

Animal Law Section

Summer 1998

Vol. 2. No. 2

Can Michigan Citizens Constitutionally Feed the Birds?

EDITOR'S NOTE: Last year, to its everlasting shame, the City of Eastpointe, Michigan decided to crack down on crime by citing Eastpointe resident Vicki Paske, an otherwise law-abiding citizen, for feeding pigeons and wild birds in her backyard. After Ms. Paske was convicted in the city's municipal court, Animal Law Section attorney Stuart M. Collis initiated an appeal to Macomb County Circuit Court. A happy conclusion was ultimately achieved through third-party mediation whereby Ms. Paske's conviction was vacated, and she may continue, with minor restrictions, feeding her backyard birds. For those who may be faced with similar situations in their own communities, we present relevant portions of attorney Collis' Appellate Brief wherein he made a devastating attack on the constitutionality of the city ordinance as overbroad and vague.

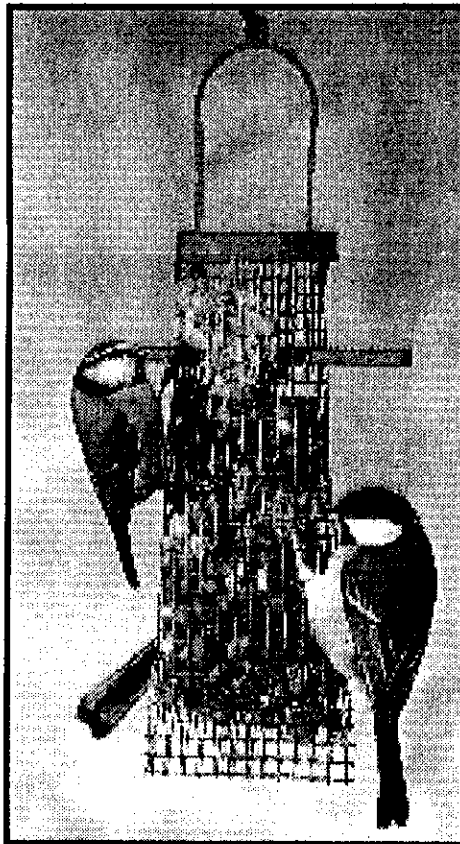
STATEMENT OF QUESTION PRESENTED

"Whether the Eastpointe City Ordinance 1860.03 is so vague or overbroad so that a reasonable person would not know what conduct was prohibited and therefore unconstitutional under the United States Constitution and Michigan Constitution." Defendants answer, "Yes."

STATEMENT OF FACTS

On June 26, 1997, the Defendants were given a citation for an alleged violation of Eastpointe city ordinance 1860.03(C), which states, "All owners and/or occupants in the City, in order to prevent rat harborage, shall: Store and handle, in a manner approved by the City, all building materials, cartons, machinery, raw materials, fabricated goods, food and/or foodstuffs and any other materials that might provide harborage and/or a food supply for rats." The Defendants own 24766 Dwight, which is located in the City of Eastpointe. Mr. Steve Glass is the code officer for the City of Eastpointe that gave the Defendants the citation based upon a large amount of pigeons that were located at the Defendants' home.

Mr. Robert Willard also witnessed twelve pigeons on the ground, which he believed were feeding since he saw the pigeons pecking on the ground. He also witnessed several pigeon droppings, which he believed and to which three neighbors testified, were a nuisance to the neighbors. Mr. Willard believed that the birds were



feeding from food that was spilled from the bird feeder, which he estimated to be three and a half to four feet off of the ground. When asked what the relationship between pigeons and the potential for rat harborage, Mr. Willard answered that he was not an expert; however, he believed that such a situation created the potential for rat harborage because other "critters" might come in to the yard to feed. None

of the neighbors testified as to the sighting of any rats but all testified that they wished the Defendants would stop feeding the pigeons.

The Defendants had testified that they had been feeding the birds since 1992 and that they purchased the bird feeder in 1996 at the request of the city officer, Mr. Steve Glass. Mr. Glass also had asked the Defendants not to feed the birds on the ground anymore, and the Defendants complied. Furthermore, the Defendants had moved the birdhouse to the farthest possible location on their property from their complaining next-door neighbor, Jeff Kretsch.

Mr. Gary Ricci, who lives across the street from the Defendants testified that the pigeons have always been in the neighborhood and that he feeds the birds as well. Furthermore, he testified that when a bird feeds, it knocks food onto the ground. He also testified that there are several bird houses in the neighborhood.

After a bench trial, the Defendants were convicted of the ordinance violation and ordered to pay \$500 or spend 30 days in jail, beginning the following day so the Defendants could make arrangements for their children. The Defendants elected to spend the time in jail; but, they changed their mind and paid the fine the following day. Finally, nowhere on the record, during or after the trial, were the Defendants informed of their right to be represented by an attorney.

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LEGAL ARGUMENT

EASTPOINTE CITY ORDINANCE 1860.03 IS VAGUE AND OVERBROAD.

Courts must attempt to construe ordinances in a constitutional manner. Lansing v Hartsuff, 213 Mich App 338, 539 NW2d 781, 785 (1995). However, if ordinary persons cannot understand what conduct is prohibited and it does not encourage arbitrary and discriminatory enforcement, it is void for vagueness. Lansing v Hartsuff, 213 Mich App 338, 539 NW2d 781, 784 (1995); People v Lino, 447 Mich 567, 527 NW2d 434, 438 (1994); People v Ford, 417 Mich 66, 331 NW2d 878, 890 (1982), citing Colten v Kentucky, 407 US 104, 92 SCt 1953, 32 LEd2d 584 (1972). In Michigan, an ordinance is vague if there is failure to provide fair notice of what conduct is prohibited, arbitrary or discriminatory enforcement is encouraged, or the ordinance is overbroad and impinges on First Amendment freedoms. Lino at 438, citing People v Howell, 396 Mich 16, 20-21, 238 NW2d 148 (1976). Eastpointe City Ordinance 1860.03 should be declared void for vagueness because no ordinary person would read it to bar feeding the birds. The relevant portions of Eastpointe City Ordinance 1860.03 states that:

All owners and/or occupants in the City, in order to prevent rat harborage, shall:

(c) Store and handle, in a manner approved by the City, all building materials, boxes, cartons, machinery, raw materials, fabricated goods, foods and/or foodstuffs and any other materials that might provide harborage and/or a food supply for rats;

(f) Elevate to a height of at least forty-eight inches above ground level all containers used for the feeding of wild birds or animals. Exhibit E.

Here, no person would be able to tell if feeding the birds is prohibited or not because one portion of the ordinance states that bird feeders must be at least forty-eight inches off the ground and in another states that any thing that might provide a food supply for rats is banned. Having a bird feeder would seem useless if you were unable to put bird food in it. Furthermore, it is impossible to say, and there was no testimony at trial, whether a

rat is even attracted to bird food. Ordinary people probably believe that since they had complied with subsection f, that they were in compliance with the statute. Therefore, this ordinance is unconstitutionally vague and the Defendants' conviction must be reversed.

Even if this Court believes that the ordinance itself is clear, it may be found void for vagueness if it encourages arbitrary or discriminatory enforcement. The ordinance states that one can store or handle "in a manner approved by the City" essentially anything that might provide harborage for a rat. Nowhere in the ordinance are there standards for the city to approve or disapprove of such structures. This gives whatever city official is in charge on a given day the pure ability to decide whether he believes that a structure is in compliance with the ordinance. Without standards, there is nothing but discretion available and therefore its enforcement, without such standards, is also discretionary. Therefore, the Defendants' conviction must be reversed.

Eastpointe's City Ordinance 1860.03 also fails under the overbreadth doctrine. Michigan's overbreadth doctrine is subsumed within its vagueness doctrine, as overbreadth is the third way that an ordinance may be found unconstitutional. People v Lino, 447 Mich 567, 527 NW2d 434, 438 (1994). Under the First Amendment, attacks for overbreadth should not be defeated based on the raising of some other person's potential rights. Village of Schaumburg v Citizens for a Better Environment, 444 US 620, 100 Sct 826, 835, 63 LEd2d 73 (1980); Broadrick v Oklahoma, 413 US 601, 93 SCt 2908, 37 LEd2d 830 (1973).

Eastpointe's ordinance could potentially violate many persons that would ordinarily fit within constitutionally protected speech areas. For example, Eastpointe's ordinance would cause shanties, similar to those that used to be in Ann Arbor in protest of homelessness to be illegal if the city did not approve the structure, which again, there are no standards for approval or disapproval. The ordinance could also violate persons who owned motor vehicles because any machinery not stored or handled, as approved by the city is illegal. See Exhibit E. Flag burning, which is constitutionally protected as a form of speech, could also be banned by Ordinance 1860.03 because a flag could be construed as a fabricated good, which if not handled to the city's specifications, whatever they might be, would be illegal. Therefore, this ordinance is overbroad and the Defendants' conviction must be reversed.

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