

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR LAKE COUNTY, FLORIDA

FLORIDA CARRY, INC., a Florida Not For
Profit Corporation,

Plaintiff,

vs.

CASE NO. 2012 - CA - 001001
Division

CITY OF LEESBURG, FLORIDA, a
political subdivision of the State of Florida,
and JAY EVANS, City Manager of the City
of Leesburg, Florida,

Defendant.

_____ /

ANSWER AND AFFIRMATIVE DEFENSES TO
FIRST AMENDED COMPLAINT

Defendants hereby respond to the First Amended Complaint and state:

1. Paragraphs 1 and 2 are admitted.
2. In response to Paragraph 3, Defendants admit Florida Carry is the Plaintiff but are without knowledge of any other allegations in Paragraph 3.
3. Paragraph 4 is admitted.
4. In response to Paragraph 5, Defendants admit Jay Evans is named as a Defendant in this action but deny the balance of Paragraph 5 and state that Jay Evans has not been the City Manager of the City of Leesburg since January, 2013, and no longer resides within the State of Florida.
5. Paragraphs 6 and 7 are admitted.
6. In response to Paragraph 8, Defendants admit Florida Carry is the named Plaintiff but are without knowledge of the remaining allegations in Paragraph 8.

7. Defendants are without knowledge of the allegations of Paragraph 9.
8. Paragraph 10 is denied in that neither Plaintiff's members nor anyone else is adversely affected by the ordinance challenged because it has been repealed, and documentation establishing that repeal has been filed with the Court.
9. Paragraph 11 is admitted.
10. In response to Paragraph 12, Defendants deny that Sanna Henderson is the Mayor of Leesburg, but admit the balance of the allegations in Paragraph 12.
11. Paragraph 13 is admitted.
12. Paragraph 14 is denied.
13. Paragraph 15 is denied inasmuch as Jay Evans is no longer City Manager of Leesburg.
14. Paragraphs 16, 17 and 18 are denied.
15. Paragraph 19 is denied, the referenced ordinance has been repealed and is no longer in force.
16. Paragraph 20 is admitted.
17. Paragraphs 21 and 22 are denied.
18. Paragraphs 23 through 25 are admitted.
19. In response to Paragraph 26, Defendants admit their responses to Paragraphs 1 through 25 as set forth above.
20. Paragraph 27 is admitted.
21. Defendants are without knowledge of the allegations of Paragraphs 28, 29 and 30.

22. Paragraphs 31 is denied; the subject ordinance has been repealed, was not enforced prior to its repeal, and was adopted many years prior to enactment of §790.33 meaning its adoption did not violate that statute because it predated the statute.

23. Paragraphs 33, 34 and 35 are admitted insofar as they quote or paraphrase accurately the language of §790.33 but are otherwise denied.

24. Paragraph 36 is denied.

25. Paragraphs 37 and 38 are denied inasmuch as the referenced ordinance is not in effect due to its repeal, and thus cannot be declared to violate any other legal provision.

26. Paragraph 39 is admitted.

27. Defendants are without knowledge of the allegations of Paragraphs 40 and 41.

28. In response to Paragraph 42, Defendants admit their responses to Paragraphs 1 through 25 as set forth above.

29. In response to Paragraph 43 Defendants deny that this action lies against the City Manager because the individual alleged to be the City Manager is not in fact the City Manager, the balance of Paragraph 43 is admitted.

30. Paragraphs 44 through 48 are denied, because the referenced ordinance has been repealed, is no longer in force, and thus cannot be enforced, rendering the relief sought moot.

31. Paragraph 49 is admitted.

32. Paragraph 50 is denied as moot since there is nothing to be enjoined insofar as the City's ordinances are concerned.

33. Defendants are without knowledge of the allegations of Paragraphs 51 and 52.

34. In response to Paragraph 53, Defendants admit their responses to Paragraphs 1 through 25 as set forth above.

35. Paragraph 54 is admitted.

36. Paragraph 55 is denied.

37. Defendants admit that Evans sent the referenced e – mail while he was serving as City Manager, a position he no longer holds.

38. Paragraph 57 is admitted.

39. In response to Paragraph 58, Defendants admit it would not be possible for Plaintiff to prove compensatory damages because no one suffered damages resulting from the facts alleged in the Amended Complaint; Defendants are without knowledge of the balance of the allegations in Paragraph 58 and further state that those remaining allegations are inappropriate because they constitute legal argument rather than a statement of ultimate fact supporting Plaintiff's claim.

40. Paragraph 59 is admitted.

41. Defendants are without knowledge of the allegations of Paragraphs 60 and 61.

FIRST AFFIRMATIVE DEFENSE

42. §15 – 3 of the Leesburg Code Of Ordinances has been repealed and is no longer in effect, thus the relief sought is moot.

SECOND AFFIRMATIVE DEFENSE

43. §15 – 3 of the Leesburg Code of Ordinances was contained in the 1953 version of the Code and has not been amended, re – enacted or otherwise changed in any manner since its initial adoption prior to the year 1953, nor since §790.33 took effect.

44. §790.33 by its own terms declares existing ordinances which, if promulgated after its effective date would violate its provision, to be null and void.

45. Plaintiffs do not allege ultimate facts establishing that Defendants promulgated §15 – 3 after that act would have been prohibited by §790.33, or that Defendants have, at any time since the effective date of §790.33, enforced or attempted to enforce §15 – 3 of the Leesburg Code.

46. The Legislature has already nullified §15 – 3 of the Leesburg Code by enacting §790.33, thus this action is moot and should be dismissed.

THIRD AFFIRMATIVE DEFENSE

47. §790.33 neither expressly, nor by implication, mandates that local governments repeal ordinances existing on its effective date, which would violate statute if enacted after its effective date.

48. Instead, §790.33 is self executing with respect to existing ordinances by declaring them null and void.

49. §15 – 3 of the Leesburg Code of Ordinances was enacted many years prior to the effective date of §790.33 and was a lawful legislative act of the City of Leesburg at the time it was promulgated.

50. Defendants have not attempted to enforce §15 – 3 since the effective date of §790.33 nor have they threatened to do so.

51. Defendants thus have not in any way violated the terms of §790.33 and Plaintiff should take nothing by this action.

FOURTH AFFIRMATIVE DEFENSE

52. §790.33(3)(f) grants standing to enforce the statute, to “an organization whose membership is adversely affected by any ordinance, regulation, measure, directive, rule,

enactment, order, or policy *promulgated or caused to be enforced* in violation of this section . . .”
[emphasis added].

53. As noted above, §15 – 3 of the Leesburg Code of Ordinances was not “promulgated” in violation of §790.33 because its promulgation occurred many years before that statute took effect, when such promulgation was a lawful act of the City of Leesburg.

54. Defendants have not caused §15 – 3 to be enforced since §790.33 took effect because they recognize that §790.33 by its own, self executing terms, declared §15 – 3 to be null and void.

55. As a result, Plaintiff lacks standing to bring this action.

PRAYER FOR ATTORNEYS’ FEES

56. Defendants have served on Plaintiff a proposed motion under §57.105, Fla. Stat., to withdraw this action for the reasons stated in the proposed motion, and if Plaintiff fails to do so, Defendants pray for an award of their reasonable attorneys’ fees under §57.105.

WHEREFORE, Defendants pray that Plaintiff take nothing by this action and that Defendants be awarded the costs of this action and their reasonable attorneys’ fees.

/s/ Fred A. Morrison
FRED A. MORRISON, of
McLin & Burnsed P.A.
Post Office Box 491357
Leesburg, Florida 34749 - 1357
(352) 787 - 1241
FAX (352) 326 - 2608
E - Mail: fredm@mclinburnsed.com
Fla. Bar No. 284823
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Mail on this 19th day of September, 2013, to Eric J. Friday, of Fletcher & Phillips, efriday@fletcherandphillips.com, and J. Patrick Buckley, III, buckley@jpbcsq.com.

/s/ Fred A. Morrison
FRED A. MORRISON