

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DELAWARE STATE SPORTSMEN’S
ASSOCIATION; BRIDGEVILLE RIFLE &
PISTOL CLUB, LTD.; WILLIAM BELL;
and CECIL CLEMENTS

Plaintiffs,

v.

C.A. No

SHAWN M. GARVIN, in his official
capacity as Secretary of the Delaware
Department of Natural Resources and
Environmental Control; and DELAWARE
DEPARTMENT OF NATURAL
RESOURCES AND ENVIRONMENTAL
CONTROL,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF

Plaintiffs, Delaware State Sportsmen’s Association; Bridgeville Rifle & Pistol Club, Ltd.; William Bell; and Cecil Clements (collectively referred to as “Plaintiffs”), by and through their undersigned counsel, hereby file this Complaint for Declaratory Relief against Defendants Shawn M. Garvin, in his capacity as Secretary of the Delaware Department of Natural Resources and Environmental Control, and Delaware Department of Natural Resources and Environmental Control (“DNREC”) (collectively referred to herein as “Defendants”), and assert the following:

Parties

1. Plaintiff Delaware State Sportsmen's Association ("DSSA") is a statewide private organization. DSSA is the official Delaware state affiliate of the National Rifle Association of America and has a mailing address in Lincoln, Delaware.

2. Plaintiff Bridgeville Rifle & Pistol Club, Ltd. ("Bridgeville") is a private organization based in Bridgeville, Delaware. Bridgeville is a constituent "Club Member" of the DSSA.

3. Plaintiff William Bell is a resident of Lincoln, Delaware, and a member of both Bridgeville and DSSA.

4. Plaintiff Cecil Clements is a resident of Wilmington, Delaware, and a member of DSSA.

5. Defendant Shawn M. Garvin is the Secretary of DNREC. The office of the Secretary of DNREC is located at 89 Kings Highway, Dover, Delaware 19901.

6. Defendant DNREC is an agency of the State of Delaware, established by 29 *Del. C.* § 8001, and which derives its powers from, *inter alia*, Title 7, Chapter 60 of the Delaware Code.

Details about Plaintiffs

7. DSSA is an organization that promotes and protects the interests of owners of firearms in and around Delaware. Many DSSA members hold hunting

licenses pursuant to 7 *Del. C.* § 501. Among DSSA's approximately 3,500 members are hunters, competitive shooters, casual recreational shooters and collectors.

8. Bridgeville is a landowner in Sussex County and routinely allows members to hunt on its property for the purpose of controlling the deer population.

9. Plaintiff William Bell currently holds a valid Delaware hunting license. Plaintiff Bell also owns a firearm that he could utilize for deer hunting pursuant to the language in House Bill 156 (as further defined herein) and codified in 7 *Del. C.* § 704(g).

10. Plaintiff Cecil Clements purchased a firearm specifically for deer hunting based on the language set forth in House Bill 156 (as further defined herein) and codified in 7 *Del. C.* § 704(g). Plaintiff Clements does not currently hold a Delaware hunting license.

Applicable Law

11. Article II, Section 1 of the Constitution of the State of Delaware provides: “[t]he legislative power of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives.”

12. The General Assembly maintains the exclusive power to make laws throughout the State of Delaware. *Cutrona v. City of Wilmington*, 127 A. 421, 426 (Del. 1924).

13. Agencies of the executive branch, including DNREC, have the ability to promulgate rules and regulations governing the administration and operation of their respective agencies. *See 29 Del. C. § 8003(7)*.

14. The power of an agency, including DNREC, to promulgate such rules and regulations is not unlimited and extends only as far as such rules and regulations are not inconsistent with the laws of the State of Delaware. *Id.*

15. The Delaware Administrative Procedures Act (“APA”) was established with the purpose of “standardiz[ing] the procedures and methods whereby certain state agencies exercise their statutory powers and to specify the manner and extent to which action by such agencies may be subjected to public comment and judicial review.” *29 Del. C. § 10101*.

16. DNREC is an agency subject to the APA. More specifically, DNREC is subject to: subchapter I (Policy and Definitions, consisting of §§ 10101 and 10102 of Title 29), subchapter II (Agency Regulations, consisting of §§ 10111–19 of Title 29), Section 10141 (review of regulations), Section 10144 (stay pending review) and Section 10145 (commencement of review). *Baker v. Delaware Dep’t of Nat. Res. & Env’tl. Control*, 2015 WL 5971784, at *12 (Del. Super. Ct.), *aff’d*, 137 A.3d 122 (Del. 2016).

17. The General Assembly lawfully passed House Bill 156 of 2018 (“House Bill 156”), which was signed into law by Governor John Carney on August

12, 2018. This legislation, which allowed for pistol-caliber rifle hunting for deer, was codified into 7 *Del. C.* § 704(g), as follows, with the newly-enacted language underlined for ease of reference:

(g) Except as set forth herein, no person may use a handgun or rifle in the pursuit, taking or attempted taking (hunting) of protected wildlife. A handgun or rifle as described herein may be used for the pursuit, taking and attempted taking (hunting) of deer on privately owned lands situated south of the Chesapeake and Delaware Canal and those lands within the State owned by the State of Delaware so designated for this purpose by the Department of Natural Resources and Environmental Control, and farms permitted by the Department through its deer depredation programs, at its discretion, under the following conditions:

(1) The handgun shall be limited to revolvers and single shot pistols with a minimum barrel length of 5.75 inches and not exceeding 12.5 inches and chambered for and using straight-wall handgun ammunition in .357 to .38 caliber with a cartridge case length of no less than 1.25 inches and a maximum case length of 1.82 inches, or in .41 caliber to a maximum of .50 caliber and a maximum case length of 1.82 inches;

(2) The handgun must be carried openly on a sling or in a holster and not concealed;

(3) The rifle shall be limited to rifles:

a. Using open, metallic/mechanical, optical, or telescopic sights;

b. Chambered for and using straight-walled ammunition as defined in (g)(1) above; and

c. Loaded with no more than 3 cartridges in the chamber and magazine combined.

(4) To be used as follows:

a. A handgun or rifle may be used during a separate 7-day season to begin on the first Saturday in January through the second Saturday in January; and

- b. A handgun or rifle may be used in place of a shotgun during the shotgun deer season(s); and
- c. When harvesting deer under a Department deer depredation program.

Hunting Guide

18. On an annual basis, DNREC produces a hunting and trapping guide to provide, in part, a summary of relevant state laws and regulations relating to hunting and trapping.

19. After the enactment of House Bill 156, DNREC issued numerous so-called directives to Plaintiffs and hunters regarding updated information on pistol-caliber rifle hunting for deer, including updates to the “Methods of Take” in the Deer Hunting Section of the 2019-2020 Delaware Hunting & Trapping Guide (the “Hunting Guide”) and a notice on its website.¹

20. In part, the Hunting Guide stated as follows (with italics for emphasis):

STRAIGHT-WALLED PISTOL-CALIBER RIFLE

Rifles chambered for straight-wall ammunition legal for deer hunting must be manually operated, *consisting of: lever action, bolt action, pump action, single shot, and revolver rifles.* Only straight-wall cartridges usable in handguns may be used that are of .357 to 38 caliber with a case length no less than 1.25 inches and a maximum case length of 1.82 inches, or .41 caliber to maximum of .50 caliber and a maximum case length of 1.82 inches. Case length excludes the bullet portion of the cartridge. *Additionally, if there is not a commercially*

¹ While DNREC published an “update” notice on its website regarding the use of straight-walled pistol-caliber rifles, it did not take any affirmative steps to widely educate the public and broadly disseminate the information relating to the changes to the law, including by means of issuing a press release specifically addressing this topic or a publishing a formal public notice.

produced handgun available that is chambered for ammunition that meets the caliber and cartridge case length criteria than a rifle chambered for that same ammunition is not permissible for use. These rifles cannot be loaded with more than three cartridges in the chamber and magazine combined when hunting deer. Open, metallic/mechanical, optical and telescopic sights may be used. These rifles cannot be used for deer hunting north of the Chesapeake and Delaware Canal. Throughout the rest of the state, these rifles may only be used for deer hunting in place of a shotgun or handgun during the November and January Shotgun Deer Seasons or in place of a handgun during the January Handgun Deer Season. Furthermore, these rifles are not a legal method of take for any other species (except groundhogs), including red fox and coyotes. (emphasis added).

21. The Hunting Guide reflects the changes in the law resulting from the enactment of House Bill 156, **but it also includes additional restrictions on pistol-caliber rifle hunting that do not appear in the plain text of 7 Del. C. § 704(g).** A comparison of 7 Del. C. § 704(g), as amended by House Bill 156, and the text in the Hunting Guide relating to pistol-caliber rifles for deer hunting is attached hereto as Exhibit A.

22. It is well-established law in Delaware that legislative acts are to be read, understood, and interpreted according to the plain meaning and ordinary import of the language employed in them. *Neary v. Philadelphia, W. & B.R. Co.*, 9 A. 405, 407 (Del. 1887). Where the intention is clearly expressed, there is little room for variety in construction. *Id.*

23. While the Hunting Guide purports to be a “summary for the convenience of hunters and trappers,” hunters, law enforcement officers and others

heavily rely on it in the field and the variety in construction between the plain text of House Bill 156, as codified in 7 *Del. C.* § 704(g), and DNREC's interpretation of the law published in the Hunting Guide will cause confusion among hunters, law enforcement officers and others, because DNREC publishes it as an official position of the agency.

General Challenges to the Hunting Guide

24. The extra-statutory language in the Hunting Guide relating to straight-walled pistol-caliber rifles (i) was published in violation of Article II, Section 1 of the Delaware Constitution; (ii) exceeds the scope of DNREC's authority as set forth in 29 *Del. C.* § 8003(7); and (iii) amounts to a regulation that was not properly promulgated through the procedures set forth in the APA.

25. DNREC usurped the will of the General Assembly by attempting to legislate from the executive branch, in clear violation of Article II, Section 1 of the Delaware Constitution.²

² For at least the past decade, hunters have been able to use the types of firearms that DNREC purports to prohibit through the Hunting Guide. For example, hunters may use a .22 caliber rimfire pistol to hunt raccoons and opossums and to take wildlife lawfully confined in a trap. *See 7 Del. Admin. Code 3900-2.1.3* and *7 Del. C. 786(e)*. Gray squirrels may also be hunted with "a .17 through .22 caliber rimfire or pellet firearm with a rifled barrel, or muzzle-loading rifle not larger than .36 caliber is permitted south of the Chesapeake and Delaware Canal." *7 Del. Admin. Code 3900-2.5*.

26. The Delaware General Assembly has already imposed a wide range of restrictions on the possession and use of firearms, including for hunting—and could have chosen to impose additional restrictions within House Bill 156. The legislature is vested with the power to enact laws. The executive branch is vested with the duty to execute such duly-enacted laws.

27. Section 704(g) of Title 7 of the Delaware Code is an express statutory directive and it should not have been distorted in the Hunting Guide. DNREC made a new pronouncement of law contrary to the language of the statute and completely disregarded the legislative intent of the General Assembly.³

28. House Bill 156 was a carefully-crafted enactment related to straight-walled pistol-caliber rifles and was subject to the formal and lengthy legislative vetting process and ultimately signed by Governor John Carney and codified in 7 *Del. C.* §704(g).

29. By contrast, the language in the Hunting Guide relating to straight-walled pistol-caliber rifles was unilaterally drafted by un-elected bureaucrats, in an

³ Notably, after House Bill 156 was enacted, though DNREC was unsuccessful in adding more restrictive language, it made repeated—and also unsuccessful— attempts to lobby the Sportsmen’s Caucus of the General Assembly, the authors of House Bill 156, to agree with their interpretation that now appears in the Hunting Guide. *See Exhibit B* (letter opposing DNREC’s interpretation from Sportsmen’s Caucus).

unlawful attempt to end-run legislative intent and distort the balance of power amongst the branches of government.

30. The language that appears in the Hunting Guide relating to straight-walled pistol-caliber rifles is inconsistent with the laws of the state, namely *7 Del. C. § 704(g)*, and therefore falls outside the scope of DNREC's authority to promulgate rules or regulations as set forth in *29 Del. C. § 8003(7)*.

31. An un-elected administrator in the executive branch may not act as a "super-legislator" and change the language of a statute merely because the un-elected official does not agree with the plain meaning of the statute.

32. The changes to both the language and the intent of House Bill 156 within the Hunting Guide amounts to a regulation that was not properly promulgated through the administrative process set forth in the APA.

33. DNREC went further than merely implementing a statutory directive and engaged in whimsical policymaking at the expense of hunters across Delaware.

34. Hunters should have been given notice and the opportunity to be heard before DNREC implemented any change outside of the straightforward text of *7 Del. C. § 704(g)* relating to straight-walled pistol-caliber rifles.

Harm Suffered

35. But for the extra-statutory language of the Hunting Guide that purports to prohibit the lawful use of certain firearms not otherwise prohibited by *7 Del. C. §*

704(g), Plaintiffs' would avail themselves of hunting throughout Delaware state parks and elsewhere with firearms allowed by statute.

36. Bridgeville, as a landowner in Sussex County, suffers direct harm as a result of the new pronouncement of law in the Hunting Guide. Bridgeville is deprived of the ability to allow its members, including Plaintiff Bell, to hunt on its property to control the deer population because of the discrepancy between the type of firearms that are allowed based on the plain meaning of by *7 Del C. § 704(g)* and the type of firearms that are prohibited by DNREC's interpretation of the law as set forth in the Hunting Guide.

37. Plaintiff Bell is faced with a Hobson's choice. If he utilizes a firearm that meet the statutory requirements set forth in *7 Del. C. 704(g)* for deer hunting, he risks criminal penalties and/or civil sanctions because such firearms fall outside of the scope of the extra-statutory language related to straight-walled pistol-caliber rifles that appears in the Hunting Guide.

38. Plaintiff Clements purchased a firearm specifically because of the expanded use related to straight-walled pistol-caliber rifles enacted through House Bill 156. However, Plaintiff Clements has not yet obtained a Delaware hunting license because of the lack of clarity in the law, due to the discrepancy between the plain text of *7 Del. C. 704(g)* and the language that appears in the Hunting Guide relating to the types of firearms that may be used for deer hunting.

39. The challenged language in the Hunting Guide related to straight-walled pistol-caliber rifles is significantly different than the language that appears in the governing statute, *7 Del. C. 704(g)*, and because hunters, including Plaintiffs, must rely on the Hunting Guide as DNREC's official position—as must all law enforcement personnel, regarding the hunting laws of Delaware—Plaintiffs are at substantial risk of possible criminal and/or civil sanctions if they do not comply with the Hunting Guide.

Basis For Declaratory Relief

40. Plaintiffs are entitled to declaratory relief because the Hunting Guide, which prohibits the lawful use of certain firearms not otherwise prohibited by *7 Del C. § 704*, demonstrably: (i) violates Article II, Section 1 of the Delaware Constitution; (ii) exceeds the statutory scope of authority granted to Defendants by the Delaware General Assembly; and (iii) amounts to a regulation that was not properly promulgated through the procedures set forth in the APA.

41. A deprivation of constitutional rights can constitute irreparable harm. *See Norfolk Southern Corp. v. Oberly*, 594 F. Supp. 514, 522 (D. Del. 1984).

42. Plaintiffs will be irreparably injured if the Hunting Guide prohibiting the lawful use of certain firearms not otherwise prohibited by *7 Del C. § 704(g)*, is not rescinded and republished in accordance with the lawfully-enacted law as set forth in *7 Del. C. 704(g)*. Plaintiffs have suffered and, without relief, will continue

to suffer adverse effects including the deprivation of their constitutional rights and the threat of criminal penalties and/or civil sanctions.

COUNT I

DECLARATORY RELIEF UNDER 10 DEL. C. § 6501

43. Plaintiffs incorporate by reference the allegations contained in the foregoing paragraphs of this Complaint as if fully set forth at length herein.

44. A clear controversy exists between Plaintiffs and Defendants as to whether Defendants exceeded their authority and violated the Delaware Constitution when they published language in the Hunting Guide prohibiting the lawful use of certain firearms not otherwise prohibited by 7 *Del. C.* § 704(g).

45. The controversy involves the rights or other legal relations of the Plaintiffs and this action is asserted by persons and entities who have an interest in contesting the claims, and have contested the claims.

46. The controversy is between parties whose interests are real and adverse, and the issues involved are ripe for judicial determination.

47. Plaintiffs seek a declaratory judgment that Defendants: (i) violated Article II, Section 1 of the Delaware Constitution by usurping the authority of the General Assembly and legislating from the executive branch; (ii) exceeded their statutory authority when they failed to replicate a statutory directive in the Hunting Guide and instead modified and expanded-upon a lawfully-enacted statute; and (iii)

inserted language into the Hunting Guide that amounts to a regulation that was not properly promulgated through the procedures set forth in the APA.

48. A declaratory judgment is necessary and proper in order to determine whether the Defendants' language in the Hunting Guide relating to straight-walled pistol-caliber rifles is unlawful.

WHEREFORE, Plaintiffs request that this Court:

1. Grant a declaratory judgment that the language in the Hunting Guide relating to straight-walled pistol-caliber rifles violates Article II, Section 1 of the Constitution of the State of Delaware and/or exceeds the statutory scope of authority granted to Defendants;

2. Grant a declaratory judgment requiring Defendants to enforce *7 Del. C.* § 704(g) as codified in the statute;

3. Grant a declaratory judgment requiring Defendants to issue a correction to the Hunting Guide so that the language relating to straight-walled pistol-caliber rifles is consistent with the language as it appears in *7 Del. C.* § 704(g);

4. Award Plaintiffs relief as allowed by statute and common law;

5. Award Plaintiffs attorneys' fees and costs; and

6. Award such other and further relief as the Court deems just, proper, and equitable, including costs, pre-judgment and post-judgment interest.

ECKERT SEAMANS CHERIN
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