

[https://www.nny360.com/news/stlawrencecounty/lawyers-for-owner-of-potsdam-s-toilet-gardens-update-suit-after-judge-s-ruling/article\\_191604d7-93a5-5f7c-97b4-52ca8b900568.html](https://www.nny360.com/news/stlawrencecounty/lawyers-for-owner-of-potsdam-s-toilet-gardens-update-suit-after-judge-s-ruling/article_191604d7-93a5-5f7c-97b4-52ca8b900568.html)

## Lawyers for owner of Potsdam's 'toilet gardens' update suit after judge's ruling

By VAUGHN GOLDEN

vgolden@wdt.net

Sep 29, 2020



A driveway on a Pine Street property in Potsdam owned by Frederick J. Robar Sr. is lined Aug. 19 with decorative toilets. Christopher Lenney/Watertown Daily Times

POTSDAM — Lawyers for Frederick “Hank” Robar have amended their lawsuit’s complaint against the village as they seek to shore up legal arguments in the case.

Last week, the judge in the case granted Mr. Robar an injunction — barring the village from forcibly removing fixtures from his seven “toilet gardens” across the village.

On Monday, the legal team for Mr. Robar filed an amended complaint that made several changes — likely in reaction to the judge’s 42-page ruling — that show areas where Mr. Robar is trying to strengthen his legal arguments that his porcelain planters are constitutionally protected.

In July, the village Board of Trustees passed a resolution ordering Mr. Robar to comply with code related to “junk storage,” requiring him to remove all of the “bathroom fixtures” from his seven notorious toilet gardens in the village. In mid-August, Mr. Robar struck back. He filed a lawsuit in U.S. District Court’s Northern District of New York, which alleges the village order is illegal under the First Amendment, Fourteenth Amendment and the Visual Artists Rights Act of 1990.

Likely the most significant addition made to Mr. Robar’s complaint this week was new evidence he’s presenting to support his claim that he alone is being unfairly targeted by the village, in violation of the Fourteenth Amendment.

Last week, Judge Lawrence E. Kahn wrote in his memorandum on the case that Mr. Robar did not provide any evidence beyond a personal statement, stating he isn’t “personally aware” of any such instances in which the junk storage law has been enforced against other residents who publicly display repurposed junk.

In order to win his equal protection claim, the judge wrote, Mr. Robar would have to provide sufficient evidence he experienced malicious selective treatment as compared to other similarly situated individuals.

The additions to the complaint appear to provide examples of six such properties that have historically displayed items that may constitute “junk” under the village’s code. Some of the items on the properties include tires, junked vehicles and milk jugs. The Times was able to spot some, but not all, of the items referenced in the amended complaint.

Another change in the complaint appears to be aimed at solidifying Mr. Robar’s position that the artistic value of his toilet displays would be degraded if they were moved or covered up.

“The porcelain planters incorporated into Mr. Robar’s artistic installations cannot be moved without causing the destruction of Mr. Robar’s artistic installations,” his updated complaint reads in part.

This point appeared to be a matter of confusion.

“It also bears noting that Mr. Robar’s planters are not site-specific,” a memorandum of law from Mr. Robar’s team filed prior to the judge’s ruling. “They can be moved and installed in various locations, and accomplish their artistic message and political protest, so long as they are publicly visible.”

In his ruling, Judge Kahn said Mr. Robar’s statements on whether the placement of the toilets and bathroom fixtures on his properties would affect his purported value of the installations were contradictory with each other.

A subtle addition in the complaint may also signal Mr. Robar’s team is still attempting to convince the court the issue is subject to strict scrutiny under the First Amendment.

The new line to Mr. Robar’s complaint reads, in part, “defendants are suppressing Plaintiff from expressing an artistic and political message based on its content and medium.”

In the original memorandum of law, Mr. Robar’s lawyers made the case that the action made by the village was based on the message of protest meant to be conveyed through the toilet gardens.

This, the attorneys argued, would be a content-based regulation. Courts apply a level of strict scrutiny, having very little leniency, where a governmental response is made due to the message an individual is trying to deliver. In Mr. Robar’s case, the message in his art is, in his eyes, a form of protest he is exhibiting against the town after being denied a zoning variance in 2005.

In the ruling last week, the judge denied the plaintiff’s argument that the regulation from the village was content-based, but he did deem it content-neutral, which is still subject to an intermediate level of scrutiny. By adding the language to the complaint, it may signal Mr. Robar’s attorneys will continue pushing that the junk storage law be considered content-based.

Earlier this month, attorneys for the village moved to have the case dismissed entirely. A hearing over that motion is scheduled for Oct. 16 in Albany.

---

Vaughn Golden