Property Supplement
Professor Grimmelmann
Georgetown University Law Center, Spring 2013

Madden v. Queens County Jockey Club, Inc.
296 N.Y. 249 (1947)

Fuld, J.

"Owney" Madden was named by one Frank Costello in 1943 as a bookmaker with whom he placed bets. "Coley" Madden, plaintiff herein, a self-styled "patron of the races", was barred by defendant from its Aqueduct Race Track in 1945, under the mistaken belief that he was Costello's bookmaker. Plaintiff thereupon sought a declaratory judgment declaring that he has a right, as citizen and taxpayer - upon paying the required admission price - to enter the race course and patronize the pari-mutuel betting there conducted. Defendant, on the other hand, asserted an unlimited power of exclusion. . . .

The question posed . . . is whether the operator of a race track can, without reason or sufficient excuse, exclude a person from attending its races. In our opinion he can; he has the power to admit as spectators only those whom he may select, and to exclude others solely of his own volition, as long as the exclusion is not founded on race, creed, color or national origin.

At common law, a person engaged in a public calling, such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased. A race track, of course, falls within that classification.

The common-law power of exclusion, noted above, continues until changed by legislative enactment. In this State, a statute - explicitly covering "race courses" - limits the power by prohibiting discrimination on account of race, creed, color, or national origin. (Civil Rights Law, § 40; see, also, Penal Law, §§ 514, 700.) That, then, is the measure of the restriction.

Plaintiff, however, asserts a right founded upon the constitutional guaranty of equal protection of the laws. The argument is based on [the assumption that] the license to conduct horse racing is a franchise to perform a public purpose. . . .

There is little need to cite authority for the proposition that a race track is normally considered a place of amusement and that - with the possible exception of ancient Rome - amusement of the populace has never been regarded as a function or purpose of government. Horse racing does not become a function of government merely because, in sanctioning it, the Legislature anticipated a consequent, though incidental, advantage to the public in "improving the breed of horses". (L. 1926, ch. 440, § 1.) There is, then, nothing inherent in the nature of horse racing which makes operation of a race track the performance of a public function. If plaintiff's assumption were valid, it would follow that the mere fact of licensing makes the purpose a public one and the license in effect a franchise. Such, however, is not the law.

Civil Rights Act of 1964

42 U.S.C. § 2000a Prohibition against discrimination or segregation in places of public accommodation

> (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter …
>
> > (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
> >
> > (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
> >
> > (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; …

Larami Corp. v. Amron*
No. CIV A. 91-6145, 1993 WL 69581 (E.D. Pa. Mar. 11, 1993)

Reed, J.

This is a patent case concerning toy water guns manufactured by plaintiff Larami Corporation ("Larami"). Currently before me is Larami's motion for partial summary judgment of noninfringement of United States Patent No. 4,239,129 ("the '129 patent") …

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* Ed: Larami's patent and a picture of a Super Soaker are available on Courseware.

Larami manufactures a line of toy water guns called "SUPER SOAKERS." This line includes five models: SUPER SOAKER 20, SUPER SOAKER 30, SUPER SOAKER 50, SUPER SOAKER 100, and SUPER SOAKER 200. All use a hand-operated air pump to pressurize water and a "pinch trigger" valve mechanism for controlling the ejection of the pressurized water. All feature detachable water reservoirs prominently situated outside and above the barrel of the gun. …

Defendants Alan Amron and Talk To Me Products, Inc. (hereinafter referred to collectively as "TTMP") claim that the SUPER SOAKER guns infringe on the '129 patent which TTMP obtained by assignment from Gary Esposito ("Esposito"), the inventor. The '129 patent covers a water gun which, like the SUPER SOAKERS, operates by pressurizing water housed in a tank with an air pump. In the '129 patent, the pressure enables the water to travel out of the tank through a trigger-operated valve into an outlet tube and to squirt through a nozzle. Unlike the SUPER SOAKERS, the '129 patent also contains various electrical features to illuminate the water stream and create noises. Also, the water tank in the '129 patent is not detachable, but is contained within a housing in the body of the water gun. …

Larami brought this action seeking a declaration that the "SUPER SOAKER" does not infringe the '129 patent(Count I) …

A patent owner's right to exclude others from making, using or selling the patented invention is defined and limited by the language in that patent's claims. Thus, establishing infringement requires the interpretation of the "elements" or "limitations" of the claim and a comparison of the accused product with those elements as so interpreted. Because claim interpretation is a question of law, it is amenable to summary judgment.

The words in a claim should be given their "ordinary or accustomed" meaning. An inventor's interpretations of words in a claim that are proffered after the patent has issued for purposes of litigation are given no weight. …

TTMP claims that SUPER SOAKER 20 literally infringes claim 1 of the '129 patent. Claim 1 describes the water gun as:

> [a] toy comprising an elongated housing [case] having a chamber therein for a liquid [tank], a pump including a piston having an exposed rod [piston rod] and extending rearwardly of said toy facilitating manual operation for building up an appreciable amount of pressure in said chamber for ejecting a stream of liquid therefrom an appreciable distance substantially forwardly of said toy, and means for controlling the ejection.

U.S. Patent No. 4,239,129.

Claim 1 requires, among other things, that the toy gun have "an elongated housing having a chamber therein for a liquid." The SUPER SOAKER 20 water gun, in contrast, has an external water reservoir (chamber) that is detachable from the gun housing, and not contained within the housing. TTMP argues that SUPER SOAKER 20 contains a "chamber therein for a liquid" as well as a detachable water reservoir. It is difficult to discern from TTMP's memorandum of law exactly where it contends the "chamber therein" is located in SUPER SOAKER 20. Furthermore, after having examined SUPER SOAKER 20, I find that it is plain that there is no "chamber" for liquid contained within the housing of the water gun. The only

element of SUPER SOAKER 20 which could be described as a "chamber" for liquid is the external water reservoir located atop the housing. Indeed, liquid is located within the housing only when the trigger causes the liquid to pass from the external water reservoir through the tubing in the housing and out of the nozzle at the front end of the barrel. SUPER SOAKER 20 itself shows that such a transitory avenue for the release of liquid is clearly not a "chamber therein for liquid." Therefore, because the absence of even one element of a patent's claim from the accused product means there can be no finding of literal infringement, I find that SUPER SOAKER 20 does not infringe claim 1 of the '129 patent as a matter of law.

Accordingly, I conclude that the SUPER SOAKER 20 water gun does not literally infringe claim 1 of the '129 patent. …

Cheney Bros. v. Doris Silk Co.
35 F.2d 279 (2d Cir. 1929)

L. Hand, Circuit Judge.

The plaintiff, a corporation is a manufacturer of silks, which puts out each season many new patterns, designed to attract purchasers by their novelty and beauty. Most of these fail in that purpose, so that not much more than a fifth catch the public fancy. Moreover, they have only a short life, for the most part no more than a single season of eight or nine months. It is in practice impossible, and it would be very onerous if it were not, to secure design patents upon all of these; it would also be impossible to know in advance which would sell well, and patent only those. Besides, it is probable that for the most part they have no such originality as would support a design patent. Again, it is impossible to copyright them under the Copyright Act (17 USCA § 1 et seq.), or at least so the authorities of the Copyright Office hold. So it is easy for any one to copy such as prove successful, and the plaintiff, which is put to much ingenuity and expense in fabricating them, finds itself without protection of any sort for its pains.

Taking advantage of this situation, the defendant copied one of the popular designs in the season beginning in October, 1928, and undercut the plaintiff's price. This is the injury of which it complains. The defendant, though it duplicated the design in question, denies that it knew it to be the plaintiff's, and there thus arises an issue which might be an answer to the motion. However, the parties wish a decision upon the equity of the bill, and, since it is within our power to dismiss it, we shall accept its allegation, and charge the defendant with knowledge.

The plaintiff asks for protection only during the season, and needs no more, for the designs are all ephemeral. It seeks in this way to disguise the extent of the proposed innovation, and to persuade us that, if we interfere only a little, the solecism, if there be one, may be pardonable. But the reasoning which would justify any interposition at all demands that it cover the whole extent of the injury. A man whose designs come to harvest in two years, or in five, has prima facie as good right to protection as one who deals only in annuals. Nor could we consistently stop at designs; processess, machines, and secrets have an equal claim. The upshot must be that, whenever any one has contrived any of these, others may be forbidden to copy it. That is not the law. In the absence of some recognized right at common law, or under the statutes -- and the plaintiff claims neither -- a man's property is limited to the chattels which embody his invention. Others may imitate these at their pleasure.

True, it would seem as though the plaintiff had suffered a grievance for which there should be a remedy, perhaps by an amendment of the Copyright Law, assuming that this does not already cover the case, which is not urged here. It seems a lame answer in such a case to turn the injured party out of court, but there are larger issues at stake than his redress. Judges have only a limited power to amend the law; when the subject has been confided to a Legislature, they must stand aside, even though there be an hiatus in completed justice. An omission in such cases must be taken to have been as deliberate as though it were express, certainly after long-standing action on the subject-matter. Indeed, were are not in any position to pass upon the questions involved, as Brandeis, J., observed in International News Service v. Associated Press. We must judge upon records prepared by litigants, which do not contain all that may be relevant to the issues, for they cannot disclose the conditions of this industry, or of the others which may be involved. Congress might see its way to create some sort of temporary right, or it might not. Its decision would certainly be preceded by some examination of the result upon the other interests affected. Whether these would prove paramount we have no means of saying; it is not for us to decide. Our vision is inevitably contracted, and the whole horizon may contain much which will compose a very different picture.

United States Constitution Amendment XIII
(1865)

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Stevens v. Casdorph
203 W. Va. 450 (1988)

Per Curiam:

. . . On May 28, 1996, [Patricia Eileen Casdorph and Paul Douglas Casdorph] took Mr. Homer Haskell Miller to Shawnee Bank in Dunbar, West Virginia, so that he could execute his will.[1] Once at the bank, Mr. Miller asked Debra Pauley, a bank employee and public notary, to witness the execution of his will. After Mr. Miller signed the will, Ms. Pauley took the will to two other bank employees, Judith Waldron and Reba McGinn, for the purpose of having each of them sign the will as witnesses. Both Ms. Waldron and Ms. McGinn signed the will. However, Ms. Waldron and Ms. McGinn testified during their depositions that they did not actually see Mr. Miller place his signature on the will. Further, it is undisputed that Mr. Miller did not accompany Ms. Pauley to the separate work areas of Ms. Waldron and Ms. McGinn.

Mr. Miller died on July 28, 1996. The last will and testament of Mr. Miller, which named Mr. Paul Casdorph as executor, left the bulk of his estate to the Casdorphs. The Stevenses, nieces of Mr. Miller, filed the instant action to set aside the will. …[4]

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[1] Mr. Miller was elderly and confined to a wheelchair.

[4] As heirs, the Stevenses would be entitled to recover from Mr. Miller's estate under the intestate laws if his will is set aside as invalidly executed. …

The Stevenses' contention is simple. They argue that all evidence indicates that Mr. Miller's will was not properly executed. Therefore, the will should be voided. The procedural requirements at issue are contained in *W.Va. Code § 41-1-3* (1997). The statute reads:

> No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly in the handwriting of the testator, *the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, and of each other*, but no form of attestation shall be necessary. (Emphasis added.)

The relevant requirements of the above statute calls for a testator to sign his/her will or acknowledge such will in the presence of at least two witnesses at the same time, and such witnesses must sign the will in the presence of the testator and each other. In the instant proceeding the Stevenses assert, and the evidence supports, that Ms. McGinn and Ms. Waldron did not actually witness Mr. Miller signing his will. Mr. Miller made no acknowledgment of his signature on the will to either Ms. McGinn or Ms. Waldron. Likewise, Mr. Miller did not observe Ms. McGinn and Ms. Waldron sign his will as witnesses. Additionally, neither Ms. McGinn nor Ms. Waldron acknowledged to Mr. Miller that their signatures were on the will. It is also undisputed that Ms. McGinn and Ms. Waldron did not actually witness each other sign the will, nor did they acknowledge to each other that they had signed Mr. Miller's will. …

Our analysis begins by noting that "the law favors testacy over intestacy." However, we clearly held in syllabus point 1 of *Black v. Maxwell*, 131 W. Va. 247, 46 S.E.2d 804 (1948), that "testamentary intent and a written instrument, executed in the manner provided by [W.Va. Code § 41-1-3], existing concurrently, are essential to the creation of a valid will." *Black* establishes that mere intent by a testator to execute a written will is insufficient. The actual execution of a written will must also comply with the dictates of W.Va. Code § 41-1-3. The Casdorphs seek to have this Court establish an exception to the technical requirements of the statute. In *Wade v. Wade*, 119 W. Va. 596, 195 S.E. 339 (1938), this Court permitted a narrow exception to the stringent requirements of the W.Va. Code § 41-1-3. This narrow exception is embodied in syllabus point 1 of *Wade*:

> Where a testator acknowledges a will and his signature thereto in the presence of two competent witnesses, one of whom then subscribes his name, the other or first witness, having already subscribed the will in the presence of the testator but out of the presence of the second witness, may acknowledge his signature in the presence of the testator and the second witness, and such acknowledgment, if there be no indicia of fraud or misunderstanding in the proceeding, will be deemed a signing by the first witness within the requirement of Code, 41-1-3, that the witnesses must subscribe their names in the presence of the testator and of each other. . . .

Wade stands for the proposition that if a witness acknowledges his/her signature on a will in the physical presence of the other subscribing witness *and the testator*, then the will is properly witnessed within the terms of W.Va. Code § 41-1-3. In this case, none of the parties signed or acknowledged their signatures in the presence of each other. This case meets neither the narrow exception of *Wade* nor the specific provisions of W.Va. Code § 41-1-3.

Workman, J., dissenting:

The majority once more takes a very technocratic approach to the law, slavishly worshiping form over substance. In so doing, they not only create a harsh and inequitable result wholly contrary to the indisputable intent of Mr. Homer Haskell Miller, but also a rule of law that is against the spirit and intent of our whole body of law relating to the making of wills.

There is absolutely no claim of incapacity or fraud or undue influence, nor any allegation by any party that Mr. Miller did not consciously, intentionally, and with full legal capacity convey his property as specified in his will. The challenge to the will is based solely upon the allegation that Mr. Miller did not comply with the requirement of West Virginia Code 41-1-3 that the signature shall be made or the will acknowledged by the testator in the presence of at least two competent witnesses, present at the same time. The lower court, in its very thorough findings of fact, indicated that Mr. Miller had been transported to the bank by his nephew Mr. Casdorph and the nephew's wife. Mr. Miller, disabled and confined to a wheelchair, was a shareholder in the Shawnee Bank in Dunbar, West Virginia, with whom all those present were personally familiar. When Mr. Miller executed his will in the bank lobby, the typed will was placed on Ms. Pauley's desk, and Mr. Miller instructed Ms. Pauley that he wished to have his will signed, witnessed, and acknowledged. After Mr. Miller's signature had been placed upon the will with Ms. Pauley watching, Ms. Pauley walked the will over to the tellers' area in the same small lobby of the bank. Ms. Pauley explained that Mr. Miller wanted Ms. Waldron to sign the will as a witness. The same process was used to obtain the signature of Ms. McGinn. Sitting in his wheelchair, Mr. Miller did not move from Ms. Pauley's desk during the process of obtaining the witness signatures. The lower court concluded that the will was valid and that Ms. Waldron and Ms. McGinn signed and acknowledged the will "in the presence" of Mr. Miller. . . .

The majority embraces the line of least resistance. The easy, most convenient answer is to say that the formal, technical requirements have not been met and that the will is therefore invalid. End of inquiry. Yet that result is patently absurd. That manner of statutory application is inconsistent with the underlying purposes of the statute. Where a statute is enacted to protect and sanctify the execution of a will to prevent substitution or fraud, this Court's application of that statute should further such underlying policy, not impede it. When, in our efforts to strictly apply legislative language, we abandon common sense and reason in favor of technicalities, we are the ones committing the injustice.

Uniform Commercial Code § 2-312.

§ 2-312 Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.

*(*1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.
…

Uniform Commercial Code § 2-403

§ 2--403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting"

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale", or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods has been such as to be larcenous under the criminal law. …

Walkovszky v. Carlton
18 NY 2d 414 (1966)

Fuld, J.

This case involves what appears to be a rather common practice in the taxicab industry of vesting the ownership of a taxi fleet in many corporations, each owning only one or two cabs.

The complaint alleges that the plaintiff was severely injured four years ago in New York City when he was run down by a taxicab owned by the defendant Seon Cab Corporation and negligently operated at the time by the defendant Marchese. The individual defendant, Carlton, is claimed to be a stockholder of 10 corporations, including Seon, each of which has but two cabs registered in its name, and it is implied that only the minimum automobile liability insurance required by law (in the amount of $10,000) is carried on any one cab. Although seemingly independent of one another, these corporations are alleged to be "operated * * * as a single entity, unit and enterprise" with regard to financing, supplies, repairs, employees and garaging, and all are named as defendants. The plaintiff asserts that he is also entitled to hold their stockholders personally liable for the damages sought because the multiple corporate structure constitutes an unlawful attempt "to defraud members of the general public" who might be injured by the cabs. …

The law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability but, manifestly, the privilege is not without its limits. Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, "pierce the corporate veil", whenever necessary "to prevent fraud or to achieve equity". In

determining whether liability should be extended to reach assets beyond those belonging to the corporation, we are guided, as Judge Cardozo noted, by "general rules of agency". In other words, whenever anyone uses control of the corporation to further his own rather than the corporation's business, he will be liable for the corporation's acts "upon the principle of *respondeat superior* applicable even where the agent is a natural person". Such liability, moreover, extends not only to the corporation's commercial dealings but to its negligent acts as well.

In the *Mangan* case, the plaintiff was injured as a result of the negligent operation of a cab owned and operated by one of four corporations affiliated with the defendant Terminal. Although the defendant was not a stockholder of any of the operating companies, both the defendant and the operating companies were owned, for the most part, by the same parties. The defendant's name (Terminal) was conspicuously displayed on the sides of all of the taxis used in the enterprise and, in point of fact, the defendant actually serviced, inspected, repaired and dispatched them. These facts were deemed to provide sufficient cause for piercing the corporate veil of the operating company — the nominal owner of the cab which injured the plaintiff — and holding the defendant liable. The operating companies were simply instrumentalities for carrying on the business of the defendant without imposing upon it financial and other liabilities incident to the actual ownership and operation of the cabs. …

The individual defendant is charged with having "organized, managed, dominated and controlled" a fragmented corporate entity but there are no allegations that he was conducting business in his individual capacity. Had the taxicab fleet been owned by a single corporation, it would be readily apparent that the plaintiff would face formidable barriers in attempting to establish personal liability on the part of the corporation's stockholders. The fact that the fleet ownership has been deliberately split up among many corporations does not ease the plaintiff's burden in that respect. The corporate form may not be disregarded merely because the assets of the corporation, together with the mandatory insurance coverage of the vehicle which struck the plaintiff, are insufficient to assure him the recovery sought. If Carlton were to be held individually liable on those facts alone, the decision would apply equally to the thousands of cabs which are owned by their individual drivers who conduct their businesses through corporations organized pursuant to section 401 of the Business Corporation Law and carry the minimum insurance required by subdivision 1 (par. [a]) of section 370 of the Vehicle and Traffic Law. These taxi owner-operators are entitled to form such corporations, and we agree with the court at Special Term that, if the insurance coverage required by statute "is inadequate for the protection of the public, the remedy lies not with the courts but with the Legislature." It may very well be sound policy to require that certain corporations must take out liability insurance which will afford adequate compensation to their potential tort victims. However, the responsibility for imposing conditions on the privilege of incorporation has been committed by the Constitution to the Legislature and it may not be fairly implied, from any statute, that the Legislature intended, without the slightest discussion or debate, to require of taxi corporations that they carry automobile liability insurance over and above that mandated by the Vehicle and Traffic Law.

This is not to say that it is impossible for the plaintiff to state a valid cause of action against the defendant Carlton. However, the simple fact is that the plaintiff has just not done so here. While the complaint alleges that the separate corporations were undercapitalized and that their assets have been intermingled, it is barren of any "sufficiently particular[ized] statements" that

the defendant Carlton and his associates are actually doing business in their individual capacities, shuttling their personal funds in and out of the corporations "without regard to formality and to suit their immediate convenience." Such a "perversion of the privilege to do business in a corporate form" would justify imposing personal liability on the individual stockholders. Nothing of the sort has in fact been charged, and it cannot reasonably or logically be inferred from the happenstance that the business of Seon Cab Corporation may actually be carried on by a larger corporate entity composed of many corporations which, under general principles of agency, would be liable to each other's creditors in contract and in tort.

In point of fact, the principle relied upon in the complaint to sustain the imposition of personal liability is not agency but fraud. Such a cause of action cannot withstand analysis. If it is not fraudulent for the owner-operator of a single cab corporation to take out only the minimum required liability insurance, the enterprise does not become either illicit or fraudulent merely because it consists of many such corporations. The plaintiff's injuries are the same regardless of whether the cab which strikes him is owned by a single corporation or part of a fleet with ownership fragmented among many corporations. Whatever rights he may be able to assert against parties other than the registered owner of the vehicle come into being not because he has been defrauded but because, under the principle of *respondeat superior*, he is entitled to hold the whole enterprise responsible for the acts of its agents.

In sum, then, the complaint falls short of adequately stating a cause of action against the defendant Carlton in his individual capacity. …

Village of Belle Terre v. Boraas
416 U.S. 1

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Belle Terre is a village on Long Island's north shore of about 220 homes inhabited by 700 people. Its total land area is less than one square mile. It has restricted land use to one-family dwellings excluding lodging houses, boarding houses, fraternity houses, or multiple-dwelling houses. The word "family" as used in the ordinance means, "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."

Appellees the Dickmans are owners of a house in the village and leased it in December 1971 for a term of 18 months to Michael Truman. Later Bruce Boraas became a colessee. Then Anne Parish moved into the house along with three others. These six are students at nearby State University at Stony Brook and none is related to the other by blood, adoption, or marriage. When the village served the Dickmans with an "Order to Remedy Violations" of the ordinance, the owners plus three tenants thereupon brought this action under 42 U. S. C. § 1983 for an injunction and a judgment declaring the ordinance unconstitutional. The District Court held the ordinance constitutional, 367 F. Supp. 136, and the Court of Appeals reversed, one judge dissenting, 476 F. 2d 806. The case is here by appeal, 28 U. S. C. § 1254 (2); and we noted probable jurisdiction, 414 U. S. 907. …

The present ordinance is challenged on several grounds: that it interferes with a person's right to travel; that it interferes with the right to migrate to and settle within a State; that it bars people who are uncongenial to the present residents; that it expresses the social preferences of the residents for groups that will be congenial to them; that social homogeneity is not a legitimate interest of government; that the restriction of those whom the neighbors do not like trenches on the newcomers' rights of privacy; that it is of no rightful concern to villagers whether the residents are married or unmarried; that the ordinance is antithetical to the Nation's experience, ideology, and self-perception as an open, egalitarian, and integrated society.

We find none of these reasons in the record before us. It is not aimed at transients. It involves no procedural disparity inflicted on some but not on others. It involves no "fundamental" right guaranteed by the Constitution, such as voting, the right of association, the right of access to the courts, or any rights of privacy. We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be "reasonable, not arbitrary" and bears "a rational relationship to a [permissible] state objective."

It is said, however, that if two unmarried people can constitute a "family," there is no reason why three or four may not. But every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function.

It is said that the Belle Terre ordinance reeks with an animosity to unmarried couples who live together. There is no evidence to support it; and the provision of the ordinance bringing within the definition of a "family" two unmarried people belies the charge.

The ordinance places no ban on other forms of association, for a "family" may, so far as the ordinance is concerned, entertain whomever it likes.

The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one … . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

MR. JUSTICE MARSHALL, dissenting.

… My disagreement with the Court today is based upon my view that the ordinance in this case unnecessarily burdens appellees' First Amendment freedom of association and their constitutionally guaranteed right to privacy. ...

The instant ordinance discriminates on the basis of just such a personal lifestyle choice as to household companions. It permits any number of persons related by blood or marriage, be it two or twenty, to live in a single household, but it limits to two the number of unrelated persons bound by profession, love, friendship, religious or political affiliation, or mere economics who can occupy a single home. Belle Terre imposes upon those who deviate from the community norm in their choice of living companions significantly greater restrictions than are applied to residential groups who are related by blood or marriage, and compose the established order within the

community. The village has, in effect, acted to fence out those individuals whose choice of lifestyle differs from that of its current residents. …

There are some 220 residences in Belle Terre occupied by about 700 persons. The density is therefore just above three per household. The village is justifiably concerned with density of population and the related problems of noise, traffic, and the like. It could deal with those problems by limiting each household to a specified number of adults, two or three perhaps, without limitation on the number of dependent children. The burden of such an ordinance would fall equally upon all segments of the community. …

Anderson v. City of Issaquah
70 Wn. App. 64 (Ct. App. 1993)

Appellants M. Bruce Anderson, Gary D. LaChance, and M. Bruce Anderson, Inc. (hereinafter referred to as Anderson), challenge the denial of their application for a land use certification, arguing, inter alia, that the building design requirements contained in Issaquah Municipal Code (IMC) 16.16.060 are unconstitutionally vague. The Superior Court rejected this constitutional challenge. We reverse and direct that Anderson's land use certification be issued.

The City of Issaquah cross-appeals, contending the trial court erroneously granted summary dismissal of its affirmative defenses. Anderson contends the cross appeal is wholly frivolous and seeks an award of reasonable attorney fees incurred in responding thereto. We affirm the trial court's summary dismissal of the affirmative defenses. We resolve our considerable doubts with respect to sanctions in favor of the City of Issaquah and deny Anderson's request for attorney fees.

Facts

Anderson owns property located at 145 N.W. Gilman Boulevard in the city of Issaquah (City). In 1988, Anderson applied to the City for a land use certification to develop the property. The property is zoned for general commercial use. Anderson desired to build a 6,800-square-foot commercial building for several retail tenants.

After obtaining architectural plans, Anderson submitted the project to various City departments for the necessary approvals. The process went smoothly until the approval of the Issaquah Development Commission (Development Commission) was sought. This commission was created to administer and enforce the City's land use regulations. It has the authority to approve or deny applications for land use certification.

Section 16.16.060 of the IMC enumerates various building design objectives which the Development Commission is required to administer and enforce. Insofar as is relevant to this appeal, the Development Commission is to be guided by the following criteria:

> IMC 16.16.060(B). Relationship of Building and Site to Adjoining Area.
>
> 1. Buildings and structures shall be made compatible with adjacent buildings of conflicting architectural styles by such means as screens and site breaks, or other suitable methods and materials.
>
> 2. Harmony in texture, lines, and masses shall be encouraged.

. . . .

IMC 16.16.060(D). Building Design.

1. Evaluation of a project shall be based on quality of its design and relationship to the natural setting of the valley and surrounding mountains.

2. Building components, such as windows, doors, eaves and parapets, shall have appropriate proportions and relationship to each other, expressing themselves as a part of the overall design.

3. Colors shall be harmonious, with bright or brilliant colors used only for minimal accent.

4. Design attention shall be given to screening from public view all mechanical equipment, including refuse enclosures, electrical transformer pads and vaults, communication equipment, and other utility hardware on roofs, grounds or buildings.

5. Exterior lighting shall be part of the architectural concept. Fixtures, standards and all exposed accessories shall be harmonious with the building design.

6. Monotony of design in single or multiple building projects shall be avoided. Efforts should be made to create an interesting project by use of complimentary details, functional orientation of buildings, parking and access provisions and relating the development to the site. In multiple building projects, variable siting of individual buildings, heights of buildings, or other methods shall be used to prevent a monotonous design.

As initially designed, Anderson's proposed structure was to be faced with off-white stucco and was to have a blue metal roof. It was designed in a "modern" style with an unbroken "warehouse" appearance in the rear, and large retail-style windows in the front. The City moved a Victorian era residence, the "Alexander House", onto the neighboring property to serve as a visitors' center. Across the street from the Anderson site is a gasoline station that looks like a gasoline station. Located nearby and within view from the proposed building site are two more gasoline stations, the First Mutual Bank Building built in the "Issaquah territorial style", an Elks hall which is described in the record by the Mayor of Issaquah as a "box building", an auto repair shop, and a veterinary clinic with a cyclone-fenced dog run. The area is described in the record as "a natural transition area between old downtown Issaquah and the new village style construction of Gilman [Boulevard]."

The Development Commission reviewed Anderson's application for the first time at a public hearing on December 21, 1988. Commissioner Nash commented that "the facade did not fit with the concept of the surrounding area." Commissioner McGinnis agreed. Commissioner Nash expressed concern about the building color and stated that he did not think the building was compatible with the image of Issaquah. Commissioner Larson said that he would like to see more depth to the building facade. Commissioner Nash said there should be some interest created along the blank back wall. Commissioner Garrison suggested that the rear facade needed to be redesigned.

At the conclusion of the meeting, the Development Commission voted to continue the hearing to give Anderson an opportunity to modify the building design.

On January 18, 1989, Anderson came back before the Development Commission with modified plans which included changing the roofing from metal to tile, changing the color of the structure from off-white to "Cape Cod" gray with "Tahoe" blue trim, and adding brick to the front facade. During the ensuing discussion among the commissioners, Commissioner Larson stated that the revisions to the front facade had not satisfied his concerns from the last meeting. In response to Anderson's request for more specific design guidelines, Commissioner McGinnis stated that the Development Commission had "been giving direction; it is the applicant's responsibility to take the direction/suggestions and incorporate them into a revised plan that reflects the changes." Commissioner Larson then suggested that "the facade can be broken up with sculptures, benches, fountains, etc." Commissioner Nash suggested that Anderson "drive up and down Gilman and look at both good and bad examples of what has been done with flat facades."

As the discussion continued, Commissioner Larson stated that Anderson "should present a [plan] that achieves what the Commission is trying to achieve through its comments/suggestions at these meetings" and stated that "architectural screens, fountains, paving of brick, wood or other similar methods of screening in lieu of vegetative landscaping are examples of design suggestions that can be used to break up the front facade." Commissioner Davis objected to the front facade, stating that he could not see putting an expanse of glass facing Gilman Boulevard. "The building is not compatible with Gilman." Commissioner O'Shea agreed. Commissioner Nash stated that "the application needs major changes to be acceptable." Commissioner O'Shea agreed. Commissioner Nash stated that "this facade does not create the same feeling as the building/environment around this site."

Commissioner Nash continued, stating that he "personally liked the introduction of brick and the use of tiles rather than metal on the roof." Commissioner Larson stated that he would like to see a review of the blue to be used: "Tahoe blue may be too dark." Commissioner Steinwachs agreed. Commissioner Larson noted that "the front of the building could be modulated [to] have other design techniques employed to make the front facade more interesting."

With this, the Development Commission voted to continue the discussion to a future hearing.

On February 15, 1989, Anderson came back before the Development Commission. In the meantime, Anderson's architects had added a 5-foot overhang and a 7-foot accent overhang to the plans for the front of the building. More brick had been added to the front of the building. Wood trim and accent colors had been added to the back of the building and trees were added to the landscaping to further break up the rear facade.

Anderson explained the plans still called for large, floor to ceiling windows as this was to be a retail premises: "[A] glass front is necessary to rent the space . . .". Commissioner Steinwachs stated that he had driven Gilman Boulevard and taken notes. The following verbatim statement by Steinwachs was placed into the minutes:

> "*My General Observation From Driving Up and Down Gilman Boulevard*".
>
> I see certain design elements and techniques used in various combinations in various locations to achieve a visual effect that is sensitive to the unique character of our Signature Street. I see heavy use of brick, wood, and tile. I see minimal use of stucco. I see colors that are mostly earthtones, avoiding extreme contrasts. I see

> various methods used to provide modulation in both horizontal and vertical lines, such as gables, bay windows, recesses in front faces, porches, rails, many vertical columns, and breaks in roof lines. I see long, sloping, conspicuous roofs with large overhangs. I see windows with panels above and below windows. I see no windows that extend down to floor level. This is the impression I have of Gilman Boulevard as it relates to building design.

Commissioner Nash agreed stating, "There is a certain feeling you get when you drive along Gilman Boulevard, and this building does not give this same feeling." Commissioner Steinwachs wondered if the applicant had any option but to start "from scratch". Anderson responded that he would be willing to change from stucco to wood facing but that, after working on the project for 9 months and experiencing total frustration, he was not willing to make additional design changes.

At that point, the Development Commission denied Anderson's application, giving four reasons:

> 1. After four [sic] lengthy review meetings of the Development Commission, the applicant has not been sufficiently responsive to concerns expressed by the Commission to warrant approval or an additional continuance of the review.
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> 2. The primary concerns expressed relate to the building architecture as it relates to Gilman Boulevard in general, and the immediate neighborhood in particular.
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> 3. The Development Commission is charged with protecting, preserving and enhancing the aesthetic values that have established the desirable quality and unique character of Issaquah, reference IMC 16.16.010C. [3]
>
> 4. We see certain design elements and techniques used in various combinations in various locations to achieve a visual effect that is sensitive to the unique character of our Signature Street. On Gilman Boulevard we see heavy use of brick, wood and tile. We see minimal use of stucco. We see various methods used to provide both horizontal and vertical modulation, including gables, breaks in rooflines, bay windows, recesses and protrusions in front face. We see long, sloping, conspicuous roofs with large overhangs. We see no windows that extend to ground level. We see brick and wood panels at intervals between windows. We see earthtone colors avoiding extreme contrast.

Anderson, who by this time had an estimated $ 250,000 into the project, timely appealed the adverse ruling to the Issaquah City Council (City Council). After a lengthy hearing and much debate, the City Council decided to affirm the Development Commission's decision by a vote of 4 to 3. . . .

Anderson filed a complaint in King County Superior Court. …

Following trial, the court dismissed Anderson's complaint, rejecting the same claims now raised in this appeal.

Discussion …

2. Constitutionality of IMC 16.16.060 (Building Design Provisions).

> [A] statute which either forbids or requires the doing of an act in terms so vague that men [and women] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). In the field of regulatory statutes governing business activities, statutes which employ technical words which are commonly understood within an industry, or which employ words with a well-settled common law meaning, generally will be sustained against a charge of vagueness. The vagueness test does not require a statute to meet impossible standards of specificity.

In the area of land use, a court looks not only at the face of the ordinance but also at its application to the person who has sought to comply with the ordinance and/or who is alleged to have failed to comply. The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcements of the law.

Looking first at the face of the building design sections of IMC 16.16.060, we note that an ordinary citizen reading these sections would learn only that a given building project should bear a good relationship with the Issaquah Valley and surrounding mountains; its windows, doors, eaves and parapets should be of "appropriate proportions", its colors should be "harmonious" and seldom "bright" or "brilliant"; its mechanical equipment should be screened from public view; its exterior lighting should be "harmonious" with the building design and "monotony should be avoided." The project should also be "interesting". IMC 16.16.060(D)(1)-(6). If the building is not "compatible" with adjacent buildings, it should be "made compatible" by the use of screens and site breaks "or other suitable methods and materials." "Harmony in texture, lines, and masses [is] encouraged." The landscaping should provide an "attractive . . . transition" to adjoining properties. IMC 16.16.060(B)(1)-(3).

As is stated in the brief of amicus curiae, we conclude that these code sections "do not give effective or meaningful guidance" to applicants, to design professionals, or to the public officials of Issaquah who are responsible for enforcing the code. Brief of Amicus Curiae, at 1. Although it is clear from the code sections here at issue that mechanical equipment must be screened from public view and that, probably, earthtones or pastels located within the cool and muted ranges of the color wheel are going to be preferred, there is nothing in the code from which an applicant can determine whether his or her project is going to be seen by the Development Commission as "interesting" versus "monotonous" and as "harmonious" with the valley and the mountains. Neither is it clear from the code just what else, besides the valley and the mountains, a particular project is supposed to be harmonious with, although "harmony in texture, lines, and masses" is certainly encouraged. IMC 16.16.060(B)(2).

In attempting to interpret and apply this code, the commissioners charged with that task were left with only their own individual, subjective "feelings" about the "image of Issaquah" and as to whether this project was "compatible" or "interesting". The commissioners stated that the City was "making a statement" on its "signature street" and invited Anderson to take a drive up and down Gilman Boulevard and "look at good and bad examples of what has been done wit h flat facades." One commissioner drove up and down Gilman, taking notes, in a no doubt sincere effort to define that which is left undefined in the code.

The point we make here is that neither Anderson nor the commissioners may constitutionally be required or allowed to guess at the meaning of the code's building design requirements by

driving up and down Gilman Boulevard looking at "good and bad" examples of what has been done with other buildings, recently or in the past. We hold that the code sections here at issue are unconstitutionally vague on their face. The words employed are not technical words which are commonly understood within the professional building design industry. Neither do these words have a settled common law meaning.

As they were applied to Anderson, it is also clear the code sections at issue fail to pass constitutional muster. Because the commissioners themselves had no objective guidelines to follow, they necessarily had to resort to their own subjective "feelings". The "statement" Issaquah is apparently trying to make on its "signature street" is not written in the code. In order to be enforceable, that "statement" must be written down in the code, in understandable terms. The unacceptable alternative is what happened here. The commissioners enforced not a building design code but their own arbitrary concept of the provisions of an unwritten "statement" to be made on Gilman Boulevard. The commissioners' individual concepts were as vague and undefined as those written in the code. This is the very epitome of discretionary, arbitrary enforcement of the law.

Councilwoman McHenry said it very well during the appeal to the City Council:

> Maybe we haven't done a good job in . . . communicating what kind of image we want. We all want an image. I bet you if I stated my image it would be certainly different from everyone of you here and everyone in the audience. . . . If we want a specific design, I agree with proponent's counsel, and that is that we come up with a specific district design . . . We don't have such a design requirement. So we all have to rely on some gut feel. And often times this gut feel gets us into trouble because it could be misinterpreted or misconstrued . . .[.]

Although the City argues that its code is not unconstitutionally vague, it primarily relies upon the procedural safeguards contained in the code. Because aesthetic considerations are subjective in concept, the City argues that they cannot be reduced to a formula or a number. The vagueness test does not require a statute to meet impossible standards of specificity.

As well illustrated by the appendices to the brief of amicus curiae, aesthetic considerations are not impossible to define in a code or ordinance. Moreover, the procedural safeguards contained in the Issaquah Municipal Code (providing for appeal to the City Council and to the courts) do not cure the constitutional defects here apparent. . . .

Certainly, the IMC grants Anderson the right to appeal the adverse decision of the Development Commission. But just as IMC 16.16.060 provides no standards by which an applicant or the Development Commission or the City Council can determine whether a given building design passes muster under the code, it provides no ascertainable criteria by which a court can review a decision at issue, regardless of whether the court applies the arbitrary and capricious standard as the City argues is appropriate or the clearly erroneous standard as Anderson argues is appropriate. Under either standard of review, the appellate process is to no avail where the statute at issue contains no ascertainable standards and where, as here, the Development Commission was not empowered to adopt clearly ascertainable standards of its own. The procedural safeguards provided here do not save the ordinance. . . .

Clearly, however, aesthetic standards are an appropriate *component* of land use governance. Whenever a community adopts such standards they can and must be drafted to give clear guidance to all parties concerned. Applicants must have an understandable statement of what is expected from new construction. Design professionals need to know in advance what standards will be acceptable in a given community. It is unreasonable to expect applicants to pay for repetitive revisions of plans in an effort to comply with the unarticulated, unpublished "statements" a given community may wish to make on or off its "signature street". It is equally unreasonable, and a deprivation of due process, to expect or allow a design review board such as the Issaquah Development Commission to create standards on an *ad hoc* basis, during the design review process.

Conclusion

It is not disputed that Anderson's project meets all of the City's land use requirements except for those unwritten and therefore unenforceable requirements relating to building design which the Development Commission unsuccessfully tried to articulate during the course of several hearings. We order that Anderson's land use certification be issued, provided however, that those changes which Anderson agreed to through the hearing before the City Council may validly be imposed.