UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ATLANTIC SHOW PROMOTIONS, INC.,

Plaintiff,

v.

CITY OF TAMPA, et al.,

Defendants.

CASE No. 94-999-CIV-T-24(B)

REPORT AND RECOMMENDATION

In this case, the plaintiff Atlantic Show Promotions, Inc., seeks a preliminary injunction directed against the City of Tampa's refusal to rent it the Tampa Convention Center to put on a gun show.[1] The plaintiff's proposed use of the Convention Center is covered by the protection afforded to commercial speech by the First Amendment. Moreover, in light of a Florida statute that preempts the field of gun regulation, the City cannot show that its refusal to rent the Convention Center for gun shows materially advances a substantial municipal interest. Under these circumstances, the City's policy of not allowing gun shows in the Convention Center violates the First Amendment. Accordingly, I recommend that the plaintiff's Motion for Preliminary Injunction (Doc. 2) be granted.

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[1]The matter has been specifically referred for a report and recommendation (Doc. 7).

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I.

The Tampa Convention Center is a public facility that is owned and operated by the City of Tampa. The Mission Statement for the Convention Center explains (Doc. 1, Ex. A):

> The mission of the Tampa Convention Center is to be an economic catalyst for the City of Tampa. The Center is primarily designed to administer to and showcase international, national, regional and statewide conventions, tradeshows and meetings that generate significant economic impact to the City of Tampa and Hillsborough County community.
>
> The secondary purpose of the Tampa Convention Center is to administer to the cultural and social needs of the region and local community, by accommodating regional/local tradeshows, special events and entertainment functions.
>
> The facility also serves to promote business and enhance the quality of life for the community by being available as a venue for community functions and meetings.

Consistent with the Mission Statement, the Convention Center has been the site of a broad range of events, including gun shows. The plaintiff, in fact, presented a gun show at the Convention Center during November 20-23, 1993.

Because of the need to reserve dates in advance, a representative of the plaintiff spoke with an employee of the Convention Center on November 9, 1993, about three gun shows in 1994. The plaintiff was advised that the Convention Center would be available in 1994 for gun shows during April 14-17, June 2-5, and November 17-20.

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The director of the Convention Center, however, wrote to the plaintiff on February 16, 1994, to advise it that the City was declining the plaintiff's request to use the Convention Center for a gun and knife show "because the City, as the landlord of this facility, has determined that it is not in the City's best interest to license its facility for this type of event" (Doc. 1, Ex. E). The plaintiff answered with a letter that pointed out that the Florida Uniform Firearms Act prohibited any city or county from regulating firearms or ammunition (Doc. 1, Ex. F). Tampa's City Attorney replied that "by prohibiting the use of the Tampa Convention Center for gun shows, the City of Tampa is not regulating firearms or ammunition," and that "[c]ontrarily, the City has established a policy providing the appropriate uses for one of its owned facilities" (Doc. 1, Ex. H).

The plaintiff subsequently filed this lawsuit pursuant to 42 U.S.C. 1983, challenging on equal protection, due process and First Amendment grounds the City's refusal to permit it to use the Convention Center for a gun show. Along with the complaint, the plaintiff filed a motion for a preliminary injunction (Doc. 2). Following the submission of memoranda and other materials, oral argument was heard on the motion.

II.

A. A preliminary injunction may be issued when necessary "to protect the plaintiff from irreparable injury and

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to preserve the district court's power to render a meaningful decision after a trial on the merits." Canal Authority of State of Florida v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974). The remedy, however, is considered extraordinary and drastic. It may be granted only if the plaintiff clearly shows (1) a substantial likelihood that it will prevail on the merits; (2) a substantial threat that it will suffer irreparable injury if the injunction is not granted; (3) that its threatened injury outweighs the threatened harm the injunction may cause the opposing parties; and (4) that granting the injunction will not disserve the public interest. Id. at 572-573. The motion should ordinarily be denied if the plaintiff fails to meet its burden as to even one of the foregoing prerequisites. United States v. Jefferson County, 720 F.2d 1511, 1519-1520 n.21 (11th Cir. 1983).

B. As with most requests for a preliminary injunction, the primary focus here is on the factor regarding likelihood of success on the merits. On that point, the plaintiff argued at some length in its initial memorandum that this case involves political speech, which is, of course, an area at the core of First Amendment protection. That, however, is a false issue, at least with respect to the motion for a preliminary injunction. The plaintiff, obviously, would not be satisfied with a preliminary injunction that simply required the City to rent it the Convention Center so that political issues regarding gun control and related matters could be

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discussed. What the plaintiff wants (and undoubtedly needs for a profitable show) is the ability to put on an event at which gun transfers can be arranged. Thus, the issue presented by the preliminary injunction is whether the transactions at the gun show constitute speech that cannot be restricted by the City.

C. The parties agree that commercial speech is protected by the First Amendment. The City argued at the hearing, however, that transactions at the proposed gun show would not amount to commercial speech and, consequently, are not covered at all by the First Amendment. This argument is meritless.

In Board of Trustees of the State University of New York v. Fox, 492 U.S. 469 (1989), the New York university system sought to apply a ban on private commercial enterprises to prohibit in dormitory rooms what are commonly known as Tupperware parties. The Supreme Court concluded that "[t]here is no doubt that the ... 'Tupperware parties' the students seek to hold 'propose a commercial transaction' ..., which is the test for identifying commercial speech." Id. at 473-74. That test also establishes that the gun transactions that would occur at the proposed gun show would constitute commercial speech. Clearly, there is no meaningful difference for First Amendment purposes between the commercial transactions that were to take place at Tupperware parties in Fox and the

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commercial transactions that would take place at a November gun show.

D. Because the proposed gun show involves commercial speech, it is entitled to First Amendment protection, although that protection is less than that afforded to core political speech. As the Supreme Court recently reiterated, "[c]ommercial speech that is not false, deceptive, or misleading can be restricted, but only if the [government entity] shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy, ___ U.S. ___, 114 S.Ct. 2084, 2088 (1994). In this case, the City has failed to make the required showing since it cannot demonstrate that its restriction on gun shows in the Convention Center "directly and materially advances a substantial state interest."

The City would have a solid argument in support of its position if it could assert that its restriction on gun shows advances a City policy on gun control. See Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986). That argument, however, is foreclosed by Florida's Uniform Firearms Act (more precisely, the "Joe Carlucci Uniform Firearms Act"). Fla. Stat. §790.33. That statute provides in pertinent part:

> (1) **Preemption.** -- Except as expressly provided by general law, the Legislature

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> hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or regulations relating thereto....
>
> . . .
>
> (3) **Policy and intent.** --
>
> (a) It is the intent of this section to provide uniform firearms laws in the state; to declare all ordinances and regulations null and void which have been enacted by any jurisdictions other than state and federal, which regulate firearms, ammunition, or components thereof; to prohibit the enactment of any future ordinances or regulations relating to firearms, ammunition, or components thereof unless specifically authorized by this section or general law; and to require local jurisdictions to enforce state firearms laws.

In light of the Uniform Firearms Act, the City Attorney in her letter to the plaintiff expressly stated that the City's policy not to permit gun shows at the Convention Center "does not attempt to regulate firearms or ammunition" (Doc. 1, Ex. H). Consistent with this letter, the City's memorandum does not seek to sustain the Convention Center restriction on the ground that it substantially advances the City's interest in regulating guns.

Having been denied by state law the best contention that could be made in support of its policy, the City has been hard-pressed to find a persuasive substitute. At the hearing, the City's counsel argued that the holding of gun shows would

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cast a bad light upon the Convention Center. Significantly, counsel did not allege, and certainly did not attempt to show, that the Convention Center, as a consequence, would lose revenue.[2] The essence of the City's argument is simply that gun shows will diminish the reputation, or stature, of the Convention Center.

The City cannot sustain its restriction on gun shows on the ground that it is advancing a substantial governmental interest by seeking to prevent damage to the Convention Center's reputation. In the first place, it is completely speculative to think that the Convention Center's reputation will be damaged merely because one of the events at the facility was a gun show. As the Supreme Court again said in Ibanez, supra, 114 S.Ct. at 2089, "'mere speculation or conjecture' will not suffice; rather the [government entity] 'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'"

Furthermore, even if there were a basis for thinking that gun shows would somehow diminish the image of the Convention Center, a prohibition on gun shows in order to maintain the image would not amount to a "substantial" City interest. Surely, a desire to prevent some vague, ill-defined

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[2]Conceivably, the City was implying that the Convention Center would lose revenue from other patrons if it conducted gun shows. If that was the City's argument, it should have explicitly said so. More important, it would have to support that argument with evidence.

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harm based upon perceived reactions to gun shows by some members of the public is not an interest of sufficient weight to override the First Amendment's protection of commercial speech.

For these reasons, the plaintiff has made a very strong showing that it is likely to succeed on the merits of its First Amendment claim.

III.

In order to obtain a preliminary injunction, the plaintiff, of course, must also satisfy the three equitable considerations that are part of the test for such relief. In this case, the necessary showing has been made.

To establish irreparable injury, the plaintiff points to the well-settled principle that "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). See also Cheffer v. McGregor, 6 F.3d 705, 711 (11th Cir. 1993); Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. 1981). The City's only response on this point is that the plaintiff's proposed conduct is not protected by the First Amendment. That contention, however, has previously been rejected.

The injury to the plaintiff from the City's policy, moreover, would outweigh any injury to the City that would result from the issuance of a preliminary injunction. Indeed, there is no demonstrable injury to the City from the scheduling

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of gun shows. Significantly, the City does not even argue this point.

Similarly, the City does not assert that the issuance of a preliminary injunction will disserve the public interest. This is understandable since ordinarily the vindication of First Amendment rights advances the public interest. There is no basis for a different conclusion here.

IV.

The plaintiff, in sum, has met all of the requirements for a preliminary injunction. It has made a very strong showing that it will likely prevail on the merits. Moreover, all of the equitable considerations favor the plaintiff. Accordingly, I recommend that the plaintiff's Motion for Preliminary Injunction (Doc. 2) be granted, and that the defendants be required to make the Tampa Convention Center available to the plaintiff under the same standards and terms that the Convention Center is made available to other organizations.

Respectfully submitted,

THOMAS G. WILSON
UNITED STATES MAGISTRATE JUDGE

DATED: AUGUST 5, 1994

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report within

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ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. 28 U.S.C. 636(b)(1).

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