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First Amendment: Residence is not "Expression;" Architectural Review Ordinance is not Subject to Strict Scrutiny

Burns v. Town of Palm Beach, no. 18-14515 (11th Cir. June 8, 2021).

In a highly readable and entertaining opinion, the Eleventh Circuit upholds a lower court decision finding that the Town's denial of a building permit for a proposed beachfront residence that would more than double the size of the existing home did not violate the plaintiff's equal protection or expressive rights.

Donald Burns (Burns) wanted to replace his 10,000 square foot "traditional" beachfront mansion in Palm Beach (Town) with a new home of nearly 20,000 square feet, in the midcentury modern style. The new structure, Burns said, would reflect his evolved philosophy of aesthetic simplicity, being "a means of communication and expression of the person inside: Me." The project required approval by the Town's seven-member architectural review commission, which evaluates permit applications to make sure new structures are "in harmony with the proposed developments on land in the general area" and "not excessively dissimilar in relation to any other structure existing . . . within 200 feet of the proposed site in respect to . . . [a]rchitectural compatibility[,] . . . [a]rrangement of the components of the structure[,] . . . [a]ppearance of mass from the street," and "[d]iversity of design that is complimentary with the size and massing of adjacent properties." As Judge Luck expressed it, in one of many memorable lines in his cogent yet highly engaging 70-page majority opinion, **"In other words, the town doesn't want elephants next to poodles."**

The commission found that Burns' new mansion was not in harmony with other developments and was excessively dissimilar to other homes within 200 feet in terms of

its architecture, arrangement, mass, and size. In lieu of challenging the decision to the Town council and then to state court, Burns sued in federal court under section 1983, claiming that the Town's criteria used to deny his building permit violated his First Amendment free speech rights and his Fourteenth Amendment rights to due process and equal protection. The district court granted summary judgment for the town.

The Eleventh Circuit affirmed.

First Amendment: The Circuit upheld the lower court's analysis, which was premised on the three-part "predominant-purpose test" which asks whether: (1) the owner of the structure subjectively intended to communicate a message; (2) the predominant purpose of the structure was to communicate a message; and (3) a reasonable observer viewing the structure in its surrounding context had a great likelihood of understanding it to be predominantly communicating some message.

Like the Town, the Circuit conceded that Burns may have intended to communicate a message. But he failed the other criteria: it was doubtful that the purpose of the new home was to convey a message rather than to serve as a residence, and even more implausible that an observer would interpret it as such—if it could even be "observed," given that the structure was to be shielded behind an 18-foot tall hedge, 32-foot palm trees, a wall and solid gate. The mansion was not First Amendment "expression." And even if the house could be deemed to be an "expression," the Town's regulation was not content-based and, despite Burns' best efforts to argue otherwise, did not implicate *Reed* :

> The section 18-205(a) criteria are not content-based because they do not distinguish favored from unfavored speech. Section 18-205(a) requires the commission to consider whether the proposed building is excessively dissimilar to any other structure within 200 feet in respect to "significant design features" and "[a]rchitectural compatibility." Town of Palm Beach, Fla., Code § 18-205(a). On its face, section 18-205(a) applies to all designs. It asks only whether the design features of the proposed building are excessively dissimilar from the surrounding homes. **If a grocery store rule requires that dissimilar-looking produce not be put next to each other on the same grocery shelf, a stock clerk doesn't have to know whether a fruit is a mango or a papaya to know that it doesn't look like a pineapple.**

Fourteenth Amendment: Given that this was not an "expression" protected by the First Amendment, Burns' void for vagueness challenge was unavailing. The Circuit agreed with the lower court's application of "less exacting scrutiny" to evaluate the Town's ordinance, which listed specific design elements to compare a proposed structure to others in the area and identified "architectural compatibility" and "harmony" with nearby structures as guidelines for a design. As to Burns' equal protection claim, the Circuit again agreed with the lower court--Burns had failed to present evidence of similarly situated building permit applications that the Town treated differently than his, so his class-of-one claim failed.

Summary Judgment: Burns also objected to the entry of summary judgment, asserting that he would introduce additional facts. But he had waived any objection to an early summary judgment because he fully briefed a response to the Town's motion and participated in oral argument. And even if he did not waive the objection, he did not meet the provisions of FRCP 56(d) which require a nonmovant seeking to avoid summary judgment to show "by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Rather, his declaration only identified "general categories of discovery that would be sought."

DISSENT: Judge Marcus dissented, in an equally lengthy opinion filled with soaring language and referencing architectural masterpieces from the Acropolis to the Capitol, including "expressive" residences from Monticello to Mies van der Rohe's Farnsworth House:

> When the river floods, the water flows beneath the house; in the snow its white beams and glass panes are nearly invisible; from within it is as though one stands unsheltered in the forest. The house expresses the view of Mies -- and of the home's first owner, Dr. Edith Farnsworth -- that the modern world has strayed too far from nature and lost the potential for individual fulfillment hidden therein Burns, said Judge Marcus, selected his new home design "because of the message he believes the International Style conveys -- minimalism, individuality, and the pursuit of fulfillment in harmony with nature." (The majority found risible the concept that a 20,000 square foot home with a wine cellar, indoor spa, two pools, and other accoutrements was "minimalist.")

At the very least, according to Marcus, more facts were necessary before deciding that the home was not expressive and strict scrutiny did not apply: whether Burns's artistic and philosophical motivation was genuine, whether there was a likelihood that some sort of message would be communicated to those viewing Burns' home, and whether the Town had applied some reason other than the ordinance provisions in denying the permit. (There were already nearly a dozen architectural styles within the Town, including "International," and recorded comments of some commission members included questionable sentiments like "[t]here's not a person in Christendom who can convince me that this house is charming." At the same time, the home's dimensions alone put it at odds with neighboring properties).

Marcus sees the majority view as preventing residential architecture from ever being protectible expression. To him, this avoids historical fact; take Frank Lloyd Wright: "A forefather of modernism, Wright's homes are an exemplary combination of aesthetic and functional concerns. **To commission a Prairie house in the early twentieth century, then, was to communicate a desire to be new, to be modern, and to be uniquely American.**"

The majority argued that such references to architectural marvels and famous architects were "extra-record" fact-finding and inappropriate for discussion. Marcus countered that "It is nothing new for the federal courts to turn to historical facts that may exist outside the record," citing as an example Justice Scalia's foray into history in *District of*

Columbia v. Heller beyond anything posited in the party briefs or the hundreds of amicus briefs filed in that case.

LINK

Guns: California's Assault Weapon Ban Declared Unconstitutional

Miller v. Bonta, no. 19-1537 (S.D. Ca. June 4, 2021).

Citing *Heller* and *MacDonald*, and moving beyond to bring AR-15's into the realm of "average" weapons for "average" use, a federal district court judge invalidates California's longstanding assault weapons ban.

Federal district court Judge Roger Benitez' opening sentence leaves little doubt as to where his 94-page opinion will land:

> **Like the Swiss Army Knife, the popular AR-15 rifle is a perfect combination of home defense weapon and homeland defense equipment**. Good for both home and battle, the AR-15 is the kind of versatile gun that lies at the intersection of the kinds of firearms protected under District of Columbia v. Heller, 554 U.S. 570 (2008) and United States v Miller, 307 U.S. 174 (1939). Yet, the State of California makes it a crime to have an AR-15 type rifle. Therefore, this Court declares the California statutes to be unconstitutional.

The law in question, California's Assault Weapons Control Act (AWCA) was enacted in 1989 by a legislature that was concerned that an assault weapon "has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings." See Cal. Penal Code § 30505(a). AWCA then banned assault weapons by specific makes and models. Cal. Penal Code § 30510.

As Benitez points out, that was long before *Heller* and *MacDonald*. In his view, these decisions, and *Caetano v. Massachusetts*, the 2016 Supreme Court case striking the state's prohibition against private possession of stun guns, create a mandate that fully incorporates the often-debated prefatory Second Amendment phrase regarding a "well-regulated militia." The personal-defense-at-home rationale in *Heller* merges seamlessly with possession of modern military-style firearms: while the Supreme Court "clearly holds that the Second Amendment protects guns commonly owned by law-abiding citizens for lawful purposes," it also holds that "the Second Amendment confers an individual right to keep and bear arms . . . that 'have some reasonable relationship to the preservation or efficiency of a well-regulated militia.'" *Heller*, 554 U.S. at 622. While the Supreme Court cautioned that the Second Amendment does not guarantee a right to keep and carry "any weapon whatsoever in any manner whatsoever and for whatever purpose," *Heller*, 554 U.S. at 626, Benitez argues that "lower courts have often cited this proviso about extreme cases to justify gun laws in average contexts."

The AR-15 was the precursor to the M-16, used by the US military for many years. But the ubiquitous household ownership (estimated at up to five million units in the US) of AR-15's, which shoot 3 rounds per second and can be outfitted in many states with clips holding 60 rounds or more, has made it an "average" weapon, according to Benitez:

> This case is not about extraordinary weapons lying at the outer limits of Second Amendment protection. The banned "assault weapons" are not bazookas, howitzers, or machineguns. Those arms are dangerous and solely useful for military purposes. **Instead, the firearms deemed "assault weapons" are fairly ordinary, popular, modern rifles. This is an average case about average guns used in average ways for average purposes.**

Given that the AWCA is not eviscerating the Second Amendment in toto, Benitez allows that intermediate scrutiny should apply. But the California law fails even under that standard, which burdens the government with showing a reasonable nexus between its regulation and a genuine harm, and the adequacy of alternate options: first, the State fails to define convincingly what danger is being averted by banning the AR-15 (statistics show far more deaths via knives or handguns). Second, its argument that other, less problematic weapons could be used for self-defense is unavailing:

> The problem is that the alternatives-remain argument has no limiting principle and would justify incremental firearm bans until there is only a single-shot derringer remaining for lawful self-defense. The same argument – that a handgun ban might be justified because government-approved alternatives are available – was rejected in Heller and it is rejected here. 554 U.S., at 629 (It is "no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed.")

Instead of avoiding the subject of multiple rounds being fired in a split second, Benitez lauds the feature as central to the homeowner's use and argues that a ten-round limit is inappropriate:

> [I]n one case an AR-15 was used in Florida by a pregnant wife and mother to defend her family from two armed, hooded, and masked home intruders. Pls. Exh. 1-1. As soon as the armed intruders entered the back door of her home, they pistol-whipped her husband -- fracturing his eye socket and sinus cavity. Then they grabbed the 11-year-old daughter. Before they could do any more harm, the pregnant wife retrieved the family AR-15 from a bedroom and fired, killing one of the attackers while the other fled. **It does not require much imagination to guess what would have happened next if the wife and mother did not have the firearm, or if she had emptied the AR-15's magazine before the attackers had fled. The quiet click would be sickening and probably with tragic results.**

Despite his doubt that Attorney General Rob Bonta would win on appeal, the judge granted a temporary stay: "Because this case involves serious questions going to the merits, a temporary stay is in the public interest. This declaration and permanent injunction are stayed for 30 days . . . "

LINK

Jails: Postcard-only Written Communications with Inmates May Violate First Amendment

Human Rights Defense Center v. Baxter County, no. 19-2056 (8th Cir. June 8, 2021).

Requiring more facts about whether alternate means are available to a human rights group attempting to provide written materials to inmates in an Arkansas county jail which allows only postcards, the Eighth Circuit vacates and remands a First Amendment decision favoring the County.

In 2012, the Sheriff of Baxter County, Arkansas (County), initiated a new policy regulating incoming mail to inmates and detainees at the County Jail and Detention Center (Jail). The policy provided "[w]ith the exception of privileged mail or legal mail, the only type of mail the jail staff are permitted to accept for the inmate is post cards. Other mail will be marked for return to sender."

Between August 2016 and May 2017, the Human Rights Defense Center (HRDC) mailed several unsolicited batches of materials to multiple inmates, including, among others, of two HRDC publications, Prison Legal News and The Habeas Citebook: Ineffective Assistance of Counsel. Each was a multiple-page booklet and each was returned to HRDC. It which sued to challenge the postcard-only policy on First Amendment and due process grounds. After a bench trial, the district court held the postcard-only policy was reasonably related to legitimate penological goals and did not violate HRDC's First Amendment rights; it also found that HRDC's due process rights were not transgressed.

On appeal, the Eighth Circuit vacated as to the First Amendment claim. While there were potentially several alternative ways in which HRDC could communicate with Jail inmates—postcards, in-person visitation, and donating materials to the Jail's law library, the district court acknowledged, that the alternative means available to HRDC, a distant publisher, were less practical than the alternatives available to the inmates' nearby relatives. The Supreme Court has made it clear that while alternative means of communication do not have to be "ideal," they do have to be "available." Here, the postcard-only policy appeared to prohibit Jail inmates from receiving any of HRDC's

publications, as subscribers or otherwise, meaning the policy was a de facto total ban on publishers communicating with inmates. As the Circuit noted, "the Supreme Court has twice warned that 'a de facto permanent ban' on inmate access to communication with outsiders would present a serious constitutional issue."

However, the lower court record did not have sufficient factfinding to determine what alternative avenues, if any, might be available to HRDC, so that it might exercise its "First Amendment interest in access to prisoners." The dismissal of HRDC's First Amendment claim was vacated and remanded for further factfinding.

DISSENT: Circuit Judge Loken would have affirmed the First Amendment dismissal, because the postcard-only policy applied specifically to materials addressed to an individual inmate; as he read it, the policy allowed the Sheriff to accept a wide range of written materials for deposit in the Jail's communal library:

> HRDC's attorneys -- a litigation team of lawyers from Seattle, Washington, Lake Worth, Florida, and Little Rock, Arkansas, who have litigated this issue all over the country -- carefully avoided asking the Sheriff whether his authority to permit receipt of books and other publisher materials as General Mail not addressed to specific inmates would include permission to accept donated copies of HRDC's Prison Legal News and The Habeas Citebook to be made available to inmates generally on the Jail's book cart or in its law library.

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Statutes: State Law Allows Consent Decree to Override Zoning Referendum

Benalcazar v. Genoa Township, no. 20-3999/4044 (6th Cir. June 10, 2021).

Despite a referendum which would have prohibited the homeowners' development plans, the court enforced a contrary consent decree which was entered into by the homeowners and the Township.

Mr. and Mrs. Benalcazar bought a property in Genoa Township, Ohio (Township) that they held for years as a peaceful retreat from the busy world around. Ultimately, they concluded that it would be a fine place for a housing development and got the Township to agree to a rezoning, allowing the development to move forward. Others in the community were not as enthused and brought the zoning action to referendum. The opponents to the development won and the referendum set aside the zoning amendment. The couple exercised their right to sue under the Civil Rights Act for

varying relief based on claims of due process and equal protection. The opponents intervened, but the Township and the couple settled by agreeing to a modified development. The court thereafter entered a consent decree.

Incensed, the intervenors appealed. They claimed the court did not have jurisdiction, among other claims. But the Sixth Circuit pointed out that so long as the suit was not frivolous and alleged claims within the court's jurisdiction, the lower court could agree to resolve the case through a consent decree. In closing, the Circuit pointed out that the opponents should not blame the court, but a state law that specifically allows for consent decrees to overturn a referendum:

> Through it all, we appreciate the intervenors' frustration that their successful referendum was minimized by this lawsuit and the resulting settlement—and that their right to vote in the referendum seemingly came to naught. . . . the intervenors must come to grips with another democratically enacted law—an Ohio statute that, for reasons of its own, allows the Benalcazars and Township to do just what they did. Recall the statutory language that qualifies the referendum right with authority to obtain a consent decree or settlement that pulls back on the result of any zoning referendum. "**Notwithstanding . . . any vote of the electors on a petition for zoning referendum," it establishes, "a township may settle any court action by a consent decree or court-approved settlement agreement which may include an agreement to rezone any property involved in the action."** O.R.C. § 505.07. In this setting, any lingering frustration of the residents of Genoa Township requires them either to change this state law or to exercise their franchise to defeat the trustees who approved the initial zoning proposal and who approved this settlement.

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