

IN THE
**COMMONWEALTH COURT
OF PENNSYLVANIA**

1693 CD 2015

FIREARM OWNERS AGAINST CRIME, *et al.*
Appellants

v.

LOWER MERION TOWNSHIP,
Appellee

Appellants' Brief

**APPEAL FROM THE ORDER OF AUGUST 27, 2015 OF COURT OF COMMON
PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA, CIVIL DIVISION,
DOCKET NO. 2015-06187.**

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I. STATEMENT OF JURISDICTION

Jurisdiction in this matter is conferred upon the Commonwealth Court of Pennsylvania pursuant to the Judicial Code, Act of July 9, 1976, P.L. 586, No. 142, § 2, effective June 27, 1978, 42 Pa.C.S. § 762, which provides, in pertinent part:

(a) General rule.--Except as provided in subsection (b), the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following cases:...(4) Local government civil and criminal matters. (i) All actions or proceedings arising under any municipality, institution district, public school, planning or zoning code or under which a municipality or other political subdivision or municipality authority may be formed or incorporated or where is drawn in question the application, interpretation or enforcement of any: (A) statute regulating the affairs of political subdivisions, municipality and other local authorities or other public corporations or of the officers, employees or agents thereof, acting in their official capacity; (B) home rule charter or local ordinance or resolution.

II. STATEMENT OF STANDARD AND SCOPE OF REVIEW

Appellate courts review grants or denials of preliminary injunctions for abuse of discretion. *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 573 Pa. 637, 645 (2003). An abuse of discretion occurs when the trial court did not have reasonable grounds to deny the injunction. *Id.* at 1001. A trial court reasonably denies injunctive relief if it finds that the

party seeking relief could not meet any one of the required elements.

Warehime v. Warehime, 580 Pa. 201, 209 (2004). It is therefore necessary for the reviewing court to examine the record to determine “if there were any apparently reasonable grounds for the action of the court below.” *Id*; see also *Rick v. Cramp*, 357 Pa. 83, 91 (1947) (stating that injunctions must be grounded in the circumstances and particular facts of the case). A court may also reverse if the “rule of law is palpably erroneous or misapplied.” *Com. ex rel. Corbett v. Snyder*, 977 A.2d 28, 44 (Pa. Cmwlth. 2009).

III. ORDER IN QUESTION

Appellants appeal from the judgment and disposition entered by the Honorable Bernard Moore, on August 27, 2015. The Court’s Order of August 26, 2015 and its Opinion, dated October 26, 2015, is attached hereto as Appendix “A.”

ORDER

AND NOW, this 26th day of August, 2015, upon consideration of Plaintiffs’ Motion for Preliminary Injunction and response thereto, it is hereby ORDERED that said Motion is DENIED.

BY THE COURT:
/s/ Bernard A. Moore

IV. STATEMENT OF QUESTIONS INVOLVED

1. Did the Court of Common Pleas abuse its discretion or misapply

the law when it determined that Appellants could not meet all of the requirements for a preliminary injunction, despite the fact that the Appellees admit that their Ordinance is in violation of 18 Pa.C.S. § 6120 and binding precedent from the Pennsylvania Supreme Court and this Court.

Suggested Answer in the *Affirmative*

V. STATEMENT OF THE CASE

This is an appeal from the Court of Common Pleas of Montgomery County, Judge Bernard Moore's Order of August 27, 2015, denying a preliminary injunction against Lower Merion Township's enforcement of Ordinance 109-16.

On March 20, 2015, Appellants Firearm Owners Against Crime, Kim Stolfer, and Joseph Abramson filed a Complaint against Appellee Lower Merion Township seeking declaratory and injunctive relief in relation to Ordinance No. 3942, codified as Section 109-16 ("Ordinance"), which Appellants contend is violative of 18 Pa.C.S. § 6120 ("Section 6120) and Article 1, Section 21 of the Pennsylvania Constitution, as it prohibits the carrying, possession, transport and discharge of firearms in Appellee's parks. (RR. 3a-28a). On May 8, 2015, Appellants filed for Preliminary Injunction (R. 45a-63a).

In its Answers to Appellants' Motion for Preliminary Injunction and Complaint, Lower Merion Township admits that Ordinance 109-16 regulates the "unlawful carry [of firearms] in Township parks" (RR. 120a, ¶ 19; RR. 128a-129a, ¶¶ 73, 75-76; 244a-245a) and that carrying of unlawful firearms in the parks results "in enforcement of this ordinance." (RR. 125a, ¶ 55; RR. 221a, ¶ 84). Appellee also admits that Ordinance 109-16 prohibits the discharge of firearms (RR. 217a, ¶ 56; RR. 244a-245a).

After hearing on August 24, 2015, Appellants' request for a preliminary injunction was denied by the Honorable Bernard Moore on August 27, 2015. (Appendix 1).

VI. SUMMARY OF THE ARGUMENT

Pursuant to Article 1, Section 21, 18 Pa.C.S. § 6120, the Uniform Firearms Act and other related legislation, Appellee is expressly and through field preemption preempted from regulating, *in any manner*, firearms and ammunition. As Appellee's Ordinance precludes an individual from being able to discharge a firearm in self-defense and, at a minimum and which Appellants dispute, the unlawful carrying of firearms in city parks, the Ordinance is unlawful. Consistent with this Court's holding in *Dillon v. City of Erie*, 83 A.3d 467 (Pa. Cmwlth. 2014), Appellants have established their right to a preliminary injunction

VII. ARGUMENT

A. Appellee Is Preempted From Regulating In Any Manner, Firearms And Ammunition

Appellants contend that pursuant to Article 1, Section 21, 18 Pa.C.S. § 6120 and the binding precedent from the Pennsylvania Supreme Court and this Court that Appellee's Ordinance is violative.

i. Appellee's Ordinance

Ordinance No. 3942, codified as Section 109-16, provides

No person except authorized members of the Police Department *shall carry or discharge firearms* of any kind in a park *without a special permit*, unless exempted. The promiscuous use of javelins, arrows, discuses or similar athletic equipment dangerous in character is prohibited unless used under the direct supervision of an authorized playground supervisor. The use of firecrackers, fireworks or rockets is prohibited.

(RR. 301a)(emphasis added)

Section 109-21, provides as penalties for violation of Section 109-16 as follows:

- A. Any person who shall violate any of the provisions of this chapter shall be liable on conviction thereof to a fine or penalty of not more than \$600 for each and every offense, to be collectible before any District Justice as like fines or penalties are now by law collectible.
- B. Police may remove from any Township park or recreation area any person who, upon the complaint of any individual and upon the police acknowledging probable cause, is violating any law,

Township ordinance, regulation or is otherwise disturbing the normal peaceful enjoyment of a Township park or the area surrounding such park.

(RR. 332a).

ii. Article 1, Section 21 Preempts Appellee

Article 1, Section 21 of the Pennsylvania Constitution provides: “The right of the citizens to bear arms in defense of themselves and the State shall not be questioned.”

The Pennsylvania Supreme Court in *Ortiz v. Commonwealth*, 545 Pa. 279, 287 (1996), in finding that both Article 1, Section 21 of the Pennsylvania Constitution and 18 Pa.C.S. § 6120, discussed *infra*, preempted *any* regulation of firearms or ammunition, declared,

Because the ownership of firearms is *constitutionally protected*, its regulation is a matter of statewide concern. The constitution does not provide that the right to bear arms shall not be questioned in any part of the commonwealth except Philadelphia and Pittsburgh, where it may be abridged at will, but that it shall not be questioned in any part of the commonwealth. Thus, 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. (Emphasis added).

In finding that the Pennsylvania Supreme Court’s holding in *Ortiz* was “crystal clear,” this Court, *en banc*, held that even regulation by a municipality *consistent with* the Uniform Firearms Act (“UFA”) was

preempted. *National Rifle Ass’n v. City of Philadelphia*, 977 A.2d 78, 82-83 (Pa. Cmwlth. 2009).¹

Furthermore, this Court previously observed in relation to Article 1, Section 21, that

Though the United States Supreme Court has only recently recognized “that individual self-defense is ‘the central component’ of the Second Amendment right,” *McDonald*, — U.S. at —, 130 S.Ct. at 3036 (emphasis omitted) (quoting *Heller*, 554 U.S. at 599, 128 S.Ct. 2783), *the right to bear arms in defense of self has never seriously been questioned in this Commonwealth*.

Caba v. Weaknecht, 64 A.3d 39, 58 (Pa. Cmwlth. Ct.), reconsideration denied (Mar. 27, 2013), appeal denied, 621 Pa. 697, 77 A.3d 1261 (2013)(emphasis added).²

Therefore, this Court has already found that an individual has a similar, if not identical, right to self-defense in Article 1, Section 21, which would again prohibit Appellants from regulating, in any manner, the carrying and discharge of firearms for self-defense.

As discussed *infra*, Appellee does not dispute that its Ordinance

¹ See also, discussed *infra*, *Clarke v. House of Representatives*, 957 A.2d 361 (Pa. Cmwlth. Ct. 2008)(*en banc*).

² It must be noted that the U.S. Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 584-85 (2008) specifically held that the definition of “bear arms” was 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.” (quoting, *Muscarello v. United States*, 524 U.S. 125, 143 (1998)(emphasis added)).

prohibits, without exception, the discharge of a firearm, which thereby denies an individual the ability to defend him/herself in a township park in violation of Article 1, Section 21, *Ortiz* and *Heller*. (RR. 217a, ¶ 56; RR. 244a-245a).³

iii. *The General Assembly Has Preempted The Entire Field Of Firearm And Ammunition Regulation*

Consistent with the holding of the Pennsylvania Supreme Court in *Ortiz*, the General Assembly has preempted the entire field of firearms and ammunition regulation through both express and field preemption. 545 Pa. at 287.

1. Express Preemption Preempts Appellee

In relation to expressed preemption, the Pennsylvania Supreme Court's decision in *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207 (2009), is extremely informative. The Court started out by emphasizing that

Municipalities are creatures of the state and have no inherent powers of their own. Rather, they “possess only such powers of government

³ Even if Appellee was to argue that there existed an inherent exception for self-defense, the U.S. Supreme Court found an identical argument, in relation to the District of Columbia's ordinance, to be “precluded by the unequivocal text” of the ordinance. *Heller*, 554 U.S. at 630. This argument would additionally be dispelled by the Appellees knowledge of drafting explicit exceptions into the text of the ordinance, as reflected by the text of 109-16. (e.g. “No person *except authorized members of the Police Department...*”)(emphasis added).

as are expressly granted to them and as are necessary to carry the same into effect.”

Id. at 220 (citing, *City of Phila. v. Schweiker*, 579 Pa. 591, 605 (2004) (quoting *Appeal of Gagliardi*, 401 Pa. 141, 143 (1960)). The Court then turned to addressing the different types of preemption that exist and declared that express provisions are those “where the state enactment contains language specifically prohibiting local authority over the subject matter.” *Id.* at 221.

Starting with the plain language of Art. 1, Sec. 21, it provides, “The right of the citizens to bear arms in defense of themselves and the State shall not be questioned.” In addressing and citing to Art. 1, Sec. 21, the Pennsylvania Supreme Court in *Ortiz*, as discussed *supra*, declared that the ownership of firearms is “constitutionally protected” and that “the General Assembly, not city councils, is the proper forum for the imposition of such regulation.” 545 Pa. at 287.

In this regard, when buttressed with Article 1, Section 25,⁴ Article 1, Section 21, is exactly clear that every citizen has an inalienable right to

⁴ Article 1, Section 25 provides, “**Reservation of powers in people.** To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.”

bear arms in defense of themselves.⁵ Through Article 1, Section 25, the People have reserved for themselves or otherwise expressly preempted the General Assembly from restricting this inviolate right. In this regard, if the General Assembly cannot even regulate, clearly a local government with “no inherent powers,” as set forth by the Court’s in *Huntley & Huntley*, cannot so regulate, *even with* the blessing of the General Assembly, as such is a power that even the General Assembly does not retain and therefore cannot grant.

In turning to the plain wording of Section 6120, it too evidences the General Assembly’s intent to expressly preempt the field of firearm and ammunition regulation. Section 6120(a) declares

No county, municipality or township may *in any manner* regulate the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components when carried or transported for purposes not prohibited by the laws of this Commonwealth. (emphasis added).⁶

Under the clear, unambiguous text of Section 6120, it cannot be disputed that the General Assembly has specifically prohibited all local

⁵ See also, Joshua Prince, Esq. and Allen Thompson, Esq., *The Inalienable Right To Stand Your Ground*, 27 ST. THOMAS L. REV. 32 (2015), available at <http://stthomaslawreview.org/articles/v27/1/prince.pdf>

⁶ The General Assembly has similarly preempted all Commonwealth agencies from regulating firearms and ammunition, pursuant to 18 Pa.C.S. § 6109(m.3)(2).

government authority in relation to firearms and ammunition.⁷ As discussed *supra*, the Pennsylvania Supreme Court already held in *Ortiz*, 545 Pa. at 287, that municipalities are prohibited from regulating firearms, *in any manner*, pursuant to both Article 1, Section 21 and Section 6120 and this Court in *National Rifle Ass’n v. City of Philadelphia*, 977 A.2d at 82, held that the “crystal clear” holding of *Ortiz* preempted regulation by a municipality even *consistent with* the UFA. Specifically, this Court declared

Unfortunately, with respect to the matter before us, while we may agree with the City that preemption of 18 Pa.C.S. § 6120(a) appears to be limited to the *lawful* use of firearms by its very terms, we believe, however, that the crystal clear holding of our Supreme Court in *Ortiz*, that, “the General Assembly has [through enactment of § 6120(a)] denied all municipalities the power to regulate the ownership, possession, transfer or [transportation] of firearms,” precludes our acceptance of the City's argument and the trial court's thoughtful analysis on this point.

Id.

Furthermore, in *Clarke v. House of Representatives*, 957 A.2d 361 (Pa. Cmwlth. Ct. 2008), this Court, *en banc*, dealt with seven ordinances enacted by the City of Philadelphia and found *all* of them, including those regulating *consistent with* the UFA, to be preempted by Section 6120. The ordinances included: (1) limit of one handgun per month and prohibition on straw purchaser sales; (2) reporting of lost or stolen firearms; (3) requiring a

⁷ See also, 53 Pa.C.S.A. § 2962(g) and 16 P.S. § 6107-C(k) placing identical restrictions on home rule charter and optional plan municipalities and counties, respectively.

license to acquire a firearm in Philadelphia or bring a firearm into Philadelphia; (4) requiring annual renewal of a gun license; (5) permitting confiscation of firearms from someone posing a risk of harm; (6) prohibiting the possession or transfer of assault rifles; and (7) requiring any person selling ammunition to report the purchase and purchase to the police department. *Id.* at 362.

More recently, in *Dillon v. City of Erie*, 83 A.3d 467, 473 (Pa. Cmwlth. 2014), this Court found that the City of Erie's ordinance precluding firearms in city parks, like the Defendant's prohibition, violated, at a minimum, Section 6120.⁸

2. Field Preemption Preempts Appellee

Even if, *arguendo*, this Court was to find that the expressed preemption of Article 1, Section 21 and Section 6120⁹ was insufficient in some regard in relation to the Ordinance challenged in this matter, the UFA, 18 Pa.C.S. §§ 6101 – 6127, clearly provides for field preemption.

In relation to field preemption, the Pennsylvania Supreme Court's

⁸ It is unclear whether the decision was strictly in relation to Section 6120 or whether it was also decided pursuant to Article 1, Section 21. Footnote 4 of the decision clearly reflects that Mr. Dillon's challenge included a challenge pursuant to Art. 1, Sec. 21 and the Court cited to *Ortiz*; however, the language in the decision holding that the City of Erie's ordinance was invalid only cites to Section 6120. 83 A.3d at 473.

⁹ See fns. 6., 7., *supra*.

decision in *Huntley & Huntley* is again extremely instructive. The Court explained that “[p]reemption of local laws may be implicit, as where the state regulatory scheme so completely occupies the field that it appears the General Assembly did not intend for supplementation by local regulations.” 600 Pa. at 220-221. Even more enlightening is the Court’s holding that “[e]ven where the state has granted powers to act in a particular field, moreover, such powers do not exist if the Commonwealth preempts the field.” *Id.* at 220 (citing, *United Tavern Owners of Phila. v. Philadelphia Sch. Dist.*, 441 Pa. 274, 279 (1971)). In further explaining the field preemption doctrine, the court declared that “local legislation cannot permit what a state statute or regulation forbids or prohibit what state enactments allow.” *Id.* (citing, *Liverpool Township v. Stephens*, 900 A.2d 1030, 1037 (Pa. Cmwlth. 2006)).

In relation to Article 1, Section 21 and Section 6120, the Pennsylvania Supreme Court in *Ortiz* clearly held that “[b]ecause the ownership of firearms is constitutionally protected, its regulation is a matter of *statewide concern* ... Thus, 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.” 545 Pa. at 287 (emphasis added). Thereafter and consistent

therewith, this Court in *Nat'l Rifle Ass'n v. City of Philadelphia*, citing to *Ortiz*, additionally held that the General Assembly has preempted the entire field. 977 A.2d at 82.

Additionally, pursuant to Section 6120, as discussed *supra*, and 18 Pa.C.S. § 6109(m.3)(2), the General Assembly has preempted all municipalities and Commonwealth agencies from regulating firearms and ammunition, respectively.

In reviewing more generally the UFA, 18 Pa.C.S. §§ 6101 – 6127, it is evident that the regulatory scheme completely occupies the field of firearm and ammunition regulation that it cannot be argued that the General Assembly intended for supplementation by local regulations – Section 6102 (definitions); Section 6103 (crimes committed with firearms); Section 6104 (evidence of intent); Section 6105 (persons not to possess, use, manufacture, control, sell or transfer firearms); Section 6106 (firearms not to be carried without a license); Section 6106.1 (carrying loaded weapons other than firearms); Section 6107 (prohibited conduct during emergency); Section 6108 (carrying firearms on public streets or public property in Philadelphia); Section 6109 (licenses); Section 6110.1 (possession of firearm by minor); Section 6110.2 (possession of firearm with altered manufacturer's number); Section 6111 (sale or transfer of firearms); Section 6111.1 (Pennsylvania

State Police); Section 6111.2 (firearm sales surcharges); Section 6111.3 (firearm records check fund); Section 6111.4 (registration of firearms); Section 6111.5 (rules and regulations); Section 6112 (retail dealer require to be licenses); Section 6113 (licensing dealers); Section 6114 (judicial review); Section 6115 (loans on, or lending or giving firearms prohibited); Section 6116 (false evidence of identity); Section 6117 (altering or obliterating marks of identification); Section 6118 (antique firearms); Section 6119 (violation penalty); Section 6120 (limitation on the Regulation of Firearms and Ammunition); Section 6121 (certain bullets prohibited); Section 6122 (proof of license and exception); Section 6123 (waiver of disability or pardons); Section 6124 (administrative regulations); Section 6125 (distribution of uniform firearm laws and firearm safety brochures); and Section 6127 (firearm tracing).

Furthermore, the General Assembly restricted the promulgation of rules and regulations relating to the UFA to the Pennsylvania State Police, pursuant to 18 Pa.C.S. § 6111.5, directed that the Pennsylvania State Police administer the Act, pursuant to 18 Pa.C.S. § 6111.1, and declared that the Pennsylvania State Police was responsible for the uniformity of the license to carry firearms applications in the Commonwealth, pursuant to 18 PA.C.S. § 6109(c). In this regard, these statutory provisions are substantially similar

to the Anthracite Strip Mining and Conservation Act, 52 P.S. §§ 681.1–681.22, and its regulatory proscription, 52 P.S. § 681.20c, which the Pennsylvania Supreme Court found to result in field preemption in *Harris-Walsh, Inc. v. Dickson City Borough*, 420 Pa. 259, 274 (1966).

Furthermore, other legislation joins the UFA in addressing regulations specific to the discharge of firearms, including the Pennsylvania Crimes Code, 18 Pa.C.S. § 101, *et seq.*, the Pennsylvania Game and Wildlife Code, 34 Pa.C.S. § 101, *et seq.*, and Pennsylvania’s Noise Pollution Exemption for Shooting Ranges, 35 P.S. Ch. 23A. In doing so, the General Assembly has clearly occupied the entire field of regulations, including those seeking to control the discharge of firearms.

The General Assembly has specifically criminalized the wrongful discharge of firearms in 18 Pa.C.S. § 2707.1 (discharge of a firearm into an occupied structure).

Additionally, it has specifically addressed the discharge of firearms in the Game and Wildlife Code, 34 Pa.C.S.A. § 101, *et seq.*: Section 2505 (sets forth safety zones in relation to discharge); Section 2506 (restricts discharge within any cemetery or burial ground); and Section 2507 (restricts the discharge of firearms in numerous ways and at numerous times). Similar to the PSP in the context of the UFA, the Pennsylvania Game Commission is

responsible for promulgating regulations in relation to the Game and Wildlife Code, pursuant to 34 Pa.C.S. § 2102.

Moreover, the General Assembly, in Title 35, Chapter 23A, Noise Pollution Exemption for Shooting Ranges, has provided for immunity from suit regarding noise related to discharge of firearms in certain situations. 35 P.S. §§ 4501, 4502.

Given the extensive breadth of the UFA, together with the Pennsylvania Crimes Code, Game and Wildlife Code, the Noise Pollution Exemption for Shooting Ranges and the holding in *Ortiz*, not to mention Article 1, Section 21 of the Pennsylvania Constitution, it is difficult to fathom how this statewide regulation would not constitute the same type of field preemption as the Pennsylvania Supreme Court found in relation to the Banking Code of 1965, 7 P.S. §§ 101–2204, in *City of Pittsburgh v. Allegheny Valley Bank of Pittsburgh*, 488 Pa. 544, 551 (1980). As the *Ortiz* Court declared, “[b]ecause the ownership of firearms is constitutionally protected, its regulation is a matter of statewide concern... and the General Assembly, not city councils, is the proper forum for the imposition of such regulation.” 545 Pa. at 287.

Therefore, even absent the express preemption of Art. 1, Sec. 21 and Section 6120, the UFA and other related legislation completely occupies the

field of firearm and ammunition regulation and therefore preempts the Appellee's regulation, *in any manner*, of firearms and ammunition.

iv. Appellee Admitted Its Ordinance Was Violative

Starting in May of 2014, Appellant Abramson contacted Appellee regarding Section 109-16 over his concern that it violates Section 6120. (RR. 335a-339a). On Wednesday, October 22, 2014, at 8:15 AM, Appellee Township Manager Ernie McNeely responded to Mr. Abramson's inquiry regarding the lawfulness of Section 109-16 that "we need to get the code updated as necessary to ensure compliance." (RR. 337a). On December 14, 2014, at 5:57 PM, Appellee Township Manager McNeely informed Mr. Abramson, "I just got the ordinance from the Solicitor so we will adopt in January." (RR. 336a). In response, Mr. Abramson asked for a copy of the revised Ordinance, which Township Manager McNeely forwarded. (RR. 335a). As reflected in the revised ordinance, the language "carry or" and "without a special permit, unless exempted" was to be struck, as not complying with the law; however, the language regarding discharge was not to be struck. (RR. 341a). Regardless, a motion by several Commissioners to revise the Ordinance on January 7, 2015 failed. (RR. 343a-344a).

As Defendant through its representative, Township Manager McNeely, admitted that Section 109-16 is violative of the law and needs to

be amended for compliance, Appellee should be estopped from arguing inconsistently that Section 109-16 is lawful. (RR. 202a-203a).

B. The Trial Court Erred in Denying Appellants a Preliminary Injunction

As this Court held in *Dillon*,

The essential prerequisites of a preliminary injunction are as follows: (1) the injunction is necessary to prevent immediate and irreparable harm not compensable in money damages; (2) greater injury will result from refusing the injunction than from granting it; (3) the injunction restores the parties to status quo ante; and (4) the activity sought to be restrained is actionable, and the plaintiff's right to relief is clear. 83 A.3d at 470 n.1 (*quoting, The Woods at Wayne Homeowners Association v. Gambone Brothers Construction Co., Inc.*, 893 A.2d 196, 204 (Pa. Cmwlth. 2006), *appeal denied*, 588 Pa. 767 (2006)).

83 A.3d at 470 fn.1.

i. *Appellants Established that the Injunction is Necessary to Prevent Immediate and Irreparable Harm not Compensable in Money Damages*

Appellants contend that the Township has violated the UFA and the Pennsylvania Constitution thereby constituting irreparable harm *per se* for the purposes of a preliminary injunction.

Violation of the State Constitution *per se* constitutes irreparable harm. *Stilp v. Com.*, 910 A.2d 775, 787 (2006). Additionally, “a violation of an express provision of a statute is *per se* irreparable harm for purposes of a preliminary injunction.” *Pleasant Hills Constr. Co. Inc. v. Pub. Auditorium*

Auth. of Pittsburgh, 782 A.2d 68, 79 (Pa. Cmwlth. 2001), *rev'd on other grounds*, 567 Pa. 38, 784 A.2d 1277 (2001) (*citing, Council 13, Am. Fed'n of State, County and Mun. Employees, AFL–CIO v. Casey*, 595 A.2d 670 (Pa. Cmwlth. Ct. 1991)) (emphasis added).

In *Dillon*, discussed *supra*, this Court reversed the trial court's denial of a preliminary injunction request with respect to the enforcement of the City of Erie's Ordinance, Section 955.06(b), which prohibited the hunting and *the carrying of firearms* in the City's parks. 83 A.3d at 473. The *Dillon* Court stated, "when the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury." *Id.*, 83 A.3d at 474 (*quoting, Pennsylvania Public Utility Commission v. Israel*, 356 Pa. 400, 406 (1947)). *See also, Devlin v. City of Philadelphia*, 580 Pa. 564, 579 (2004) ("[I]n addition to the constitutional and statutory limits on a municipality's power, a municipality is also prohibited from exercising powers in violation of basic preemption principles, which dictate that 'if the General Assembly has preempted a field, the state has retained all regulatory and legislative power for itself and no local legislation in that area is permitted'." (citation omitted)).

In this matter, Appellee Township has admitted that its Ordinance is

violative of, at a minimum, Section 6120¹⁰ and that it is enforcing¹¹ the Ordinance in relation to unlawful carrying of firearms¹² and the discharge of firearms.¹³ While Appellants contend that Appellees argument regarding its interpretation and enforcement of this Ordinance in relation to possession and transport of firearms appears disingenuous and an afterthought once it reviewed the text of Section 6120,¹⁴ even assuming, *arguendo*, that the

¹⁰ See, Section VII., A., iv. of this Brief.

¹¹ (RR. 125a, ¶ 55; RR. 221a, ¶ 84)

¹² (RR. 120a, ¶ 19; RR. 128a-129a, ¶¶ 73, 75-76; 244a-245a)

¹³ (RR. 217a, ¶ 56; RR. 244a-245a)

¹⁴ Defendants previously contended that the language “unless exempted” in the Ordinance means that those who comply with the UFA are exempted and therefore, the Ordinance is regulating consistently with the UFA. (RR. 241a-244a). This argument ignores two major issues.

First, the exemption for police officers undermines the Appellee’s argument that the “unless exempted” portion of the Ordinance was to relate to those exemptions provided by the UFA. Specifically, 18 Pa.C.S. § 6106(b)(1) already exempts police officers and therefore, if the “unless exempt” provision was intended to relate to the UFA, it would be duplicative and unnecessary. Therefore, when enacted, the language “unless exempted” was never intended to provide exemption to those who were complying with the UFA.

Second, if Appellee’s argument that “unless exempted” portion is to be accepted as permitting the lawful possession of firearms in parks, the prior clause, relating to the issuance of a “special permit”, would mean that the Appellee has authorized the issuance of special permits to those who would be in *unlawful* possession of firearms in the park. Clearly, this would be in direct violation of the UFA and cannot be considered to be regulating consistently with the UFA.

Rather, Appellants contend that the proper reading and understanding of 109-16 as enacted is that unless 109-16 explicitly exempts the individual (*e.g.* members of the police department), an individual must obtain a “special permit” to even *lawfully* carry a firearm in a city park. This would clearly be inconsistent with the UFA and regulate the lawful carrying and transportation of firearms and ammunition. While Appellants acknowledge that this interpretation would likewise seem redundant in its exception,

Ordinance only regulated the unlawful possession of a firearm, this Court's binding, *en banc*, decisions in *Nat'l Rifle Ass'n* and *Clarke* clearly dictate that Appellee's Ordinance is violative, as even regulation *consistent* with the UFA is preempted. Furthermore, it is undisputed that the Ordinance even prohibits Appellants from the *lawful* discharge of a firearm for purposes of self-defense.¹⁵

Accordingly, Appellants have demonstrated that Appellee's Ordinance is violative of Art. 1, Sec. 21, Section 6120 and binding precedent from the Pennsylvania Supreme Court and this Court and therefore constitutes immediate and irreparable harm.

ii. Appellants Established That Greater Injury Will Result From Refusing The Injunction Than From Granting It

In order to determine whether greater harm would occur to the Appellants by refusing the injunction than to the Appellee by granting it, a court must determine whether the grounds relied upon for the comparison of harms suffered were reasonable. *See Com. ex rel. Corbett v. Snyder*, 977 A.2d 28, 42 (Pa. Cmwlth. 2009); *see also, Summit Towne Center*, 573 Pa. at

unlike with Appellee's interpretation, it would not result in the Township issuing "special permits" to individuals who are *prohibited* under the UFA.

¹⁵ Even setting aside Art. 1, Sec 21., 18 Pa.C.S. §§ 505, 506 addresses the statutory lawful use of lethal force for an individual and in the protection of others. *See also*, Section VII., A., ii., and this Court's observation in *Caba*.

645-646.

Moreover, and directly on point in relation to Section 6120, this Court in *Dillon* declared that a municipality's regulation of "firearms shows that a greater injury will occur by refusing to grant the injunction because [the ordinance] is unenforceable." 83 A.3d at 474. The *Dillon* Court went on to additionally hold that "the injunction is reasonably suited to abate the offending activity by enjoining the enforcement of this unlawful and unenforceable ordinance; and the injunction will not adversely affect the public interest because the City was prohibited from enacting [the ordinance] and the ordinance is, again, unlawful and unenforceable." *Id.*

Accordingly and consistent this Court's decision in *Dillon*, Appellants have demonstrated that greater injury will occur by refusing to grant the injunction.

iii. Appellants Established That An Injunction Restores The Parties To Status Quo Ante

This Court previously held that "[t]he status quo ante is that 'last actual, peaceable and lawful uncontested status which preceded the pending controversy'." *Woods at Wayne Homeowners Ass'n*, 893 A.2d at 204 fn.10 (quoting, *Commonwealth v. Coward*, 489 Pa. 327, 342 (1980)).

Accordingly and consistent with this Court's decision in *Dillon*,

Appellants have demonstrated that the last actual, peaceable and lawful uncontested status of the Ordinance was prior to its enactment.

iv. Appellants Established That The Activity Sought To Be Restrained Is Actionable, And The Plaintiff's Right To Relief Is Clear

As discussed *supra*, Appellees Ordinance violates Art. 1, Sec. 21 of the Pennsylvania Constitution, Section 6120 and binding precedent from the Pennsylvania Supreme Court and this Court, as it regulates firearms. Moreover, it is undisputed that the Ordinance denies all individuals the ability to *lawfully* utilize a firearm for purposes of self-defense of themselves or others.

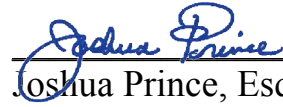
Accordingly and consistent with this Court's decision in *Dillon*, the activity sought to be restrained is actionable and the Appellants' right to relief is clear.

VIII. CONCLUSION

WHEREFORE, Appellants respectfully request that this Court reverse the trial court's denial of their request for a preliminary injunction and issue an Order enjoining Appellee's enforcement of Section 109-16.

Respectfully Submitted,

Date: December 7, 2015



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Word Count Certification

I certify that this brief complies with the word count limit as it does not exceed 14,000 words. This certificate is based on the word count of the word processing system – Microsoft Word – used to prepare the brief.



Joshua Prince, Esq.

APPENDIX A

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

FIREARM OWNERS AGAINST CRIME,
KIM STOLFER and JOSEPH ABRAMSON

Plaintiffs,

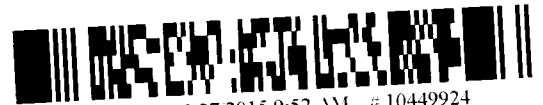
v.

LOWER MERION TOWNSHIP

Defendant.

Civil Action

Docket No. 2015-06187



2015-06187-0023 8/27/2015 9:52 AM # 10449924
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Mark Levy - MontCo Prothonotary

ORDER

AND NOW, this 26th day of AUGUST, 2015, upon consideration of
Plaintiffs' Motion for Preliminary Injunction and response thereto, it is hereby ORDERED that
said Motion is DENIED.

Bernard H. Moore
J.

Copies mailed 8/26/15 to:
Joshua Prince, Esq.
Gilbert P. High, Jr., Esq.

M. Palmer
Secretary

**IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL DIVISION**

**FIREARM OWNERS AGAINST
CRIME, KIM STOLFER, and
JOSEPH ABRAMSON**

v.

LOWER MERION TOWNSHIP

:
:
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:
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:
:

**Commw. Ct. No. 1693 CD 2015
Com. Pleas No. 2015-06187**

OPINION

Moore, J.

October 26, 2015

I. FACTS AND PROCEDURAL HISTORY

The question presented by this appeal is whether this Court properly denied the Motion for Preliminary Injunction filed by Firearm Owners Against Crime, Kim Stolfer, and Joseph Abramson (collectively, “Plaintiffs”).

The action underlying this dispute seeks a declaration from this Court that Lower Merion Township Code Section 109-16¹ (the “Ordinance”) is in conflict with the Pennsylvania Uniform Firearms Act² (“UFA”). On April 21, 1965, Lower Merion Township (the “Township”) enacted Ordinance Number 1480, which provided in relevant part: “No person except authorized members of the police department shall carry or use firearms of any kind in a park.”

In 2011, the Township began having discussions that the then existing ordinance did not comply with the UFA because it did not provide for the lawful carry of firearms by citizens including concealed carry with a gun permit, or open carry without a permit. (*See* N.T. 8/24/15, Ex. SE-2). The portion of the UFA that conflicted with the text of the former ordinance states: “No county, municipality or township may in any manner regulate the lawful ownership,

¹LOWER MERION TOWNSHIP, PA., CODE § 109-16 (2015).

² 18 Pa.C.S. § 6101 *et seq.*



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Opinion

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Mark Levy - MontCo Prothonotary

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possession, transfer or transportation of firearms, ammunition or ammunition components when carried or transported for purposes not prohibited by the laws of this Commonwealth.” 18

Pa.C.S.A. § 6120(a). As a result of the apparent conflict, the Township amended the language of the Township Ordinance to its present-day form. The Ordinance currently provides that “[n]o person except authorized members of the police department shall carry or discharge firearms of any kind in a park without a special permit, unless exempted.” LOWER MERION TOWNSHIP, PA., CODE § 109-16. There is no evidence that this code section has ever been enforced against anyone. (N.T. 8/24/15, pp. 7, 16).

On March 20, 2015, Plaintiffs filed a Complaint seeking a declaration that Section 109-16 violates the UFA and article I, section 21 of the Pennsylvania Constitution. On May 8, 2015, Plaintiffs filed a Motion for Preliminary Injunction. This Court held a hearing on the Motion for Preliminary Injunction on August 24, 2015, and on August 26, 2015, issued an order denying the motion. Plaintiffs now appeal from this Court’s August 26, 2015 Order.

II. DISCUSSION

Review of a trial court’s order with respect to a preliminary injunction is “highly deferential.” *Synthes USA Sales, LLC v. Harrison*, 83 A.3d 242, 248 (Pa. Super. 2013) (quoting *Warehime v. Warehime*, 860 A.2d 41, 46 (Pa. 2004)). A reviewing court does not inquire into the merits of the controversy. *Hoffman v. Steel Valley Sch. Dist.*, 107 A.3d 288, 290 (Pa. Cmwlth. 2015). Instead, appellate courts conduct a limited examination of the record to determine whether there are any apparently reasonable grounds for the trial court’s action. *Id.* A lower court has “apparently reasonable grounds” for the denial of relief where it determines that an essential prerequisite to the issuance of a preliminary injunction has not been established by

the moving party. *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003).

There are six “essential prerequisites” that a party must establish prior to obtaining preliminary injunctive relief. The party must show: 1) “that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages”; 2) “that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings”; 3) “that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct”; 4) “that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits”; 5) “that the injunction it seeks is reasonably suited to abate the offending activity”; and, 6) “that a preliminary injunction will not adversely affect the public interest.” The burden is on the party who requested preliminary injunctive relief

Synthes USA Sales, 83 A.3d at 249 (quoting *Warehime v. Warehime*, 860 A.2d 41, 46-47 (Pa. 2004)).

Plaintiffs contend that the Ordinance regulates firearms in a way that is prohibited by 18 Pa.C.S. § 6120(a), the Pennsylvania Supreme Court’s decision in *Ortiz v. Commonwealth*, 681 A.2d 152 (Pa. 1996), and other cases interpreting 18 Pa.C.S. § 6120. However, at this preliminary stage of the litigation, based on the evidence before this Court, it is unclear that the statute is in violation of the UFA or unconstitutional. A preliminary injunction is not proper for that reason.

The text of the Ordinance at issue reads: “[n]o persons except authorized members of the Police Department shall carry or discharge firearms of any kind in a park without a special permit, unless exempted.” LOWER MERION TOWNSHIP, PA., CODE § 109-16. The UFA provides that “[n]o county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components when carried or transported for purposes not prohibited by the laws of this Commonwealth.” 18

Pa.C.S.A. § 6120(a). The Township has advanced arguments that although the Ordinance is perhaps not a model of clarity, it does not in any way restrict the possession or ownership of firearms beyond the UFA. The Township maintains that the statute clarifies that those exempted, i.e., those who possess firearms in conformity with the laws of the Commonwealth, may carry firearms in Lower Merion Township parks, and that those who carry firearms in contravention of the laws of the Commonwealth may not carry firearms in municipal parks. The main purpose of the statute, the Township suggests, is to prevent the unauthorized discharge of firearms in municipal parks. This, of course, does not regulate the “lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components”.

Furthermore, since Plaintiffs’ claims are uncertain and the Township has proffered weighty arguments in opposition to those claims, this matter is not ripe for a preliminary injunction.³ All of the issues presented by this case can be fully adjudicated at the time of a regular trial.

In addition, Plaintiffs must also show the existence of immediate and irreparable harm justifying the extraordinary relief requested. In order to establish immediate or irreparable harm, a petitioner must produce “concrete evidence” demonstrating “actual proof of irreparable harm.” *Greenmoor, Inc. v. Burchick Constr. Co., Inc.*, 908 A.2d 310, 314 (Pa. Super. 2006). A plaintiff’s alleged irreparable injury cannot be founded on speculation and hypothesis alone. *Id.* Plaintiff has not met this burden.

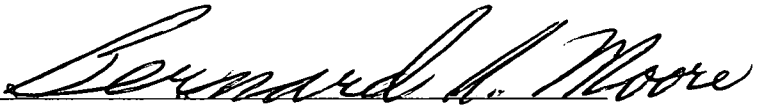
³ In particular, the Commonwealth Court’s decision in *Minich v. Cnty. of Jefferson*, 869 A.2d 1141 (Pa. Cmwlth. 2005), *appeal denied*, 889 A.2d 90 (Pa. 2005), cited by the Township, supports the notion that the Ordinance is not clearly at odds with the UFA. In that case, the Commonwealth Court concluded that 18 Pa.C.S. § 6120 did not preempt a county ordinance prohibiting the possession of firearms in the county courthouse. In regard to Plaintiffs’ constitutional argument, *Minich v. Cnty. of Jefferson*, 919 A.2d 356, 361 (Pa. Cmwlth. 2007), also cited by the Township, states that “[t]he right to bear arms, although a constitutional right, is not unlimited, and it may be restricted in the exercise of the police power for the good order of society and the protection of its citizens.” In that case, the court concluded that a county ordinance prohibiting the carry of firearms in the county courthouse did not violate article I, section 21 of the Pennsylvania Constitution. Cumulatively, these cases cast doubt on the Plaintiffs’ entitlement to relief.

III. CONCLUSION

The grant of a preliminary injunction is a “harsh and extraordinary remedy.” *City of Philadelphia v. Commonwealth of Pennsylvania*, 922 A.2d 1, 9 (Pa. Cmwlth. 2003). Trial courts properly grant such exceptional relief “only when and if *each* criteria has been fully and completely established.” *Id.* Plaintiffs did not meet that burden.

This Court’s determinations were proper and accordingly, this Court’s Order should be **AFFIRMED.**

BY THE COURT:


BERNARD A. MOORE, J.

Date: October 26, 2015
Cc: Joshua Prince, Esq.
Gilbert P. High, Esq.