

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

MATTHEW WILSON, et al.,)
)
 Plaintiffs,)
)
 v.) 07 CH 4848
)
 COOK COUNTY, et al.,)
)
 Defendants.)

MEMORANDUM AND ORDER

Defendants have filed a Motion to Dismiss Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief which has been fully briefed and argued. Plaintiffs' Complaint challenges the constitutionality of the Cook County ordinance relating to assault weapons and large capacity magazines.

The Ordinance

In 1993, the Cook County Board of Commissioners ("the Board") enacted the "Cook County Firearms Dealer's License and Assault Weapons and Ammunition Ban Ordinance." (Motion, Ex. A-1). In the Preamble, the Board found that in 1993, almost one-quarter of the trauma cases at Cook County Hospital were injuries suffered from gun shot wounds, there was no legitimate sporting purpose for military style assault weapons, and that assault weapons were twenty times more likely to be used during a crime than any other weapon. (*Id.*) This ordinance was amended in 1998. At that time, the Board noted that firearms were the cause of approximately three-quarters of all homicides in the county and that 71% of defendants charged in unlawful weapons cases had some form of gang affiliation. (Motion, Ex. B).

On November 14, 2006, the Board enacted Ordinance No. 06-O-50 ("the Ordinance") which amended the Cook County Deadly Weapons Control Ordinance. On June 19, 2007, the Board enacted Ordinance No. 07-O-36 which changed the title of Ordinance No. 06-O-50 to the Blair Holt Assault Weapons Ban. This is the legislation at issue. (Motion, Ex. C). The Ordinance prohibits the manufacture, sale, offer or display for sale, transfer acquisition or possession of assault weapons and large capacity magazines. A person found in violation of the Ordinance is subject to a jail sentence up to six months and fines between \$500.00 and \$1,000.00. (*Id.*). The Ordinance allowed persons who lawfully possessed assault weapons 90 days from the effective date to surrender the weapons to the Sheriff, remove the weapons from the county or to modify the weapons so that they were no longer assault weapons. (*Id.*).

The Parties

Plaintiffs, Matthew Wilson, Troy Edlund, and Joseph Messineo, have filed suit against the County of Cook and, in their official capacities, Todd Stroger, President of the Board, the members of the Board, and Thomas Dart, Sheriff of Cook County. Plaintiffs allege that they are "law abiding citizens" and residents of Cook County who own "firearms," "firearms magazines," and "gun parts" which were legally purchased. (1st Am. Compl. ¶¶1, 6, 8). Plaintiffs allege that the 90-day time limit for conforming with the Ordinance has passed. (1st Am. Compl. ¶19). Plaintiffs further allege that they are "[m]en of ordinary intelligence . . . unsure upon reading the aforementioned ordinance as amended, and must guess whether [their] firearms are 'assault weapons' within the vague language of the amended ordinance's definitions." (1st Am. Compl. ¶¶2, 7 and 12). Plaintiffs also allege that they wish to purchase additional firearms, parts and accessories, including parts and accessories for firearms they now own, and cannot because they must guess as to whether they will be banned by the Ordinance. (1st Am. Compl. ¶¶4, 9 and 15).

Procedural History

Defendants previously filed a motion to dismiss Plaintiff's original complaint pursuant to §2-619.1 before Judge Philip L. Bronstein. On August 17, 2007, Judge Bronstein granted Defendants' motion and dismissed Counts I and II (Due Process) and III (Equal Protection) pursuant to §2-615 with leave to amend within 28 days. Count IV (Open Meetings Act) was dismissed with prejudice pursuant to §2-619.

Plaintiffs subsequently filed their First Amended Complaint which alleges: (1) the Ordinance's definition of "assault weapon" is unconstitutionally vague; (2) the Ordinance violates due process by imposing strict liability; (3) the Ordinance violates due process because it is overbroad in its application; (4) the Ordinance violates Plaintiffs' individual right to keep and bear arms; and (5) the ordinance is an unconstitutional exercise of the County's police powers. Plaintiffs attached pictures of firearms which they own to their First Amended Complaint. (1st Am. Compl. ¶¶1, 6, 11; Group Exs. B, B(a), C, D, E(a) and (b) and Ex. F).

Defendants filed a motion to dismiss the First Amended Complaint stating it was being brought pursuant to §2-619.1. Plaintiffs moved to strike and dismiss the motion to dismiss on the grounds that the motion was not properly brought pursuant to §2-619.1. On December 6, 2007, Judge Bronstein denied Plaintiffs' motion to strike and dismiss based upon defense counsel's representation that the motion to dismiss was mislabeled and was actually being brought as a §2-615 motion to dismiss. Defendants' motion to dismiss the First Amended Complaint will be considered pursuant to §2-615.

"A section 2-615 motion admits as true all well-pleaded facts and reasonable inferences that can be drawn from those facts, but not conclusions of law or conclusions of fact unsupported by allegations of specific facts." Talbert v. Home Savings of

America, 265 Ill. App. 3d 376, 379-80 (1st Dist. 1994). "Exhibits attached to the pleadings are considered part of the pleadings for all purposes where the pleading is founded on such exhibits." Evers v. Edwards Hosp. Ass'n, 247 Ill. App. 3d 717 (2d Dist. 1993).

Questions Presented

1. Whether the Ordinance is unconstitutionally vague. (Count I).
2. Whether the Ordinance violates due process because it does not contain a scienter requirement. (Count II).
3. Whether the Ordinance violates due process as overbroad. (Count III).
4. Whether the Ordinance violates Article I, Section 22 of the Illinois Constitution and the Second Amendment to the United States Constitution. (Count IV).
5. Whether the Ordinance violates due process as an unlawful exercise of the County's police power. (Count V).
6. Whether the Ordinance violates equal protection. (Count VI).

Count I

In Count I, Plaintiffs allege that the Ordinance is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution because of the "vague" definitions given "assault weapons" and assault weapons components. Plaintiffs then set forth specific objections to various words and phrases in the Ordinance. (Count I, ¶¶21-22, 29, 33, 37-40, 50, 53-55 and 59). Plaintiffs do not allege that they have been prosecuted under the Ordinance, but rather challenge the facial validity of the Ordinance.

Laws are presumed to be constitutional. People v. Einoder, 209 Ill. 2d 443, 450 (2004). "If reasonably possible, a court must construe a [law] so as to affirm its constitutionality." Id. "The constitutional principle of due process of law requires that a statute 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" Russell v. Department of Natural Resources, 183 Ill. 2d 434, 442 (1998) quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). "In addition, a statute must provide explicit standards for those police officers, judges, and juries who apply them, in order to prevent arbitrary and discriminatory enforcement." Id. "A statute violates due process 'on the basis of vagueness only if its terms are so ill-defined that the ultimate decision as to its meaning rests on the opinions and whims of the trier of fact rather than any objective criteria or facts.'" People v. Einoder, 209 Ill. 2d 443, 451 (2004) quoting People ex rel. Sherman v. Cyrns, 203 Ill. 2d 264, 291 (2003).

Where a party challenges a law as being facially void, the law is "normally not unconstitutional on its face unless it provides no standard of conduct at all, i.e., the ambiguity is so pervasive that it is incapable of any valid application." City of Chicago v. Pooh Bah Enterprises, 224 Ill. 2d 390, 442 (2006). The only exception is where the statute applies to fundamental protected rights such as First Amendment rights. Id.; Coalition of New Jersey Sportsmen v. Whitman, 44 F. Supp. 2d 666 (D.C. N.J. 1999), aff'd, 253 F.3d 157 (3d Cir. 2001). The right to bear arms is not a fundamental right. Kalodimos v. Village of Morton Grove, 103 Ill. 2d 483, 509 (1984). "A mere hypothetical involving a disputed meaning of some terms of a statute does not make the statute unconstitutionally vague." Einoder, 209 Ill. 2d at 451. "The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." Id.

The Ordinance at issue classifies and defines assault weapons in two ways. The Ordinance sets forth a list of specific makes and models of firearms which are automatically categorized as assault weapons under the Ordinance. (Ordinance, Sec. 54-211(7)). The Ordinance also provides specific detailed definitions of what constitutes an assault weapon. (Ordinance, Sec. 54-211(1)-(6)). The definition of assault weapons is broken down according to types of weapons, rifles, pistols, and shot guns. The Ordinance further defines certain terms contained in the definitions of assault weapons, e.g. detachable magazine, muzzle brake, and muzzle compensator. (Ordinance, Sec. 54-211(7)). The Ordinance contains objective criteria for enforcement, provides specific standards and is not so ambiguous on its face "that it is incapable of any valid application." Pooh Bah, 224 Ill. 2d at 442.

Count I alleges many hypothetical situations which Plaintiffs claim render the statute unconstitutionally vague. However, a law is not unconstitutionally vague simply because Plaintiffs can think of hypothetical situations "involving a disputed meaning" of any of the Ordinance's terms. Einoder, 209 Ill. 2d at 451; see also Richmond Boro Gun Club, Inc. v. City of New York, 97 F.3d 681, 685 (2nd Cir. 1996)(Rejecting plaintiffs' argument that terms such as "bayonet mount," "barrel shroud," "flash suppressors" or "grenade launcher" were unconstitutionally vague, finding that for purposes of deciding facial vagueness the question is whether all applications are impermissibly vague, not whether "the plaintiffs can posit some application not clearly defined by the legislation."); accord National Rifle Ass'n of America v. Magaw, 132 F.3d 272, 293 (6th Cir. 1997)(holding that the terms "flash suppressor" and "protrudes conspicuously" were not unconstitutionally vague because not all applications of the terms were unconstitutionally vague); Coalition of New Jersey, 44 F. Supp. 2d at 676 (holding that "so long as the disputed law encompasses some of the 'core' conduct in which plaintiffs wish to engage, a court will not entertain a facial vagueness challenge to other hypothetical conduct"). The terms of the Ordinance are not so ill-defined as to be unconstitutionally vague. Einoder, 209 Ill. 2d at 461.

In response, Plaintiffs cite to City of Chicago v. Morales, 527 U.S. 41 (1999), suggesting that Morales sets forth a different standard for determining whether a law is

unconstitutionally vague than the cases cited by Defendants. The standard set forth in Morales, however, does not differ from the standard set forth in the Illinois cases cited by Defendants. The ordinance at issue in Morales, targeting "gang loitering," allowed police officers to approach two or more persons on the street if they reasonably believed at least one was a "criminal street gang member." The persons had to be loitering which was defined as remaining in one place "with no apparent purpose." The officer was required to then order all persons to leave and any person, whether a gang member or not, who disobeyed was to be charged with violation of the ordinance. The ordinance in Morales was found to be unconstitutionally vague because: (1) it failed to set forth any standards by which an ordinary citizen would be able to determine if he or she was violating the ordinance; and (2) it failed to set forth even minimal guidelines for law enforcement, particularly as to the "no apparent purpose" to be present provision and as to the unfettered discretion to order persons to disperse. Id. at 58-61. The Ordinance at issue in the instant case does not suffer from these defects.

In their briefs, the parties specifically address Section 54-211(7) which lists specific weapons which are prohibited under the Ordinance as well as "copies or duplicates thereof." Plaintiffs argue that "copies or duplicates" are vague terms rendering the Ordinance void. Defendants argue that these terms have plain and ordinary meanings.

When interpreting a statute, Illinois courts "give language its plain and ordinary meaning, and, where the language is clear and unambiguous, [a court] must apply the statute without resort to further aids of statutory construction." Town & Country Utilities, Inc. v. Ill. Pollution Control Bd., 225 Ill. 2d 103, 117 (2007). The same principle applies to the interpretation of ordinances. In re Application of County Collector, 132 Ill. 2d 64, 72 (1989).

The terms "copies" and "duplicates" are not vague but have plain and ordinary meanings used in everyday life. As noted by Defendants, the *American Heritage Dictionary* defines "copy" as "an imitation or reproduction of an original; a duplicate" and defines "duplicate" as "identically copied from an original." These dictionary definitions are reinforced by Hayes v. Wagner, 220 Ill. 256 (1906), which defines a duplicate document as one "which is the same, in all respects, as another instrument from which it is indistinguishable in operation." Plaintiffs are incorrect that Defendants' arguments showing that duplicate and copy are not vague terms contradict well pled facts in Paragraphs 50 through 52 of the First Amended Complaint. Those paragraphs are legal conclusions. A person of ordinary intelligence would understand that Section 54-211(7) includes the specific models listed and any imitations or reproductions of the specific models. The terms "copies" and "duplicates" have plain meanings and may be read together with the list of prohibited weapons without confusion. See Coalition of New Jersey, 44 F. Supp. 2d at 679 (rejecting vagueness challenge to the use of term "substantially identical" when referring to a list of prohibited weapons).

Plaintiffs appear to be arguing for the application of a subjective standard in determining a vagueness challenge, but the question before the court is not whether

Plaintiffs understand the Ordinance. The question is whether the Ordinance gives a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Russell, 183 Ill. 2d at 442. Plaintiffs' allegations that they are persons of ordinary intelligence and cannot understand the Ordinance, (1st Am. Compl. ¶¶2, 7, and 12), are insufficient to state a due process claim on the basis of vagueness. Whether Plaintiffs themselves comprehend the Ordinance is not at issue. People v. Conlan, 189 Ill. 2d 286, 293 (2000)(Statute not unconstitutionally vague because a person earnestly attempting to understand the statute could fully comprehend its terms).

The Ordinance is not unconstitutionally vague and Count I does not state a cause of action for violation of due process.

Count II

In Count II, Plaintiffs allege that the Ordinance violates due process because it does not contain a scienter requirement. This argument appears to have two prongs. Plaintiffs argue that the lack of scienter buttresses their assertions that the Ordinance is vague and is a separate basis for declaring the Ordinance unconstitutional on its face. Plaintiffs' allegations fail.

Generally, silence in a statute as to a scienter requirement is not controlling as to whether knowledge is a provable element of the offense. Staples v. U.S., 511 U.S. 600, 619 (1993). The scienter requirement may differ for different elements of the offense. Liparota v. U.S., 471 U.S. 419, 423, fn. 5 (1985). The determination of what, if any, scienter may be required is a question of law to be determined by the court. Staples, 511 U.S. at 604-05. The decision as to the required mental state is generally made in the context of an actual prosecution as to proper instructions and burden of proof. See, e.g., Id. (Reversing conviction of plaintiff on basis that the prosecution was required to prove that petitioner knew the features of his firearm fell within the prohibitions of the statute at issue despite lack of specific scienter requirement in statute.); Liparota, 471 U.S. at 433-434 (Reversing conviction based on finding that the government was required to prove that the defendant knew his acquisition or possession of food stamps was unauthorized under the statute at issue); U.S. v. Freed, 401 U.S. 601, 607-08 (1971)(Finding that prosecution was not required to allege scienter in charging defendants for possession of hand grenades as the statute at issue was a regulatory measure in the interest of public safety); but see Peoples Rights Organization, Inc. v. City of Columbus, 152 F.3d 522 (6th Cir. 1998)(where court considered various facial challenges to an assault weapon ordinance including an allegation that a lack of scienter rendered the ordinance unconstitutional). Defendants, however, appear to agree, for purposes of this motion, that the Ordinance does not provide for *mens rea*. Defendants state that the Ordinance is a regulatory measure which addresses issue of public safety.

Although historically at common law criminal responsibility required *mens rea*, exceptions have been made, "especially in the expanding regulatory area involving activities affecting public health, safety, and welfare." Freed, 401 U.S. at 607. The

Illinois Supreme Court has held that a legislature may create strict liability offenses. People v. Brown, 98 Ill. 2d 374, 376 (1983). Statutory provisions which seek to promote public safety may be valid without scienter. Id. at 379 citing Freed. A public welfare offense generally has two characteristics. First, the legislature has acted to prohibit conduct that a reasonable person would know is subject to stringent regulation and may seriously threaten the community's health and safety. Liparota, 471 U.S. at 433. Second, the legislation "provide[s] for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary." Staples, 511 U.S. at 616. The Ordinance here meets both factors.

Defendants in arguing that no scienter requirement or *mens rea* is required where as here the statutory provision at issue deals with public safety cite to Freed, supra. Plaintiffs rely on Staples, supra, in support of their argument that the lack of a scienter requirement renders the Ordinance void on its face. Neither case involves a facial challenge to a statute.

In Freed, the defendant was charged with the possession of hand grenades without registration. The statute at issue did not contain a requirement of a specific intent or knowledge that the grenades were unregistered. The Freed court held that scienter was not required where the prosecution involved "a regulatory measure in the interest of public safety" and a deadly weapon. Freed, 401 U.S. at 609. The Freed court said:

This is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons, no less dangerous than the narcotics involved in United States v. Balint, 258 U.S. 250,254, where a defendant was convicted of sale of narcotics against his claim that he did not know the drugs were covered by a federal act.

Id.

The Ordinance here similarly falls into the category of a regulatory provision seeking to secure the safety of the public. The purpose of the Ordinance is to prevent violent crimes associated with assault weapons and to prevent injury and death. As the court in Brown, 98 Ill. 2d at 381, quoting People v. Johnson, 288 Ill. 442, 445-46 (1919), declared:

One may violate the law without any intent on his part to do so. Various statutes of this State punishing the doing of acts without requiring allegation or proof of criminal intent upon the part of the doer have been upheld on the ground that they were a valid exercise of police power. * * * Laws [cannot] be held invalid merely because some innocent person may possibly suffer. The principle of police regulation is, 'the greatest good to the greatest number.'

An individual "who attempts in earnest to understand the [Ordinance] . . . can fully comprehend its terms and, more importantly, understand what is prohibited." People v.

Conlan, 189 Ill. 2d 286, 293 (2000). The Ordinance addresses and is reasonably related to the dangers posed by the possession of assault weapons to society. See People v. Marin, 342 Ill. App. 3d 716, 724 (1st Dist. 2003)(where the court found that criminal statute of aggravated use of a weapon was valid even though it did not contain a culpable mental state "because access to a weapon can lead to criminal behavior despite lack of criminal intent").

The Ordinance is not a "trap for the unwary" as individuals should be alerted to the fact that assault weapons may be subject to regulation. Assault weapons have been the subject of restrictive legislation by the federal government, state governments and local governments. See, e.g., Silveira v. Lockyear, 312 F.3d 1052 (9th Cir. 2002)(upholding California assault weapon ban except for exemption for retired peace officers); Olympic Arms v. Buckles, 301 F.3d 384 (6th Cir. 2002)(upholding federal assault weapon ban); Richmond Boro Gun Club v. City of New York, 97 F.3d 681 (2d Cir. 1996)(upholding New York City assault weapon ban); Coalition of New Jersey Sportsmen, Inc. v. Whitman, 44 F. Supp. 2d 666 (N.J. 1999)(upholding New Jersey assault weapon ban); City of Cincinnati v. Baskin, 859 N.E.2d 514 (Ohio 2005)(upholding Cincinnati Ordinance prohibiting semiautomatic rifle with capacity of more than 10 rounds); Arnold v. City of Cleveland, 616 N.E.2d 163 (Ohio 1993)(upholding Cleveland ban on assault weapons). Cook County's regulation of assault weapons is consistent with a widespread concern as to the danger assault weapons pose to society.

Defendants look to Staples for support. In Staples, the plaintiff was indicted for unlawful possession of a machine gun in violation of a federal statute requiring registration of such weapons. Staples, 501 U.S. at 603. Machine gun was defined as "any weapon which shoots, . . . or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." Id. at 601. The federal statute at issue in Staples was silent as to a *mens rea* requirement. Id. at 605. In searching Staples' home, police officers found a rifle which had been modified to be fully automatic. Id. at 603. Staples testified that he was unaware that the semi-automatic rifle he owned had been illegally modified into a fully automatic weapon and he had only fired the rifle as a semi-automatic weapon. Id. at 603-04.

Plaintiffs' position in Count II is that the Ordinance is void on its face because it is silent as to a scienter or *mens rea* requirement. Staples does not stand for this proposition. In Staples, the plaintiff appealed his conviction in which the prosecution was not required by the district court to establish *mens rea*. The United States Supreme Court reversed the decision affirming the conviction and remanded the case for further proceedings. The reversal was based on the Supreme Court's conclusion that the statute should have been interpreted as requiring the prosecution to prove that Staples knew that the gun he possessed had the characteristics that brought it within the definition of a machine gun, Staples, 511 U.S. at 602, although it contained no such requirement. Specifically, the Court held that the prosecution was required to prove that Staples knew his weapon could fire automatically. The Staples court did not hold that it was necessary to prove that the possession of the gun itself was unlawful. See, Rogers v. U.S., 522 U.S.

252, 255 (1988)(which interprets the holding in Staples). The Staples court did not hold or suggest that a law which does not contain an explicit *mens rea* requirement is void on its face as a violation of due process. The Ordinance, as shown, is not unconstitutionally vague. It clearly sets out and gives proper notice of its prohibited conduct. The lack of *mens rea* does not make the Ordinance vague.

The Staples court looked to guns as a whole and rejected the government's position that the public safety exception relied on in Freed could relieve the prosecution of proving *mens rea*. Id. at 610. The Supreme Court stated that although guns are "dangerous in some general sense," that is not enough to alert an individual to probable regulation to relieve that individual of *mens rea* in that prosecution. The court noted that there is a "tradition of widespread lawful gun ownership." Id. at 610. However, the Supreme Court specifically stated that certain types of guns, such as machine guns, sawed-off shot guns and artillery pieces, would be analogous to the grenade in Freed and have the "same quasi-suspect character." Id. at 611-12. Again, Staples did not hold a statutory provision void on its face but required *mens rea* for a conviction under the facts and circumstances in that case.

In this case, assault weapons are a specific category of guns which are closer in nature to the hand grenades in Freed and the narcotics in U.S. v. Balint, 258 U.S. 250, 254 (1922), than to guns in general given the well-publicized concerns regarding the danger to the public from assault weapons and a history of regulation in this county and elsewhere. The nature of assault weapons and large capacity magazines and a history of regulation puts individuals on notice of the likelihood of regulation.

Additionally, the Staples court distinguished Freed because of the severity of the criminal penalty attached. Staples, 501 U.S. at 616. The statute in Staples called for up to ten years imprisonment for violation of the statute. Id. In the instant case, the Ordinance does not amount to a felony but contains a criminal penalty of only a \$500-\$1,000 fine and/or up to six months in jail, not the state penitentiary. Staples is again distinguishable given the nature of the objects being regulated and the much lighter criminal penalty at issue. The public safety and welfare exception would apply.

Count II does not state a cause of action for violation of due process.

Count III

Count III alleges that the Ordinance is overbroad in its applications and violates due process. Plaintiffs specifically allege that the Ordinance is overbroad because of its "vague definitions," (Count III, ¶23), and because the Ordinance is not limited to the use of assault weapons by criminals but applies also to those who possess assault weapons for hunting or self-defense. (Count III, ¶21).

Initially, "vagueness and overbreadth are two different legal principles. People v. Marin, 342 Ill. App. 3d 716, 721 (1st Dist. 2003). Plaintiffs' allegation that the statute is overbroad because it is vague does not support a claim of overbreadth. Rather, this

allegation is another repetition of their vagueness claim raised in Count I. As such, the only issue raised by Count III is whether the statute is overbroad because its application is not limited to criminals.

Where no fundamental right is involved, the rational basis test applies. Marin, 342 Ill. App. 3d at 722. As stated earlier, the right to bear arms is not a fundamental right. Kalodimos v. Village of Morton Grove, 103 Ill. 2d 483, 509 (1984). Applying the rational basis test, a law is overbroad where it does not bear a reasonable relationship to the public interest being served and the means adopted are not a reasonable method of accomplishing the public interest. Marin, 342 Ill. App. 3d at 721, citing People v. Wright, 194 Ill. 2d 1 (2000).

In enacting Cook County's original assault weapons ban, the Board set forth the rationale behind banning assault weapons. (Motion, Ex. A-1, Ordinance No. 93-0-37). Specifically, with regard to assault weapons, the Board stated that: (1) 1,000 of the 4,500 trauma cases at Cook County Hospital involved gun shot wounds; (2) assault weapons are twenty times more likely to be used in the commission of a crime than other weapons; and (3) there is no legitimate sporting purpose for assault weapons. (Motion, Ex. A-1, Ordinance No. 93-0-37). Given the public interest which led to the assault weapons ban, a complete ban on assault weapons bears a rational relationship to the public interest being served and is a reasonable method of accomplishing the public interest. The Ordinance is not overbroad.

The court in Arnold v. City of Cleveland, 616 N.E. 2d 163 (Ohio 1993), rejected an overbreadth challenge to an ordinance of the City of Cleveland banning assault weapons. The court's holding, although not controlling, is instructive:

... The ordinance, while admittedly broad in its scope, is a reasonable exercise of the municipality's police power. The ultimate objective of the legislation appears to be public safety. To reach this end, the municipality is attempting to limit the accessibility of certain generally recognized dangerous firearms.

Id. at 173. The Cleveland prohibition against assault weapons was upheld as a proper limitation on a certain class of weapons which would maintain the safety and security of the public while allowing the "availability of certain firearms for purposes of hunting, recreational use and protection." Id. The same may be said as to the Ordinance here.

Plaintiffs argue that City of Chicago v. Morales, 527 U.S. 41 (1999), and U.S. v. Emerson, 270 F.3d 203 (5th Cir. 2001), require that this court apply strict scrutiny to the Ordinance. Morales and Emerson did not involve regulation of firearms. See, e.g. Lewis v. U.S., 445 U.S. 55 (1980)(applying rational basis standard in reviewing firearms restrictions); Bach v. Pataki, 408 F.3d 75 (2d Cir. 2004)(holding that courts review firearm restrictions using a rational basis standard). Plaintiffs also argue that the United States Supreme Court may decide in Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir.), cert. granted sub nom., District of Columbia v. Heller, 128 S. Ct. 645 (2007), that strict scrutiny applies. As discussed below, the Second Amendment applies only to

infringement by the federal government, not state governments or their subsidiaries. Therefore, even if the Supreme Court decides that there is a fundamental individual right to bear arms under the Second Amendment and applies a strict scrutiny test to the District of Columbia regulation at issue in Parker, that ruling will not apply to state and local laws.

Count IV

In Count IV, Plaintiffs allege that the Ordinance violates Plaintiffs' individual rights to keep and bear arms under Article I, Section 22 of the Illinois Constitution and the Second Amendment to the U.S. Constitution. Defendants argue that Count IV should be dismissed because the Second Amendment to the U.S. Constitution does not apply to state or local governments and the Illinois Constitution does not prohibit regulation of firearms including reasonable prohibitions.

Second Amendment:

In Quilici v. Village of Morton Grove, 695 F.2d 261, 269-70 (7th Cir. 1982), the Seventh Circuit held that under Presser v. Illinois, 116 U.S. 252 (1886), the Second Amendment limits only the actions of Congress and the National government. The Second Amendment has never been incorporated into the Fourteenth Amendment and there is no incorporation by implication. Id. Therefore, the County's enactment of the Ordinance banning assault weapons and large capacity magazines does not violate the Second Amendment. Plaintiffs do not allege that any defendant in this action is a member of a federal agency or employed by the federal government in any capacity. Skar v. Byrne, 727 F.2d 633, 637 (7th Cir. 1984)(Second Amendment does not apply to states or their subdivisions); Manos v. Cairg, 162 F. Supp. 2d 979, 989 (N.D. Ill. 2001)(Plaintiff failed to state a claim for violation of the Second Amendment as defendants were not part of the federal government or employed by the federal government).

Plaintiffs argue that they may have a Second Amendment claim citing to Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir.), cert. granted sub nom., District of Columbia v. Heller, 128 S. Ct. 645 (2007), which is currently on appeal before the U.S. Supreme Court. Parker, however, involves an ordinance enacted by the District of Columbia which is a Federal District ultimately controlled by Congress. Id. at 401, n. 13. The Second Amendment applies to the District of Columbia because the District is "directly constrained by the Bill of Rights." Id. The Parker court specifically noted that the Second Amendment had not been incorporated through the Fourteenth Amendment and that the issue of incorporation was not relevant to the court's decision. Id. Even if the U.S. Supreme Court decides that there is an individual right to bear arms under the Second Amendment, the Second Amendment constrains only infringement by the federal government.

Article 1, Section 22:

In Kalodimos v. Village of Morton Grove, 103 Ill. 2d 483 (1984), the Illinois Supreme Court considered the issue of whether Morton Grove's complete ban on handguns violated Article 1, Section 22 of the Illinois Constitution which provides: "Subject to only the police power, the right of the individual to keep and bear arms shall not be infringed." Following an extensive analysis of the language of the Section 22 and the legislative history, the Kalodimos court found that a reasonable prohibition of handguns is constitutional under Article 1, Section 22. Id. at 498. The right to possess firearms is not a fundamental right and "the right to arms secured by the Illinois Constitution . . . is subject to substantial infringement in the exercise of police power even though it operates on the individual level." Id. at 509.

Under Kalodimos, a flat ban on handguns, an entire category of firearms, by a home rule municipality is constitutional under Article 1, Section 22. Therefore, it logically follows that a flat ban of assault weapons and large capacity magazines by the County is also constitutional. As the Kalodimos court made clear, the right to bear arms under the Illinois Constitution is subject to substantial infringement and is not unfettered. Plaintiffs disagree with the holding of Kalodimos and would like this court to disregard it. This court, however, is bound by Illinois Supreme Court precedent. The Ordinance does not violate Article 1, Section 22 of the Illinois Constitution.

Count V

In Count V, Plaintiffs allege that Paragraph 7(a) of the Ordinance is an unconstitutional exercise of the County's police powers in violation of due process. Count V repeats Plaintiffs' vagueness arguments from Count I. As discussed in connection with Count I, the Ordinance is not unconstitutionally vague and provides specific guidance for law enforcement. An ordinance which bans a category of guns is a proper exercise of the police power. Kalodimos, 103 Ill. 2d at 508-09. The Ordinance is not an unconstitutional exercise of the County's police powers. See generally Coalition of New Jersey, 44 F. Supp. 2d 666 (D.C.N.J. 1999)(where court held regulation of assault weapons is a legitimate state interest). The County Board has exercised its police powers in a way that regulates a certain category of dangerous and destructive weapons, assault weapons, while balancing the Plaintiffs' and others use of guns for purposes of hunting and protection.

Count VI

In Count VI, Plaintiffs allege that Section 54-211(7) of the Ordinance violates the Equal Protection Clause because it bans specifically listed firearms, but does not ban other firearms identical in function. These allegations ignore the fact that the Ordinance's list of specific firearms in Section 54-211(7) is non-exhaustive. The Ordinance also bans firearms with certain enumerated features under Sections 54-211(1) through (6). Plaintiffs argue that Sections 54-211(1) through (6) of the Ordinance are

flawed under the holding in Peoples Rights Organization v. City of Columbus, 152 F.3d 522 (6th Cir. 1998). In that case, the provisions of the City of Columbus's assault weapons ban were found to be vague. The Ordinance here and the Columbus Ordinance, however, are different. Furthermore, in that case, the court used a heightened standard of review. However, a heightened standard of review has been found to be inapplicable "when the statute neither reaches significant constitutionally protected conduct, nor provides unfettered discretion to law enforcement." Coalition of New Jersey Sportsmen v. Whitman, 44 F. Supp. 2d 666, 681 (D.C.N.J. 1999). Plaintiffs' argument has no merit.

Unless a fundamental right is involved or a classification is based on an inherently suspect characteristic, the Equal Protection Clause requires only that a classification rationally further a legitimate governmental interest. Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)(citations omitted); Gun Owners' Action League v. Swift, 284 F.3d 198 (1st Cir. 2002). Regulating assault weapons is a legitimate governmental interest, Kalodimos v. Village of Morton Grove, 103 Ill. 2d 483, 503-04, 509 (1984), and banning possession of such weapons is a rational method of furthering that legitimate interest. Under rational basis review, courts do not "pass judgment on the effectiveness of the classifications." Gun Owners', 284 F.3d at 214.

Plaintiffs claim that the Ordinance fails to ban virtually identical firearms, but an equal protection claim cannot be based on disparate classifications of weapons. A claim of equal protection "based on disparate classifications of similar weapons . . . is not cognizable. The equal protection clause applies to persons, not products." Coalition of New Jersey, 44 F. Supp. at 686. Moreover, even if such a claim could be stated, Plaintiffs do not allege any facts showing that there are two firearms with the same characteristics which are not both prohibited under the Ordinance as a whole. Nor do Plaintiffs claim that any such firearm exists. There is no basis for Plaintiffs' argument. Count VI does not allege a violation of the Equal Protection Clause.

Conclusion

Plaintiffs' First Amended Complaint challenges the Board's decision to regulate a particular category of weapons, assault weapons and large capacity magazines, which it has determined poses a particular danger to the safety and welfare of the public. The Plaintiffs have challenged the Ordinance based on their assertions that they are law abiding citizens who possess weapons lawfully and for lawful purposes and have longstanding rights to possess weapons. However, the Ordinance is rationally related to its asserted purpose, with clearly delineated terms, not overbroad in its prohibitions, fair in its classifications, and a correct exercise of the County's police power. The Ordinance addresses the grave and recognized dangers of assault weapons while allowing the possession of weapons for legal recreational and protective purposes.

IT IS HEREBY ORDERED that Defendants' motion to dismiss the First Amended Complaint is granted with prejudice.

ENTERED
JUDGE MARY K. ROCHFORD-1570
APR 29 2008
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Mary K. Rochford

Judge Mary K. Rochford

Circuit Court of Cook County
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