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FINAL ORDER

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

COPY

STANLEY HAMBRICK,
Plaintiff,

v.

KASIM REED in his official capacity as MAYOR OF THE CITY OF ATLANTA and GEORGE N. TURNER, in his official capacity as CHIEF OF THE ATLANTA POLICE DEPARTMENT,
Defendants.

CIVIL ACTION FILE NO:

2013CV235965

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DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ORDER

On September 30, 2013, this matter came before the Court for a hearing on Plaintiff's PETITION FOR A WRIT OF MANDAMUS. After the hearing, but prior to this Court issuing an Order in the matter, Plaintiff filed a MOTION FOR INJUNCTIVE RELIEF and Defendants filed a MOTION TO STAY THE PROCEEDINGS PENDING IMMINENT LEGISLATIVE ACTION. On October 3, 2013, the Court conducted a hearing on both motions. Having considered the record, the briefs and arguments of the parties, and the applicable law, the Court hereby DENIES Defendants' MOTION TO STAY THE PROCEEDINGS PENDING IMMINENT LEGISLATIVE ACTION, GRANTS Plaintiff's PETITION FOR A WRIT OF MANDAMUS, and DENIES Plaintiff's MOTION FOR INJUNCTIVE RELIEF.

As an initial matter, Defendants' motion to stay these proceedings is premised on the effect of a proposed ordinance that is to be voted on by the Atlanta City Council. The Court finds no legal authority for staying the proceedings and DENIES Defendant's Motion to Stay.[1]

[1] According to Defendants' MOTION TO STAY THE PROCEEDINGS PENDING IMMINENT LEGISLATIVE ACTION, the applicable wording of the proposed ordinance is as follows: "[T]he version of Chapter 30, Article XXIII, existing prior to the approval of 08-O-1220, and which was lawfully repealed thereby, remains repealed and without any effect." (Defs.' Mot. Stay Proceedings Pending Imminent Legislative Action 4). The Court notes that even if there was legal authority for staying the proceedings, the language of the proposed

The central issue in this matter is the status of Article XXIII of Chapter 30 of the Code of Ordinances of the City of Atlanta ("Article XXIII")—the city's public property vending ordinance. On September 2, 2008, the Atlanta City Council passed Atlanta City Ordinance No. 08-O-1220 ("Ordinance 08-O-1220"), which repealed the existing vending ordinance and replaced it with a new version of Article XXIII. On December 21, 2012, in a separate case before this Court, Ordinance 08-O-1220 was found unconstitutional and held to be "void and without effect." Miller v. City of Atlanta, No. 2011CV203707 (Ga. Super. Ct. 2012).[2] Defendants contend that even though Ordinance 08-O-1220 was found to be unconstitutional, the repeal of the prior version of Article XXIII survived. (Defs.' Resp. Opp'n to Pl.'s Pet. Writ Mandamus 6–9). Therefore, according to the Defendants, the prior version of Article XXIII "remains repealed," leaving the city with no public property vending ordinance in place. (Defs.' Resp. Opp'n to Pl.'s Pet. Writ Mandamus 9).

In Georgia, the rule regarding statutes that contain repealing clauses has been stated as follows:

> In cases in which statutes containing repealing clauses have been held to be unconstitutional, the general rule is that the clause containing the repeal is incidental to the rest of the statute, and that if the latter is invalid, the clause containing the repeal will likewise be deemed invalid, leaving the prior general law unrepealed.

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ordinance would not moot this action nor would it have any effect on this Order or the findings herein.

[2] During oral argument, Defendants objected to the introduction of the applicable ordinances. Under the new Georgia evidence rules, municipal ordinances have to be authenticated under O.C.G.A. § 24-9-920 or O.C.G.A. § 24-2-221. Additionally, the Court cannot take judicial notice of municipal ordinances. Fulton Greens Ltd. P'ship v. City of Alpharetta, 272 Ga. App. 459, 461 n.9, 612 S.E.2d 491, 493 n.9 (2005) ("[J]udicial notice can[]not be taken by the superior court . . . of city or county ordinances, . . ." (internal quotation marks omitted)). However, a trial court my take judicial notice of documents, records, or pleadings on file with the same court, even if they are not from the same case. E.g., In re S.H.P., 243 Ga. App. 720, 722, 534 S.E.2d 161, 164 (2000); NationsBank N.A. (S.) v. Tucker, 231 Ga. App. 622, 500 S.E.2d 378 (1998). The municipal ordinances at issue in this matter were all part of the record in the Miller case that was previously before this Court. Thus, the Court can take judicial notice of the ordinances.

Fid. & Cas. Co. of N.Y. v. Whitehead, 114 Ga. App. 630, 634, 152 S.E.2d 706, 710 (1966); see also Sullivan v. Johnson, 189 Ga. 778, 786, 7 S.E.2d 900, 904 (1940) ("An Ordinance which has been duly adjudicated to be unconstitutional should thenceforth be treated as wholly void and inoperative for any purpose."); McCants v. Layfield, 149 Ga. 231, 231, 99 S.E. 877, 878 (1919) ("The general rule is that, where an act of the General Assembly which repeals any part of parts of a prior statute upon the same general subject is itself repealed, such repeal operates to restore to efficacy as law the provision or provisions of the prior repealed statute."). Defendants point to other language in Fidelity and Casualty, where the Court of Appeals further explained that "the question in every case is whether the legislature intended that the repeal should take effect in any event—that is, whether the repeal provision is severable." Fidelity & Cas., 114 Ga. App. at 634, 152 S.E.2d at 710. This severability issue was effectively decided in Miller, where the Court found Ordinance 08-O-1220, in its entirety, to be "void and without effect." Miller, No. 2011CV203707, slip op. at 3. Thus, because Ordinance 08-O-1220—which contained an express repeal of the prior version of Article XXII—was found unconstitutional in its entirety, Article XXIII as it existed prior to the date of the passage of Ordinance 08-O-1220 was not repealed and remains in effect.

Turning to the mandamus petition, the Georgia Supreme Court has said that "[m]andamus is a harsh remedy and ought not be granted unless a defect in legal justice would ensue from failure to grant it." Lansford v. Cook, 252 Ga. 414, 414, 314 S.E.2d 103, 104 (1984). The Official Code of Georgia Annotated provides: "All official duties should be faithfully performed, and whenever, from any cause, a defect of legal justice would ensue from a failure to perform or from improper performance, the writ of mandamus may issue to compel a due performance if there is no other specific legal remedy for the legal rights . . . ." O.C.G.A. § 9-6-20. "Where the question is one of public right and the object is to procure the enforcement of a public duty, no legal or special interest need be shown, but it shall be sufficient that a plaintiff is interested in having the laws executed and the duty in question enforced." O.C.G.A. § 9-6-24. In determining whether a party is entitled to a writ of mandamus, Georgia Courts have developed a two prong test: "(1) the applicant must demonstrate a clear legal right to the relief sought, and (2) there must be no other adequate remedy." E.g., Humphrey v. Owens,

289 Ga. 721, 722, 715 S.E.2d 119, 120 (2011) (quoting Carnes v. Crawford, 246 Ga. 677, 678, 272 S.E.2d 690 (1980)).

Plaintiff has standing to bring this action in order to "procure the enforcement of a public duty"—that of having vending permit applications accepted and reviewed in accordance with a lawful ordinance. See, e.g., Bankers Life & Cas. Co. v. Cravey, 208 Ga. 682, 688 69 S.E.2d 87, 91 (1952) (holding, in a mandamus action brought by a business owner, that the Insurance Commissioner was required to follow the law in the review and issuance of business licenses). In assessing whether a petitioner has a "clear legal right" to mandamus relief, the Georgia Supreme Court has said, "Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary." Smith & Wesson Corp. v. City of Atlanta, 273 Ga. 431, 433, 543 S.E.2d 16, 19-20 (2001). Conversely, "[W] here the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." Id. at 433, 543 S.E.2d at 20. Here, Article XXIII falls into the former category. No discretion is given in Article XXIII to deny public property vending permits. In fact, the word "shall," which is "generally construed as a word of mandatory import," O'Donnell v. Durham, 275 Ga. 860, 861, 573 S.E.2d 23, 26 (2002), appears in multiple places throughout Article XXIII. For example, Section 30-1427, titled "Types and classifications of vending permits," states: "(a) Six types of vending permits *shall* be issued by the city as follows: (1) Street Vending." Atlanta, Ga., Code of Ordinances ch. 30, art. XXIII, § 30-1427 (emphasis added). Section 30-1429, titled "Site selection process," states: (a) Completed applications for the permits required under this division, together with the nonrefundable application fee, *shall* be accepted by the department of police license and permit section on the announced dates on a first come, first served basis." Atlanta, Ga., Code of Ordinances ch. 30, art. XXIII, § 30-1429 (emphasis added). Tellingly, Section 30-1434, titled "Grounds for denial, revocation and suspension of vendor permits" contains multiple, specific grounds for the denial of a permit, but none of these grounds grant discretion in the acceptance or issuance of vending permits to Defendants. Atlanta, Ga., Code of

Ordinances ch. 30, art. XXIII, § 30-1434. The Court finds that Article XXIII is ministerial and nondiscretionary and that Plaintiff has a clear legal right to the relief sought.

The second prong of the test requires that there be no other adequate remedy for the petitioner to pursue. Here, Article XXIII provides no alternative remedy or appeal process for a vendor that is denied a permit. Dean v. Gober, 272 Ga. 20, 22, 524 S.E.2d 722, 724 (1999) ("[T]he forfeiture statute itself provides no remedy for a public official's failure to comply with [the mandated duty]. Therefore, the lack of a specific legal remedy was sufficiently shown."). Furthermore, this is not a situation where Plaintiff has some other special remedy to pursue such as in a challenge to a judicial or quasi-judicial ruling, Anderson v. McMurray, 217 Ga. 145, 150, 152, 121 S.E.2d 22, 26, 27 (1961) (finding that mandamus does not lie where public officials sit in a "quasi-judicial capacity" and that "the writ of certiorari would lie for correction of any errors"), or in a proceeding that would be properly handled via a habeas corpus petition, Daker v. Ray, 275 Ga. 205, 206, 563 S.E.2d 429, 430 (2002) (stating that mandamus was "inappropriate" where a petitioner was seeking relief from a term of confinement and that the "exclusive remedy is a petition for a writ of habeas corpus"). The Court therefore finds that there is no other adequate legal remedy for Plaintiff to pursue and that mandamus should be granted.

Lastly, Plaintiff has also moved for the Court to issue an injunction "ordering Defendants to issue vending permits to qualified applicants immediately upon the issuance of this Court's order" and "preventing Defendants or their agents from arresting, fining, forcing to vacate, or confiscating the goods of any person who was 1) permitted to vend on public property in 2012, and 2) resumes operating at the vending locations to which they were assigned during that year." (Pl.'s Mot. Injunctive Relief 2–3). "The granting and continuing of injunctions shall always rest in the sound discretion of the judge, according to the circumstances of each case. This power shall be prudently and cautiously exercised and, except in clear and urgent cases, should not be resorted to." O.C.G.A. § 9-5-8. The Court hereby DENIES Plaintiff's Motion for Injunctive Relief.

It is hereby ORDERED that Plaintiff's Petition be granted and that a mandamus absolute be granted. Defendants are hereby ORDERED to accept, review, and process applications for vending permits according to Article XXIII of Chapter 30 of the Code of Ordinances of the City of Atlanta as it existed prior to the date that Atlanta City Ordinance No. 08-O-1220 was passed.

SO ORDERED this the 8th day of Oct., 2013.

SHAWN ELLEN LaGRUA, JUDGE
Fulton County Superior Court
Atlanta Judicial District

Distributed via electronic mail only to:

Yasha Heidari, Esq.	yasha@heidariplank.com
Robert Frommer, Esq.	rfrommer@ij.org
Robert Gall, Esq.	bgall@ij.org
Amber Robinson, Esq.	arobinson@atlantaga.gov