

## Considering The Right To Bear Arms

*My article, “The Right to Regulate the Right to Bear Arms,” appeared in the March/April 2018 issue of The Missouri Municipal Review. The article analyzed recent changes to Missouri’s firearms laws and highlighted a case that was pending at the Missouri Court of Appeals: Zoological Park Subdistrict of the Metropolitan Park Museum District v. Jeffrey Smith, ED105784. The Court of Appeals issued its ruling on Nov. 6, 2018. While the case was remanded to the trial court on procedural grounds, the trial court’s decision and the concurring opinion by Judge Roy Richter present some important issues for cities to consider.*

In 2015, Smith, a concealed-carry (CCW) permit holder, intended to conduct an open carry demonstration at the St. Louis Zoo. The Zoo<sup>1</sup> prohibits firearms and St. Louis City prohibits openly carrying firearms by ordinance.<sup>2</sup> Smith argued that § 571.107.1, RSMo. – listing where CCW permit holders cannot carry concealed firearms, such as polling places, jails, courthouses, stadiums, amusement parks, hospitals, taverns, and municipal buildings – only prohibits carrying *concealed* firearms into such locations, and that St. Louis’s open carry ban was preempted as to CCW permit holders by § 21.750.3, RSMo. The Zoo sought an injunction, arguing that § 571.107.1 prohibited carrying firearms, openly or concealed, into any “gated area of an amusement park.” The trial court enjoined Smith from carrying firearms at the Zoo.

On its face, § 571.107.1 only restricts carrying *concealed* firearms into the locations listed therein. Section 21.750.2 prohibits cities and political subdivisions from adopting “any order, ordinance or regulation concerning in any way the . . . use, keeping, possession, bearing . . .” of firearms, except as provided in Subsection 3. Under Subsection 3 of § 21.750, cities can pass ordinances banning open carry, but



CCW permit holders can still openly carry firearms in such cities, so long as they carry their permits. The Zoo contended that § 571.107 “sets forth *locations and facilities where concealed carry endorsements and permits are not valid and*, therefore, do not authorize the concealed carrying of a firearm. Because [§ 21.750.3] allowing the open carry of firearms is premised on a valid concealed carry endorsement/permit, in places where a concealed carry endorsement/permit does not authorize the carrying of a concealed weapon, a person who holds an open carry endorsement/permit cannot openly carry his or her firearm in those places either.”<sup>3</sup> The trial court agreed.<sup>4</sup> However, the court’s analysis presupposes that a city bans openly carrying firearms by ordinance. While St. Louis City has such an ordinance,

many cities do not. Without such an ordinance, § 21.750.3 is inapplicable because the city has not exercised its authority to regulate open carry. If cities do not ban open carry, nothing prohibits CCW permit holders from openly carrying firearms into places where § 571.107 prohibits carrying *concealed* firearms.

The Court of Appeals did not resolve this issue. Instead, the court held that the Zoo failed to request a declaratory judgment and that summary judgment was improper, in part because an injunction is a form of relief rather than an independent cause of action.<sup>5</sup> Further, the court held that the hearings on preliminary and permanent injunctions were improperly conjoined. The case was remanded to the trial court for further proceedings.

Judge Richter’s concurrence states that he would have ruled that openly carrying firearms in the Zoo is prohibited. “[T]he plain language of Section 21.750 initially appears to be unambiguous and allow for the open carry of a firearm if an individual has a valid concealed carry permit. However, this does not end our analysis. The reference to a ‘valid’ concealed carry permit requires us to examine Section 21.750 in conjunction with Section

571.107 and its limitations on locations in which concealed carrying a firearm is permitted.”<sup>6</sup> Judge Richter continued, “[a]n individual’s permit is not valid where the permit is specifically not recognized and in fact the action subject to the permit is prohibited by law. Thus, when the limitations of Section 571.107 are read together with the plain language of Section 21.750, it is clear the legislature would not have intended the incongruous result that where individuals are prohibited by law from concealed carrying firearms in certain places those individuals could open carry a firearm into such locations.”<sup>7</sup> It is debatable whether CCW permits are not “valid” in the locations listed in § 571.107. Non-CCW permit holders who bring concealed firearms to locations listed in § 571.107 are subject to much harsher punishments than CCW permit holders.<sup>8</sup> Furthermore, a permit is not required to *openly* carry firearms, and state law doesn’t prohibit open carry.

As with the trial court’s decision, the concurring opinion begs the question of whether the General Assembly intended § 571.107 to have one meaning in cities that ban open carry (firearms are prohibited in the restricted locations, whether openly or concealed), and another in cities that don’t (only concealed firearms are prohibited in such locations). The only places where state law (§ 571.030.1(8) and (10), RSMo.) expressly prohibits *openly* carrying firearms are government buildings, schools, churches and polling places, but that statute exempts CCW permit holders.<sup>9</sup> This appears to be a loophole in Missouri’s statutes that could endanger the public, even in locations presumably intended to be gun free.

If this case goes back through the appellate courts and the trial court’s decision is affirmed, cities can protect these sensitive locations by enacting ordinances prohibiting or restricting open carry. Smith contends that § 21.750.3, by its plain language, preempts ordinances banning openly carrying firearms as to CCW permit holders, even in locations listed in § 571.107.

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If Smith ultimately prevails, cities must consider different approaches. Options are limited due to the General Assembly’s broad preemption of local firearms regulations, as set forth in § 21.750. The trial court’s decision indicates that if cities ban openly carrying firearms, the locations listed in § 571.107.1 are off limits to firearms. However, without such an ordinance, these sensitive locations could be vulnerable. 🍃

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Footnotes for this article are available by request. Contact the Missouri Municipal League at (573) 635-9134 or email [info@mocities.com](mailto:info@mocities.com).

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