International Municipal Lawyers Association

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Case Law Update

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HOMELESS

***City of Grants Pass v. Johnson*, 144 S.Ct. 2202 (2024)**

Grants Pass has one ordinance that prohibits sleeping on sidewalks, streets, and alleys and it has a second ordinance that prohibits camping on public property. The 9th Circuit held that these ordinances violated the 8th Amendment. The Supreme Court decided that not allowing people to sleep with a blanket or pillow was not cruel and unusual punishment. But that's OK because Grant's Pass only uses the law as one tool of many to encourage the homeless to accept services and to ensure sidewalks and other public spaces are safe and accessible. The Court held that the "cruel and unusual clause" only applies to the method of punishment after criminal conviction, not to whether certain behavior should be criminalized. But they didn't actually make that ruling. Instead, they took an originist view of the 8th Amendment and stated that the founders thought that cruel and unusual punishments were practices such as disemboweling, burning alive and anything that would cause terror, pain or disgrace. The "unusual" part comes in because by the time the Amendment was drafted, those punishments were not used. They also take a swipe at their own holding that people shouldn't be punished for their status. However, they leave that ruling in tact for now.

ANIMALS

***Brodanex v. Town of St. John*, 2023 WL 7002161 (7th Cir. October 24, 2023)**

People reported that Brodanex's dog-training included shooting dogs with blanks and beating them with whips. Upon inspection (with the landlord's permission), animal control found unclean conditions and injured animals. Warrants were obtained and Brodanex was charged with animal torture and animal cruelty. The trial court ruled that the landlord didn't have authority to consent to the search, suppressed the evidence, and dismissed the cases. Brodanex then sued the city under the Fourth Amendment. The circuit court ignored the trial court and district court's reasoning and granted summary judgment on the basis of *Monell*[1] because there was no evidence that a final policy maker authorized the warrant request.

***Madero v. Luffey*, 2024 WL 3066038 (3rd Cir. June 20, 2024)**

Luffey owned 42 cats. After neighbor complaints, the city removed the cats and gave them to HAR, which contracted with the city to hold and care for animals that the city brought in. Among many others, Madero sued HAR under section 1983. The district court said that Madero showed no evidence that HAR was a state actor and dismissed the claims against HAR. The circuit court disagreed. Among the reasons: an email from HAR asking if they needed to hold cats as evidence and contract required HAR to house and care for animals brought by in by animal control. HAR was performing a traditional government function which makes it a state actor.

[1] To remove the city's qualified immunity, 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).

NUISANCE AND DEMOLITION

***Sanimax USA v. City of South St. Paul*, 2024 WL 878914 (8th Cir. March 1, 2024)**

To promote business and light industry instead of meat packing and rendering plants, the city passed an ordinance that prohibited generating offensive odors. This ordinance applied to businesses in a newly created zone, the I-1 Light Industrial district. The ordinance required Significant Odor Generators (SOG) to develop an odor management plant. A business became a SOG if the property generated 7 verified odor complaints within a 6-month period and if the property generated a certain ratio of odor units using an olfactometer. If the property owner did not cooperate with the city, the city would issue administrative citations. Sanimax received 20 of these citations and accrued $35,000 in fines. Sanimax sued under the 1st Amendment, claiming that the city strengthened its ordinance to provide for penalties out of retaliation for legal actions Sanimax took. To prove that theory, Sanimax had to prove not only that *but for* the legal challenges, the city would not have adopted the ordinance, but that the city did so in retaliation. There was plenty of evidence that city staff was struggling to find ways to bring Sanimax into compliance with the odor ordinance, but there was no evidence that city council passed the ordinance in retaliation.

***Ituah v. City of Philadelphia*, 2024 WL 3177770 (3rd Cir. June 26, 2024)**

City demolished property due to imminent danger. Ituah sued under:

1. The Takings Clause. Abating a dangerous structure or a public nuisance is not a taking. The Takings Clause of the Fifth Amendment provides that private property shall not 'be taken for public use, without just compensation.' U.S. Const. amend. V. Property is not "taken" where a city or other appropriate public authority has acted pursuant to its right and obligation to ensure public safety in remediating a dangerous condition. The inspector testified that there was a potential of a very serious collapse of the building that would pose a danger to the public, remaining occupants of the property, and the adjoining property.

***First Floor Living v. City of Cleveland*, 83 F.4th 445 (6th Cir. 20223)**

In 2018, First Floor Living and Flush Designs bought property with the aim of renovation. *Prior to* the purchases, the City condemned the buildings and ordered that they be demolished. The City sent notices, through certified mail, to Lush Designs to let the new owners know of the finding. The notice said the owner had 10 days to file a rehabilitation plan with the City or the building would be demolished. Notice was also posted on the building. The letters were received. Lush began repairing the building and was told by the building department that the building was not subject to a condemnation order. However, in 2019, after searching for rehabilitation permits, the city issued a permit for its demolition.

First Floor Living's property was owned by the state when the notices were posted and mailed. In 2020, notices were sent to First Floor, who was renovating the property without permits, and to First Floor's registered agent. City also posted notice on the building and searched the database for renovation permits. The letters were not claimed. The property was demolished.

The circuit court held that the 14th Amendment was not violated because both properties were provided adequate notice. Certainly, Lush was notified. As for First Floor, the court held that when a property changes hands, the government does not need to start the notification process over. That would unduly hamper the state's interest in demolishing blighted properties. So, once the prior owner was notified, the property was eligible for demolition.

MULTIFAMILY

***SO Apt's v. City of San Antonio* 2024 WL 3506191 (5th Cir. July 23, 2024)**

San Antonio has a proactive Apartment Inspection Program to monitor apartments that have a history of code violations. Complexes that receive three or more unabated violations in a 6-month period must enroll. The violation and the program point may be appealed. The fee for being in the Apartment Inspection Program is $100 per unit per year. The City conducts monthly inspections and releases complexes that receive two or less program points after enrollment. Because of excessive points, SO was enrolled in the program and charge a fee of $12,500. The complexes sued for a preliminary injunction. The complex tried three avenues to prove they had a substantial likelihood of prevailing.

1. Fourth Amendment: The program allowed for warrantless searches. The absence of warrant language did not mean that the complexes had to acquiesce to the inspectors. Looking at that particular section of the code of ordinances as a whole, warrants are required for inspections.

2. Eight Amendment: The fees are an unconstitutional disproportionate punishment and should not be dependent on the number of dwelling units. The 8th Amendment only applies to fees issued for punishment. These fees are not punishment because they fund the inspection program. The fees are directly related to the amount of work the city must undertake to monitor the complexes.

3. Fourteenth Amendment: Completely baseless. Notice and chance to appeal are provided.

***Rhone v. City of Texas City*, 93 F.4th 762 (5th Cir. 2024)**

City, citing the IPMC, told Rhone that he could not sell or lease his apartments until they were repaired. Rhone claimed that city staff told tenants that the property was unsafe so they shouldn't pay their rent. He also claimed that the city gave him pretexts about why his permits were not approved. City filed an injunction, which prohibited Rhone from leasing the apartments, and then filed an abatement action. The court ordered that the buildings be demolished. Rhone appealed and the city removed to federal court. The apartments were demolished. Among his complaints, Rhone claimed that the municipal judge was not sufficiently independent from the city when it rendered judgment in favor of the city, and if there was sufficient independence, there was an appearance of impropriety. Because there is no authority that has held appointed municipal judges are constitutionally suspect, the court focused on the judge's contract. The contract stated, "all material decisions affecting the Office of Municipal Court Judge will be submitted to [the City Attorney] for approval." The City Attorney prepared the abatement complaint and the abatement order, presented

evidence at the hearing, and his signature was on the order: "approved as to form, substance and entry." The court held that, at least facially, it appeared that the City Attorney has final authority on what the order on his own petition would say. This point was remanded for the district court to decide if the role of the City Attorney violated due process. The district court found that the signature block did not meant that the judge needed the city attorney's approval before entering the order.

CLUBS

***Assoc. of Club Exec. v. City of Dallas* , 83 F.4th 958 (5th Cir. 2023)**

A new Dallas ordinance requires that SOBs (Adult Businesses) close between 2 a.m. and 6 a.m. due to data that showed an increase of violent crime during those hours. The Association sued for a preliminary injunction[2]. Only the first element, substantial likelihood to prevail, was in dispute. So, the *Renton* and *Almeda* secondary effects mythoi were brought in. To determine whether the Association would prevail on a lawsuit, the court reduced the question down to: (a) could the city reasonably believe that its evidence linked the SOBs' operation between 2 a.m. and 6 a.m. and the increase of violent crime during those hours. Yes. The city had the data to provide the link. Therefore, the ordinance was designed to serve a substantial government interest. (b) What about alternative avenues of communication? Twenty hours is plenty of time to transmit your message.

Diamond S.J. Enter. v. City of San Jose 2022 WL 22717851 (9th Cir. April 30, 2024)

A nightclub, SJ Live, booked a popular entertainer (Lucci). On the night of the performance, there was confusion and possible double bookings, so the manager cancelled and locked the doors. Gun shots occurred. Based on videos of the events, the chief of police gave SJ Live a Notice of Intended Action to Revoke Entertainment Permit for 6 nuisance violations. The permit was revoked for 30 days. SJ Live appealed the administrative decision twice before filing the lawsuit. SJ Live suit claimed that the city facially violated the 1st Amendment because the nuisance provisions were prior restraints. To survive a facial challenge, a licensing procedure must not confer unbridled discretion on a city official. The Court ruled that the ordinance did not give unbridled discretion because the ordinance required that a public nuisance be substantial and unreasonable from the viewpoint of a reasonable person. The nuisance provisions also state that the behavior must jeopardize or endanger health, safety, or welfare of persons on or close to the area, required an administrative hearing, and allowed for an administrative and judicial review.

[2] For a court to grant a preliminary injunction, the movant must prove (1) a substantial likelihood that the movant will prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury outweighs the threatened harm an injunction may cause; and (4) that granting the preliminary injunction is in the public interest. *S. Monorail Co. v. Robbins & Myers, Inc.*, 666 F.2d 185, 186 (5th Cir. 1982).

RESTAURANT

Red Door Asian Bistro v. City of Fort Lauderdale 2023 WL 5606088 (11th Cir. Aug. 30, 2023) Long Island restauranteurs, Red Door, thought it would be a good idea to expand to Florida. During renovations, beginning Jan 2018, Red Door installed an Owens Corning "zero clearance" kitchen hood. Although the building code requires 18-inches of clearance for a kitchen hood, the clearance can be reduced. Inspectors didn't like the insulation material Owens Corning used and wanted the Red Door to use a different material. Red Door had the manufacturer call the inspectors and send a letter explaining the hood. Because this saga drug on for 4 months, the architect told the city to red tag the hood so that the inspector's concerns would be in writing. While all of this was happening, the main inspector used racial slurs and made derogatory comments and gestures. Once the hood officially failed, the chief building inspector asked a third party to inspect the hood. The hood passed. The restaurant opened May 12, but the permit was rescinded on May 18. Red Door was allowed to stay open during this phase of the dispute. The case was finally closed out in August and Red Door sued under the 14th Amendment's guarantee of equal protection. The 14th Amendment's central purpose is the prevention of official conduct discriminating on the basis of race. Plaintiff's must show that the conduct had a discriminatory effect and the conduct was motivated by a discriminatory purpose. The district court granted summary judgment to the city because Red Door did not bring forth a valid comparator. However, comparators are only needed for selective enforcement equal protection claims. This complaint was for misapplication of the law with a discriminatory purpose, the core elements of which are a discriminatory motive and a discriminatory effect. Here the inspector did not correctly enforce the law due to anti-Asian animosity. The circuit court reversed the summary judgment for the city and removed qualified immunity for the inspector.

CHATTELS

***Nat'l Fed'n of the Blind v. City of Arlington*, 2024 WL 3434407 (5th Cir. July 17, 2024)**

Two nonprofits partner with 3rd party companies to place donation boxes in the city. The 3rd party buys the donated items for 6.6¢ a pound. Besides the revenue, the boxes build awareness and communicate an appeal to support the nonprofits' causes. The city requires a permit for these boxes, and regulates color, signage, size, upkeep, maintenance and setback. They are also only allowed in 3 zoning districts. The nonprofits brought a facial 1st Amendment challenge to the ordinance. Because the ordinance is content-neutral, the court analyzed it under intermediate scrutiny.[3] Arlington had significant government interests: health, safety, welfare, aesthetics, and ordered appearance of developed property. The court held that the zoning regulation and the setback were narrowly tailored because the area where boxes could be placed was comprised of over 7000 acres. Also, the setback was not just concerned with aesthetics, but with traffic and pedestrian safety.

[3] The test examines whether the regulations "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative **2538 channels of communication. *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 791 (1994).

Restricting the boxes from residential areas promoted the significant government interest because the boxes themselves were unaesthetic. The court compared the boxes to billboards. Even well-maintained billboards are ugly. Also, the nonprofits have other means of communicating their desire for solicitations: at home pickup services, church pickup services, magazine flyers, and store front drop off locations.

***Todman v. Mayor of Baltimore*, 2024 WL 2887403 (4th Cir. June 10, 2024)**

Baltimore has an Abandonment Ordinance that states that tenant's belongings are abandoned at time of eviction. There is no reclamation period. The landlord is required to give notice to the tenant the date that the eviction will occur and warn that any property in the dwelling will be considered abandoned. However, landlords are only required to give this notice to late with the rent tenants, not hold over tenants. The Todmans were hold over tenants. At the tenant hold over hearing, the parties agreed that the judgement of possession would become valid on July 16, which would give the Todmans until August 2nd to leave. However, the eviction warrant was mailed on July 17, with an eviction date of July 31. The Todmans claim that they never saw the warrant. On the 31st, the eviction occurred while the Todmans were at work. The sheriff allowed Mrs. Todman's mother to grab her medications, phone and charger. The landlord then called Todman and told him everything in the apartment was now his, including a motorcycle, family photos, and cremains. The Todmans sued under the 14th Amendment for violation of due process. Because the Todmans were deprived of property through government action, only the third due process prong needed to be analyzed, which is were the eviction procedures constitutionally adequate.[4] The court held that the notice was insufficient. None of the pre-hearing notices contained a warning about abandoned property. The warning on the warrant was confusing, in small print and partially obstructed by the seal of the court. There was also no opportunity to contest the eviction and there was no post-deprivation procedure. Also, the city was liable because it was their Abandonment Ordinance that caused the deprivation.

ZONING

***Oakland Tactical Supply v. Howell Twp* 2024 WL 2795571 (6th Cir. May 31, 2024)**

Company wanted to open a long-range shooting site, but parcel was in an agricultural/residential zone. Company applied for a zoning change, which was denied. The City did amend the ordinance to include sport shooting ranges in an "Industrial Flex Zone." However, the parcel was not in that zone.

The court analyzed the city's zoning decision under the Supreme Court's new 2nd Amendment test (*New York State Rifle v. Bruen*). (1) Is the company's desired conduct

[4] To establish a procedural due process violation under § 1983, plaintiffs must show (1) that they were deprived of a cognizable liberty or property interest (2) through some form of state action (3) with constitutionally inadequate procedures. *Todman v. Mayor & City Council of Baltimore*, 104 F.4th 479, 487 (4th Cir. 2024).

covered by the plain text of the 2nd Amendment; and (2) is the city's ordinance consistent with the nation's historical tradition of firearm regulation.

As for the first element, training is covered by the plain text of the 2nd Amendment. If you have a right to bear arms, you have a right to use them correctly. However, you do not have a right to train in a specific place or at a specific distance. The 2nd Amendment's intent is for self-protection at confrontation. The court does not believe that being proficient at 1000 yards is necessary for this event. City wins this one.

STREET PREACHERS

***Sessler v. City of Davenport*, 102 F.4th 876 (8th Cir. 2024)**

Davenport has a City Special Event Policy for events on public property. Street Fest received a permit and was allowed to limit access to several blocks of downtown if they erected fencing and hired security. The 6-foot fences had open points for pedestrian entry and exit. Vendors paid for spaces or the ability to be roaming vendors. Without paying the vendor fee, Sessler, three adults, and two children entered and began to speak using a microphone and a loudspeaker. After much negotiation, the police and Sessler agreed upon a spot in which he could preach. He was warned not to scream or impede sales. After 30 minutes, vendors complained that he was too loud, blocking customers, and driving customers away. The police then had Sessler move to a space across the street from the festival, where Sessler preached for two hours.

The officers were sued for 1st Amendment violations and the city was sued for 1st Amendment violations under *Monell*. For government restricted speech, the courts analyze (1) the nature of the forum in which the speech occurred, and (2) whether the restriction was content-based or content-neutral. The court held that the fenced-in area was a limited public forum. It also found that the restrictions placed on Sessler were content neutral and reasonable. Although some festival attendees complained about the message, the police were concerned with volume and disruption. They gave warnings about the volume and then found a suitable place for Sessler's annunciations. The officers retained their qualified immunity and the court found that the Special Event Policy was not content based.

***Meinecke v. City of Seattle*, 2024 WL 1666696 (9th Cir. April 18, 2024)**

In 2022, Meinecke attended an abortion rally and a Pridefest with the purpose of reading the Bible loudly. Some of the attendees abused and assaulted him. He refused to move upon police request, so he was arrested. No actions were taken against the wrongdoers. In the first event, protesters grabbed his Bible, ripped pages from it, and physically moved him across the street. Upon his return, someone knocked him down and took one of his shoes. Police asked him to move across the street. He declined, and was arrested for obstruction. He was held until the protest ended. No charges were filed.

At the Pridefest, attendees danced around him, blocked people's view of him, and howled and barked like dogs. Someone poured water on his head. Officers asked him to leave the park, he refused, and was arrested for obstruction. The city prosecutor dismissed the

charges. Meinecke moved for a preliminary injunction to prevent the police from imposing restrictions and charging people with obstruction when they are speaking in a public fora.

The first two prongs of 1st Amendment public injunctions were not in dispute. So, the court only needed to decide if the justifications for exclusion satisfy strict scrutiny. Although the actions taken by the police appear to be content neutral, the police moved Meinecke because people did not like his message (known as a heckler's veto). Therefore, the police chose sides in a debate, so their actions were content based. The actions fail strict scrutiny analysis because the actions were not narrowly tailored. The court had a list of actions the police could have taken. Meinecke proved he was likely to succeed on the merits and loss of a 1st Amendment right constitutes irreparable harm. Remanded to have district court to issue preliminary injunction against police from doing what they did – but only for Meinecke.