IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EZELL, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 10-CV-5135**
	)	**Judge Virginia M. Kendall**
CITY OF CHICAGO,	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION
TO STAY ENFORCEMENT OF COURT'S RULING PENDING APPEAL

Defendant City of Chicago (the "City"), by its attorney, Stephen R. Patton, Corporation Counsel for the City of Chicago, hereby files this reply in support of its motion to stay enforcement of the Court's September 29, 2014 Memorandum Opinion and Order ("Order") and corresponding Judgment in a Civil Case ("Judgment") pending disposition of the case on appeal.

I. Plaintiffs' unpersuasive arguments further demonstrate why the City has a substantial likelihood of success on appeal.

Plaintiffs have no real response to the City's argument that the Court erred in applying a near-strict level of scrutiny – the same level of scrutiny *Ezell I* applied to the City's complete ban on gun ranges – to the City's zoning classification. *Ezell I* makes clear that "laws that merely regulate rather than restrict . . . may be more easily justified." *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011). Plaintiffs contend that the Court correctly applied the higher standard, summarily stating that the "zoning ordinance has worked a total ban on firing ranges, to equal the actual ban struck down in 2011." Resp. at 3. But the Court did not equate the zoning regulation with a complete ban, and Plaintiffs have no support for this bald assertion. In fact, the Court soundly rejected Plaintiffs' entire *de facto* ban argument, holding that Plaintiffs "failed to

adequately develop the contention with either facts or case law." Order, Dkt. # 280, at 13. If the complete constellation of regulations Plaintiffs challenge do not constitute a ban, then, by definition, the individual zoning regulation, alone, cannot constitute one either. Thus, because the zoning regulation is not a ban, the Court erred in applying *Ezell I*'s near-strict level of scrutiny.

For this same reason, Plaintiffs' contention that the City is improperly attempting to shift the burden of proof to Plaintiffs, Resp. at 2-3, is entirely misplaced. *Ezell I*'s sliding-scale approach necessarily encompasses some determination of the impact of the law or regulation on the right, before the Court selects the appropriate level of scrutiny. *Ezell*, 651 F.3d at 708 ("[t]he rigor of this judicial review depends on the relative severity of the burden and its proximity to the core of the right."). As discussed above, severe burdens on the core Second Amendment right of armed self-defense require "an extremely strong public-interest justification and a close fit between the government's means and its ends," *id*., while mere regulations, "laws restricting activity closer to the margins" of the right, or "modest burdens" on the right are "more easily justified." *Id*. Thus, in order to decide how strong the City's justifications needed to be – and how closely the regulation served that justification – the Court first had to take into account how severely, or modestly, the zoning classification impacted Plaintiffs' core right to practice at a shooting range.

The record shows that Plaintiffs' Second Amendment rights are affected only modestly, and therefore why a lower level of scrutiny should apply. And in its motion to stay, the City explained how the Court erred in relying on a handful of telephone inquiries about potential gun range locations to conclude that the zoning classification did, in fact, place a severe burden on

Plaintiffs' constitutional rights. This approach is fully consistent with *Ezell I*, and is not an attempt to require individual proof in a facial challenge.[1]

And as the City explained fully in both its motion for summary judgment and its motion to stay, the zoning classification easily satisfies the more appropriate, intermediate level of scrutiny. The City's undisputed evidence established the known risks of lead contaminated air from gun ranges to surrounding, populated areas, as well as the potential for criminal activity and injury associated with gun ranges. Def.'s SOF, Dkt. # 224, ¶¶ 15, 17-20. These risks to the public's safety, health and welfare warrant the City's treatment of gun ranges as "high impact" uses under the zoning code, which, like other high impact uses (such as adult uses), are best suited to areas with low foot traffic and population. *Id*., ¶ 17. Thus, the zoning classification is substantially tied to the City's important interests in protecting the health, welfare, and public safety of its citizens. *See, e.g., U.S. v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (regulations valid under Second Amendment intermediate scrutiny so long as they are "substantially related to an important government objective.").

Likewise, with respect to the hours regulation, the City explained how the Court applied too-high a level of scrutiny – acknowledging that "Plaintiffs provide minimal evidence about any

[1] To inflate the purported burden on their rights, Plaintiffs contend that only 2.2% of the land in Chicago is available for firing ranges under the City's zoning regulations. Resp. at 3. Plaintiffs' calculation erroneously compares the 3,386 acres of land available for ranges to the total acreage of the City, which is 148,151 acres, including streets, alleys, and residence districts. As argued by the City on summary judgment, and as accepted by the Court, the proper way to evaluate the land available in the City for firing ranges is to compare the 3,386 acres to the approximate 32,000 acres (exclusive of streets, alleys, and expressways) zoned for business, commercial, and manufacturing uses, which results in 10.58% of the available land.

impact the regulation would impose on a range and agree that most public firing ranges utilize similar hours," Order, Dkt. # 280, at 27, while then requiring the City to present "substantial evidence" of "secondary public-safety effects." *Id*. Plaintiffs do not actually respond to this argument, but simply reiterate the Court's incorrect holding that the City needed to present "substantial evidence of secondary public-safety effects" to justify an operational regulation that only minimally impacts Plaintiffs' Second Amendment rights. Resp. at 4. The regulation permits gun ranges to be open for 11 hours a day, seven days a week, which provides ample opportunity for individuals to train for self-defense, and cannot be characterized as a restrictive measure under any lens. Thus, under the more deferential scrutiny appropriate for regulatory provisions that impose only modest burdens on core rights, the City's public safety rationales for not allowing gun ranges to be operational in the late hours of the evening (*see* City's Motion to Stay at 6-7 and Def.'s SOF, Dkt. # 224, ¶¶ 69-71), are more than sufficient.

Accordingly, the City has shown a substantial likelihood of success on appeal, and a stay is warranted. Furthermore, Plaintiffs fail to address the fact that this case presents important issues of first impression. Maintaining the status quo pending guidance from the appellate court on these issues is prudent, and serves the primary purpose of staying injunctive relief, which is to "at all times . . .'minimize the costs of being mistaken.'" *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992), quoting *American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986). This additional factor also weighs in favor of a stay.

II. Plaintiffs fail to articulate how a stay would cause any real harm.

Plaintiffs offer no more explanation of the harm to their interests than they mustered in their summary judgment submissions; at most, a minimal burden on their ability to exercise their Second Amendment rights. Plaintiffs fall back on their unfounded refrain that the absence of

gun ranges in the City is solely attributable to the City's regulations, or that "it would be unfair to tell would-be range owners they cannot even start the range-approval process until the Seventh Circuit rules on the zoning and business hours issues." Resp. at 1-2. But in requesting the stay, the City is not forestalling any potential range owner from beginning the range-approval process on any of the approximately 1,900 parcels that would comply with the zoning regulation. *See* Def.'s SOF, Dkt. # 224, ¶ 14. Nor is there any evidence to suggest that the City's regulations, and not the extremely high costs of range construction or the current economic climate, has caused the absence of ranges in the past three years. The stay simply requests that the City not be required to grant a license for a gun range in a densely-populated area that, after the Seventh Circuit has weighed in on the reasonableness of the City's regulations, the City may not be constitutionally required to grant.

Plaintiffs attempt to dismiss the potential harms to the City, and therefore to the health and safety of its citizens, by characterizing the risks of firearms and live-fire training near residential areas and densely populated commercial areas as "speculation and fearmongering." Resp. at 4. Far from it, the inherent dangers of firearms – including lead poisoning, accidental and intentional gunshot injuries, associated criminal activity, and environmental impact – have been long-recognized and well-documented, and Plaintiffs did not contest any of the evidence the City produced on this point. *See* Def.'s SOF, Dkt. # 224, ¶¶ 15, 17-20, 76-78. Allowing gun ranges to be built in densely-populated, commercial areas, operating 24-hours a day, would necessarily place a much greater number of people at risk from these well-documented hazards. *Id*., ¶¶ 76-78. At a minimum, a stay would protect the public until such time as the Seventh Circuit rules on the merits.

For the foregoing reasons, the City respectfully requests that the Court stay enforcement of its Order and Judgment until this matter has been resolved on appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rebecca Hirsch, an attorney, hereby certify that on this, the 25th day of November, 2014, I caused a copy of the forgoing **Defendant's Reply in Support of its Motion to Stay Enforcement of Court's Ruling Pending Appeal t**o be served via electronic notification on:

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