UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MARGARET and STEVE GERHARD,
N20711 Oneonta Dr.
Fence, WI 54120, Case No.

Plaintiffs,

v.

CITY OF GREEN BAY,
100 North Jefferson Street
Green Bay, WI 54301,

TONY FEITZER,
In his official capacity as Manager of the
City of Green Bay Department of Public Works
100 North Jefferson Street
Green Bay, WI 54301,

Defendants.

COMPLAINT

Plaintiffs, Margaret and Steve Gerhard, by and through their undersigned counsel, bring this Complaint against the Defendant, City of Green Bay. In support of this Complaint, Plaintiffs allege as follows:

Introduction

1. The Plaintiffs in this case are a husband and wife who spent nearly two decades improving the landscaping of their property in the City of Green Bay (the "City") by converting it to a natural garden. The City entered onto the Plaintiffs' property without a warrant, without their consent, and without giving the Plaintiffs an opportunity to be heard, and destroyed that garden. The City attempted to justify its entry onto and destruction of the Plaintiffs' property by relying upon a City Ordinance that allowed the City to enter a citizen's property and destroy it if

the City determines that it is "unsightly." The City Ordinance in question provided no notice as to what is or is not permitted and the City's enforcement actions here gave the Plaintiffs no opportunity to be heard as to its validity and applicability. As such, the ordinance and the enforcement actions of the City violated the Plaintiffs' Fourteenth Amendment rights by depriving them of property without due process of law and violated their right under the Fourth and Fourteenth Amendments to be secure in their homes and free from unreasonable searches and seizures.

Parties

2. Plaintiffs Margaret and Steve Gerhard, husband and wife, are adult citizens and residents of the United States and the State of Wisconsin. They currently reside at N20711 Oneonta Drive, Fence, WI 54120. They resided at 2789 St. Ann Drive, Green Bay, WI from 1987 until 2013.

3. Defendant City of Green Bay ("City") is an incorporated Wisconsin municipality operating under Chapter 62, Wisconsin Stats., maintaining its place of business at 100 North Jefferson Street, Green Bay, WI 54301.

4. Defendant Tony Feitzer was the manager (or similarly-titled head) of the City's Department of Public Works and the City's Weed Commissioner in 2011, and, upon information and belief, still holds those positions. He is sued in his official capacity and has an office address of 100 North Jefferson Street, Room 300, Green Bay, WI 54301.

Jurisdiction and Venue

5. The causes of action in this case arise under the Constitution and laws of the United States, and subject matter jurisdiction is therefore proper under 28 U.S.C. §§ 1331 and 1343.

6. A substantial part of the events or omissions giving rise to these causes of action occurred in the City of Green Bay, WI, which is within the Eastern District of Wisconsin; venue is therefore proper under 18 U.S.C. § 1391(b)(2).

Section 8.11-Green Bay's "Noxious Weed Ordinance"

7. The City Ordinance in dispute in this case is Section 8.11 which is frequently referred to as a "Noxious Weed Ordinance." Section 8.11 has been amended since the conduct which occurred in this case. All allegations herein refer to the ordinance as it read in 2009 and 2011.

8. Section 8.11 was titled "NOXIOUS WEEDS AND OTHER UNSIGHTLY GROWTH." Section 8.11 empowered City officials and employees to enter onto a citizen's property without a warrant, without consent, and without giving the citizen a chance to be heard and to destroy the citizen's plants if a City official determined them to be "unsightly." To make matters worse, the statute required the property owner to pay the cost of destruction.

9. Section 8.11(1)(a) specifically defined "noxious weeds" by naming specific plants and by cross reference to specific plants listed in particular statutory sections and the DNR administrative code. At all times relevant hereto, the Plaintiffs' property contained no plants that fit within the definition of noxious weeds.

10. Section 8.11(3)(a)(1) and (2), however, also prohibited "grass, hay, brambles, brush, reeds, rushes, cat tails, or any combination thereof, **or any unsightly growth**, to a height of over 9 [inches]." (Emphasis added). The Ordinance did not define "unsightly growth."

11. Under Section 8.11, the City's "Weed Commissioner" had full discretion to use subjective judgment to determine whether a home owner was in violation of Section 8.11, and had the power to "cut down and remove or cause to be cut down and removed all such growths"

at the property owner's expense. This could be done, and in this case was done, without giving the property owner the opportunity to challenge the subjective judgment of the City official who made the decision.

12. The case is not about the aesthetic merits of natural gardening, but rather calls into question whether the government may enter onto a citizen's property without a warrant or consent or adequate notice and opportunity to be heard and destroy that citizen's property based upon a single City official's subjective determination that it is unsightly.

The Gerhards' Property

13. The Gerhards lived at 2789 St. Ann Drive in the City of Green Bay from 1987 until 2013.

14. In 1994, after becoming aware of growing evidence on the environmental damage caused by planting, fertilizing, and mowing a grass lawn, they began converting their lawn into a natural garden. The work they put into their property over the next 18 years was substantial. It took constant labor, years of careful planning, and significant monetary investment. Through years of effort they were able to create an attractive, eco-friendly, and well-maintained garden covering most of their property.

15. The Gerhard's property was not an eye-sore and was not an unkempt mess. It was intentionally designed, well maintained and weeded on a regular basis. The natural landscape they desired for their property was carefully controlled.

16. By 2009, their garden contained herbs, perennial flowers, native plants, bushes, and vegetables – some of heirloom variety and quality. A healthy bed of mulch replaced grass as ground cover. Some plants were purely decorative; others, such as the sunflowers, also gave them privacy. Other plants included lilies of the valley, irises, peonies, phlox, sedums, garlic,

chives, dill, sage, cilantro, bee balm, mints, and lavender.

17. The Gerhards' property did not include any plants listed specifically in the City's Noxious Weed Ordinance or in any of the lists of noxious weeds cross-referenced by that ordinance. With the exception of a single small and ornamental planting of little bluestem, the property also did not include any grass, hay, brambles, brush, reeds, rushes, cat tails, or any combination thereof, or any unsightly growth of any kind, much less any over nine inches tall.

18. Ms. Gerhard cultivated medicinal herbs, edible herbs, and vegetables for her own kitchen and those of her friends. Ms. Gerhard also made fresh bouquets from her plants and used dried vegetation as materials for arts and craft projects in the community.

First Entry, Seizure, and Destruction, July, 2009

19. In July, 2009 the Gerhards' cultivated landscape included an approximately 16' x 16' plot surrounded by an approximately 6' tall wooden fence, in which the Gerhards grew organic catnip, sorrel, chives, oregano, and other plants.

20. On July 15, 2009, the City issued the Gerhards a 24-hour weed removal notice by rubber-banding it to their front door handle. However, the Gerhards were out of town at the time, and did not receive the notice for several days.

21. Prior to their return, City employees entered their property without a warrant, without consent, and without notice or an opportunity to be heard, and destroyed all of the plants within that fenced garden by digging them up and spraying chemical herbicides. The City officials issued the Gerhards an invoice for $73.90 for their destruction "services."

22. The Gerhards objected to the intrusion onto and destruction of their property. After days of calling and leaving unreturned messages, Ms. Gerhard reached the DPW's then-manager, Tom Steffel. She complained about the unlawful entry and destruction, and explained

that her plants were not weeds, but a natural garden. Mr. Steffel admitted that he approved the destruction without viewing it himself, and verbally agreed to rescind the invoice.

23. On August 11, 2009, Mr. Steffel signed a "void or cancellation of an invoice" form (a true and accurate copy of which is attached as Exhibit A), on which he wrote "property owner did not receive notice on time to comply with violation letter." However, neither Mr. Steffel nor any other City official took any other action to compensate the Gerhards for their losses.

24. Some short time later, Mr. Steffel told Ms. Gerhard that he had since viewed their property and determined that it was not in violation of the noxious weed ordinance and that it would be fine to maintain the property in its then-current condition going forward. City officials reneged on that assurance two years later.

Second Entry, Seizure, and Destruction, August 2011

25. On August 10, 2011, the City issued another removal notice (a true and accurate copy of which is attached as Exhibit B), which the Gerhards received.

26. On August 11, 2011 Ms. Gerhard called the DPW, which had a new manager, Tony Feitzer. Again, she explained that her plants were not noxious weeds, but planned, natural, and attractive landscaping. Mr. Feitzer suggested that she contact her Alderman to get a variance. She asked Mr. Feitzer for assurances that neither he nor other City employees would destroy her plants while she sought a variance. He assured her that they would take no action while she did that.

27. Ms. Gerhard then met with her Alderman and was making progress working within the system to obtain a variance.

28. On or about August 23, 2011, Ms. Gerhard took her husband, a disabled Vietnam

veteran, to Milwaukee for a medical checkup at Froedtert Hospital, following major surgery earlier in August.

29. On or about August 24, 2011, despite the previous assurances from Mr. Feitzer, city workers entered the Gerhards' property without a warrant, without consent, and without notice or an opportunity to be heard, and over the course of three-and-a-half hours destroyed virtually every plant on the property. They also applied chemical herbicides to make sure that they did not regrow. The workers removed the destroyed plants from the property.

30. Upon information and belief, Mr. Feitzer made the decision to have City workers enter on and destroy the Gerhards' property. He did so knowing that the Gerhards objected and without permitting them to have any sort of hearing as to whether their landscaping violated the Ordinance.

31. When the Gerhards came back from Milwaukee, Ms. Gerhard called Mr. Feitzer to demand an explanation. Mr Feitzer claimed he was "between a rock and a hard place" because he had gotten "tons of calls" complaining about her garden.

32. Ms. Gerhard later learned this was untrue when she requested the complaint log with an open record request and discovered there were only two complaints – both from a single neighbor.

33. After the destruction nothing regrew, not even the perennial plants, due to the root removal and chemical herbicides.

Ordinance Amendment and Aftermath

34. As the result of these incidents, Ms. Gerhard worked with other concerned citizens to amend Green Bay's ordinances to expressly permit naturally-landscaped gardens.

35. While such an amendment eventually occurred, her five applications for a

naturally-landscaped garden permit were delayed and never granted.

36. Because the City refused to permit them to maintain their property in peace, the Gerhards sold their house on St. Ann Drive and moved to a different community.

Allegations Common to All Claims

37. Under 42 U.S.C. § 1983, "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

38. A municipality is a "person" for purposes of § 1983 and can be liable if "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated." *Monell v. Dep't of Soc. Services of City of New York*, 536 U.S. 658, 690 (1978).

39. The illegal entry onto and destruction of the Gerhards' property was an implementation and execution of the City's officially adopted and promulgated Noxious Weed Ordinance.

40. Defendant Tony Feitzer, in ordering the illegal entry onto and the destruction of the Gerhards' property, was acting under the color of authority – namely, the Noxious Weed Ordinance.

41. As described more fully below, the Defendants deprived the Plaintiffs of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution. The Defendants also unreasonably seized their property in violation of the

Fourth Amendment to the United States Constitution.

42. The Defendants' deprivations of the Plaintiffs' constitutional rights caused the Plaintiffs compensable injuries, including the loss of their plants, lost harvests from their plants, lost income, and emotional and physical distress.

43. Punitive damages are available against government officials for malicious, wanton, or oppressive actions that deprive people of their constitutional rights, and those actions taken in reckless indifference to those rights. *Smith v. Wade*, 461 U.S. 30 (1983).

44. Defendant Feitzer's actions in ordering City employees to illegally enter onto and destroy the Plaintiffs' property were malicious, wanton, oppressive, and at the very least taken in reckless indifference to the Plaintiffs' rights.

45. Defendant Feitzer took action based on woefully inadequate information. He had no information to support a conclusion that any of the Gerhards' plants were forbidden by the Noxious Weed Ordinance.

46. While Feitzer initially gave the Gerhards an opportunity to seek a variance, he did not give them an opportunity to demonstrate that their property was not in violation of the Noxious Weed Ordinance. A variance should not have been necessary, because the Gerhards could have demonstrated that their property was compliant, but Feitzer did not give them that chance.

47. Furthermore, Feitzer arbitrarily and unilaterally rescinded that forbearance with no additional notice, sending workers onto the Gerhards' property without giving them any further notice to destroy their property.

48. Throughout this conflict Feitzer showed utter disregard for the Gerhards' constitutional rights, acting purely in his own discretion and without adequate notice or

opportunity to be heard, to declare that the Gerhards were in violation of the law and destroy their property as punishment.

First Claim for Relief
Deprivation of Fourteenth Amendment Right to Due Process of Law

49. Plaintiffs incorporate by reference the allegations above as if fully set forth herein.

50. The Fourteenth Amendment to the United States Constitution provides, in part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, §1.

51. The illegal entry onto and the destruction of the Gerhards' garden deprived them of their property.

52. The Defendants failed – at three distinct points – to provide the Gerhards due process of law before depriving them of their property. First, the Noxious Weed Ordinance failed to provide adequate notice of what behavior was prohibited. Second, the Defendants failed to give the Gerhards sufficient notice before destroying their property. Third, the Defendants afforded the Gerhards no opportunity – either before or after the destruction – to be heard and to contest the City's determination that their garden violated the Noxious Weed Ordinance.

53. To comport with due process, laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

54. A law is unconstitutionally vague when it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.*

55. The Gerhards' garden could have only been destroyed as "unsightly growth." It

contained none of the explicitly-prohibited species of plant. Furthermore, with the exception of a single plant, their garden contained no grass, hay, brambles, brush, reeds, rushes, cat tails, or any combination thereof, of over nine inches.

56. The Noxious Weed Ordinance is impermissibly vague, at least when enforced against "unsightly growth." "Unsightly" is a wholly subjective term. City officials were given no guidance as to what is "unsightly," but instead were permitted to decide on a purely subjective basis what they did not like the look of. It is exactly this kind of total discretion, devoid of any guiding principles, which the void-for-vagueness doctrine prohibits.

57. The Gerhards were therefore not given fair notice of what conduct was prohibited by the Noxious Weeds Ordinance.

58. "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (citations omitted).

59. Notice of an alleged violation must be given in a manner reasonably calculated to ensure the intended target receives it in a timely manner. *Jones v. Flowers*, 547 U.S. 220, 226 (2006).

60. The Noxious Weeds Ordinance itself provided no timeline for the destruction of allegedly unsightly growth. Further, the ordinance did not even require any notice to the landowner. As a result, the Noxious Weeds Ordinance was facially unconstitutional.

61. The Defendants' attempts to provide notice to the Gerhards were legally insufficient.

62. The City rubber banded a 24-hour abatement notice to the Gerhards' front door in July 2009, but the Gerhards did not receive it before the destruction because they were out of town.

63. In 2011, the City gave the Gerhards another 24-hour abatement notice (which they received), but then agreed to forbear enforcement while the Gerhards sought a variance. But the City reneged on that promise, and without giving any further notice to the Gerhards, proceeded to illegally enter onto their property and destroy their garden.

64. While the exact amount of time necessary to provide constitutionally-adequate notice differs depending on the factual scenario, the City had no justification for a mere 24-hour notice or proceeding without any notice here. Only in the most extreme situations will notice of a day or less be justified – in particular where some imminent threat to health or human safety threatens. Here, there was no such threat.

65. The Gerhards were deprived of property without adequate and timely notice. In July 2009 they were deprived of property on 24-hours' notice not reasonably calculated to provide notice. In August 2011, they were deprived of property effectively without any notice.

66. Furthermore, the Defendants provided the Gerhards no procedure by which they could challenge the allegation that their garden violated the Noxious Weeds Ordinance. The Ordinance itself provides no such process, and the City did not have such a process in place. Instead, the subjective opinion of one person – Mr. Feitzer – was treated as conclusively established.

67. "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." *Fuentes*, 407 U.S. at 81. While later cases limited *Fuentes* by permitting a post-deprivation hearing, any post-

deprivation hearing must still be "full and immediate" and provide a clear and certain remedy. *See, e.g., Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 611 (1974).

68. The Defendants failed to provide any hearing in which the Gerhards could have challenged the allegations against them, either pre- or post-deprivation.

69. If they had been given the opportunity, the Gerhards could have proven that the allegations were baseless. They grew no prohibited plants, and had done nothing wrong, and yet had no power to stop the illegal entry onto and destruction of their property. A government official was able to singlehandedly declare that they were lawbreakers and punish them.

70. By failing to put the Gerhards on notice of what behavior was prohibited, by failing to give the Gerhards timely and adequate notice of the allegations against them, and by failing to give the Gerhards the opportunity to contest those allegations, the Defendants deprived the Gerhards of their property without due process of law in violation of the Fourteenth Amendment.

Second Claim for Relief
Deprivation of Fourth Amendment Right to Be Free from Unreasonable Searches and Seizures

71. Plaintiffs incorporate by reference the allegations above as if fully set forth herein.

72. The Fourth Amendment to the United States Constitution provides, in part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV.

73. The Fourth Amendment has been incorporated against the States and their political subdivisions by the Fourteenth Amendment. *Mapp v. Colorado*, 338 U.S. 25, 27-28 (1949).

74. The government may not search nor seize private property without a warrant,

unless an exception to the warrant requirement applies. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

75. In 2009, pursuant to the Noxious Weed Ordinance, City employees searched the Gerhards' property by entering onto their land and entering into a garden plot enclosed in a 6' tall fence.

76. After searching and finding what they erroneously and unreasonably thought to be plants prohibited by the Noxious Weed Ordinance, they proceeded to seize the Gerhards' property by destroying the plants.

77. The City employees did not have a warrant to search and seize the Gerhards' property, and no exception to the warrant requirement applied.

78. In 2011, pursuant to the Noxious Weed Ordinance and at the direction of Mr. Feitzer, City employees again searched the Gerhards' property by entering onto their land.

79. After searching and finding what they erroneously and unreasonably thought to be plants prohibited by the Noxious Weed Ordinance, they proceeded to seize the Gerhards' property by destroying the plants.

80. The City employees did not have a warrant to search and seize the Gerhards' property, and no exception to the warrant requirement applied.

81. By searching and seizing the Gerhards' property without a warrant when no exception to the warrant requirement applied, the Defendants deprived the Gerhards of their Fourth Amendment rights.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment:

A. Finding that the Defendants deprived the Plaintiffs' of their Fourteenth

Amendment right to due process of law in violation of 42 U.S.C. § 1983;

B. Finding that the Defendants deprived the Plaintiffs' of their Fourth Amendment right to be free from unreasonable searches and seizures in violation of 42 U.S.C. § 1983;

C. Awarding the Plaintiffs damages of at least $125,000, or such other amount as the trier of fact determines was caused by those deprivations, against the Defendants jointly and severally;

D. Awarding the Plaintiffs punitive damages against Defendant Tony Feitzer;

E. Awarding the Plaintiffs their ordinary costs and reasonable attorney's fees under 42 U.S.C. § 1988(b); and

F. Awarding the Plaintiffs such other relief as this Court finds just and equitable.

THE PLAINTIFFS DEMAND A JURY OF 12 PERSONS.

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY,
Attorneys for Plaintiffs

Dated: 7/10/2015

/s/RICHARD M. ESENBERG

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EXHIBIT A

VOID OR CANCELLATION OF AN INVOICE

INVOICE # 092535 DATE OF INVOICE 7-22-09

NAME: Steven gerkard ADDRESS 2789 St. Ann dr.

PARCEL # 21-5489 AMT: $73.90

REASON:

property owner did not receive notice
on time to comply with violation letter
Note: owner unable to notify prior to invoice

PER Tom Stegall
Superintendent/Supervisor

8-11-09

EXHIBIT B

DATE: 8-10-11 TIME: 7:15 INITIALS: PW

ADDRESS: 2789 St Ann VEGETATION HEIGHT: 9-16

RESIDENT/PROPERTY OWNER NOTICE TO CUT GRASS/WEEDS

This property has been identified as being in violation of City of Green Bay Municipal Code 8.11, ***"NOXIOUS WEEDS AND OTHER UNSIGHTLY GROWTH".***

Failure to cut the excessively long grass/weeds within 24 HOURS of this notice will result in City crews completing the work. Property owners will be invoiced based on the amount of time required to complete the work. The minimum charge will be $59 for 15 minutes of work (fee subject to annual review and increase).

This property will be re-checked regularly and if found in violation, City crews will take action to remove the excessive grass growth and weeds ***without notice***, (including weeds on sidewalks and driveway areas) and invoice accordingly. **Invoices must be paid within 30 days or will be attached to the annual property tax bill.** City ordinances listed at:

www.ci.green-bay.wi.us/law/ordinancebook.html see #8 then ***NOXIOUS WEEDS AND OTHER UNSIGHTLY GROWTH.***

Questions – please call City of Green Bay Public Works at (920) 448-3535 between 8 a.m. – 4:30 p.m., weekdays.
Deptdata/publicworks/adm/forms/street/long grass & weeds 05-2010

See Back

(Mr. Steffel retired)
mr. feitzer incharge now