UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANDREW H. STEVENS	:	**Case No. 2:20-cv-1230**
	:	
Plaintiff,	:	**Judge Marbley**
	:	
-vs-	:	**Magistrate Deavers**
	:	
CITY OF COLUMBUS, OHIO,	:	
	:	
Defendant.	:	

MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

In Columbus, it is a third degree misdemeanor, punishable with sixth days in jail and $100 per day fines, to maintain "incompatible" landscaping or to alter one's own grass (which the City, though not in writing, deems a "distinctive architectural feature"). Making matter worse, homeowners seeking to avoid such harm must prove, with evidence, to an unaccountable commission of unremovable nearby private property owners, that their landscaping is "compatible."

This Court should preliminarily enjoin the City of Columbus from continuing to impose criminal, civil, or equitable penalties upon Plaintiffs and other Columbus homeowners in response to their failure to obtain Historic Resource Commission ("HRC") approval of gardening and landscaping alterations. Doc. 1-2 (Photographs of Plaintiffs' Home).

The City impermissibly requires that, to obtain approval, Plaintiffs and others must prove to a commission of unaccountable non-governmental actors that their alteration is "compatible" and "appropriate." The Due Process clauses of both state and federal constitutions forbid such a regulatory scheme, particularly when it imposes criminal penalties and draconian daily fines on homeowners. Such vagueness, aggravated by such delegation and burden-shifting, has never survived searching judicial review, has recently failed such review twice within this District, and cannot survive here, especially as Plaintiffs confront irreparable harm and the public interest warrants suspension of enforcement.

More globally, the City's regulations arbitrarily prohibit Plaintiffs and others, simply because they dwell within a neighborhood designated by the City to be a "historic district," from making *any* minor alteration to their own yard. But requiring government permission for alteration of all property, rather than just historically significant features, fails to substantially advance any governmental interest, much less in a tailored fashion.

Accordingly, whether solely against Plaintiffs or against all, "the Landscaping Compatibility Mandate," as defined herein, must be enjoined.

II. Background[1]

In 2017, Plaintiff Andrew Stevens purchased a neglected home (originally built in 1890) in a neglected urban neighborhood, not in a "planned community" subject to restrictive covenants,[2] and poured countless hours and dollars into rehabilitating it. After acquiring several historic district permits, Mr. Stevens renovated the home, preserving all meaningful historic and architectural features. And the City's agents concede that "He's done a great job with work on the house," such that "the house is fantastic." Doc. 1-5, PageID 81.

Having completed most major work on the home, he turned his attention to the yard, which had become an unsightly and unsafe patchwork of eroding mud, weeds, and grass. Id., at PageID 74-75. ("You see dead spots. You don't see growth . . . the soil is washing out into the street . . . my front yard, prior to me installing the wall, was just straight dirt and mud. And any time we had a big storm, it would wash straight out on the sidewalk, wash out on the street . . . based on the slope of my yard, . . . it would take years, if it's even possible, for me to grow grass, plants, vegetation in the front yard"); see Doc. 1, PageID 27.

Plaintiffs cleaned up the yard, replacing neglected retaining walls with new ones, resulting in a terraced garden that most likely consider the most attractive and well-maintained yard in his neighborhood. Doc. 1-2. Rather than receiving accolades, Mr. Stevens received from the City's enforcement agents a prompt threat of prosecution, imprisonment, and fines, unless he could secure his neighbors' approval of his new shrubs and mulch: on or about June 25, 2018, City of Columbus "Code Enforcement Officer" Tim Noll issued a "Columbus City Code Violation Notice" to Mr. Stevens, citing as a "violation" that "a retaining brick wall has been erected in the front yard without first obtaining the required certificate of appropriateness." See Doc. 1-5, PageID 55. The Notice of Violation further opined that Mr. Stevens violated the law because "[a]ny exterior

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[1] All facts recounted here are derived from Plaintiffs' Verified Complaint and its attachments.

[2] Ohio provides for the possibility that the fastidious tastes and preferences of some private homeowners may be imposed on their neighbors' properties, when those neighbors voluntarily join a preexisting planned community. See R.C. 5312.13 ("The owners association and all owners, residents, tenants, and other persons lawfully in possession and control of any part of an ownership interest shall comply with any covenant, condition, and restriction set forth in any recorded document to which they are subject, and with the bylaws and the rules of the owners association, as lawfully amended. See also *Lake Milton Estate Prop. Owners Ass'n, Inc. v. Hufford*, 2018-Ohio-4784, ¶ 23 ("It is axiomatic that restrictive covenants run with the land and bind subsequent purchasers of real property as long as the subsequent purchaser had notice of the covenant").

change or alteration requires a certificate of appropriateness from the Bryden Historic District." *Id.* The Notice of Violation demands that "you are hereby given notice to correct the alleged violations . . . within 30 calendars days," and threatens that "failure to comply with this notice is a Misdemeanor of the Third Degree and may be punishable by . . . sixty days imprisonment," but also apprised Mr. Stevens that he may appeal with the City's "Historic Preservation Office." *Id.* Mr. Stevens dutifully "appealed" the Notice of Violation to the City, which convened several hearings on the matter.

As it turns out, the City of Columbus, by characterizing *everything visible* to be an "architectural feature," prophylactically forbids even the most menial alteration of one's yard, garden, or landscaping, unless an untrained board of volunteering nearby-property-owners who cannot be removed, supplied with nothing more than vague and broad standards, approves that alteration. See CC Section 3116.04 ("no person shall construct, reconstruct, alter, change the exterior color of or demolish any listed property or architectural feature thereof or any structure or architectural feature now or hereafter in a district or make site improvements thereon without first applying for a certificate of appropriateness therefor and obtaining either such certificate of appropriateness or a clearance"). And because the standards governing the City's citizens' decision-making are unfathomably broad and unclear, no person of ordinary intelligence can predict what is subject to its review or what should be approved.

More specifically, the capricious neighbors comprising the HRC apparently apply two standards, if private property has been altered or is to be altered within a historic district: (1) whether the alteration is "compatible" to (a) other improvements; (b) the home itself; (c) "adjacent contributing properties"; (d) "open spaces;" and (e) "the overall environment;" and (2) whether the alteration is "appropriate" to the same factors. See CC Section 3116.09; 3116.10(A); 3116.11; CC Section 3116.13. None of the foregoing terms are defined, with the exception of "architectural feature." And *that* term is tautologically defined in a manner that subjects all visible private property to government "compatibility" review: an "architectural feature" is identified in CMC Section 3116.011 as "the architectural treatment and general arrangement of such portion of: (1) [t]he exterior of a property as is designed to be exposed to public view."

Applying these standards, on or about December 27, 2018, the City of Columbus Historic Resources Commission ("HRC") denied Mr. Stevens' appeal requesting retention of his garden. Doc. 1-5, PageID 49-51. Denying Mr. Stevens' right to landscape his front yard, the HRC reasoned that Mr. Stevens' grass, mud, and dirt is an "architectural feature," - - which cannot be altered unless the HRC finds the alteration to be "compatible" with the five metrics described above - - and Plaintiffs' garden failed this these requirements. In support of this finding, HRC "Commissioners" explained that Mr. Stevens' garden was "not in character with the neighborhood or the house" because it "was too suburban." *Id.*[3]

III. Law and Analysis

In determining whether to grant the present motion for issuance of a preliminary injunction, the Court is to consider four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether the issuance of a temporary restraining order or preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of a temporary restraining order or preliminary injunction. *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997). These factors are to be *balanced* against one another and should not be considered prerequisites to the granting of a temporary restraining order or preliminary injunction. *See United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 347 (6th Cir. 1998). This balance of interests weighs strongly in favor of the Plaintiffs and the granting of the present motion, because Plaintiffs are likely to prevail on the merits and face the irreparable harm of criminal prosecution and extensive fines.

A. Plaintiffs are likely to prevail on the merits of their Due Process claims.

The City's Landscaping Compatibility Mandate, enforced by untrained and capricious nearby property owners who volunteer, is unconstitutional both on its face and as-applied to Plaintiffs for four reasons: (1) it is impermissibly vague; (2) it impermissibly delegates these vague standards for capricious enforcement; and (3)

[3] Subsequently, the City's Board of Commission Appeals, also comprised of untrained volunteers, announced, without findings or conclusions, that it would simply defer to the factual and legal findings of the HRC as a matter of course, and the special municipal court division into which the City channels appeals of these matters determined that it lacked the authority to determine Mr. Stevens' issues. See Plaintiffs' Verified Complaint, ¶ 45-53.

it shifts the burden to homeowners to prove to these capricious actors that their landscaping is "appropriate" and "compatible"; and (4) it is substantively arbitrary to require government approval of landscaping as appropriate or compatible.

The Due Process Clause of the Fourteenth Amendment provides that "no State shall ... deprive any person of life, liberty, or property without due process of law." The Clause "was intended to prevent government from abusing its power, or employing it as an instrument of oppression." *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (internal citations and quotations omitted). "No clause in our nation's Constitution has as ancient a pedigree as the guarantee," and "[s]ince the Fifth Amendment's ratification, one theme above all others has dominated the Supreme Court's interpretation of the Due Process Clause: fairness." *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 821 F.3d 19, 31 (D.C. Cir. 2016), citing *Snyder v. Com. of Mass.*, 291 U.S. 97, 116, (1934) (Cardozo, J.) ("Due process of law requires that the proceedings shall be fair . . . with reference to particular conditions or particular results.").

Unquestionably, these Due Process guarantees protect liberty and property interests such as the right to landscape: the Supreme Court has squarely rejected any notion that "basic and familiar uses of property," are a "government benefit." *Horne v. Dept. of Agriculture*, 135 S.Ct. 2419, at 2430 (2015). Rather, "the *right* to build on one's own property . . . cannot remotely be described as a 'government benefit.'" *Id.*

In evaluating the merits of Plaintiffs' claims, this Court must remain mindful that while federal guarantees suffice to determine this matter, the Ohio Constitution is more protective and may be applied without adherence or deference to federal constitutional precedent.[4] This is particularly true within the context of private property rights: "Ohio has always considered the right of property to be a *fundamental right*. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio

[4] The United States Constitution provides a floor, not a ceiling, for individual rights enjoyed by state citizens. *Arnold v. Cleveland*, 67 Ohio St.3d 35 (1993), citing, *e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982) (" * * * [A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."); *California v. Greenwood*, 486 U.S. 35, 43 (1988) ("Individual States may surely construe their own constitutions as imposing more stringent constraints . . .").

Constitution and must be trod upon lightly, no matter how great the weight of other forces." *Norwood v. Horney*, 110 Ohio St.3d 353, at 361-62 (2006) (internal citations omitted). And these "venerable rights associated with property" are not confined to the mere ownership of property: "[t]he rights related to property, i.e., to *acquire, use, enjoy,* and dispose of property, are among the most revered in our law and traditions." *Id.* In sum, "the free use of property is guaranteed by Section 19, Article I of the Ohio Constitution." *State v. Cline*, 125 N.E.2d 222, 69 Ohio Law Abs. 305. More specifically, homeowners "have a constitutionally protected property interest" in freedom "from unreasonable and arbitrary interference from the government." *Mariemont Apartment Association v. Village of Mariemont,* 2007-Ohio-173, at ¶40-42. To these ends, a District Court in the Northern District recently explained that "the Ohio Constitution is more protective of private property rights than its federal counterpart, the Ohio Supreme Court insists upon a more stringent Equal Protection analysis." *Yoder v. City of Bowling Green*, Ohio, No. 3:17 CV 2321, 2019 WL 415254, at p. 4-5 (N.D. Ohio Feb. 1, 2019), citing *Norwood* and Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 198 (2018), at 16 ("Nothing compels the state courts to imitate federal interpretations of the liberty and property guarantees in the U.S. Constitution when it comes to the rights guarantees in their own constitutions").

Pursuant to these understandings, Plaintiffs are likely to prevail on the merits of one or more of their claims: the City controls their private property with vague standards, the enforcement of which are delegated to untrained private individuals. Those individuals necessarily wield that power arbitrarily, such that planting grass, shrubs, or vegetables unexpectedly requires government approval and is often disallowed. Even if vagueness concerns were held aside, the exertion of a command and control policy by which each and every exterior alteration of one's private yard must be approved by a government commission is a bridge too far for the Ohio Constitution's substantive guarantees.

i. The City's Landscaping Compatibility Mandate is impermissibly vague.

Due Process claims regarding vagueness, delegation, and burden-shifting often overlap, and are mutually reinforcing. *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019)(Gorsuch, concurring)("A statute

that does not contain 'sufficiently definite and precise' standards 'to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed at once presents a delegation problem and provides impermissibly vague guidance to affected citizens"); *Biener v. Calio,* 361 F.3d 206, 215-17 (3rd Cir. 2004)("[w]ithout sufficient limitations, the delegation of authority can be deemed void for vagueness as allowing *ad hoc* decisions or giving unfettered discretion to the private party"); *Norwood v. Horney,* 2006-Ohio-3799, at ¶ 83, citing *Grayned v. Rockford*, 408 U.S. 104, 108–109 (1972)("If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to police [officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application"); *Johnson v. Morales*, 946 F.3d 911, 916–40 (6th Cir. 2020)("the generality of a standard based on 'the interest of the public health, morals, safety, or welfare' make it plausible that placing the burden of persuasion on Johnson impermissibly heightened 'the possibility of mistaken factfinding' and created the danger that her valid property interest in her business was illegitimately jeopardized").

In accordance with these axions, two courts within this District have recently found land use regulation that delegate broad and vague powers to citizen commissions to impermissibly violate homeowners' rights to Due Process. See *Rice v. Vill. of Johnstown, Ohio,* No. 2:19-CV-504, 2020 WL 588127, at 4-8 (S.D. Ohio Feb. 5, 2020)(insufficient standards over use of private property delegated to Planning and Zoning commission appointed by City Council); *Ctr. for Powell Crossing, LLC v. City of Powell, Ohio*, No. 2:14-CV-2207, 2016 WL 1165355, at 24-25 (S.D. Ohio Mar. 25, 2016)(insufficient standards over use of private property delegated to commission appointed by City Charter).

Consequently, *even if* the City's standards could survive vagueness scrutiny when *not* delegated, even if the City's delegation could survive with *more precise* standards, or even if the City's delegation of vague standards could survive *without* presumptions and burdens against the homeowner's private rights, the combination of the three is fatal in this instance.

a. The requirements that landscaping on private property be "compatible" and "appropriate" are inherently vague.

The Landscaping Compatibility Mandate is impermissibly vague because it attaches severe civil and criminal penalties to two entirely subjective proscriptions that apply once the City determines that the "alteration" of a "distinctive architectural feature" is at issue: a homeowner may not make lawn, garden, or other minor landscaping changes unless these alterations are (1) "compatible to each other and to the subject building or structure as well as to adjacent contributing properties, open spaces and the overall environment;" and/or (2) "appropriate." See, respectively, CC 3116.04; CC 3116.05; CC 3116.09(B)(1); CC 3116.10(A); CC 3116.11; CC Section 3116.13(A). The meaning of these broad standards is indeterminate.

"Under the tenets of due process, an ordinance is unconstitutionally vague under a void-for-vagueness analysis when it does not clearly define what acts are prohibited under it." *Norwood v. Horney,* 110 Ohio St.3d 353, 2006-Ohio-3799. "Due process demands that the state provide meaningful standards in its laws. A law must give fair notice to the citizenry of the conduct proscribed and the penalty to be affixed if that law is breached." *Id.,* at ¶81. And "implicitly, the law must also convey an understandable standard *capable of enforcement in the courts,* for judicial review is a necessary constitutional counterpoise to the broad legislative prerogative to promulgate codes of conduct." *Id.*

Further, there is no basis for applying less scrutiny simply because the challenged enactment may be a land use regulation rather than a traditional felony-level offense:

> "All laws" "ought to be expressed in such a manner as that its meaning may be unambiguous, and in such language as may be readily understood by those upon whom it is to operate." * * * [I]n the criminal context this Court has generally insisted that the law must afford "ordinary people ... fair notice of the conduct it punishes." And I cannot see how the Due Process Clause might often require any less than that in the civil context either.

Sessions v. Dimaya, 138 S. Ct. 1204, 1226–31 (2018)(Gorsuch, concurring, and holding "How . . . is anyone supposed to locate 'the ordinary case' and say whether it includes a substantial risk of physical force? The truth is, no one knows. The law's silence leaves judges to their intuitions and the people to their fate. In my judgment, the Constitution demands more.").

The Supreme Court's reasoning in *Dimaya* echoes Ohio's already-established stringent application of vagueness scrutiny when Ohioans' private property rights are at stake: "Though the degree of review for vagueness is not described with specificity, if the enactment 'threatens to inhibit the exercise of constitutionally protected rights,' (such as property rights in Ohio), a more stringent vagueness test is to be applied." *Yoder v. City of Bowling Green, Ohio*, No. 3:17 CV 2321, 2019 WL 415254, at 4-5 (N.D. Ohio Feb. 1, 2019), citing *Norwood,* 110 Ohio St.3d at. 379, and *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). In *Norwood,* the Ohio Supreme Court determined the term "deteriorating" to be impermissibly vague. The Court emphasized that "the term appears in the Norwood Code but is not defined," that "it offers so little guidance in application that it is almost barren of any practical meaning," and that the standard invited speculation. *Id.,* at ¶95, 97. The Court thus concluded that "[i]n essence, 'deteriorating area' is a standardless standard. Rather than affording fair notice to the property owner, the Norwood Code merely recites a host of subjective factors that invite ad hoc and selective enforcement." *Id.,* at ¶ 99.

Applying such reasoning, courts within this district have concluded that subjecting property rights to determinations of factors such as suitability, adequacy, compatibility, and consistency are "vague and not discernable standards to ensure due process." *Rice,* supra. at 7-8 ("the Johnstown Ordinance does not prove enough guidance" to serve as "standards to guide the private parties' discretion"), citing *Powell,* supra., at 678 (assailing vague considerations such as "natural, cultural, and visual elements" to be insufficiently "discernable standards" to limit administrative or private parties' discretion).

Likewise, in *Viviano v. Sandusky,* the court invalidated as vague a City of Sandusky prohibition on anything other than a "one-family dwellings" that defined "dwelling as a "building designed or occupied exclusively for non-transient residential use (including one-family, two-family, and multifamily buildings)." 2013-Ohio-2813, at ¶ 4. In holding this definition to be unconstitutionally vague the court explained as follows:

> The ordinance must preclude arbitrary, capricious, or discriminatory enforcement. An ordinance cannot leave what constitutes a violation open to interpretation by relying on the enforcing body to use "common sense." Such an assessment is "exactly the kind of unfettered discretion that the vagueness doctrine prohibits." The concern here centers on the term "non-transient" as used in the

> Zoning Ordinances and notices. It is undefined within the ordinance and does not lend itself to a plain and unambiguous meaning. Absent a time scale, the term is rendered entirely subjective and incapable of providing guidance to either the citizen or the enforcing party.

Viviano, supra., at ¶ 18-20. Similarly, in *City of Toledo v. Ross,* the appellate court invalidated as vague the City of Toledo's definition of "group rental house," explaining as follows:

> Clearly, terms that require such subjective interpretation to determine their meaning are vague. It would be impossible for a person of common intelligence to be able to determine what conduct is prohibited, insofar as every person's interpretation of the meaning of "transient, limited, or seasonal" could vary so greatly. Moreover, because of the vague terms used, TMC 1103.64 allows for arbitrary and discriminatory application and enforcement of TMC 1167.01(28). Accordingly, we find that the language in TMC 1103.64, specifically, "common living arrangement or basis for the establishment of the housekeeping unit is of transient, limited or seasonal duration," does not provide fair notice to those who must obey the standards of conduct specified therein and does not provide constitutionally adequate guidelines for those charged with enforcing it.

City of Toledo v. Ross, 2001 WL 1001257, at 4–5 (2001)(emphasis added). And in a different context, in *State v. Bielski,* an Ohio appellate court invalidated on vagueness grounds a mandate that "[a]ll exterior property and premises, and the interior of every structure, shall be free from any accumulation of rubbish or garbage." 2013-Ohio-5771, ¶¶ 13-20. In support of this conclusion, the court emphasized the need for laws with "clear definition of terms," "clear guidance," and "explicit standards for those who apply them." *Id.* And the Court reasoned that "almost none of the key words . . . were particularly clear," citing "no indication of what constitutes rubbish or garbage" or "accumulation." *Id.*, at ¶¶ 19-20, 24 ("[w]hen people of ordinary intelligence are unable to understand exactly what acts are prohibited by the rubbish ordinance, . . . the ordinance is unconstitutionally vague, and is therefore unenforceable . . . this provision is arbitrarily enforced and is left to the complete discretion of the official in charge of evaluating the alleged violation, a violation with no clearly enumerated standards. In this case, Appellant testified that he was not aware that there was rubbish on his rental property").

Further, many courts have concluded that conditioning land uses on subjective parameters such as "compatibility" are impermissibly vague and vest enforcement agents with unbridled discretion. *Int'l Outdoor, Inc. v. City of Troy,* 361 F. Supp. 3d 713, 718 (E.D. Mich. 2019), citing *Desert Outdoor Advertising v. Moreno Valley,* 103 F.3d 814, 817-19 (9th Cir. 1996) (standard for permit requiring "such a display will not have a

harmful effect upon the health or welfare of the general public and will not be detrimental to the welfare of the general public and will not be detrimental to the aesthetic quality of the community or the surrounding land uses" provided no limits on city authority); *Lamar Advertising Co. v. City of Douglasville, Georgia*, 254 F.Supp.2d 1321, 1329 (N.D. Ga. 2003) (variance criteria considering "the value of the surrounding property, the environment of the surrounding property, the public good, and the purpose of the zoning ordinance" provided "unbridled discretion" to city); *CBS Outdoor, Inc. v. City of Kentwood*, 2010 WL 3942842, at 9 (W.D. Mich. Oct. 6, 2010) (permit scheme considering whether feature is aesthetically compatible with its surroundings" provided "unfettered discretion"); see also *Lamar Adver. Co. v. City of Wixom*, No.2002–60166 (E.D.Mich. Jan. 31, 2003)(invalidating provisions requiring the zoning board to determine "compatibility with adjacent uses of land, compatibility with the surrounding natural environment, and appropriate capacity of public services and facilities affected by the billboard's land use").

Finally, some state courts have employed state constitutions to invalidate vague delegations to questionably-public commissions to preserve "buildings of historical interest":

> There has been called to our attention no case in Texas or elsewhere in which the powers of a state board are more vaguely expressed or less predictable than those permitted by the phrase in question. The word "buildings" comprehends all structures; "historical" includes all of the past; "interest" ranges broadly from public to private concerns and embraces fads and ephemeral fascinations. All unrestorable structures ordinarily hold some nostalgic tug upon someone and may all qualify as "buildings . . . of historical . . . interest."

Texas Antiquities Comm. v. Dallas Cty. Cmty. Coll. Dist., 554 S.W.2d 924, 927-928 (Tex. 1977)("statutory delegations of power may not be accomplished by language so broad and vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application . . . We have, in this case, no standard or criteria either by statute or rule which affords safeguards for the affected parties").

Like the "ordinary case" found to be too vague in *Dimaya*, the "deteriorating area" in *Norwood,* the "accumulation of rubbish" in *Bielski,* the "buildings of historic interest" in *Texas Antiquities Comm*, the "transience" in *Viviano* and *Ross*, and the "aesthetic compatibility" in several of the foregoing cases, the City's mandate that one's yard be sufficiently "compatible" and "appropriate" to multiple other points of reference invites subjective, speculative, and arbitrary denial of constitutionally-protected rights.

First, "compatibility" and "appropriateness" are inherently subjective inquiries, particularly obscured when one is to assess whether any one of a home's characteristics is "compatible" with or "appropriate" to numerous differing features, ranging from the home itself to other homes to "the overall environment." Such standards invite the HRC's collection of unaccountable nearby private property owners to lord over the private property rights of their neighbors however they see fit. As such, these standards fails to supply enforcement authorities with sufficient clarity as to how to consistently enforce the City's regulations without arbitrariness.

Second, the City's code fails to provide definitions governing the meaning of "compatible" or "appropriate" in this context or any other. Meanwhile, the City maintains "guidelines." But they say nothing about grass or the slope or grade of a lawn, despite specifically mentioning other landscaping features such as historic trees. *Guidelines*, p. 83. Even more blurry, those guidelines speak *approvingly* of retaining walls like the one Mr. Stevens added to his yard. *Id*., at 5, 83.

Third, "compatibility" and "appropriateness" are especially suspect when a homeowner, prior to doing yard work, looks up and down his street and many of the neighborhood's observable features are what the City refers to as "pre-existing nonhistoric conditions" rather than *actually* historic. *Guidelines*, p. 4 ("Many nonhistoric or nonoriginal features of buildings and their sites exist within the City's historic districts"). Indeed, many of the homes within the Bryden Historic District do in fact maintain front yard terracing, gardens, and/or retaining walls rather than grass, mud, or debris. Doc. 1-6, PageID 89 ("There are 35 retaining walls up and down Bryden Road."); see also Doc. 1-7. As the HRC has explained, "something has been grandfathered in so that doesn't count . . . we just don't have the ability to address anything that happened prior to Commission." PageID 86. But while the City apparently judges "compatibility" based upon what surrounding properties look like, the City maintains *no list or process* for differentiation between which features in a neighborhood are "historic" and what is *not* historic but "preexisting nonhistoric conditions." See Doc. 1, PageID 7-8 (BCA Member remarking "we have no way of knowing because nobody in their right mind keeps a record of this stuff").

As one HRC member explained to Mr. Stevens, Bryden Road Historic District was designated "in the 80s," so "if someone put a retaining wall in in 1978 and you're looking at it with frustration, . . . it's because they predated the historic district." Doc. 1-6, PageID 113. So "compatibility" and "appropriateness" *cannot* be determined by currently-existing features in the neighborhood. Thus, not only is there insufficient *actual* notice as to whether one's landscaping is "compatible," but there is also no "constructive notice" or "inquiry notice."

Fourth, absent standards, HRC members and the City make up their own. According to some advising the HRC, landscaping is not "compatible" or "appropriate" if it is not consistent with the requirements for *National Parks*: during Mr. Stevens' hearing, the City official on duty advised the HRC's private citizen members to rely on "The National Parks Service Guidelines for Preserving Cultural Landscapes," even though this is a downtown urban neighborhood, when assessing landscaping alterations. Doc. 1-6, PageID 71 (City's staff advisor to HRC, citing "Guidance on Identifying Retaining and Preserving Character").

To others, landscaping is insufficiently "compatible" when it looks "too suburban" to the Doc. 1-6, 78-79 ("I have a couple issues with it . . . It's really not at all in character of either the neighborhood and/or the house. It's a very 2018 suburban Home & Garden show terracing").

Yet another view is that landscaping is not "compatible" or "appropriate" where, after the HRC members conduct a short séance to channel the subjective intentions of those who constructed the home 150 years ago and left no notes evidencing such intentions, they determine that the builder would not have planted the grass in the same location. Doc. 1-6, 78-79 ("I can't personally see that the terracing would ever have been put in by the architect that designed that house").

A slightly different view is that a homeowner's landscaping is not "compatible" or "appropriate" if it does not look like how the HRC members imagine - - without any evidence - - that the neighborhood looked when it was built. Doc. 1-6, PageID 84 (HRC Member positing "I think we have to go back to what Bryden Road was about when it was built. It was about a lot of things, but one of the things it was about was that

continuous view down the street in a park-like setting where you had a continuous green laws which differed greatly from the era before that . . . you had this continuous front, connected green lawn").

And a completely different view is that landscaping is not "compatible" or "appropriate" if it fails to look enough like the neighbors' landscaping. PageID 88 (HRC explaining "We have a pretty good sense here of what your neighboring properties are like. And then we have a photo of what you - - what has been done, and it's not similar or compatible with what is existing on either side. . . . so that deems it inappropriate"); PageID 89 (HRC Member seeking "a continuation of the character of your house next door"); PageID 90 ("The issue is you put in landscaping that is very, very different from the character of Bryden Road . . . the landscaping you put in is not at all compatible with the remainder of Bryden Road"); PageID 107 ("[Approval] depends on the location, the neighborhood, the character of the neighborhood. In particular historical neighborhoods where they're not part of the character of the neighborhood, where they don't predominate, then we would not, of course……It has to do with the context of the neighborhood"); PageID 87 ("The [purpose of this] commission is to retain the character of the neighborhood"); *Id.* (". . . even though it's been there for 50 years, it's not really in the historical character of the neighborhood when the neighborhood was created. It's really not about what the neighborhood *is*"). Thus, apparently as with life under an aggressive homeowners' association (but without the voluntariness or the clearly-written rules), landscaping is not "compatible" if it is simply *different* from the current landscaping of other houses on the homeowner's street.[5]

Fifth, Mr. Stevens is a person of ordinary intelligence who reviewed the City's regulations prior to improving his yard, and nevertheless remained entirely unaware that (1) the City could insist that he either seek a permit or prove "compatibility" or "appropriateness" prior to doing some minor landscaping, gardening, and yard maintenance (he could not have known the City would view his grass as a "distinctive architectural feature"); or (2) his landscaping could be misconstrued as "incompatible." Doc. 1-6, PageID 72. ("I've read the whole 125-page architectural guidelines multiple times . . . but I didn't see any specific prohibition about retaining walls. I wasn't making any changes to the building structure itself. I didn't need a permit for this").

[5] This case is particularly illustrative of the vagueness of "the house next door" benchmark, since the landscaping near Plaintiffs appears fairly similar. See photographs of 1728-1740 Byrden Road, at Doc. 1-7, PageID 147.

Indeed, Mr. Stevens was familiar with the HRC and had already sought and obtained several other permits for his home. Doc. 1-6 (HRC Members commenting that "He's been here on multiple occasions for multiple projects. He's done a great job with work on the house").

Sixth, the City's ambiguities leave judges and juries to *guess* as to whether homeowners should be convicted and criminally punished for altering a "distinctive architectural feature" and creating "incompatible landscaping" or "inappropriate landscaping." How could a court draft jury instructions that correctly charge the jury with determining whether to criminally convict Mr. Stevens or others on the bases of "compatible" gardening or landscaping? Judging "compatibility" and "appropriateness" impermissibly invite "subjective interpretation" to the point that different judges, juries, and enforcement agents could reach different results regarding guilt and innocence. And for the same reason, no judicial oversight or review of HRC findings is possible.

Seventh, the City's continuous reference to its land use regulations as "historical" regulations materially misleads homeowners like Mr. Stevens:[6] the City regulates features of private property without any evidence that those features are historical, and without regard to whether the manner of enforcement *actually* preserves history, and instead emphasizes what HRC members deem to be "appropriate to" and "compatible with" the *current* environment of the neighborhood. For instance, "contemporary design for alteration of a property shall not be discouraged." CC 3116.11(9). Blurring matters even more, "changes which have taken place over the course of time are evidence of the property's history and environment. These changes may have acquired significance in their own right, and if so, this significance shall be respected." CC 3116.11(4). All of this is in addition to the HRC Members' *unwritten* "period of significance" test, which posits that "something that was original to the neighborhood's period of significance" is "appropriate" and "compatible" and therefore must be preserved as is, even if the HRC does not know the "period of significance for Bryden Road." PageID 112-113; see also 114-115 (HRC Member

[6] The State of Ohio defines "historic properties" as sites, structures, buildings, places, objects, and districts that meet the criteria of the state registry of archaeological landmarks, the definition of archaeological sites as written in section 149.52 of the Revised Code, the state registry of historic landmarks or the national register and which possess archaeological data." See OAC 149-1-02(A)(4).

explaining "Where it starts tends to be where there's some integrity of the historical starting point that somebody can point to something and say this was there in 1820. And then the period of significance on the other side runs up to where it – where they feel that it's appropriate . . . I do not know off the top of my head the period of significance for Bryden Road . . . I would suggest you find an attorney to find that specific point"). Moreover, "inappropriate" landscaping is permitted when the HRC's private actors conclude that it is warranted by "unusual and compelling circumstances." CC 3116.09(2); 3116.23). As such, apparently new modern landscaping and gardening is "appropriate and compatible," as is gardening and landscaping developed over the course of time, gardening and landscaping within the "period of significance," which consists of years the HRC's members do not know, and gardening and landscaping that is simply exempted by the HRC's private actors.

Ultimately, a homeowner may be prosecuted or fined for "incompatible" landscaping even though his or her garden appears *similar* to nearby landscaping, if HRC members subjectively *disfavor* that landscaping; conversely a homeowner may be prosecuted or fined if his landscaping is too *different* from the landscaping that HRC members subjectively *favor*. And as this case demonstrates, even a well-educated homeowner with good faith and experience with the City's regulations can become ensnared in this vagueness. To understand one's dominion over his own property, a Columbus homeowner must, as the HRC itself advised Mr. Stevens, "find an attorney,' even as the Mandate imposes significant criminal and civil liability. In sum, the City's Compatibility Mandate consist of standardless standards that fail to supply homeowners with sufficient notice as to when governmental permission is required or when an exterior alteration should be approved.

Thus, the CC 3116.11(2) prohibition on "alteration" of any "distinctive architectural feature" is impermissibly vague, both on their face, and as applied here, as are the City's "compatibility" and "appropriates" standards. *Consequently*, Plaintiffs are likely to succeed on the merits of their vagueness claim,

and the City must be enjoined from enforcing noncompliance with these standards to prosecute, imprison, or fine Plaintiffs or others, on account of their landscaping.[7]

b. The Landscape Compatibility Mandate's vagueness is magnified by the City's delegation of unfettered regulatory power to determine "compatibility" to unremovable and capricious non-governmental actors.

The Due Process Clause also limits "the manner and extent" to which authority may be delegated to private parties. See *Biener v. Calio*, 361 F.3d 206, 216 (3d Cir.2004). "A delegation of legislative authority offends due process when it is made to an unaccountable group of individuals and is unaccompanied by 'discernible standards,' such that the delegatee's action cannot be 'measured for its fidelity to the legislative will.'" *Ctr. for Powell Crossing, LLC v. City of Powell, Ohio*, 173 F. Supp. 3d. 639, 675-79 (S.D. Ohio 2016). The Supreme Court articulated this facet of due process law in *Eubank v. Richmond,* 226 U.S. 137 (1912) and *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), wherein the Court condemned "the standardless delegation of power to a limited group of property owners." *Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668, 677–78 (1976). See also *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Gen. Elec. Co. v. New York State Dep't of Labor,* 936 F.2d 1448, 1454-57 (2d Cir. 1991); *cf. Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (Fifth Amendment due process clause limits ability of federal government to delegate to coal producers the power to fix wages and hours).

In *Roberge,* a Seattle zoning ordinance allowed a home for the aged poor to be built in a particular area, but only "when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building." 278 U.S. at 118. The Supreme Court struck down the ordinance:

> The [ordinance] purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners . . . They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. [citation omitted]. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment.

[7] The law and analysis in this Section applies with full force to the City's prohibition on altering anything it declares, *ad hoc* and without evidence, to be a "distinctive architectural feature," or not "appropriate" when applied to landscaping.

Id. at 121–22. And in *Eubank,* the Supreme Court struck down an ordinance that required a city's building committee to establish set-back lines for a given piece of property whenever requested to do so by two-thirds of the adjacent property owners. The Court ruled that this ordinance violated due process, employing reasoning that readily applies to this case:

> One set of owners determine not only the extent of use but the kind of use which another set of owners may make of their property.... The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the proper rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest and even capriciously.

226 U.S. at 143–44. "*Eubank* and *Roberge* 'stand for the proposition that a legislative body may not constitutionally delegate to private parties the power to determine the nature of rights to property in which other individuals have a property interest, without supplying standards to guide the private parties' discretion.'" *Ctr. for Powell Crossing, LLC,* supra., and *Rice v. Vill. of Johnstown, Ohio,* No. 2:19-CV-504, 2020 WL 588127, at 4-8 (S.D. Ohio Feb. 5, 2020). Otherwise, "administrative decision-making [will be] made potentially subservient to selfish or arbitrary motivations or the whims of local taste." *Geo-Tech Reclamation Indus., Inc. v. Hamrick,* 886 F.2d 662, 664–67 (4th Cir. 1989), citing *Eubank* and *Roberge*; see also Volokh, *The New Private–Regulation Skepticism: Due Process, Non–Delegation, and Antitrust Challenges*, 37 Harv. J. L. & Pub. Pol'y 931, 951 (2014).

This District most recently applied this "private non-delegation doctrine" four years ago in *Powell Crossing* and just one month ago in *Rice.* In Powell, Judge Graham squarely addressed the Due Process Clause's prohibition on delegation of power to private parties, affirming that property rights of others could not be determined by an unaccountable board of private citizens. *Ctr. for Powell Crossing, LLC v. City of Powell, Ohio*, No. 2:14-CV-2207, 2016 WL 1165355, at 24-25 (S.D. Ohio Mar. 25, 2016)(concluding that "the Charter Amendment's broad delegation of power to the Commission, comprised of five private citizens, is unconstitutional"). In so holding, the court observing that "a delegation of legislative authority offends due process when it is made to an unaccountable group of individuals and is unaccompanied by 'discernible standards,'" that "the delegation of authority to the Comprehensive Plan Commission is unaccompanied by

discernible standards," and that "[s]uch a standardless delegation of legislative power to five private citizens, each of whom directly represent the interests of area homeowners' associations, plainly violates due process of law." *Ctr. for Powell Crossing, LLC,* supra. Similarly in *Rice,* the Court concluded that the Village of Johnstown's Zoning Ordinance "does not provide enough guidance" to meet the requirement of "standards to guide the private parties' discretion" where a Planning and Zonings Commission of "five electors" appointed by council were delegated power to apply control the property of others by applying lengthy but vague standards. *Rice,* at 1-2, 7-8.

Likewise here, as chronicled above, untrained commission member who are otherwise non-governmental and also neighboring property owners are impermissibly empowered to exercise power over the nature and use of others' properties, determining what constitutes a "distinctive architectural feature" that may not be altered and what constitutes "compatible landscaping."

First, as in *Powell* and *Rice,* the ordinances here delegate application of these vague standards to volunteering private individuals who are nearby property owners. See *Ctr. for Powell Crossing, LLC,* supra. ("The Amendment requires that a Comprehensive Plan Commission be organized and have as its members five presidents of certain Powell-area homeowners associations"); *Rice,* supra. (characterizing volunteering planning and zoning commission members appointed by council as "purely private citizens"). Here, the City's code delegates the power to determine which gardens are "compatible" not to politically accountable governmental actors, but to those who "at a minimum either own, rent or have a business in a property listed on the Columbus Register of Historic Properties or in a designated historic district." CMC 3117.02. That "membership may include, but shall not be limited to, architects, contractors, carpenters, engineers, archeologists, architectural or public historians, developers, business owners, lawyers or bankers" even further invites bias, partiality, and caprice. *Id.* Problematically, the Code makes no effort to identify and eliminate partiality, bias, or conflicts of interest, and maintains no standards for removal or recusal of capricious members. See *Ass'n of Am. Railroads v. U.S. Dep't of Transp,* No. 12-5204, 2016 WL 1720357, at 1-17 (D.C. Cir. Apr. 29, 2016); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

Second, the HRC members consistently refer to the very type of criteria, such as "character," "identity," "suitability," "adequacy," and "compatibilith" found to be impermissibly standardless in *Ctr. for Powell Crossing, LLC* and *Rice.* They express concerns over "character" and enforce unwritten personal predilections against "really geometric terracing," "black mulch," "plantings," and front yards that are "very manicured." Doc. 1-6, PageID 113-116. Meanwhile the they enforce unwritten subjective preferences for a "green" and "slopey feel" to the yard and its landscaping. PageID 83; see also PageID 64(expressing a desire for a "continuous green ribbon that ran the entire length of the street"); PageID 89 (desiring that "lawn" be "the dominant character of Bryden Road"); PageID 82 (preferring an "ongoing continuous lawn of Bryden Road); PageID 92-93 ("[we are trying to create] this park-like feeling. . . beautiful sloping lawn . . .").

These subjective preferences ultimately metastasize into denial of private property rights where untrained neighbors view their neighbor's new landscaping as "inappropriate." Doc 1-6, PageID 85 ("the appropriateness of this neighborhood is that sloping continuous lawn"); PageId 116 ("the use of all retaining wall and all the mulch on your design itself is inappropriate"); *Id.* ("We're not attorneys, so the point is we're looking at whether or not the wall is appropriate."); PageID 82 ("It would seem to be appropriate to get some lawn back into this front yard.") The result is a vague, arbitrary, and capricious regulation of the private property rights of some homeowners by others.

Third, with no meaningful opportunity for judicial review and standards that no court *could* review, the ruling of this commission of unaccountable nearby property owners is, in operation, final.[8] Thus, Columbus homeowners are bound by private nearby property owners' opinions as to what looks "appropriate" to them.

Finally, here again, the Ohio Constitution requires stricter scrutiny when power over the free use of private property is delegated to private actors. Due process demands that "[i]n such cases [where power is delegated to a private actor], the courts must ensure that the grant of authority is construed strictly and that any

[8] While an aggrieved homeowner may appeal to a Board of Commission Appeals, that Commission is similarly staffed with unpaid, untrained, and unmoored private architects who cannot be removed. And that Commission defers to all HRC factual and legal findings. Doc. 1, PageID 7-8. From there, the City's Code provides for an appeal to a makeshift wing of the City's own municipal court, but that court lacks jurisdiction to permit discovery or address constitutional concerns.

doubt over the propriety of the taking is resolved in favor of the property owner." *Norwood*, supra, at ¶ 72, quoting *Pontiac Improvement Co.,* 104 Ohio St. at 453-454.[9]

The City's delegation of broad power to impose criminal penalties on the basis of "inappropriate or incompatible landscaping" fails serious constitutional scrutiny, whether the state or federal constitution is applied, meaning that Plaintiffs are likely to prevail on the merits of their Due Process claim.

c. The Landscaping Compatibility Mandate's vagueness is multiplied by forcing homeowners *to prove compliance with these vague standards* and overcome presumption *against* their property rights.

Stricter scrutiny of the City's vague standards are warranted because a homeowner, once having engaged in the "crime" of landscaping or gardening, is presumed liable for prosecution and fines *unless* able to carry the burden of proving that his landscaping is (1) not a modification of a "distinctive architectural feature;" and (2) sufficiently "appropriate" and "compatible." Meanwhile, there is no requirement that the City provide any evidence whatsoever to justify a conclusion that the landscaping is an affront to historic preservation or otherwise "incompatible." Forcing the homeowner to prove compliance with such vague standards stacks the deck against the constitutionally-guaranteed free use of property.

"The point of procedural due process is to 'require procedural fairness and to prohibit the state from conducting unfair or arbitrary proceedings." *Johnson v. Morales*, 946 F.3d 911, 916–40 (6th Cir. 2020), citing *Puckett v. Lexington-Fayette Urban Cty. Gov't*, 833 F.3d 590, 606 (6th Cir. 2016) (quoting *Garcia v. Fed. Nat'l Mortg. Ass'n*, 782 F.3d 736, 740-41 (6th Cir. 2015)). "These requirements are not satisfied simply because a hearing took place." *Moody v. Mich. Gaming Control Bd.*, 871 F.3d 420, 427 (6th Cir. 2017). Rather,

[9] Indeed, "state courts have been more willing to closely scrutinize unlawful delegations than federal courts." *Behm v. City of Cedar Rapids*, 922 N.W.2d 524, 571 (Iowa 2019); see also *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 468 (Tex. 1997) (noting that "while federal courts have generally been reluctant to use the nondelegation doctrine to invalidate laws, state courts have not been so chary, "observing that "state courts have frequently invalidated such provisions," and reasoning that "if the delegation at issue is to a private entity, we must craft our own criteria to judge its constitutionality"); citing *Sedlak v. Dick*, 256 Kan. 779, 887 P.2d 1119, 1134–35 (1995) (striking down statute allowing committee of union and business representatives to select Workers' Compensation Board members); *City of Chamberlain v. R.E. Lien, Inc.*, 521 N.W.2d 130, 132–133 (S.D.1994) (striking down statute requiring city to incorporate American Institute of Architects' standard form as part of municipal contracts); *Stewart v. Utah Public Serv. Comm'n*, 885 P.2d 759, 775–776 (Utah 1994) (striking down statute allowing public utility to veto rate regulation plan adopted by Public Service Commission).

courts are required to look to the "substance, not to bare form, to determine whether constitutional minimums have been honored." *Bell v. Burson*, 402 U.S. 535, 541 (1971).

"Burden-shifting can be a problem of constitutional dimension in the civil context." *Johnson v. Morales*, 946 F.3d 911, 916–40 (6th Cir. 2020). For instance, in *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958), the Court invalidated a California procedure under which *taxpayer*s had the burden of demonstrating that they were *not* individuals who advocated the overthrow of the government in order to qualify for tax exemptions. The Court was particularly concerned that the burden-shifting in *Speiser* led to situations where "the possibility of mistaken factfinding" created the danger that legitimate conduct would be penalized. 357 U.S. at 526, 78 S.Ct. 1332; see also *Western & A.R.R. v. Henderson*, 279 U.S. at 642 (1929)("[a] statute creating a presumption that is arbitrary, *or* that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment. *Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property*"); *Minski v. U.S.* 131 F.3d 614, 617 (6th Cir., 1942)("[t]he guaranty of the due process clause of the Fifth Amendment is, that a law shall not be unreasonable, arbitrary or capricious, and we think that the presumptive evidence clauses of the act here involved must fall before the constitutional inhibition"). A Sixth Circuit panel recently applied this principle in explaining that "a hearing in which the suspension is presumed to be warranted" and the property owner "bore the burden to prove the opposite" is one that "fails to provide the meaningful procedure mandated by due process":

> [In] requiring her to bear the burden of proving that her business was not a threat to the public health, morals, safety, or welfare, the ordinance created a situation where Johnson's vested property interest in her business license could be revoked without any proof, but reinstated only if Johnson proved that her business was not a danger to the health, morals, safety, or welfare, of the city; and that such a system unfairly jeopardized Johnson's property interest . .. "

Johnson, supra. (Here, the fact-laden nature of the inquiry and the generality of a standard based on 'the interest of the public health, morals, safety, or welfare' make it plausible that placing the burden of persuasion on Johnson impermissibly heightened 'the possibility of mistaken factfinding' and created the danger that her valid property interest in her business was illegitimately jeopardized"), citing *Ramsey v. Bd. of Educ. of Whitley Cty.*, 844 F.2d 1268, 1273 (6th Cir. 1988) and *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985).

Moreover, shifting of the burden is particularly impermissible in Ohio when property rights are at stake, much less when vague power to curtail those rights has been delegated: the Ohio Supreme Court has expressed that Due Process requires all inferences to be drawn in favor of *the Ohio landowner.* And in *Norwood v. Horney,* the Court left no doubt that drawing a presumption against property right is unconstitutional: "[G]iven our reaffirmation that the Ohio Constitution confers on the individual fundamental rights to property that may be violated only when a greater public need requires it, there are significant questions about the validity of the presumption in favor of the state . . .". *Norwood v. Horney*, 2006-Ohio-3799, at ¶ 72, 88, Ftnt 16 (adding "[w]e hold that when a court reviews an eminent-domain statute or regulation under the [Due Process Clause], the court shall use the heightened standard of review employed for a statute or regulation that implicates a First Amendment or other fundamental constitutional right"),[10] citing See *Grace v. Koch* (1998), 81 Ohio St.3d 577, syllabus (holding that elements of adverse possession must be proved by clear and convincing evidence); *Addington v. Texas* (1979), 441 U.S. 418, 424 (noting that the "clear and convincing evidence" standard of proof is often used in cases in which the "interests at stake * * * are deemed to be more substantial than mere loss of money" and "to protect particularly important individual interests in various civil cases"). And in cases of *delegated* power, Due Process demands that "[i]n such cases, the courts must ensure that the grant of authority is construed strictly and that any doubt over the propriety of the taking is resolved in favor of the property owner." *Norwood*, supra, at ¶ 72, quoting *Pontiac Improvement Co.*, 104 Ohio St. at 453-454; see also *Saunders v. Clark Cty. Zoning Dep't*, 66 Ohio St. 2d 259, 259–65 (1981)("Zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled. Therefore . . . restrictions on the use of real property by

[10] When a right rises to the level of an "individual fundamental right," triggering "a heightened standard of review," the burden cannot remain *on the citizen* to prove his entitlement to that right, particularly in the face of a private actor applying vague standards. For example, in the First Amendment cases alluded to by *Norwood*, the governmental actor bears the burden of establishing that the regulations meet the applicable standard. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Government must often prove that the restriction is narrowly tailored to serve a significant government interest, and that the statute does not burden more speech than necessary "by substantial evidence," while "[c]ontent-based regulations are presumptively invalid."

ordinance, resolution or statute must be strictly construed, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed").

Indeed, "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979).

But here, the City's enforcement agents issue citations presuming that homeowners' landscaping fails to preserve history and is "incompatible" and "inappropriate," thus immediately threatening to prosecute and fine homeowners who have made any exterior alteration to their homes *unless* that homeowner can appear at a hearing and carry the burden of securing concurrence that his or her new landscaping is "compatible." Indeed, pursuant to CC 3316.27(E), the Code Enforcement Officer's "notice" becomes a final "order," penalties and all, unless a homeowner "appeals" that conclusion and then proves compatibility and appropriateness of his or her gardening to a questionably-public commission of nearby homeowners.

Further, the City presumes *against* constitutionally-protected property rights elsewhere. CC 3116.06 requires the homeowner to "apply" to exercise these rights before exercising them. CC 3117.07 mandates that in addition to "applying," "certain supplemental materials regarding architectural compatibility shall be required." And CMC 3117.08 dictates that "for any application, the application bears the burden" to prove "compelling circumstances" in favor of why that homeowner should be free to garden or landscape his or her yard.

If the homeowner fails to carry these burdens, the enforcement agent's original citation is effective, and fines and criminal penalties are imposed. But see *Johnson*, supra (objecting that "at no point was the City required to justify that initial decision"). This, despite the vagueness of the standard with which the homeowner must prove compliance. Due to this deficiency, both independently and when compounded

alongside the City's vagueness and delegation problems, Plaintiffs are likely to succeed on the merits of their Due Process claim.

ii. The City's requirement of governmental approval of every exterior alteration of one's home as "appropriate" and "compatible" violates the Ohio Constitution's substantive guarantees.

Even if the City's vague delegations were held aside, subjecting every exterior alteration of a private home to government review and approval fails to narrowly and substantially advance the City's interest in historic preservation because it (1) requires review and approval of private property alterations *unrelated* to historical preservation; and (2) applies standards imposing, if anything clear, conformity with neighboring properties and subjective preferences rather than standards narrowly targeted toward historic preservation.

In Ohio, a regulation infringing upon private property rights must be "necessary" to *substantially* advance the state's interest and bear a *substantial* relationship to those interests, and cannot be "arbitrary" or "unduly oppressive":

> Before the police power can be exercised to limit an owner's control of private property, it must appear that the interests of the general public require its exercise and the means of restriction must not be unduly oppressive upon individuals. Further, the free use of property guaranteed by the Ohio Constitution can be invaded by an exercise of the police power only "when the restriction thereof bears a substantial relationship to the public health, morals and safety."

State ex rel. Pizza v. Rezcallah, 1998-Ohio-313, 84 Ohio St. 3d 116, 131–32 (emphasis added). Distillation of these governing precedents thus reveals that a regulation of property violates the Ohio Constitution's guarantees of Due Process and Equal Protection when it is "arbitrary," "unduly oppressive upon individuals," not "necessary for the public welfare," or fails to *substantially* advance a legitimate interest *through a substantial relationship to it*. See *Direct Plumbing Supply v. City of Dayton*, 138 Ohio St. 540 (1941); *Olds v. Klotz*, 131 Ohio St. 447, 451 (1936); *City of Cincinnati v. Correll*, 141 Ohio St. 535, 539 (1943). Pursuant to these standards, the Ohio Supreme Court recently applied exacting scrutiny to invalidate an Ottawa Hills zoning restriction, due to its "disparate treatment" of homeowners. *Boice v. Ottawa Hills*, 2013-Ohio-4769, ¶17-19 (observing that "there was disparate treatment of the residents in the village when it came to permitting houses to be built on lots smaller than 35,000 square feet," that the land use at issue involved a *de minimus* difference, and that other similarly situated houses were "grandfathered in."); see also *State v. Mole*, 2016-

Ohio-5124, ¶¶ 12-29 ("the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis' . . . classifications must have a reasonable basis and may not 'subject individuals to an arbitrary exercise of power").

Thus, pursuant to the Ohio Constitution, this Court must carefully scrutinize the City's arbitrary and disparate treatment of Plaintiffs' property rights. A court in the Northern District of Ohio recently articulated the stricter standard of review governing due process and equal protection challenges to land use regulation, made pursuant to the Ohio Constitution:

> First, under the Ohio Constitution, private property rights are "fundamental rights" to be "strongly protected". Although the *Norwood* court dealt with a takings claim, it described the "rights related to property, i.e., to acquire, use, enjoy, and dispose of property" as "among the most revered in our law and traditions." Further, Ohio courts apply a higher level of scrutiny to such claims regarding property rights, and homeowners who have acted without knowledge or intent enjoy greater protections. *** * *** the undersigned concludes that Ohio courts, interpreting the Ohio Constitution, apply something higher than rational basis review, but less than strict scrutiny to cases involving property rights.

Yoder v. City of Bowling Green, Ohio, No. 3:17 CV 2321, 2019 WL 415254, at 3–6 (N.D. Ohio Feb. 1, 2019)("[t]he dwelling limit is impermissibly arbitrary, oppressive, and untailored . . .Within the regulations, the City claims to be effectuating a governmental interest in limiting population density. * * * But the City's dwelling limit only focuses on the type of relationship between those living together in a home, and as such, is both over- and under-inclusive with respect to either of these interests").

The City claims that its Landscaping Compatibility Mandate exists "to preserve our city's historic buildings and neighborhoods;" and "to preserve the area's historic character." *Guidelines, p. 1.* Conceding, *arguendo*, that the City maintains a palatable government interest in preserving history, a mandate that private landscaping be "compatible" to neighboring homes and "the overall environment" or "appropriate" in the subjective viewpoints of nearby property owners, fails - - for multiple reasons - - to substantially advance this governmental interest in a sufficiently narrow and non-arbitrary manner (There is neither a substantial government interest in requiring that a homeowners' landscaping be compatible with that of his or her

neighbors, nor in requiring approval of landscaping/gardening prior to its occurrence, but the Court need not reach that issue to acknowledge that Mr. Stevens is likely to succeed on the merits of this claim).

First, the Landscaping Compatibility Mandate is over-inclusive with respect to any governmental interest in historic preservation: it requires governmental approval of *every* exterior alteration of one's home, irrespective of whether what is being altered has been proven to maintain any historical significance whatsoever.

Second, the Landscaping Compatibility Mandate is under-inclusive with respect to any governmental interest in historic preservation and concomitantly treats similarly-situated homeowners unequally: the City's Code and the HRC's own policies (written and unwritten) concede that the Mandate does not impose penalties on those homeowners whose private landscaping is "incompatible" or "inappropriate" so long as that landscaping is "grandfathered in" or otherwise exempt. See *Guidelines*, p. 4 ("Many nonhistoric or nonoriginal features of buildings and their sites exist within the City's historic districts"). Indeed, many of the homes within the Bryden Historic District do in fact maintain front yard terracing, gardens, and/or retaining walls rather than grass, mud, or debris. See Doc. 1-7. Meanwhile, the City maintains a myriad of other exemptions to the Mandate, such as when its members conclude that there is an "economic hardship" or are "unusual and compelling circumstances" for approving "inappropriate" landscaping. See, *inter alia*, CC 3116.08; 3116.09(2). Finally, the City selectively imposes these regulations only within certain neighborhoods rather than with respect to historical significance throughout the City. On this front, the Supreme Court has explained that "the very existence of the 'escape hatch' . . . only heightens the irrationality of the restrictive definition." *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 512 (1977). The Ohio Supreme Court's decision in *Boice* teaches the same lesson: there, the homeowner was permitted to build on a lot deemed by zoning regulations to be "too small" because others had previously enjoyed the same right on identical or smaller lots but were "grandfathered in." *Boice v. Ottawa Hills*, 2013-Ohio-4769, ¶17-19; see also *Yoder*, supra ("the law is under-inclusive as to any governmental interest. There are 233 houses in the City

which, irrespective of size, are "grandfathered in" and therefore exempt from this regulation . . . Thus, the limit is arbitrary . . . and treats similarly-situated homeowners and tenants differently without any justifiable basis").

Third, the Landscaping Compatibility Mandate is untailored to historic preservation: the Mandate requires gentrification, homogeneity, and conformity with the private landscaping of one's neighbors, not historic preservation. *None* of the five metrics to which the "compatibility" of one's landscaping is compared account for *history*; instead, they measure whether the alteration is "compatible" to (a) other improvements; (b) the home itself; (c) "adjacent contributing properties"; (d) "open spaces;" and (e) "the overall environment." CC Section 3116.11, 3116.13. And the HRC's private actor-members apply and enforce the Mandate through reference to the current appearance of neighboring homes' landscaping, rather than through historic data or evidence. Landscaping is deemed incompatible if it appears "too suburban" or includes "too much mulch," even as the HRC Members drawing those conclusions maintain no interest in or knowledge of when a home was built or what a yard may have actually looked like at that time. See *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 664–67 (4th Cir. 1989)("[W]e find that § 20–5F–4(b)'s clause authorizing the Director to reject permits that are "significantly adverse to the public sentiment" bears no substantial or rational relationship to the state's interest in promoting the general public welfare").

Fourth, the Landscaping Compatibility Mandate is unduly burdensome: criminal prosecution and daily fines of $100 are hardly an appropriate response to basic gardening and landscaping that the vast majority of homeowners in Columbus regularly undertake.

Finally, there is no special dispensation for regulations within locations the City has labeled as a historic district, particularly when the regulations become untethered to historic preservation itself. And to be sure, there is no limiting principle whatsoever to the City's Landscaping Mandate: it could be enforced against *all* City homeowners to require complete and total conformity and homogeneity, and to stamp out *all* of individual efforts, preferences, choices, and privacies that otherwise exemplify homeownership.

The City's Landscaping Compatibility Mandate is thus arbitrary: it treats similarly situated homeowners differently without justification, unduly oppresses innocent owners, is under-inclusive, over-

inclusive, and insufficiently tailored to either the City's avowed interest in historic preservation. Consequently, the Landscaping Compatibility Mandate fails equal protection and due process scrutiny, meaning that Plaintiffs are highly likely to prevail on the merits and the Mandate should be preliminarily enjoined.

B. Plaintiff is confronted with irreparable injury.

A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir.1992). Courts have also held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights. *See, e.g., Connection Distrib. Co. v. Reno,* 154 F.3d 281, 288 (6th Cir.1998) (recognizing that the loss of First Amendment rights, for even a minimal period of time, constitutes irreparable harm).

Meanwhile, satisfaction of the first prong of the preliminary injunction standard – demonstrating a strong likelihood of success on the merits – also satisfies the irreparable injury standard. *See Elrod v. Burns*, 427 U.S. 347, 373 (1973) (holding that if a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated).

Here, Plaintiffs have demonstrated a substantial likelihood of success on the merits. Thus, Plaintiff will suffer irreparable injury if the City is not immediately enjoined from enforcing its unconstitutional policy. Further, Plaintiffs here faces imminent criminal prosecution, sanctions, and equitable orders in response to the exercise of very basic rights. That severe economic penalty that grows larger by the day. Finally, it is well recognized that each parcel of land is unique. "Damages at law" are a "clear inadequacy" when dealing with "an interest in land." *Sholiton Indus., Inc. v. Wright State Univ.,* No. 95-CA-101, 1996 WL 531587, at 4-5 (Ohio Ct. App. Sept. 20, 1996).

C. No public interest is served by continued enforcement of the Landscape Compatibility Mandate in its current form, nor would private harm accrue.

Neither the City nor any private residents will suffer any harm should an injunction be issued. The vast majority of Ohioans - - including City of Columbus residents - - live in locations *without* such mandates; and there is no chaos in such places. Indeed, the City itself makes numerous exceptions to the Landscaping

Compatibility Mandate, thereby demonstrating there is nothing intrinsically dangerous regarding "incompatible landscape." Meanwhile, somewhat unlike a historic building that has been altered, "incompatible landscaping" could always be altered back to whatever the City deems "compatible," were the City to somehow prevail in this matter: a homeowner can plant more grass. Finally, the City remains free to enforce nuisance laws and *directly* address externalities caused by harmful landscaping, whatever those may be. And the City is free to preserve *actual* history with more precise standards and processes.

IV. CONCLUSION

This Court should preliminarily enjoin the City of Columbus from imposing criminal and civil penalties upon Plaintiff Andrew Stevens for failure to obtain Historic Resource Commission ("HRC") approval of his minor gardening and landscaping improvements and preliminary enjoin the City from further enforcing the Landscaping Compatibility Mandate (articulated in CC 3116.04, when applied to landscape, and 3116.13), whether as against Mr. Stevens or all similarly-situated homeowners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on Defendants, through email to Defendants' Counsel, on **March 9, 2020**

Respectfully submitted,
/s/ Maurice A. Thompson
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