International Municipal Lawyers Association
2023 Code Enforcement Program
Case Law Update

Sherri Russell
City Attorney
Lake Jackson, Texas

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First Amendment -- Speech

McCoy v. Town of Pittsfield

1st Circuit





McCoy

STORAGE CONTAINER ORDINANCE

Must be permitted

Must meet all setbacks

Only one allowed if in residential area

15-month maximum time limit



McCoy

IMPETUS

McCoy received permit for container

During McCoy's first term, he painted a pro-Trump mural on container

McCoy received two extensions

Container repainted

Third extension denied

No penalties imposed



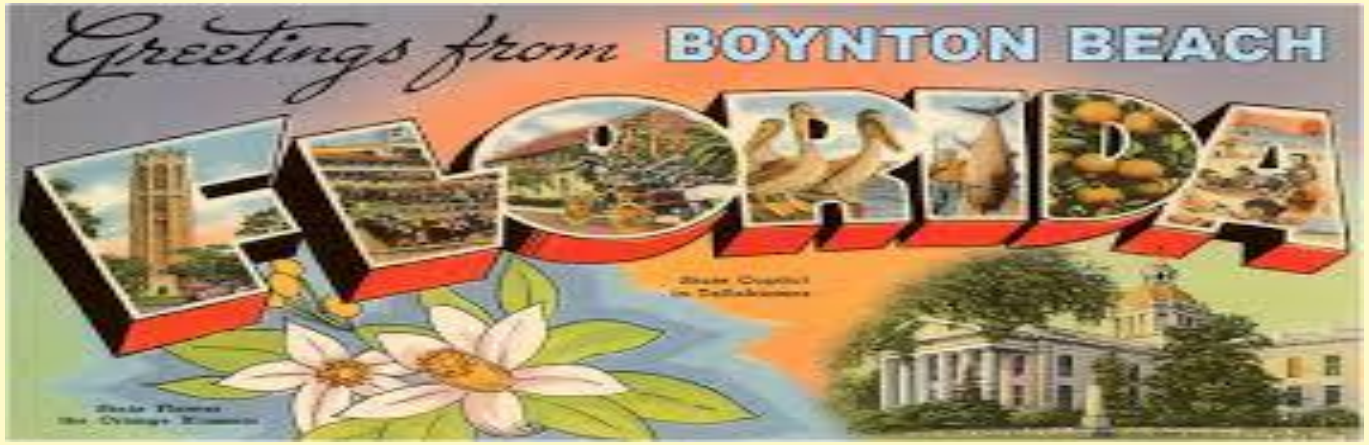
McCoy

CLAIM	REQUIREMENT TO PROVE CLAIM
Ordinance, as applied, was	
Content-based →	Application of ordinance to his trailer due to his message
Viewpoint-based restriction on speech →	Ordinance was adopted as a pre-text to regulate political views

Mata Chorwadi, Inc. v. City of Boynton Beach

11th Circuit





Mata

CHRONIC NUISANCE PROPERTY CODE

Code defines nuisance as

- Two or more calls for service related to an overdose within 30 days

Code defines pattern of nuisance activity as

- City responds to 3 nuisance activities in 30 days

Nuisance Abatement Agreement

- Violation gives city ability to abate nuisances and charge $1000 per day fine

Place sign in public place



Mata

IMPETUS

From December 2017 to April 2018 city responded to 13 overdose calls

- 6 calls in January

Signed abatement agreement “under duress”

Sign placed in front window of hotel office

Mata sued under First Amendment



Mata

OVERBREADTH DOCTRINE

Plaintiff may challenge law that may deter others from engaging in protected expression

- Mata trying to protect guests right to call 911
- Guests are not penalized for calling 911
- Guests' expression was not chilled
- Mata had no standing

JUS TERTII

Legal duties imposed on plaintiff violate third parties' rights

- A misalignment of interests, not a violation of guests' rights
- Hotel is injured if guests' free speech right not violated (can call 911)
- If guests are deterred, then hotel is not injured
- No standing







Porter v. Martinez

9TH CIRCUIT

Porter

IMPETUS

Post-Trump election protests

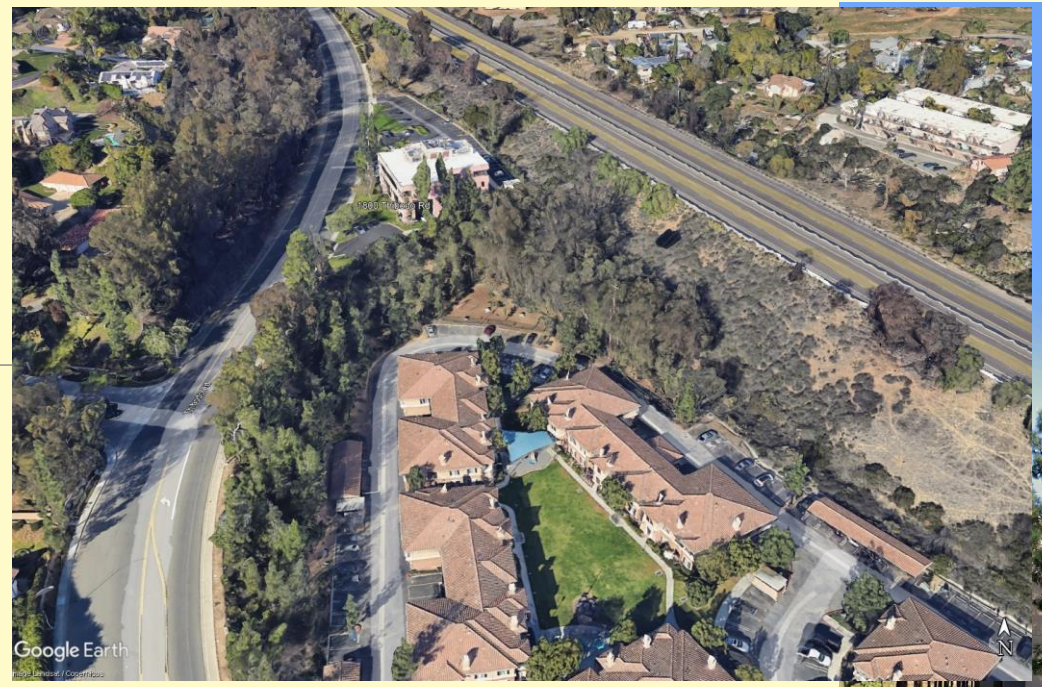
Complaints from neighbors

Porter honked her horn 11 to 15 times

Cited for misuse of horn

Citation dismissed

But she is no longer able to use her horn to show support because she fears the citation







Porter



STATUTE

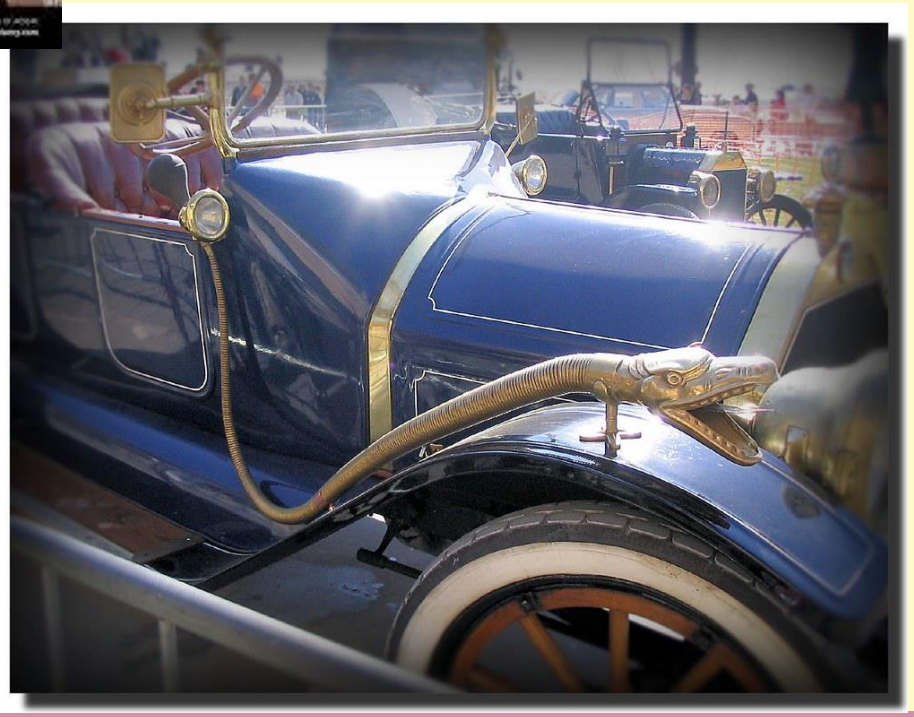
Sec. 27001

- (a) The driver . . . When reasonably necessary to ensure safe operation shall give audible warning . . . with horn
- (b)The horn shall not otherwise be used . . .

Law started in 1913

40 states have similar laws





Porter

CONTENT NEUTRAL LAW

INTERMEDIATE SCRUTINY

Does the ordinance advance a substantial interest? → Advances traffic safety by
- Limiting indiscriminate use of horn
- Limiting startle responses to the horn

Is it narrowly tailored? → Impossible to allow non-distracting honking

Reasonable alternative avenues of communication? →

Porter

CONTENT NEUTRAL LAW

INTERMEDIATE SCRUTINY

Does the ordinance advance a substantial interest?





Is it narrowly tailored?

Reasonable alternative avenues of communication?





Porter


EXCESSIVE
HORN USE
VIOLATES
27001 CVC
TRAFFIC
SAFETY


Paramount Pictures
WRITERS GUILD
ON
STRIKE!
HONK IF YOU'VE
EVER WATCHED
TELEVISION
MELROSE
GATE



Fourth Amendment





Short Term Rentals

May v. Pritchett
11th Circuit





May

IMPETUS

May owned a short-term rental

County sent notices saying no STRs allowed

Magistrate judge ruled code was unclear, but STRs were prohibited

County amended zoning code to prohibit STRs and did not grandfather

May continued to rent out the property and received a citation

She was convicted and the judge sentenced her to 6 months probation, 30 days served

Georgia Supreme Court ruled old ordinance was vague, May was grandfathered, and reversed conviction





May

FOURTH AMENDMENT SEIZURE THROUGH MALICIOUS PROSECUTION

Did county charge offense

- With malice and
- Without probable cause

Was defendant acquitted

Did erroneous charge cause damages

PROBABLE CAUSE

Probable cause can rest on mistakes of fact or law

But – must be objectively reasonable mistake

- County thought new law applied to May and the new law was clear

Animals







Sanders v. Genesee County
6th Circuit

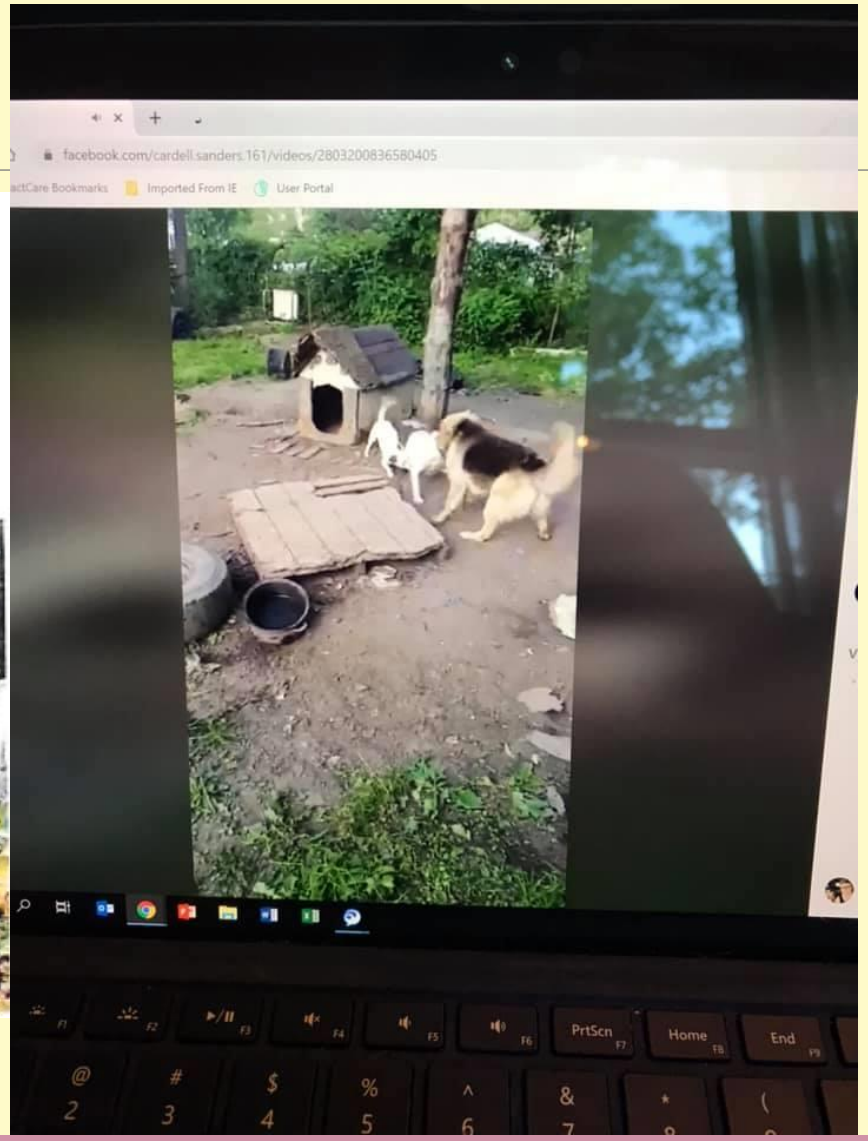




Sanders






facebook.com/cardell.sanders.161/videos/2803200836580405
PrtScn
Home
End

Sanders





Sanders

FOURTH AMENDMENT EXCEPTIONS

Plain View Doctrine

- Police in a lawful position to view object
- Police plainly saw its incriminating character
- Police have a lawful right of access to the object

Exigent Circumstances

- Reasonable officer could see imminent and ongoing danger
- Circumstances may not terminate

FOURTEENTH AMENDMENT EXCEPTIONS

Post-deprivation hearing

- State law allows “claim and delivery hearing”
- Would have to sacrifice his 5th Amendment rights
- Not ideal, but it still adequate





*Verdun v. City of San Diego**
9th Circuit

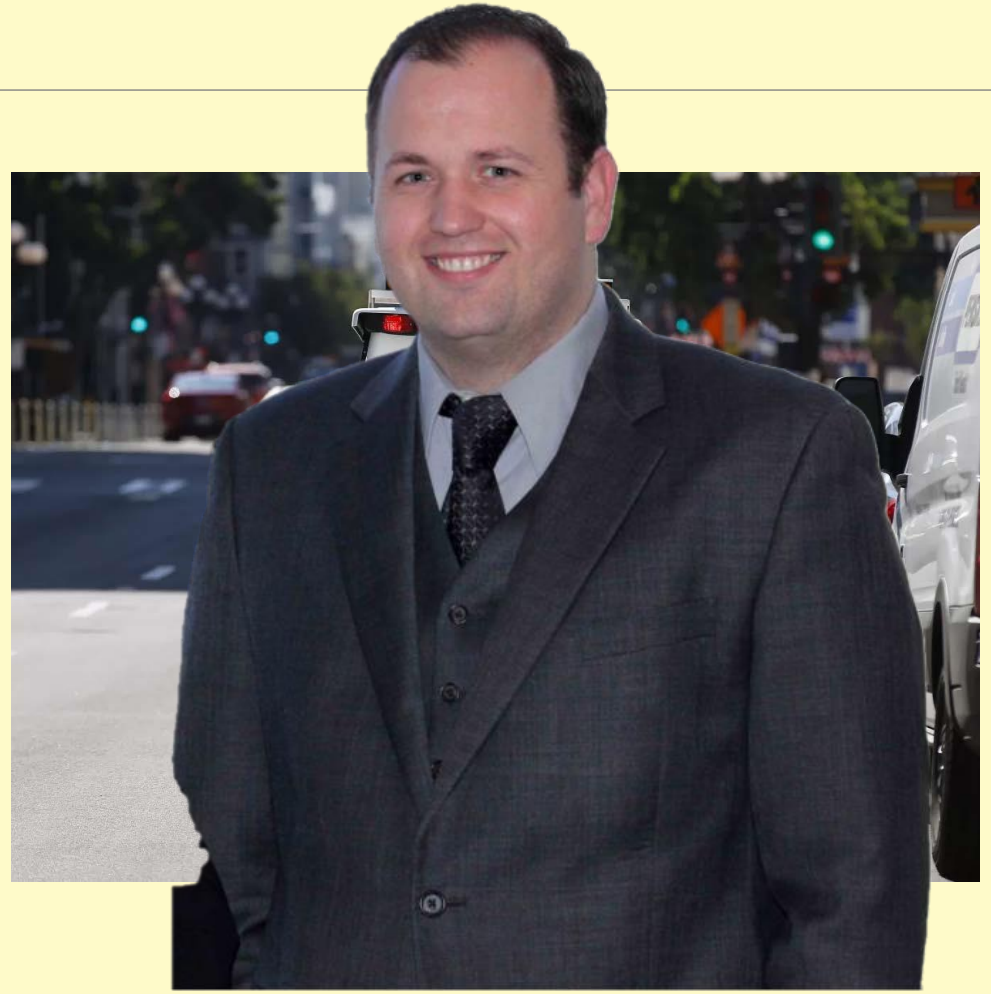
Verdun

IMPETUS

City chalks tires

Plaintiff does not like city chalking tires

Plaintiff sues under Fourth Amendment



Verdun

Warrantless searches are unreasonable except for

TRAFFIC CHECKPOINTS

Immigration
Sobriety
Hit and run
License and registration checks
Poaching

CERTAIN TYPES OF PEOPLE

Drug and alcohol testing of railroad employees

Customs employees wanting to move into drug interdiction

Desks and offices of government employees

Students

Welfare beneficiary home visits



Verdun

Warrantless searches are unreasonable except for

WHERE RISK TO PUBLIC SAFETY IS REAL

Airports

Courthouses

SPECIFIC BUSINESSES

Bars

Gun places

Junkyards

Stone quarries

Massage parlors

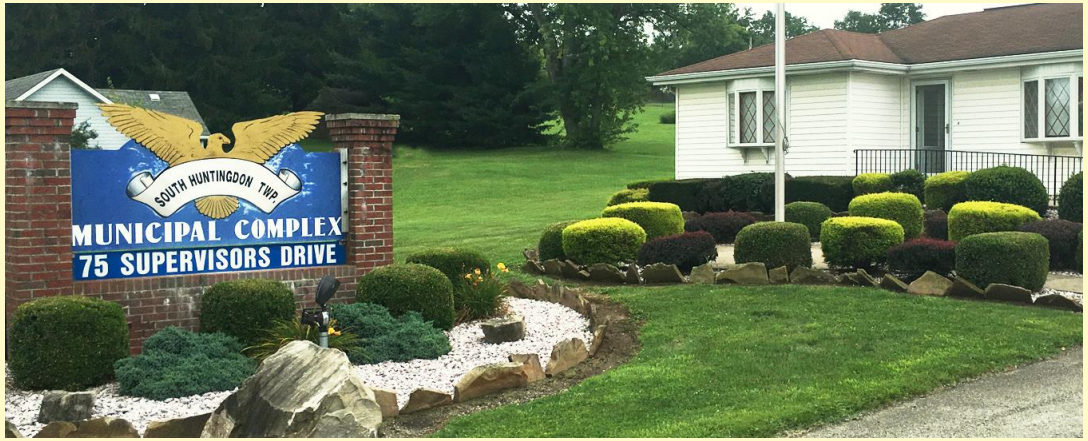


Verdun

ANALYSIS

Are the warrant and probable cause requirements impractical?	Yes. Thousands of warrants to monitor parking spaces
Is primary purpose crime control?	No. It is management of traffic and parking.
Does the search bear a sufficient connection to reason for the search?	Yes.
Is the search reasonable?	Small intrusion on personal liberty. No detention, no damage, not permanent, small anxiety







Vuyanich v. South Huntington Township

W. D. PENN.

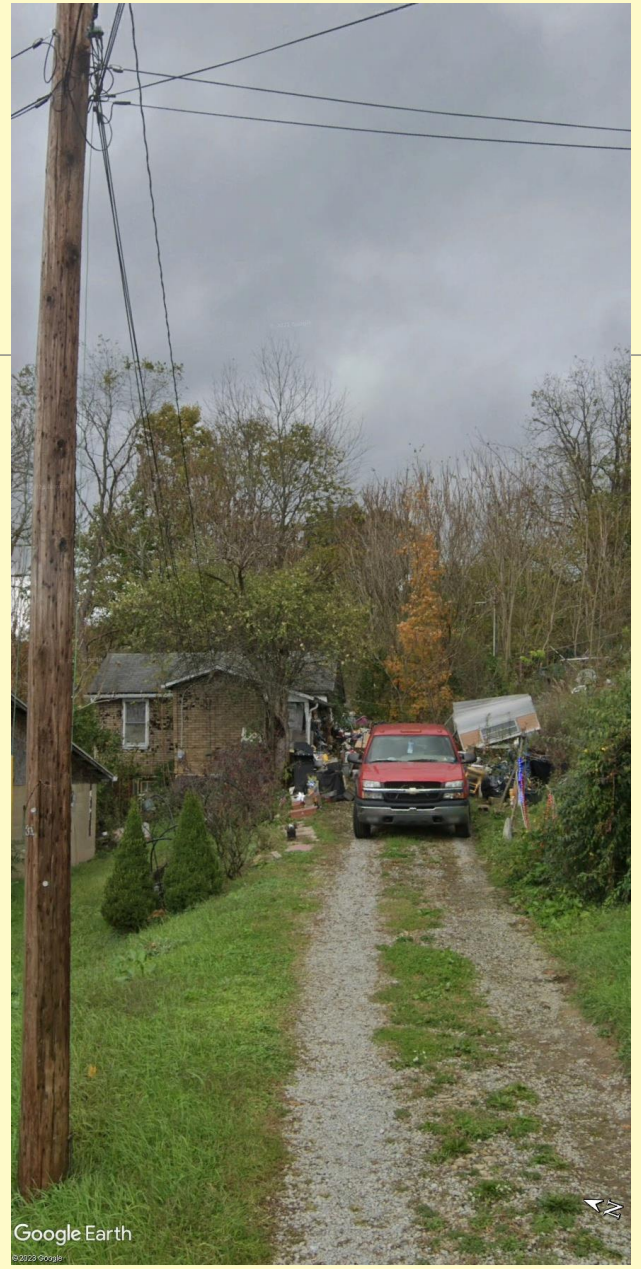
Vuyanich

IMPETUS

Plaintiff's property was full of junk

Property was in two towns – Smithton and S. Huntingdon

Judge gave Smithton permission to clean the property





Vuyanich

IMPETUS

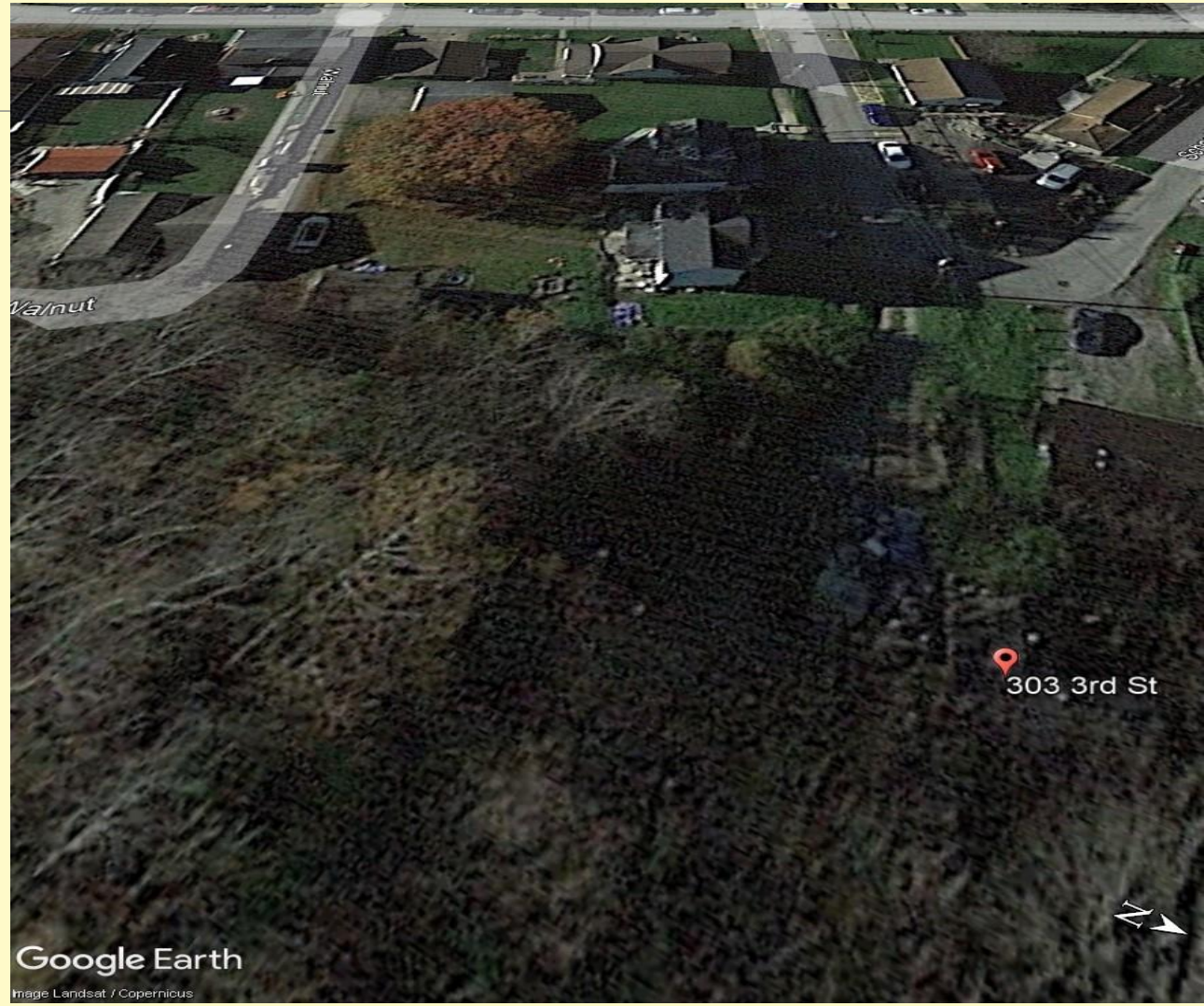
Plaintiff's property was full of junk

Property was in two towns – Smithton and S. Huntingdon

Judge gave Smithton permission to clean the property

Smithton offered to have their contractor clean the Huntington side if Huntington would pay

Huntington officials stood on property to look at situation





CURTILAGE ANALYSIS





Fifth Amendment -- Takings





Grater v. Damascus Township
6th Circuit

Grater

IMPETUS

Grater inherited his father's used farm equipment business

Grater expanded collection, but not sales

The town passed a zoning resolution prohibiting junkyards and storage of scrap metal

Grater convicted of 18 violations





Grater

1.5 million pounds

$60,000 lien (after $171,000 credit)

Grater

TAKINGS CLAUSE

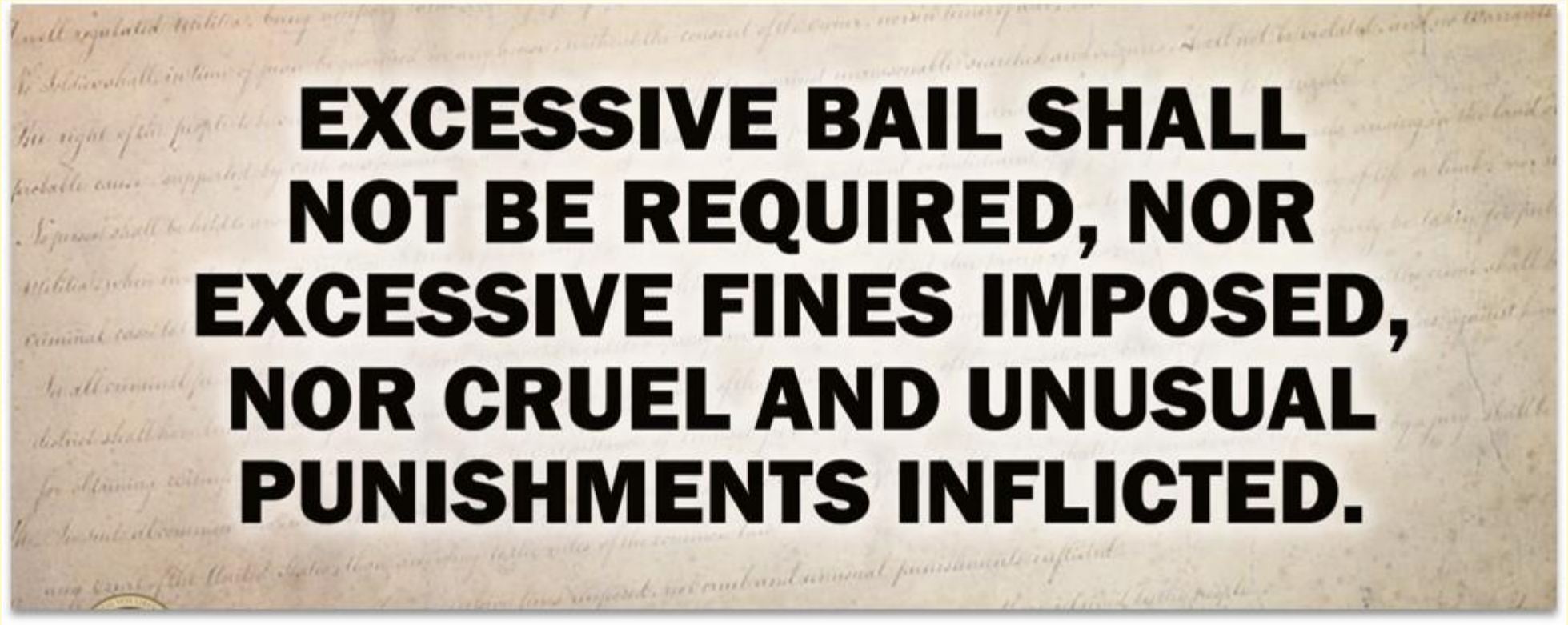
"nor shall private property be taken for public use, without just compensation"

But government may remove a nuisance without compensating property owner

Bars government from forcing one person to bear public burdens when whole public should bear them

No one has a right to maintain a nuisance.

Eighth Amendment







*Johnson v. Grants Pass**
72 F.4th 868 (9th Cir. 2023)

Grants Pass

IMPETUS

Small town with large number of involuntarily homeless

- No where for the homeless to go

Amended camping ordinance to allow people to sleep

- Bedding materials, sleeping bags, cardboard boxes, tents, stoves prohibited
- Civil fines and park exclusion for 30 days
- Criminal trespass



Grants Pass

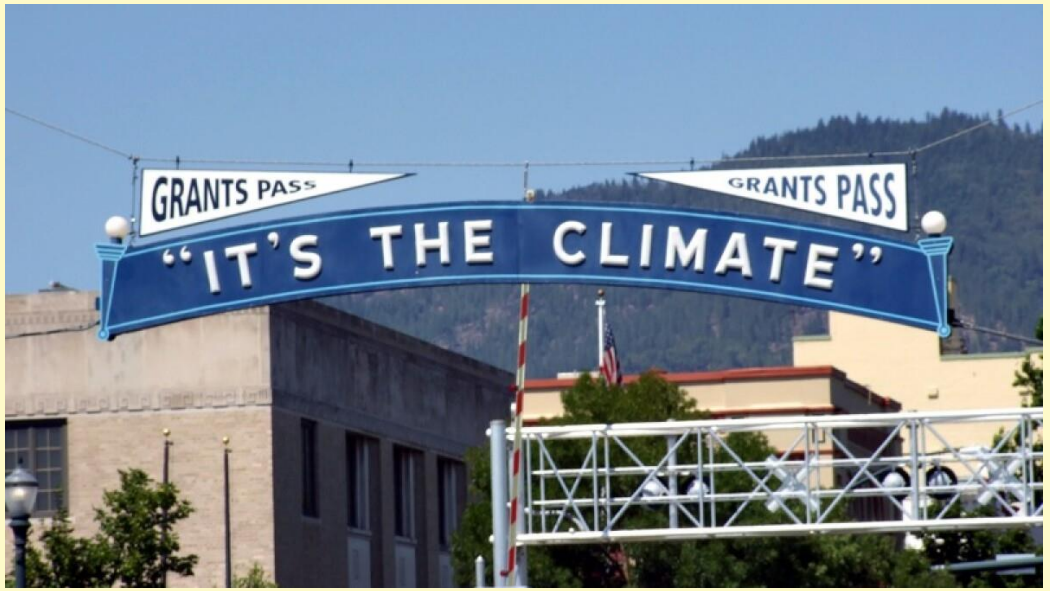
EIGHTH AMENDMENT

Martin prohibits criminal penalties for sitting, sleeping, or lying on public property if cannot find shelter

Grants Pass ordinance starts as civil enforcement

But becomes criminal; and

Grants Pass ordinance punishes people for protecting themselves from the environment



Fourteenth Amendment







Lepper v. Scordino
2nd Circuit

Lepper

IMPETUS

Lepper started to build treehouse

- Wood from boathouse destroyed in Hurricane Sandy and untreated wood

Letter and notice of violation for no permit

Lepper denied permit and told to appeal to ZBA

Citations, notice of unsafe structure, and convictions followed







Lepper

14TH AMENDMENT – SELECTIVE ENFORCEMENT

The person, compared to others similarly situated, was selectively treated; and

The selective treatment was motivated by intent to discriminate on basis such as race, religion, or malicious intent to injure

14TH AMENDMENT – CLASS OF ONE

The person has been intentionally treated differently from others similarly situated; and

There is no rational basis for the difference in treatment

Lepper

EVIDENCE

Other treehouses exist

- No evidence that city received notice that they were unpermitted or received complaints

Treehouse 1 – unpermitted, lost appeal to ZBA, moved treehouse to receive permit

Treehouses 2-5 – received notices that they needed permits; applied and received them, no need to go to ZBA







Green Genie, Inc. v. City of Detroit, 6th Cir. 2023

Green Genie

IMPETUS

Green Genie wanted to open a medical marijuana dispensary on Mack Avenue

Medical marijuana dispensaries cannot be within 1000 feet of a zoning lot containing a school



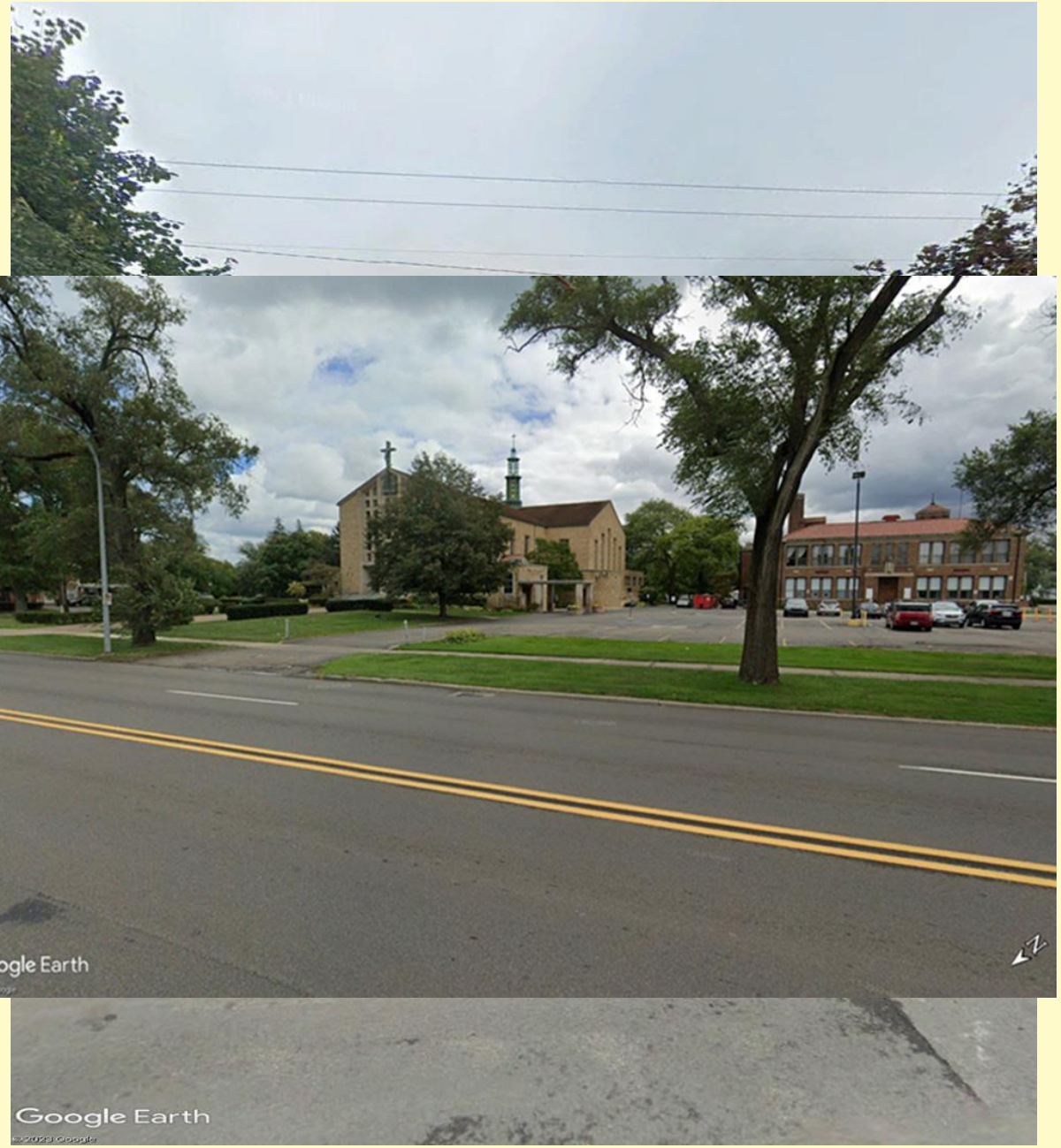
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- Within 1000 feet was tax lot on which church and school sit
- But church and school on different platted lots



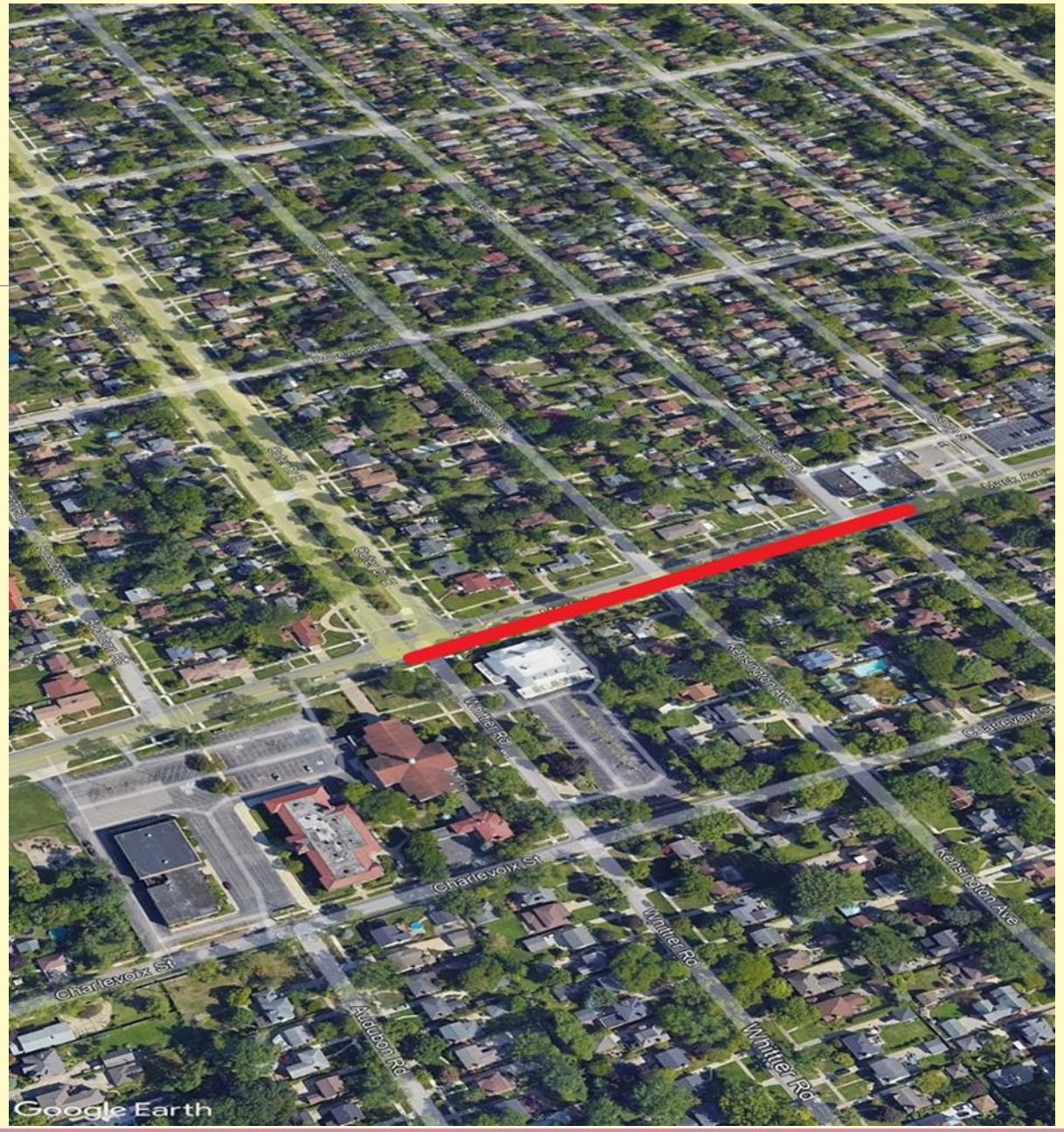
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Green Genie

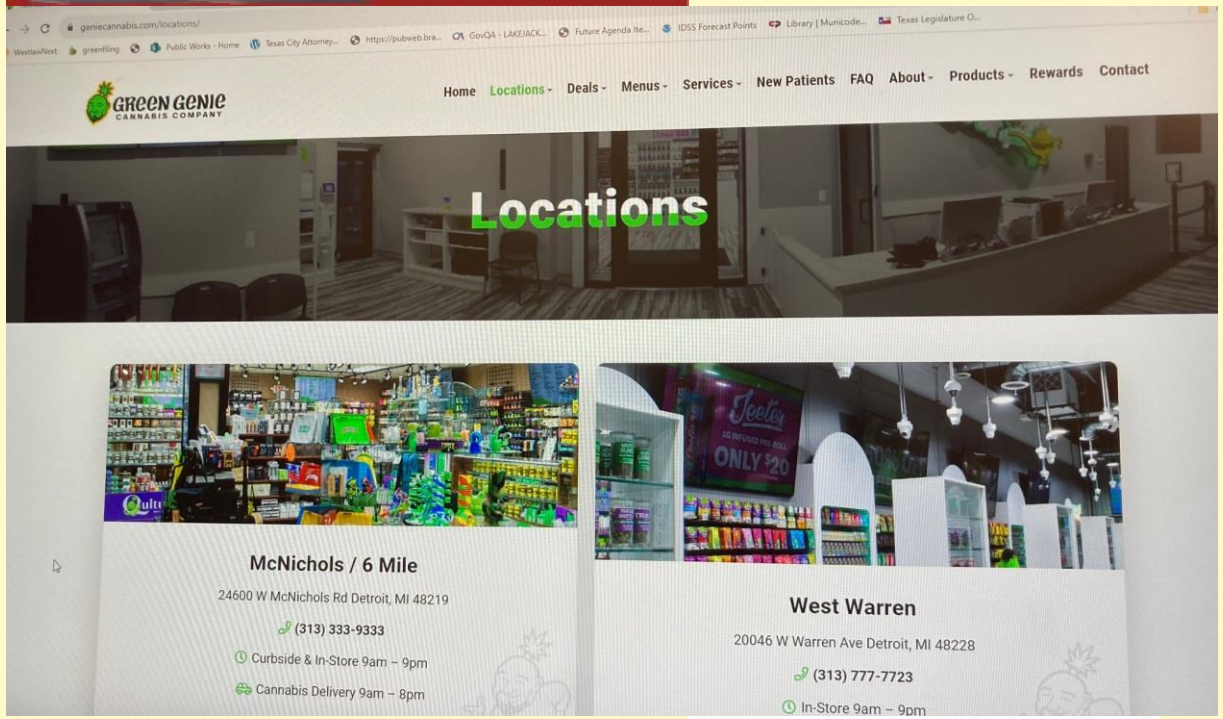
14TH AMENDMENT – DEPRIVATION OF PROPERTY

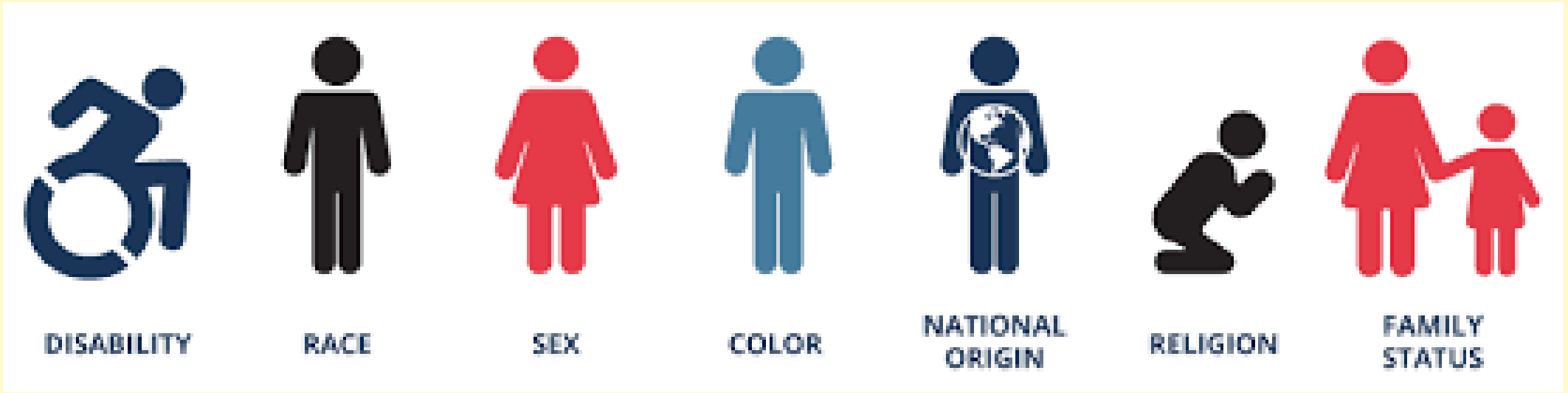
One must have a legitimate claim of entitlement to property interest

Government benefits/procedures are not protected entitlement

- Government may grant or deny at its discretion

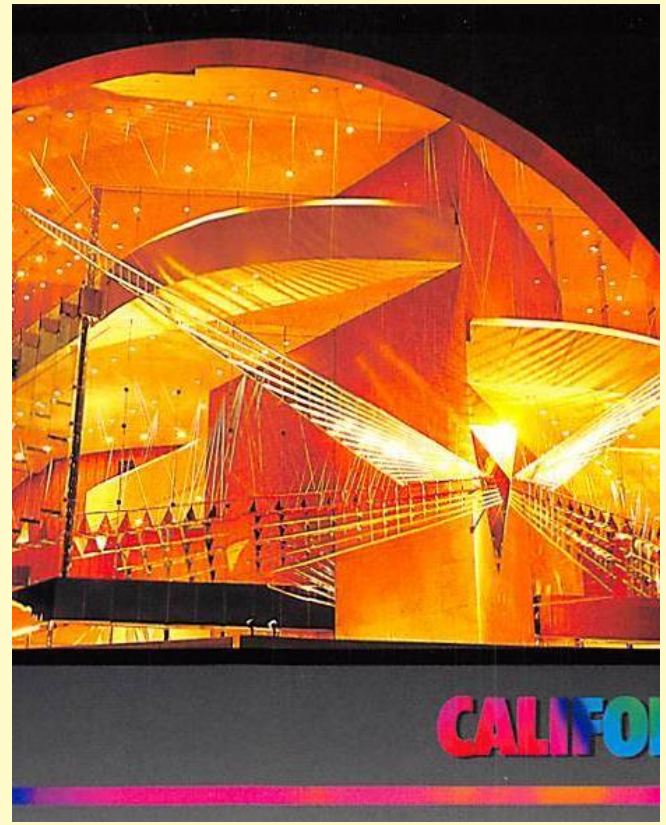






Fair Housing Act





SoCal Recovery, LLC v. City of Costa Mesa*
9th Circuit

SoCal

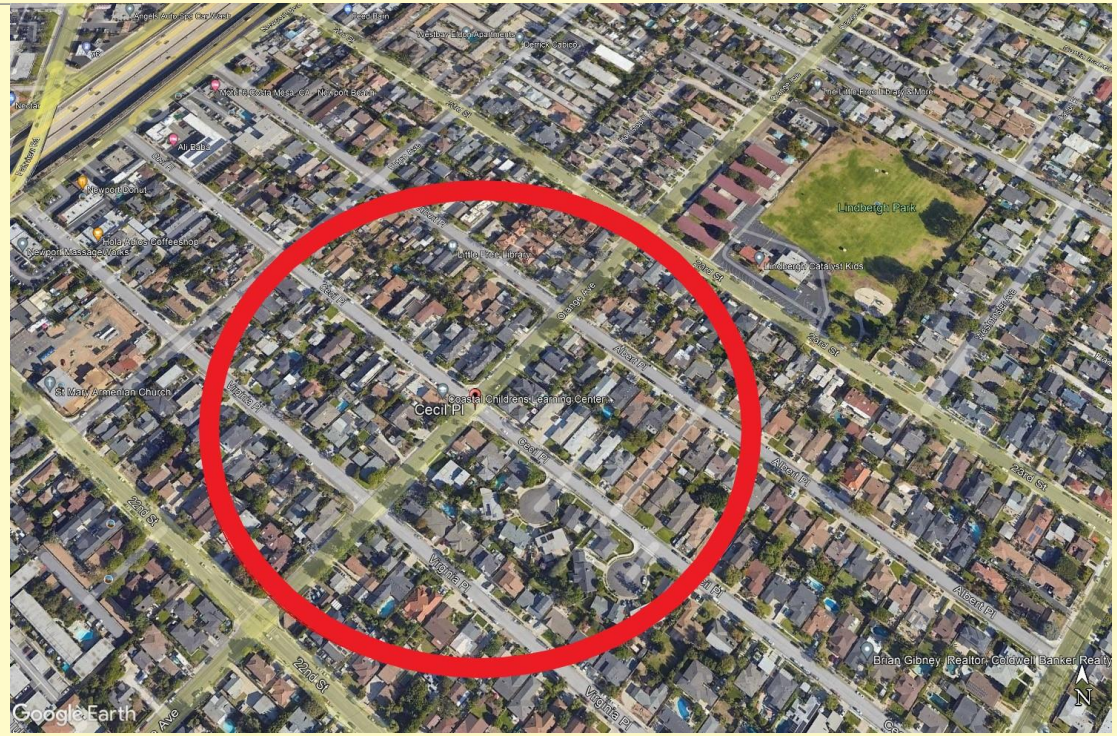
IMPETUS

Costa Mesa amended zoning to reduce number of sober homes

Separation requirement of 650 feet from sober homes and drug/alcohol treatment centers

- Reasonable accommodation requests were permitted





Numbers reduced from 94 to 16

SoCal

IMPETUS

Costa Mesa amended zoning to reduce number of sober homes

Separation requirement of 650 feet from sober homes and drug/alcohol treatment centers

Reasonable accommodation requests were permitted

SOCAL

Needed reasonable accommodations for 3 pre-existing sober homes

All 3 denied

SoCal

FHA

Cities cannot discriminate through zoning against the disabled or against a person that has a relationship or association with a disabled person

Any aggrieved person may sue

ANALYSIS

No question that recovering addicts are disabled

SoCal was “aggrieved” because could not conduct business

SoCal did not need to prove every client was disabled

- Can satisfy serving disability through collective basis
- Admissions criteria, house rules, testimony of employees and residents



Statute of Limitations





Bruce v. City of Miamisburg, S.D. Ohio Jan. 13, 2023*

Bruce

IMPETUS

Bruce bought two properties in city

Bruce did not hire a property manager, rent out or visit the houses for five years

City sent multiple notices concerning lack of maintenance; also published in papers and posted on front doors

- Address on the quitclaim deed, PO box, Colorado state penitentiary

Structured demolished, invoice sent

Bruce filed six constitutional claims against the city three years after demolition



Bruce

SOL

Section 1983 does not contain a statute of limitations

- 6th circuit uses two-year SOL

SOL begins to run when plaintiff knows or has reason to know of injury through reasonable diligence

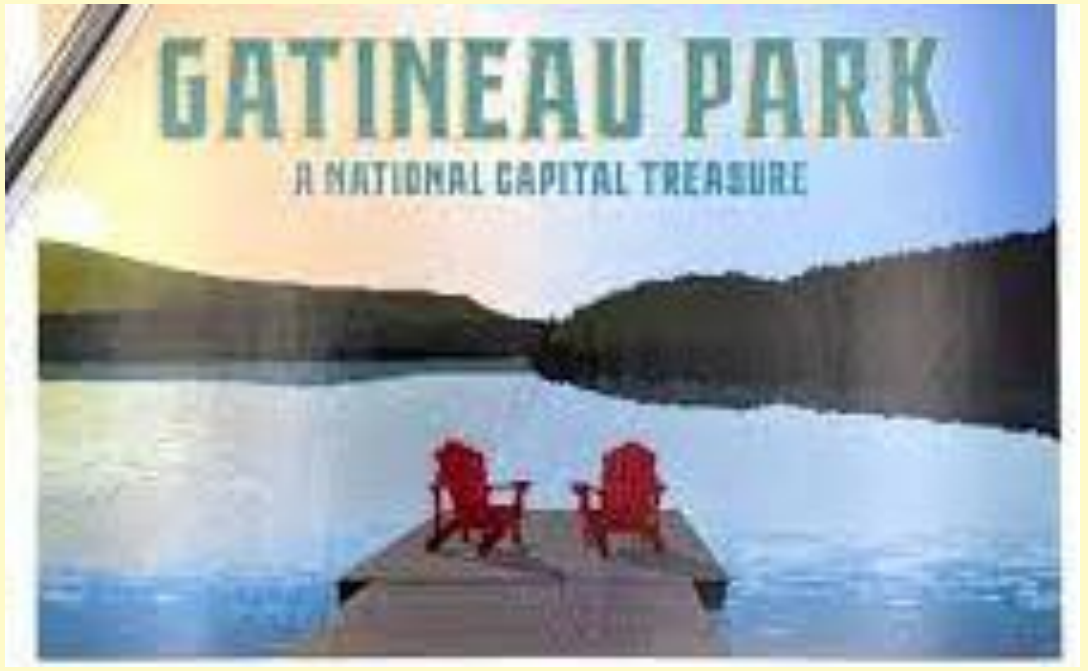
With 46 years of real estate experience, it wasn't reasonable for Bruce not to check on the properties





Canada





City of Gatineau c. Stinson, 2023 QCCA 306 (CanLII)

Gatineau

IMPETUS

Owner obtained all permits necessary to build home

- Big home: three floors but looks like 4, plus a roof terrace; side walls within 1.5 m of side property line

Neighbors complained

- Loss of sun, height of side walls, too close, elevator in front of window



Gatineau

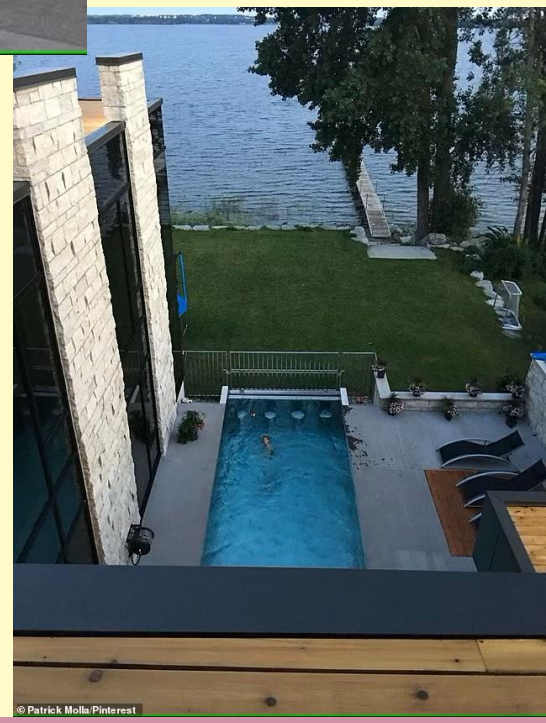
MISTAKE WAS FOUND

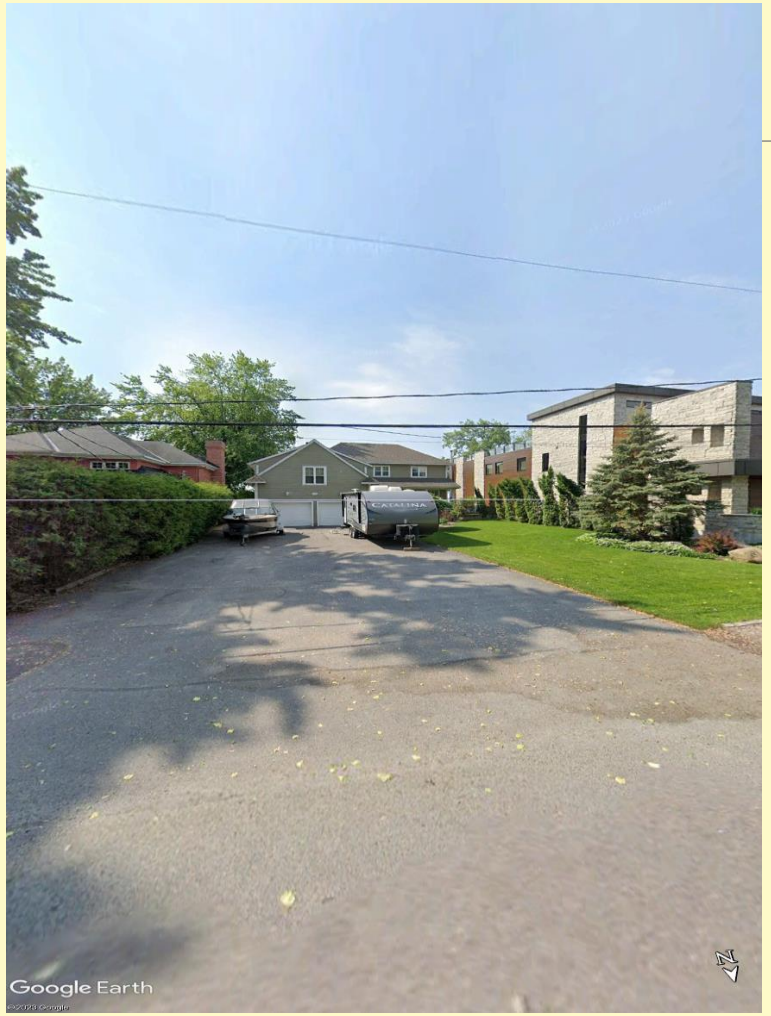
Front setbacks must match neighbors’

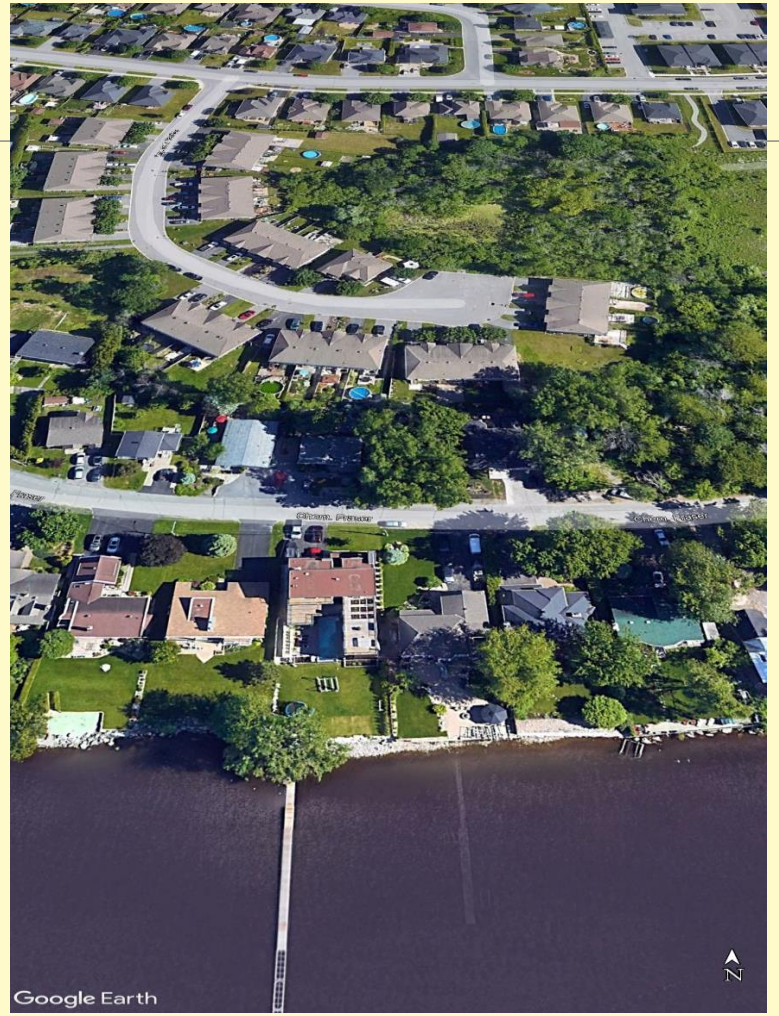
Neighbors have built to be close to river, not street

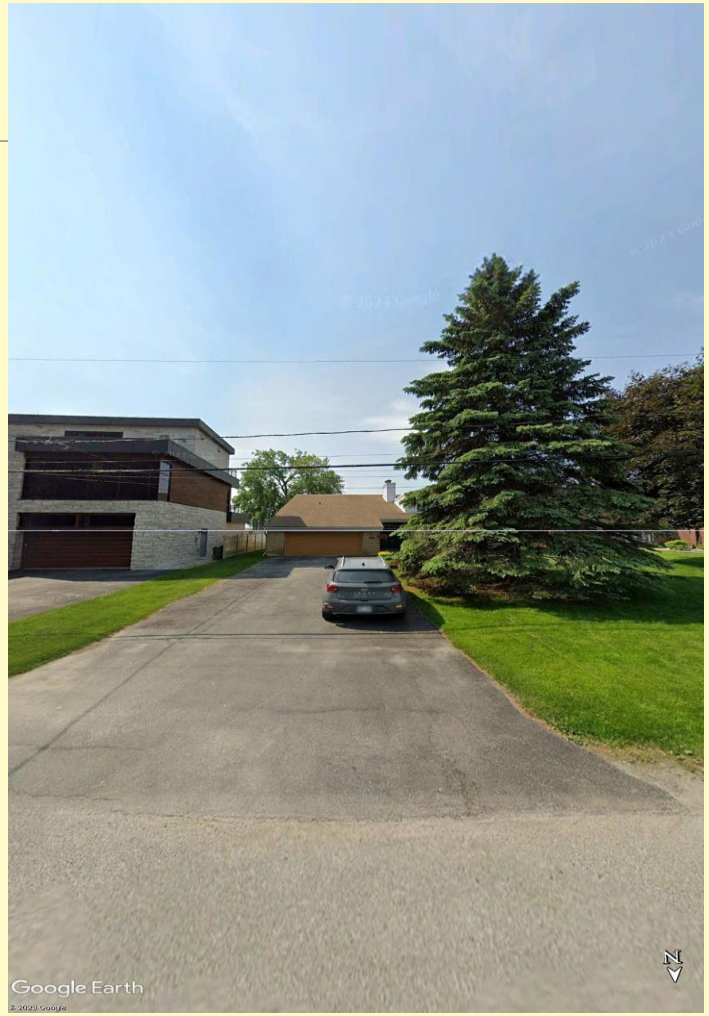
- Setback should have been 15 m not 7 m






Google Earth


Google Earth


Google Earth

Gatineau

MISTAKE WAS FOUND

Front setbacks must match neighbors’

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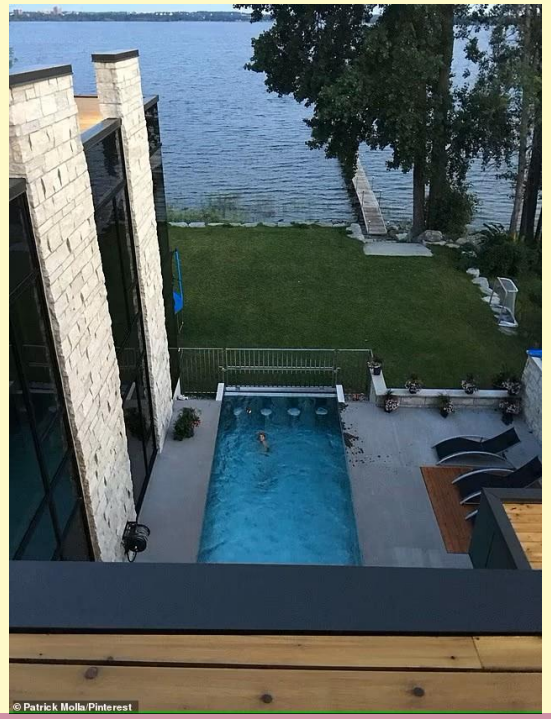
- Setback should have been 15 m not 7 m

City told owner that city would ask council for an exemption

Nine months later, council agrees to the exemption

Neighbors appeal council decision





Gatineau

BASIS FOR EXEMPTION

Does lack of exemption cause serious harm to owner?

Would the exemption hinder neighbors' enjoyment of their right of ownership?

APPLICATION

House cost $800,000

Complaints had nothing to do with frontage

- Height
- Side setback
- Loss of sunlight
- Loss of privacy
- Loss of view from side of house



42 USCA §1981

All persons . . .have the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property . . .



Yoshikawa v. Seguirant 9th Cir.

Yoshikawa

IMPETUS

Property had a nonconforming dock

Multiple stop work orders

Contractor overheard racial term

Seguirant lost qualified immunity



Yoshikawa

§1981

(a) All persons . . .have the same right . . . to make and enforce contracts . . .

(c) The rights protected by this section are protected

- against impairment by nongovernmental discrimination and impairment under color of State law

§1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges . . . secured by the Constitution and laws,

- shall be liable to the party injured . . .

Law must expressly contain a substantive right and a cause of action to bring suit



Sheba Ethiopian Restaurant v. DeKalb County
11th Cir.

Sheba

IMPETUS

Sheba's was a restaurant/night-club

18 years later County conducted multiple inspections

- Overcrowding and fire hazards
- Revoked alcohol license, Certificate of Occupancy, and business license

Sheba sues claiming county violated §1981 through racial discrimination



Sheba

QUALIFIED IMMUNITY

Did official violate a statutory or constitutional right; and

Was the right clearly established at that time

- Would every reasonable official understand that what he is doing violates a right?

ANALYSIS

Was it clearly established that an official can be liable under §1981 for racially discriminating against a corporation?

For racial discrimination, Plaintiff must allege a member of racial minority

SCOTUS 1977 dicta – corporations do not have a racial identity



Smush that cucaracha!



63.5 million verdict

Fuller v. Carollo 11th Circuit