THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH

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NOTICE OF DECISION

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Case Name: **UNIVERSITY SYSTEM OF NEW HAMPSHIRE v Bradley Jardis, et al**
Case Number: **215-2011-CV-00553**

Enclosed please find a copy of the court's order of January 09, 2012 relative to:

Ex Parte Request for Preliminary Relief

January 10, 2012

David P. Carlson
Clerk of Court

(468)

C: Donald Lee Smith, ESQ; Joshua M. Wyatt, ESQ; Seth J. Hipple, ESQ

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. SUPERIOR COURT

University System of New Hampshire

v.

Bradley Jardis and Tommy Mozingo

Docket No. 11-C-553

ORDER

The petitioner, the University System of New Hampshire, petitioned the Court for an *ex parte* temporary restraining order and preliminary and permanent injunctive relief against the respondents, Bradley Jardis and Tommy Mozingo. On December 8, 2011, the Court granted an *ex parte* temporary restraining order, enjoining the respondents, "their officers, agents, servants, employees, . . . attorneys . . . [,] and any person acting in active concert and participation with [them] . . . from carrying firearms or any other weapons prohibited by the USNH Weapons, Firearms and Explosives policy on the Plymouth State University campus, or any other campus administered by [the petitioner's] Board of Trustees . . . "; ordering the respondents "to post a copy of the Temporary Restraining Order on the blog/website www.freekeene.com"; and directing that "[a]ny person found to be in violation of the USNH Weapons, Firearms and Explosives policy after receiving notice of the Temporary Restraining Order shall be held in contempt of the Court." The respondents object to the *ex parte* temporary

restraining order. The Court held a hearing on the *ex parte* temporary restraining order on December 13, 2011. For the reasons stated below, the preliminary *ex parte* relief requested by the petitioner remains in full force and effect.

Factual Background

The petitioner is "a body politic and corporate, the main purpose of which shall be to provide a well coordinated system of public high education offering liberal undergraduate education encompassing the major branches of learning, emphasizing our cultural heritage, and cultivating the skills of reasoning and communication." RSA 187-A:1. The petitioner is governed by a board of trustees comprised of "[e]ight ex-officio members: the governor of the state, the chancellor of the university system, the commissioner of agriculture, markets, and food, the commissioner of education, the president of the university of New Hampshire, the president of Plymouth state university, the president of Keene state college, [and] the president of the Granite state college," eleven members appointed by the governor with the advice and consent of the council, several current students from within the university system and several members elected by alumni of the university system. RSA 187-A:13. The legislature "delegated broad authority to the board of trustees who shall be responsible for managing the university system in a manner which promotes academic excellence and serves the educational needs of the people of New Hampshire." RSA 187-A:2-b.

The petitioner has promulgated the Weapons, Firearms and Explosives policy (the "Firearm policy"), which states as follows:

> This policy pertains to items that would generally be considered dangerous on a university campus and/or illegal such as but not limited to: Firearms; guns (pellet, air, paint ball, tranquilizer, stun, spear, dart); slingshots; switchblades; knives with a blade longer than 4 inches; combat and martial art type weapons (metal knuckles, throwing stars, clubs, metal swords); bows; arrows; explosive devices or substances (grenades, bombs, fireworks, ammunition).
>
> 1. The possession of any item referenced above is not allowed on campus property except with the expressed permission of the Chief of University Police.
> 2. Use of any item referenced above is not permitted on campus property.
> 3. Transfer or sale of any of the items referenced above is not permitted on campus property.
> 4. If a replica/toy version of any weapon will be used for an on-campus class presentation, project, or activity, the faculty/staff member overseeing the event and University Police must be alerted prior to the event occurring.
>
> Authorized items may be stored in the University Police Office.
>
> Exceptions to this policy include pocket knives, general tools, utensils, or items not designed as weapons unless the object is used in a way that would be considered dangerous.

On December 5, 2011, Mr. Jardis posted a "press release" on his blog/website, www.freekeene.com, stating that Mr. Jardis and Mr. Mozingo planned to carry "unconcealed, loaded, and slung rifle[s]" onto the Plymouth State University campus on Friday, December 9, 2011 to challenge the validity of the Firearm policy. The "press release" generated numerous electronic comments from other individuals, some of

whom stated that they intended to join the respondents at Plymouth State University on December 9th "with their weapons." Subsequently, on December 8, 2011, the petitioner filed its verified petition for temporary restraining order and preliminary and permanent injunctive relief against the respondents.

Legal Standard

An injunction is an "extraordinary remedy," which "should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law." N.H. Dept. of Environmental Servs. v. Mottolo, 155 N.H. 57, 63 (2007). A party seeking injunctive relief also must show that it is likely to succeed on the merits. Mottolo, 155 N.H. at 63. Moreover, courts consider the impact on the public interest and the possibility of substantial harm to others. See UniFirst Corp. v. City of Nashua, 130 N.H. 11, 13-14 (1987).

Discussion

Whether the petitioner is likely to succeed on the merits of its claim requires the Court to interpret RSA 159:26 to determine if it preempts the Firearms policy.

> The preemption doctrine flows from the principle that municipal legislation is invalid if it is repugnant to, or inconsistent with, State law. Thus, preemption will occur when local legislation either expressly contradicts a statute or otherwise runs counter to the legislative intent underlying a statutory scheme. The preemption issue is, then, "essentially one of statutory interpretation and construction."

City of Manchester v. Sec'y of State, 161 N.H. 127, 131 (2010) (internal citations omitted) (quoting Lakeside Lodge v. Town of New London, 158 N.H. 164 (2008)).

Where statutory language is clear and unambiguous, the Court accords the words used their plain meaning. Grand China, Inc. v. United Nat. Ins. Co., 156 N.H. 429, 431 (2007). The Court "will consider legislative history only if the statutory language is ambiguous." ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746, 752 (2011). The Court does not "consider words and phrases in isolation, but rather within the context of the statute as a whole." Grand China, 156 N.H. at 431. This technique "enables [the Court] to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." Id.

Under RSA 159:26,

> I. To the extent consistent with federal law, the state of New Hampshire shall have authority and jurisdiction over the sale, purchase, ownership, use, possession, transportation, licensing, permitting, taxation, or other matter pertaining to firearms, firearms components, ammunition, firearms supplies, or knives in the state. Except as otherwise specifically provided by statute, no ordinance or regulation of a political subdivision may regulate the sale, purchase, ownership, use, possession, transportation, licensing, permitting, taxation, or other matter pertaining to firearms, firearms components, ammunition, or firearms supplies in the state. Nothing in this section shall be construed as affecting a political subdivision's right to adopt zoning ordinances for the purpose of regulating firearms or knives businesses in the same manner as other businesses or to take any action allowed under RSA 207:59.
>
> II. Upon the effective date of this section, all municipal ordinances and regulations not authorized under paragraph I relative to the sale, purchase, ownership, use, possession, transportation, licensing, permitting, taxation, or other matter pertaining to firearms, firearm components, ammunition, firearms supplies, or knives shall be null and void.

A political subdivision is "[a] division of a state that exists primarily to discharge some function of local government." BLACK'S LAW DICTIONARY 1277 (9th ed. 2009).

Generally, political subdivisions are "geographic or territorial divisions of the state rather than a functional division of the state." Mcelhiney v. Univ. of Akron Personnel Dep't, C.A. No. 10343, 1981 WL 2640, at *2 (Ohio App. Dec. 30, 1981); e.g., Univ. Sys. of N.H. v. U.S. Gypsum Co., 756 F. Supp. 640, 644 (D.N.H. 1991) ("Counties, municipalities, and, usually, local school districts are classified as political subdivisions . . . ."). "The delegation of governmental functions to a political subdivision is accompanied by a delegation of governmental authority. Thus, political subdivisions have police powers, certain taxing authority and/or rights of eminent domain." Mcelhiney, 1981 WL 2640, at *2; see also Old Colony Trust Co. v. United States, 438 F.2d 684, 686 (1st Cir. 1971) ("Common understanding, for example, might as well view 'subdivision' as implying a geographic unit exercising sovereign powers, e.g., a city or county government."); Texas Learning Tech. Group v. C.I.R., 958 F.2d 122, 124 (5th Cir. 1992).

The plain language of the statutory scheme of RSA 159:26 makes clear that the legislature intended "political subdivision" to mean a geographic or territorial subdivision of the State. The third sentence of paragraph I refers to a "political subdivision's right to adopt zoning ordinances." RSA 159:26, I. Only municipalities have the ability to adopt zoning ordinances. See Black's Law Dictionary 1759 (9th ed. 2009) (defining "zoning ordinance" as "[a] city ordinance that regulates the use to which land within various parts of the city may be put."). Moreover, paragraph II

states that "all *municipal* ordinances and regulations not authorized under paragraph I . . .shall be null and void." RSA 159:26, II (emphasis added). Thus, the legislature evidenced an unambiguous intent that municipal ordinances and regulations be invalidated by paragraph I.

In this case, the Court finds that the petitioner is likely not a political subdivision under RSA 159:26. See, e.g., Mcelhiney, 1981 WL 2640, at *2 (holding that the University of Akron is not a political subdivision); Winberg v. Univ. of Minn., 499 N.W.2d 799, 801 (Minn. 1993) (holding that the University of Minnesota is not a political subdivision). The petitioner is not a geographic or territorial division of the State of New Hampshire. The petitioner has no police powers, taxing authority, or rights of eminent domain. See generally In re Ricker, 66 N.H. 207 (1890) (discussing sovereign and police powers); State Employees' Ass'n of N.H., Inc., SEIU Local 1984 v. State, 161 N.H. 558, 563 (2011) (holding that the Community College System of New Hampshire is not an executive entity).

Nonetheless, the respondents argue that the petitioner is "collaterally estopped to deny that it is not a political subdivision" because in University System of New Hampshire v. Gypsum, 756 F. Supp. 640 (1991), the petitioner "eagerly claimed that it was not a political subdivision." The Court disagrees. Collateral estoppel will arise where: (1) the issue subject to estoppel is identical in each action; (2) the first action must have resolved the issue finally on the merits; and (3) the party to be estopped must

have appeared as a party in the first action. In re Michael E., __ N.H. __ (Sept. 22, 2011). In Gypsum, the federal court did not hold that the petitioner was a "political subdivision." Instead, the federal court held that the University System of New Hampshire was "a governmental corporation" and "therefore a citizen of New Hampshire, subject to diversity jurisdiction of the federal court." Gypsum, 756 F. Supp. at 647. Indeed, the federal court distinguished a state university from a political subdivision in analyzing whether the University System of New Hampshire was sufficiently autonomous from the state to be considered "the real party in interest" for the purposes of diversity jurisdiction. Id. at 645 ("With sufficient autonomy from the state, especially with regard to financial matters, an agency, political subdivision, *or* state university is the real party in interest and is thus a 'citizen' for the purposes of diversity jurisdiction.")(emphasis added). Thus, collateral estoppel does not bar the petitioner from arguing it is not a political subdivision because the issue subject to estoppel is not identical in each action and the federal court did not resolve whether the petitioner is a political subdivision finally on the merits.

Nonetheless, the respondents argue that the legislative history of RSA 159:26 supports their claim that the petitioner is a political subdivision. However, as stated above, in interpreting a statute, the Court "look[s] to the plain meaning of the words used and will consider legislative history only if the statutory language is ambiguous." ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746, 752 (2011). Here, the Court finds

the language of RSA 159:26 to be plain and unambiguous. Therefore, the Court will not consider the legislative history.

Additionally, the respondents argue that the Court should follow the reasoning in Appeal of Pinkerton, 155 N.H. 1 (2007) in determining whether the petitioner is a political subdivision for the purposes of RSA 159:26. The Court disagrees. In Pinkerton, the New Hampshire Supreme Court held that Pinkerton Academy was a political subdivision for the purposes of the National Labor Relations Act. 155 N.H. at 8. However, whether an entity is a political subdivision for the purposes of the National Labor Relations Act does not control whether the petitioner is a political subdivision for the purposes of RSA 159:26. See Philadelphia Nat'l Bank, et al. v. United States, 666 F.2d 834, 839 (3d Cir. 1981) (holding that while "an entity may have some governmental characteristics for certain purposes[, that] does not necessarily control its status under a different statutory scheme.").

The respondents also argue that the Court should consider Oregon Firearms Educational Foundation v. Board of Higher Education, et al., 264 P.3d 160 (Or. Ct. App. 2011) because the Oregon statute at issue in that case is "substantially similar to RSA 159:26." Upon review of Oregon Firearms Educational Foundation, the Court finds that the Oregon statute is not "substantially similar" to RSA 159:26. The Oregon statute states in relevant part:

> (1) Except as expressly authorized by state statute, *the authority to regulate in any matter whatsoever* the sale acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition, is vested solely in the Legislative Assembly.
>
> (2) Except as expressly authorized by state statute, *no county, city or other municipal corporation or district may enact civil or criminal ordinances*, including but not limited to zoning ordinances, to regulate, restrict or prohibit the sale, acquisition, transfer, ownership, possession, storage, transportation, or use of firearms or any element relating to firearms and components thereof, including ammunition. Ordinances that are contrary to this subsection are void.

OR. REV. STAT. § 166.170 (emphasis added). The Oregon statute makes no mention of "political subdivisions." Thus, the Court finds the Oregon case unpersuasive and irrelevant.

Additionally, the respondents argue that the Firearms policy is unconstitutional under the Federal Constitution. The Second Amendment to the Federal Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." "Like most rights, the right secured by the Second Amendment is not unlimited. . . . [The Second Amendment] right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." District of Columbia v. Heller, 554 U.S. 570, 626 (2008). For example, in Heller, the United States Supreme Court explained that "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" are "presumptively lawful regulatory measures." Id. at 626-27 n.26.

While "[t]he analytical basis for the presumptive constitutionality of these regulatory measures was not thoroughly explained, . . . [i]t seems most likely that the Supreme Court viewed the regulatory measures listed in Heller as presumptively lawful because they do not infringe on the Second Amendment right." United States v. Bena, No. 10-2834, 2011 WL 6376649, at *2-3 (8th Cir. Dec. 21, 2011); see also United States v. Marzzarella, 614 F.3d 85, 91 (3d Cir. 2010). In Heller, immediately following the above-quoted language, the Supreme Court "made clear that restrictions on the possession of dangerous and unusual weapons are not constitutionally suspect because these weapons are outside the ambit of the amendment." Marzzarella, 614 F.3d at 91. Specifically, "Heller characterized the Second Amendment as guaranteeing 'the right of *law-abiding, responsible* citizens to use arms in defense of hearth and

home.'" Bena, 2011 WL 6376649, at *3 (quoting Heller, 554 U.S. at 635). "By equating the list of presumptively lawful regulations with restrictions on dangerous and unusual weapons, . . . the Court intended to treat them equivalently – as exceptions to the Second Amendment guarantee." Marzzarella, 614 F.3d at 91.

In this case, the Court finds that the Firearms policy is likely presumptively lawful under the Federal Constitution. The statutory scheme establishing the petitioner is indicative of the legislature's recognition that the petitioner's property and buildings are sensitive public places devoted to providing higher education. See RSA 187-A:1 (providing that the petitioner's main purpose is "to provide a well coordinated system of public higher education."); DiGiacinto v. Rector & Visitors of George Mason Univ., 704 S.E.2d 365, 370 (Va. 2011). Thus, the Firearms policy is likely valid under the Federal Constitution.

Finally, the respondents argue the Firearms policy is unconstitutional under the State Constitution. Part I, Article 2-a of the State Constitution provides: "All persons have the right to keep and bear arms in defense of themselves, their families, their property and the State." "[T]he State constitutional right to bear arms is not absolute and may be subject to restriction and regulation." State v. Smith, 132 N.H. 756, 758 (1990). In evaluating a constitutional challenge to gun control regulations, the Court determines whether the regulation at issue is a "reasonable" limitation upon the right to bear arms. Bleiler v. Chief, Dover Police Dep't, 155 N.H. 693, 700 (2007). Under the reasonableness test, the Court "focuses on the balance of the interests at stake, rather than merely on whether any conceivable rationale exists under which the legislature may have concluded the law could promote the public welfare." Id.

In this case, the Court finds that the Firearms policy is likely a reasonable restriction on the right to keep and bear arms. "Unlike a public street or park, a university traditionally has not

been open to the general public 'but instead is an institute of higher learning that is devoted to its mission of public education.'" DiGiacinto, 704 S.E.2d at 370 (quoting ACLU v. Mote, 423 F.3d 438, 444 (4th Cir. 2005)). The petitioner's board of trustees has broad authority and discretion in dealing with the requirements of order and discipline. See RSA 187-A:2-b; Lieberman v. Marshall, 236 So. 2d 120, 123 (Fla. 1970). "The State and its citizens, through their University and public school officials, have a valid interest in the orderly, peaceful, and nondisrupted operation of the University system." Lieberman, 236 So. 2d at 126. "Moreover, parents who send their children to a university have a reasonable expectation that the university will maintain a campus free of foreseeable harm." DiGiacinto, 704 S.E.2d at 370. "Restraint may be imposed where necessary to preserve the safety and order of the campus community and prevent interference with the pursuit of educational objectives." Lieberman, 236 So. 2d at 126. Thus, the petitioner has a strong interest in the safe and orderly operation of the university property in order to provide a public education to the people of New Hampshire.

The respondents argue that the Firearm policy prevents an individual "from exercising his or her right to self-defense." However, as the United States Supreme Court has explained the Second Amendment protects the "right of law-abiding, *responsible* citizens to use arms in defense of hearth and home." Heller, 554 U.S. at 635. Here, the respondents and several other individuals were planning to enter onto the Plymouth State University campus "carrying unconcealed, loaded, slung rifles" in order to challenge the validity of the Firearm policy. Such action is disruptive, highly visible, and intended to bring about a confrontation. Moreover, such action carries with it "the virus of violence" and, thus, it is subject to reasonable restraint. Lieberman, 236 So. 2d at 126. Furthermore, the respondents could have sought permission from the Chief of University Police to carry their weapons or replica versions of their weapons onto

campus for purposes of protesting the Firearms policy. However, the respondents apparently chose not to do so. Thus, the petitioner's interest in the promoting the safety, welfare, and education of its faculty, staff, and students outweighs any interest the respondents had in self-defense. See id.

Accordingly, the petitioner has shown a likelihood of success on the merits of its claim against the respondents because RSA 159:26 likely does not preempt the Firearms policy and the Firearms policy is likely valid under the Federal and State Constitutions.

Additionally, the Court finds that the petitioner has shown an immediate danger of irreparable harm without an adequate remedy at law. If the respondents were permitted to bring firearms onto the Plymouth State campus in violation of the Firearms policy, it would introduce an element of volatility and a heightened risk of harm to the students, faculty, and staff present on the campus. Further, a temporary restraining order imposes only a minor burden on the respondents, requiring that the respondents delay their entry onto campus until the dispute between the parties can be resolved by the Court.

Therefore, the petitioner's *ex parte* request for preliminary relief is GRANTED and the Temporary Restraining Order remains in full force and effect.

SO ORDERED.

January 9, 2012

Timothy J. Vaughan
Presiding Justice