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Case Law Update

2023 Local Government Code Enforcement Cases

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First Amendment

Mccoy v. Town of Pittsfield, 59 F.4th 497 (1st Cir. 2023)

McCoy received a permit and two extensions from the Board of Selectmen to keep a trailer on his property for temporary storage but denied the third extension. McCoy sued claiming the Town violated his First Amendment through content and viewpoint discrimination. A restriction that targets speech is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed," and viewpoint-based if it "targets not subject matter, but particular views taken by speakers on a subject." Both require strict scrutiny analysis. However, the ordinance that allowed temporary trailers did not regulate or refer to the appearance of the trailers. Therefore, the ordinance was content-neutral and only required intermediate scrutiny analysis. Board wins.

Mata Chorwadi, Inc. v. City of Boynton Beach, 2023 WL 3186740 (11th Cir. May 2, 2023)

Boynton Beach has a chronic nuisance code that defines a "nuisance" as one of twenty-six (26) activities such as prostitution, trespass, loitering, or two (2) or more calls for service to a property related to an overdose within thirty (30) days. Under the Code, a pattern of nuisance activity is found when the City has responded to three (3) nuisance activities at the property in thirty (30) days. Once a property displays a pattern of nuisance activity, the City may declare the property a "chronic nuisance." Once a property has been declared a chronic nuisance, the property owners are provided with a Nuisance Abatement Agreement which contains a Corrective Action Plan. The City also places a sign at the property that states the hotel is a chronic nuisance property as "a direct result of continued activity by person(s) at this location requiring the attention of Police and/or Fire Department personnel."

Plaintiffs sued alleging that enforcement of the code chilled Plaintiff's and their hotel guests' First Amendment right to call 911 and caused harm to Plaintiff's business. The court held that Plaintiff's lacked standing to sue on behalf of the hotel guests:

(1) *Overbreadth Doctrine*: plaintiffs may challenge a law because it may deter others from engaging in protected expression. Court held that because the nuisance code does not apply to guests, i.e., they are not penalized for calling, so their expression was not chilled.

Jus tertii standing: a plaintiff is permitted to challenge the enforcement of a law against himself and also assert that the legal duties imposed on the plaintiff operate to violate third parties' rights. Plaintiff theory: Hotel guests were confused by the sign and were deterred from calling 911. However, there was no confusion, rather a misalignment between the Plaintiff's interests and hotel guests' interests. The Plaintiff is injured only if guests' First Amendment rights are not violated (they are free to call 911). If guests' rights *are* violated (are deterred from calling 911), then

the Plaintiffs are not injured. The reality is that Plaintiff doesn't like signs because upstanding citizens don't want to stay at the hotel. City wins.

Porter v. Martinez, 68 F.4th 429 (9th Cir. 2023)

State law prohibits honking vehicle horns "except as a warning of danger." Porter honked, the officer did not see an emergency, and Porter received a citation. Porter sued, asserting that the law violated her First Amendment rights.

For the First Amendment, the court must first analyze whether the law is content neutral, i.e., does it draw distinctions based on message. The next step is to analyze whether the law is content based in its justification, i.e., did the government adopt the law because it disagreed with a message or can the law be justified without reference to content of regulated speech?

The court held that the statute was content neutral on its face and in its justification, so the court used intermediate scrutiny to analyze the facts. The elements for intermediate scrutiny are (1) does the law further an important government interest? (2) is the restriction in the law narrowly tailored so that the restriction is no greater than necessary to further or protect the interest? and (3) are there alternative channels of communication?

The no honking law furthers the important government interest of traffic safety and it is narrowly tailored to the problems that horns cause such as startling drivers. The alternative channels of communication are attending the demonstration, waving, and showing a thumbs up or raised fist. State wins.

Fourth Amendment

May v. Pritchett, 2022 WL 16753599 (11th Circuit November 8, 2022)

May owned a vacation home that she rented out as a short term rental. The County's zoning ordinance stated that only listed uses were permitted, and short term rental is not listed in the pertinent zoning. The County began issuing cease and desist letters and eventually amended the ordinance to make the prohibition clear. May, feeling that her house was grandfathered, persisted in renting out the house for one-week periods and was convicted of violating the zoning ordinance. On appeal, the Supreme Court of Georgia ruled that the ordinance was void for vagueness and dismissed May's criminal citation. May then sued the County for violating her Fourth Amendment rights by maliciously prosecuting her based on an ordinance that did not apply to her. To establish malicious prosecution, a plaintiff must prove that the defendant instituted a criminal prosecution with malice and without probable cause and the criminal prosecution was terminated in plaintiff's favor. Because the County did not know the ordinance was void due to its vagueness, their determination that they had probable cause to issue a citation to May was based on a mistake of fact or law. Therefore, the County was granted summary judgment.

***Sanders v. Genesee County*, 2023 WL 4543488 (6th Cir. July 14, 2023)**

Police were called to a house for dogs without water in July. Prior to this call, police had received at least 10 other calls for animal issues. The police entered a neighbor's yard to check on the conditions of the dogs. There was no clean water or food and some dogs could not reach the shade due to the length of their chains. The police then entered the backyard and found green water and piles of spoiled food. The police took possession of the dogs and placed them on police hold. All dogs had severe cases of heartworms. One dog had to be euthanized due to heartworms. Criminal charges and a lawsuit were filed under the Fourth Amendment. The right to be free from a warrantless search is clearly established. However, there are exceptions to the warrant requirement. One is the plain-view doctrine and exigent circumstances. Both applied in this case. The Plaintiff also sued under the Fourteenth Amendment for his right to a hearing (due process) before his property was taken. A pre-deprivation hearing was not required due to the plain-view doctrine and exigent circumstances. However, Plaintiff was not given a post-deprivation hearing, including his criminal case. There was an action, Michigan Court Rule 3.105 "Claim and Delivery," available to Plaintiff to recover the dogs. Plaintiff claimed he did not request that hearing because he wanted to to keep his 5th amendment right. The court held that just because the hearing was not ideal, it was not insufficient. County wins.

***Verdun v. City of San Diego*, 51 F.4th 1033 (9th Cir. 2022)**

City chalks tires as part of parking enforcement. Plaintiffs filed this lawsuit claiming it was an illegal search and seizure. Administrative searches do not need warrants, but they are limited to situations where obtaining a warrant is impracticable and where the primary purpose is distinguishable from crime control. The administrative search must bear a sufficient connection to the governmental interests they serve and cannot advance as their primary purpose discovering evidence of criminal wrong-doing. Also, the desire to execute an administrative search must be balanced against privacy interests and the search must be reasonable in scope and manner of execution.

1. Is the primary purpose of tire chalking uncovering evidence of ordinary criminal wrongdoing? No. The purpose of the chalking is to enhance public safety, improve traffic control, and promote commerce. Chalking is cost-effective and more efficient and accurate than other methods.

2. Was the search reasonable? The court must consider:

(a) *the gravity of the public concerns served by the search*: parking and traffic management are strong governmental interests;

(b) *the degree to which the search advances the public interest*: chalking has a tight nexus to parking management;

and

(c) *the severity of the interference with individual liberty*: chalking involves no detentions, no damage, and no substantial anxiety. City wins.

***Vuyanich v. South Huntingdon Twnshp*, 2023 WL 4238891 (W.D. Penn. June 28, 2023)**

Plaintiff's property is situated in a borough and a township. The borough received permission from the township and a court of common please to clean the property. However, the borough requested funds from the township to clean their side of the property. Consequently, three township supervisors visited the property and stood by a shed for about 20 minutes while plaintiff was present. There is no information on whether they agreed to pay for the cleaning. The township was sued under the Fourth Amendment for entering and searching the curtilage area. Warrantless searches of the curtilage are not allowed because the curtilage is closely related to the intimate actions that take place in the home. To determine if the search was in the curtilage, the factors to be examined are (a) the proximity of the area to the home, (b) whether the area is included within an enclosure surrounding the home, (c) the nature of the uses to which the area is put, and (d) the steps taken by the resident to protect the area from observation by people passing by.

(a) The dilapidated shed was located 50 to 75 yards from Plaintiffs' dwelling. It was separated from the dwelling by a barrier of junk, and there was junk strewn in and around the shed. Portions of the shed were missing and the inside was clearly visible.

(b) The shed was not connected to the home and was not enclosed.

(c) There were no signs (e.g., "no trespass," "keep out," or "big dog") anywhere in that area of the property. The shed was filled with junk as well as the surrounding area. There was absolutely no evidence that the area was an extension of the daily intimate activities of the home.

(d) Nothing about the area precluded curious neighbors, members of the public, or government agents from entering and viewing the property. The area at issue was easily accessible by a public road, and when Plaintiffs saw the supervisors, Plaintiff greeted them and did not tell them to leave.

Fifth Amendment

Grater v. Damascus Township, 2023 WL 3059080 (6th Cir. April 24, 2023)

Grater inherited his used farm equipment business stores from his father. About 10 years after his father started storing used equipment on his property, the town passed a zoning ordinance. Eventually, the town began sending Grater notices that he was violating the zoning ordinance. When Grater failed to comply with the ordinance, the town issued 18 citations, 9 for illegal dumping and 9 for unlawful property use (unlicensed junkyard and storing scrap metal). All convictions were upheld on appeal. The town then declared the property a nuisance and ordered Grater to abate or the town would abate and put a lien on the property. Grater asked for a hearing and the nuisance finding was upheld. After several weeks of work, 1.5 million pounds of equipment and materials had been removed. After crediting Grater for the price of scrap ($171,000), the bill came to $60,000. Among his baseless claims, Grater asserted that the abatement constituted a taking. The Fifth Amendment guarantees that "private property shall not be taken for a public use without just compensation." However, the Takings Clause does not eliminate the police power of the State to enact limitations on the use of their property. Because no individual has a right to create a nuisance, the State has not 'taken' anything

when it asserts its power to enjoin the nuisance. With no constitutional right to maintain a nuisance, no compensation is required for the abatement of one. Township wins.

Eight Amendment

Johnson v. City of Grants Pass, 2022 WL 4492090 (9th Cir. Sept. 28, 2022)

Under *Martin v. Boise*, also a 9th Circuit case, cities cannot punish people for sleeping outdoors if there are no shelter beds available. Attempting to comply with *Martin*, Grants Pass removed the word "sleeping" from its no camping ordinance. Camping in public places and the use of any type of bedding material, stoves, fires, and tents was still prohibited. Offenders are barred from all city parks for 30 days if they violated this or any other park regulation twice in one year. If found in a park after this, offenders are arrested and charged with criminal trespass. The Court held that the anti-camping ordinance violated the Eighth Amendment. First, the ordinance is a criminal ordinance disguised as a civil ordinance, it just takes a circuitous route. The ordinance prohibits the homeless from engaging in activity that they cannot avoid, so the ordinance created a status offense. Civil citation x 2violations = park exclusion x 1 exclusion violation = criminal trespass.

Second, the ordinance prohibits people from taking minimal measures to stay warm and dry while sleeping. If the law is that you cannot prohibit people from sleeping, then you cannot prohibit them from taking rudimentary steps to avoid the cold ground and the weather. City loses.

Fourteenth Amendment

Lepper v. Scordino, 2023 WL 4004220 (2nd Cir. June 15, 2023)

Lepper began building a treehouse but did not obtain a permit. When he did apply for a permit, it was denied due to lack of plans or a survey. Regardless, Lepper continued to build the treehouse. Lepper was convicted of violating the zoning code and setback requirements and the treehouse was declared to by unsafe and could not be occupied without a CO. Lepper sued under two equal protection theories: selective enforcement and class-of-one. For both of these theories, Lepper needed some evidence of similarly situated persons who were treated differently. Lepper pointed out four other treehouses that had been built without a permit. The building official stated that he was unaware of these treehouses, but as soon as he knew about them, he sent letters stating that the treehouses needed permits. One family was denied variances and were required to move their treehouse to meet the setback requirements. All others were given permits. City wins.

Fourteenth Amendment

Green Genie, Inc. v. City of Detroit, 63 F. 4th 521 (6th Cir. 20223)

Government benefits, such as a permits and government procedures, are not property rights and not a protected entitlement. City wins.

Fair Housing Act

SoCal Recovery v. City of Costa Mesa, 56 F.4th 802 (9th Cir. 2023)

SoCal operated three sober living homes in City. City amended its ordinance to require sober living homes to obtain a permit and to be located more than 650 feet from other sober living homes. The ordinances were passed in an explicit effort to reduce the number of sober living homes (from 94 to 16) because of the deleterious effect the homes had to the neighborhoods' residential character. The ordinances effected both single- and multi-family areas. SoCal's permits and requests for reasonable accommodations were denied because the City would not waive the 650-foot rule. City issued citations and filed abatement actions when SoCal did not close its homes. SoCal brought suit claiming a violation of the FHA and ADA. The FHA prohibits discrimination against a person in terms of renting or leasing a dwelling because of a handicap and the ADA prohibits a public entity from discriminating through its zoning laws against a person with a disability. The issue on appeal was whether SoCal had standing and whether it was required to prove that the residents were actually disabled. The FHA gives any "aggrieved person" the right to sue and the ADA gives any person alleging discrimination a right to sue. Because sober homes are not allowed to locate and SoCal was told it must stop operating in Costa Mesa, they were allowed to sue under both the FHA and ADA. The district court held that each resident had to prove their disability for SoCal to survive summary judgment. The 9th Circuit held that sober living home operators can satisfy the actual disability prong on a *collective basis* by demonstrating that they serve or intend to serve individuals with actual disabilities. Medical evidence is not necessary. Evidence of policies such as admissions criteria, zero drug and alcohol policy, mandatory involvement in recovery programs, and random drug tests are sufficient to prove who their clientele are. City loses.

Statute of Limitations

Bruce v. City of Miamisburg, 2023 WL 184010 (S.D. Ohio Jan. 13, 2023)

Bruce's properties were cited multiple times for tall grass, unsecured trash, and having debris on the property. The properties were eventually declared public nuisances, and unfit for human habitation. Between 2013 and 2017, 11 notices were sent to multiple addresses, all owned by Bruce, and his PO Box which he had maintained for 36 years. The notices were also placed on the front door of the properties. The demolition notices were published in five Miami Valley newspapers for a total of 16 days. In July 2018, Miamisburg demolished the properties and mailed invoices to the PO Box. Bruce filed suit in March 2021 claiming constitutional violations under 42 USCA 1983. Section 1983 does not have a statute of limitations, so federal courts must look to state law's residual personal injury actions for the SOL. In Ohio, this SOL is two years. Bruce's SOL began to run when he knew or had reason to know of the injury. For Bruce, his case will be barred if he should have known of the demolition before March 2019. Notices of demolition were placed on the properties by May 2018 and the buildings were demolished in July 2018. The court held that it was not reasonable for him to go eight months without knowing two of his buildings no longer existed. City wins.

Canada

City of Gatineau c. Stinson, 2023 CanLII 306, 2023 306, (Can. Que. C.A.)

Patrick Molla received a permit for a large house. The neighbors begin to complain as soon as construction begins. Two months after construction begins, a front setback error was discovered. The city called Molla and said that a variance would be requested from municipal council and that he did not need to stop construction to wait for a decision. Ten months later, council approved the setback. Then, the trial court ordered complete demolition of the house.

According to Statutory Law 145.4 of the *Act respecting land use planning and development* ("LAU"), an exemption may be granted only if the application of the by-law causes a serious prejudice to the person who applied for the exemption. Moreover, it shall not be granted where it hinders the owners of the neighboring immovables in the enjoyment of their right of ownership. The appellate court's analysis:

Would denial of the waiver cause serious harm to Molla? Yes. He had spent about $400,000, half the final cost, on construction costs at that point.

Were the neighbors harmed? The neighbor complaints were: loss of sunshine on the side of the houses, pool filter noise, loss of privacy, too close to the sides, and can't sit on porch because of wall. None of these complaints are related to the front setback. Molla gets to keep his house.

Section 1981

Sheba Ethiopian Rest., Inc. v. Dekalb County, No. 21-013077, 2023 WL 3750710 (11th Cir. June 1, 2023)

Two different circuits recently ruled on whether section 1981 could be used to sue a governmental entity for discrimination.

Section 1981 provides that all persons shall have the same right to make and enforce contracts as is enjoyed by white citizens. To state a claim under section 1981 for race discrimination, a plaintiff must allege (1) he is a member of a racial minority, (2) the defendant intended to racially discriminate against him, and (3) the discrimination concerned one or more of the activities enumerated in the statute.

Sheba was a restaurant turned night club and was licensed by the county. The county amended its zoning code and reclassified establishments as nightclubs or late night establishments. Any nightclub or late night establishment within 1500 feet of a residential property had to obtain a special land use permit. Sheba fell under both definitions, but it was grandfathered. However, 7 years later, a grumpy person began a campaign to cripple the Ethiopian restaurant community. The Late Night Taskforce ordered restaurants to choose whether they were a nightclub or a late night establishment. Sheba chose late night establishment and its license was renewed, but Sheba started receiving many citations. Eventually the fire marshal

shut it down for use of sparklers in champagne bottles and overcrowding. A month later the CO was revoked and the license was revoked.

Sheba sued the county for race discrimination under 42 U.S.C. section 1981. The circuit court held that officials are entitled to qualified immunity because it was not clearly established that a corporation could have a race or suffer race discrimination under section 1981. The court quoted Supreme Court dicta that said, "a corporation ... has no racial identity and cannot be the direct target of the [city's] alleged discrimination." Therefore, a reasonable official would not have understood that discriminating against a corporation violates section 1981.

Yoshikawa v. Seguirant, No. 21-15970, 2023 WL 4722982 (9th Cir. July 25, 2023)

Yoshikawa was trying to revamp a house, but the inspector repeatedly issued stop work orders and ordered Yoshikawa to reapply for building permits. A 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." "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. The circuit court held that Section 1981 creates federal rights but does not provide an express or implied cause of damages against the government and that § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units. The court remanded with instructions to allow Yoshikawa to replead his § 1981 claim as a § 1983 claim.