

Mootness and Federal Claims: Amending or Repealing City Ordinances in Response to Litigation

by John A. Greco



The field of federal claims includes challenges to the validity of municipal ordinances under the United States Constitution. Such claims may include challenges to the facial constitutionality of an ordinance, or a constitutional challenge as applied to the facts of the case. The plaintiff may generally seek declaratory relief, damages, and/or an injunction. These types of claims, if ultimately successful, may expose the municipality to not only the above relief, but also, to an award of attorney's fees pursuant to 42 U.S.C. § 1988.

There may be instances where the city attorney reviewing or defending the lawsuit decides that there may be merit to the federal claims, or that the area is sufficiently unsettled such that

the litigation could result in an adverse decision, declaring the ordinance unconstitutional, enjoining conduct, and awarding damages and attorney's fees.

The city attorney in this circumstance may consider recommending that the governing body revisit the ordinance for several reasons. Amending or repealing the ordinance may render moot some or all of the challenges. Action before litigation is concluded might minimize or eliminate a claim to attorney's fees. The city attorney may also recommend giving the governing body the opportunity to revise the ordinance, rather than subject the ordinance to the court's construction or interpretation. This practice is not uncommon, and is the subject of many federal court (and state court) decisions, frequently in the context of First

Amendment challenges. This article addresses some of the issues involved in amending or repealing ordinances while such measures are in the midst of a challenge in federal court.

The Doctrine of Mootness

Under Article III of the U.S. Constitution,¹ federal courts may adjudicate only ongoing cases or controversies.² For federal jurisdiction to lie, a litigant must have suffered, or be threatened with, an actual injury likely to be redressed by a favorable judicial decision.³ The doctrine of mootness has its roots in this "case or controversy" limitation under Article III of the Constitution.⁴

Mootness can occur due to a change in circumstances or a change in the law.⁵ If a case is determined to be moot, the district court does not have subject matter jurisdiction over the claims.⁶ As a result, the issue of whether or not a claim is moot can be raised at any time in the proceedings: during the litigation, or after judgment, on appeal.⁷

There are exceptions to the application of the mootness doctrine, such as where the issue presented is "capable of repetition, yet evading review."⁸ To this end, where the defendant has asserted its "voluntary cessation" of the challenged practice but it is one the defendant is free to resume at any time, the Supreme Court has stated:

It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." ... "If it did, the courts would be compelled to leave 'the defendant... free to return to his old ways.'... In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."⁹

Repeal or Amendment of Ordinances

When, in response to litigation, a

municipality enacts an amendment to an ordinance or repeals the objectionable provisions of an ordinance, the claims directed to the ordinance may be rendered moot.¹⁰ Several issues may arise when a law is amended in response to litigation over the application of that law.

The United States Supreme Court has indicated that the test for mootness in the context of legislative changes is whether the law has been “sufficiently altered so as to present a substantially different controversy[.]”¹¹ Accordingly, the threshold determination is whether the revision to the law removes the challenged features of the prior law.¹² Stated differently, where a superseding statute leaves the objectionable features of the prior law substantially undisturbed, the case is not moot.¹³ Where the changes in the law have “fundamentally altered the statutory framework as to render the original controversy a mere abstraction,” the case is moot.¹⁴

Further, the “voluntary cessation” doctrine is narrowly construed where the mootness results from the amendment or repeal of an ordinance. The U.S. Court of Appeals for the Ninth Circuit has characterized the exception in this context as follows:

A statutory change ... is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed. As a general rule, if a challenged law is repealed or expires, the case becomes moot. The exceptions to this general line of holdings are rare and typically involve situations where it is virtually certain that the repealed law will be reenacted.¹⁵

In evaluating whether a municipality’s voluntary cessation has rendered moot a case so as to deprive the federal court of jurisdiction, it has been recognized that “governmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities.”¹⁶ “Mere speculation that the city may return to its previous ways is no substitute for concrete evidence of secret intentions.”¹⁷ A substantial amendment

to a statute or ordinance may moot a challenge to the original law where “there is no practical likelihood” that the regulation will be reenacted in its original form.¹⁸ “Thus, even when a legislative body has the power to re-enact an ordinance or statute, ordinarily an amendment or repeal of it moots a case challenging the ordinance or statute.”¹⁹

In general, actions rendered moot because of the amendment or repeal of an ordinance will be limited to claims for declaratory or injunctive relief, but not necessarily claims for damages.

As a result of the foregoing, the plaintiff facing a defense of mootness in federal court may find it difficult to overcome the assertion that a municipality will not re-enact the objectionable ordinance. In finding for governmental entities, courts have considered the local government’s history of attempting to comply with statutory requirements,²⁰ and comments on the record that the municipality does not intend to re-enact the ordinance.²¹ However, where the record demonstrates that the governmental entity intends to reinstate the objectionable regulations, the case may not be found to be moot. In *City of Mesquite v. Aladdin’s Castle*, the U.S. Supreme Court did just that and specifically held the case was not moot because

the city stated its intent to reenact the challenged law.²²

A plaintiff persisting in a federal challenge to a municipal ordinance despite the ordinance’s amendment or repeal may argue that it has vested rights under the law as it was at the time the litigation commenced.²³ The determination of whether the plaintiff has any rights under the prior law will likely depend on the law of the state in which the litigants are citizens.²⁴

Claims for Damages

In general, actions rendered moot because of the amendment or repeal of an ordinance will be limited to claims for declaratory or injunctive relief, but not necessarily claims for damages.²⁵ Notwithstanding this general rule, though, damages claims need to be analyzed carefully in light of the disposition of the claims in the district court.

A recent decision from the U.S. Court of Appeals for the Eleventh Circuit is instructive in this regard. In *Covenant Christian Ministries, Inc. v. City of Marietta*,²⁶ the plaintiff, a religious institution, challenged an ordinance which allowed private parks, playgrounds, and recreation centers, but not religious institutions, in a residential zone. The ordinance was later amended to require special approval for all of the above uses in the residential zone. The district court found that the claims were moot, and also severed the original ordinance, such that none of the uses were allowed in a residential zone.²⁷

On appeal, the Eleventh Circuit agreed that the claims were moot, and held that the mooting of the injunctive claims resulted in no liability for damages. The appellate court reasoned that the plaintiff’s claim was based on the

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inability to build in a residential zone, and, since the plaintiff was not entitled to build under the original ordinance (as interpreted by the district court) or under the amended ordinance, the plaintiff was entitled to no damages. Thus, the availability of damages may depend upon the outcome of the mootness analysis performed by the court.

Attorney's Fees

Mootness may, in the first instance, be determined by the district court. However, as demonstrated by the case law in this area, oftentimes amendments or repeals are enacted post-judgment, when the case is already on appeal. If an appellate court determines that a controversy has become moot on appeal, the court of appeal must determine the appropriate remedy. Once an appellate court has determined that a case is moot on appeal, the court may order a vacatur of the judgment, or remand to the district court for further consideration.²⁸

Mootness of the plaintiff's claims may have the result of eliminating or minimizing the municipality's liability for an award of attorney's fees because the vacation of the judgment prevents the plaintiff from being a "prevailing party," the predicate for an award of attorney's fees under 42 U.S.C. § 1988.²⁹

Absent an actual judgment favorable to the plaintiff, the U.S. Supreme Court, in *Buckhannon Board and Care Home, Inc.*, has rejected a plaintiff's entitlement to attorney's fees under a "catalyst theory."³⁰ There, the law at issue was amended, thereby mooting the controversy. The plaintiff argued it was, nonetheless, a "prevailing party" entitled to attorney's fees because it achieved the desired result, as the lawsuit brought about a voluntary change in the defendant's conduct.³¹ The Supreme Court disagreed:

[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change. Our precedents thus counsel

against holding that the term 'prevailing party' authorizes an award of attorney's fees without a corresponding alteration in the legal relationship of the parties.³²

Conclusion

During litigation, upon the recommendation of the city attorney or on its own accord, the governing body of a municipality may decide to revise its ordinance before or after the court reaches the merits of the plaintiff's claims. This may be due to the desire to make changes that are warranted, and to take control of the legislative process before the ordinance is possibly modified or struck by the court, with the collateral effect, in some circumstances, of avoiding the potential of an award of damages or attorney's fees. As long as the legislative revision removes the challenged features of the prior law, this may be a productive choice for a municipality faced with the options of defending the litigation or making changes to its code which will eliminate the need for a judgment by the court.

Notes

1. U.S. CONST. art. III.
2. See *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990).
3. *Id.*
4. *Friends of the Earth, Inc. v. Laidlaw Env't Serv. (TOC), Inc.*, 528 U.S. 167, 189 (2000).
5. *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004).
6. *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001).
7. See *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 478 (1990) ("This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate.").
8. *Moore v. Ogilvie*, 394 U.S. 814 (1969).
9. *Friends of the Earth, Inc.*, 528 U.S. at 189 (citing *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968) (citations omitted)). The "heavy burden of persuad[ing]" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness. *Id.*
10. See, e.g., *Massachusetts v. Oakes*,

491 U.S. 576 (1989) (overbreadth challenge moot when statute was amended); *Kremens v. Bartley*, 431 U.S. 119 (1977) (claims of named plaintiffs were rendered moot by legislation passed after decision of trial court).

11. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993).

12. See, e.g., *Covenant Christian Ministries, Inc. v. City of Marietta*, 654 F.3d 1231 (11th Cir. 2011); *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004); *Naturist Soc'y, Inc. v. Fillyaw*, 958 F.2d 1515 (11th Cir. 1992).

13. *Naturist Soc'y, Inc.*, 958 F.2d at 1520.

14. *Id.*

15. *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006) (quoting *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994)).

16. *Coral Springs St. Sys., Inc.*, 371 F.3d at 1330 ("[T]his Court has repeatedly held that the doctrine of voluntary cessation does not apply in cases where the challenged laws have been repealed unless there is some reason to believe that the law may be reenacted after dismissal of the suit.").

17. *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1334 (11th Cir. 2005).

In the context of government actors, the Eleventh Circuit applied a rebuttable presumption that the objectionable behavior would not recur. See *Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340 (11th Cir. 2011).

18. See *Green v. City of Raleigh*, 523 F.3d 293 (4th Cir. 2008) (quoting *Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006)). See also *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546 (5th Cir. 2006) (a claim that city council might one day amend the ordinance to reenact the offending provisions was insufficient to defeat mootness).

19. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010).

20. *Covenant Christian Ministries, Inc. v. City of Marietta*, 654 F.3d 1231 (11th Cir. 2011).

21. See *S. Fla. Equitable Fund LLC v.*

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2. See U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y., 495 F. Supp.2d 375 (S.D.N.Y. 2007).

3. U.S. ex rel. Touhy v. Ragen, 340 U.S. 462, 467-69 (1951) (federal court cannot enforce a subpoena against an employee of the federal governmental agency when the agency has validly enacted a regulation that withdraws from employees the power to produce documents).

4. Of course, the court *could* order that the DOJ or an agency attorney be allowed to participate in the deposition. Non-parties do not have an absolute right to attend federal civil action depositions, but the court has discretion to permit such attendance. See *Grand River Enter. Six Nations, Ltd. v. Pryor*, No. 02 Civ. 5068(JFK)(DFE), 2008 WL 806530 *1 (S.D.N.Y. Mar. 24, 2008) (discussing relevant factors and citing cases). However, in our scenario, the United States is still technically the plaintiff, so the DOJ or the agency attorney might assert the right to attend as the party representative (potentially preventing the relator's attendance). Alternatively, the relator or the federal lawyers could try to attend as consulting experts with the connivance cooperation of the relator's lawyer—which they undoubtedly would receive. **M**

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fuse to answer Officer Beech's questions. Thus, a reasonable officer could believe that her refusal to answer constituted obstruction. This was sufficient to establish Beech's qualified immunity defense as a matter of law; therefore, the district court did not err in granting summary judgment in his favor.

On whether, as a matter of law, an individual subject to a *Terry* stop had the right to refuse to answer an officer's questions, the Tenth Circuit found there was no authority "clearly establishing a right" under the First or Fourth Amendment to refuse to answer an officer's questions during a *Terry* stop; further, there appeared to be nothing under the Fifth Amendment that would allow a person to ignore police requests for general information. Under circuit precedent, the

Fifth Amendment right to remain silent might be triggered during a *Terry* stop, but this was narrowly limited to pre-arrest custodial interrogations where incriminating questions are asked. At the time of Koch's arrest, there was neither Supreme Court nor Tenth Circuit precedent, nor clearly established weight of authority from other courts, recognizing a right to refuse to respond to an officer's questions during a *Terry* stop. A reasonable officer could believe that, under the circumstances of this case, Koch was required to answer questions regarding Lance's whereabouts, and that her refusal to do so constituted a willful delay or obstruction of an officer's duty. **M**

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City of Miami, 770 F. Supp.2d 1269 (S.D. Fla. 2011). This case is currently pending on appeal.

22. 455 U.S. 283 (1982).

23. *Covenant Christian Ministries, Inc.*, 654 F.3d at 1234 (the plaintiff church argued that its right to a building permit vested before the enactment of a 2008 ordinance, and thus, subsequent changes to a 2004 ordinance did not affect its entitlement to a building permit).

24. *Id.* (analyzing Georgia law and determining that the plaintiff did not have any vested rights under the prior ordinance).

25. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 608-09 (2001) ("[F]or so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case.").

26. *Covenant Christian Ministries, Inc.*, 654 F.3d 1231.

27. The district court severed the original ordinance by striking private parks, playgrounds and recreation centers. The Eleventh Circuit upheld this ruling, reasoning that the severance was consistent with the purpose of the residential zoning restriction which was intended for "low density single-family detached housing and residentially compatible uses requiring large amounts of open space." *Id.*

28. See, e.g., *Lewis v. Cont'l Bank Corp.*,

494 U.S. 472, 482 (1990) ("Our ordinary practice in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss. ... However, in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully.").

29. See, e.g., *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. 598, 605 (2001) ("prevailing party" refers only to a party who or that has achieved a "judicially sanctioned change in the legal relationship of the parties"); *Truesdell v. Philadelphia Hous. Auth.*, 290 F.3d 159, 163 (3d Cir. 2002); *City of Morris v. Nationalist Movement*, 273 F.3d 527, 535 (3d Cir. 2001) (events which occurred subsequent to the contested orders rendered appeal moot as to the Nationalist Movement's claim of right to use the courthouse steps and lawn, though not as to the question of attorney's fees).

30. *Buckhannon Bd. & Care Home, Inc.* at 608-09.

31. *Id.* at 601.

32. *Id.* at 605. But see *NRA of Am., Inc. v. City of Chicago*, 646 F.3d 992 (7th Cir. 2011) (remanding for award of attorney's fees in spite of mootness, where plaintiff prevailed on issue before the U.S. Supreme Court); *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226 (3d Cir. 2008) (plaintiff entitled to attorney's fees for obtaining preliminary injunction even though the case ultimately became moot through a revised ordinance). **M**

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