VILLAGE COURT VILLAGE OF POTSDAM
COUNTY OF ST. LAWRENCE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

-against- **Decision**

JASON ROHRER
Defendant

In this proceeding the defendant is charged with a violation of Potsdam Village Code section 145-6 A & B. The statute states in pertinent part:

§ 145-6. Brush, grass and weeds.
A. Cutting of grass and other vegetation. It shall be the duty of the lessee or person in charge or, if there is no lessee or person having charge, then the owner of each and every parcel of land in this municipality fronting upon any street or highway to maintain the area between the curb or edge of the roadway and the sidewalk of a line 10 feet from and parallel to the edge of the roadway, whichever is less, free from weeds or plant growth in excess of 10 inches in height.
B. Control of grass and weeds on private property.(1) It shall be the duty of the owner, lessee or person having charge of each and every parcel of land in this municipality to keep said parcel free of harmful weeds and other rank or noxious vegetation.
(2) Grass shall not exceed 10 inches in height. This provision shall not apply to land used for farm purposes. [Amended 5-12-2005 by L.L. No. 2-2005]
Section A, addresses only the portion of a lot between the curb or edge of the roadway and the edge of the sidewalk (or for a distance of ten feet from the road if that is a smaller distance), while Section B is of more general application.

The complaint filed with the court states that on July 28, 2005 the complainant observed "the lawn at 93 Elm Street in excess of ten inches of height....On August 4th I observed that Mr. Rohrer had not complied...."
Trial was held over many hours and the parties were permitted to submit memorandums of law.
As noted in the complaint, the Village Code Enforcement officer first filed with the defendant a Notice which alleged violation of "Chapter" 145-6 of the Village Code. The notice further provided that "On the reverse side of this notice, please find laws and penalties which may be imposed". However, in fact the reverse side was blank as a result of the failure to revise the form to reflect the provisions of the revised ordinance which had been enacted on May 12th, 2005.
The evidence before the court establishes that in 2004 the defendant received complaints from the village Code Enforcement Officer that his lawn was not in conformance with the Village Code as then written. The previous ordinance required that "Grass shall be cut on improved property at least once every two weeks and on vacant parcels of land at least once every three

weeks from the first day of May to the first day of October each year. This provision shall not apply to land used for farm purposes." Based upon this complaint, the defendant converted his lot to "a natural landscape". He dug up the lawn and began the process of converting it to a meadow featuring plants and wildflowers native to the region. He described how he would find particular wildflowers that appeared aesthetically pleasing and promote their growth in the yard, while at the same time avoiding and extracting nonnative species. The defendant demonstrated his active involvement in ensuring a natural development of the property with a focus on wildflowers and plants native to the area.

ANALYSIS OF THE STATUTE

Under the Municipal Home Rule Law, a Village has the authority to enact statutes for "The protection and enhancement of its physical and visual environment." (Municipal Home Rule Law Section 10 (ii) 1 A 10).

The Village Law also gives broad powers with respect to zoning.

§ 7-700 Village Grant of power.

> For the purpose of promoting the health, safety, morals, or the general welfare of the community, the board of trustees of a village is hereby empowered, by local law, to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes. As a part of the comprehensive plan and design, the village board is empowered by local law, to regulate and restrict certain areas as national historic landmarks, special historic sites, places and buildings for the purpose of conservation, protection, enhancement and perpetuation of these places of natural heritage. Such regulations shall provide that a board of appeals may determine and vary their application in harmony with the general purpose and intent, and in accordance with general or specific rules therein contained.

The Village has enacted a zoning ordinance which implements section 7-700 of the Village Law. In pertinent part, Potsdam's statute provides

> ARTICLE VI Property Maintenance
>
> § 110-34. General provisions.
>
> Residential premises shall be maintained in conformity with the provisions of this Part 1 so as to assure the desirable residential character of the property.

§ 110-35. Open areas. [A, B. and C omitted]

> D. Yars and courts shall be kept clean and free of physical hazards.
>
> E. Heavy undergrowths and accumulations of plant growth which are noxious or detrimental to health shall be eliminated.

Section 145 does not appear in that portion of the code involving zoning. Furthermore, the zoning ordinance has set forth a separate standard as far as maintenance of property. Following general principals of statutory construction, it then follows that the Village is not

relying on its powers with respect to Zoning to enact Section 145. Apparently then, the Village relied on its general powers under Municipal Home Rule Law Section 10 (ii) 1 A 10, the authority to enact statutes for "The protection and enhancement of its physical and visual environment."

In attempting to construe an ordinance, the court looks to words of the enactment and the stated legislative purpose. Unfortunately, the ordinance filed says little about the ends which it seeks to achieve. The Ordinance enacted, in its "purpose" clause indicates that the sole purpose for Local Law 2 of the year 2005 is to change the law. "The Purpose of the Local Law is to Amend Chapter 145 Streets and Sidewalks, Article II General Provisions Section 145-6 Brush, grass, and weeds, of the Village of Potsdam Municipal Code." Rather than an explanation of the goal sought to be accomplished by the legislation this "purpose" clause provides only the impact on the village code.

The statute as enacted lacks definitions. Some of its provisions appear to be astonishingly broad in impact if they were to be interpreted literally. For example, Section A provides that within ten feet of a street, property is to be kept clear of "weeds or plant growth in excess of ten inches in height". Even the most cursory tour of the village would reveal that literally hundreds of trees throughout the village are in violation of this provision, including ones planted by the Village. While the issue of trees is not before the court, this example cautions that the Village Board apparently did not intend that the statute should be interpreted literally.

In the absence of definitions, it is useful to look to other enactment within the Village Code that use the same terms. In this case Section B of the statute uses the terms "harmful weeds and other rank or noxious vegetation" but does not define them. In another article of the code, the Village has defined noxious weeds to mean "Any living stages (including but not limited to, seeds and reproductive parts) of any parasitic or other plant of a kind, or subdivision of a kind, which is of foreign origin, is new to or not widely prevalent in this state and can directly or indirectly injure crops or other useful plants, livestock or poultry or other interests of agriculture, including irrigation." (Potsdam Village Code Chapter 161 "Trees" at section 161.3.) This definition is quite restrictive in form, and based on the testimony includes precisely those types of plants which defendant actively sought to exclude from his meadow as he developed it..

The lack of definitions also makes problematic the interpretation of the exceptions contained within the ordinance. Subdivision B explicitly provides that "This provision shall not apply to land used for farm purposes." The ordinance provides no definition or restriction on what is meant by a "farm purpose". However, it has apparently been interpreted by the code enforcement officer to include a downtown corn field on Market Street. It also appears to have been interpreted as well to exempt the flower and vegetable gardens of homeowners throughout the village. One could certainly argue that a natural landscape which most closely resembles a meadow could fit within the definition of a farm purpose.

CONSTITUTIONAL ISSUES

Before proceeding to the other legal issues, the court must address the constitutional issues raised by the defendant. The defendant argues that his activity is protected because his actions in establishing natural landscaping on his premises are an expression of an environmental ethic.

There is no doubt that a persons actions can be protected expression. However, this

does not necessarily result in the absolute protection of that activity. Rather the impact is much more limited. Legislation which is neutral to expression in its intent may be constitutional even if the impact may limit some expression. For example, if I wished to express how powerful my motor vehicle was by speeding through the village at seventy miles per hour, this would not bar prosecution for speeding. The court does not doubt that the defendant's natural landscape is an expression of his concern for nature. However, this alone does not render the application of the ordinance unconstitutional. As the Supreme Court stated in United States vs. O'Brien 391 US 367 at p. 376, "We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea." The Court continued: "we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

It seems clear to the court that the ordinance enacted was unrelated to the suppression of free expression. Since the Court determines this case based upon principals of statutory construction, judicial policy directs that we need not consider the other issues raised by the O'Brien fourfold test.

Natural Landscaping

The defendant presented evidence, including expert testimony, that his lot was being cared for as a natural landscape. The concept of natural landscaping has developed over the past fifteen years as an alternative to the more common grass lawn. Its adherents point to its advantages in eliminating the requirement for infusions of fertilizers, herbacides, and pesticides and the absence of pollution from gasoline powered mowers. It is generally far more energy efficient as well.

The concept of natural landscaping is a nationally recognized (and in some places encouraged) form of lot care. Documents filed with summations include analysis of the law with respect to natural landscaping, including a detailed law review article. The concept appears to have developed adherents from a broad base of backgrounds. The concept appears to be most developed in the upper midwest. Indeed, a village in Wisconsin gives tours of its naturally landscaped lots. The court has determined that many municipalities throughout the country have enacted ordinances which recognize this alternative to the traditional lawn. It is apparent from a review of these ordinances that it is possible both to protect the villages' interest in safeguarding "its physical and visual environment" and recognize the right of property owners to engage in more natural landscaping than the traditional straitjacket of a mowed lawn. (In addition to the sources provided by the parties, the court notes that it also reviewed an ordinance formulated for the City of Rochester, Minnesota.)

Application of Section 145-6 B

The court is most troubled by the very broad nature of Section 145-6 B. The ordinance applies to owners and lessees of "each and every parcel of land". They are enjoined to keep their property free of "weeds and other rank or noxious vegetation". Part B directs that grass be no more than ten inches in height.

The statute purports to place a single standard for lot care based upon an implicit

assumption that all lots (other than farm lots) are covered in a grass monoculture. The court does not doubt that the ordinance is an appropriate regulation of grass monoculture lots. If someone has elected to have their yard in the form of a traditional lawn, then the ordinance as written is an appropriate exercise of the village's authority to maintain "its physical and visual environment" by regulating how such lawns shall be maintained.

However, the defendant's lot is not a traditional lawn. It would appear that to the court that the regulation was not designed to apply to natural landscapes. In considering then the People's case, it seems appropriate to make general comments on the landscapes found within the municipality. An implicit assumption of the statute is that all lands within the village are grass lots. This assumption is not borne out by reality.

In point of fact, the Village of Potsdam has significant variation in the types of landscapes encompassed within its boundaries. The Village boundaries include forest lands, farms, pasture, meadows, extensive gardens, lush wetlands along the Racquette River, as well as traditional lawns, concrete, and asphalt. Between the Bagdad road and Clarkson housing is a small lush wetland with tall grasses, reeds, and trees. The Clarkson woods have an extensive wetland which includes a heron rookery, biking, and cross country ski trails. Sandstone Park is bordered by wetlands and wet meadows. Unquestionably grasses (and other vegetation) exceed ten inches in height in a number of these landscapes. Unquestionably, some of these landscapes are natural and intended to remain so. However, there is nothing in the ordinance which would in any way limit its application to these premises. The ordinance applies to owners and lessees of "each and every parcel of land". This analysis leads the court to conclude that certainly with respect to any number of other entities within the village, that the ordinance is overbroad and prohibits far more than the Village Board intended. However, the Court cannot be selective in determining application of the ordinance. Having found that the defendant has developed his lot as a natural meadow, the court has no basis for considering his premises any differently than the other natural landscapes where application of the ordinance was clearly not intended. Accordingly, with respect to **Section 145-6 B** the defendant is found not guilty.

Application of Section 145-6 A

Has the defendant violated his duty "to maintain the area between the curb or edge of the roadway and the sidewalk of a line 10 feet from and parallel to the edge of the roadway, whichever is less, free from weeds or plant growth in excess of 10 inches in height."

This ordinance only restricts the size of weeds and plant growth within ten feet of a roadway. As the defendant has pointed out, the village has not been consistent in its application of this statute. There does seem to the court to be a stronger governmental interest in regulating the height of vegetation along streets and roadways, related not only to aesthetic concerns but also to concerns for the safety of those using roadways and crosswalks. However, during the trial, the People were very clear that they did not base their case against the defendant on safety concerns.

The section as written applies only to "weeds and plant growth". The court has already discussed the impact of applying a literal definition of "plant growth" to this ordinance. If trees are plants (and, of course, they are), then application of this portion of the ordinance leads to extraordinary results which in the present state of the legislative history could not have been the intention of the village board. The court cannot provide the missing restrictive language and concludes that the portion of the law restricting "plant growth" is unenforceable as written.

Accordingly the court is left to determine whether the plants in question were "weeds". The only definitions provided by the Village Code refers (in an unrelated section) to "noxious weeds". Based upon the evidence the court finds that the defendant did not have plants which meet the definition of "noxious weeds" as otherwise defined in the village code. (Indeed, all the evidence is to the contrary. The defendant actively sought to eliminate plants which met the statutory definition.) What is a weed? Definitions vary depending on profession and point of view. A widely accepted definition is that a weed is "any plant growing out of place". Another definition is "A plant considered undesirable, unattractive, or troublesome, especially one growing where it is not wanted, as in a garden." It is apparent that the plants growing on the defendant's property were ones he desired. Indeed, when he found invasive or undesirable plants, he removed them. It has been said that "one man's junk is another man's treasure". Likewise one person's weed may be another's prized wildflower. Applying these ordinary definitions, the People have failed to establish that the plants in defendant's lot were weeds.

In conclusion, the court finds that the people have failed to prove beyond a reasonable doubt that the defendant violated section 145-6 (A) of the ordinance. The defendant is found not guilty.

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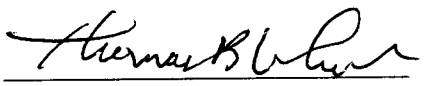

Thomas B. Wheeler, Justice