QUINLAN™ March 25, 2013 | Volume 7 | Issue 6

Zoning Bulletin

in this issue:

WEST®

Mat #41329847

First Amendment—Church erects temporary signs announcing services, is told signs violate town ordinance

Church contends town's differing restrictions for different types of noncommercial signs is content-based and therefore unconstitutional

Citation: *Reed v. Town of Gilbert, Ariz., 2013 WL 474515 (9th Cir. 2013)*

Contributors

Corey E. Burnham-Howard

Zoning Bulletin is published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. For subscription information: call (800) 229-2084, or write to West, Credit Order Processing, 620 Opperman Drive, PO Box 64833, St. Paul, MN 55164-9753.

POSTMASTER: Send address changes to Zoning Bulletin, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

WEST®

610 Opperman Drive
P.O. Box 64526
St. Paul, MN 55164-0526
1-800-229-2084
email: west.customerservice@thomsonreuters.com
ISSN 0514-7905

The Ninth Circuit has jurisdiction over Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

NINTH CIRCUIT (ARIZONA) (02/08/13)—This case addressed the issue of whether a town's sign code improperly discriminated between different forms of noncommercial speech and was thus in violation of free speech rights under the First Amendment to the United States Constitution. More specifically, the case addressed whether the differing restrictions between types of noncommercial speech were: (1) "adequately justified without reference to the content of the regulated speech"; and (2) "narrowly tailored."

The Background/Facts: Good News Community Church and its pastor, Clyde Reed (collectively, "Good News"), rented space at an elementary school in Chandler, Arizona, which borders Gilbert, Arizona (the "Town"). Good News placed about 17 signs in the area, announcing the time and location of its services. In 2005, the Town advised Good News that it was violating the Town's sign ordinance (the "Sign Code") because "the signs were displayed outside the statutorily-limited time period."

The Sign Code required a sign permit for the erection of signs in Town, with exceptions. Three of the types of those exceptions were: "Temporary Directional Signs Relating to Qualifying Event"; "Political Signs"; and "Ideological Signs." Temporary Directional Signs directed people to an event. Political Signs were temporary signs that supported candidates for office or urged action on any other matter on the ballot of elections. Ideological Signs were those communicating a "message or ideas for noncommercial purposes that were not construction signs, directional signs, garage sale signs, or signs owned or required by a governmental agency." Under the Sign Code, the town's restrictions on these different types of signs varied by sign type.

Good News' signs were Temporary Directional Signs. As such, they were subject to specified size restrictions and could only be displayed "up to 12 hours before, during and 1 hour after the qualifying event ends." Also, they could not be placed "in a public right-of-way."

Good News brought a legal action challenging the Sign Code as unconstitutional in violation of its free speech rights under the First Amendment to the United States Constitution. Good News argued that the different restrictions for different types of noncommercial speech (such as different restrictions placed on Temporary Directional Signs, Political Signs, and Ideological Signs) were "inherently content-based and thus unconstitutional." In other words, Good News contended that the Sign Code improperly regulated noncommercial temporary signs based on their content. It sought a preliminary injunction barring enforcement of the Sign Code.

The district court denied Good News' motion for the preliminary injunction. The United States Court of Appeals, Ninth Circuit, affirmed in part and remanded in part.

On remand, the district court granted the Town summary judgment. It found that there were no material issues of fact in dispute and decided, on the law alone, that the Sign Code was constitutional.

Good News appealed.

DECISION: Affirmed.

The United States Court of Appeals, Ninth Circuit, held that the Sign Code's different restrictions on the different types of noncommercial speech were not based on the content of the speech. Applying the standard of review for restrictions on content-neutral speech, the court also concluded that the Sign Code's Temporary Directional Sign regulations were narrowly tailored to serve governmental interests, and were therefore constitutional.

The court explained: "The 'government may impose reasonable restrictions on the time, place, or manner of engaging in protected speech provided that they are adequately justified without reference to the content of the regulated speech.' In addition to being justified without reference to content, the restrictions must be 'narrowly tailored to serve a significant governmental interest and . . . leave open ample alternative channels for communication of the information.' "

The court rejected Good News' argument that the Sign Code's different restrictions for different types of noncommercial speech were inherently content-based and thus unconstitutional. Instead, the court held that distinctions based on the speaker or the event are permissible where there is no discrimination among similar events or speakers. "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys," explained the court.

Here, the court found that the distinctions in the Sign Code's regulations of Temporary Directional Signs, Ideological Signs, and Political Signs were content neutral: The Sign Code placed no restrictions on the particular viewpoints of any person or entity that sought to erect a Temporary Directional Sign and the exemption applied equally to all. The Town did not adopt its regulation of speech because it disagreed with the message conveyed. Each classification and its restrictions were based on objective factors relevant to the Town's creation of the specific exemption from the permit requirement and did not otherwise consider the substance of the sign. The Political Signs exemption responded to the need for communication about elections. The Ideological Sign exemption recognized that an individual's right to express his or her opinion is at the core of the First Amendment. The Temporary Directional Sign exemption allowed the sponsor of an event to put up temporary directional signs immediately before the event. Accordingly, the court found that each exemption was based on objective criteria and none drew distinctions based on the particular content of the sign. It made no difference which candidate was supported, who sponsored the event, or what ideological perspective was asserted.

In short, the court concluded: "[A]s long as the Temporary Directional Signs exemption—which [was] the exemption that was applied to Good News' signs and that Good News challenge[d]—[was] content neutral and reasonable in relationship to its purpose—providing direction to temporary events—its constitutionality would not be affected by the fact that the exemptions for Political Signs or Ideological Signs were different."

The court also concluded that the Temporary Directional Signs exemption was narrowly tailored to serve the Town's significant governmental interests

of safety and aesthetics. Good News had contended that the Sign Code was not narrowly tailored because all temporary signs placed within the public right-of-way implicated safety and aesthetic concerns, but Temporary Directional Signs were more severely limited than Political and Ideological Signs. The court explained that, contrary to Good News' argument, to be narrowly tailored, restrictions on types of noncommercial speech need not be uniform or vary only to the extent that the type of speech affects a town's interests. For several reasons, the court found it was permissible that Political and Ideological Signs infringed on the Town's interests to a greater extent than Temporary Directional Signs: (1) unlike political, ideological, and religious speech which are clearly entitled to First Amendment protection, there does not appear to be a constitutional right to an exemption for Temporary Directional Signs; (2) each exemption reflected a balance between the Town's interests and the constitutional interests of the type of sign covered; (3) the exemptions were not in competition for limited space; the erection of one type of temporary sign did not preclude the placement of another; (4) there was no showing that the restrictions on Temporary Directional Signs interfered with their purpose: directing interested individuals to temporary events; and (5) courts generally defer to a city's determinations of size and duration.

In sum, the court found that: (a) the Town was not required to create an exemption for Temporary Directional Signs; (b) the restrictions on directional signs were rationally related to the purpose of the directional signs; and (c) the restrictions were reasonably designed to promote the Town's interests in aesthetics and safety. Moreover, the Sign Code left open "ample alternate means of communication."

See also: *Reed v. Town of Gilbert, Ariz., 587 F.3d 966 (9th Cir. 2009).*

See also: *G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064 (9th Cir. 2006).*

See also: *Hill v. Colorado, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000).*

Case Note:

In its decision, the court acknowledged that it was conceivable that different exemptions for noncommercial speech might improperly restrict speech. However, the court found that was not the case here, since the Temporary Directional Sign exemption was: content neutral; and not in competition with other exemptions from the permit requirement (i.e., this was not a situation where there were a limited number of billboards or maximum number of temporary signs that could be placed in the public right-of-way, nor did the erection of temporary directional signs in any way limit any other person's rights to erect political, ideological, or other signs).

Case Note:

The court also held that amendments made to the Sign Code during pendency of the appeal (i.e., limiting the temporary directional signs' exemption from the permit

requirement for only events held within the Town) did not render moot Good News' lawsuit challenging the constitutionality of the Sign Code.

Nonconforming Uses—City refuses to issue permit allowing nude dancing at nightclub

Nightclub claims nude dancing is a grandfathered, legal nonconforming use

Citation: *600 Marshall Entertainment Concepts, LLC v. City of Memphis, 2013 WL 379784 (6th Cir. 2013)*

The Sixth Circuit has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.

SIXTH CIRCUIT (TENNESSEE) (02/1/13)—This case addressed the issue of whether nude dancing at a nightclub was entitled to grandfathering.

The Background/Facts: 600 Marshall Entertainment Concepts, LLC ("600 Marshall") was a nightclub in Memphis, Tennessee (the "City"). It was located within a Central Business District ("CBD") zoning district. The CBD was created by City ordinance in 1981. Adult entertainment was permitted in the CBD from 1981 to 1993. "Adult entertainment" was defined in the zoning title of the City Code of Ordinances to encompass things such as adult book stores, adult movie theaters, and live performances involving nudity or sexual acts. In 1993, the City and Shelby County issued Joint Ordinance No. 4209 (the "1993 Ordinance"), which eliminated adult entertainment as one of the permitted uses within the CBD.

While the zoning ordinances defined and prohibited adult entertainment, the presentation of "compensated dancers"—whether or not they were engaged in nude dancing—was regulated by the Dance Hall Ordinance. A substantially similar version of the Dance Hall Ordinance was enacted in 1971. The current version required any establishment wishing to present compensated dancers to first obtain a dance permit and pay a $500 fee.

Various entities operated at the 600 Marshall location as a bar, club, or other similar facility since at least the 1970s. From the 1970s until the early 2000s, operators at the location occasionally presented or allowed various types of adult entertainment. At least through the late 1990s, that adult entertainment included nude dancing. However, no dance permit had been issued for the businesses at the 600 Marshall location since at least 1991.

In 2005, 600 Marshall was purchased by a new owner. That owner wanted to operate an adult nightclub featuring compensated nude dancers. He applied for a dance permit under the Dance Hall Ordinance. Eventually, 600 Marshall received a dance permit with a nudity restriction; 600 Marshall could present compensated dance on its premises, so long as the dance did not involve adult entertainment and it maintained an up-to-date dance permit. It could also pres-

ent adult entertainment, so long as that entertainment did not involve nude dancing.

Then, 600 Marshall appealed. Among other things, it argued that adult entertainment at its establishment was a grandfathered nonconforming use, and that allowing nude dancing would not expand the nonconforming use. It further argued that, under state law, the City lacked the authority to restrict the expansion of a nonconforming use because the ordinance conflicted with state law, Tenn. Code Ann. § 13-7-208(c).

The district court found that allowing 600 Marshall to present frequent nude dancing would expand the nonconforming use in contravention of the City Code.

Again, 600 Marshall appealed.

DECISION: Affirmed.

The United States Court of Appeals, Sixth Circuit, found that the whole dispute as to whether nude dancing at 600 Marshall would illegally expand the nonconforming use was putting "the proverbial cart before the horse." The bottom line, concluded the court, was that nude dancing was not an activity that could be grandfathered because it was not being legally conducted at 600 Marshall when the 1993 Ordinance changed the zoning laws to prohibit adult entertainment in the CBD.

The court explained: Both state law, Tenn. Code Ann. § 13-7-208(b)(1), and the City Code, § 16-116-2(A), contained grandfather clauses. Such grandfather clauses, explained the court, provide: "an exception to a restriction that allows all those already doing something to continue doing it, even if they would be stopped by the new restriction." To qualify for grandfathering, 600 Marshall had to prove: "(1) that there ha[d] been a change in zoning[;] and (2) that the use to which [it] put [its] land was permitted prior to the zoning change." In other words, the grandfather statutes could save only those uses which were legal at the time the change in zoning occurred.

The court found it was undisputed that the owner of the premises at 600 Marshall did not have a dance permit in 1993 when adult entertainment became a prohibited use in the CBD. Thus, any nude dancing that may have been occurring at that time was done without a permit and therefore was illegal under the Dance Hall Ordinance. Again, although "adult entertainment" was permitted under the zoning code until 1993, any compensated "nude dancing" had required a permit under the Dance Hall Ordinance and a similar prior version, since 1971. Although nude dancing had occurred at 600 Marshall thought the late 1990s, it was not occurring legally since no dance permit had been issued for the businesses at the 600 Marshall location since at least 1991. Since illegal activities are not entitled to grandfathering, any illegal nude dancing at 600 Marshall in 1993 was not entitled to grandfathering. The fact that 600 Marshall had since obtained a dance permit in 2005 was irrelevant.

Since nude dancing was not grandfathered at 600 Marshall, the court found it was unnecessary to determine whether frequent nude dancing would constitute an impermissible expansion of a legal nonconforming use; any such nonconforming use was illegal.

See also: *Coe v. City of Sevierville, 21 S.W.3d 237 (Tenn. Ct. App. 2000).*

Case Note:

600 Marshall had also alleged multiple constitutional violations, including that: the Dance Hall Ordinance was unconstitutional as an improper restraint on expressive activities because it did not contain certain procedural safeguards; that the Dance Hall Ordinance was unconstitutionally vague, both facially and as applied; and that 600 Marshall was deprived of a protected due process property or liberty interest when an earlier-issued dance permit was revoked. The United States Court of Appeals, Sixth Circuit, rejected all of these claims. It held that: 600 Marshall forfeited its right to raise its improper restraint argument on appeal; the Dance Hall Ordinance was not unconstitutionally vague but was, in fact, relatively simple, and, in any case, 600 Marshall failed to point to any term or provision in the Ordinance that it believed was vague; and 600 Marshall was not deprived of a protected property or liberty interest when an earlier-issued dance permit was revoked and not reissued because 600 Marshall did not have a legitimate property interest in the dance permit originally issued because that permit allowed adult entertainment and thus was issued erroneously, nor had 600 Marshall sought a permit to present nonnude dancing.

RLUIPA—County zoning ordinance prohibits construction of private institutional facilities in zoning district

Church, which had purchased land in the zoning district to construct place for worship, alleges that prohibition violates RLUIPA

Citation: *Bethel World Outreach Ministries v. Montgomery County Council, 2013 WL 363620 (4th Cir. 2013)*

The Fourth Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

FOURTH CIRCUIT (MARYLAND) (01/31/13)—This case addressed the issue of whether a county zoning regulation, which prohibited the construction of private institutionalized facilities in a particular zoning district violated the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA").

The Background/Facts: Bethel World Outreach Ministries ("Bethel") was a Christian church with two places of worship in Montgomery County, Maryland (the "County"). Facing overcrowding at its places of worship, Bethel purchased a 119-acre property in the County (the "Property"). The Property was within a 93,000-acre area that had been designated as an "agricultural reserve." It was zoned "rural density transfer zone." In that zone, property was subject to a transferable development rights system. Under that system,

developers could purchase rights from landowners in the rural density transfer zone to build in other areas of the County. The property of the landowner who sold the development rights would then be subject to an easement, which restricted the density of residential development permitted on that property. Prior to 2007, the easements did not affect institutional use of property in the zone, so a church was a permitted use on Bethel's property.

In October 2007, the County Council adopted an amendment to its zoning provision, ZTA 07-07 (the "Ordinance"). The Ordinance prohibited a landowner from building a private institutional facility on any property subject to a transferable development rights easement. Because Bethel's Property was subject to such an easement, the Ordinance barred Bethel from building even a small-sized church on the Property.

In May 2008, Bethel filed a legal action in federal court. It alleged that the Ordinance violated its rights under RLUIPA, the First and Fourth Amendments to the United States Constitution, and the Maryland Declaration of Rights. More specifically, Bethel had argued that the County violated: (1) the substantial burden provision of RLUIPA (42 U.S.C.A. § 2000cc(a)(1)); (2) RLUIPA's nondiscrimination provision (42 U.S.C.A. § 2000cc(b)(2)); (3) RLUIPA's unreasonable limitation provision (42 U.S.C.A. § 2000cc(b)(3)(B); and (4) its free exercise and equal protection rights under the United States Constitution and the Maryland Declaration of Rights.

The County moved for summary judgment. It asked the district court to find that there were no material issues of fact and to decide the matter in its favor on the law alone. The district court issued summary judgment to the County on all claims.

Bethel appealed.

DECISION: Affirmed in part, reversed in part, and matter remanded.

The United States Court of Appeals, Fourth Circuit, held that: (1) a genuine issue of material fact precluded summary judgment on Bethel's RLUIPA substantial-burden claim; (2) the County did not violate RLUIPA's nondiscrimination provision; (3) the Ordinance did not constitute an unreasonable limitation on a religious institution under RLUIPA; and (4) the Ordinance did not violate Bethel's free exercise rights.

The court explained:

> Bethel's principal argument had been that it had bought property reasonably expecting to build a church and the County Ordinance impeding the building of the Church imposed a substantial burden on Bethel's religious exercise in violation of RLUIPA (42 U.S.C. § 2000cc(a)(1)).

RLUIPA's substantial burden provision prohibits the imposition or implementation of any land use regulation in a manner that:

> "imposes a substantial burden on the religious exercise [(including the use, building, or conversion of real property for the purpose of religious exercise)] of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution . . . is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."

The Fourth Circuit court found that the district court had applied the wrong

standard when ruling on Bethel's substantial burden provision violation claim. The Fourth Circuit explained that, in the land use context, a plaintiff can succeed on a substantial burden claim by establishing that a government regulation put substantial pressure on it to modify its behavior. However, the plaintiff need not show that the land use regulation targeted the plaintiff since the substantial burden provision protects against both nondiscriminatory and discriminatory conduct that imposes a substantial burden on religion.

Here, the court found that Bethel had, at the very least, offered evidence raising a question of material fact as to whether it had a reasonable expectation of being able to build a church. The court also found it significant that: Bethel had shown that its current facilities were inadequate and the construction of even a small church on the Property would alleviate that burden; and the County had completely prevented Bethel from building any church on its Property, rather than simply imposing limitations on a new building.

Still, the Ordinance would violate RLUIPA by imposing a substantial burden on religious exercise only if the Ordinance failed to satisfy strict scrutiny. That is, the Ordinance would not be in violation of RLUIPA if the County could show that it had used the least restrictive means of furthering a compelling governmental interest. The court assumed, without deciding, that the County's claimed interests of preserving agricultural land, water quality, and open space and managing traffic and noise in the rural density transfer zone were "compelling." The court also found that the County had failed to demonstrate that, as a matter of law, the Ordinance was the least restrictive means of furthering that interest. The County had presented no evidence that its interest in preserving the integrity of the rural density transfer zone could not be served by less restrictive means, "like a minimum lot-size requirement or an individualized review process." The court therefore reversed the district court's grant of summary judgment to the County on Bethel's substantial burden claim, and remanded the matter.

Bethel had also claimed that the Ordinance violated RLUIPA's nondiscrimination provision. That provision provides: "No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." (42 U.S.C.A. § 2000cc(b)(2).) Here, the court found the Ordinance was facially neutral, applying to all private institutional facilities. Moreover, the court could find no evidence that Bethel was prohibited from constructing its church on the basis of religion; rather the court found that the County had expressed concern with the size of the proposed facility. The court affirmed the district court's grant of summary judgment to the County on this claim.

The court also rejected Bethel's claim that the Ordinance violated RLUIPA's unreasonable limitation provision. That provision provides that government shall not impose or implement a land use regulation that "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." (42 U.S.C.A. § 2000cc(b)(3)(B).) In other words, the provision prevents government from adopting policies that make it difficult for religious institutions to locate anywhere within the jurisdiction.

Here, the court found that the Ordinance merely prohibited religious assemblies, along with other institutional uses, on properties in the rural density

transfer zone that are encumbered by transferable development rights easements. Bethel had failed to produce any evidence suggesting that religious organizations were left without a reasonable opportunity to build elsewhere in the County. Thus, the court held that Bethel's unreasonable limitation claim failed as a matter of law.

Finally, the court also concluded that Bethel's constitutional claims—that the County violated its free exercise and equal protection rights—also failed. Bethel's free exercise violation claim failed because Bethel could not show that the Ordinance was not rationally related to a legitimate governmental interest. Also, Bethel's equal protection rights violation claim failed because Bethel failed to show that the County discriminated against it on the basis of religion and the County's actions were rationally related to a legitimate governmental interest.

See also: *Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 226 Ed. Law Rep. 595 (2d Cir. 2007).*

See also: *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter, 456 F.3d 978 (9th Cir. 2006).*

See also: *Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004).*

See also: *Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003).*

Zoning News from Around the Nation

CALIFORNIA

In early February, California's highest court heard arguments over whether municipalities can ban medical marijuana dispensaries. "In essence, the court will decide, when it comes to medical marijuana, whether federal or state laws prevail here in California, and whether cities can regulate dispensaries through zoning laws."

Source: *KCET; www.kcet.org*

Several municipalities are reportedly using zoning and health laws to close so-called "maternity hotels," which house immigrants who want to deliver their babies in the United States.

Source: *Diamondbar-Walnut Patch; http://diamondbar-walnut.patch.com*

ILLINOIS

State legislators are considering a bill that would allow the production and sale of medical cannabis at special distribution centers throughout Illinois. The legislation would permit a pilot program for growing, harvesting and distributing cannabis to patients diagnosed with a debilitating medical condition from a single facility in each state senate district. The bill failed to make it to a vote during a lame-duck session last year. The bill preempts home rule authority, so municipalities would not be able to "opt out" of the program. The Metropolitan Mayors Caucus has suggested that municipalities adopt regula-

tions in anticipation that the legislation would be approved by the General Assembly.

Source: *Chicago Tribune; http://articles.chicagotribune.com*

MARYLAND

State Senator Barry Glassman has introduced Senate Bill 427, which would, reportedly, allow farmers a method to recoup lost value in their land resulting from two recently enacted state environmental mandates. SB 427 would set up a process under which farmers affected by the economic effects of the 2012 Sustainable Growth and Agricultural Act "would be able to have a fair market value evaluation taken of their property prior to the impact of new regulations and one taken after the impact of completed regulations, within a five-year limit. The farmer could then use the diminution of value as a credit against state income taxes for that year, until the total amount of the credit is met."

Source: *Baltimore Sun; http://www.baltimoresun.com*

KANSAS

In an effort to address what can be sold on a farm, House Bills 1430 and 1852 are being considered in the state legislature. House Bill 1430 would add commercial protections for farmers. The House Agriculture Subcommittee has deleted provisions of House Bill 1430 that specified farmers' constitutional protections. Still opponents say it would leave "local government almost no recourse to have some control over what goes on in their jurisdictions (other) than to change or abolish zoning and/or repeal land use taxation." House Bill 1852 was introduced as a counter-measure and would, proponents say, "facilitate a 'major expansion' of sales of non-meat products such as pickles and dried herbs by farmers." It has passed the House.

Source: *Watchdog.org; http://watchdog.org*

WISCONSIN

The state legislature is considering AB 1, a mining bill. The bill, which was approved on party line votes in Assembly and Senate mining committees, would change the permitting process for ferrous mining. It would set a 420-day deadline, with one 60-day extension, for the state Department of Natural Resources to act on a permit and allows exemptions from some environmental rules for mining companies. Proponents of the bill say it could help to pave the way for 700 jobs over 35 years. Critics say it would ease environmental protections and limit public input. The bill next goes to the Legislature's Joint Finance Committee, and a vote on a final version.

Source: *Wisconsin State Journal; http://host.madison.com*

QUINLAN™

April 10, 2013 | Volume 7 | Issue 7

Zoning Bulletin

in this issue:

WEST®

Mat #41329848

First Amendment—Zoning ordinance bans billboards throughout township

Billboard developer contends ordinance violates the First Amendment guarantee of free speech

Citation: *Interstate Outdoor Advertising, L.P. v. Zoning Bd. of Tp. of Mount Laurel, 706 F.3d 527 (3d Cir. 2013)*

Contributors

Corey E. Burnham-Howard

Zoning Bulletin is published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. For subscription information: call (800) 229-2084, or write to West, Credit Order Processing, 620 Opperman Drive, PO Box 64833, St. Paul, MN 55164-9753.

POSTMASTER: Send address changes to Zoning Bulletin, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

WEST®

610 Opperman Drive
P.O. Box 64526
St. Paul, MN 55164-0526
1-800-229-2084
email: west.customerservice@thomsonreuters.com
ISSN 0514-7905

The Third Circuit has jurisdiction over Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands.

THIRD CIRCUIT (NEW JERSEY) (02/11/13)—This case addressed the issue of whether an ordinance that prohibited billboards was unconstitutional in violation of the First Amendment guarantee of free speech.

The Background/Facts: Interstate Outdoor Advertising, L.P. ("Interstate") sought to erect nine outdoor advertising signs along U.S. Interstate-295 in Mount Laurel Township, New Jersey (the "Township"). I-295 is a major transportation corridor with three lanes of traffic running through the Township in each direction. Interstate filed development applications with the Township Zoning Board of Adjustment (the "Zoning Board").

Since 1988, the Township's zoning ordinance prohibited in all zoning districts: "[o]utdoor advertising signs (i.e., billboards)"; and "[s]igns immediately adjacent to interstate 295 and the New Jersey Turnpike." While Interstate's billboard applications were pending, the Zoning Board adopted Ordinance 2008-12 (the "Ordinance"). Among other things, the Ordinance prohibited "Billboards" "within the Township."

Ultimately, the Zoning Board denied each of Interstate's applications.

Interstate sued. It alleged that the Ordinance violated the First Amendment guarantee of free speech.

The district court granted the Township's motion for summary judgment. It found that there were no material facts in dispute and decided the matter on the law alone in the Township's favor. The court held that: "the Ordinance was a reasonable means of achieving the Township's substantial interests of traffic safety and maintaining the natural beauty of the Township"; "that the Township enacted [the Ordinance] based upon evidence that it would advance those twin goals"; and "that the [O]rdinance was reasonably related to achieving traffic safety and preserving aesthetic."

Interstate appealed.

DECISION: Affirmed.

The United States Court of Appeals, Third Circuit, concluded that the Ordinance's ban on billboards did not violate Interstate's rights as to commercial speech or noncommercial speech.

The court held that, as to its restrictions on commercial speech, the Ordinance did not violate the First Amendment because it: served a substantial government interest; and was no more extensive than necessary to advance that interest. More specifically, the court found that the Ordinance: advanced the Township's interests of traffic safety and aesthetics; and that the Township-wide ban on billboards was "perhaps the only effective approach" to address the Township's concerns for those interests.

In so holding, the court rejected Interstate's argument that the Township's concern about preserving aesthetics was "overblown." Interstate had pointed to the fact that the billboards were to be posted along the

multilane, heavily trafficked, Route I-295 corridor in "heavy industrial zones." The court found that argument "ignore[d]" the fact that billboards are "real and substantial hazards to traffic safety" and "by their nature, wherever located and however constructed, can be perceived as an esthetic harm." Accordingly, the court found that "[t]he industrial nature of the highway d[id] not mitigate [the Township's] concerns about the aesthetics of the highway." In fact, found the court, "it may well suggest an even greater need to guard against the deterioration of the Township's character and evoke a greater concern for safety."

The court concluded that "[t]he fact that the [O]rdinance advances that substantial interest in a manner that, although all inclusive, is nevertheless not overly inclusive given the impact of billboards on a community, is sufficient to allow [the Ordinance] to survive Interstate's challenge even though it has a very real impact on Interstate's commercial speech."

The court also rejected Interstate's argument that the Township's goals of traffic safety and aesthetics could be achieved with a less restrictive ordinance that allowed billboards in certain areas under certain conditions. The court reasoned: "[i]f the [Township] has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them."

The court further held that, as to its restrictions on noncommercial speech, the Ordinance did not violate the First Amendment because it: served the substantial governmental interests of traffic safety and aesthetics; specifically provided that it was to be applied in a content-neutral manner; and left open ample alternative channels for communication of the information.

Interstate had argued that, although various alternative means of communication may be available (e.g., on-premises signs; Internet advertising; radio; newspapers; etc.), those means were not available to the specific target audience of the drivers traveling I-295 that would be reached by the proposed billboards. The court said that "maximizing . . . profit is not the animating concern of the First Amendment." That Interstate could not reach the distinct audience of travelers on the particular section of I-295 that it desired to target did not mean that adequate alternative means of communication did not exist.

See also: *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341, 6 Media L. Rep. (BNA) 1497, 34 Pub. Util. Rep. 4th (PUR) 178 (1980).*

See also: *Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800, 16 Env't. Rep. Cas. (BNA) 1057, 11 Envtl. L. Rep. 20600 (1981).*

See also: *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346, 1 Media L. Rep. (BNA) 1930, 1976-1 Trade Cas. (CCH) ¶ 60930 (1976).*

Case Note:

Throughout its discussion, the court emphasized the United States Supreme Court's acknowledgement that "complete billboard bans may be the only reasonable means by which a legislature can advance its interests in traffic safety and aesthetics."

Case Note:

In its discussion, the court noted that local governments need not generate their own site-specific studies before enacting an ordinance—so long as whatever evidence the local government relies upon is reasonably believed to be relevant to the problem that the local government addresses.

Constitutionality of Zoning Regulation—County zoning and permit ordinances regulate fortune teller's business

Fortune teller claims regulations violate her constitutional rights to free speech, freedom of religion, and equal protection

Citation: *Moore-King v. County of Chesterfield, Va., 2013 WL 680683 (4th Cir. 2013)*

The Fourth Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

FOURTH CIRCUIT (VIRGINIA) (02/26/12)—This case addressed the issue of whether a county zoning ordinance, business license tax, and fortune teller permit ordinance violated a fortune teller's: constitutional rights to free speech and free exercise of religion under the First Amendment to the United States Constitution; rights to religious exercise under the Religious Land Use and Institutionalized Persons Act (the "RLUIPA"); and equal protection rights under the United States Constitution's Equal Protection Clause.

The Background/Facts: Beginning in late 2008, Patricia Moore-King ("Moore-King") sought to offer services as a psychic and spiritual counselor in Chesterfield County, Virginia (the "County"), under the name of "Psychic Sophie." She rented office space in an area zoned as a C-3 Community Business District. Other tenants in the office building included

clinical psychologists and licensed professional counselors. Moore-King's primary practice was spiritual counseling involving a psychic reading based on tarot cards and astrological signs.

In August 2009, authorities from the County contacted Moore-King and informed her she needed a business license to operate. When Moore-King sought to register with the County's Commissioner of Revenue as a business likely to earn less than $10,000 in annual revenue, she learned that the County classified her as a fortune teller as defined in the County Code. The County required any individual seeking to open a business as a fortune teller to acquire a fortune teller business permit, pay the fortune teller license tax, and secure a conditional use permit in certain zoning districts. She then received a letter informing her that she owed the County $343.75, consisting of the $300 fortune teller license tax under Code § 6-44 and a penalty and accrued interest for late payment.

Moore-King chose not to pay the license tax but instead to challenge the legality of the County's regulatory scheme (which included the zoning ordinance, business license tax ordinance, and fortune teller permit ordinance). In December 2009, she filed a complaint against the County alleging seven counts under the Constitution and federal statutory law. Among other things, she asserted violations of her First Amendment rights to free speech and the free exercise of religion; statutory claims under the Religious Land Use and Institutionalized Persons Act (the "RLUIPA"), 42 U.S.C.A. §§ 2000cc et seq.; and allegations that the County's regulatory treatment of her violated the Equal Protection Clause under the 14th Amendment.

Finding no issues of material fact in dispute, and deciding the matter on the law alone, the district court eventually issued summary judgment in favor of the County.

Moore appealed.

DECISION: Affirmed.

The United States Court of Appeals, Fourth Circuit, held that the County ordinances (i.e., the zoning ordinance, business license tax ordinance, and fortune teller permit ordinance) that regulated Moore-King's fortune telling business did not violate the First Amendment expression rights of Moore-King. The court also found that Moore-King's beliefs were a way of life, rather than deep religious convictions, and therefore not entitled to protections offered by the First Amendment or RLUIPA. Also, the court held that the County's regulatory treatment of Moore-King did not violate the Equal Protection Clause under the 14th Amendment because the County could rationally find it proper to place a greater regulatory burden on Moore-King's activities than on licensed counselors and advisors.

On appeal, Moore-King had contended that the County's regulatory scheme for fortune tellers trenched upon her constitutional right to free expression. The County responded that Moore-King's business involved

"inherently deceptive speech undeserving of any First Amendment protection." The court rejected the County's argument. The court recognized that fortune telling is "not necessarily fraudulent or inherently deceptive simply because it involves predictive speech." Rather, found the court: "[t]he reality that much professional intercourse depends on predictions about what the future may bring suggests that categorical branding of fortune telling as unworthy of First Amendment protection for that same reason is untenable." The court concluded that whether Moore-King's specific activities were fraudulent or deceptive was a genuine issue of material fact, unsuitable for decision on a summary judgment basis (but better answered by a jury). The court also noted that "[e]ven when considering some instances of defamation and fraud, . . . falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood." Here, the County had not specifically argued that Moore-King's speech was knowingly or recklessly false. Absent such arguments, the court could not agree with the County's position that inherently deceptive speech necessarily lacks First Amendment protection. Consequentially, the court concluded that the First Amendment Free Speech Clause afforded some degree of protection to Moore-King's activities.

Next, the court looked to determine the appropriate level of First Amendment protection that should be accorded Moore-King's counseling activities. The court found that neither commercial speech nor the time, place, and manner doctrine was a perfect fit. Rather, the court determined Moore-King's activities "fit comfortably within the confines of" analysis under the "professional speech doctrine"—which regulates occupational speech. (A distinction is made between professional speech and protected expression.) The court explained that, under the professional speech doctrine, the government can license and regulate those who would provide services to their clients for compensation without running afoul of the First Amendment. The court went on to find that the County's regulation of Moore-King's profession raised no First Amendment problem because it amounted to a generally applicable licensing and regulatory regime for fortune tellers: The County uniformly required any individual seeking to open a business as a fortune teller to acquire a fortune teller business permit, pay the fortune teller license tax, and secure a conditional use permit in certain zoning districts. Thus, the court held that Moore-King's activities fell squarely within the scope of the professional speech doctrine and that the County's regulations therefore did not abridge her First Amendment freedom of speech.

Moore-King had also argued that the County's regulatory scheme interfered with the free exercise of her religion under the First Amendment and the RLUIPA, which in pertinent part prohibits a government from enacting a land use regulation that imposes a "substantial burden on the religious exercise of a person." (42 U.S.C.A. § 2000cc(a)(1).) The County contended that Moore-King's set of beliefs did not constitute a religion. The appellate court agreed.

The court explained that whether Moore-King's set of beliefs deserved constitutional protection as a religion, depended on whether they were: (1) sincerely held; and (2) religious in nature under Moore-King's "scheme of things." Because the parties agreed and the record supported the view that Moore-King sincerely held her beliefs, the court focused on the second prong. The court determined that Moore-King's beliefs failed to meet the second prong because they did not amount to "a religious faith as opposed to a way of life." Rather, the court found her beliefs more closely resembled "personal and philosophical choices consistent with a way of life, not deep religious convictions shared by an organized group deserving of constitutional solicitude." Thus, concluded the court, Moore-King could not avail herself of the protections afforded those engaged in religion.

Finally, as to Moore-King's Equal Protection argument, the court explained that the County's zoning or licensing ordinance would violate the Equal Protection Clause only if Moore-King could demonstrate "that she ha[d] been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Moore-King had argued that she had been "irrationally treated differently from those engaged in 'other office uses'; other fortune tellers, like those at church-sponsored fairs or telling fortunes as stage actors; and other 'spiritual readers,' 'prophets,' 'psychics,' or 'advisors.' " The County had contended that Moore-King was not in fact similarly situated to any of those entities, and even if she was, any differential treatment was not without a rational basis. The court agreed with the County.

The court said that, assuming without deciding that Moore-King was situated similarly to the entities she identified, she nonetheless failed to carry her burden of negating "every conceivable basis which might support" the County's zoning and licensing ordinances. The court determined that the County could believe it appropriate to impose higher entry costs or more stringent zoning limitations on those seeking to open a business as a fortune teller than on "other office uses" cited by Moore-King in order to discourage the—in Moore-King's words—"innumerable scam artists." Likewise, the County could rationally suppose it proper to place greater regulatory burdens on Moore-King's counseling activities than on the licensed counselors and advisers to whom she sought to compare herself. Granting the County wide latitude to determine how to regulate those who claim or pretend "to disclose mental faculties of individuals for any form of compensation," the court could not say the County's regulatory scheme lacked any rational relationship to a legitimate governmental interest.

See also: *U.S. v. Alvarez, 132 S. Ct. 2537, 183 L. Ed. 2d 574, 40 Media L. Rep. (BNA) 1953 (2012).*

See also: *Lowe v. S.E.C., 472 U.S. 181, 105 S. Ct. 2557, 86 L. Ed. 2d 130, Fed. Sec. L. Rep. (CCH) P 92062 (1985).*

See also: *U.S. v. Seeger, 380 U.S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965).*

See also: *Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).*

See also: *F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d 211, 21 Media L. Rep. (BNA) 1466 (1993).*

Preemption/Constitutionality—Town ordinance prohibits installation of manufactured homes more than 10 years old

Landowner contends ordinance is preempted by the National Manufactured Housing Construction and Safety Standards Act

Citation: *Schanzenbach v. Town of Opal, Wyo., 706 F.3d 1269 (10th Cir. 2013)*

The Tenth Circuit has jurisdiction over Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

TENTH CIRCUIT (WYOMING) (02/7/13)—This case addressed the issue of whether a local zoning ordinance that prohibited the installation of any manufactured home that was older than 10 years at the time of the permit application was preempted by the National Manufactured Housing Construction and Safety Standards Act. It also addressed whether the ordinance violated a landowner's equal protection and substantive due process rights under the United States Constitution.

The Background/Facts: Roger Schanzenbach ("Schanzenbach") owned several properties in the town of Opal, Wyoming ("Opal"). He sought to install mobile manufactured homes on those properties, and applied for the required permits with Opal. Opal's town council issued several building permits to Schanzenbach. However, shortly thereafter, the town council enacted an ordinance that included a provision banning the installation of any manufactured home that was older than 10 years at the time of the relevant permit application (the "10-Year Rule").

When Schanzenbach's permits were about to lapse, he had not yet started construction on his properties. He requested an extension, and the town council denied his request. It also rejected his applications for new permits because the proposed homes were more than 10 years old and thus violated the 10-Year Rule.

Schanzenbach brought a legal action against Opal and its town council (hereinafter, collectively "Opal"). He argued that Opal's 10-Year Rule was preempted by the National Manufactured Housing Construction and

Safety Standards Act of 1974 (the "Manufactured Housing Act") (42 U.S.C.A. §§ 5401-5426). He also alleged that the 10-Year Rule violated his constitutional rights to equal protection and due process.

Finding no material issues of fact in dispute, and deciding the matter on the law alone, the district court awarded summary judgment to Opal.

Schanzenbach appealed.

DECISION: Affirmed.

The United States Court of Appeals, Tenth Circuit, held that the 10-Year Rule was not preempted by the Manufactured Housing Act. The court also held that the 10-Year Rule was sufficiently rational to survive the equal protection and substantive due process challenge.

In so holding, the court explained that pursuant to the United States Constitution's Supremacy Clause, and the United States Supreme Court's interpretation of that clause, states (including local governments) are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. Also, state (and local government) laws are preempted when they conflict with federal law.

The court determined that the 10-Year Rule was not preempted by the Manufactured Housing Act and its related regulations (see 24 CFR §§ 3280.101-3280.816) because the Manufactured Housing Act and the related regulations governed only the construction and safety of manufactured homes, and the 10-Year Rule did not regulate "the construction or safety" of manufactured homes but was based on Opal's interests of aesthetics and property values of its neighborhoods.

Schanzenbach had argued that the 10-Year Rule related to the "durability" of manufactured homes and thus was encompassed by construction and safety. The court disagreed, finding the "durability of the home [was] irrelevant under the [10-Year Rule]" because: "[n]o matter how durable the home, its age may bar it from being moved into town"; and "a home less than 10 years old when moved into town [would be] entitled to remain no matter how 'undurable' it may be."

Schanzenbach had also argued that the 10-Year Rule violated the Equal Protection Clause because it distinguished between manufactured homes older than 10 years and those younger than 10 years without a rational basis for doing so. The court found this argument to be "meritless." Since Schanzenbach had not suggested that he belonged to a suspect class or that he was asserting a fundamental constitutional right, the 10-Year Rule was "presumed to be valid" as long as it was "rationally related" to a legitimate interest of Opal. The court found the 10-Year Rule was rationally related to Opal's interest of aesthetics: "In our view, the town council could have rationally believed that a manufactured home more than 10 years old that is being moved onto a lot in the community is likely to be less attractive than the homes in the vicinity of the lot."

The court also rejected Schanzenbach's argument that Opal's 10-Year

Rule violated his right to substantive due process because it was not rationally related to Opal's interest in preserving neighborhood aesthetics. The court explained that "before a zoning ordinance can be declared unconstitutional on due process grounds, the provisions must be clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Here, the court found that Opal "could have rationally concluded that the 10-Year Rule would help preserve neighborhood aesthetics," and thus the rule was not clearly arbitrary or unreasonable.

See also: *Arizona v. U.S., 132 S. Ct. 2492, 183 L. Ed. 2d 351, 115 Fair Empl. Prac. Cas. (BNA) 353, 95 Empl. Prac. Dec. (CCH) P 44539 (2012).*

See also: *Georgia Manufactured Housing Ass'n, Inc. v. Spalding County, Ga., 148 F.3d 1304 (11th Cir. 1998).*

See also: *Texas Manufactured Housing Ass'n, Inc. v. City of Nederland, 101 F.3d 1095 (5th Cir. 1996).*

Case Note:

When analyzing the preemptive scope of the Manufactured Housing Act, the court found the guidance of the Fifth and Tenth Circuits helpful.

Zoning News from Around the Nation

ARKANSAS

The state Senate recently passed Senate Bill 367. "Under the bill, if a state or local law or rule reduces a property value by 10 percent, the property owner—or even a property user such as a lessee—would have a claim to compensation." Critics say "the bill could complicate the ability of local governments to regulate anything, large or small." The bill heads to the House Judiciary next.

Source: *Arkansas Times; www.arktimes.com*

GEORGIA

Pending state legislation, House Bill 176, would reportedly "negate the Federal Telecommunications Act, which authorizes cities to regulate the placement of towers through zoning procedures as long as wireless coverage is not prohibited." The bill would essentially "subvert the [local] zoning process"—with cell phone companies no longer needing to prove things such as a need for the tower or a lack of alternative locations.

Source: *Johns Creek Patch; http://johnscreek.patch.com*

HAWAII

State senators recently advanced a bill, Senate Bill 215, which would "create a Public-Private Partnership Authority that would promote development projects." The authority would not have exemptions from state land use regulations (as does the Public Land Development Corp, which is expected to be repealed), but counties, by ordinance or memorandum of agreement, could waive zoning, land use, and permitting requirements on any project prior to construction. The bill was approved by the Senate Ways and Means Committee and the Senate Education Committee, and now goes to the full Senate.

Source: *Star Advertiser; http://www.staradvertiser.com*

MONTANA

A Helena judge is weighing "whether the city can use its zoning authority to regulate the kinds of materials used in building, or if, . . . that power rests solely with the state." A 2008 Helena ordinance established the wildland-urban interface zone, which encompasses the entire city. Among other things, the ordinance regulates building materials. For example, it prohibits new wood shingles—the purpose of which is to resist the spread of fire. A local homeowner sued and has argued that state law prohibits cities from enacting building codes beyond the statewide code established by the Department of Labor and Industry. The city has argued that the state building code law expressly excludes zoning regulations from its prohibition on city rulemaking. It also argued that state law specifically allows municipalities to "regulate and restrict the erection, construction, reconstruction, alteration, repair and use of buildings, structures or land," and to "enact zoning ordinances that promote the health, safety, morals or general welfare of the community."

Source: *Independent Record; http://helenair.com*

NEW YORK

The Town of Warwick recently passed two zoning laws—"one that prohibits fracking waste byproducts on town roads and the other prohibiting heavy industry altogether."

Source: *Warwick Advertiser; http://warwickadvertiser.com*

ZONING PRACTICE APRIL 2013

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 4

PRACTICE URBAN LIVESTOCK

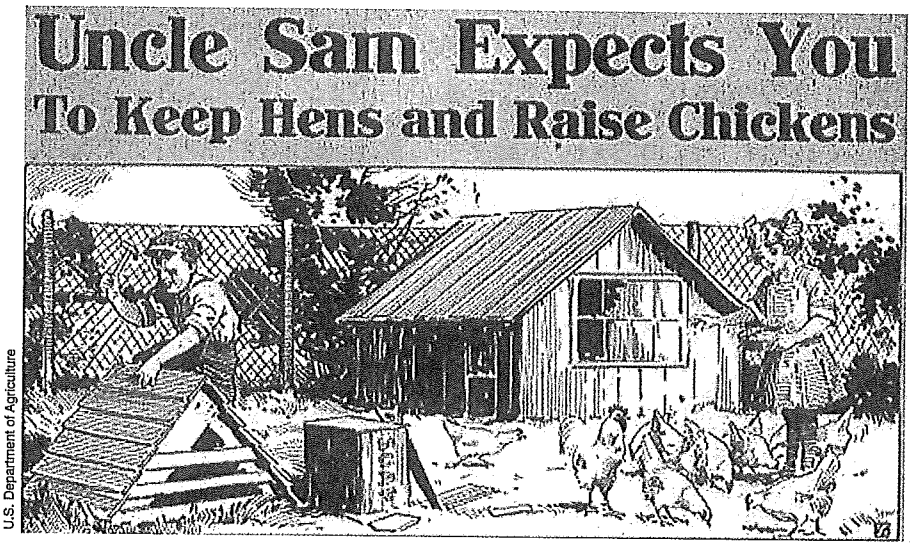
4

Urban Micro-Livestock Ordinances: Regulating Backyard Animal Husbandry

By Jaime Bouvier

While small farm animals never completely disappeared from most cities, a growing number of communities are revisiting their animal control and zoning regulations in response to a renewed interest in chickens, bees, and goats among urban agriculture practitioners and backyard hobbyists.

This article explores how small farm animals (i.e., micro-livestock) can and already do coexist in urban environments, and it examines the regulatory tools cities use to sanction and control backyard animal husbandry. The following sections are intended to serve as a guide for local governments considering legalizing and regulating this budding hobby.



During World War II, the U.S. government framed backyard chicken keeping as a patriotic duty.

WHAT IS MICRO-LIVESTOCK?

There is no universal definition of micro-livestock. It often just means small animals—like chickens, ducks, quail, and rabbits. It can also mean breeds that are smaller than average—such as bantam chickens, Nigerian Dwarf goats, or Red Panda cows. Finally, it can mean an animal of what is normally a large breed that just happens to be small. Many international organizations have long championed raising micro-livestock in cities to provide a secure and safe local food source. Because they require less food and water, are often especially hardy breeds, and their small size makes them ideal for small lots, micro-livestock are especially well suited to urban living.

Right now, most attempts to legalize micro-livestock focus on chickens, goats, and bees. Although rabbits are micro-livestock, they have caused less controversy. Perhaps because they are more accepted as pets, they were never made illegal in many cities. Very small pigs, like the pot-bellied pig, have also been accepted in many cities as a pet; because they are not being raised for bacon, people don't think of them as livestock. There has been some move to legalize miniature horses as guide animals for the blind and disabled. Other animals, like miniature hogs, cows, or sheep, may also be suitable for city life under the right circumstances, but fewer people are advocating for them.

A SHORT HISTORY OF URBAN HENS AND OTHER MICRO-LIVESTOCK.

Although micro-livestock never disappeared from cities altogether, they used to be an accepted and even encouraged part of urban life. For example, during the Victory Garden campaign, when the U.S. government urged American citizens to grow more of their own food to support the war, the government encouraged people to keep and raise chickens.

As it became cheaper and more convenient to buy food from a grocery store, it became less common to see livestock in the city. While many people believe that livestock became illegal because they were a nuisance, there is little evidence that this was the case—especially when just

ASK THE AUTHOR JOIN US ONLINE!

Go online during the month of April to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. *Jaime Bouvier will be available to answer questions about this article. Go to the APA website at www.planning.org and follow the links to the Ask the Author section. From there, just submit your questions about the article using the e-mail link. The author will reply, and* Zoning Practice *will post the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of* Zoning Practice *at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA* Zoning Practice *web pages.*

About the Author
Jaime Bouvier is a senior instructor of law and codirector of the Writing and Academic Support Program at Case Western Reserve University School of Law in Cleveland, Ohio. She has also represented state and local governments as well as landowners in zoning and land-use litigation.

a few animals were kept. Instead, exiling livestock was partially a class-based phenomenon. Excluding animals that were seen as productive, that is animals kept for food purposes, was a way to exclude the poor. Animals that came to be viewed as nonproductive, such as dogs and cats, required money to keep and did not have the same associations. By illegalizing behavior associated with the recently rural and poor, a city could present itself as prosperous and progressive.

The desire to exclude the poor is a reason why ordinances making livestock illegal are often found in suburbs and even exurbs where the lot sizes are especially conducive to raising animals. It is also a reason why changing the regulations, even in such suburbs, is often especially contentious.

Now, however, raising livestock is becoming an activity that many young, educated, middle-class people seek out. The association between micro-livestock and poverty is no longer relevant. And distinguishing cities and suburbs from rural occupations is no longer universally seen as a sign of progress. In fact, many view a well-regulated return of micro-livestock to the cities and suburbs as embracing progressive values. And legalizing micro-livestock can actually attract people who seek to live in a place that supports the close-knit communities that this hobby creates.

MICRO-LIVESTOCK COMMUNITIES

Communities are essential to the micro-livestock movement. They provide much-needed support for people to discuss common problems and share interests. Many communities began as a few people who already raised chickens, or goats, or bees—in violation of city law. They organized to legalize their animals. One of the leading examples of this is a group called Mad City Chickens in Madison, Wisconsin. Members of the group who kept chickens illegally, the self-described "Chicken Underground," were

> Many communities began as a few people who already raised chickens, or goats, or bees—in violation of city law.

generally law-abiding citizens uncomfortable with their outlaw status. They did not understand why raising chickens in a way that did not bother their neighbors should be illegal. In 2004, in response to the group's lobbying efforts, Madison amended its zoning ordinance to allow chickens (and, subsequently, bees in 2012). Their lobbying efforts became the focus of a film, also titled *Mad City Chickens*, and have been a model for other groups seeking to legalize micro-livestock, such as the New York City Beekeepers Association and Seattle's Goat Justice League.

These groups' stories show that many people already keep micro-livestock in cities whether or not they are legal. It also shows that once citizens and city leaders are educated about these animals and shown how they can, and already do, peacefully coexist in cities, they often will legalize these animals. Finally, it shows that cities are better off reasonably regulating micro-livestock, rather than forcing hobbyists out of their cities or underground.

CHICKENS, GOATS, AND BEES: BENEFITS

The main benefits to keeping chickens, goats, and bees is not so much to eat the animal itself, though people do eat chickens and goats. The main benefit is to eat the food they produce: eggs, milk, and honey. There is good research to show that backyard eggs are tastier and have more nutrients than store-bought ones. Milk from backyard goats, moreover, tastes better because goat milk does not store or ship well. It is also, arguably, easier to digest for those who cannot drink cow's milk. Goat hair is a prized material for making cashmere and mohair fabric. Manure from these animals is an excellent, and surprisingly pricey, fertilizer. Many people also value these animals for their companionship and become as close to them as they do any other pet. Finally, backyard and hobbyist livestock keepers ensure a diverse and more robust population of animals, ensuring the propagation of breeds that are not valued commercially but may become important if commercial breeds, because of genetic uniformity, become threatened by disease.

Apart from honey, keeping bees in urban areas has two main benefits: pollination services and ensuring an extant bee population. Honeybees pollinate two-thirds of our food crops and in recent years have suffered devastating losses. Some experts assert that these losses are caused or exac-

erbated by the use of pesticides, the stress of constant travel to different farms to pollinate crops, and the lack of plant diversity in rural environments. Thus, hobbyist beekeepers who do not subject their hives to such stressors may prove to be a haven for the continued existence of honeybees.

CHICKENS, GOATS, AND BEES: CONCERNS

Concerns about chickens and goats generally boil down to three things: odor, noise, and disease. None of these provide a reason to ban hens and does, but roosters can be too noisy and a rutty buck may be too smelly for dense urban environments.

Contrary to popular myth, roosters do not just crow in the morning to greet the rising sun—roosters crow all day. Hens do not need roosters to lay eggs; roosters are only necessary to fertilize the eggs. Hens are generally quiet, but when they do cluck, the resulting noise is about the same decibel level as a quiet human conversation. And, as long as a chicken coop is regularly cleaned and adequately ventilated, a small flock of hens will not be smelly.

Goats, too, are not generally noisy animals. While a goat may bleat, the sound is generally far less than the noise of a barking dog. Some goats, just like dogs or cats, are noisier than others. And, as for odor, female goats (does) and neutered male goats (wethers) do not smell. Male goats (bucks), during the mating season, do smell. The gamy odor of a rutty buck is the smell many associate with goats. While it is necessary for a doe to mate with a buck and deliver a kid to lactate and provide milk, this can be arranged with a stud-buck kept in more rural environs.

Finally, there is the issue of disease. As with any animal, including dogs and cats, disease can be spread through feces. Regular cleaning and straightforward sanitation practices, such as hand washing, can take care of this issue. While concerns about backyard chickens spreading avian flu have surfaced in some communities, the kind of avian flu that can cross over to humans has not yet been found in North America. And neither the Centers for Disease Control nor the Department of Agriculture have asserted that the possibility of bird flu is a reason to ban backyard hen keeping. Public health scholars have concluded that backyard chickens present no greater threat to public health than other more common pets like dogs and cats.

The major objection to honeybees is the fear of being stung. Here, it is important to understand the distinction between bees and wasps. Honeybees are defensive; they will not bother others unless they are threatened. A honeybee's stinger is attached to the entrails, so it will die if it stings. Bees want pollen; they are not interested in human food. Wasps, by contrast, are predatory, can sting repeatedly with little consequence, and are attracted to human food. Many people confuse fuzzy honeybees with smooth-skinned yellow jackets, a kind of wasp that forms papery hives. People do not keep wasps because they are not effective pollinators and do not produce honey.

A connected objection is a fear of a swarm. A swarm is a group of bees traveling to establish a new hive. While a swarm can be intimidating, before bees swarm they gorge on honey to prepare for the trip, which makes them particularly lazy and docile. Unless attacked or bothered, they will follow a scout bee to a new location within a few hours to a day.

AGRICULTURAL BASICS FOR CITIES CONSIDERING LEGALIZING MICRO-LIVESTOCK

Chickens and goats require companionship. As a consequence, cities should allow a minimum of four hens and two does. This ensures that the city is not interfering with good animal husbandry practices.

And, while bees never lack for companionship, it is a good idea to allow beekeepers to have more than one hive. This allows the beekeeper to better inspect for and maintain hive health. Cities should not be overly concerned that hives kept too close together will compete for food—honeybees fly up to a three-mile radius from the hive to find pollen.

FEDERAL AND STATE LAW CONSIDERATIONS

Before drafting an ordinance, local governments should be aware that federal and state laws already regulate livestock. The federal government regulates the sale, processing, labeling, and transportation of chickens, eggs, and other meats (21 U.S.C. §451 et seq.; 21 U.S.C., §1031 et seq.; and 21 U.S.C. §601 et seq.). The FDA requires that all milk be pasteurized, including goat milk (21 C.F.R. §1240.61) and regulates nutrition and information labeling of honey (21 U.S.C. §§342–343). Many of these laws have exceptions for animals and animal products raised for home consumption, but someone who wants to raise eggs, milk, or meat for sale or distribution would need to comply.

Most states have laws regulating the movement of livestock, including chickens, goats, and bees, into and out of the state. To track and attempt to control some diseases associated with livestock and bees, some states either require or encourage keepers of livestock and beekeepers, even backyard hobbyists, to register their premises with the state. Other states only ask to be alerted if a particular disease is found. Many states also have laws regulating the slaughter and sale of any animal used for meat, as well as laws regulating the sale of eggs, milk, and milk products. While these, also, generally have exceptions for home consumption, they will apply to sales. Often state agricultural extension services will have online information pages describing the regulations and exemptions for hobbyists.

Before drafting an ordinance, local governments should be aware that federal and state laws already regulate livestock.

For beekeeping, however, a few states have passed laws that interfere with a local government's ability to regulate. Wyoming, for instance, controls how close together apiaries (an area with one or more beehives) may be located (Wyo. Stat. Ann. §11-7-201). In June 2011, Tennessee preempted all local government ordinances regulating honeybee hives (Tenn. Code. Ann. §44-15-124). And in July 2012, Florida also preempted all local government ordinances regulating managed honeybee colonies or determining where they can be located (Fla. Stat. §§586.055 & 586.10).

COMMON ASPECTS OF URBAN MICRO-LIVESTOCK REGULATION

In the cities that have recently passed ordinances regulating micro-livestock, the ordinances are all quite different. No standard ordinance has yet been established.

Wikimedia Commons/beth h

Portland, Oregon, allows up to three pygmy goats in a residential backyard without a permit (§13.05.015.E).

There are, however, many common aspects to these regulations. Most of them limit the number and type of livestock that can be kept in the city, establish setbacks for where the animals can be kept on the property, and require a certain amount of space per animal. Some also require a license.

Micro-Livestock Standards

Most cities have not taken a comprehensive regulatory approach to micro-livestock, but appear to allow particular livestock in response to citizen lobbying. Hundreds of cities have legalized chickens in the past few years. And the growing popularity of beekeeping means many cities have also adopted separate ordinances to allow for it. For example, South Portland, Maine (§§3-51 & 3-710; Cary, North Carolina (§5.3.4(J) & (O)); Ypsilanti, Michigan (§§14-13 & 14-171); and Littleton, Colorado (§§10-4-4 & 10-4-14) have recently passed ordinances separately allowing for both chickens and bees.

Some cities make idiosyncratic choices. For example, Ponca City, Oklahoma, allows miniature horses and donkeys, but still bans all other fowl and livestock (§7-3-10). Sebring, Florida, allows two hens and two pot-bellied pigs (§4-1). And Carson City, Nevada, allows chickens, pigs, rabbits, and bees, but no goats (§§7.02 & 7.13.190).

And some only allow goats. In 2011, Loveland, Ohio, allowed two pygmy goats on residential properties of any size (§505.16). It defines pygmy as a goat no heavier than 60 pounds. The choice of such a light weight is curious, given that many micro-goat breeds weigh more than 60 pounds. Also, many breeds of dogs weigh up to three times as much, but most cities do not restrict the size of dogs. In 2010, Carl Junction, Missouri, allowed just one pygmy goat on a property of any size (§205.200(C)). Because goats are herd animals, this limit encourages poor animal husbandry practices.

Meanwhile, many cities are legalizing a wider variety of livestock. For example, Denver allows up to eight ducks or chickens and up to two dwarf goats and two beehives (§8-91; §11.8.5.1). But it requires 16 square feet of permeable land available to each chicken and 130 square feet for each goat. The city also requires adequate shelter to protect the animals from the elements and from predators. This means that to keep the full complement of eight chickens and two goats, the yard would have to have approximately 400 square feet of space. For chickens, ducks, and goats, Denver has a 15-foot setback from neighboring structures used for dwelling and requires that the animals be kept in the rear half of the lot. For bees, Denver has a five-foot setback from any property line and requires that hives be kept in the back third of the lot.

Seattle allows up to eight domestic fowl, four beehives, one potbelly pig, and two pygmy goats, or no pig and three pygmy goats, on any lot (§23.42.052). It then employs a step system for additional animals. For lots larger than 20,000 square feet, an additional small animal—which means a dog, cat, or goat, may be kept on the lot. Seattle also allows other farm animals, including cows, horses, or sheep, to be kept on lots that are greater than 20,000 square feet. Seattle allows one of these animals per 10,000 square feet. Also, it has a 50-foot setback from the neighboring property for all farm animals, not including potbelly pigs, fowl, or miniature goats. Finally, Seattle has a separate ordinance that restricts goats to their premises, "except for purposes of transport or when on property other than

that of the miniature goat's owner with the permission of a lawful occupant of that property" (§ 9.25.084(H)).

Cleveland has a slightly more complex ordinance in that it has different regulations for residential and nonresidential districts (§347.02). It also employs a step system, allowing one animal per a certain number of square feet. In residential districts, it allows one hen, duck, rabbit, or similar animal per 800 square feet, and one beehive per 2,400 square feet. The ordinance spells out that a standard residential lot in Cleveland is 4,800 square feet, so most households could keep up to six hens and two beehives. Setbacks for hens are five feet from the side-yard line and 18 inches from the rear-yard line. Setbacks for bees are five feet from the lot line and 10 feet from any dwelling on another parcel. Neither animal is allowed in the front or side yard. Cleveland only allows goats, pigs, sheep, or similar farm animals on lots that have at least 24,000 square feet (i.e., a little more than a half-acre). If a lot is that size or larger, two of these animals will be allowed, with an additional one for each additional 2,400 square feet. Enclosures for these animals must be set back 40 feet from the property line and at least 100 feet from the dwelling of another.

In Cleveland, the nonresidential districts are less restrictive, with one chicken, duck, or rabbit per 400 square feet, one beehive per 1,000 square feet, and one goat, pig, or sheep per 14,400 square feet. This can allow for more intensive operations in less populated areas—and also opens the area to urban farms.

Hillsboro, Oregon, and El Cerrito, California, employ similar step systems. El Cerrito allows three hens as long as the property is at least 4,000 square feet (§7.08.020). Hillsboro allows three hens as long as the property is 7,000 square feet (§6.20.070). Both cities require at least 10,000 square feet to keep goats, but Hillsboro limits goats to two, and El Cerrito does not appear to limit them. El Cerrito, however, does require an administrative use permit to keep goats and allows for a conditional use permit to keep goats on a smaller parcel of land. El Cerrito requires a property of at least 5,000 square feet to keep one beehive. That beehive must be 20 feet from an adjacent dwelling and 10 feet from the property line. Hillsboro allows up to three beehives on any size residential property with a setback of 10 feet from the property line.

Vancouver, Washington, is an example of a less restrictive ordinance (§20.895.050). It allows up to three goats, if they weigh less than 100 pounds, on any size property. It also allows chickens, ducks, geese, or rabbits on any size lot with no numerical restriction. It does provide in the ordinance that the keeping of animals is subject to already existing nuisance requirements.

Roosters and Bucks

Most of these cities prohibit roosters and male goats (or bucks). Hillsboro prohibits roosters and uncastrated male goats with no exceptions. Seattle also prohibits roosters and uncastrated males but has an exception for nursing offspring that are less than 12 weeks old. Denver does the same but only until they are six weeks old. El Cerrito prohibits roosters but does not say anything about the gender of the goats it allows. And Cleveland has a more complicated system, in that it will allow roosters, but only on property that is at least one acre in size with a 100-foot setback from the property line for the coop. Cleveland, like El Cerrito, does not say anything about goat gender.

Licensing

Some cities require a permit or license. Most of these permits are relatively straightforward and do not allow for much discretion on the part of the official who issues it. For instance, Denver requires a livestock or fowl permit to keep chickens or goats but requires no more than the provisions of the ordinance be met and a fee be paid to acquire the license. The city charges $100 annually for a livestock permit and $50 annually for a fowl permit.

Cleveland also requires a license. Its health department issues a two-year license to keep any type of livestock, including chickens and bees. In issuing the license the director of public health must consider evidence of "nuisance or conditions that are unsafe or unsanitary" and any "recorded violations" and may deny the license on those grounds (§205.04). The department also notifies neighbors about the license application and waits at least 21 days to hear back from them. The director can consider any evidence that the neighbors submit concerning nuisance, unsanitary, or unsafe conditions. To determine whether to grant the license, and any time after the license is granted, the department can inspect the property and enforce any penalties for violating sanitation or nuisance regulations.

Ellensburg, Washington, has an interesting ordinance in that it requires a license for dogs and cats, but does not require a license to keep up to two beehives and four hens (§§5.30.260 & 5.30.310). Seattle, likewise, requires a license for dogs, cats, pigs, and goats, but does not require one for chickens or bees (§9.25.050).

After restricting livestock to property with three acres or more, Pittsburgh amended its ordinance to allow chickens and bees in 2011 (§912.07). It allows three hens and two beehives per 2,000 square feet on occupied, residentially zoned lots. It allows one more bird and hive for each additional 1,000 square feet. However, it requires the home owner to seek a special exception to keep livestock as an accessory use (§922.07). The special exception requires the zoning board of adjustment to hold a public hearing, to make findings of fact, and issue a written decision within 45 days of the hearing. This allows it to reevaluate and reweigh all of the concerns with raising chickens and bees in the city, even though the city council had already made the legislative determination and established criteria for when and where it was legal to do so. This puts a substantial burden on each home owner to fully argue the case before each iteration of the board. It also uses up considerable city resources.

Some cities require a permit or license . . . [which] are relatively straightforward and do not allow for much discretion on the part of the official who issues it.

COMMON AND LESS COMMON BEE PROVISIONS

Some cities never made keeping bees illegal, and do not regulate the practice.

Michael Acas

Chicago allows up to five bee colonies in a residential backyard without a permit (§17-17-0270.7).

Among cities that do regulate beekeeping, flyway barriers and a source of fresh water are common requirements. Flyway barriers force bees to fly up over the heads of people so that they do not establish flight paths through a neighbor's property or populated sidewalks, streets, or parks. Bees require water; if a beekeeper does not provide it, bees will frequently use a close source, like a neighbor's pool.

Concerning flyway barriers, Cleveland requires a fence or a dense hedge of at least six feet in height within five feet of the hive and extending at least two feet on either side. However, it does not require a flyway barrier if the hive is at least 25 feet from the property line or on a porch or balcony at least 10 feet from the ground. South Portland, Maine, has a similar flyway barrier standard, but requires it to extend at least 10 feet in each direction. And Carson City, Nevada, requires the flyway barrier to "surround" the hive on any side that is within 25 feet of a property line. Neither South Portland nor Carson City has exceptions for balcony or rooftop hives.

Concerning a water source, Ellensburg, Washington, requires "a consistent source of water . . . at the apiary when bees are flying unless it occurs naturally. The water may be 'sweetened' with mineral salt or chlorine to enhance its attractiveness." Cleveland requires a freshwater source to be maintained "throughout the day." And Carson City requires water only from April 1 to September 30.

As for less common provisions, Ellensburg, Washington, requires that all hives "consist of moveable frames and combs." Cleveland prohibits Africanized bees. Africanized bees have only been found in a few southern states; beekeepers, moreover, do not seek to keep Africanized bees. Boise, Idaho, prohibits Africanized bees, as well as wasps and hornets (§11-09-11.03). This is peculiar; people do not keep wasps or hornets because they do not provide honey or pollination services. Boise and Carson City require a queen to be removed if the hive shows "unusually aggressive characteristics." And Carson City requires the new queen to be chosen from "stock bred for gentleness and non-swarming characteristics." Carson City only allows honey to be extracted "where there is no access by bees before, during, or after the extraction process." Carson City also requires any hive found to be diseased to be either "treated so as to completely eradicate the disease" or destroyed at the owner's expense. Finally, both Carson City and Ellensburg provide that abandoned hives are to be considered nuisances.

RECOMMENDATIONS

Of the ordinances discussed above, two stand out as potential models: Denver's and Seattle's. These ordinances show that the trend, over time, is to simplify regulations. Local governments seeking to regulate these practices should consider how much they are prepared to spend, in terms of resources, on licensing or monitoring these practices given the relatively small degree of actual nuisance they cause. Governments should also keep in mind that straightforward ordinances following developing norms will be easier to follow and easier to enforce.

Cover image: © iStockphoto.com/Michael Gatewood; design concept by Lisa Barton

VOL. 30, NO. 4

Zoning Practice is a monthly publication of the American Planning Association. Subscriptions are available for $95 (U.S.) and $120 (foreign). W. Paul Farmer, FAICP, Chief Executive Officer; William R. Klein, AICP, Director of Research

Zoning Practice (ISSN 1548–0135) is produced at APA. Jim Schwab, AICP, and David Morley, AICP, Editors; Julie Von Bergen, Assistant Editor; Lisa Barton, Design and Production.

Missing and damaged print issues: Contact Customer Service, American Planning Association, 205 N. Michigan Ave., Suite 1200, Chicago, IL 60601 (312-431-9100 or customerservice@planning.org) within 90 days of the publication date. Include the name of the publication, year, volume and issue number or month, and your name, mailing address, and membership number if applicable.

ZONING PRACTICE
AMERICAN PLANNING ASSOCIATION

205 N. Michigan Ave.
Suite 1200
Chicago, IL 60601–5927

1030 15th Street, NW
Suite 750 West
Washington, DC 20005–1503

HOW DOES YOUR COMMUNITY REGULATE BACKYARD FARM ANIMALS?

4