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Drivers Privacy Protection Act-Lobbyist's Use of Motorcycle Gang Drivers' License Photos to Oppose Open-Carry Laws is Covered by "Governmental Use" Exception

Baas v. Fewless, No. 17-11225 (11th Cir. Apr. 2, 2018).

Upholding the court below, the Eleventh Circuit has found that a governmental affairs representative of a county sheriff's office was "lobbying" when he used photos of motorcycle gang members to urge a Florida legislative committee not to adopt open-carry firearm laws, and was therefore covered under the DPPA's "governmental use" exception.

Michael Fewless (Fewless) served as Captain of the governmental affairs section of the Orange County (Florida) Sheriff's Office (OCSO), during which he worked with state, local, and federal representatives on issues surrounding local, state, and federal legislation. In April of 2011 a Florida senate bill was floated that would have permitted the open carry of firearms in the state - something law enforcement strongly objected to - and Fewless was tasked with opposing the bill.

After hearing an officer speak about how the bill would allow motorcycle groups, a collection of which are referred to as "One Percenters Motorcycle Clubs," to carry their weapons openly, Fewless determined it would be good to show the Senate Judiciary Committee photos of members of this group to "shock the Committee." He thus had 21 photos sent to him that were from either booking photos or the DMV. He selected seven of these and sent them, without any identifying information, to members of the Committee. He did not present the photos at the actual hearing.

The bikers whose driver's license photos were used by Fewless filed suit, alleging that he and another officer violated the federal Driver's Privacy Protection Act (DPPA) by obtaining and disclosing their driver's license photos for an impermissible purpose. Fewless sought summary judgment on the grounds of qualified immunity and the district court granted it, finding that Fewless' use of the photos fell within an exception to the DPPA-specifically, DPPA's "Government Function Exception." The court construed Fewless' activities as "lobbying," which was a permissible Government Function. Members of the motorcycle group appealed.

The DPPA's general prohibition against obtaining and disclosing driver's license records has 14 exceptions. The one relevant to this case allows disclosure of personal information for "use by any government agency, including any court or law enforcement agency, in carrying out its functions . . . ." 18 U.S.C. 2271(b)(1). The question for the Circuit was, in light of the fact that the DPPA does not define "function," whether Florida law characterizes lobbying as an appropriate *government function*. The motorcycle group appellants did not dispute that lobbying constituted a government function under Florida law, but rather argued Fewless wasn't lobbying on behalf of OCSO when he used their DMV photos, and thus there *was a material fact at issue*, meaning summary judgment was inappropriately granted. The Circuit was unpersuaded by their argument--specifically that Fewless' personal opposition to the bill meant that he *not* lobbying for the government when he spoke against it. The Circuit instead found Fewless used the photos in conjunction with his testimony and presentation to the Senate Judiciary Committee - a government function - and that he was lobbying on OCSO's behalf at the time. Fewless was therefore entitled to qualified immunity.

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Due Process: Illinois Statute Prohibiting Sexual Predator "to Knowingly be Present" in any Public Park Property Meets Rational Basis Test

People v. Pepitone, No. 122034 (Ill. Apr. 5, 2018).

Reversing the appellate court, the Illinois Supreme Court has upheld a 2012 revision of a state law which criminalizes the knowing presence by a convicted sex offender in a park, irrespective of the violator's activities or proximity to children.

In 1998, Marc Pepitone (Pepitone) pleaded guilty to predatory criminal sexual assault of a child. He was sentenced to six years imprisonment. In 2012 the sexual predator provisions of the Illinois Criminal Code (2012 Law) were revised to create stronger protective language. Section 11-9.4-1(b) of the 2012 Law states "It is unlawful for a sexual predator or a child sex offender to knowingly be present in any public park building or on real property comprising any public park."

Fifteen years after Pepitone's original sexual child sexual assault charges, in 2013, a Village of Bolingbrook police officer was patrolling a municipal park, observed a van improperly parked across three spaces, checked the van's plates and learned that it was registered to a sex offender. Pepitone approached, walking his dog, and inquired if there was a problem with the

van. He related that he was a child sex offender but that his registration requirement had expired in 2010. The officer notified Pepitone that as a child sex offender, he was forbidden to be on park property. Though Pepitone was unaware of such a ban, he was arrested for violating section 11-9.4-1(b).

Pepitone filed a motion to dismiss, arguing that the 2012 Law was facially unconstitutional under federal and state due process clauses (U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2) and unconstitutional as applied under the federal and state ex post facto clauses (U.S. Const., art. I, § 10; Ill. Const. 1970, art. I, § 16). (The parties stipulated that Pepitone was a child sex offender for purposes of the 2012 Law). The trial court denied the motion, the case proceeded to a one-day jury trial and Pepitone was found guilty of violating the 2012 Law.

On appeal, the court reversed his conviction on due process grounds--despite two similar appellate court rulings addressing substantive due process challenges involving public parks and sex offender registration issues. The appellate court noted that, unlike its repealed predecessor which "actually attempted to tie the child sex offender's presence to times when children were also present," the 2012 Law "cannot be reasonably construed as aimed at preventing a substantial step toward the commission of a sex offense against a child or any offense that would result in an individual qualifying as a sexual predator." The 2012 Law was "premised on a vague notion that a child or other 'target' may be present in a public park building or on public park property," and it "makes no attempt to assess the dangerousness of a particular individual." The majority concluded that the statute violated due process because "it is not reasonably related to its goal of protecting the public, especially children," from individuals fitting the definition of a child sex offender and because it is not "drafted in such a way as to effect that goal without arbitrarily stripping a wide swath of innocent conduct and rights" from such individuals who have already "paid the penalty" for their crimes.

On appeal, the Illinois Supreme Court reversed. First, it noted-and Pepitone had acknowledged-that "being present in a park is not a fundamental right." Thus, the proper gauge for his substantive due process claim was the rational basis test. The Illinois high court cited language offered during the legislative process to the effect that "[p]ublic parks offer many opportunities for sexual predators and child sex offenders to have easy access to potential victims." Furthermore, even the United States Supreme Court has noted "a frightening and high risk of recidivism" for convicted sex offenders. Although Pepitone disputed the data offered by the State "[t]he problem for the defendant is that, regardless of how convincing that social science may be, 'the legislature is in a better position than the judiciary to gather and evaluate data bearing on complex problems.'"

The court was equally unswayed by Pepitone's arguments about overbreadth. He asserted that the 2012 Law punished a wide range of innocent conduct-"not only dog walking in Bolingbrook but also visiting museums in Chicago, attending a sporting event at Soldier Field or a cultural event at Grant Park in Chicago, visiting Lincoln Park Zoo in Chicago, playing in adult sports leagues or taking adult classes sponsored by the Chicago Park District, going to public beaches in Chicago, or visiting any Illinois State Park." The court responded that none of those innocent activities were being criminalized-it was the conduct of a convicted sex offender: "Like the statute outlawing possession of any firearm or any firearm ammunition by a convicted felon (720 ILCS 5/24-1.1(a) (West 2016)), the statute here makes the status of the defendant an element of the offense. Consequently, conduct that is innocent for most people is not innocent for those who have been convicted of certain offenses."

In sum, the Illinois Supreme Court concluded that there was a rational relation between protecting the public, particularly children, from sex offenders and "prohibiting sex offenders who have been convicted of crimes against minors from being present in public parks across the state." It reversed the decision below. However, because the lower court had not addressed Pepitone's as-applied ex post facto clause claim, the high court remanded to the appellate court for consideration of that issue.

LINK

Due Process: No Rational Basis for Cutting off Tenant's Water Because Landlord Failed to Pay Bill

Winston v. City of Syracuse, No. 17-1017-cv (2d Cir. Apr. 11, 2017).

Second Circuit joins other circuits in holding that cities do not have unlimited license to refuse water service to an unrelated, unobligated third party.

Plaintiff Jacqueline Winston (Winston), a longtime tenant in a multi-family building, filed a class action under 42 U.S.C. 1983 alleging that Syracuse (City) violated her due process and equal protection rights (1) when it shut off her water service after her landlord failed to pay the building's water building and (2) when the City subsequently denied her an opportunity to open a separate water account under her own name.

The district court ruled that the City's water account policies were rationally related to its interest in providing water services to City residents and there was no rational basis for treating landlords and tenants differently. The district court also reasoned that the City could terminate water service to a landlord's property because it would further the city's goal of collecting unpaid water bills.

The Second Circuit affirmed in part and reversed in part, holding that the City had offered sufficient, rational reasons for its policy of refusing to allow tenants to open separate water accounts. As a tenant, Winston is not a member of a suspect class, nor is opening a water account a fundamental right. The transitory nature of tenants justifies the account policy because it is far more practicable to identify a building owner in arears and place a lien on the property than to track down individual tenants.

The practice of terminating water service to tenants when a landlord fails to pay the water bill, however, is not rationally related to the City's interest in collecting outstanding bills. The Second Circuit joined the Fifth, Sixth, Seventh, and Ninth Circuits in supporting this proposition. The court agreed with the plaintiff's interpretation of the City's own ordinance, which creates two classes of tenant water users: tenants whose landlords have delinquent water bills and tenants whose landlords are current in their payments. Neither category of tenant is legally obligated to pay their landlord's unpaid water bill. Therefore, to punish one group for the actions of a third party-in this case the landlord-would fail rational basis review for equal protection and substantive due process. The City has an important interest in collecting debt and maintaining bond ratings, but this does not give it an unlimited license to refuse water service to an unrelated, unobligated third party.

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Employment Discrimination: Prior Salary Cannot Justify Wage Differential between Male and Female Employees

Rizo v. Yovino, No. 16-15372 (9th Cir. Apr. 9, 2018).

The Ninth Circuit, in an en banc decision which produced numerous statements about the legitimacy of prior wage history as a factor to be considered, has held that prior

salary-whether considered alone or in conjunction with other factors-cannot justify differing wage rates for male and female employees.

Aileen Rizo (Rizo) was hired as a math consultant by the Fresno County Office of Education (County) in October 2009. Previously, she had been employed in Arizona as a middle and high school math teacher, earning $50,630 per year for 206 working days, plus a stipend of $1,200 per year for her master's degrees.

Rizo's new salary upon joining the County was determined in accordance with the County's Standard Operating Procedure 1440 (SOP 1440), which dictates that a new hire's salary is to be determined by taking their prior salary and adding 5%, without reference to experience. She was given a salary of $62,133 for 196 days of work plus a master's degree stipend of $600.

During a lunch with colleagues in 2012, Rizo learned that her male colleagues had been subsequently hired as math consultants at higher salary steps. She filed a complaint about the pay disparity with the County, which responded that all salaries had been set in accordance with SOP 1440. The County claimed that SOP 1440 actually placed more women at higher compensation steps than males.

Rizo disputed that analysis and sued the County's Superintendent of Education, claiming a violation of the Equal pay Act, Title VII of the Civil Rights Act of 1964 and various California statutes. The County moved for summary judgment, asserting that although Rizo was paid less than her male counterparts for the same work, the discrepancy was based on Rizo's prior salary--contending that her prior salary was a permissible affirmative defense to her concededly lower salary than her male counterparts under a fourth catchall clause in the Equal Pay Act, a "factor other than sex."

The Equal Pay Act states in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. 29 U.S.C. §206(d)(1)

The district court denied summary judgment, reasoning that SOP 1440 "necessarily and unavoidably conflicts with the Equal Pay Act " because "a pay structure based exclusively on prior wages is so inherently fraught with the risk-indeed, here, the virtual certainty-that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand." It certified the legal question for interlocutory appeal, recognizing that denying summary judgment for the County "effectively resolves the issue of liability on Plaintiff's claims in her favor."

A three-judge panel of the Ninth Circuit vacated the denial of summary judgment and remanded, concluding that concluded that *Kouba v. Allstate Insurance Co*., 691 F.2d 873 (9th Cir. 1982) was controlling and permits prior salary alone to constitute a "factor other than sex" under the Equal Pay Act.. In *Kouba*, the employer considered prior salary along with other factors, "including 'ability, education, [and] experience,'" in setting employees' salaries. The panel concluded, however, that because *Kouba* "did not attribute any significance to Allstate's use of these other factors," that case permits consideration of prior salary alone, as long as use of that factor "was reasonable and effectuated some business policy." Because it believed it was compelled to follow *Kouba*, the panel directed the district court on remand to consider the reasonableness of the County's proffered business reasons for its reliance on prior salary.

However, an en banc review of that decision rendered a different result. The Ninth Circuit affirmed the district court's original denial of summary judgment to the defendant on a claim under the Equal Pay Act, the en banc court held that prior salary alone or in combination with other factors cannot justify a wage differential between male and female employees.

Overruling *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982), the en banc court held that an employee's prior salary does not constitute a "factor other than sex" upon which a wage differential may be based under the statutory "catchall" exception set forth in 29 U.S.C. § 206(d)(1). The en banc court concluded that "any other factor other than sex" is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance. By relying on prior salary, the defendant therefore failed as a matter of law to set forth an affirmative defense. The en banc court remanded the case to the district court.

Concurring, Judge McKeown, joined by Judge Murguia, wrote that she agreed with most of the majority opinion, particularly its observation that past salary can reflect historical sex discrimination. She wrote that the majority, however, went too far in holding that any consideration of prior pay is impermissible under the Equal Pay Act, even when it is assessed with other job-related factors.

Concurring, Judge Callahan, joined by Judge Tallman, wrote that in holding that prior salary can never be considered, the majority failed to follow Supreme Court precedent, unnecessarily ignored the realities of business, and, in doing so, might hinder rather than promote equal pay for equal work.

Concurring in the judgment, Judge Watford wrote that in his view, past pay can constitute a "factor other than sex," but only if an employee's past pay is not itself a reflection of sex discrimination.

LINK

Insurance: Where Underlying Policy Explicitly Excludes Defense Costs, Umbrella Policy Cannot be Invoked to Cover the Excluded Costs

City of Phoenix v. First State Insurance Company, No. 16-16767 (9th Cir. April 4, 2018).

Phoenix unsuccessfully argues that, if its underlying liability policy did not cover $1.4 million in defense costs accrued in defending an asbestos-mesothelioma claim, its umbrella policy should cover those costs.

Carlos Tarazon (Tarazon) worked as an underground pipe layer in Phoenix (City) from 1968 to 1993, through which he was exposed to asbestos and ultimately died of mesothelioma. The City settled with Tarazon for $500,000, though its defense expenses topped $1.4 million. When its insurance company refused to cover these costs, Phoenix sued, alleging breach of contract and bad faith claims, which it lost on summary judgment, prompting its appeal.

From the early through mid-1980s the City was covered by four consecutive excessive liability policies, each of these provided $500,000 in liability coverage in excess of a $500,000 self-insured retention. The agreements governing these policies provided that the insurance company would indemnify Phoenix for "ultimate net loss in excess of the retained limit of $500,000" but that the term "ultimate net loss" *did not include* defense costs. The Circuit, like the lower court, held the provisions were not ambiguous and plainly stated that the insurance company would only cover "ultimate net losses" exceeded $500,000 not including defense costs. Since the Tarazon

settlement was $500,000 Phoenix was thus not entitled to indemnity. The City countered that, if the insurance company was not required to pay under the Excess Policies, then it should under the City's additional Umbrella Policies in effect for the same years. These policies however stated that the City was indemnified for "ultimate net loss in excess of the underlying limit or the [self-insured retention], whichever is the greater." The self-insured retention was $500,000 and, where no underlying insurance applied, the underlying limit was, at maximum, $25,000. Since the City's asbestos liability was within the scope of the Excess Policies already discussed, it would only be indemnified if its ultimate net loss exceeded $500,000 - which it did not based on the settlement. The Circuit thus affirmed the lower court.

LINK

Telecommunications: City May Allow Telecom Provider to Construct Fiber-Optic Infrastructure without First Obtaining Cable Franchise Agreement

MCC Iowa, LLC v. City of Iowa City, No. 16-3696 (8th Cir. Apr. 4, 2018).

Although the federal Communications Act requires that cable providers have signed a local cable franchise agreement before building infrastructure, where a telecom provider abandons plans to provide cable and merely provides internet and telecom services, the franchise agreement requirement does not apply-and localities may grant such a provider access to right of way for construction.

MCC Iowa, LLC (MCC) provides both cable and telecom service in Iowa City (City) and is the only cable provider in the City. In 2015 a new company, ImOn Communications, LLC (ImOn), publicly stated its intent to provide both cable and telecom services within the City. The City passed three resolutions to facilitate ImOn's construction of fiber-optic for its services, including access to the right-of-way. ImOn now provides internet and telephone service, but states it has abandoned plans to provide cable service. MCC filed suit alleging the City and ImOn colluded to its disadvantage, alleging the City was permitting ImOn to build a "cable system" without - as required by law - having a cable franchise, which it alleged the City did with the unlawful resolutions facilitating the construction of the fiber-optic network without a franchise agreement. The district court dismissed the case at summary judgment, holding ImOn was not required to have a cable franchise because it is not providing cable service.

The Circuit first noted that it is clear Title VI of the Communications Act requires a franchise *only* for the provision of cable service, not at the *construction* of the infrastructure needed to provide it. MCC argued that the City's Cable Television Enabling Ordinance (Cable Ordinance), however, required the franchise earlier in the process than the timeline envisioned in the federal law. The Cable Ordinance states that:

> No person, firm, company, corporation or association shall construct, install, maintain or operate within any public street in the city, or within any other public property of the city, any equipment or facilities for the distribution of cable service over a cable television system or an open video system to any subscriber unless a franchise authorizing the use of the streets or properties or areas has first been obtained pursuant to the provisions of this chapter, and unless such franchise is in full force and effect.

Iowa City Code § 12-4-6(A).

While this seemed to be a promising avenue, the Circuit rejected the argument, instead finding the Cable Ordinance had to be interpreted consistent with federal law. The flaw in the argument

derives from the fact that cable and internet/telephone services were historically separate and regulated under two different parts of the Communications Act, the former under Title VI and the latter under Title II. However, now these are often combined in the same infrastructure - fiber-optic for example - but the providers do not necessarily offer both services. In that scenario, the Communications Act and the FCC are clear that "[Local Franchising Authorities' (LFA)] jurisdiction applies only to the provision of cable services over cable systems . . . [A]ssuming an entity already possesses authority to access the public rights-of-way, an LFA may not require the [entity] to obtain a franchise solely for the purpose of upgrading its network. So long as there is a non-cable purpose associated with the network upgrade, the [entity] is not required to obtain a franchise until and unless it proposes to offer cable services." MCC's attempt to circumvent this provision by arguing ImOn's *public statements about its intent* to provide cable service triggered the franchise requirement, was flatly rejected. The Circuit held that MCC was misinterpreting the FCC's rule that the franchise requirement is triggered with an application to actual provide the services. The Circuit affirmed the lower court.

LINK

Qualified Immunity: Officers Could Rely on EMT's Assessment that Arrestee was Merely Drunk and not *in extremis*

Barberick v. Hilmer, Nos. 17-5792 & 5793 (6th Cir. Apr. 4, 3018).

Reversing the lower court, the Sixth Circuit finds that sheriff's deputies who relied on an EMT's assessment that their arrestee was drunk, but not in life-threatening narcotic overdose, had not violated the decedent's clearly-established right.

On November 16, 2015 Boone County, Kentucky sheriff deputies and EMTs were dispatched to the home of Frank Barberick (Barberick) home in response to a 911 hang-up call. They were told a previous suicide attempt occurred at the address and arrived to find conflicting reports from Barberick, clearly under the influence of something, whose story continually changed about what and how much drugs he took, and his mother, whose story was more consistent and indicated he took one or two handfuls of pills while reiterating that he had attempted suicide before. The sheriff deputy had the EMTs assess Barberick, who shined a light in his pupils, deemed he did not take narcotics, but was drunk, facilitating the officer's arrest of Barberick for an outstanding warrant without further medical evaluation. He was carried to the police car, laid down in the back, driven to the jail, where upon arrival he was unconscious and unresponsive and died after failed CPR attempts. Barberick's widow filed suit alleging the deputy and EMT's showed deliberate indifference to Barberick's serious medical needs. The district court denied motions for qualified immunity by the deputies - who argued they were entitled to rely on the EMT's assessment.

The Circuit began with the traditionally-second prong of the qualified immunity assessment, looking at whether the decedent's right at issue was clearly established. Barberick's widow had argued that three precedential cases put the officers on notice of clearly established law requiring them to take more immediate and responsive action beyond mere reliance on the EMT's opinion, when confronted with an arrestee in an obvious near-death condition. The Circuit rejected each. The first case dealt with corrections officers that allowed only limited contact by an inmate with a doctor over the course of two weeks as he declined and ultimately died of untreated diabetes-but that case was founded on the officers' violation of known protocols. The second case focused on a jail booking officer who was aware an inmate was under the influence of drugs but failed to seek appropriate medical relief - seeking only the advice of an unlicensed medical assistant. The facts of the third case were that only a single defendant who had 14 years' experience as a corrections officer and ignored a requirement to check inmates in crisis conditions every 15 minutes was denied immunity. Each of the proffered precedents involved ignoring established

protocol, the onset of more serious deterioration, and/or the passage of significant time. The Circuit deemed none of these cases were on point and reversed the lower court, granting qualified immunity to the officers that relied on the EMT's assessment.

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Zoning: Reversal of Rehab Center Zoning Approval Based on Neighbors' Complaints does not, without more, Constitute Discrimination

Get back Up, Inc. v. City of Detroit, No. 17-1824 (6th Cir. Mar. 30, 2018).

The fact that neighbors may have infused discriminatory sentiments into their objections over a rehab center, leading to Detroit's reversal of zoning approval for the facility, did not mean that the reversal constituted discrimination under the ADA or FHA- there were sufficient non-discriminatory grounds for the decision.

Dr. Billy Taylor (Taylor) has sought to open Get Back Up on the outskirts of Detroit (City) - a rehab center for recovering drug and alcohol addicts - for ten years. The initial zoning application was filed in 2007, approved by the zoning board, but the decision was reversed after neighbors appealed. That led to litigation, during the pendency of which the City and Get Back Up agreed the facility could open. It operated for six years, but when Detroit won the suit, it promptly closed the facility. Get Back Up replied promptly by filing another zoning application in 2015 and, again, the application was approved by the zoning board and reversed after neighbors appealed. And, again, Get Back Up appealed-- but instead of challenging the zoning ordinance's validity, it claimed that the *zoning board's decision* discriminated against the recovering addicts in violation of the Americans with Disabilities Act, the Fair Housing Act, and the Rehabilitation Act. It sought a preliminary and permanent injunction, both of which the district court denied.

Intentional discrimination claims, which all three of Get Back Up's allegations were, are reviewed under the *McDonnell Douglas* burden-shifting analysis. The Circuit found Get Back Up met its burden to show a prima facie case, noting the neighbors made discriminatory comments and they were adopted, in part, by the zoning board. Holding the statutes at issue do not "make a city liable merely for being exposed to its citizens' allegedly discriminatory views-the City is only liable if its decision-makers actually discriminated," the Circuit moved on to see if the City had non-discriminatory reasons to offer for its decision. It did, including neighbor "(1) complaints about trash and debris outside Get Back Up's facility, (2) Get Back Up residents' allegedly disruptive behavior during the years the facility was in operation, (3) concerns about neighborhood property values, and (4) concerns about the number of clients Get Back Up would be allowed to house if its permit was approved." All of these derive from City zoning ordinances and are mandatory elements of a Conditional Use Permit review. Having found the City met its burden, the onus flipped back to Get Back Up to show these were pretextual. That was a hurdle too high though, for while Get Back Up argued these neighbor issues were not its fault and/or not reported to the facility such that it could address them, the court found the counter-arguments missed the point because Get Back Up failed to show "that the Board's reliance on the neighbors' allegations [wa]s suspect." It affirmed the lower court.

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