FOREST PRESERVE GUN BAN SECOND AMENDMENT CHALLENGE

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In the case of *Solomon v. Cook County Board of Commissioners*, 2021 U.S. Dist. LEXIS 173175 (E.D. Ill. 9/13/2021), Plaintiff Simon Solomon challenged a state law and a forest preserve ordinance that prevented concealed carry license holders from carrying concealed weapons in the Forest Preserve District of Cook County (FPDCC).

The Illinois Firearm Concealed Carry Act (the "Act") expressly prohibited the concealed carry of a firearm on or into any real property under the control of the Cook County Forest Preserve District. 430 ILCS 66/65(a)(14) ("Section 65(a)(14)"). The Illinois General Assembly did not extend this prohibition to any other county forest preserve district in the state.

In pertinent part, Section 65(a)(14) of the Act prohibited any "licensee" from "carrying a concealed firearm into the parking area of a prohibited location," including FPDCC property. A concealed firearm could, however, be carried into the parking area as long as he or she "stores the firearm or ammunition concealed in a case within a locked vehicle or locked container out of plain view within the vehicle in the parking area." 430 ILCS 66/65(b)

FPDCC Ordinance 3-3-6 prohibited concealed carry licensed holders from knowingly carrying a firearm on or into FPDCC property. Between July 13, 2011, and August 31, 2018, there were 16,741 violations of various ordinances within the FPDCC; 226 of those violations were categorized as weapons violations.

Plaintiff Simon Solomon, a 63-year-old Cook County resident, had been visiting properties owned by the Forest Preserve District of Cook County (FPDCC) for about forty years. Plaintiff is also a firearm owner and obtained his Illinois concealed carry license ("CCL") approximately five years ago. The process included completing a paper application and attending a 16-hour, two-day class.

On April 30, 2015, Plaintiff stopped at his usual fishing location within the Skokie Lagoons on his way home from work. In the summertime, Plaintiff drives to the Skokie Lagoons and fishes at the same spot every night on his way home from work. The Skokie Lagoons are FPDCC property, consisting of seven lagoons connected by channels on the Skokie River. Plaintiff knew this FPDCC property closed each night at sunset.

As Plaintiff was finishing his fishing for the night, he was approached by a FPDCC police officer for being on FPDCC property after sunset. The FPDCC officer discovered that Plaintiff was carrying a weapon in violation of FPDCC Ordinance 3-3-6 and arrested him. The FPDCC confiscated two firearms from Plaintiff, a 45 caliber Colt Semi Auto handgun and a North America Arms 22 caliber Derringer. Plaintiff has never been assaulted, attacked, or threatened on FPDCC property.

SECOND AMENDMENT CLAIM

Plaintiff sued the Forest Preserve District of Cook County, alleging 430 ILCS 66/65(a)(14) and FPDCC Code Section 3-3-6 violated the Second Amendment of the United States Constitution. Plaintiff petitioned the federal district court to declare Section 65(a)(14) and Ordinance 3-3-6 unconstitutional and issue an injunction prohibiting government officials from enforcing these laws. In so doing, Plaintiff asked the court to invalidate both laws "to the extent that they are applied to prohibit private citizens who are otherwise qualified to possess handguns from carrying handguns for self-defense in forest preserves of Cook County."

The State of Illinois intervened to defend the constitutionality of the state statute. Defendant Cook County and the State of Illinois claimed the statute and the ordinance were both constitutional on the grounds that "the entire Forest Preserve District is a 'sensitive place' on which firearms regulations are presumptively lawful" because these laws were "substantially related to public safety."

As cited by the federal district court, the Second Amendment states: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Further, the court noted the U.S. Supreme Court in the case of *District of Columbia v. Heller*, had held the Second Amendment effectively codifies a preexisting "individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

As described by the court, *Heller* had struck down the District of Columbia's ban on the possession of usable handguns in the home because the law prevented citizens from using, or even having, "the quintessential self-defense weapon" in the place where the "need for defense of self, family, and property is most acute." In the opinion of the federal district court, "*Heller* left open many questions related to the Second Amendment, including what level of scrutiny to apply to firearms regulations." The court, however, noted the Supreme Court in *Heller* was "clear that its ruling would not invalidate all restrictions on owning or carrying firearms," including "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." The court, however, acknowledged the Supreme Court in *Heller* did not otherwise explain or elaborate on what counts as a "sensitive place."

"SENSITIVE PLACE" ANALYSIS

In this case, Defendants had contended the entire FPDCC is a "sensitive place" as referenced in *Heller* because these properties are "a recreational space where children tend to congregate." As characterized by FPDCC, "the Ordinance protects children in family-oriented, sensitive areas designed for their education and enjoyment."

In response, Plaintiff had argued that it was "not appropriate for the Illinois General Assembly to call all 70,000 acres of the Forest Preserve District a sensitive place" in the challenged state statute. Further, Plaintiff argued that it was "illogical to call Cook County's forest preserve district a sensitive place, but not to do the same for any of the forest preserve districts in Illinois' 101 other counties."

When compared to any of the other forest preserves in Illinois, Defendants countered that FPDCC was significantly "different in terms of the number of visitors it has and the size of some of its attractions."

As identified by the federal district court, "the critical issue in this case" was "not the difference between the FPDCC and forest preserves in other counties, but the differences among the various FPDCC sites." In determining whether a particular location is properly designated a "sensitive place," the federal district court would analyze and discern the traits of designated "sensitive places." As characterized by the court, such "sensitive places" would typically involve "gatherings of large groups of people or performance of government functions":

> When a location is designated as a "sensitive place," all examples of that location tend to have the trait that justifies the designation. For instance, all schools have groups of children present... In contrast, when a regulation sweeps up different types of locations, with rationales that differ or vary in strength, it tends to fare poorly on judicial review.

70,000 ACRES OF DISTINCT SITES

In determining the size and location of a designated "sensitive place," the federal district court recognized FPDCC "is not a single place or type of place." Instead, the court found FPDCC "is a large set of 'distinct, non-adjacent' places, covering 70,000 acres, which is more than 11% of the land in Cook County and an area roughly half the size of the City of Chicago."

Moreover, the court noted the pretrial record did not state "how many different FPDCC sites there are." While "the FPDCC website had a location list which contained roughly 320 separate entries," the court found it "difficult to tell how many separate pieces of property or sites there are." According to the court, it was "clear that the FPDCC is comprised of scores, if not hundreds, of different locations":

> Crucially, not all FPDCC locations are of the same type. On one end of the spectrum is the Chicago Botanic Garden, an example Defendants repeatedly point to, which hosts roughly a million visitors per year and offers a wide range of facilities and activities. The Chicago Botanic Garden offers adult education classes, symposia, professional certificate programs, and spans 385 acres, including 26 gardens and four natural areas. On the other end of the spectrum is, for example, Bluff Spring Fen, a nature preserve that allows hiking but bars fishing and even dogs and has no obvious developments besides a parking lot.

Under such circumstances, the federal district court concluded: "FPDCC is not a single place, or even a category of the same kinds of places, like schools and post offices." Given such "a wide range of different sites with different facilities that are all owned by the Forest Preserve District," the court found this range of sites and facilities undermined FPDCC's claim that "such a spread of locations could be designated a single sensitive place." Moreover, in the opinion of the court, properly designating one location a "sensitive place" would not necessarily allow "the government to give the same designation to a different, non-adjacent location."

Further, the court determined the mere fact that "children are present on FPDCC property" as well as "the presence of large gatherings of people" would not justify designating the entire FPDCC as a "sensitive place." On the contrary, the court found the pretrial record had failed to demonstrate "the presence of children or large crowds on all FPDCC sites, or reveal how many FPDCC sites have these traits":

> Perhaps the presence of children would qualify those FPDCC sites as "sensitive places," but Defendants do not present, and the Court is not aware of, any authority for treating all of the "distinct, non-adjacent" locations as "sensitive places" merely because a subset of them qualify.

PUBLIC RECREATION SAFETY

According to FPDCC, the governmental interest in public safety justified a ban on guns in the forest preserve to effect "protection people in recreational areas, especially children, from gun violence." The federal district court acknowledged: "Public safety is unquestionably a strong governmental interest." That being said, the court also noted the challenged gun regulations must still bear a "substantial relationship" to that strong governmental interest.

To "explain the extent of the government's interest," FPDCC had presented the following data on "the visitors to FPDCC property, especially children":

> The FPDCC receives approximately 62 million visitors annually with many facilities and activities aimed at children, including nature centers, youth athletic leagues, campgrounds, Ecological Stewardship Program, the Mighty Acorns Program, and the Citizen Scientists program. The Forest Preserve District also hosts educational programming by other organizations, volunteer events, and permitted activities such as picnics, all of which have minors in attendance.

As characterized by the federal district court, FPDCC had, for the most part, presented "aggregate data about types of visitors (youth vs. adult), types of locations, and types of activities." The court, however, noted this information was "not broken down geographically."

According to the court, FPDCC's data from 2017 and 2018 had indicated "there were roughly 30 athletic leagues with permission to use FPDCC property and that each athletic event ranged in attendance from 20 to 100 people." The court, however, noted this data failed to indicate "where those athletic events occurred, or whether they all happened on the same few FPDCC sites or whether they were spread more evenly across its 70,000 acres."

While recognizing the public safety interest in general and FPDCC in particular was well-established, the court found the record was "uncertain or weak as to the entirety of the FPDCC," specifically the presence of children in some areas of the FPDCC.

REGULATION RELATIONSHIP TO SAFETY

To pass constitutional muster, the federal district court would require "the government must show a substantial relationship between the regulations and its interest in public safety, with a

fairly close fit (though a perfect fit is not required)." In this particular instance, FPDCC, therefore, had to "show a substantial relationship between prohibiting CCL holders from carrying firearms in the FPDCC and the safety of visitors, especially children."

Based upon its review of the pretrial record, the federal district court held FPDCC had failed to show this required "relationship between CCL holders and threats to public safety." Moreover, the court found "no evidence that the regulations reduce crime or prevent injuries or death." In particular, the court noted: "Almost none of the data in the record concerns CCL holders, or if it does, the parties have not disaggregated CCL holders from non-CCL holders." Instead, the court found FPDCC data had simply relied on general violent crime statistics from Cook County and the City of Chicago to demonstrate a threat to public safety, without identifying "any violent crimes committed by CCL holders."

With regard to FPDCC in particular, the court noted only four of "all the crimes committed in the Forest Preserve between 2014 and 2019" were "committed by CCL holders." Moreover, the court found those crimes were "all violations of Section 65(a)(14)," i.e., "the crimes committed by CCL holders were only unlawful concealed carry, not murder, assault, armed robbery, or other violent crimes." Similarly, the court noted "the record shows between 2011 and 2018, a mere 14 violations of Ordinance 3-3-6."

Since the pretrial record did not contain "evidence that CCL holders committed other crimes in or out of the FPDCC," the federal district court held "the link between regulating their conduct and public safety tenuous." Moreover, in the opinion of the court, the record did not contain any evidence that "prohibiting CCL holders from carrying firearms in the FPDCC will otherwise reduce crime, prevent injury, or save lives":

> Defendants here offered no evidence connecting concealed carry by CCL holders to any threat to public safety, much less a threat within the regulated area, the FPDCC. Defendants had to provide some link between the regulated activity and their interest in public safety, but that link is not in the record.

DISCONNECTED CRIME DATA

With regard to "public-safety-oriented evidence," the court found general evidence of criminal activity in Cook County and Chicago was "related only loosely, if at all, to the Forest Preserve District." In the opinion of the court, such evidence of Chicago crime data was "unhelpful because only 5% of FPDCC land is within Chicago city limits and Defendants do not explain why they dangers of urban gun violence should be attributed to forest preserves."

Similarly, the court found crime FPDCC's data from Cook County was "geographically disconnected from the places regulated by Section 65(a)(14) and Ordinance 3-3-6 with no explanation for why they should apply to the Forest Preserve." Accordingly, the court held FPDCC had failed to establish "dangers for public safety inside the Forest Preserve that could be ameliorated by barring CCL holders from carrying firearms in the Forest Preserve."

The federal district court did acknowledge: "the government has established a high number of visitors to some, but not all, FPDCC sites, and the presence of children on some, but not all,

FPDCC sites." The court, however, found "the record contains little information on the concentration or spread of visitors across the range of FPDCC properties or types of property (aside from the Botanic Garden)." In the opinion of the court, this information in the record was, therefore, "a shaky foundation for a regulation that applies to all of the Forest Preserve District." Moreover, the court found FPDCC had "shown little threat to public safety in the FPDCC, and even less involving concealed firearms, and none by CCL holders":

> Nor has the government provided evidence that the current low threat of gun violence in the FPDCC is a result of Section 65(a)(14) and Ordinance 3-3-6. Both restrictions regulate people whom and behavior that the government has not demonstrated pose such a danger to public safety that a ban on otherwise lawful concealed carry is justified through the entirety of the Forest Preserve District.

As a result, based on the evidence in the record, the federal district court held "the firearms regulations at issue to be unconstitutionally overbroad" because Section 65(a)(14) and Ordinance 3-3-6 were "not substantially related to the interest that the government identified."

The court, however, did not hold that "the government necessarily must justify such a restriction on a site-by-site basis." Instead, the court indicated FPDCC "may be able to do so for categories of sites or activities, such as, hypothetically, nature centers or athletic facilities." In so doing, the court rejected FPDCC's argument that "it would be impossible or unworkable for them to identify places within the Forest Preserve where children are present, perhaps even in a way that would qualify as a "sensitive place" under *Heller*":

> [N]othing in the caselaw suggests that they would have to write regulations that vary by time of day or that apply only when children are present; school zone laws without such variance have been upheld despite children not being physically on school grounds twenty-four hours per day, seven days per week, three hundred and sixty-five days per year. In fact, the Illinois General Assembly has already made these kinds of distinctions.

PROPOSED LEGISLATIVE RESPONSE

Accordingly, the federal district court held the challenged "firearms regulations at issue to be unconstitutionally overbroad." In finding "Section 65(a)(14) is unconstitutional as written," the federal district court acknowledged "the General Assembly is capable of identifying and writing legislation" to determine "whether or how to regulate concealed carry of firearms in different places in the FPDCC." According to the court, such judgments are "best left to the legislature, and the legislature ought to have an opportunity to make those judgments."

As a result, the federal district court issued an order which "temporarily stay enforcement of its ruling for a period of six months, i.e., until March 15, 2022, to provide the General Assembly an opportunity to act on this matter if it chooses to do so." Similarly, Cook County would have to make a revised FPDCC Ordinance 3-3-6 consistent with the Second Amendment reasoning of the court.

On January 21, 2022, proposed legislation to amend the Illinois Firearm Concealed Carry Act (Senate Bill 3745) was introduced into the Illinois General Assembly by Senator Ram Villivalam. This Bill provides an extensive list of "sensitive places" within recreational areas and facilities. In so doing, this Bill is an apparent attempt to clearly identify those different places in the FPDCC where prohibiting carrying firearms was substantially related to the safety of visitors, especially children. In pertinent part, a synopsis of the Bill described this proposed legislation language as follows:

> [A] licensee under the Act shall not knowingly carry a firearm into a campground, aquatic center, grounds of an aquatic center, boat launch, boating center, athletic venue, picnic grove, nature center, grounds of a nature center, pavilion, grounds of a pavilion, golf course, golf course parking lot, driving range, adventure course, grounds of an adventure course, zipline building, grounds of a zipline, equestrian center, grounds of an equestrian center, exercise venue, grounds of an exercise venue, any Illinois Nature Preserve, Land and Water Reserve, or any public or private gathering or special event conducted on property that requires the issuance of a permit under the control of the Cook County Forest Preserve District...

According to TrackBill.com, once introduced, this Bill was referred to committee in the Illinois Senate with no further action scheduled.

https://trackbill.com/bill/illinois-senate-bill-3745-concealed-carry-forest-preserv/2203028/

Absent final action by the General Assembly before March 15, 2022, to amend the "unconstitutional as written" Section 65(a)(14) the temporary stay of enforcement of the federal district court's above-described order would expire. At that point, having held Section 65(a)(14) and Ordinance 3-3-6 violated the Second Amendment, the federal district court would issue an injunction prohibiting government officials from enforcing these unconstitutional gun regulations in the FPDCC.

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SEE ALSO:

Right to Bear Arms Limited in "Sensitive" Public Facilities
James C. Kozlowski. *Parks & Recreation*. Apr. 2011 Vol. 46, Iss. 4
https://mason.gmu.edu/~jkozlows/lawarts/04APR11.pdf

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