

STATE OF RHODE ISLAND  
PROVIDENCE, SC.

SUPERIOR COURT

TOWN OF BARRINGTON :

Plaintiff :

vs. :

C.A. No. 02-

EMILY CALANDRELLI, GENE OBERHAUSER, :  
GIFT GROUP OF AMERICA, dba IMAGINE and :  
CUZZONE COMMERCIAL PROPERTIES :

Defendants :

EMILY CALANDRELLI, GENE OBERHAUSER, :  
GIFT GROUP OF AMERICA, dba IMAGINE :

Plaintiffs :

vs. :

TOWN OF BARRINGTON by and through its :  
Building Official ROBERT B. SPEAKER and its :  
Treasurer DEAN HUFF, JR. :

Defendants :

VERIFIED ANSWER AND COUNTERCLAIM

Now come the Defendants Emily Calandrelli, Gene Oberhauser and Gift Group of America, dba Imagine (collectively referred to as “Imagine”) and hereby respond to the Plaintiff Town of Barrington’s (the “Town”) complaint as follows:

1. Admitted.
2. Admitted.
3. Denied that this court’s jurisdiction is properly invoked in this action.
4. Admitted.

5. Admitted that the Town requested removal of Imagine's cow under the threat of a fine of up to \$500,000 per day. Denied that such a request was lawful.
6. Admitted that Exhibit B is a true and accurate copy of correspondence sent by the Town to Imagine. All other allegations are denied.
7. Admitted that Exhibit C and D are true and accurate copies. All other allegations are denied.
8. Denied.
9. Denied.
10. Admitted that Exhibit E is a true and accurate copy of correspondence received by Imagine from the Town. All other allegations are denied.
11. Admitted that Exhibit F is a true and accurate copy of correspondence to the Town from Imagine. All other allegations are denied.
12. Admitted that the cow remains. Denied that it is a continuing violation of the Town's zoning ordinance.
13. Denied.
14. Denied.

WHEREFORE, Imagine prays that this Honorable Court will deny the relief sought by the Town and award Imagine its court costs and other relief as this Court shall deem fair and just.

#### AFFIRMATIVE DEFENSES

1. The Town's claim against Imagine fails to state a cause of action for which relief can be granted in as much as the complaint does not seek to declare rights, status, or other legal relations.

2. This Court lacks subject matter jurisdiction over this action and lacks jurisdiction to grant the relief sought. This Court lacks jurisdiction to order someone to appeal. This Court lacks jurisdiction to order zoning violation fines that lie exclusively within the jurisdiction of the Town. And, this Court lacks jurisdiction to award the Town its attorneys' fees pursuant to R.I. Gen. Laws § 9-30-10 which limits recovery to court costs.
3. The Town ordinance in question is unconstitutional both as written (facially) and as applied.

Defendants EMILY CALANDRELLI,  
GENE OBERHAUSER, and GIFT  
GROUP OF AMERICA, dba IMAGINE  
By their Attorney:

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Carolyn A. Mannis, Esq. #4275  
As volunteer lawyer for the Rhode Island  
Affiliate of the ACLU  
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## COUNTERCLAIM

### PARTIES

1. Counterclaim Plaintiffs Emily Calandrelli and Gene Oberhauser are owners and operators of Gift Group of America, a novelty gift store doing business as Imagine and located at 18 Maple Avenue in the Town of Barrington, Rhode Island (collectively referred to as "Imagine").
2. Counterclaim Defendant Town of Barrington is being sued by and through ROBERT B. SPEAKER its Building Official in that he is the person charged

with the enforcement of the Zoning Ordinance and DEAN HUFF, JR. in that damages are sought (collectively referred to as the “Town”).

#### JURISDICTION

3. This Court has jurisdiction over the within counterclaim pursuant to R.I. Gen. Laws § 9-30-1 *et seq.* and pursuant to R.I.Super.R.Civ.P. 65 and R.I. Gen. Laws § 8-2-13.

#### STATEMENT OF FACTS

4. Imagine has been running a novelty gift store in the Town since June of 2001.
5. Earlier this year, Imagine began displaying artwork in the form of a blue fiberglass cow on property it leases from Cuzzone Commercial Properties located within the Town.
6. The artwork in question is neither misleading nor related to unlawful activities.
7. The artwork in question is protected speech.
8. On or about July 19, 2002, the Town sent a Notice of Violation threatening Imagine with a Five Hundred Dollar (\$500) per day penalty if the artwork was not removed.
9. The Notice of Violation also states, “Failure to comply may result in a summons to court.”
10. Other than the within action, the Town has never summonsed Imagine to court.
11. Imagine continues to display the artwork in question.

12. Merchandise is not defined, exempted or regulated in the Zoning Ordinance in question, Article XVII, as it relates to signs. A true copy of the Barrington Zoning Ordinance, Article XVII is attached hereto as Exhibit A.
13. The Town has advised Imagine that it must pay a \$150 fee in order to contest the Notice of Violation and the applicability of Article XVII to the artwork.
14. The Town's threats and intimidation have caused Imagine irreparable harm for which there is no adequate remedy at law.
15. Imagine has a likelihood of success on the merits of her claim at trial given that the Zoning Ordinance in question, Article XVII, on its face and as applied, is clearly vague and overbroad and violative of the First, Fifth and Fourteenth Amendments to the U.S. Constitution and Article 1 §2 and Article 1, §21 of the Rhode Island State Constitution.
16. Imagine also has a likelihood of success on the merits of her claim that the procedures used by the Town to enforce the ordinance violate procedural due process.
17. Imagine also has a likelihood of success on the merits of her claim that the Town's enforcement of the ordinance violates her rights to equal protection of the laws.

#### STATEMENT OF CLAIM

18. The Zoning Ordinance in question, Article XVII, is unconstitutional on its face and as applied and violates the First, Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1 §2 and Article 1, §21 of the Rhode Island State Constitution because it is unconstitutionally vague and

overbroad and violates procedural due process rights and equal protection of the laws.

19. The Zoning Ordinance defines 'sign face' as "Any picture, symbol, emblem, letter, object or decorative device, or combination of these, whether illuminated or not illuminated, which is designed to be freestanding or used on the exterior of a building or seen from the exterior of a building. A sign face may convey a message to the public concerning the identification of the premises or to advertise or promote the interests of any private or public firm, person or organization, or may be purely decorative." (§ 185-89)
20. The Zoning Ordinance in question, Article XVII, on its face is vague and overbroad and lacks objective and measurable standards as to the signs that are prohibited.
21. The Town cannot regulate speech that poses no danger to the Town interest assertedly underlying the regulation nor can it completely suppress information when narrower restrictions on expression would serve the Town's interest just as well.
22. The Zoning Ordinance in question, Article XVII, has the effect of entirely suppressing both commercial and non-commercial speech in order to pursue a non-speech related policy.
23. The Zoning Ordinance in question, Article XVII is more extensive than is necessary to serve the Town's interest.

24. The Zoning Ordinance in question, Article XVII, does not allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he or she may comply accordingly.
25. The Zoning Ordinance in question, Article XVII, impermissibly delegates basic policy matters to the Building Official for resolution on an ad hoc and subjective basis that leads citizens of the Town to steer far wider of the unlawful zone than if the boundaries were narrowly tailored.
26. The Zoning Ordinance in question, Article XVII, provides ineffective or remote support for the Town's stated purpose.
27. The Zoning Ordinance in question, Article XVII, will not advance the Town's stated purpose to a material degree.
28. As such, the Zoning Ordinance, Article XVII, as it relates to signs, violates the due process requirement of the Fourteenth Amendment.
29. The proscription of the Zoning Ordinance, Article XVII, relating to signs is not adequately delineated. Instead, the Zoning Ordinance as it relates to signs sets forth standards that are impermissibly broad and lacking objectivity.
30. The Zoning Ordinance, Article XVII, seeks to regulate pictures, symbols, emblems, letters, objects and/or decorative devices. (§ 185-89)
31. The Zoning Ordinance makes the legality of a sign judged solely by the characteristics assigned to it by the Town's Building Official.
32. The Zoning Ordinance sweeps within its prohibition signs that may not be punished under the First and Fourteenth Amendments and criminalizes and/or punishes constitutionally protected free speech.

33. The Zoning Ordinance in question, Article XVII, on its face is not necessary to serve the public interest nor is it narrowly drawn.
34. As a result of the enforcement of this unconstitutional Zoning Ordinance, Article XVII, Imagine was deprived of their rights under the Constitution by the Town who were acting under color of law through their enforcement under the unlawful Zoning Ordinance and Imagine is therefore entitled to damages as a result of that action.
35. As a result of the enforcement of this unconstitutional Zoning Ordinance, Article XVII, Imagine has suffered deprivation of protected freedoms, has been subjected to unlawful prosecution, and incurred other losses and has been damaged economically.
36. The Town has unlawfully demanded that Imagine file an appeal and pay a \$150.00 filing fee without first having been afforded an opportunity to be heard in violation of Imagine's procedural due process rights.
37. The Town has unlawfully enforced the Zoning Ordinance in question, Article XVII against Imagine in violation of state and federal equal protection rights.

WHEREFORE, Imagine prays that this Court will:

- A. Enter an Order declaring the relative rights and obligations of the parties. Specifically, an Order is requested declaring that the Zoning Ordinance, Article XVII, as it relates to signs is unconstitutional both on its face and as applied, in that it is vague and overbroad and violates the First, Fifth and Fourteenth Amendments and Article 1 §2 and Article 1, §21 of the Rhode Island State Constitution.. An Order is also requested declaring

that the process sought by the Town to force Imagine to pay a fee to appeal without affording it a hearing, violates Imagine's constitutionally protected procedural due process rights.

- B. Enter an Order temporarily restraining and preliminarily enjoining the Town and Building Official, their successors, agents, employees and anyone acting in concert with them from violating Imagine's protected constitutional rights.
- C. Enter an Order temporarily restraining and preliminarily enjoining the Town and Building Official, their successors, agents, employees and anyone acting in concert with them from enforcing or threatening to enforce the Zoning Ordinance, Article XVII, against Imagine for its cow display.
- D. Set this matter down for a hearing on permanent injunction and after hearing thereon enter a permanent injunction in accordance with the relief set forth herein.

After hearing on the merits,

- 1. Enter a permanent injunction enjoining the Town and Building Official from enforcing the Town's Zoning Ordinance, Article XVII, against Imagine for its cow display.
- 2. Enter a judgment declaring that the Town's Zoning Ordinance, Article XVII, as it relates to signs, on its face and as applied, violates the First, Fifth and Fourteenth Amendments to the U.S. Constitution, and Article I, Section 21 of the R.I. Constitution.

3. Enter a judgment declaring that the procedures used by the Town to enforce the Zoning Ordinance, Article XVII, against Imagine violate constitutionally protected procedural due process rights.
4. Enter a judgment declaring that the procedures used by the Town to enforce the Zoning Ordinance, Article XVII, against Imagine violate equal protection rights.
5. Enter judgment for Imagine against the Town and Building Official declaring that the Town and Building Official violated Imagine's federally protected constitutional rights in violation of 42 U.S.C. § 1983.
6. Award Imagine its compensatory damages.
7. Award Imagine its costs, including reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 and/or the Equal Access to Justice Act, R.I. Gen. Laws § 42-92-1 *et seq.*
8. Award Imagine such other and further relief as this Court deems necessary and appropriate.

Defendants EMILY CALANDRELLI,  
GENE OBERHAUSER, and GIFT  
GROUP OF AMERICA, dba IMAGINE  
By their Attorney:

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Carolyn A. Mannis, Esq. #4275  
As volunteer lawyer for the Rhode Island  
Affiliate of the ACLU  
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Dated: October 28, 2002

I VERIFY THAT THE ANSWERS AND ALLEGATIONS ARE TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

\_\_\_\_\_  
Emily Calandrelli

\_\_\_\_\_  
Gene Oberhauser

Signed and sworn to before me this \_\_\_\_ day of October, 2002.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

#### CERTIFICATION

I hereby certify that I hand-delivered a true copy of the within to Michael A. Ursillo, Esq., URSILLO, TEITZ & RITCH, LTD., 2 Williams St., Providence, RI 02903 on this \_\_\_\_ day of October, 2002.