



January 23, 2018

***Via Electronic Mail***

Cheektowaga Town Councilmembers  
3301 Broadway  
2nd Floor, Room 208  
Cheektowaga, NY 14227

Diane Benczkowski  
3301 Broadway  
2nd Floor, Room 208  
Cheektowaga, NY 14227

Dear Cheektowaga Town Councilmembers and Supervisor Benczkowski,

We are writing regarding Cheektowaga’s nuisance ordinance, known as “Rental Property” and found in Chapter 194 of Cheektowaga’s municipal code. Nuisance ordinances, such as this one, infringe on residents’ constitutional right to petition the government because they punish calls for police assistance. Furthermore, such ordinances harm domestic violence and other crime victims who may be punished under the ordinance for crimes committed against them.

We wish to call your attention to a recent court case from the Appellate Division of the Third Department where an ordinance that is very similar to the Cheektowaga nuisance ordinance was struck down as unconstitutional. We believe that your nuisance ordinance is also unlawful and we hope that this recent decision will prompt Cheektowaga to rescind its Rental Property ordinance. In this letter we (1) explain why the Cheektowaga ordinance is unconstitutional under the First Amendment, under the recent Third Department decision; (2) discuss how the Cheektowaga ordinance also may run afoul of the Constitution’s Equal Protection and Due Process clauses, as well as the Fair Housing Act; and (3) set forth a request for limited records related to the ordinance pursuant to New York State Freedom of Information Law, N.Y. Pub. Off. Law § 84 *et seq.*

**The Cheektowaga “Rental Property” Ordinance is Unconstitutional**

In a June 2017 decision, *Village of Groton v. Pirro*, the Third Judicial Department’s Appellate Division struck down the Village of Groton’s Nuisance Law as unconstitutional.<sup>1</sup> The Nuisance Law penalized properties for criminal activity, even when tenants reported the criminal activity or were the victims of it.

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<sup>1</sup> *Bd. of Trustees of Vill. of Groton v. Pirro*, 152 A.D.3d 149 (3d Dep’t 2017).

The First Amendment protects the right to petition the government for redress of grievances, including the right to make criminal complaints to the police. The court in *Village of Groton* found that the Nuisance Law was unconstitutional under the First Amendment because it “deters tenants from seeking assistance from police by placing them at risk of losing their homes.”<sup>2</sup> The court struck down the entire law on its face because it would chill people, including domestic violence victims, from reaching out for police assistance. It noted that “the unconstitutional aspects of the law are so interwoven in its provisions that severance would be impractical,” concluding that the entire law was invalid under the First Amendment.<sup>3</sup> The ruling did not depend on the way that Groton had actually enforced the ordinance.

Cheektowaga’s ordinance, like the law struck down in *Village of Groton*, violates the First Amendment’s protection of the right to petition the government because it imposes penalties based on reports of criminal activity or other offenses. Like the unconstitutional Village of Groton ordinance, the Cheektowaga ordinance contains the following provisions:

- The Cheektowaga ordinance punishes landlords and tenants for a wide range of behaviors – criminal and noncriminal – that any person engages in on a property. The ordinance is triggered by police response to a broad list of conduct, including any criminal activity, with domestic violence explicitly listed as an example, and “activities affecting the quality of life of residents.”<sup>4</sup> This is similar to the unconstitutional Village of Groton law, under which points accumulated toward a public nuisance determination based on a comprehensive list of criminal and non-criminal incidents, ranging from “[s]uffering or permitting the premises to become disorderly” to assault.<sup>5</sup>
- The Cheektowaga ordinance does not require convictions in order for the ordinance to be triggered. Police response “for reports of criminal activity or public nuisance activity” is sufficient.<sup>6</sup> Similarly, under the invalid Groton nuisance ordinance, violations that accrued points did not need to involve criminal prosecution or conviction, and merely had to be proven by a preponderance of the evidence.<sup>7</sup>
- The Cheektowaga ordinance permits the town to base notices of criminal and nuisance behavior as well as fines on “complaint[s] alleging the occurrence of criminal activity or a public nuisance.”<sup>8</sup> Thus, like the ordinance at issue in *Village of Groton*, nothing in the law precludes the ordinance from being triggered for “police involvement resulting from a tenant’s exercise of the right to petition the government for redress by summoning police.”<sup>9</sup>

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<sup>2</sup> *Id.* at 156.

<sup>3</sup> *Id.* at 161.

<sup>4</sup> Town of Cheektowaga, N.Y., Code §§ 194-2, 194-4(A).

<sup>5</sup> *Vill. of Groton*, 152 A.D.3d at 157.

<sup>6</sup> Town of Cheektowaga, N.Y., Code § 194-4(A).

<sup>7</sup> *Vill. of Groton*, 152 A.D.3d at 157.

<sup>8</sup> Town of Cheektowaga, N.Y., Code §§ 192-2, 194-4(A).

<sup>9</sup> *Vill. of Groton*, 152 A.D.3d at 157.

- Like the Groton ordinance, the Cheektowaga ordinance makes no distinction between crimes committed by tenants and crimes committed against tenants.<sup>10</sup>
- Both the Cheektowaga ordinance and the invalidated Groton ordinance may cause tenants to lose their homes because the ordinances permit eviction of tenants as a remedy that landlords may use when a property is designated a nuisance.<sup>11</sup>

Additionally, Cheektowaga’s ordinance raises concerns under the Fourteenth Amendment’s Equal Protection Clause and Due Process Clause, and the Fair Housing Act. Under both the Fourteenth Amendment’s Equal Protection Clause and the Fair Housing Act, laws may not discriminate on the basis of sex. In September 2016, the Department of Housing and Urban Development issued guidance making clear that nuisance ordinances that have an unjustified discriminatory effect on victims of domestic violence violate the Fair Housing Act.<sup>12</sup> This guidance explains that where nuisance ordinances have a disparate impact cities face a “difficult burden” in justifying their use and that repealing nuisance ordinances is “[o]ne step a local government may take toward meeting its duty to affirmatively further fair housing.”<sup>13</sup> Laws such as Cheektowaga’s that punish domestic violence victims, who are predominantly women, for seeking police assistance or for being the victims of crime in their homes may unlawfully discriminate on the basis of sex.<sup>14</sup> Laws such as Cheektowaga’s that encourage eviction of tenants pursuant to a nuisance designation without providing adequate procedural protections, including an opportunity for landlords or tenants to contest the purported criminal or nuisance activity, may violate the Fourteenth Amendment’s Due Process Clause.

Though these issues were not reached in the *Village of Groton* decision, similar claims against comparable nuisance ordinances have led to settlements involving significant monetary compensation. The American Civil Liberties Union (ACLU) filed and settled cases on behalf of domestic violence victims in Borough of Norristown, PA for \$495,000, and Surprise, AZ for over \$200,000, and both settlements also led to complete repeal of the laws, with an agreement not to adopt similar provisions in the future.<sup>15</sup>

Recent lawsuits also have resulted in agreements or court orders to stop enforcement of laws similar to your nuisance ordinance that threaten tenants with evictions. In July 2017, tenants

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<sup>10</sup> *Id.* at 158. See Town of Cheektowaga, N.Y., Code § 194-4(A).

<sup>11</sup> Town of Cheektowaga, N.Y., Code § 194-4(A) (explaining that once a property owner or manager receives a notice pursuant to the ordinance they “shall then take appropriate action to notify the tenant to cease any such activity, or evict said tenant”); *Vill. of Groton*, 152 A.D.3d at 158.

<sup>12</sup> Department of Housing and Urban Development, Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (Sept. 13, 2016), <https://portal.hud.gov/hudportal/documents/huddoc?id=FinalNuisanceOrdGdnce.pdf>.

<sup>13</sup> *Id.* at 9, 12.

<sup>14</sup> Cheektowaga’s ordinance explicitly lists domestic violence and sexual assault as criminal activity that could trigger the ordinance. Town of Cheektowaga, N.Y., Code § 194-2.

<sup>15</sup> ACLU Women’s Rights Project, *Recent Settlements and the Implications of Local Nuisance Ordinances for Municipal Governments*, <http://www.imla.org/images/links/webinar/Bulletin%20for%20municipalities%20on%20Briggs%20settlement%20and%20nuisance%20ordinances.pdf>; ACLU, *Nancy Markham v. City of Surprise*, <https://www.aclu.org/cases/nancy-markham-v-city-surprise>.

with criminal records in transitional supportive housing represented by the ACLU obtained a preliminary injunction from a federal court against a Residential Rental Property Ordinance in Hesperia, California. The Hesperia ordinance, like the ordinance in Cheektowaga, allowed the city to prompt evictions of tenants based on supposed criminal activity on the property without adequate due process.<sup>16</sup> In 2016, Wilkes-Barre, Pennsylvania agreed to stop enforcing an ordinance that allowed city officials to evict tenants and prevent landlords from renting properties if anyone was suspected of illegal activity involving drugs or guns on the premises, after the ACLU filed a lawsuit on behalf of tenants and landlords threatened with eviction under the ordinance.<sup>17</sup>

Cities in New York also have settled constitutional and Fair Housing Act challenges against their nuisance ordinances. In 2010, a lawsuit brought by domestic violence survivors against East Rochester, New York was settled for monetary damages and resulted in the municipality agreeing to amend its ordinance.<sup>18</sup> Hornell, New York also settled a challenge brought against its nuisance ordinance by a domestic violence survivor, amending its law in 2011.<sup>19</sup>

Given the *Village of Groton* decision, the Cheektowaga Rental Property ordinance is clearly unconstitutional. We therefore ask that Cheektowaga rescind this ordinance.

### **Freedom of Information Law Request Regarding Cheektowaga’s “Rental Property” Ordinance**

In addition, we request records regarding the ordinance entitled “Rental Property” and located in Chapter 194 of Cheektowaga’s Municipal Code. Below we have detailed the information we seek for inspection or production in accordance with the New York State Freedom of Information Law, N.Y. Pub. Off. Law § 84 *et seq.*

If possible, please provide the requested records in electronic format. If requested records are maintained in a computer database, please contact us before retrieving the records so that we can ensure that the retrieved records are in a usable and readable format. We agree to compensate you for the cost of duplicating the records we request, as provided by law. Upon locating the requested documents, please contact us prior to photocopying and advise us of the actual cost of duplication.

The New York State Freedom of Information Law requires a response within five business days of the receipt of a written request for records. If access to the records we are requesting will take longer than five days, please contact us with information about when we might expect copies or the ability to inspect the requested records.

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<sup>16</sup> ACLU of Southern California, *Victor Valley Family Resource Center v. City of Hesperia*, <https://www.aclusocal.org/en/cases/victor-valley-family-resource-center-v-city-hesperia>.

<sup>17</sup> ACLU of Pennsylvania, *Peters v. Wilkes-Barre*, <https://www.aclupa.org/our-work/legal/legaldocket/peters-v-wilkes-barre/>.

<sup>18</sup> Brian Sharp, *City to fix law that snared victims*, Democrat & Chronicle, Nov. 1, 2015, <http://www.democratandchronicle.com/story/news/2015/11/02/city-fix-law-snared-victims/74879710/>.

<sup>19</sup> Stipulation of Settlement and Discontinuation, *Peeso v. City of Hornell*, No. 6:11-cv-06306 (W.D.N.Y. filed Nov. 14, 2011).

We seek the following records in possession of the Town of Cheektowaga:

From November 1, 2012 to the present, copies of all warnings, notices, orders, penalties, fines, or other communications issued pursuant to the Rental Property ordinance by any city official or employee.

Please furnish records to:

Scout Katovich  
Legal Fellow  
New York Civil Liberties Union  
125 Broad Street, 19<sup>th</sup> Floor  
New York, NY 10004

If for any reason any portion of this request is denied, please inform us of the reasons for the denial in writing and provide the name and address of the person or body to whom an appeal should be directed.

Please contact Scout Katovich by February 9, 2018, to advise us of whether you plan to rescind your nuisance ordinance. We welcome the opportunity to discuss this matter further with you. Thank you for your consideration.

Sincerely,

Scout Katovich  
Legal Fellow  
New York Civil Liberties Union

John A. Curr III  
Western Regional Office Director  
New York Civil Liberties Union  
712 Main Street, Buffalo, NY 14202

Sandra Park  
Senior Staff Attorney  
ACLU Women's Rights Project

Amy Schwartz-Wallace  
Senior Staff Attorney  
Empire Justice Center

Connie Neal  
Executive Director  
New York State Coalition Against Domestic  
Violence

Cc: Town of Cheektowaga Law Department