International Municipal Lawyers Association

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Case Law Update

2022 Local Government Code Enforcement Cases

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Refresher

§ 1983 is the vehicle that plaintiffs use to assert constitutional violations. To prevail on a § 1983 claim against an individual defendant, "plaintiff must show that defendant[,] acting under color of state law, deprived him of a right secured by the Constitution or the laws of the United States and the defendant had personal involvement in the violation; liability cannot be predicated solely on the operation of *respondeat superior. Downs v. Borough of Jenkintown*, 2020 WL 2615620, *6 (E. D. Pa. May 22, 2020).

Qualified immunity for an individual is removed if two conditions are met. First, the plaintiff must allege facts that amount to a violation of a constitutional right. Second, the right must have been clearly established at the time of the violation. *Downs v. Borough of Jenkintown*, 2020 WL 2615620, *9 (E. D. Pa. May 22, 2020).

To breach the immunity shield of the city, the unconstitutional act had to have been taken due to an official policy, ordinance, or decision officially adopted and promulgated by the city's governing body or someone who acts for the governing body. *Monell v, Dep't Soc. Serv.*, 436 U.S. 658 (1978).

First Amendment

Adult Business

***Club Madonna, Inc. v. City of Miami Beach*, 2022 WL 3022525 (11th Cir. Aug. 1, 2022).**

After a 13-year old human trafficking victim was found performing at the only all nude dance club in city, the city enacted an ordinance that required all nude dance clubs to obtain two forms of identity from performers, a sworn statement from the manager that the performer is not being coerced into dancing, and that the club keep a log of the entry and exit of performers. Failure to comply could result in fines and closure of the business. Club sued under the First Amendment. Because the ordinance regulates who can and cannot dance, the First Amendment is implicated. Both parties agreed that the ordinance should be evaluated under intermediate scrutiny: (1) does the ordinance advance a substantial interest; (2) is it not substantially broader than necessary to achieve the interest; and (3) are there reasonable alternative avenues of communication?

1. Substantial interest: prevent human trafficking and prevent children from nude dancing at the club.
2. The requirements are significantly time consuming but are not substantially overbroad to achieve the substantial interest.
3. The club has the same amount of time to have performers on the stage with or without the regulation, so the avenues of communication have not changed.

Signs

***LaCroix v. Town of Fort Myers Beach*, 38 F.4th 941 (11th Cir. 2022)**

City's sign ordinance prohibited portable signs to prevent visual blight and confusion. An officer cited LaCroix for carrying a sign, which happened to have a religious message. Because the ordinance is content neutral, the ordinance is subject to intermediate scrutiny. However, the court only looked at the alternative channel prong of the three-part test. The court granted the preliminary

injunction because: (1) all portable signs are banned, no matter where they are carried; (2) portable signs are inexpensive, easy to create, and can reach a wide variety of "listeners" (should be readers); (3) identity of the sign holder or the place where it is carried may also communicate a separate message from the sign itself; (4) the sign ordinance also bans alternative channels such as vehicle signs, pole signs, signs on public property, etc.

***McLendon v. Long,* 22 F.4th 1330 (11th Cir. 2022)**

State law forbids registered sex offenders from participating in Halloween, so the Sheriff's office placed Halloween warning signs in front yards of registered sex offenders. The court held that the signs were compelled government speech so the placement of the signs must be analyzed under strict scrutiny: is there a compelling state interest and is the action narrowly tailored to serve the interest? In this case, there was no evidence that placing signs in all 57 sex offender yards helped to prevent child abuse. There had never been an issue of a registered sex offender abusing a child during Halloween or any other time. Further, the names, addresses, and pictures of registered sex offenders is on the state and county website and posted at the county clerk's office.

Cooking and Serving as Expressive Conduct

***Fort Lauderdale Food Not Bombs*, 11 F.4th 1266 (11th Circuit 2021)**

Food Not Bombs (FNB) is an unincorporated group that hosts food sharing events and advocates the message that food is a human right and society has a responsibility to provide for all. FNB holds weekly vegetarian or vegan food sharing events in a downtown park where the homeless tend to congregate to advance its message that society can end hunger and poverty if we redirect our collective resources from the military and war to providing food. At the weekly events, FNB posts banners with its name and logo and distributes literature during the event. In 2014, the city passed an ordinance which requires a conditional use zoning permit for the operation of outdoor food distribution in the downtown park. No food distribution is allowed in any other park. The road to obtaining a permit is long and expensive. Also, there are many requirements placed on the permit, such as staying 500 feet from residential property, that a certified food manager be present, and that the site provide handwashing, wastewater disposal, and restroom facilities. Penalties are a $500 fine and/or 60 days in jail.

The ordinance is content neutral, so only intermediate scrutiny is required: (1) does the ordinance advance a substantial interest; (2) is it not substantially broader than necessary to achieve the interest; and (3) are there reasonable alternative avenues of communication?

1. The city's substantial interest is managing the park property so that residents can enjoy the park by ensuring sanitation and other logistical problems.
2. The permitting requirement does not contain any standards for denying the permit. There are no standards for the groups that receive a permit to follow; so, the problems that the permits are attempting to remedy are not being addressed.
3. There is no point in addressing the third factor. The ordinance was held to be unconstitutional.

Qualified Immunity

***Yoshikawa v. Seguirant,* 2022 WL 2912474 (9th Cir. July 215, 2022)**

Yoshikawa bought waterfront property in Hawai'i. The property had a nonconforming structure that was built into the shoreline setback area. However, in 2015 and 2016, despite obtaining permits and passing nine inspections, the encroachment was not mentioned. In May 2016, a stop work order was issued due to the encroachment. In December 2016, Yoshikawa was told to submit new plans. In February 2017, the contractor overheard the inspector stating that "I keep shutting them down but f--- [expletive] these Haoles don't listen, that's why I try [sic] keep it local." The inspector issued two more stop-work orders and in early 2018 the Board of Building Appeals determined that a new permit was needed because Yoshikawa had removed and replaced the encroachment. "Haole" means "foreigner" in Hawaiian. It typically refers to Caucasians or others who are not locals.

Yoshikawa sued on an equal protection claim, alleging that the inspector had interfered with his right to contract with white architects and contractors and that the statements were made with intent to discriminate based on race, alienage, and/or national origin. Qualified immunity shields government officials if their conduct does not violate clearly established rights of which a reasonable person would have known.

The courts must ask (1) do the alleged facts show the officer's conduct violated a right; and (2) was the right clearly established or would a reasonable officer know that the conduct would violate a right?

The inspector's argument was that because Yoshikawa had committed a violation, his discrimination was irrelevant. However, it is legally possible for a person to commit a violation of a regulation and for the enforcement of the regulation to be discriminatory if the government would not have enforced the regulation in the manner it did but for the plaintiff's race. The court held that a reasonable government official would know that intentional discrimination in the enforcement of building codes clearly violates constitutional and statutory rights.

Fourth Amendment

Homelessness

***Garcia v. City of Los Angeles*, 11 F.4th 1113 (9th Cir. 2021)**

City ordinance allowed city employees to remove and discard publicly stored private items if they were "bulky" items without prior notice unless the bulky item was designed to be used as a tent. During "clean ups," staff throws the items into trash compactors. Courts look at four factors when asked to grant a preliminary injunction: 1. Likelihood of success on the merits; 2. likelihood of suffering irreparable harm without the injunction; 3. if the balance of equities tip in plaintiff's favor and 4. whether the injunction is in the public interest.

The city's defense was based on the severability clause in the ordinance – that "removing" and "discarding" were severable from each other. An invalid part of a law is severable if it is not necessary to the measure's operation and purpose. However, once staff removes an item, they need to know what to do with the item. In this case, the ordinance provides that the City may remove property but does not specify what happens after that movement or removal. For example, non-bulky items that are removed must be stored for 90 days. For bulky items, though, the ordinance states "[w]ithout prior notice, the city may remove and may discard any Bulky Item, whether Attended or Unattended." City officials had testified that bulky items had to be destroyed because

they did not have space to store them. Therefore, the court held that "remove and discard" cannot be severed from each other. The first two prongs were met and the injunction was granted.

Warrants

***Sorrow v. City of Atlanta*, 2022 WL 2784603 (11th Cir. July 15, 2022)**

Throughout the years, Sorrow obtained permits to repair her 1930s-era bungalow. Her neighbor once complained that Sorrow was adding a second story to the house, but the city did not find any building code violations. Eventually, a hotel bought property adjacent to Sorrow and had the property rezoned for hotels. In the next two years, the city visited Sorrow's property 32 times and she received four citations. The city then applied for an administrative search warrant to determine if Sorrow had added a second story. Plaintiff claims that the statements in the warrant's affidavit were false and that the warrant was executed after it expired. The court held that even if all alleged errors were removed or remedied in the warrant, there was still sufficient content for a judge to find probable cause.

Fifth Amendment

Takings

***F.P. Dev., Inc. v. Charter Twp of Canton*, 16 F.4th 198 (6th Cir. 2021)**

City requires permit and mitigation to remove trees. F.P. hired a timber company to clear a ditch clogged with trees and debris and to clear other trees from its property. City discovered the clearing, and after a professional tree survey was complete, determined that F.P. had to replant 187 trees or pay $47,898. Instead, F.P. sued. The court held that the ordinance violated the unconstitutional conditions doctrine under *Nollan*, specifically the "rough proportionality" of the mitigation required due to the impacts of development. Although, the city does not have to find an exact level of mitigation for each case, it must make some kind of individual determination that the mitigation is related in nature and to the extent of the impact. City did not have evidence that the mitigation would offset environmental degradation and did not take into consideration that the clearing of the ditch could be beneficial to the environment.

Commerce Clause

Short Term Rentals

***Hignell-Stark v. City of New Orleans*, 2022 WL 3584037 (5th Cir. 2022)**

New Orleans requires owners of short-term rentals in residential areas to live on the property and have a homestead exemption on the property. The court held that this requirement was a *per se* violation of the commerce clause because it discriminated against out-of-state property owners. The city had valid reasons for the requirements – responsible adult at the property, protect nature of neighborhoods, and ensure affordable housing. However, there were reasonable alternatives that

would meet these objectives, such as requiring a caretaker to be on-site and capping the amount of STR licenses per neighborhood.

Fourteenth Amendment

Due Process

***Lewis v. Village of Alsip*, 23 F.4th 772 (7th Circuit 2022)**

City had ordinance that banned parking on "primary snow routes" if more than one inch of snow had fallen in the preceding 12 hours. These routes are marked with signs. The ordinance also bans parking on any public street if more than three inches of snow fell the preceding day. These streets do not have signs. Lewis received a $50.00 fine for parking on a public street after 3 inches of snow had fallen. Her 14th Amendment claim was that the city was required to post signs on every block of every street informing drivers of the snow parking rules. The Due Process clause requires governments to make laws available to the public, not to ensure that everyone knows all of the rules. Citizens must make an effort to learn the laws by visiting the city's website. Ordinance was upheld.

***Henry Hill v. Whitford*, 2021 WL 3661325 (6th Cir. Aug. 18, 2021)**

Compliance officer went to property that received complaints about sewage in the basement. When Hill refused him access, compliance officer gave Hill the option of entrance or calling the police. Hill complied and compliance officer found two inches of raw sewage, gas-powered equipment, gas cans, propane tanks, and water heaters in the basement. Compliance officer red-tagged the entire building. All residents were ordered to vacate. Hill claimed that he consented to compliance officer's entry under duress. Stating that he "would call the police" is not a threat because the option is entering freely or obtaining a warrant.

Hill also claimed that evicting residents without a due process hearing violated the Fourteenth Amendment. Ordinarily, the government must provide notice and a hearing before evictions, but there are emergency exceptions. So long as there is an adequate due post-deprivation hearing, the Fourteenth Amendment is not violated.

Equal Protection

Schworck v. City of Madison, 2022 WL 832053 (7th Cir. March 21, 2022)

Schworck was a co-founder of The Lion of Judah House of Rastafari (The Lion). He started operating a church and advertised its mission as distributing cannabis to church members in exchange for donations. Besides criminal charges, Schwork's request to reclassify the property from a food mart to a house of worship was not granted due to hazardous conditions and ordinance violations. Schwork claims that he was singled out for mistreatment as a "class of one." To prove a "class of one" claim, plaintiffs must prove that they were intentionally treated differently from others similarly situated. The other entities must be identical or directly comparable to plaintiff. The three churches that Schwork used were not comparable. First, the Vine Church's Facebook post stating that they would be in a new building is not proof that the church was operating as a church on property without a Certificate of Occupancy. The Vine also had all budling permits, passed all inspections, and didn't sell pot. The other two churches had received Certificate of Occupancies as churches. Also, the conspiracy theory that the city conspired to deprive Schwork of equal protection fails because there was no evidence that the city ever permitted other churches to violate drug laws.

Eight Amendment

Excessive Fines

***Ficken v. City of Dunedin*, 2022 WL 2734429 (11th Circuit July 14, 2022)**

Fines violate the Eighth Amendment clause if they are grossly disproportional to the underlying offense. Because the legislature enacted the fine range, the fines are presumptively constitutional if Ficken was within the class of persons regulated by the law. Ficken was within the class – repeat violators of the tall grass and weeds law.