Constitutional Rights and Zoning: *Sacred, Profane, Fracking, Ripeness, Bricks, and Music*

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19th Annual Alfred B. DelBello Land Use and Sustainable Development Conference:
Making Progress in an Altered Landscape
Pace Law School (Virtual)
December 10, 2020

UF Levin College of Law
Environmental and Land Use Law Program
UNIVERSITY of FLORIDA

SACRED I: W(H)INING ABOUT A CHURCH

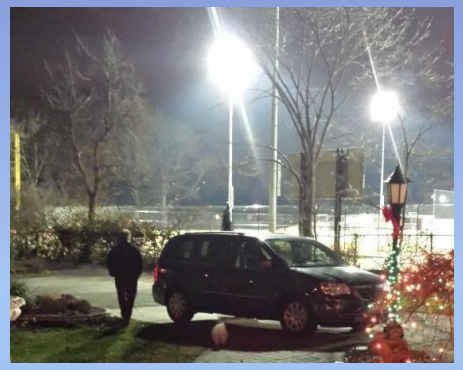
Calvary Chapel Bible Fellowship v. Cty. of Riverside, 948 F.3d 1172 (9th Cir. 2020)

Calvary Chapel hoped to expand its church on the vacant parcel by building a larger sanctuary, a special occasion facility, an open-air wedding venue, a church administration building, and a single-family residence. After realizing the impact of the 1999 amendments, Calvary Chapel asked Riverside to amend its ordinance.

Churches and other houses of worship are permitted in the C/V Zone if, at some point, they rent their facilities out in return for compensation, in addition to meeting the other zoning requirements. And nothing in the text of the ordinance prevents churches from holding regular worship services or other religious assemblies in their special occasion facilities. . . . In short, the zoning ordinance as written permits religious uses as contemplated by Calvary Chapel. Thus, there is no equal terms violation.

SACRED II: IS BASEBALL "RELIGIOUS EXERCISE"?
Marianist Province of the United States v. City of Kirkwood, 944 F.3d 996 (8th Cir. 2019)

Vianney's track, football, and soccer facility is equipped with lights and a sound system that were installed before 2012. The baseball field is bordered by residential homes and has been used to play baseball and other sports without lights for decades. Vianney's efforts, from 2012 to 2016, to install lights and an updated sound system on this baseball field form the basis of this dispute.



Vianney asserts that various forms of religious exercise "motivate the school's use" of its baseball field at night. The school emphasizes that athletics is part of the "formation of young men" in the Catholic Marianist tradition and that nighttime sports games allow it to reach out to the community and engage in religious fellowship. . . .

Vianney has not demonstrated that its religious exercise is substantially burdened, rather than merely inconvenienced, by its inability to use its baseball field at night. We agree with other circuits that have concluded requiring a religious institution to use feasible alternative locations for religious exercise does not constitute a substantial burden.

PROFANE: SEX TOYS ARE NOT SPEECH

Adam & Eve Jonesboro, LLC v. Perrin, 933 F.3d 951 (8th Cir. 2019)

Arkansas passed Act 387 of 2007 "to establish requirements governing the location of adult-oriented businesses in order to protect the public health, safety, and welfare and to prevent criminal activity." Ark. Code Ann. § 14-1-301(a). The Act prohibits those businesses from locating within 1,000 feet of a "child care facility, park, place of worship, playground, public library, recreational area or facility, residence, school, or walking trail.“

Yet, not all conduct is "protected speech simply because the person engaging in [it] intends thereby to express an idea." *Masterpiece Cakeshop*, 138 S. Ct. at 1742. A court "must first determine whether [the plaintiff's action] constituted expressive conduct." . . .

But Adam and Eve fails to make such a showing. It claims that "this is a restraint of speech based purely on content, they don't like what [Adam and Eve is] selling." But Adam and Eve has cited no authority that selling sexually-oriented devices is speech. Moreover, it expressly and repeatedly rejects that it is an adult-oriented business similar to those found in *Alameda Books, Erie, City of Renton, or Young*—each of which, according to the Supreme Court, engaged in protected speech.

FRACKING: A LINE IN THE SAND

Minnesota Sands, LLC v. County of Winona, 940 N.W.2d 183 (Mich. 2020)

In November 2016, the Winona County Board of Commissioners revised its comprehensive zoning ordinance to prohibit "[i]ndustrial mineral operations" within the county. The ordinance continues to allow extraction of "construction minerals," provided that the landowner secures a conditional-use permit. Appellant Minnesota Sands, LLC (Minnesota Sands) is a Minnesota mining company that seeks to mine and process silica sand in Winona County (County)—an industrial mineral operation under the zoning ordinance—and sell its product to out-of-state oil and gas producers for use in hydraulic fracturing. The company claims that the County's prohibition on its proposed land use violates the Commerce Clause. U.S. Const. art. I, § 8.

As a land-use regulation, the ban on industrial mining operations is foremost a restriction on the rights of Minnesota landowners, not an "export ban." Specifically, the ordinance restricts the rights of any landowner who wishes to engage in industrial mining operations within the County. Unlike a typical export embargo that confers a home-state advantage by denying outsiders equal access to some in-state market, the ordinance is evenhanded on its face. It pays no regard to whether the person or entity who wishes to engage in industrial mining resides in-state or out-of-state or wishes to sell the industrially mined sand to in-state or out-of-state consumers.

RIPENESS: SWIMMING IN THE CATSKILLS
Thomas v. Town of Mamakating, 792 Fed. Appx. 24 (2d Cir. 2019)

When Thomas purchased the property at issue, it contained a mound of sand that was the result of an abandoned, unpermitted mining operation. In 2011, Thomas applied for and received a building permit to construct a swimming pool, which would require removing a portion of the remnant sand mound. Thomas later submitted an amended building application seeking to construct a 1,500-square-foot pole barn in addition to the pool. In 2012, the Town's building inspector determined that site plan review and approval by the planning board were required for the amended application because "the amount of grading shown on [the] Site Plan does not appear to be associated with the proposed improvements."

As relevant to this case, the Supreme Court has held that a takings claim arising from a local land use dispute is not ripe until the local regulatory body has rendered a "final decision" regarding the use of the property at issue. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, (1985), overruled on other grounds by *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2169-70 (2019). After the Supreme Court decided *Williamson*, this Court extended the final decision requirement to other constitutional claims relating to land use disputes, including substantive and procedural due process challenges. . . .

Thomas is not challenging the issuance of the site plan approval and the building permit in 2013, but rather challenging a series of decisions after 2015 which allegedly deprived Thomas of her rights to finish the construction at issue. Because Thomas can still seek a use variance from the zoning board and has not done so, we cannot evaluate how the Town's zoning rules will ultimately be applied to Thomas's property.

BRICKS: THERE'S NO ACCOUNTING FOR TASTE
Leibundguth Storage & Van Serv., Inc. v. Vill. of Downers Grove, 939 F.3d 859 (7th Cir. 2019)

Downers Grove has a comprehensive ordinance regulating signs. Section 9.020 sets out rules for all signs, including a rule prohibiting "any sign painted directly on a wall" (§9.020.P). . . .

This sign is 40 feet long and 10 feet high, or 400 square feet. It is painted on a brick wall. The ordinance's size limit and no-paint-on-walls rules independently forbid this sign. It would fare no better if it were a flag or carried a political message.

A limit on the size and presentation of signs is a standard time, place, and manner rule, a form of aesthetic zoning. The Supreme Court has told us that aesthetic limits on signs are compatible with the First Amendment. Like other time, place, and manner restrictions, an aesthetic rule must serve its ends; it cannot be arbitrary. The rule must be justified without reference to the content or viewpoint of speech, must serve a significant government interest, and must leave open ample channels for communication. . . .

[T]he Village gathered evidence that signs painted on walls tend to deteriorate faster than other signs (Leibundguth's own sign is full of chipped paint and flaking bricks) and, when revised or painted over, can become downright ugly. Old paint may show through; efforts to remove paint may leave a ghost image or bleach the brick so that the building becomes mottled. Leibundguth tells us that those effects are too slight to justify legislation, but *de gustibus non disputandum est*. ("There's no accounting for taste.") People's aesthetic reactions are what they are; if a large number of people find paint-on-brick ugly, and paint-over-paint-on-brick worse, this is a raw fact that a governmental body may consider. It need not try to prove that aesthetic judgments are right.

MUSIC: ROCKING IN THE CATSKILLS
Town of Delaware v Leifer, 34 N.Y.3d 234, 139 N.E.3d 1210 (2019)

Defendant Ian Leifer owns a 68-acre property containing a single-family home and undeveloped land within the boundaries of plaintiff Town of Delaware. In 2016, he planned to sponsor on the property a three-day event named "The Camping Trip" — which he had hosted twice before in previous years — over the course of an August weekend. The event was advertised online as a celebration of Shabbat, the Jewish Sabbath, during which attendees would camp on the property and view live outdoor music performances before and after Shabbat, which extends from sundown Friday to sundown Saturday.

A time, place or manner regulation is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation" and is not "substantially broader than necessary to achieve [that] interest" (*Ward* [*v. Rock Against Racism*], 491 U.S. at 799-800 [internal quotation marks and citation omitted]). To be constitutional, the regulations need not be the least restrictive means of advancing the government goal . . . . The Zoning Law provisions at issue here satisfy this requirement. By automatically allowing a limited and balanced suite of principal and accessory land uses that are closely related to the government's purpose of preserving agricultural character (e.g., agriculture, agriculture services establishments, single- and two-family dwellings), but prohibiting a range of more obtrusive uses absent a special use permit or variance (including "theater[s]" with attendant noise and traffic), the provisions directly promote that government purpose, which would be less effectively achieved in their absence.