January 23, 2018

Via Electronic Mail

Rochester City Council Members
City Hall, Room 301A
30 Church St.
Rochester, NY 14614

Lovely Warren
City Hall, Room 307A
30 Church St.,
Rochester, NY 14614

Dear Rochester City Council Members and Mayor Warren,

We are writing regarding Rochester’s nuisance ordinance, known as “Abatement of Nuisances” and found in Section 3-15 of Rochester’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.

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 Rochester 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 Rochester to rescind its Abatement of Nuisances ordinance. In this letter we (1) explain why the Rochester ordinance is unconstitutional under the First Amendment, under the recent Third Department decision; (2) discuss how the Rochester ordinance also may run afoul of the Constitution’s Due Process Clause; 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 Rochester “Abatement of Nuisances” 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.1 The Nuisance Law penalized properties for criminal activity, even when tenants reported the criminal activity or were the victims of it.

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

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1 Bd. of Trustees of Vill. of Groton v. Pirro, 152 A.D.3d 149 (3d Dep’t 2017).
homes.” 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. The ruling did not depend on the way that Groton had actually enforced the ordinance.

Rochester’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 authorizes the imposition of penalties based on criminal activity or other offenses, which generally come to the attention of Rochester through 911 calls and police reports. Though Rochester’s ordinance protects victims of crime, including domestic violence victims, by providing that “points, sanctions and penalties assessed under this ordinance shall not be applied against the premises where an owner, lessor, lessee, mortgagee or other person . . . was a victim of the enumerated crime or violation,” it does not adequately protect other people who call the police or seek emergence assistance. Like the unconstitutional Village of Groton ordinance, the Rochester ordinance contains the following provisions:

- The Rochester ordinance punishes landlords and tenants for a wide range of behaviors – criminal and noncriminal – that any person engages in on a property. The ordinance assigns points towards a nuisance designation for a broad list of conduct, including controlled substances offenses, city code violations, and “[s]uffering or permitting the premises to become disorderly.” 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.

- The Rochester ordinance does not require convictions in order for the ordinance to be triggered. Instead, like the invalid Groton nuisance ordinance, violations that accrue points must merely be proven by a preponderance of the evidence.

- The Rochester ordinance does not specify what kind of evidence may be used to prove that violations have occurred. 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.”

- Both the Rochester ordinance and the invalidated Groton ordinance may cause tenants to lose their homes. The Rochester ordinance permits the city to order the

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2 Id. at 156.
3 Id. at 161.
4 City of Rochester, N.Y., Code § 3-15(A).
5 City of Rochester, N.Y., Code § 3-15(B).
6 Vill. of Groton, 152 A.D.3d at 157.
7 Id.; City of Rochester, N.Y., Code § 3-15(B)(4).
8 City of Rochester, N.Y., Code § 3-15(B)(4).
9 Vill. of Groton, 152 A.D.3d at 157.
closure of a building if it is determined to be a public nuisance.\textsuperscript{10} The Groton ordinance permitted eviction of tenants as a remedy that landlords could use when a property was designated a nuisance.\textsuperscript{11}

Additionally, Rochester’s ordinance raises concerns under the Fourteenth Amendment’s Due Process Clause. Laws such as Rochester’s that permit displacement of tenants pursuant to a nuisance designation without providing adequate procedural protections, including an opportunity for tenants to contest the purported nuisance activity, may violate the Fourteenth Amendment’s Due Process Clause.

Though this issue was not reached in the Village of Groton decision, a similar claim succeeded in an as-applied challenge against the City of Rochester’s nuisance law in October 2017. In Alcorn ex rel. Proas Partners, LLC v. Muhammad, a trial court found Rochester’s ordinance to be “unconstitutional as to innocent parties.”\textsuperscript{12} The court found that the city’s closure of a property that had been designated a nuisance was “so arbitrary and oppressive as to be a taking without due process of law in violation of the Fourteenth Amendment.”\textsuperscript{13} The court determined that the hearings provided under Rochester’s Abatement of Nuisances ordinance were constitutionally insufficient to protect the landlord’s and tenants’ property interests.\textsuperscript{14} In reaching this conclusion the court noted that “the accumulation of nuisance points based upon calls to 911 by owners and tenants” undermined the city’s stated interest in promoting public safety.\textsuperscript{15} In addition to finding that the ordinance violated the Due Process Clause, the court also held that it violated the Fourth Amendment’s protection against unlawful seizure of property and the Eighth Amendment’s prohibition on excessive fines.\textsuperscript{16}

Lawsuits 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.\textsuperscript{17}

Recent lawsuits also have resulted in agreements or court orders to stop enforcement of laws similar to your nuisance ordinance that threaten to displace tenants. In July 2017, tenants 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 Rochester, allowed the city

\textsuperscript{10} City of Rochester, N.Y., Code § 3-15(C)(1)(a).
\textsuperscript{11} Vill. of Groton, 152 A.D.3d at 158.
\textsuperscript{13} Id. at *10.
\textsuperscript{14} Id. at *8-9.
\textsuperscript{15} Id. at *9.
\textsuperscript{16} Id. at 10-11.
to take actions that could result in tenants losing their homes based on supposed criminal activity on the property without adequate due process. 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.

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. Hornell, New York also settled a challenge brought against its nuisance ordinance by a domestic violence survivor, amending its law in 2011.

Given the Village of Groton and Alcorn decisions, the Rochester Abatement of Nuisances ordinance is clearly unconstitutional. We therefore ask that Rochester rescind this ordinance.

Freedom of Information Law Request Regarding Rochester’s “Abatement of Nuisances” Ordinance

In addition, we request records regarding the ordinance entitled “Abatement of Nuisances” and found in Section 3-15 of Rochester’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.

We seek the following records in possession of the City of Rochester:

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21 Stipulation of Settlement and Discontinuation, Peeso v. City of Hornell, No. 6:11-cv-06306 (W.D.N.Y. filed Nov. 14, 2011).
From November 1, 2012 to the present, copies of all warnings, notices, orders, penalties, fines, or other communications issued pursuant to the Abatement of Nuisances ordinance by any city official or employee.

Please furnish records to:

Scout Katovich  
Legal Fellow  
New York Civil Liberties Union  
125 Broad Street, 19th 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

Iman Abid  
Genesee Valley Chapter Director  
New York Civil Liberties Union  
121 North Fitzhugh Street, Suites 401-403  
Rochester, New York 14614

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New York State Coalition Against Domestic Violence

Cc: Corporation Counsel