

Judge Posner Won't Cut Down Chicago's Weed Ordinance

One man's weed is another man's native plant, which caused Appellate Court Judge Richard Posner to write a 16-page opinion on whether Chicago's weed ordinance is unconstitutional.

Discount Inn, Inc. sought to have the city's weed ordinance, which allows the city to fine a property owner when the average height of weeds exceeds 10 inches, declared unconstitutional. It argued that the fines (\$600 to \$1,200) were "excessive" under the Eighth Amendment and forced cutting of the weeds violated the First Amendment's free speech clause.

The appellate court found the fine was not excessive "even if the 'excessive fines' clause is applicable."

As to free speech, "[t]hough plants do not speak, this need not exclude all gardens from the protection of the clause, for the clause has been expanded by judicial interpretation to embrace other silent expression, such as paintings," the judge wrote.

Judge Posner found ambiguity with the word "weed," which was not defined in the ordinance. He noted that weeds could include native plants. "The concern is that native plants, while sharing with weeds the property of not having to be planted, are, unlike weeds, beautiful and nondestructive when properly managed."



"But the plaintiff's claim that the free-speech clause insulates all weeds from public control is ridiculous," Judge Posner wrote. "Taken to its logical extreme, the plaintiff's defense of the weed would preclude any efforts by local governments to prevent unsightly or dangerous uses of private property."

However, Judge Posner did express a concern about the ordinance using an average height of 10 inches to find a violation. "We are not reassured by the City's statement that a property owner 'can use a ruler to determine whether a plant is more or less than ten inches tall and can likewise use simple arithmetic to determine the average height of the plants on his property.' What if there are thousands of plants, and therefore a thousand measurements to be made and the results then averaged? But the difficulty of compliance is not persuasive ground for deeming the ordinance unconstitutional."

Discount Inn, Inc. v. City of Chicago, Seventh Cir. No. 14-3678, issued September 28, 2015.

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