

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

DAVID EIKELAND :
 :
 :
V. :
 :
GARY T. SILVA, in his capacity as :
Chief of Police of the City of Newport :
 :

**PETITION FOR WRIT OF MANDAMUS, DECLARATORY, AND ALTERNATE
RELIEF**

PARTIES AND JURISDICTION

1. Plaintiff, David Eikeland, is a resident of the City of Newport, County of Newport, in the State of Rhode Island and Providence Plantations.
2. Defendant, Gary T. Silva, is the Chief of Police of the City of Newport, County of Newport, in the State of Rhode Island and Providence Plantations.
3. Jurisdiction is conferred in this Court pursuant to Rhode Island General Laws § 8-2-16, § 9-30-1, et seq., 42 U.S.C. § 1983, and Rule 81(d) of the Superior Court Rules of Civil Procedure as Plaintiff requests a writ of mandamus and alternate injunctive relief.
4. The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II.
5. The Fourteenth Amendment provides in pertinent part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
U.S. Const. amend. XIV, § 1.

FACTS

6. On May 15, 2010, the Plaintiff requested in writing from the Newport Police Department an application for license to carry a concealable weapon. Shortly thereafter, the Plaintiff visited the Newport Police Department in person, at which time he was informed that that it was the department's policy not to issue permits and that no application was available.
7. On or about January 25, 2011 Plaintiff met with then Newport Chief of Police Michael McKenna to discuss the development of an application. Chief McKenna indicated that an application would be furnished by the end of February.
8. On March 16, 2011, Chief McKenna contacted Plaintiff via E-mail and indicated that he was moving forward in the development of an application and that he would contact Plaintiff again, presumably to provide an application, by the end of the following week.
9. After Chief McKenna retired, Plaintiff contacted Chief Gary Silva again seeking an application.
10. Chief Silva replied on or about June 22, 2011 indicating that the development of the application package was in process and referring Plaintiff to the Rhode Island Attorney General's office.
11. Despite representations that the process to develop the application was under way, in a letter dated 29 November 2011, in response to a request for documents under the Rhode Island Access to Public Records Act the Licensing Authority represented to the Rhode Island Department of Attorney General that "The City neither has a permit application

nor has one in draft form.” Letter from City Solicitor Joseph J. Nicholson, Jr. to Special Assistant Attorney General Lisa Pinsonneault, 29 November 2011. A copy of the letter is attached hereto and incorporated herein as Exhibit A.

12. Plaintiff has continued to make several informal follow up contacts with the Newport Police Department for the purpose of obtaining an application.

13. On or about April 27, 2012 Counsel for Plaintiff wrote a letter to the Newport Police Department requesting an application on behalf of his client. A copy of the letter is attached hereto and incorporated herein as Exhibit B.

14. In a response written by Assistant City Solicitor Christopher J. Behan, Chief Silva agreed to develop a policy and application to comply with RIGL 11-47-11(a) but failed to indicate a date or time when this process would be completed, instead expressing a “hop[e]” that the process “can be met at least in terms of having a policy and procedures drafted subject to final approval by this office and, if need be, the Newport City Council” within ninety days. A copy of the letter is attached hereto and incorporated herein as Exhibit C.

15. Despite the assurances that he would develop an application within ninety days, when Plaintiff returned to the Newport Police Department upon the expiration of the ninety day period to obtain an application, no application was made available and Plaintiff was once again directed to the Department of the Attorney General.

16. The refusal to provide an application and stall by recognizing the obligation to develop an application but insist upon a need for more time to do so has been a long-standing tactic by the Newport Licensing Authority to avoid its obligations under RIGL § 11-47-11(a).

17. Rhode Island General Laws § 11-47-11(a) provides:

§ 11-47-11 License or permit to carry concealed pistol or revolver. – (a) The licensing authorities of any city or town shall, upon application of any person twenty-one (21) years of age or over having a bona fide residence or place of business within the city or town, or of any person twenty-one (21) years of age or over having a bona fide residence within the United States and a license or permit to carry a pistol or revolver concealed upon his or her person issued by the authorities of any other state or subdivision of the United States, issue a license or permit to the person to carry concealed upon his or her person a pistol or revolver everywhere within this state for four (4) years from date of issue, if it appears that the applicant has good reason to fear an injury to his or her person or property or has any other proper reason for carrying a pistol or revolver, and that he or she is a suitable person to be so licensed. The license or permit shall be in triplicate in form to be prescribed by the attorney general and shall bear the fingerprint, photograph, name, address, description, and signature of the licensee and the reason given for desiring a license or permit and in no case shall it contain the serial number of any firearm. The original shall be delivered to the licensee. Any member of the licensing authority, its agents, servants, and employees shall be immune from suit in any action, civil or criminal, based upon any official act or decision, performed or made in good faith in issuing a license or permit under this chapter.

18. Rhode Island General Laws § 11-47-2(5) provides:

§ 11-47-2 Definitions. – When used in this chapter, the following words and phrases are construed as follows:

(5) "Licensing authorities" means the board of police commissioners of a city or town where the board has been instituted, the chief of police or superintendent of police of other cities and towns having a regular organized police force, and, in towns where there is no chief of police or superintendent of police, it means the town clerk who may issue licenses upon the recommendation of the town sergeant, and it also means any other person or body duly authorized by the city or town charter or by state law.

19. Pursuant to RIGL 11-47-2(5) Chief Silva, in his capacity of Chief of Police in the City of Newport, is the “licensing authority” for the issuance of concealed weapons licenses and permits in the City of Newport.

COUNT I - MANDAMUS

20. The Defendant has a defined ministerial and legal obligation and duty to accept and consider an application filed pursuant to § 11-47-11(a) and does not have legal authority or discretion to refuse to allow the Plaintiff to apply for a license.
21. Pursuant to RIGL § 11-47-11 the City of Newport “shall issue” gun permits to qualified applicants and cannot arbitrarily deny that right.
22. Plaintiff is entitled to have an application for a lawful permit accepted and reviewed by the City of Newport Licensing Authority.
23. Plaintiff has no plain or adequate remedy at law.
24. The issuance of a writ of mandamus will be an effective remedy.

WHEREFORE, Plaintiff requests this Honorable Court:

- a. Issue a writ of mandamus requiring that Defendant comply with the legal mandates of RIGL § 11-47-11(a).
- b. Provide to the Plaintiff and accept from the Plaintiff an application for a gun permit.
- c. Order the Defendant to institute policies and procedures whereby the Chief of Police as the “licensing authority” for the City of Newport pursuant to RIGL § 11-47-2(5), accepts and reviews applications for permits for applicants in addition to the Plaintiff.
- d. Alternatively, Plaintiff requests the issuance of a mandatory injunction against the Defendant requiring him to immediately accept and consider Plaintiff’s

Application pursuant to RIGL § 11-47-11(a) under the authority vested in the Defendant pursuant to RIGL § 11-47-2(5).

- e. Award counsel Fees and costs to the Plaintiff for the prosecution of the instant action
- f. Any and all other relief that the Court deems appropriate.

**COUNT II – RIGHT TO KEEP AND BEAR ARMS U.S. CONST.,
AMENDS. II AND XIV, R.I. CONST., ART. I § 22, and 42 U.S.C. § 1983**

- 25. Paragraphs 1 through 24 are incorporated and re-alleged as though fully set forth herein.
- 26. The Second Amendment to the United States Constitution “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).
- 27. If a state or municipality requires its citizens to obtain licenses or registrations in order to possess handguns, then it may not refuse to issue the requisite licenses and registrations to people who are otherwise qualified. See *Heller*, 554 U.S. at 635 (“Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.”).
- 28. By refusing to issue or accept applications for concealed carry permits Defendant unjustifiably burdens Plaintiff’s exercise of his fundamental right to keep and bear arms in violation of the rights secured by Article 1, Section 22 of the Constitution of the State of Rhode Island and Providence Plantations, the Second Amendment to the United States Constitution, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983.

WHEREFORE, Plaintiff requests this Honorable Court:

- a. Issue a writ of mandamus requiring that Defendant comply with the legal mandates of RIGL § 11-47-11(a).
- b. Provide to the Plaintiff and accept from the Plaintiff an application for a gun permit.
- c. Order the Defendant to institute policies and procedures whereby the Chief of Police as the “licensing authority” for the City of Newport pursuant to RIGL § 11-47-2(5), accepts and reviews applications for permits for applicants in addition to the Plaintiff.
- d. Alternatively, Plaintiff requests the issuance of a mandatory injunction against the Defendant requiring him to immediately accept and consider Plaintiff’s Application pursuant to RIGL § 11-47-11(a) under the authority vested in the Defendant pursuant to RIGL § 11-47-2(5).
- e. Award counsel Fees and costs to the Plaintiff for the prosecution of the instant action
- f. Any and all other relief that the Court deems appropriate.

COUNT III – U.S. CONST., AMEND. XIV, EQUAL PROTECTION, and 42 U.S.C. § 1983

29. Paragraphs 1 through 28 are incorporated and re-alleged as though fully set forth herein.

30. By refusing to issue or accept applications for concealed carry permits Defendant unjustifiably and impermissibly classifies individuals with respect to the exercise of a fundamental constitutional right. The provision creates two classifications of individuals. Citizens outside of Newport, who are permitted to exercise their fundamental right to

keep and bear arms, and citizens of Newport who are not permitted to exercise their rights under the Rhode Island or United States Constitution. The classification system is inherently arbitrary, irrational, and deprives individuals of their fundamental right to bear arms based on criteria (residence) that cannot be justified under any means-ends level of scrutiny for the security of a fundamental constitutional right.

31. The provision thus violates Plaintiff's Fourteenth Amendment right to equal protection of the law, damaging him in violation of 42 U.S.C. § 1983.

WHEREFORE, Plaintiff requests this Honorable Court:

- a. Issue a writ of mandamus requiring that Defendant comply with the legal mandates of RIGL § 11-47-11(a).
- b. Provide to the Plaintiff and accept from the Plaintiff an application for a gun permit.
- c. Order the Defendant to institute policies and procedures whereby the Chief of Police as the "licensing authority" for the City of Newport pursuant to RIGL § 11-47-2(5), accepts and reviews applications for permits for applicants in addition to the Plaintiff.
- d. Alternatively, Plaintiff requests the issuance of a mandatory injunction against the Defendant requiring him to immediately accept and consider Plaintiff's Application pursuant to RIGL § 11-47-11(a) under the authority vested in the Defendant pursuant to RIGL § 11-47-2(5).
- e. Award counsel Fees and costs to the Plaintiff for the prosecution of the instant action

f. Any and all other relief that the Court deems appropriate.

DATED September 4, 2012

Plaintiff,
David Eikeland
By and Through Counsel

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