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FEATURED CASE:

Art: Developer's Willful Destruction of "Street Art" on Building Results in $6.75 Million Award to Artists

Castillo v. G&M Realty, L.P., Nos. 18-498-cv and 18-538-cv (2d Cir., Feb. 21, 2020).

A New York developer who maliciously whitewashed an entire building covered with acclaimed street art violated the Visual Artists Rights Act of 1990 and was liable for $150,000 in statutory damages for each work destroyed.

In 2002, defendants G&M Realty L.P. and Gerald Wolkoff (collectively, Wolkoff) installed artwork in a series of dilapidated warehouses that they he owned in Long Island City, New York. Wolkoff enlisted Jonathan Cohen (Cohen), a distinguished aerosol artist, to turn the site, known as 5Pointz, into a major global center for aerosol art. It attracted thousands of daily visitors, numerous celebrities, and extensive media coverage.

"Creative destruction" was an important feature of the 5Pointz site. Some art at the site achieved permanence, but other art had a short lifespan and was repeatedly painted over. An elaborate system of norms—including Cohen's permission and often consent of the artist whose work was overpainted—governed the painting process. During its lifespan, 5Pointz was home to a total of approximately 10,650 works of art.

In May 2013, Cohen learned that Wolkoff had sought municipal approvals looking to demolish 5Pointz and to build luxury apartments on the site. Cohen applied to the New York City Landmark Preservation Commission to have 5Pointz designated a site of

cultural significance. The application was unsuccessful, as were Cohen's efforts to raise money to purchase the site. Cohen, joined by numerous 5Pointz artists, thereafter sued under Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (VARA) to prevent destruction of the site. VARA grants visual artists certain "moral rights" in their work, preventing modifications of artwork that are harmful to artists' reputations. It also affords artists the right to prevent destruction of their work if it has achieved "recognized stature" which continues even after the work is sold. And an artist who establishes a violation of VARA may obtain actual damages and profits or statutory damages, which are enhanced if the artist proves that a violation was willful.

In mid-2013, Plaintiffs obtained a temporary restraining order to prevent the demolition of the site. They then applied for a preliminary injunction. Before that could be obtained, Wolkoff began to destroy the artwork. He banned the artists from the site and refused them permission to recover any work that could be removed. Several nights later (and before the district court's written opinion could issue), Wolkoff deployed a group of workmen who, at his instruction, whitewashed the art.

In November 2013, the district court issued its opinion denying the preliminary injunction. It concluded that, although some of the 5Pointz paintings may have achieved recognized stature, resolution of that question was best reserved for trial. Furthermore, given the transitory nature of much of the work, preliminary injunctive relief was inappropriate and that the monetary damages available under VARA could remediate any injury proved at trial.

A three-week trial eventually ensued. In November 2017, an advisory jury found violations of VARA as to 36 of the 49 works that were whitewashed. More precisely, it found that 28 works had achieved recognized stature and had been unlawfully destroyed and that 8 other works had been mutilated or distorted to the detriment of the artists' reputations. It recommended an award of $545,750 in actual damages and $651,750 in statutory damages. In February 2018, the district court issued its findings of fact and conclusions of law. It found that Wolkoff had willfully violated VARA by destroying the art, works that "reflect[ed] striking technical and artistic mastery and vision worthy of display in prominent museums if not on the walls of 5Pointz."

While the court did not award actual damages, because it could not reliably fix the value of the destroyed art, it did award maximum statutory damages, based on Wolkoff's awareness of the ongoing litigation and his refusal to afford the artists any opportunity to retrieve or save their works. That award amounted to $150,000 for each of 45 works, for a total of $6.75 million. The court offered additional findings of willfulness, including the fact that Wolkoff had falsely stated that he needed to begin demolition imminently, which mitigated against the preliminary injunction the plaintiffs originally requested. In the absence of such a deadline, the court stated, it would have granted the injunction.

The crux of the parties' dispute on appeal was whether the works at 5Pointz were works of "recognized stature," thereby protected from destruction under VARA. Wolkoff contended that many of the works could not achieve such status because they were

temporary. But VARA makes no distinction between permanent and temporary works, and the Second Circuit referenced numerous highly-acclaimed temporary installations such as Christo's placement in 2005 of 7,503 orange draped gates in Central Park—a work that lasted only two weeks. It noted the public's interest in street art, graffiti, and even creations such as Banksy's which are intended to self-destruct.

Wolkoff also argued that, because the artists knew the 5Pointz building would eventually be torn down, they could not have expected preserve their works. But VARA addresses that possibility, requiring that artists be allowed reasonable opportunity to salvage their works. The Second Circuit found ample basis for the district court's finding of VARA violation.

The Second Circuit also upheld the award of damages. It was particularly troubled by Wolkoff's whitewashing of the 5Pointz art, because nothing in the demolition process required that step, Wolkoff did so knowing of the artists' VARA rights. The Circuit found that the lower court had properly evaluated all six factors relevant to the determination of statutory damages:

The district court carefully considered the six factors relevant to a determination of statutory damages and concluded that 'Wolkoff rings the bell on each relevant factor. Those six, drawn from copyright law, are '(1) the infringer's state of mind; (2) the expenses saved, and profits earned, by the infringer; (3) the revenue lost by the copyright holder; (4) the deterrent effect on the infringer and third parties; (5) the infringer's cooperation in providing evidence concerning the value of the infringing material; and (6) the conduct and attitude of the parties.'

Wolkoff's lack of remorse, and statement that he would take the same action again, did not help his cause. The massive statutory damages award was sustained.

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Jails: Five Instances over Seven Years of Failure to Assign Inmates to Lower Bunk do Not Constitute Custom or Practice

Bridges v. Dart, No. 19-1791 (7th Cir. Feb. 19, 2020).

An inmate who fell from a top bunk in a County detention center despite medical orders that he be placed in the lower bunk could not demonstrate an actionable "custom or practice" by the jail by citing five such instances over a seven-year period.

In February 2014, Kenyatta Bridges (Bridges) was a pretrial detainee at the Cook County Department of Corrections (Department). Cook County Hospital medical records

dated March 2014 indicated that Bridges had suffered blunt head trauma. The medical records also indicated a prescription for a lower bunk to begin March 2014 and end September 2014. Despite this alert, Bridges was assigned an upper bunk and in April 2014, he fell out of the top bunk, injuring himself.

Bridges filed suit under Section 1983 against Thomas Dart, the Sheriff of Cook County, Illinois (Sheriff) in his official capacity as well as Cook County, Illinois (County) alleging that the injuries he sustained were caused by the defendants' pattern and practice of ignoring medically necessary lower bunk prescriptions. The district court granted summary judgment in favor of the defendants. To support his claim, Bridges cited five lawsuits filed by Department detainees between 2005 and 2012 claiming they were injured by using upper bunks after their lower bunk prescriptions were ignored.

The Seventh Circuit affirmed the district court's grant of summary judgment in favor of the defendants. The Seventh Circuit noted that although there is no bright line rule defining "widespread custom or practice," there must at least be some evidence demonstrating that there is a policy at issue rather than a random event or even a short series or random events. Previously, the Seventh Circuit has dismissed claims of widespread custom or practice involving a single incident, or even three incidents, because they do not demonstrate the unlawful practice was so pervasive that it amounted to a policy decision. Bridges' showing of five inmate complaints over a seven-year period was inadequate as a matter of law to indicate that the Department had a widespread custom or practice of which policymakers had reason to be aware.

LINK

Religion: In Light of *American Legion,* Longstanding Cross in Florida Public Park Does Not Violate Establishment Clause

***Kondrat'yev v. City of Pensacola*, No. 17-13025 (11th Cir. Feb. 19, 2020).**

A 75-year old, 34 foot tall cross located in a public park survived removal based on the Supreme Court's decision in *American Legion*.

In 1941, the National Youth Administration erected a wooden cross in Pensacola's Bayview Park to be the focal point of an annual Easter program. The program was organized by the Pensacola Junior Chamber of Commerce (Jaycees) and became a tradition during and after World War II. A stage was built in front of the cross to serve as a permanent home for the program.

In 1969, the Jaycees replaced the original cross with a 34-foot concrete cross, which was later donated to the City. The City maintains the cross at around $233 per year. The cross is one of two religious displays in Bayview Park, and the cross is one of over 170 monuments in the City's parks. The cross has continued to serve as the location of the annual Easter program, but has also been used for other purposes such as Veterans and Memorial Days. The cross has stood in Bayview Park for over 75 years.

Plaintiffs filed suit alleging the cross's presence on city property violates the First Amendment Establishment Clause.

In 2019, the U.S. Supreme Court decided *American Legion v. American Humanist Association*, which found that a 32-foot Latin cross on public land did not violate the Establishment Clause. Because of its decision in *American Legion*, the U.S. Supreme Court remanded this case, which originally ordered the removal of a 34-foot Latin cross maintained by the City on public property, which was granted certiorari after *American Legion* was decided. This case was remanded to the Eleventh Circuit for consideration in light of the *American Legion* decision.

On remand, the Eleventh Circuit decided that the plaintiffs have Article III standing to challenge the City's maintenance of a cross in Bayview Park under *Rabun*, but found that *American Legion* abrogates *Rabun* to the extent that *Rabun* disregarded evidence of historical acceptance and instead applied the *Lemon* test. Moreover, *American Legion* applies to the cross's presence on city property and as such, the cross does not violate the Establishment Clause.

LINK

RLUIPA: Requirement that Churches Obtain Special Use Exception, While Public Schools Do Not, Violates RLUIPA

Hunt Valley Baptist Church, Inc. v. Baltimore County, No. 17-0804 (D. Md. Feb. 10, 2020).

A Maryland church successfully challenged a county zoning requirement that religious institutions must obtain a special use exception to build, while public schools were exempt.

Hunt Valley Baptist Church (Church), which began operations in Baltimore County, Maryland (County) in 2004, desired to expand its facilities to serve a burgeoning congregation. According to its pastor, the Church's 350 seats and 84 parking spots were insufficient to serve occasional crowds of more than 500 attendees. The Church also wanted to build additional structures which could accommodate large crowds

attending weddings, funerals and similar gatherings. It identified a site where it planned to erect a substantial building to house a fellowship hall, gymnasium, classrooms, offices and enough seating for 1,000 parishioners and petitioned for a special exception.

After considering the petition, an Administrative Law Judge (ALJ) granted the special exception. However, that decision was appealed to the County Board by a non-profit entity known as Valleys Planning Council, Inc. After seven days of hearings The County Board thereafter reversed the ALJ's grant of special exception, holding that the gymnasium including basketball court was "not the type of use" that the County had approved via the special exception. It also found that the proposed parking lot did not satisfy the County's pervious surface requirement to avoid excessive water runoff.

The Church sued the County, asserting eight causes of action including violations of RLUIPA and the Free Exercise and Establishment Clauses. In response, the County first challenged the constitutionality of RLUIPA, but was unsuccessful:

> The County contends that RLUIPA inherently infringes upon the authority of states and local jurisdictions. See, e.g., ECF 172 at 7 (referring to Hunt Valley's claim as a "demand[] to avoid and suppress the local land use law"). Importantly, "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." New York v. United States, 505 U.S. 144, 156 (1992); see also Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 759 (1982). Here, because RLUIPA was enacted pursuant to Congress's constitutional "power to enforce, by appropriate legislation, the provisions of this article," see U.S. Const., amend. XIV, the statute is consistent with the Tenth Amendment.

The court found that the County's zoning code violated the equal terms provision because it allowed public schools as of right, but required churches in the very same zone to obtain a special exception permit. "While public schools are permitted by right in the zone, churches, such as Hunt Valley, must apply for and obtain a special exception." The court noted that the County had never even asserted that churches would have a more deleterious water effect than schools.

LINK

Takings: Reversion of Zoning from Urban to Agricultural Use was not Actionable Taking

Bridge Aina Le'a, LLC v. Hawaii Land Use Commission, No. 18-15738 (9th Cir. Feb. 19, 2020).

Where a property's zoning reverted from urban use to agricultural use after the owner did not make good on a commitment to build low income housing on the land, the reversion was not a taking under *Lucas* or *Penn Central* because the land retained considerable value and the owner's investment expectations had been largely preserved.

In 2011, the Hawaii Land Use Commission (Commission) reverted 1,600 acres of land from a conditional urban land use classification to an agricultural use classification. This reversion occurred after 22 years where landowners made unfulfilled development representations to the Commission to maintain the land's urban use classification.

Bridge Aina Le'a was one of the landowners at the time of the reversion. It challenged the reversion's constitutionality. At trial, the jury found the reversion was an unconstitutional regulatory taking under *Lucas v. South Carolina Costal Council* and under *Penn Central Transportation Co. v. City of New York*. The district court held that either finding by the jury independently supported the verdict and denied the State's motion for judgment as a matter of law. The district court also denied the State's renewed JMOL motion after judgment was entered.

On appeal, the Ninth Circuit held that the district court erred in denying the State's renewed JMOL motion because the plaintiff's evidence did not establish a taking pursuant to either *Lucas* or *Penn Central*.

There was no taking pursuant to *Lucas* because the land retained substantial residual value in its agricultural use classification. The agricultural use classification allowed plaintiffs to continue to use the land in economically beneficial ways. The Court held the State was entitled to a Judgment as a Matter of Law for the jury's findings as it pertains to *Lucas*.

When the Ninth Circuit applied the *Penn Central* factors to the evidence presented at trial, it found that the jury could not reasonably find in favor of the plaintiff. It was determined that the valuation evidence strongly weighed against a taking under the first *Penn Central* factor. The Ninth Circuit rejected the plaintiff's assertion that the disruption of a land sales agreement showed economic impact, especially since the record demonstrated that the plaintiff overstated the reversion's impact on its contractual relationship with the prospective purchaser. The Ninth Circuit held the Commission's reversion did not interfere with the plaintiff's reasonable investment-backed expectations at the time of acquisition.

Additionally, it was noted that in 1991, before the plaintiff purchased the property, the Commission clarified to the plaintiff that it might issue an order to show cause as to why the land should not revert for failure to substantially comply with representations made to obtain the reclassification to an urban use. Hawaii law expressly authorizes the Commission to impose such conditions, and such conditions run with title to the land. Plaintiff had committed to build affordable housing units in exchange for an order designating the land's urban use classification. The plaintiff failed to uphold its end of the arrangement in failing to complete the units. Because the plaintiff's evidence established a diminution in value that was disproportionately small and because the reversion did not interfere with the plaintiff's reasonable investment-backed expectations, no reasonable jury could conclude the reversion effected a taking pursuant to *Penn Central*.

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THIS JUST IN: Detroit Contemplating Nation's First Drone Highway: Spurred by an entrepreneur who previously developed the app which allows customers to locate products in Target stores, Detroit is contemplating the creation of an overhead highway which would accommodate commercial drones, linking nearby municipalities. Tolls might be charged. The NAVs would be flying below the FAA's maximum height allowance of 400 feet and weigh less than 55 pounds.

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