

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

American Promotional Events, Inc. – East)	Case No.
)	
Plaintiff,)	
)	PETITION FOR TEMPORARY AND
vs.)	PERMANENT INJUNCTIVE RELIEF,
)	DECLARATORY JUDGMENT, AND
City of Des Moines,)	WRIT OF CERTIORARI
)	
Defendant.)	(EMERGENCY RELIEF REQUESTED)

Plaintiff American Promotional Events, Inc. – East (“American”) hereby states its claim for a temporary and permanent injunction, declaratory judgment, and writ of certiorari against the City of Des Moines.

PARTIES & JURISDICTION

1. American is the largest distributor of consumer fireworks, novelties, and sparklers in the United States. It is a United States corporation organized under the laws of the State of Alabama. American became registered to do business in the State of Iowa as of June 7, 2017.

2. Upon information and belief, the City of Des Moines is a municipal corporation organized under the laws of the State of Iowa.

3. This Court has jurisdiction over the parties to, and subject matter of, this action.

4. The amount in controversy in this action exceeds the minimum jurisdictional limits of this Court.

5. Venue is appropriate in this Court pursuant to Iowa Code § 616.16.

BACKGROUND/FACTS

6. This is a case about the City of Des Moines' preemption by the State of Iowa's fireworks law, which allows the City to regulate only the use and not the sale of fireworks within the City's jurisdiction. Through two local ordinances, the City has unlawfully restricted the sale of fireworks to the outskirt industrial-zoned sections of town, which acts as a de facto ban on the sale of fireworks in the City of Des Moines.

7. On March 30, 2017, Governor Branstad signed into law House File 295. The new law is attached as Exhibit 1 to this Petition. Among other things, the new law provides in Subsection 12(c), "A city shall not adopt an ordinance, motion, resolution, or amendment that sets standards or requirements regarding the sale or marketing of consumer merchandise that are different from, or in addition to, any requirement established by state law."

8. House File 295 took effect upon enactment.

9. The definition of "consumer merchandise" in House File 295 is very broad and would certainly include fireworks and novelties as consumer merchandise. The definition at Subsection 12(c)(1)(a) provides that consumer merchandise "means merchandise offered for sale or lease, or provided with a sale or lease, primarily but not exclusively for personal, family, or household purposes, and includes any container used for consuming, carrying, or transporting such merchandise."

10. On May 9, 2017, Governor Branstad signed into law the "Fireworks Bill," Senate File 489. The new law is attached as Exhibit 2 to this Petition.

11. Senate File 489 took effect upon enactment.

12. Consistent with House File 295, the fireworks law provides that municipalities may regulate the use, but not the sale, of fireworks and novelties within their jurisdictions.

Senate File 489 amends Iowa Code § 364.2 to provide that: “A city council may by ordinance or resolution prohibit or limit the use of consumer fireworks, display fireworks, or novelties, as described in 727.2.” (emphasis added).

13. The sale of consumer fireworks is regulated through new Iowa Code §§ 100.19 and 100.19A, which provide for consumer fireworks seller licensing and consumer fireworks wholesaler registration. See Senate File 489 pages 5-6.

14. On June 5, 2017, the City of Des Moines’ City Council exceeded its local legislative authority by enacting Ordinance No. 15,585 controlling the sale of fireworks and novelties in the City of Des Moines. Ordinance No. 15,585 was published on June 8, 2017.

15. Ordinance No. 15,585, “AN ORDINANCE to amend the Municipal Code of the City of Des Moines, Iowa, 2000, adopted by Ordinance No. 13,827, passed June 5, 2000, as heretofore amended, by amending Sections 134-1087, 134-1122 and 134-1267, and by adding and enacting new Section 134-1281, relating to the sale of consumer fireworks in industrial zoning districts,” provides that fireworks and novelties can only be sold in the City of Des Moines in M-1 light industrial districts or M-2 heavy industrial districts outside the Downtown Overlay District. A copy of Ordinance No. 15,585 is attached as Exhibit 3 to this Petition.

16. On June 5, 2017, the City of Des Moines’ City Council approved on second reading another proposed fireworks ordinance. The proposed ordinance is scheduled for final consideration on June 12, 2017.

17. This proposed ordinance, “AN ORDINANCE to amend the Municipal Code of the City of Des Moines, Iowa, 2000, adopted by Ordinance No. 13,827, passed June 5, 2000, as heretofore amended, by amending Sections 46-3,46-211,46-212 and 46-216, repealing Sections 46-213,46-214, 46-215, and by adding and enacting new Sections 46-213,46-214 and 46-215,

relating to fireworks and pyrotechnic special effects material” would provide, among other things, “Consumer Fireworks may only be sold during the dates and times as allowed under Iowa Code Chapter 100 and in zoning districts permitted by this [municipal] code.” A copy of this proposed ordinance is attached as Exhibit 4 to this Petition.

18. American anticipates that if this proposed ordinance is approved, it will move to amend this Petition.

19. American primarily sells its fireworks and novelties out of existing large and small retail outlets and to local philanthropic organizations in support of their fundraisers at which these organizations sell American’s products.

20. These stores and philanthropic organizations are located almost exclusively in commercially zoned districts in Des Moines, which are zoned C-1 through C-4, and not in industrial zones M-1 and M-2.

21. Such sales are allowed under the state fireworks law. It is the unlawful City ordinances that restrict sales to industrial districts and forbid sales out of commercial property like existing large and small retailers or from the locations of these philanthropic organizations.

22. On June 5, 2017, American obtained its Iowa Wholesale Consumer Fireworks Registration from the Iowa State Fire Marshal Division to allow it to sell consumer fireworks and novelties to commercial retailers. The registration certificate is attached as Exhibit 5 to this Petition.

23. The large and small retail outlets out of which American sells its fireworks and novelties have applied for a license as consumer fireworks and novelties sellers and their licenses are pending.

24. Under state law, fireworks and novelties were to begin being sold out of permanent structures (like existing retailers) in the City of Des Moines on June 1, 2017. Senate file 489, Subsection 4(c)(1).

25. For every day in which American cannot sell its fireworks and novelties from June 4 to July 8 within the City of Des Moines, it loses thousands of dollars.

26. If American loses out on selling for this entire July 4 season because of Des Moines' unlawful city ordinances, it estimates its losses at \$300,000.

COUNT I: PREEMPTION BY ENACTED SENATE FILE 489

27. American hereby incorporates and re-alleges paragraphs 1-26 as if fully set forth herein.

28. Through Senate File 489, the Iowa Legislature specifically permitted the sale of consumer fireworks and novelties in Iowa.

29. The Iowa Legislature created a licensing/permitting system at the state level for commercial retailers and wholesalers.

30. Iowa Code § 364.2(6), as amended by Senate File 489, allows a City Council to regulate only the use of consumer fireworks and novelties.

31. The City of Des Moines' effort, through Ordinance No. 15,585, seeks to prohibit the sale (as opposed to use) of consumer fireworks and novelties at commercial retailers, despite the Iowa Legislature's authorization and licensing of sales at such retailers.

32. The Iowa Legislature established a statutory scheme for the sale of consumer fireworks and novelties that set forth specific regulations to be enforced by the Fire Marshal to regulate the safety of such sales and to license the retailers and wholesalers of consumer fireworks and novelties.

33. Ordinance No. 15,585 singles out consumer fireworks and novelties in an effort to prevent sales in the City of Des Moines, contrary to Senate File 489, by specifically limiting sales of consumer fireworks and novelties, instead of applying general zoning regulations relating to any commercial sales.

34. Ordinance No. 15,585 is preempted by Senate File 489, as enacted, under express preemption, implied or conflict preemption, and field preemption.

35. American is being damaged daily by the inability to sell consumer fireworks and novelties to commercial retailers for re-sale in the City of Des Moines.

36. American is entitled to a temporary injunction, a permanent injunction, and damages.

WHEREFORE, American asks this Court to immediately set this matter for hearing on a temporary injunction and to enter a temporary and permanent injunction prohibiting the City of Des Moines from enforcing Ordinance No. 15,585 or from otherwise attempting to regulate the sale of consumer fireworks and novelties in contradiction to state law and to award damages to American and for any other relief which the Court deems just.

COUNT II: PREEMPTION BY ENACTED HOUSE FILE 295

37. American hereby incorporates and re-alleges paragraphs 1-36 as if fully set forth herein.

38. Through House File 295, as enacted at Iowa Code § 364.3, the Iowa Legislature specifically prohibited a city's regulation of consumer merchandise, providing that "A city shall not adopt an ordinance, motion, resolution, or amendment that sets standards or requirements regarding the sale or marketing of consumer merchandise that are different from, or in addition to, any requirement established by state law."

39. Consumer merchandise includes consumer fireworks and novelties.

40. Senate File 489 sets forth the standards and requirements for the sale of consumer fireworks and novelties in Iowa.

41. Further, the Iowa Code allows cities to regulate the location and use of buildings, structures or land. Iowa Code § 414.1 provides that “Any city is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.”

42. The relevant portions of Ordinance No. 15,585 do not regulate the location or use of buildings, structures or land. American acknowledges that the City of Des Moines may regulate the location and use of buildings, structures, or land for commercial activity.

43. Ordinance No. 15,585, to the contrary, regulates the sale of a specific consumer merchandise—consumer fireworks and novelties—a city action that is specifically prohibited by House File 295.

44. Ordinance No. 15,585 is preempted by House File 295, as enacted, under express preemption, implied or conflict preemption, and field preemption.

45. American is being damaged by the inability to sell consumer fireworks and novelties to commercial retailers for re-sale in the City of Des Moines.

46. American is entitled to a temporary injunction, a permanent injunction, and damages.

WHEREFORE, American asks this Court to immediately set this matter for hearing on a temporary injunction and to enter a temporary and permanent injunction prohibiting the City of

Des Moines from enforcing Ordinance No. 15,585 or from otherwise attempting to regulate the sale of consumer fireworks and novelties in contradiction to state law and to award damages to American and for any other relief which the Court deems just.

COUNT III: SUBSTANTIVE DUE PROCESS

47. American hereby incorporates and re-alleges paragraphs 1-46 as if fully set forth herein.

48. American has a liberty interest in selling consumer fireworks and novelties as allowed by Senate File 489 and as licensed through its wholesaler license.

49. American has a property interest in not being subject to irrational monetary fines and irrational sales locations imposed by the City of Des Moines through its zoning ordinances.

50. The City of Des Moines lacks a rational basis for Ordinance No. 15,585 in that there is not a reasonable fit between any governmental interest and the means chosen to advance that interest.

51. American is being damaged by the inability to sell consumer fireworks and novelties to commercial retailers for re-sale in the City of Des Moines.

52. American is entitled to a temporary injunction, a permanent injunction, and damages.

WHEREFORE, American asks this Court to immediately set this matter for hearing on a temporary injunction and to enter a temporary and permanent injunction prohibiting the City of Des Moines from enforcing Ordinance No. 15,585 or from otherwise attempting to regulate the sale of consumer fireworks and novelties in contradiction to state law and to award damages to American and for any other relief which the Court deems just.

COUNT IV: TEMPORARY AND PERMANENT INJUNCTIVE RELIEF

53. American hereby incorporates and re-alleges paragraphs 1-52 as if fully set forth herein.

54. As set forth above, Ordinance No. 15,585 is preempted by state law, including Senate File 489 and House File 295, and violates American's substantive due process rights.

55. American does not have an adequate remedy at law for the City of Des Moines' violation of state law and its substantive due process rights.

56. Based upon the foregoing alleged facts and law, a temporary injunction against the City of Des Moines is warranted because American is likely to prevail on the merits at trial.

57. American is being irreparably harmed because it is losing sales revenue for every day these unlawful ordinances remain in effect.

58. Temporary relief is necessary because Senate File 489 authorizes sales within a short window relating to the Fourth of July Holiday, between June 1 to July 8. Therefore, a failure to address the City of Des Moines' actions by temporary injunction would lead to the prohibition of an entire Fourth of July season of sales in the City of Des Moines.

59. No petition seeking this relief or part thereof has been previously presented by American to any other court or jurisdiction.

60. American seeks a temporary and permanent injunction. A supporting affidavit is attached as Exhibit 6, as required by Iowa Rule of Civil Procedure 1.1502(1).

WHEREFORE, American asks this Court to immediately set this matter for hearing on a temporary injunction and to enter a temporary and permanent injunction prohibiting the City of Des Moines from enforcing Ordinance No. 15,585 or from otherwise attempting to regulate the

sale of consumer fireworks and novelties in contradiction to state law and for any other relief which the Court deems just.

COUNT V: DECLARATORY JUDGMENT

61. American hereby incorporates and re-alleges paragraphs 1-60 as if fully set forth herein.

62. As set forth above, Ordinance No. 15,585 is preempted by state law, including Senate File 489 and House File 295, and violates American's substantive due process rights.

63. An actual and justiciable controversy presently exists because Ordinance No. 15,585 has been adopted by the Des Moines City Council and will prevent American from using its Iowa Wholesale Consumer Fireworks Registration to sell consumer fireworks and novelties to its retail partners for resale.

64. American has a legitimate interest in Ordinance No. 15,585 because its sales are being unlawfully prevented by the City of Des Moines, despite the Iowa Legislatures' authorization of such sales, and seeks a declaratory judgment to determine its rights and obligations, pursuant to Iowa Rules of Civil Procedure 1.1101 and 1.1102.

WHEREFORE, American asks this Court to immediately set this matter for hearing on a temporary injunction and to enter a temporary and permanent injunction prohibiting the City of Des Moines from enforcing Ordinance No. 15,585 or from otherwise attempting to regulate the sale of consumer fireworks and novelties in contradiction to state law and to enter a declaratory judgment that Ordinance No. 15,585 is unlawful and unenforceable and for any other relief which the Court deems just.

COUNT VI: WRIT OF CERTIORARI

65. American hereby incorporates and re-alleges paragraphs 1-64 as if fully set forth herein.

66. American asserts this writ of certiorari action, in the alternative, in the event the City of Des Moines' actions are deemed to be quasi-judicial.

67. The City of Des Moines exceeded its authority in enacting Ordinance 15,585 because the ordinance is preempted by state law, including Senate File 489 and House File 295, and violates American's substantive due process rights.

68. This cause of action was timely filed within thirty (30) days of the City of Des Moines' approval and the publication of Ordinance No. 15,585.

69. American has a legitimate interest in Ordinance No. 15,585 because its sales are being unlawfully prevented by the City of Des Moines, despite the Iowa Legislatures' authorization of such sales, and asks that the Court grant it a Writ of Certiorari and declare Ordinance No. 15,585 unlawful.

WHEREFORE, American asks this Court to immediately set this matter for hearing on a temporary injunction and to enter a temporary and permanent injunction prohibiting the City of Des Moines from enforcing Ordinance No. 15,585 or from otherwise attempting to regulate the sale of consumer fireworks and novelties in contradiction to state law and to grant a writ of certiorari and declare Ordinance No. 15,585 unlawful and for any other relief which the Court deems just.

Respectfully submitted,

/s/ Holly M. Logan

Holly M. Logan, AT0004710

/s/ Sarah E. Crane

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