifle Ass'n v. City of Philadelphia*, 977 A.2d 78, 79, 83 (Pa. Cmwlth. 2009), where the court reviewed, *inter alia*, the City of Philadelphia's enacted Bill No. 080033 and found such to be preempted. A copy of Bill No. 080033 is attached hereto as Exhibit S.

[13] Interestingly, although the Defendants argue that the General Assembly did not intend to regulate "use," they do not explain, if that is the General Assembly's understanding or intent, why numerous bills have been offered in the General Assembly *to permit* municipalities to regulate, *inter alia*, "use", as addressed by Plaintiff's Brief in Support of Its Petition for Contempt at 22-26.

[14] 607.01(e).

[15] 607.01(f). Interestingly, almost every single firearm that was labeled as an "Assault Weapon" in Act 30 of 1993, is found in the Defendants' current definition of an "Assault Weapon" found in Section 1102.01.

[16] 607.01(k).

divestiture of firearms from someone posing a risk of harm, the City's argument is without merit.

Interestingly, an issue not addressed by the City and which undermines its argument that the PA Supreme Court did not decide whether "use" is prohibited (Def. Brief at 23, fn. 7), is its argument (Def. Brief at 31) relating severability in *Firearm Owners Against Crime, et al. v. City of Pittsburgh, et al.*, GD-19-0053301. Specifically, Defendant contends that if any provision is found unlawful, only that provision should be held unlawful and not the entire enactment. In review of Ordinance 30 of 1993, Section 607.15 contained a severability provision. *See*, Def. Exhibit B. Thus, the City finds itself in an untenable position of either having to admit that the Pennsylvania Supreme Court did in *Ortiz* address the "use" provision of Ordinance 30 – as otherwise, if municipalities could regulate "use," the Court would have merely severed the unlawful provisions and allowed the "use" portion to remain – or that there is no ability to sever unlawful provisions.

Moreover, while the City attempts to claim that to the extent there is any ambiguity in Section 6120, that ambiguity must inure to its benefit (*FOAC, et al.*, Def. Brief at 26), it fails to address the fact that (1) Section 6120 and the legion of binding precedent is explicitly clear that it preempts all regulation of firearms; (2) Article 1, Section 21 is also explicitly clear, and is upon which the PA Supreme Court rendered the *Ortiz* decision; and, (3) even if, *arguendo*, Article 1, Section 21 and Section 6120 were ambiguous, since the City has enacted criminal ordinances, any ambiguity or vagueness, pursuant to 1 Pa.C.S. § 1928(b)(1) and the rule of lenity, must be decided in the Plaintiff's favor, consistent with the binding legion of precedent. *United States v.*

Thompson/Ctr. Arms Co., 504 U.S. 505, 517-18 (1992)(holding that the rule of lenity even equally applies to civil provisions that are part of a criminal enactment).

iii. Regulations Similar/Identical To The City's Ordinances Were Already Held Unlawful by the Pennsylvania Supreme Court

In *Ortiz*, the Pennsylvania Supreme Court addressed and struck down, pursuant to Article 1, Section 21 and Section 6120, substantially similar, and in many regards identical, regulations of the City as a result of the enactment of Ordinance 30 in 1993. 681 A.2d at 154. As discussed *supra*, these included regulations on "assault weapon," "large capacity ammunition belt" and "device, accessory or ammunition." *See*, Exhibit A, Section 607.01(h). [17] Accordingly, as the City is acutely aware, the Supreme Court has already ruled that it lacks the power to regulate, as it has done in Ordinances 2018-1218 and 2018-1219. Furthermore, even in relation to the extreme risk protection provision of Ordinance 2018-1220, this type of regulation by the City of Philadelphia was previously ruled preempted by the Commonwealth Court, and affirmed by the Pennsylvania Supreme Court, in *Clarke v. House of Representatives*, 957 A.2d 361, 362-364 (Pa. Cmwlth. 2008)(declaring that, *inter alia*, that Bill 040312 that permits "a firearm can be confiscated from someone posing a risk of harm" is preempted) aff'd sub nom. *Clarke v. House of Representatives of the Com.*, 602 Pa. 222 (2009).

[17] As such, the City's argument that it may regulated magazines and rapid fire devices (*FOAC, et al*., Def. Brief at 26-28) is without merit, since the Supreme Court has already ruled that such are unlawful, as otherwise, as discussed *supra*, the Court would have severed the unlawful provisions and allowed the regulation of ammunition feeding devices and other devices and accessories to stand.

Much to the chagrin of the City, the legion of precedent is clear – the Pennsylvania General Assembly reserved "the exclusive prerogative to regulate firearms in this Commonwealth." *Commonwealth v. Hicks*, 56 MAP 2017, 2019 WL 2305953, at *5, fn 6 (Pa. May 31, 2019); *see also*, *Ortiz*, 545 Pa. at 287 (holding that the "regulation of firearms is a matter of concern in all of Pennsylvania, not merely in Philadelphia and Pittsburgh, and the General Assembly, not city councils, is the proper forum for the imposition of such regulation"); *Clarke*, 957 A.2d at 364 (holding that the regulation of anything involving firearms is that "which the General Assembly has assumed sole regulatory power").

Nevertheless, it attempts to argue that the Child Access and Extreme Risk Protection provisions of 2018-1220 are lawful, in defiance of the *Clarke* holding. *FOAC, et al.*, Def. Brief at 28 - 34. Even setting the *Clarke* decision aside, the Defendants cannot explain how 2018-1220 does not regulate the "possession" and "transfer" of firearms, as Plaintiff addressed in its Brief in Support of Its Petition for Contempt at 31-32. In relation to Section 1106.02, it criminalizes and regulates where a "Firearm custodian" allows a minor to gain access to (*i.e.* possession and transfer) and use of a firearm. [18] Similarly, Section 1107.01, *et seq.*, addresses the forced relinquishment (*i.e.* possession and transfer) of firearms in relation to the issuance of an extreme risk protection order.

[18] The City humorously contend that this provision does not "regulate" firearms (*FOAC, et al.*, Def. Brief at 30) but acknowledge it "imposes a fine on those who irresponsibly store firearms." Forcing an individual to choose between either being fined or complying with a provision is the regulation of that activity. Even more humorous is the fact that such is wholly supported by the City's own quoted definition to "Regulate" being "[t]o control (an activity or process) esp. through the implementation of rules." *FOAC, et al.*, Def. Brief at 30.

iv. There Exists No Viable Self-Defense Exception

Contrary to the City's claims that the Ordinances permit use of the regulated items for purposes of self-defense (Def. Brief at 3, 7-8, 24), the enacted exemptions do not provide for viable self-defense uses. First and foremost, Ordinance 2018-1220 does not provide for any self-defense exemption; thereby violating the dictate of *Heller* that self-defense is at the core of the Second Amendment. Second, the exemptions (Sections 1101.05, 1102.04, 1104.05) only address the use of a "lawfully possessed Firearm," – which regulate "possession" of firearms in direct defiance of Section 6120 – and, contrary to Defendants' assertion, do not grant exception to the use of "Armor or Metal Penetrating Ammunition," "Large Capacity Magazines," or "Rapid Fire Devices," as the exemptions only apply to a "Firearm," which is defined in Section 1101.01 and does not include those items. Third, the provisions only permit exemption where the otherwise prohibited "Firearm" is being used for "*immediate* and otherwise lawful protection of a person[] or another person[] or property or for lawful hunting purposes." Thus, an individual, who is carrying and displaying [19] a loaded "Firearm" with a "Large Capacity Magazine" in public for purposes of his/her own lawful protection of him/herself and others, would not be entitled to any of the exemptions, as "Large Capacity Magazines" are not exempt and there is no "immediate" use, as the "Firearm" is being carried and displayed as a protective and preventive measure.

[19] Display is to "make visible," "to show or exhibit" or "to reveal". *See*, *Dictionary.com*, available at https://www.dictionary.com/browse/display. *See also*, *Mariam-Webster.com* defining "display" as "to put or spread before the view." Available at https://www.merriam-webster.com/dictionary/display.

C. *The General Assembly Has Occupied the Entire Field of Firearms Regulation*

Contrary to the City's argument, as discussed at length in Plaintiff's Brief in Support of Its Petition for Contempt at 22-27, the General Assembly has occupied the entire field of firearms regulation, as recently reaffirmed by the Pennsylvania Supreme Court in *Hicks*, discussed *supra*.

While the City makes much out of the fact that the Pennsylvania Supreme Court did not list the express preemption of Article 1, Section 21 and Section 6120 in *Hoffman Min. Co. v. Zoning Hearing Bd. Of Adam Twp., Cambria Cty.*, 612 Pa. 598, 609 (2011) (Def. Brief at 22), such misses the mark, as the Court was only listing those areas of the law, where they found that "field preemption" existed. As the Supreme Court already found that Article 1, Section 21 and 18 Pa.C.S. § 6120 constitute "express preemption" in *Ortiz*, it was unnecessary to additionally list the UFA as constituting field preemption in *Hoffman Min. Co*.

Furthermore, contrary to the Defendants' statement that "[i]t has been more than twenty years since the Pennsylvania Supreme Court has addressed this state's firearms preemption laws" *(FOAC, et al.*, Def. Brief at 38), as discussed *supra*, less than two months ago, the Pennsylvania Supreme Court in *Hicks* reaffirmed that the General Assembly reserved the "the exclusive prerogative to regulate firearms in this Commonwealth."

D. *No Right To Sever*

Although the City is correct that there is a general right to severance of an

unlawful provision (*FOAC, et al.*, Def. Brief at 40), it fails to address that *all* the enacted provisions are in violation of Article 1, Section 21 and Section 6120 and therefore, there is nothing left to stand. Even if, *arguendo*, this Court were to find that some provision is not unlawful, the right to severance is not absolute and there is no right to severance, pursuant to 1 Pa.C.S. § 1925, where, after the void provisions are excised, the remainder of the act is incapable of execution. As held by the Pennsylvania Supreme Court in *Genkinger v. City of New Castle,* 368 Pa. 547, 554 (1951)

> If the part which is unconstitutional in its operation, is independent of, and readily separable from, that which is constitutional, so that the latter may stand by itself, as the reasonable and proper expression of the legislative rule, it may be sustained as such; but *if the part which is void is vital to the whole,* or other provisions are so dependent upon it, and so connected with it, that it may be presumed the legislature would not have passed one without the other, the whole statute is void.

In this matter, even if, *arguendo*, this Court found that one provision was lawful, due to all the provisions being vital to the whole and connected therewith, the Ordinances in their entirety must be struck down. [20]

E. Defendants' Signage Regulates Possession and Transport of Firearms

While Defendants contend that they are not bound by 18 Pa.C.S. § 913(d), as it only applies to counties, they fail to address the fact that Plaintiff raised this as a preemption issue (Pltf. Brief at 32-34), as the Defendants were unlawfully regulating the possession and transport of firearms and ammunition at the City-Council building by erecting the sign. Thus, Defendants cannot escape the fact that the sign regulates, *inter*

[20] *See*, *Protz v. Worker's Compensation Appeal Board (Derry Area School District),* 639 Pa. 645, 665-66 (2017)

alia, the possession and transport of firearms and ammunition, as explicitly prohibited by Article 1, Section 21, and Sections 6120 and 2962.

F. None of the Defendants Are Entitled To Immunity

Contrary to Defendants' contention (Def. Brief at 46-47), none of the Defendants are entitled to any form of immunity and even if, *arguendo*, they were, that immunity would be unconstitutional based upon Article 1, Section 11 of the Pennsylvania Constitution and the legion of precedent.

First, as Plaintiff asserted in its Answer to Defendant's New Matter ¶ 2, the City failed to raise immunity in its original Answer of March 31, 1994, as required by Pa.R.C.P. 1030, and therefore, any defense of immunity is waived. Moreover, as specified in Plaintiff's Answer to Defendant's New Matter ¶ 2, by entering into the Stipulation and Court Order, the Defendant waived any immunity defense.

Second, the City's New Matter ¶¶ 4-5, and as addressed in Plaintiff's Answer to Defendant's New Matter, it admits that the councilmembers were acting "in their individual capacities" and therefore, since they were not acting in their "official capacities," would not be entitled to any form of immunity.

Third, even if the Defendants were entitled to "legislative immunity" as the Defendants claim, as the City acknowledges, it is strictly a common law doctrine, which has never been enacted by the General Assembly, and therefore, it would be unconstitutional pursuant to Article 1, Section 11 of the Pennsylvania Constitution.

Specifically, the Pennsylvania Supreme Court previously held in *Dorsey v. Redman*, 626 Pa. 195, 209 (2014) that pursuant to Article 1, Section 11 of the

Pennsylvania Constitution that the "Constitution neither prohibits nor grants immunity to the Commonwealth, but vests authority in the General Assembly to determine the matters in which the government shall be immune."

Article 1, Section 11, of the Pennsylvania Constitution provides:

> All courts shall be open, and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. *Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct*. (emphasis added).

In analyzing the Political Subdivision Tort Claims Act ("PSTCA"), the Pennsylvania Supreme Court previously held that the Pennsylvania Constitution authorized the immunity for political subdivisions under the PSTCA through Article 1, Section 11, because it specifically declares that "[s]uits may be brought against the Commonwealth in such manner and in such cases *as the Legislature may by law direct*." *Carroll v. York Cty.*, 496 Pa. 363, 366-67, (1981)(emphasis added). The Court then further declared that "the conferring of tort immunity upon political subdivisions is within the scope of the Legislature's authority pursuant to Article I, Section 11." *Id*.

More recently, in *Dorsey*, 626 Pa. at 209, the Court reaffirmed that *only* the General Assembly is empowered by the Commonwealth's Constitution to "determine the matter in which the government shall be immune." The Court continued, "our Court has recognized that the Legislature is the *exclusive* body with authority to confer immunity upon political subdivisions" and that "[t]hus, the breadth of immunity enjoyed by local agencies is ultimately for legislative, rather than judicial, determination." *Id*. (*citing City of Phila. v. Gray,* 534 Pa. 467, 474 (Pa. 1993))(emphasis added).

Accordingly, legislative immunity is unconstitutional, pursuant to Article I, Section 11, as the General Assembly never enacted legislative immunity; rather, as acknowledged by the City, legislative immunity is a judicially created immunity. Therefore, as the legion of precedent supports, since the Legislature, pursuant to Article 1, Section 11, is the exclusive body with authority to confer immunity on entities within the Commonwealth, Plaintiffs contend that legislative immunity is unconstitutional and therefore, Defendants are not entitled to it.

G. Plaintiff has Shown Wrongful Intent

The City belives that it somehow has not shown wrongful intent because they made a "good-faith effort" to comply with State preemption. As discussed in Plaintiff's principal brief, this is far from the case.

Various quotes from City Council members and the Mayor himself point to a much different conclusion – that being the action taken by the City would result in litigation in which they hoped an activist court would rule in their favor. The City offers a statement made by City Councilwoman Erica Strassburger, in which she states "the mayor and I are aware of the state laws that are on the books, and we happen to strongly disagree with them. If there's not political will to make change, we're ready and willing to make changes through the court system." They then claim "[t]his too says nothing about lacking legal authority 'to enact any manner of regulation.'" Def. Brief at 26.

While this statement might not outwardly declare that the City lacks the legal authority to enact any manner of regulation, it is the only reasonable reading of such a statement. "[W]e're ready and willing to make changes through the court system" can

only be read to imply that they City knew it was wrong and hoped a court would be judicially active, ignore the binding precedent, and find in their favor.

However, let there not be any dispute as to what was intended by Councilwoman Strassburger. As was readily admitted by the City, Councilwoman Strassburger also declared "[t]he inability for municipal governments to enact their own common-sense gun control measures defies this core principle." Def. Answer ¶ 20. And then, there is Mayor Peduto's statement during the Press Conference on April 9, 2019 declaring:

> So what were going to do is we're going to overturn this law. And them were going to overturn this law in Florida, and then were going to overturn this law in other states, in legislative bodies at the municipal level will be talking about guns because unfortunately our state capitols and Washington have been bought by the gun manufacturing lobby who has decided that they and they alone should right the laws about guns in our society. [21]

Aware of these statements and the City's intent, the PA Supreme Court signaled to the City in *Commonwealth v. Hicks*, 56 MAP 2017, 2019 WL 2305953, at *5, fn 6 (Pa. May 31, 2019)(citing to *Ortiz v. Commonwealth*, 681 A.2d 152, 156 (Pa. 1996)) that the "General Assembly[] reserve[ed] .. the *exclusive prerogative* to regulate firearms in this Commonwealth, codified at 18 Pa.C.S. § 6120." (emphasis added).

H. Public Policy Compels a Finding of Contempt

Contrary to the City's assertion, public policy compels a finding of contempt, for without finding such it would empower other municipalities to enter into agreements to terminate lawsuits against them, only to later change their position and engage in the behavior that brought the litigation in the first place. Defendant claims that "[h]olding the

[21] *See* the City of Pittsburgh's Official YouTube Channel, *Firearms & Gun Violence Legislation Signing*, April 9, 2019, https://www.youtube.com/watch?v=bBOu5k7sBV0, Peduto's quoted statement starting at 8:16.

City in contempt in this instance would chill the ability of local elected officials to pursue reform of the law…" Def. Brief at 27.

Defendant apparently ignores the remedy that is painfully obvious for it to "pursue reform of the law". It is the same remedy – the ability to petition the General Assembly to alter the law – that is available to everyone in the Commonwealth who does not like the state of the law. Simply ignoring the plain language of the law to "facilitate change" through litigation is not only improper but unlawful and cannot be countenanced by this Court. Moreover, the City ignores the "chilling effect" of subjecting people to compliance or prosecution pursuant to an unlawful ordinance – a direct consequence of its action.

The City claims that "[i]f Plaintiff's position is affirmed, it would mean that elected officials in 1995 could forever bind the City of Pittsburgh, and therefore its population, to a particular interpretation of the law," and cites to *Horne v. Flores*, 557 U.S. 433, 449 (2009) for the proposition that "[i]njunctions of this sort bind state and local officials to the policy preferences of their predecessors and may thereby improperly deprive future officials of their designated legislative and executive powers." Def. Brief at 27. [22] But that argument misses the mark, as the Pennsylvania Supreme Court has repeatedly found that it is the General Assembly – not the City – which has the authority

[22] It should also be noted that the case to which Defendant cites involves a Rule 60(b)(5) motion under the Federal Rules of Civil Procedure, which permits a party to obtain relief from a judgment or order if, among other things, "applying [the judgment or order] prospectively is no longer equitable." i.e. "a significant change either in factual conditions or in law" renders continued enforcement "detrimental to the public interest." *Horne v. Flores*, 557 U.S. 433, 447, 129 S. Ct. 2579, 2593, 174 L. Ed. 2d 406 (2009). (internal citations omitted). In the instant matter, there is an agreement between the two parties. Should the City seek to alter the agreement, it would need to renegotiate the terms, not demand the Court do its bidding.

to regulated matters pertaining to firearms. Further, the Agreement does not bind future officials to the "policy preferences" of their predecessors at all, as it solely requires compliance with Pennsylvania law.

It appears, based on the Defendant's argument, that it believes that it, and its City Council, are of a special class that are not required to comply with the laws of Pennsylvania. This is a position that no court can countenance.

II. ORAL ARGUMENT

In the event this Court desires oral argument on these issues, the undersigned respectfully informs the Court that he is currently scheduled for a jury trial August 6-9th, an all day hearing on August 22nd, and to be away on a pre-planned vacation from September 6-16th.

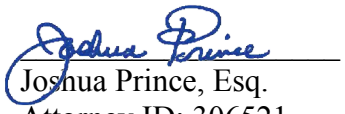
III. CONCLUSION

For the foregoing reasons, Allegheny County Sportsmen's League respectfully request this Honorable Court to find the City of Pittsburgh in contempt of court and issue an order (1) requiring the City of Pittsburgh to immediately comply with the Settlement Agreement and this Court's Order of February 27, 1995, (2) declaring that the City if Pittsburg lacks the authority to regulate, in any manner, firearms and ammunition, (3) enjoin the City of Pittsburgh from regulating, in any manner, firearms and ammunition, (4) awarding sanctions and attorney fees, after permitting counsel 21 day to submit a fee request, and (5) holding Mayor Peduto and those City Councilmember that voted in favor

of the Proposals jointly and severally liable for all sanctions, fines, fees and costs assessed against the City of Pittsburgh.

Respectfully Submitted,

Date: July 29, 2019



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing and the exhibits related thereto are being provided via email and US Mail on July 29, 2019 to:

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Dated: July 29, 2019