A5-025

APR 2 4 2007

IN THE SUPREME COURT OF GEORGIA

ANTHONY MANN	:	
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APPELLANT	:	
	:	
VERSUS	:	CASE NUMBER S07A1043
	:	
STATE OF GEORGIA DEPARTMENT OF CORRECTIONS and JOSHUA BARNETT, in his official capacity as a probation officer, Department of Corrections for the STATE OF GEORGIA and VICTOR HILL, SHERIFF OF CLAYTON COUNTY, GEORGIA	:	
	:	
APPELLEES	:	

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

PART I - STATEMENT OF FACTS

While this is the second appearance of this action before this court, the particular facts of this case are diametrically opposed to this court's previous ruling.[1]

In appellant's previous appearance before this court, under O.C.G.A. §42-1-13, this court undertook appellant's claim that the restrictions of the code section were unconstitutional in that it violated his Fifth and Fourteenth Amendments to the United States Constitution.

This court passed upon whether there was a "taking" by virtue of the fact of appellant's particular residence.

What is paramount to this particular appeal is the fact that

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[1] *Mann v. State*, 278 Ga. 422

appellant, well prior to the enactment of the offending code section, established a residency in the form of a fee title interest to and into his property, which serves as a dwelling for he and his wife.

Additionally, prior to the enactment, the appellant also established a successful commercial business.

Appellant purchased his home with his wife in Hampton, Clayton County, Georgia, on October 24, 2003 (T 4, Lines 2-3; T 5, Lines 5-23).

Subsequent to the occupation of this dwelling by appellant and his wife, a daycare facility established its business within 1,000 feet of the appellant's residence (T 7, Lines 5-9).

Thereafter, appellee BARNETT, appellant's probation officer, advised appellant of the violation under O.C.G.A. §42-1-15 under threat of having appellant's probation revoked (T 7, Lines 23-25; T 8, Lines 12 - 20).

To sustain his livelihood, appellant formed a corporation, of which appellant is a 50% shareholder, to and into a barbecue restaurant (T 9, Lines 2-20). As a part of that venture, the appellant, as one of the principals, entered into a Commercial Lease Agreement with the lessor in November of 2004 and opened in June of 2005 (T 9, Line 25).[2] The appellant conducted many tasks at his business based primarily on the fact that the other shareholder maintained a full-time job elsewhere (T 20, Lines 24-25; T 21, Lines 1-4).

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[2]The commercial lease is located in Lovejoy, Clayton County, Georgia (T 9, Line 18).

In exact in fashion, as the offending restrictions of O.C.G.A. §42-1-15 placed upon appellant's residency after the licensing of the daycare facility within 1,000 feet of his residence, another daycare facility, subsequent to the execution of appellant's lease and operation of his ongoing concern, moved in within 1,000 feet of appellant's business (T 10, Lines 1-4).

Appellant actually removed himself not only from his residence, but ceased his activities and employment at his business and, as a result of him removing himself from the business under threat of arrest and revocation, the business suffered (T 21, Lines 5-11).

PART II - ENUMERATION OF ERRORS

1. The court erred in ruling that there exists no unconstitutional taking of appellant's interest in his residence.
2. The court erred in ruling that there exists no unconstitutional taking of appellant's interest in his business.
3. The trial court erred in failing to recognize that the offending statute will forever deny the appellant of his right to transact business and otherwise infringe on his ability to contract.

Jurisdiction is conferred upon the Georgia Supreme Court under paragraph 3 of Section VI, Article VI, of the Constitution of the State of

Georgia. This is the second appearance of this case under O.C.G.A. §42-1-15 (Sex Offender Registry Statute), and jurisdiction is not otherwise conferred upon the Court of Appeals of the State of Georgia.

PART II - ARGUMENT AND CITATION OF AUTHORITY

O.C.G.A. §42-1-15(a)(1) unconstitutionally denies the appellant protection to his person and property. Article I, Section I, Paragraph II of the Georgia Constitution provides as follows:

> "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the law."

> "Any invasion, regardless of its degree of the owner's dominion over use of sale of his private property is interdicted by the Fourteenth Amendment, as well as Article I, Section I, Paragraph II of Georgia's Constitution." *Clark v. State*, 219. Ga. 680, 682.

> "Any intelligent court *must* hold that this liberty stops precisely where to extend it would trespass upon another's property. If one is granted the liberty to invade another's private property over the objection of the owner for any period of time, that same liberty would continue for all time, and the result is destruction of property without due process, in direct violation of

the Constitution." *Id* at 682.

The prohibitive language of the unconstitutional provisions of O.C.G.A. §42-1-15(a) clearly constitutes a deprivation of property, in direct contravention of the constitutional protection under the Georgia Constitution. This protection has been extended to the citizen and his property when the courts deprived the citizen of the possession of his property, where the rights thereto have not been forfeited by rule of law. See *Frankel v. Frankel*, 212 Ga. 643.

In further defining the intent of Article I, Section I, Paragraph II of the Georgia Constitution, the Supreme Court, in *Vickford v. Knowland*, 240 Ga. 255, stated that the equal protection provisions of both the State and Federal Constitutions are intended to prevent extraordinary benefits or burdens flowing to any one group.

O.C.G.A. §42-1-15(a) INVADES THE PROVINCE OF THE AFFORDED PROTECTION UNDER BOTH THE FEDERAL CONSTITUTION, AS WELL AS THE STATE CONSTITUTION, IN THAT IT REQUIRES THIS APPELLANT, WHO HAD ALREADY PURCHASED A HOME, TO INVOLUNTARILY VACATE HIS OWN DWELLING UNDER THE THREAT OF ARREST AND SUBSEQUENT REVOCATION PROCEDURES WHEN, AND ONLY WHEN, A DAY CARE FACILITY SUBSEQUENTLY MOVED INTO THE APPELLANT'S SUBDIVISION SUBSEQUENT TO THE PURCHASE BY THE APPELLANT AND HIS WIFE OF THEIR HOME

Appellant is mindful that the legislature has the power to enact discriminatory legislation upon a valid classification upon the standards

enunciated by this court.[3]

The distinction to be made, which does not pass muster upon the generally accepted standards, is the fact that the appellant neither sought out and purchased the dwelling subsequent to the establishment of the day care facility, nor has the appellant voluntarily remained at his dwelling, both prior to the unconstitutional act and the establishment of the day care facility.

In connection with both the appellant's dwelling and the operation of his business, our State Constitution provides, under Article I, Section I, Paragraph I:

> "No person shall be deprived of life, liberty, or property except by due process of law."

A particular law that, even though fair and constitutional it may appear on its face, may nevertheless not legally be applied to achieve an unconstitutional result or legally be applied to as to deprive any person of rights, privileges and immunities of the Constitution of the United States of America and the Constitution of Georgia. If such a law is applied and administered by a public authority with an evil eye and unequal hand so as to practically make unjust and illegal discriminations between persons in similar

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[3]See *McDaniel v. Thomas*, 248 Ga. 632; *Reed v. Hopper*, 235 Ga. 298; and *City of Calhoun v. North Georgia Electric Membership Corporation*, 233 Ga. 759. (The three generally accepted standards for determining constitutionality under the equal protection provisions of both the Federal and State Constitutions are: (1) Rational relationship test; (2) Intermediate level of scrutiny; and (3) Strict judicial scrutiny standard.)

circumstances material to their rights, the denial of equal justice is still within the prohibition of our Constitution. See *Walker v. State*, 220 Ga. 415, 418.

The term "property" has not only been defined by the Supreme Court of this state as not just the thing possessed, but also the rights of the owner in relation to the land or the thing and the right of the person to possess, use, enjoy, and dispose of it, and the corresponding rights to exclude others from the use. As such, there need not be any physical invasion damaging to the property, but only an unlawful interference with the right of the owner to enjoy his possession. See *Duffield v. DeKalb County*, 242 Ga. 432.

The appellant has, without contradiction, shown that his right to use and enjoy his dwelling since the unconstitutional enactment of O.C.G.A. §42-1-15(a) has been unconstitutionally abridged by the fact that now that the day care center has moved in upon him within the prohibited restrictive footage, he can no longer reside at the dwelling with his wife, or even sleep at his dwelling over night. After all, the term "day care facility", by its own terms, indicates that the care provided is during the day and is otherwise not open in the form of receiving and discharging minors in its ordinary course of business at night.

THE INSTANT ACTION CONSTITUTES A GOVERNMENTAL ACTION, BOTH PRESENTLY AND IN THE FUTURE, THAT OCCUPIES OR ENCROACHES UPON THE PRIVATELY OWNED PROPERTY, BOTH IN HIS BUSINESS AND IN HIS PERSONAL DWELLING, AND THE IMPACT OF SUCH RESULTS IN A TAKING

OF UNCONSTITUTIONAL FLAVOR

In this case's predecessor, this court held as follows:

> "Even where governmental action does not occupy or encroach upon privately owned property, the property's use still may be impacted such that a taking is deemed to have occurred. For instance, a regulation that denies all economically beneficial or production use of land will require compensation." *Mann v. State*, 278 Ga. 442, 443.

In the instant action, in contrast to the this case's predecessor, the appellant in this case has, in fact, obtained an economical and substantial interest in the purchase and occupation of his marital dwelling, for which he has some reasonable expectation of an investment. After all, for the majority of couples and/or persons in our society today, the purchase of their dwelling is an, if not the, essential asset of his, her, or their estate. The appellant in this case has moved to a dwelling which was, at the time, unaffected by any of the enacted provisions, only because there had not yet been a day care facility established, not only after his occupation of the dwelling, but well after the enactment of the statute.

The trial court suggested, in its order (R 133-36) that there was no economic impact upon the appellant due to the fact that he was not required to sell that property, but only prohibited from residing at that particular location

and, may even rent or sell it or visit it. There is no evidence in the record that this home was purchased for other than a residence for appellant and his wife. This dwelling was not purchased as an investment for rent or resale at a later date. Several posits are formed by this suggestion. What if the appellant were unable to sell his house? What if the appellant were unable to rent this particular dwelling? We know from this court's earlier decision that he cannot move back into the residence of his parents because he has no economic expectation or impact upon doing so. Faced with a mortgage and inability to sell or lease this particular piece of property and, coupled with the fact that he must glean some form of resources to support himself in the form of rent or a further mortgage upon another dwelling, presumably then unstained by this prohibitive statute, a solution to this posit would be that the appellant reside at his business, which has been stained by his prohibitive statute, which the trial court has failed to recognize in its Order.

Furthermore, the business that the appellant occupies is likewise an encroachment upon property from which he expects an economic benefit that has now been completely, if not entirely, sterilized from any existing employment duties which he is required to discharge, but will also be necessarily stained in the future were the appellant to move to a new location where subsequently a new day care facility might open in the prohibited area.

In light of that, the Supreme Court, in the predecessor case, held:

"Regulations that fall short of eliminating property's beneficial economic interest use may still effect a taking, depending upon the regulation's economic impact on the landowner, the extent to which it interferes with reasonable investment-backed expectations, and the interest promoted by the government action." *Id* at 443, citing *Palazzolo v. Rhode Island*, 553 U.S. 606, 617 (121 SC 2448, 150 LE 2d 592).

Our Supreme Court, upon considering this, noted:

"When considering these factors, courts must remain mindful that the taking clause is intended to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'." [citing *Palazzolo, supra*].

The enactment of O.C.G.A. §42-1-15(a)(1) denies the appellant of his right to transact business, accept private employment, and unconstitutionally forbids his right to contract.[4]

"The right to transact business in a manner not contrary to public health, safety, morals or public policy is a protected constitutional right and must be preserved to the citizens without

[4]Despite being raised by appellant's Complaint (R 4-19), as well as appellant's Post-Hearing Brief (R 114-123 at 120), the trial court failed to pass upon this issue raised by appellant.

discrimination." *Hughes v. Reynolds*, 223 Ga. 727, 730.

The enforcement of the instant oppressive statute clearly forbids your appellant from not only seeking and obtaining private employment, but also has unconstitutionally burdened him with the right to contract through his corporation to employ the services of his restaurant through a valid leasehold agreement that his corporation has with Lovejoy Realty, LLC. There is no question that the contract, which the appellant executed through his corporation/partnership with Charles Ballard, is not contrary to public health, safety, and morals or public policy, but is entirely within all realms of lawful businesses, many of which will compete against one another for the finest food, at least on an annual basis.

In further demonstrating the oppressive nature of O.C.G.A. §42-1-15(a), the unconstitutional structure of that particular subsection would absolutely prohibit the appellant from participating in any type of festival, contest, or any other festivities in which he and his partner may wish to engage their trade, such as the Taste of Clayton or the upcoming Taste of Atlanta. To be sure this is so, we know that from our own participation in these festivities, minor children will, in fact, congregate in and around such events, and the appellant, again, is unconstitutionally burdened with having to refuse and otherwise deny himself of these business opportunities.

The trial court, in its Order Denying Plaintiff's Request for

Permanent Injunction (R 133-136) treated appellant's employment rather cavalierly (see R 133). Not only did appellant specifically describe his many undertakings as part of being an employee (T 21, Lines 1- 4), but he specifically testified that as a result of the fact that he had to remove himself from the business under threat of revocation and arrest, his business suffered from his inability to remain employed at the business (T 21, Lines 5-11).

PART III - CONCLUSION

The trial court's findings and subsequent ruling, as well as the STATE'S contention, is terribly myopic. It seeks to allow the appellant to purchase a home with growing economic value upon the paying down of the mortgage, as well as a growing interest in an ongoing concern by margins of profit over losses. They would suggest that the appellant and those similarly situated, once a facility has moved in upon their established dwelling and business rights, would be required to relinquish their rights in these investments, only to be forced to relocate on, at best, a purely transient basis, to another location. Not only has this appellant suffered an injury, but he will continue to suffer imminent injury upon the relocation of his business and residence once a daycare facility has been licensed by the STATE to establish an operation. The appellant and his wife, for that fact, find themselves in nothing more than a house of mirrors. As we all are cognizant of the fact that the housing market has been on the decline for a year now, the appellant will

no doubt suffer a loss upon the sale of his residence, if he is able to sell it at all. Equally in doubt is the fact that appellant will likely sustain a large economic impact upon the necessity of early termination of his commercial lease in an attempt to move to a location of at least opportunity. Yet, we must ask how long will each instance last? Will it be one week before a daycare center opens within the prohibited 1,000 feet of appellant's new residence; or, will it be six weeks into a three-month lease that a daycare facility establishes operation within the prohibited confines of appellant's newly acquired commercial premises.

The appellees will suggest to the court that, like the trial court erroneously noted, the appellant may visit these locations and even have an ownership interest in the commercial venture of the business. Under the prohibitive statute, however, the appellant will never be able to transact a valid lease agreement, residential, commercial or otherwise, nor will he be able to enter into a contract for a joint venture to create a capacity to earn an income and thereby support a residential dwelling. As the trial court noted in its opinion, it conceded that a sole proprietorship may, in fact, create a different scenario. However, this presents a rather cavalier presbyopic attitude juxtaposition to one whom cannot see the ocean for all of the waves pounding in the surf.

The trial court's opinion and the STATE'S argument would be

that appellant may visit both his business and his residence, but cannot be employed there, only to cause him the trouble and expense of pulling up roots in both locations and moving to another upon the whim of another daycare facility moving in within the prohibited area. This, the trial court's opinion and the STATE'S argument, would suggest these acts to be facile in their procurement, doubtful as to one undertaking, and unduly burdensome and unconstitutional as to any and all future and imminent violations that certainly will occur.

In the instant action, the appellant's property interest is paramount and can be considered nothing less than apex to any other set of facts, particularly in contrast with the predecessor case. The appellant has now been making the mortgage payments on his house, for which he testified that there is at least some equity in the Hampton, Clayton County, Georgia, property. The appellant, mindful of his obligations upon the prohibitions of his sentence and the resulting enactment of O.C.G.A. §42-1-13 et seq., nevertheless incurred debt and obliged himself to a mandatory duty in his barbecue restaurant, all in an effort to seek and obtain private employment and have the ability to earn money to support himself and his spouse. Not only does the appellant have reasonable investment-backed expectations to his home place with the amassing of equity, but he also enjoys that very same benefit with the occupation and duties as a fifty percent (50%) shareholder of the corporation

for the barbecue restaurant.

Were the appellant to have to relinquish his home place as a result of any decision-based constitutional upholding, he and his wife would nevertheless be banished to residing at nothing other than hotels, if any he could find or, at the very least, with some landowner, who would permit a tenant at will, month-to-month lease, all depending upon whether or not a day care facility should, at its whim, wish to establish a business within the prohibited area.

There is no question that the same burden would apply to the appellant's employment. Even if the appellant were not so employed by virtue of his fifty percent (50%) ownership in the corporation, together with a substantial interest, occupation, and discharge of duties as a result of the obligation and lease he executed on behalf of the corporation, the offending statute would nevertheless be unconstitutional in any other circumstance. For instance, even if the appellant were merely an employee of the barbecue restaurant, once his employment would have extinguished by virtue of threat of arrest and prosecution under the offending statute, he would be required to again seek employment from some other trade, occupation or industry, only subject to him being voluntarily discharged from his employment, due to the fact that a day care facility had subsequently moved in on his employer's place of business.

As the Supreme Court suggested in its term "mindful", this court, as all other courts, must consider the fact that this appellant did not choose to remain in possession of any of the premises, both private and commercial, when a day care facility had already been established in either place. The compounding nature of the unconstitutional provisions of this act would require the appellant and his wife, and all others similarly situated, to live as hobos and vagabonds, hopefully in search of a month-by-month leased premises from a potential landlord. In this case, the appellant, nor his wife, can expect any economical interest, nor obtain any equity, in any privately-owned dwelling. Appellant is mindful that the facts of this case would simply require him to remove himself from his residence and his place of employment and, as far as a future residence, hopefully, he and his wife could acquire and purchase another home. Likewise, he and his partner in the corporation may voluntarily be relieved of the lease obligations of their tenancy, only to relocate to another commercial avenue. The problem arises when, in both cases, a day care facility elects to establish itself within the prohibited area. As the evidence has demonstrated, the construction of these day care establishments and the procurement of any such license has its effect in not only residential areas, but commercial areas, as well.

To even consider upholding the instant statute requires this appellant and all others in his status to become vagabonds and gypsies, and

otherwise relinquish themselves to mere serfdom and an ultimate banishment to what the Old Testament describes as a leper colony, which, throughout our history, has been demonstrated as contrary to our Constitution.

As is set forth in the oldest testament and book known to mankind, this appellant, like others, will be banished to a leper colony beyond all means, and as set forth herein above, the statute is hereby unconstitutional.

Respectfully submitted this 24th day of April, 2007.

ALBERT BAILEY WALLACE, P.C.

BY: _____
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SUPREME COURT OF GEORGIA
Case No. S07A1043

Atlanta April 20, 2007

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

ANTHONY MANN v. DEPARTMENT OF CORRECTIONS et al

Your request for an extension of time to file the brief of appellant in the above case is granted. You are given an extension until April 24, 2007, to file. Failure to do so will subject you to the sanctions of Rules 7 and 10 of this Court.

Appellee shall have twenty days from the date the appellant's brief is filed.

A request for oral argument must be independently timely filed. No extensions requesting oral argument will be granted. Rule 50 (3).

A copy of this order MUST be attached as an exhibit to the document for which you received this extension.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Jeanette Wilson, Deputy Clerk

CERTIFICATE OF SERVICE

This is to certify that I have this date served the following parties with a copy of the within and foregoing pleading by placing a true copy of same in the United States Mail with adequate postage affixed to insure delivery addressed to:

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This 24th day of April, 2007.

ALBERT BAILEY WALLACE, P.C.

BY: _____
Stephen Bailey Wallace, II

CIVIL.MANN.SUPREME.CERT.SER