

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

10 FEB -1 PM 3: 59

DONALD R. DENNY, JOHN R. DOSTER,
JERRY L. DOWNS, KENNETH H. HOOD,
ROBERT A. JENKINS, ROBERT N. LANÉ,
DWIGHT McCART, MARY KAY M. PAYNE,

TOM LAWLER, CLERK

PLAINTIFFS,

vs.

~~PLAINTIFF~~

CIVIL ACTION
FILE NO. 09-A-11566-2

~~vs.~~

CITY OF SNELLVILLE, JERRY OBERHOLTZER,
INDIVIDUALLY AND IN HIS CAPACITY OF MAYOR,
KELLY KAUTZ, TOD WARNER, TOM WITTS,
BARBARA BENDER AND MIKE SABBAGH, INDIVIDUALLY
AND IN THEIR CAPACITIES AS COUNCIL MEMBERS,
AND RUSSELL TREADWAY, INDIVIDUALLY AND IN HIS
CAPACITY OF CITY MANAGER

Defendants

FINAL ORDER:

1. **GRANTING PERMANENT INJUNCTIVE RELIEF AGAINST THE CITY OF SNELLVILLE PROHIBITING THE IMPLEMENTATION OF AND/OR OPERATION OF CITY OF SNELLVILLE ORDINACE 2009-14 WHICH PROVIDES FOR SUNDAY SALES OF ALCOHOL BEVERAGES AND EXTENDED HOURS OF SALES**
2. **GRANTING WRIT OF MANDAMUS AGAINST THE CITY OF SNELLVILLE AND AGAINST CITY OF SNELLVILLE MAYOR JERRY OBERHOLTZER, AND AGAINST CITY OF SNELLVILLE COUNCIL MEMBERS: KELLY KAUTZ, TOD WARNER, TOM WITTS, BARBARA BENDER AND MIKE SABBAGH, AND AGAINST CITY MANAGER RUSSELL TREADWAY, HEREBY COMPELLING SAID INDIVIDUALS TO TAKE WHATEVER ACTIONS NECESSARY TO PROMPTLY REDEEM, VOID, VACATE AND/OR RECALL ANY AND ALL**

**LICENSES, PERMITS, AND/OR AUTHORIZATIONS ISSUED BY THE CITY OF
SNELLVILLE IN ACCORDANCE WITH CITY OF SNELLVILLE ORDINANCE
2009-14.**

On or about December 28, 2009, the above referenced case came before the Court for hearing on the *Plaintiff's Motion for Emergency Temporary Restraining Order*, docketed December 23, 2009, and after proper notice to all parties, Plaintiff and Defendant appeared and were represented by counsel, and after hearing argument and upon consideration of the case, the Court issued *Emergency Restraining Order and Notice*, docketed December 28, 2009, attached hereto as Exhibit "A", and *First Amendment To Emergency Restraining Order and Notice, with attachments*, docketed December 28, 2009, and attached hereto as Exhibit "B", and same are incorporated herein by reference and are hereby made a part of this order.

On or about January 27, 2010, the above referenced case came before the Court for hearing on whether or not to make the Emergency Restraining Order an interlocutory injunction that would govern the parties until a final hearing could be had. Plaintiff and Defendant appeared, presented by counsel, and a complete hearing was had. After hearing evidence and advocacy from Counsel, and upon consideration of the case, the Court makes the following findings of fact and conclusions of fact and law:

On or about January 13, 2010, Plaintiff filed its *Motion for Order Advancing Trial on Merits and Consolidating Trial with Hearing on Interlocutory Injunction*, and, conversely, on or about January 26, 2010, Defendant filed its *Objection to Consolidate of Interlocutory Injunction with Trial on the Merits*. Oral argument was had before the Court. Defendant argues several Georgia cases that would seem to support the Defense's view that the Court cannot advance trial on the merits and consolidate trial with hearing on interlocutory injunction absent agreement of all parties, however, said

cases provided by the Defense do not cite and/or reference O.C.G.A. § 9-11-65(a)(2), the statute at issue, and therefore, said case law is not controlling and/or persuasive on the Court. Rather, the statute itself, provides guidance on this issue and the Court finds that consolidation is discretionary and the Court hereby orders same. As such, the Court entered the following orders:

1. *Order Denying Defendants' Objection to Consolidation of Interlocutory Injunction with Trial on the Merits*, docketed January 28, 2009, and attached hereto as Exhibit "C"; and
2. *Order Advancing Trial on Merits and Consolidating Trial with Hearing on Interlocutory Injunction*, docketed January 28, 2009, and attached hereto as Exhibit "D".

The *Orders* referenced herein immediately above are incorporated herein by reference and are hereby made a part of this order.

Defendant further argued that the underlying case should be dismissed because the Plaintiff's didn't correctly file and serve Georgia's Attorney General concerning the Plaintiff's alleged challenge to the constitutionality of O.C.G.A. § 3-3-7. The Court never reached this issue as the constitutionality or lack thereof was not the underlying legal basis for the Court's *Emergency Restraining Order*. As such, the constitutionality or lack thereof, of O.C.G.A. § 3-3-7 is not material to the Court's rulings, and, as such, said issue is not reached herein. Further, Defendant's argument was not advanced because of the materiality of the constitutionality of the statute to the City's position, but rather, Defendant advanced a purely technical argument based on the Plaintiff's failure to serve Georgia's Attorney General with notice of this action. As such, the constitutionality of the statute at issue has no bearing on how the City interpreted the statute and/or applied the statute to its governance, and said issue is not reached herein.

Defendant orally motioned the Court to dismiss the Plaintiff's case because of the lack of a "certified" copy of the ordinance at issue being attached to the original pleading. This issue was waived by the Defendant since the Defendant did not bring this issue up at the parties' December 28, 2009, emergency hearing, which would have been the appropriate and proper time to challenge this issue. Alternatively and additionally, the "certified" copy of the ordinance at issue is not material as Georgia is a "notice" pleading state and the Defendant was clearly on notice, actual notice (at hearing) that the ordinance was being challenged. As such, Defendant's Motion to Dismiss the Plaintiff's Complaint for failure to attach a "certified" copy of the ordinance at issue is hereby **DENIED**.

City of Snellville Ordinance No. 2009-14, enacted by Defendants, allows for the licensing and regulation of Sunday sales of alcoholic beverages for consumption on the premises. The passage of said Ordinance was not conditioned upon approval in a referendum election pursuant to O.C.G.A. § 3-3-7(j); rather, said Ordinance was enacted solely pursuant to O.C.G.A. § 3-3-7(l).

The issue presented in this case is whether a municipality located within a county with a population of 160,000 persons or greater must comply with the provisions of O.C.G.A. § 3-3-7(j), requiring a public referendum before passing an ordinance authorizing the licensing and regulating the Sunday sales of alcohol for consumption on the premises, or whether O.C.G.A. § 3-3-7(l) allows such a municipality to circumvent the requirements of O.C.G.A. § 3-3-7(j) and pass an ordinance without a referendum.

O.C.G.A. § 3-3-7(j)(1) provides that: Notwithstanding any other provisions of law, in all counties or municipalities in which the sale of alcoholic beverages is lawful for consumption on the premises, the governing authority of the county or municipality may, by resolution or ordinance conditioned on approval in a referendum, authorize the sale

of alcoholic beverages for consumption on the premises on Sundays from 12:30 P.M. until 12:00 Midnight. (*Emphasis supplied by the Court.*)

Moreover, O.C.G.A. § 3-3-7(j)(2) provides that: Any governing authority desiring to permit and regulate Sunday sales pursuant to this subsection, but only after a referendum election, shall so provide by proper resolution or ordinance conditioned on a referendum . . . If more than one-half of the votes cast on the question are for approval of Sunday sales, the governing authority may by appropriate resolution or ordinance permit and regulate Sunday sales by licensees. Otherwise, such Sunday sales shall not be permitted. (*Emphasis supplied by the Court.*)

Thus, by the clear and unambiguous language of O.C.G.A. § 3-3-7(j), a municipality may only authorize the Sunday sales of alcoholic beverages for consumption on the premises after a proper referendum election has been held and the residents of the municipality have voted in favor of the proposed ordinance or resolution.

Defendants, however, posit that O.C.G.A. § 3-3-7(l) provides an alternative means by which a municipality may authorize Sunday sales. The preambulatory language of O.C.G.A. § 3-3-7(l) provides as follows: In all counties having a population of 160,000 or more according to the United States decennial census of 1980 or any future such census in which the sale of alcoholic beverages is lawful and in all municipalities within such counties in which the sale of alcoholic beverages is lawful, the governing authority of the county or municipality, as appropriate, may authorize the sale of alcoholic beverages for consumption on the premises.

Moreover, O.C.G.A. § 3-3-7(l)(3) provides that: The provisions of this subsection are in addition to or cumulative of and not in lieu of any other provisions of this title granting certain authority to a county or municipality relative to the sale of alcoholic beverages for consumption on the premises. (*Emphasis supplied by the Court.*)

It is Defendants' contention that O.C.G.A. § 3-3-7(l) provides an alternative means by which a municipality may enact an ordinance allowing for the licensing and regulation of Sunday sales and that it was the intent of the General Assembly to allow municipalities in counties with populations greater than 160,000 persons to pass ordinances allowing Sunday sales without a referendum election. Defendants' have cited no authority in support of this position. Further Defendant can point to no city in the state of Georgia that has followed this specific code subsection and/or can point to no city in the state of Georgia that has allowed Sunday alcohol sales without a voter referendum approving same.

This Court rejects Defendants' interpretation of O.C.G.A. § 3-3-7(j) and (l) as not in conformity with Georgia law. By the clear and unambiguous language of O.C.G.A. § 3-3-7(j), a municipality may only pass an ordinance authorizing the licensing and the regulation of Sunday sales of alcohol if said ordinance is conditioned upon approval in a referendum election. The City's failure to have a referendum on the issue disenfranchised its voters and deprived them of the opportunity to express their desire on the issue. O.C.G.A. § 3-3-7(l) merely provides restrictions upon how a municipality, through such an ordinance, may regulate Sunday sales once approved in a referendum election.

If, as Defendants contend, O.C.G.A. § 3-3-7(l) provides an alternative means to the requirements of O.C.G.A. § 3-3-7(j), then the mandatory language of O.C.G.A. § 3-3-7(j) would be rendered meaningless. However, it is a well-settled canon of Georgia statutory construction that all statutes must be interpreted "in pari materia, and reconcile[d], if possible, so that they may be read as consistent and harmonious with one another." Washington v. Harrison, 299 Ga. App. 335 (2009); City of LaGrange v. Ga. Public Svc. Comm., 296 Ga. App. 615 (2009). This Court is under no duty to entertain

“a construction of a statute which will result in unreasonable consequences or absurd results not contemplated by the legislature.” Haugen v. Henry County, 277 Ga. 743 (2004).

Thus, in construing O.C.G.A. § 3-3-7(j) and (l) together, this Court finds that O.C.G.A. § 3-3-7(j) requires that any ordinance, whether passed in accordance with the restrictions of O.C.G.A. § 3-3-7(l) or not, must first be conditioned upon approval in a referendum election.

In the instant case, Defendants’ passage of the ordinance allowing for Sunday sales was unlawful, and by doing so Defendants have disenfranchised the residents of the City of Snellville and have denied the residents their lawful right to approve or reject sales of alcohol on Sunday.

Although the Court disagrees with the City’s interpretation of O.C.G.A. § 3-3-7, and the Court further disagrees with the City’s position and posture taken on O.C.G.A. § 3-3-7, the Court does herein find that the City’s issue before the Court was, in fact, justiciable, and said issue was not asserted by the Defendants to harass and/or delay the Plaintiff in their cause of action, and/or the City’s position was not advanced for the purposes of needlessly expanding the litigation.

PERMANENT INJUNCTION

The City of Snellville is hereby permanently prohibited and permanently enjoined from the implementation of and/or the operation of City of Snellville Ordinance 2009-14 which provides for Sunday sales of alcohol beverages and extended hours of said sales as said ordinance is void and illegal as a matter of law.

WRIT OF MANDAMUS

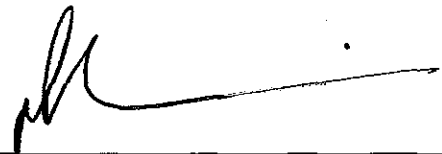
O.C.G.A. § 9-6-20 provides that, "whenever, from any cause, a defect of legal justice would ensue from . . . improper performance [of an official duty], the writ of mandamus may issue to compel a due performance if there is no other specific legal remedy for the legal rights." Here, Defendants have passed an illegal and void ordinance authorizing the licensing and regulation of Sunday sales of alcohol for consumption on the premises. Accordingly, the Court hereby issues a *Writ of Mandamus* against the City of Snellville and against the City of Snellville's Mayor Jerry Oberholtzer, and against the City of Snellville Council Members: Kelly Kautz, Tod Warner, Tom Witts, Barbara Bender and Mike Sabbagh, and against Snellville City Manager Russell Treadway, hereby compelling said individuals to take whatever actions necessary to promptly redeem, void, vacate and/or recall any and all licenses, permits, and/or authorizations issued by the City of Snellville in accordance with City of Snellville Ordinance 2009-14.

HEREIN FAIL NOT.

SO ORDERED, this 1 day of Feb , 2010.

NUNC PRO TUNC 01-27-2010

MARK A. LEWIS, JUDGE
Residing by Designation



THE HONORABLE MARK A. LEWIS
Superior Court of Gwinnett County
By Designation

cc: Michael J. Williams, Esq., *Counsel for Defendants*
G. Richard Stepp, Esq., *Counsel for Plaintiffs*
any and all Attorneys of Record
any and all Parties of Record not presented by Counsel