

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:09-CV-00504**

WILLIAM DAVID BOWDEN,)
)
 Plaintiff,)
)
v.)
)
TOWN OF CARY,)
)
 Defendant.)
_____)

VERIFIED COMPLAINT

NOW COMES the Plaintiff, William David Bowden (“Mr. Bowden”), and complaining of the Defendant Town of Cary (“Town of Cary” or “Town”) does hereby allege as follows:

INTRODUCTORY STATEMENT

1. Mr. Bowden, angry at the Town of Cary for its treatment of him in another matter, painted a protest sign on the side of his own house. The simple sign reads, “Screwed by the Town of Cary.” The Town, citing its sign ordinance, is now threatening to fine Mr. Bowden hundreds of dollars a day, starting tomorrow, if he does not remove the sign. The Town is trying to silence core political speech that is directed at the Town itself.

2. This is a civil rights action, pursuant to 42 U.S.C. § 1983 and the Declaratory Judgment Act, seeking declaratory relief, injunctive relief, and damages against Defendant for committing acts under color of law that have deprived and continue to deprive Mr. Bowden of his rights secured by the Constitution and laws of the United States of America and the State of North Carolina. In particular, the Town is violating Mr. Bowden’s rights under the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 12 and 14 of the North Carolina Constitution by enforcing against him an unconstitutional ordinance – Chapter 9 of the Town’s Land Development Ordinance (the “Sign Ordinance”).

3. Mr. Bowden now sues the Town for violation of his rights. He contemporaneously moves for an Emergency Temporary Restraining Order and Preliminary Injunction to block the Town’s imminent enforcement against him of the unconstitutional Sign Ordinance.

JURISDICTION AND VENUE

4. The Court has jurisdiction over the federal claims in this action under 28 U.S.C. § 1331, in that the claims arise under the Constitution of the United States, and under 28 U.S.C. § 1343. The matters in controversy arise under the Civil Rights Act, 42 U.S.C. § 1983, 42 U.S.C. § 1981, and 28 U.S.C. §§ 2201-02.

This Court has supplemental jurisdiction over the state constitutional claims pursuant to 28 U.S.C. § 1367.

5. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1391(b) because the Town is located within the Eastern District of North Carolina, and a substantial part of the events and omissions giving rise to Mr. Bowden's claims occurred, and continue to occur, within the Eastern District of North Carolina.

PARTIES

6. At all times relevant to the allegations in this Complaint, Mr. Bowden has been a citizen and resident of the Town of Cary in Wake County, North Carolina.

7. The Town of Cary is a municipal agency operating under the laws and Constitution of the State of North Carolina.

8. On information and belief, at all times relevant to the allegations in this complaint, the Town was authorized to and did waive any state-law immunity from civil liability under state-law causes of action by purchasing liability insurance, either by contract with an insurance company or by participation in an insurance risk pool that covers the claims raised in this lawsuit.

FACTS

Mr. Bowden's Protest Sign

9. For several years, Mr. Bowden has been engaged in a dispute with the Town of Cary over water runoff from a road project. Specifically, Mr. Bowden claims that the Town's repaving, and later widening, of Maynard Road have caused water runoff that has damaged his home.

10. As part of the road-widening project, the Town built up the roadbed, raising it several feet where it passes Mr. Bowden's house. Mr. Bowden has repeatedly complained to the Town about the changes to his property, which include forced relocation of his driveway and the disappearance of several feet of Mr. Bowden's front yard, as well as the removal of several trees.

11. As a result of what Mr. Bowden deems to be a lack of adequate resolution of the dispute, particularly with regard to continued water runoff and resulting water damage to his home, Mr. Bowden hired a sign painter to paint a protest sign on the front of his house on Friday, July 31, 2009.

12. The protest sign states, "Screwed by The Town of Cary," in fluorescent orange letters. The letters range from about 14" tall to about 21" inches tall. Photographs of Mr. Bowden's protest sign are attached hereto as Exhibit A.

The Notices of Code Violations

13. On the same day that the sign was painted on Mr. Bowden's house, the Town of Cary hand-delivered to Mr. Bowden a "Notice of Zoning Violation." A copy of the notice is attached hereto as Exhibit B. The July 31, 2009 notice states that Mr. Bowden's residence "is in violation of the Town of Cary Sign Ordinance Section 9.3.2(S), Residential Signs."

14. Section 9.3.2(S) provides, in relevant part:

Residential signs shall be allowed, provided that:

- (1) **Such signs shall not exceed five square feet per side in area and 42 inches in height.**
- (2) There shall be not more than two residential signs on any site containing only a single dwelling unit.

(Emphasis added in Notice of Zoning Violation).

15. No definition of a "Residential Sign" is provided in the July 31, 2009 Notice of Zoning Violation. Additionally, no definition of "Residential Sign" is provided anywhere in the Sign Ordinance. A copy of the fifty-two page Sign Ordinance, in its entirety, is attached hereto as Exhibit C.

16. In the July 31, 2009 Notice of Zoning Violation, the Town advised Mr. Bowden of the following:

Corrective Action Required: Please remove all non-compliant signage that is painted on the side of your house and bring your property into compliance as outlined in 9.3.2(S) of the LDO. Failure to bring your property into compliance within 72 hours of receipt of this notice may result in additional enforcement

measures including the issuance of civil citations. Once the signage is removed, please contact Brent Reck, Town of Cary Zoning Compliance Supervisor at (919) 621-3254 to close this violation.

(Emphasis in original.)

17. The notice also advises Mr. Bowden of the following:

The Town of Cary Sign Ordinance fine structure for illegal signs is as follows:

- One hundred dollars (\$100.00) **per sign**, per day for the first day of violation.
- Two hundred fifty dollars (\$250.00) **per sign**, per day for the second day of violation.
- Five hundred dollars (\$500.00) **per sign**, per day for the third day of violation, and for each day thereafter that the sign ordinance is being violated.

(Emphasis in original.)

18. On behalf of Mr. Bowden, counsel for the American Civil Liberties Union of North Carolina Legal Foundation (ACLU-NCLF) sent a letter to the Cary Town Attorney on August 4, 2009, expressing concern that several provisions of the Sign Ordinance, both on their face and as applied to Mr. Bowden, are unconstitutional under the First Amendment.

19. Cary Town Attorney Christine Simpson responded to the ACLU-NCLF's letter on August 18, 2009. In that letter, Ms. Simpson noted that the Town was conducting a "comprehensive review of the Town's sign ordinance."

20. ACLU-NCLF Legal Director Katherine Parker followed up on September 16, 2009 with an email describing additional constitutional concerns about various other provisions of the Sign Ordinance. In that email, Ms. Parker asked for an update regarding the issue with Mr. Bowden.

21. Between August and November 2009, Assistant Town Manager Mike Bajorek came to Mr. Bowden's house several times, asking Mr. Bowden, "What would it take for you to take the sign down?" Mr. Bowden explained that he had no intention of taking down the sign as long as the underlying dispute remained unresolved. Mr. Bowden explained, "I have finally gotten the Town's attention with my sign. If I take it down, the attention will go away."

22. About a month ago, Mr. Bajorek arrived at Mr. Bowden's house once again, asking Mr. Bowden to remove the sign. Mr. Bowden stated, "What would you do if it was your house?" Mr. Bajorek left without providing a response.

23. Upon information and belief, the Town's real desire in seeking to silence Mr. Bowden's speech is to prevent embarrassment to the Town and certain of its residents stemming from Mr. Bowden's message, not to ensure traffic flow or traffic safety or to ensure a consistent and pleasing aesthetic scheme (independent of the message itself).

24. The next communication from the Town came on November 12, 2009, in the form of another Notice of Zoning Violation. The November 12, 2009 Notice of Zoning Violation is attached hereto as Exhibit D.

25. The November 12, 2009 notice relies on entirely different provisions of the Sign Ordinance – Section 9.3.2(X)(2)(a)1, which concerns “Wall Signs – Residential/Institutional,” and 9.8.3(B), which concerns appropriate “Sign Colors.”

26. Section 9.3.2(X)(2)(a)1 provides:

Wall signs shall be allowed on residential/institutional properties provided that:

(a) Single-family residential units (either attached or detached) in zoning districts or planned developments designated for such use shall be permitted one wall sign, provided that

1. Such sign shall not exceed two square feet in area.

27. Section 9.8.3(B) provides:

All signage shall utilize the same building colors as shown on an approved site plan, and may have one additional color not found on the site plan. The use of high intensity fluorescent pigments is prohibited.

28. The November 12, 2009 notice provides that “within seven days of your receipt of this notice, we need for you to support your community’s sign rules and take the required corrective action to remove the sign currently painted

on your house.” The notice further provides, “Please understand that your failure to follow these LDO requirements will leave the Town with no other choice than to pursue additional enforcement measures including, but not limited to, issuing civil citations – something we’re sure no one would like to see happen.” The notice included another summary of the applicable fines, as described above.

29. Attached to the copy of the notice sent to Katherine Parker of the ACLU was the Town’s policy statement regarding political signs. That policy statement recognizes that “[t]he Town has intentionally adopted extremely restrictive regulations on signs in both residential and nonresidential areas....” That policy statement also describes the Town’s desire to prevent certain “overly enthusiastic individual[s]” from expressing their messages too boldly.

30. As set forth more fully herein, the aforementioned provisions of the Sign Ordinance, both on their face and as applied, violate Mr. Bowden’s free speech rights under the United States and North Carolina Constitutions.

31. Other provisions of the Sign Ordinance compound the problem with the above provisions, including, without limitation, Section 9.1.2(B)(4), which “prohibits all signs not expressly permitted by this chapter,” and Section 9.4, which sets out “prohibited signs,” which “include *but are not limited to*” those set forth in that Section.

32. Furthermore, Section 9.2 exempts from the ordinance entirely certain signs based on content, including works of art and holiday decorations displayed between November 15 and January 15. As a result, the Notices of Violation as to Mr. Bowden's sign constitute content-based restrictions on protected speech.

33. The Town's content-based regulation of protected speech is subject to, and cannot survive, strict scrutiny.

34. Even if the relevant provisions at issue were to be determined content neutral, they would not survive intermediate scrutiny.

35. The Town's demand that Mr. Bowden's protest sign be removed violates his right to freedom of speech and his right to petition his government under the First Amendment to the United States Constitution and Article I, Sections 12 and 14 of the North Carolina Constitution.

36. The above-described actions of the Town of Cary were taken under color of state law and pursuant to the Town of Cary's official custom, practice or policy.

37. Mr. Bowden has no plain, adequate, or complete remedy at law to redress the wrongs herein alleged.

38. Mr. Bowden is now suffering and will continue to suffer immediate and irreparable injury from the Town's acts, policies, and practices unless he is

granted the relief sought by this action. Each day that Mr. Bowden is threatened with, or levied with, ever-growing fines for failing to remove the sign is a day that his constitutional rights are denied and his protected speech is chilled.

39. Because of this threat of future immediate and irreparable injury, Mr. Bowden is contemporaneously moving for an emergency temporary restraining order. The Town has delayed enforcement against Mr. Bowden for one day, but it intends to begin enforcement on Friday, November 20, 2009.

40. There is an actual controversy between Mr. Bowden and the Town of Cary.

41. 42 U.S.C. § 1983 provides a remedy for the Town's actions.

FIRST CAUSE OF ACTION

DECLARATORY JUDGMENT & VIOLATION OF PLAINTIFF'S FREE SPEECH RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS

42. The allegations set forth in paragraphs 1 through 41 are incorporated by reference as if fully set forth herein.

43. The provisions of the Sign Ordinance cited by the Town, along with other provisions of the Sign Ordinance, are unconstitutional under the First and Fourteenth Amendments to the United States Constitution, both on their face and as applied.

44. The Sign Ordinance is content-based: it regulates various aspects of signage based on content. For example, there is no size regulation – or regulation of any sort – on certain signs and displays, such as works of art and holiday decorations. As a result, the Sign Ordinance is subject to strict scrutiny, which it cannot survive because the interests asserted in connection with the Sign Ordinance are not compelling, the Sign Ordinance is not narrowly tailored, and the Sign Ordinance does not represent the least restrictive means for the Town to achieve its goals.

45. Even if the Sign Ordinance is content neutral, it is unconstitutional because it cannot survive intermediate scrutiny because the Sign Ordinance is not narrowly tailored to the Town's alleged interests and the Sign Ordinance does not leave open ample alternative channels for communication. Regarding the latter, the alternatives offered by the Town for Mr. Bowden to express his message are woefully inadequate and have been offered by the Town, and are allowed by the Sign Ordinance, only because they are inadequate and do not provide a real, effective avenue for Mr. Bowden to communicate his message.

46. Further, the Sign Ordinance vests virtually unfettered discretion in the Town to restrict constitutionally-protected speech; such discretion, because it is not circumscribed by any discernible standards or definitions, violates the First Amendment. Relatedly, the Sign Ordinance is impermissibly vague and

overbroad. For example, the Sign Ordinance places no restrictions at all on “works of art,” yet it restricts heavily political signs, wall signs, ground signs, and the like; it is unconstitutional for the Town to give itself the power to decide what is a “work of art” and therefore exempt from the Sign Ordinance.

47. In the alternative to Mr. Bowden’s sign being a political sign the prohibition of which is unconstitutional, Mr. Bowden’s sign is a work of art under the Sign Ordinance and therefore exempt from the Sign Ordinance.

48. The Town’s actions deny Mr. Bowden the right to engage in expressive activities protected by the United States Constitution.

49. Mr. Bowden is entitled to a declaratory judgment under 28 U.S.C. §§ 2201-02 that the Town’s attempts to remove his sign are unconstitutional.

50. Mr. Bowden has suffered injury, including immediate and irreparable injury, as a direct and proximate result of Defendants’ violation of his First Amendment rights as alleged herein, which violation constitutes a violation of 42 U.S.C. § 1983.

SECOND CAUSE OF ACTION

DECLARATORY JUDGMENT & VIOLATION OF PLAINTIFF’S FREE SPEECH RIGHTS UNDER THE NORTH CAROLINA CONSTITUTION

51. The allegations set forth in paragraphs 1 through 50 are incorporated by reference as if fully set forth herein.

52. The provisions of the Sign Ordinance cited by the Town, along with other provisions of the Sign Ordinance, are unconstitutional under Article I, Sections 12 and 14 of the North Carolina Constitution, both on their face and as applied.

53. The Town's actions deny Mr. Bowden the right to engage in expressive activities protected by the North Carolina constitution.

54. Plaintiff is entitled to a declaratory judgment under 28 U.S.C. §§ 2201-02 that the Town's attempts to remove his sign are unconstitutional under the North Carolina constitution.

55. Plaintiff has suffered injury, including immediate and irreparable injury, as a direct and proximate result of the Town's violation of his rights as alleged herein.

WHEREFORE, Mr. Bowden prays that the Court award:

- (a) Injunctive relief prohibiting the Town from denying Mr. Bowden the right to display his sign on his own home and compelling him to remove that sign;
- (b) Injunctive relief prohibiting the Town from proceeding with code violation matters relating to the July 31, 2009 and November 12, 2009 Notices of Zoning Violation;

- (c) Injunctive relief prohibiting the Town from imposing any fines based on the sign or enforcing any previously-imposed fines based on the sign;
- (d) Declaratory relief that the Town's actions constitute a violation of Mr. Bowden's rights under the First and Fourteenth Amendments to the United States Constitution and the North Carolina constitution;
- (e) Damages to be determined; and
- (f) Attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

DEMAND FOR TRIAL BY JURY

As to those issues triable by jury, Mr. Bowden demands a jury trial.

Respectfully submitted this 19th day of November, 2009.

s/ Mark R. Sigmon

Mark R. Sigmon

NC Bar No. 37762

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Counsel for Plaintiff David Bowden

VERIFICATION

I, William David Bowden, depose and say that I have read the foregoing Verified Complaint and declare that the contents thereof are true of my own personal knowledge, and as to those matters about which I have no personal knowledge, I believe them to be true.


William David Bowden

Subscribed to and sworn to before me
this 18th day of November, 2009.


Notary Public

Emily-Mary Brown

My Commission Expires:
December 5, 2012

