

In the District Court
of
Franklin County, Kansas

Ellen Finnerty,

Plaintiff,

v.

The City of Ottawa, Kansas,

Defendant.

Civil Action No.

Petition for Declaratory Judgment; Jury Trial
Demand; Exhibits 1-4.

Petition for Declaratory Judgment

Ellen Finnerty files this Petition for Declaratory Judgment seeking prospective, non-monetary relief from the City of Ottawa’s unconstitutional home-based business prohibitions.

Introduction

1. The only thing standing between Ellen Finnerty and her dream business is the City of Ottawa, Kansas.

2. Ms. Finnerty is a 52-year-old single mother who works full-time as a machine operator. To help support her family, Ms. Finnerty wants the opportunity to sell homegrown produce and home-raised honey at Ottawa’s farmer’s market. But she can’t. Ottawa outlaws any home-based business not “conducted entirely within a dwelling unit” and all home-based businesses involving “animal care of any type.” Since gardens grow outside, and honeybees are animals, Ms. Finnerty is prohibited from using her own backyard to garden and safely raise honey, as a home-based business. Selling homegrown blackberries or home-raised honey at the local farmer’s market shouldn’t land you in jail. But for some in Ottawa, that’s exactly what can happen.

3. Ottawa’s home-based business prohibitions are unreasonable, irrational, arbitrary, oppressive, and unconstitutional. There is no evidence that all home-based businesses conducted outside the dwelling unit are inherently dangerous to the public’s

welfare; nor is there any evidence that all home-based businesses involving animals are inherently dangerous to the public's welfare. There is no evidence that backyard gardening or backyard beekeeping are inherently dangerous to the public's welfare either. On the contrary. Ms. Finnerty's home-based business would benefit her, her family, and the citizens of Ottawa, if allowed.

4. This lawsuit seeks to vindicate Ms. Finnerty's fundamental and inalienable natural right to earn an honest living; her fundamental and inalienable natural right to use her own backyard for a peaceful, productive, and benign purpose; and her right to be treated equally under the law; all of which are protected by the Kansas Constitution Bill of Rights.

5. The City of Ottawa's home-based business prohibitions deprive Ms. Finnerty, and others like her, of their constitutional rights under the Kansas Constitution Bill of Rights Sections 1, 2, and 18.

6. This Court should declare Ottawa's home-based business prohibitions unconstitutional and permanently enjoin their enforcement.

Parties

7. Ellen Finnerty is a resident of Ottawa, Kansas, and lives at the house she owns at 820 E. 8th Street.

8. Defendant City of Ottawa, Kansas (City or Ottawa) is a municipal corporation organized under the laws of the State of Kansas, is sued for non-monetary, prospective relief, and is capable of being sued as such. KSA § 12-101.

9. The City may be served with process by serving the city clerk or the mayor. KSA § 60-304(d)(3).

10. The Attorney General will be served with a copy of the proceedings.

Jurisdiction and Venue

11. Ms. Finnerty seeks to vindicate her rights under Sections 1, 2, and 18 of the Kansas Constitution Bill of Rights, under the Kansas Declaratory Judgment Act, KSA § 60-1701, *et seq.*, the Kansas Injunctive Relief Act, KSA § 60-901, *et seq.*, and KSA § 60-257.

12. Ms. Finnerty is not suing Ottawa for money and her claims aren't sounding in tort. Instead, Ms. Finnerty seeks prospective declaratory and injunctive relief from Ottawa's unreasonable, irrational, oppressive, and arbitrary home-based business prohibitions involving backyard gardening and beekeeping. As more fully developed below and throughout this lawsuit, Ottawa's home-based business prohibitions violate Ms. Finnerty's fundamental and inalienable natural right to earn an honest living, violates her fundamental and inalienable natural right to use her own property for a peaceful, productive, and benign purpose, and violates her right to be treated equally under the law. These constitutional violations are ongoing and continuous. As more fully developed later, Ms. Finnerty seeks 1) a judgment declaring the home-based business prohibitions unconstitutional; and 2) a permanent injunction preventing the enforcement of the home-based business prohibitions.

13. This Court has jurisdiction pursuant to KSA § 60-1701, *et seq.*, KSA § 60-901 *et seq.*, Sections 1, 2, and 18 of the Kansas Constitution Bill of Rights, KSA § 20-301, and KSA § 60-257.

14. Ms. Finnerty's home is located in the City of Ottawa, within Franklin County, Kansas. Venue is proper.

Facts

Ellen Finnerty and Her Dream Business: Backyard Gardening and Home-Raised Honey

15. Ellen Finnerty is a 52-year-old single mother who works as a machine operator in the Gardner-Edgerton area.

16. Over the years, Ms. Finnerty began contemplating retirement and how to help support herself and her family. Ms. Finnerty decided that backyard gardening and backyard beekeeping would be a fun and rewarding way to make additional money and spend time bonding with her almost-teenage daughter.

17. Ms. Finnerty has taken concrete steps to achieve her dream business. She designed a honeybee-friendly pollinator garden, planted blackberry bushes, blueberry bushes, apple trees, cherry trees, and hazelnut trees.

18. Ms. Finnerty doesn't use chemicals or pesticides in her garden and doesn't plan to use them either.

19. Ms. Finnerty has completed beekeeping classes at Johnson County Community College, covering such topics as beekeeping techniques and practices. She also received hands-on training by working beehives.

20. Ms. Finnerty's neighborhood and backyard is well-suited for backyard gardening and beekeeping. It's low density, the house abuts an alley, and it's mostly tree lined. *See, Google Maps.*



21. In August 2022, Ms. Finnerty reached out to the City's Permit Technician to see what kind of permit she needed in order to legally place "2-3 hives at her residence," for the home-raised honey portion of the business. *See Ex. 1.*

I'm hoping you have more knowledge of Bee Keeping as a home occupation and can answer to Ellen, who is included in this email. She's asking what permitting or approvals she needs to place 2-3 hives at her residence at 820 E. 8th. I explained to Ellen that Mike is OOO the next couple days and then back in briefly before being out again, so this response will not be immediate.

Thank you,

Melanie LaMar
Permit Technician

22. The City Planner responded that “animal keeping of any kind is prohibited as a home occupation. Animal keeping is only permitted on agricultural zoned land. I know this is a hot topic in the region and cities are slow to adopt code[s] to address bee keeping/chickens/etc[,] in residential districts.” Ex. 2.

Hi Ellen,

I am the Planner with the City of Ottawa. Melanie informed me you were curious about hosting a few bee hives at your residence at 820 E. 8th St.

As it currently stands with Ottawa Zoning Regulations, animal keeping of any kind is prohibited as a home occupation. Animal keeping is only permitted on agricultural zoned land. I know this is a hot topic in the region and cities are slow to adopt code to address bee keeping/chickens/etc in residential districts. If you have further questions, please feel free to reply to this message or give the office a call. I know Mike is not in the office today and is in and out of the office next week; but he will get back with you soon.

23. When Ms. Finnerty requested authority for the City Planner’s position, the City Planner cited Zoning Code (Code), Section 23-301(b). Ex. 3.

Ellen,

I will provide you a screenshot of the code as well as a link to regulations and where to find it.

SECTION 23-3 PROHIBITED HOME OCCUPATIONS

23-301. Except where allowed as a permitted or conditional use, home occupations shall not in any event include the following:

- a. Antiques, retail or wholesale.
- b. Animal care of any type.
- c. Funeral homes or services.
- d. Retail sale or rental of any goods or products, other than where the commercial exchange constituting such sales or rental is accomplished by means of catalog orders, whether in written or electronic form.

Revised 04-04-12

23-2

https://www.ottawaks.gov/_files/ugd/9968d8_bab4358f217e40c091a1d9dca26318d1.pdf

Article 23 is Home Occupations. You will find it in Section 23-3. Let me know if you have more questions. Thanks.

Best,

24. If allowed to produce home-raised honey, Ms. Finnerty would safely place two beehives in the middle of her backyard, near the already-existing water feature she installed, safely away from any passersby or neighboring dwellings; she would maintain her beehives according to commonly accepted practices; and as necessary or appropriate, she would seek the advice, guidance, and counsel from established beekeepers.

The City of Ottawa Criminalizes Home-Based Businesses that are Safe, Beneficial to the Community, and that Have Been Practiced for Millenia—for No Good Reason.

25. The City of Ottawa criminalizes *any* home-based business that is not “conducted entirely within a dwelling unit,” *see* Code, Article 2, Sections 2-301 & Section 23-101, and *all* home-based businesses involving “animal care of any type,” *see* Code, Section 23-301(b) & Section 23-101, in a manufactured home subdivision district, the area where Ms. Finnerty lives.¹

26. Violating Ottawa’s home-based business prohibitions is punishable by up to six months in jail, a potential \$500 fine, or both—for each offense. Each day a person operates a safe but illegal home-based business is another potential 6-month jail sentence. Code, Section 30-501. That means the government could seek a 7-year jail sentence for a 14-day pop-up home-based business.

27. Ottawa’s “entirely within a dwelling unit” mandate prohibits backyard gardening as a home-based business.

28. Ottawa’s “entirely within a dwelling unit” mandate and “animal care of any type” prohibition forbids backyard beekeeping as a home-based business.

29. Because Ottawa’s Code doesn’t expressly prohibit backyard gardening as a hobby, for sustenance, or even for one’s own enjoyment, it is permitted—upon good faith belief. *See* Code, Article 2, Section 2-301 (agricultural use of property doesn’t include land used for recreational purposes, or land that is a residential suburban property—undefined by

¹ Exhibit 4. It’s also accessible here: https://www.ottawaks.gov/_files/ugd/9968d8_0cd6e5ba60154e5a923848d6ce9508d3.pdf (last accessed May 22, 2023).

the Code—or home sites and yard areas whose primary function is for residential or recreational purposes); *M.S.W., Inc. v. Bd. of Zoning Appeals of Marion Cnty.*, 29 Kan. App. 2d 139, 151 (2001) (zoning ordinances must be liberally construed in favor of the property owner); *State v. Eckert*, 522 P.3d 796, 804 (Kan. 2023) (all doubts about the meaning of a criminal statute must be resolved in favor of the person subject to the statute under rule of lenity).

30. Because Ottawa’s Code doesn’t expressly prohibit backyard beekeeping and raising honey either, if done as a hobby, for sustenance, or for one’s own enjoyment either, it is permitted—upon good faith belief. *See* Code, Article 2, Section 2-301 (agricultural use as described in the preceding paragraph); *see* Code, Article 2, Section 24-602 (common household pets permitted as an accessory use in any district); Minnesota Public Radio, Daily Circuit Blog (May 1, 2012) (quoting Gary Reuter from University of Minnesota Department of Entomology) (“For most hobby beekeepers they’re more – it’s more accurately a pet, you know? And I know everybody’s going to think that’s weird but, for a hobby beekeeper - yeah part of it’s to get honey - but most of it’s they enjoy working with the bees; watching the bees; watching their behavior; and seeing what they do. It’s just fun to have ‘em out there, so I compare ‘em more to a dog or a cat or a fish than I do to, you know, a cow or a chicken.”); Frank C. Pellett, *Lippincott’s Farm Manuals: Productive Bee-Keeping, Modern Methods of Production and Marketing of Honey*, 1 (Kary C. Davis, Ph.D. ed., 1916) (“Honey-Bees as Pets.— No, this is not a joke, for bees really do make nice pets. ... Yes, it is safe to say that nearly every really successful bee-keeper comes to feel a strong affection for the busy little insects, and to regard his bees as pets.”); *Smith v. Steineauf*, 140 Kan. 407 (1934) (right to keep animals for “pleasure” and “the felicity of the home” is protected); *M.S.W., Inc., supra*; *Eckert, supra*;

Beekeeping: Deeply Rooted in History and Tradition

31. Beekeeping is an ancient practice. For thousands of years, people around the world kept bees in wooden boxes, straw skeps, pottery vessels, and the like. *See generally*, Richard Jones, *The World's Beekeeping Past and Present*, in *The Hive and the Honey Bee* 1-22 (Joe

Graham ed., rev. ed., 2015); E.C. Martin, *et al.*, *Beekeeping in the United States*, U.S. Department of Agriculture, Agriculture Handbook No. 335 (revised), 2 (1980).

32. In Kansas, people have been keeping domesticated bees for more than 170 years. *See The Kansas State Bee-Keepers Association*, *The Kansas Lever* (Apr. 13, 1893).

33. Local Kansas beekeepers' associations have existed since at least 1872. *Bee Books*, *The Kansas Spirit* (Feb. 17, 1872) (describing Douglas County, Kansas, Beekeepers Association).

34. Kansans have been selling their own local honey for more than 150 years. *E.g.*, *Fine Honey*, *The Daily Kansas Tribune* (Sep. 26, 1869) (describing D.G. Watt of Wakarusa keeping bees, selling honey, and exhibiting hives at Kansas State fair); *Improved Bee-Keeping*, *Western Home Journal* (Dec. 9, 1869) (column explaining how one increases profitability from beekeeping); *Bees for the Horticulturist*, in *Bulletin of the Kansas State Horticultural Society*, (Kansas State Printing Plat, Topeka, 1922) at 16 (“There is another reason why I produce comb honey if I can, and that is it is easy to sell and has always sold for a good price”).

35. For more than 150 years, Kansans have been keeping beehives at their homes. *E.g.*, *The Baldwin Institute*, *The Daily Kansas Tribune* (Sep. 3, 1871) (article describing a Doctor's beehives on his residential property); *What I Know About Bee-Keeping*, *The Kansas Spirit* (Mar. 9, 1872) (describing five beehives kept at home in Atchison); *Bees for the Horticulturist*, *supra* at 18 (describing keeping hives “at home”).

36. People even kept bees in the City of Ottawa—for money. *E.g.*, J.R. Barnhart, *Bee-Keeping for Profit*, *Ottawa Tribune* (May 30, 1890). Indeed, Ottawa has a rich beekeeping tradition. *E.g.*, *Beekeepers, Attention*, *The Ottawa Herald* (Nov. 30, 1893) (announcing Kansas State Beekeepers Association meeting in Ottawa; inviting “every one who has one or more stands of bees”); *The Kansas State Bee-Keepers Association*, *The Kansas Lever* (Apr. 13, 1893) (referencing the “proprietor of the Ottawa Bee Hive Factory”); *id.* (Secretary and Treasurer of the State Beekeepers Association from Ottawa); *Who Should Keep Bees?*, *Ottawa Gazette* (July 26, 1879); *Rules for Beginners in Beekeeping*, *The Ottawa Daily Republic* (Aug. 3, 1898).

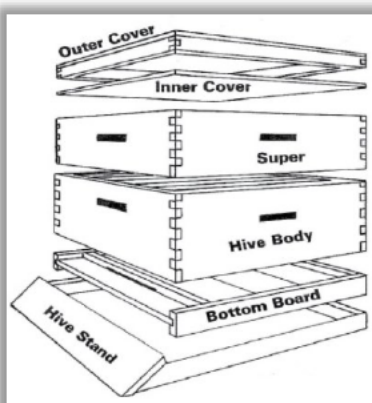
37. The honeybee is even the official insect of the State of Kansas. KSA § 73-1601.

Modern Backyard Beekeeping: An Overview

38. Modern backyard beekeeping requires little equipment. A hive, a few hive tools, a simple veil, gloves, and a good smoker is enough. *See, generally*, Charles C. Dadant, *Beekeeping Equipment*, in *The Hive and the Honey Bee* 463-484 (Joe Graham ed., rev. ed., 2015).

39. The typical backyard hive is a Langstroth, eponymously named and patented in 1852. The typical Langstroth holds 10 removable frames, although some prefer an 8-frame instead because they're lighter and easier to move. *See* Howland Blackiston, *Beekeeping for Dummies* 92(5th ed., 2020).

40. A complete Langstroth hive has just a few basic components:²



41. The outer and inner covers protect the hives below; the super is where the excess honey is stored; the queen excluder keeps the queen from laying eggs in the super; and the hive body / brood chamber (brood box) is where the queen lays eggs, raises brood, and so on; and the bottom board protects the hives. The removable frames sit inside the brood box and the super, and that's where the bees build their wax, raise their brood, and store their honey.

42. Experienced beekeepers usually recommend new beekeepers start with two hives so they can draw comparisons between them.

² Image from Rachele Messner, et al., *Backyard Beekeeping*, Utah State University, Extension Sustainability (2014) available at https://digitalcommons.usu.edu/cgi/viewcontent.cgi?article=2044&context=extension_curall.

43. Beekeepers work their hives as necessary. They check on the queen (making sure she's laying eggs), inspect the comb development, monitor for disease, and so on. During the nectar flow, they decide whether to add another brood box or super. Later in the season, they check the bees' honey production. Working the hive takes about 15-20 minutes. *See* Howland Blackiston, *Beekeeping for Dummies* 155-192 (5th ed., 2020).

44. At the end of the season—in Kansas, sometime around July or August—the beekeeper starts to prepare for winter. That means harvesting honey, addressing any problems, and then, for the most part, leaving the hives alone until the next Spring.

Backyard Beekeeping: Beneficial to the Beekeeper, the Community, and Safe

45. In recent years, backyard beekeeping has become increasingly popular, for good reasons.

46. Beekeeping benefits both the community and the individual beekeeper. Honeybees help pollinate local gardens, fruits, vegetables, berries, and native plants.

47. Tending bees and being outdoors provides health benefits to the beekeeper.

48. Eating local, fresh honey provides health benefits “given its antimicrobial, antiviral, antiparasitary, anti-inflammatory, antioxidant, antimutagenic and antitumor effects.” Rachele Messner, et al., *Backyard Beekeeping*, Utah State University, Extension Sustainability (2014); *see also*, Delaney Nothhaft, *Is honey good for you? Learn about the buzz here.*, USA Today (May 20, 2023).

49. Backyard beekeeping also dramatically improves gardens, increasing the health of plants and the amount of produce yielded. Howland Blackiston, *Beekeeping for Dummies* 10 (5th ed., 2020).

50. Backyard beekeeping can be financially beneficial, too. Bees produce pollen, propolis, beeswax, royal jelly, and course, honey, all of which can be marketed and sold.

51. One colony can produce 60-100 pounds of honey per year. A 20-ounce jar of local honey sells for around \$18-\$20; a 10.5-ounce jar of honey with a honeycomb chunk sells

for around \$16-\$18; and a 6-ounce jar of bee pollen sells for around \$5-\$7. Of course, prices fluctuate depending on yields, weather, and so on.

52. Beekeeping can also be a profound source of joy and happiness. Pellett, *Lippincott's Farm Manuals, supra*, at 1, 7-8; Karin Alton, et al., *Can Beekeeping Improve Mental Wellbeing during Times of Crisis?*, *Bee World* 99:2, 40-43, (2022); *Cf. Steineauf*, 140 Kan. 407 (1934).

53. Beekeeping is easy and safe. Howland Blackiston, *Beekeeping for Dummies* 1 (5th ed., 2020). Western or European honeybees—the type Ms. Finnerty would purchase—are generally docile, gentle, and rarely sting, unless their hive is threatened. Michelle Berquist, et al., *Towards a New Approach to Beekeeping Policy in Urban Ontario*, University of Toronto (2012).

54. Western honeybees do not exhibit defensive behaviors beyond about six and a half feet from their hive. Dr. Norman Gary, *Activities and Behavior of Honey Bees*, in *The Hive and the Honey Bee* 1-22 (Joe Graham ed., rev. ed., 2015).

55. Passersby won't be impacted by a beehive if they stay beyond about six and a half feet from it. *See, id.*

56. Honeybees are interested in pollen and fresh water—not human food or activities—and rarely sting unless threatened or disturbed near the hive's entrance. *See, e.g.*, Jaime Bouvier, *How Cities Are Responding to the Urban Agriculture Movement with Micro-Livestock Ordinances*, 57 *The Urban Lawyer*, 85, 107 (2015); Douglas Sponsor, *Beekeeping in, of or for the city? A socioecological perspective.*, 3 *People and Nature*, 550, 553 (2021).

57. Beekeeping rarely causes *any* significant problems, *see* Nina Mukherji and Alfonso Morales, *Zoning for Urban Agriculture*, *American Planning Association Zoning Practice*, March 2010 at 6, and “[c]oncerns” about honeybee stings “are exaggerated.” Bouvier, 107. Bathtubs, pools, lawn mowers, and stairs are far more dangerous than honeybees. *See generally*, Center for Disease Control Statistics.

58. Western or European honeybees aren't at all like wasps, hornets, or yellow jackets, which are often mistaken for honeybees. Wasps, hornets, or yellow jackets are attracted to human food, picnics, garbage cans, and are aggressive. Honeybees can only sting once, and are killed in the process, while wasps, hornets, and yellow jackets can sting numerous times. Blackiston, 43-8.

59. Backyard beekeeping is safely and legally practiced in cities across the Nation, including Washington, D.C., Los Angeles, Baltimore, Chicago, St. Louis, Kansas City, MO; and in Wichita, Lawrence, Prairie Village, Lenexa, Mission, Olathe, Shawnee, Overland Park, Leawood, Columbus, Phillipsburg, Derby, Kansas City, Kansas.

60. At the state level, some states have either preempted or severely limited municipalities from regulating backyard beekeeping. *E.g.*, Florida, New Jersey, Oregon, North Carolina.

It's Perfectly Legal—and Safe—to Sell Backyard Honey Directly to Consumers

61. In Kansas, backyard beekeepers can legally sell home-raised honey “direct to consumer[s] without licensing.” *Foods Sold Direct to Consumers in Kansas: Regulations and Food Safety Best Practices*, Kansas State University Agricultural Experiment Station and Cooperative Extension Service (Jan. 2023).

62. Locally raised honey is regularly sold at the Ottawa Farmer's Market.

Backyard Gardening

63. Backyard gardening is an ancient practice too.

64. Backyard gardening is a “potential source of income.” Nina Mukherji and Alfonso Morales, *Zoning for Urban Agriculture*, American Planning Association Zoning Practice, March 2010 at 6.

65. In Kansas, people have been selling home-grown food for hundreds of years. *See* Angel Kwolek-Follard, *Customers and Neighbors: Women in the Economy of Lawrence, Kansas, 1870-1885*, *Business and Economic History*. Vol. 27, No. 1, Fall 1998 (describing the extensive

economic activity of women in home-based businesses, including “raising vegetables in the side garden.”).

66. Backyard gardening has long been considered beneficial, both nutritionally and psychologically. During World War I, the Great Depression, and World War II, for example, homegrown food was “largely a tool of food security” and provided much needed support in “hard times.” Nina Mukherji and Alfonso Morales, *Zoning for Urban Agriculture*, American Planning Association Zoning Practice, March 2010 at 2, 3.

67. During the Covid-19 Pandemic, people turned to gardening for stress relief *and* food access. Summer Cortez, et al., *Gardening During Covid-19: Experiences from gardeners around the world*, U.C. Agriculture and Natural Resources (2022).

It’s Perfectly Legal—and Safe—to Sell Backyard Produce Directly to Consumers

68. In Kansas, backyard gardeners can legally sell 1) fresh, uncut fruits and vegetables; 2) whole, frozen fruits or vegetables not heated before freezing; 3) intact salad greens not cut beyond normal harvesting; 4) cut berries, cut herbs, cut carrots, zucchini noodles; and 5) nuts and nut butters, directly to the consumer without a license. *Foods Sold Direct to Consumers in Kansas: Regulations and Food Safety Best Practices*, Kansas State University Agricultural Experiment Station and Cooperative Extension Service (Jan. 2023).

Home-Based Businesses: Deeply Rooted in Our Nation’s and State’s History and Tradition

69. Working from home was the norm for much of America’s history—not the exception. It’s what shaped the traditional, quintessential American Main Street. Olivia Gonzales & Nolan Gray, *Zoning for Opportunity: A Survey of Home-Based Business Regulations*, Ctr. for Growth & Opportunity at Utah State University, at 6 (March 2020). It was the norm in Kansas too. See Angel Kwolek-Follard, *Customers and Neighbors: Women in the Economy of Lawrence, Kansas, 1870-1885*, Business and Economic History. Vol. 27, No. 1, Fall 1998 (describing the extensive economic activity of women in home-based businesses, including “raising vegetables in the side garden.”).

There's No Good Reason for the City of Ottawa's Home-Based Business Prohibitions

70. Ms. Finnerty realleges and incorporates by reference all the preceding paragraphs.

71. There are no constitutionally sufficient reasons for completely and totally prohibiting Ms. Finnerty and others like her from engaging in backyard gardening and backyard beekeeping, as a home-based business, for at least all of the following reasons, whether viewed individually or collectively: Ms. Finnerty

- a. Doesn't use gardening chemicals and doesn't plan to use gardening chemicals.
- b. Doesn't plan to have customers physically visiting her house.
- c. Doesn't plan to employ anyone, other than perhaps her daughter.
- d. Would safely place two hives in the middle of her yard, near an already-existing water source, which is about twenty-five feet from any property lines, and even further from any neighboring dwellings.
- e. Would maintain her beehives according to commonly accepted practices. And
- f. Would, as necessary or appropriate, seek advice, guidance, and counsel from established beekeepers.

72. Ottawa's home-based business prohibitions involving backyard gardening and backyard beekeeping are unreasonable, irrational, arbitrary, and oppressive for at least all of the following reasons, whether viewed individually or collectively:

- a. There is no evidence that all home-based businesses conducted outside the dwelling unit are inherently dangerous to the public's health, safety, or welfare.
- b. There is no evidence that all home-based businesses involving animals are inherently dangerous to the public's health, safety, or welfare.
- c. Ms. Finnerty's proposed home-based business involving backyard gardening and backyard beekeeping:
 - i. Won't generate on-street parking.
 - ii. Won't increase foot or car traffic.

- iii. Won't involve solid or hazardous waste.
 - iv. Won't generate pollution, loud noises, or noxious fumes or smells.
 - v. Won't change the neighborhood's character. And
 - vi. Won't pose a significant, serious, substantial, or even minimal risk to the public health, safety, or welfare to the community.
- d. There's no evidence that backyard gardening and beekeeping, in and of themselves, pose an inherent danger or risk to the public's health, safety, or welfare.
 - e. There's no evidence that placing two beehives in the middle of Ms. Finnerty's backyard, near a water source, more than ten feet from existing buildings and property lines, poses a significant, serious, substantial, or even minimal risk to the public health, safety, or welfare to the community.
 - f. There's no evidence that Ms. Finnerty's backyard garden poses a significant, serious, substantial, or even minimal risk to the public health, safety, or welfare to the community.
 - g. There's no evidence that backyard gardening and backyard beekeeping *for money* is any different than backyard gardening and backyard beekeeping as hobbies.
 - h. Backyard gardening and backyard beekeeping *benefits* individuals who garden and keep bees.
 - i. Backyard gardening and backyard beekeeping actually *benefits* the community too.
 - j. Ottawa's code is so arbitrary, it criminalizes growing produce for money in a backyard, but at the same time permits selling produce in a front yard, 120 days a year. *See* Code, Article 24, Section 24-501(a)(5).

Ottawa's Home-Based Business Prohibitions Injure Ellen Finnerty and Others Like Her

73. Ms. Finnerty realleges and incorporates by reference all the preceding paragraphs.

74. Ottawa's home-based business prohibitions prevent Ms. Finnerty from engaging in traditional and benign home-based businesses involving backyard gardening and backyard beekeeping, even though both are innocuous and safe.

75. The City of Ottawa's home-based business prohibitions unreasonably, arbitrarily, oppressively, and unfairly prohibit Ms. Finnerty's fundamental and inalienable natural right to earn an honest living, to be free from unreasonable government restrictions, her fundamental and inalienable natural right to use her own backyard for a peaceful, productive, and benign purpose, and her right to be treated equally under the law, all of which are protected by the Kansas Constitution Bill of Rights.

76. The City of Ottawa's home-based business prohibitions, as described throughout this lawsuit, are not appropriately tailored to fit the practice of backyard gardening or backyard beekeeping.

77. Because of the home-based business prohibitions, Ms. Finnerty has refrained from purchasing backyard beekeeping equipment, honeybees, and so on.

78. But for the home-based business prohibitions, Ms. Finnerty would immediately begin taking additional steps to start her backyard beekeeping and backyard gardening business.

79. The same day the home-based business prohibitions are declared unconstitutional and enjoined, or as soon thereafter as reasonably possible, Ms. Finnerty would begin taking steps to purchase and place two beehives in her backyard.

80. Every day the home-based business prohibitions are in effect, Ms. Finnerty is losing the opportunity to earn an honest living, losing the opportunity to make additional income, and is losing the opportunity to use her own backyard for a peaceful, productive, and benign purpose, and she's being treated unequally under the law.

81. Ms. Finnerty fears criminal and civil prosecution or adverse action if she begins backyard beekeeping as a home-based business.

82. The home-based business prohibitions are ongoing and continuous, as are the violations of Ms. Finnerty's rights under the Kansas Constitution Bill of Rights.

83. Ms. Finnerty is irreparably harmed and injured by Section 23-301(b) of Ottawa's Zoning Code which prohibits home-based businesses involving "animal care of any type," Ottawa's prohibition on any home-based business that is not "conducted entirely within a dwelling unit," Section 2-301, page 2-11, and the Code's concomitant enforcement penalties under Section 30-501.

84. There is no administrative remedy available that would provide Ms. Finnerty with the relief she seeks.

85. Ms. Finnerty has no other remedy at law, other than to file this lawsuit for prospective, non-monetary relief from the ongoing and continuous violations of her constitutional rights.

Declaratory Judgment and Injunctive Relief

86. Plaintiff realleges and incorporates by reference all the preceding paragraphs.

87. An actual controversy has arisen and now exists between Ms. Finnerty and Defendant concerning Plaintiff's rights under the Kansas Constitution Bill of Rights. A judicial declaration is necessary and appropriate at this time. Plaintiff's injuries result from, and are caused by, Defendant's home-based business prohibitions. Plaintiff's injuries are concrete, particularized, and cognizable.

88. Plaintiff desires a judicial determination of her rights against Defendant as they pertain to the home-based business prohibitions at issue in this matter.

89. It is appropriate and proper that a declaratory judgment be issued under the Kansas Declaratory Judgment Act, KSA § 60-1701, *et seq.*, declaring unconstitutional all relevant portions of home-based business prohibitions at issue in this case.

90. Pursuant to the Kansas Injunctive Relief Act, KSA § 60-901, *et seq.*, it is appropriate and requested that this Court issue permanent, prospective relief prohibiting enforcement of the home-based business prohibitions at issue in this case.

**Claim One: Violation of the Kansas Constitution Bill of Rights, Section 1
(Life, Liberty, and Pursuit of Happiness Clause)**

91. Plaintiff realleges and incorporates by reference all the preceding paragraphs.

92. Kansas Constitution Bill of Rights Section 1 guarantees that “[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.”

93. Section 1 of the Kansas Constitution Bill of Rights is a “natural rights” clause that sets forth “rights that are broader than and distinct from those in the Fourteenth Amendment” to the United States Constitution. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 622 (2019). Section 1’s protections apply to “an enormous variety of topics” and is “nonexhaustive.” *Hodes* at 624, 631-32; *accord Smith v. Steineauf*, 140 Kan. 407 (1934).

94. The “scope” and “contours” of the “natural rights guaranteed” by Section 1 requires an examination of the historical record, including the “writings of John Locke and William Blackstone.” *State v. Carr*, 314 Kan. 615, 629 (2022).

Section 1 Protects the Right to Earn an Honest Living

95. Based upon Section 1’s text, the historical record, the Magna Carta, the writings of John Locke, William Blackstone, Thomas Jefferson, Cato’s Letters, and others—as will be shown throughout this lawsuit—the right to earn an honest living is a fundamental and inalienable natural right protected by Section 1 of the Kansas Constitution Bill of Rights.

96. The right to earn an honest living is objectively, deeply rooted in both our Nation’s and State’s history and tradition, and implicit in the concept of ordered liberty such that neither liberty nor justice could exist without it.

97. Kansas founders understood the right to earn an honest living to be a natural right too. *See, e.g.*, Richard Cordley, *The Lessons of Our History*, *The Herald of Freedom* (Dec.

3, 1859) (“every man has an inalienable right to the undisturbed possession and use of himself and all his faculties. The right of individual self-possession and self-use are the only basis of free government, and any government that fully guarantees these, whatever its form, is a free government.”); Solon Thatcher, *The Republican*, Western Home Journal, (Aug. 4, 1859) (the natural rights expressed in the Declaration of Independence are “the foundation stones upon which the whole structure of Liberty rests;” the “rights of the people are jealously cared for” in the Kansas Constitution, which “is radiant with the sunlight of Liberty.”).

98. In sum, Kansas Constitution Bill of Rights Section 1 protects the right to earn an honest living, to conduct business free from unreasonable governmental interference, and to be free from unreasonable government restrictions.

Right to Use One’s Own Backyard for a Peaceful, Productive, and Benign Purpose

99. Based upon Section 1’s text, the historical record, the Magna Carta, the writings of John Locke, William Blackstone, Thomas Jefferson, Chancellor James Kent, Justice Joseph Story, Cato’s Letters, and others—as will be shown throughout this lawsuit—the right to own, use, and enjoy property is a fundamental and inalienable natural right protected by Section 1 of the Kansas Constitution Bill of Rights.

100. The right to own, use, and enjoy private property has long been recognized as an inalienable natural right, is deeply rooted our Nation’s and State’s history and tradition, and implicit in the concept of ordered liberty such that neither liberty nor justice could exist without it. *See, e.g., Leavenworth Lodge No. 2 of I.O.O.F. v. Byers*, 54 Kan. 323 (1894) (“The general principle is that every owner has absolute dominion over his own property,” and plaintiffs “have the natural right to the use of the same in their own way”); *Gray v. Stewart*, 70 Kan. 429 (1904) (holding there’s a “natural right[] of persons to hold and manage their own property” and laws that limit the natural right must be “strictly construed”); *Babb v. Rose*, 156 Kan. 587 (1943) (same).

101. In sum, Kansas Constitution Bill of Rights Section 1 protects the fundamental and inalienable natural right to use one's own backyard for a peaceful, productive, and benign purpose.

Ottawa's Home-Based Business Prohibitions Violate Ms. Finnerty's Fundamental and Inalienable Natural Rights

102. Ottawa's home-based business prohibitions as applied to Plaintiff, violates Kansas Constitution Bill of Rights Section 1.

103. There's no evidence, or sufficient justification, for Ottawa's home-based business prohibitions, as described above and throughout.

104. Ottawa's home-based business prohibitions are unreasonable, irrational, arbitrary, oppressive, and unconstitutional for at least all of the reasons stated above and throughout the lawsuit, whether viewed individually or collectively.

105. Ottawa's home-based business prohibitions, as applied to Plaintiff, are not appropriately tailored to any sufficiently important government interest.

106. Ottawa's home-based business prohibitions, as applied to Plaintiff, do not directly or materially advance any sufficiently important government interest.

107. As a consequence of Ottawa's home-based business prohibitions, Plaintiff has been and will continue to be injured, and is therefore entitled to, among other things, declaratory judgment and prospective injunctive relief, and any other equitable or other legal relief as the court deems just or appropriate.

108. Plaintiff has no other legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to her constitutional rights that is a direct and proximate result of Defendant's application and enforcement of Ottawa's home-based business prohibitions.

109. Unless Ottawa's home-based business prohibitions, as applied to Plaintiff and others who are similarly situated, are declared unconstitutional and permanently enjoined,

Plaintiff and others who are similarly situated will continue to suffer great and irreparable harm. Plaintiff therefore seeks such declaratory and injunctive relief.

**Claim Two: Violation of the Kansas Constitution Bill of Rights, Section 18
(Due Course Clause)**

110. Plaintiff realleges and incorporates by reference all the preceding paragraphs.

111. Section 18 states, in pertinent part: “All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law[.]”

112. Section 18 is Kansas’ due process of law clause. *Hodes*, 309 Kan. 610 at 627; *Creecy v. Kansas Dep’t of Revenue*, 310 Kan. 454, 462 (2019).

113. Due process of law protects, among other things, the right to earn an honest living, to conduct business free from unreasonable governmental interference, to be free from arbitrary, unreasonable, oppressive, or irrational government restrictions, and to use one’s property for a peaceful, productive, and benign purpose.

114. There’s no evidence, or sufficient justification, for Ottawa’s home-based business prohibitions, as described above and throughout.

115. Ottawa’s home-based business prohibitions are unreasonable, irrational, arbitrary, oppressive, and unconstitutional for at least all of the reasons stated above and throughout the lawsuit, whether viewed individually or collectively.

116. Ottawa’s home-based business prohibitions as applied to Plaintiff, violates Kansas Constitution Bill of Rights Section 18.

117. Ottawa’s home-based business prohibitions as applied to Plaintiff, are not appropriately tailored to any sufficiently important government interest.

118. Ottawa’s home-based business prohibitions as applied to Plaintiff, do not directly or materially advance any sufficiently important government interest.

119. Plaintiff has no other legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to her constitutional rights that is a direct and

proximate result of Defendant's application and enforcement of Ottawa's home-based business prohibitions.

120. Unless Ottawa's home-based business prohibitions, as applied to Plaintiff and others who are similarly situated, are declared unconstitutional and permanently enjoined, Plaintiff and others who are similarly situated will continue to suffer great and irreparable harm. Plaintiff therefore seeks such declaratory and injunctive relief.

**Claim Three: Violation of the Kansas Constitution Bill of Rights Sections 1 and 2
(Equal Protection)**

121. Plaintiff realleges and incorporates by reference all the preceding paragraphs.

122. Kansas Constitution Bill of Rights Section 1 guarantees the equal protection of rights. Kansas Constitution Bill of Rights Section 2 guarantees that "[a]ll political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit."

123. Kansas Constitution Bill of Rights Sections 1 and 2 protect against unequal treatment. These clauses protect similarly situated people from being treated differently, and differently situated people from being treated similarly.

124. There's no evidence, or sufficient justification, for treating those who use their own backyard for a peaceful, productive, and benign purpose differently from others who also use their own backyard for a peaceful, productive, and benign purpose based solely on whether the peaceful, productive, and benign purpose involves a commercial transaction, and vice versa.

125. There's no evidence, or sufficient justification, for treating backyard gardeners and backyard beekeepers differently from other backyard gardeners and backyard beekeepers based solely on whether the backyard gardening and backyard beekeeping involves a commercial transaction, and vice versa.

126. Ottawa's home-based business prohibitions unconstitutionally treat those who use their own backyard for a peaceful, productive, and benign purpose differently from others

who also use their own backyard for a peaceful, productive, and benign purpose based solely on whether the peaceful, productive, and benign purpose involves a commercial transaction, and vice versa, even though the activities themselves are identical.

127. Ottawa's home-based business prohibitions unconstitutionally treat backyard gardeners and backyard beekeepers differently from other backyard gardeners and backyard beekeepers based solely on whether the backyard gardening and backyard beekeeping involves a commercial transaction, and vice versa, even though the activities themselves are identical.

128. There's no evidence, or sufficient justification, for treating those who use their own backyard for a peaceful, productive, and benign purpose the same as those who use their property in a way that isn't peaceful, productive, or benign.

129. There's no evidence, or sufficient justification, for treating backyard gardeners and backyard beekeepers the same as those whose pursuits are inherently dangerous.

130. Ottawa's home-based business prohibitions unconstitutionally treat those who use their own backyard for a peaceful, productive, and benign purpose the same as those who use their property in a way that isn't peaceful, productive, or benign.

131. Ottawa's home-based business prohibitions unconstitutionally treat backyard gardeners and backyard beekeepers the same as those whose pursuits are inherently dangerous.

132. Ottawa's home-based business prohibitions, as applied to Plaintiff, are not appropriately tailored to any sufficiently important government interest.

133. Ottawa's home-based business prohibitions, as applied to Plaintiff, do not directly or materially advance any sufficiently important government interest.

134. Plaintiff has no other legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to her constitutional rights that is a direct and proximate result of Defendant's application and enforcement of Ottawa's home-based business prohibitions.

135. Unless Ottawa's home-based business prohibitions, as applied to Plaintiff and others who are similarly situated, are declared unconstitutional and permanently enjoined,

Plaintiff and others who are similarly situated will continue to suffer great and irreparable harm. Plaintiff therefore seeks such declaratory and injunctive relief.

Claim Four: Violation of the Kansas Constitution Bill of Rights Sections 1, 18, Void for Vagueness Doctrine

136. Plaintiff realleges and incorporates by reference all the preceding paragraphs.

137. To the extent the government takes the position that either backyard gardening or backyard beekeeping as hobbies are prohibited by the Code, such prohibitions violate Ms. Finnerty's fundamental and inalienable natural rights to use her own backyard for a peaceful, productive, and benign purpose, as protected by Section 1 and/or Section 18 of the Kansas Constitution Bill of Rights. *See Smith v. Steinauf*, 140 Kan. 407 (1934).

138. To the extent the government takes the position that either backyard gardening or backyard beekeeping as hobbies are prohibited by the Code, the Code is unconstitutionally vague in that it doesn't provide fair notice as to the conduct proscribed—a violation of Kansas Constitution Bill of Rights Section 18, Kansas' due process clause—and because it doesn't provide explicit standards for enforcement to protect against arbitrary enforcement—a violation of the separation of powers doctrine under the Kansas Constitution—for at least all of the following reasons, whether considered individually or collectively:

- a. "Animal care" isn't defined in Article 2, Section 23-301.
- b. "Agricultural use" in Article 2, Section 2-301 doesn't provide fair notice and is susceptible to arbitrary enforcement.
- c. "Residential suburban property" as used in "agriculture use" in Article 2, Section 2-301, isn't defined.
- d. "Recreational purposes" as used in "agriculture use" in Article 2, Section 2-301, isn't defined.
- e. "Common household pets" in Article 2, Section 24-602(a) doesn't provide fair notice and is susceptible to arbitrary enforcement.

- f. “Large domestic farm animals” in Article 2, Section 24-602(a) doesn’t provide fair notice and is susceptible to arbitrary enforcement.

139. Plaintiff has no other legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to her constitutional rights that is a direct and proximate result of Defendant’s application and enforcement of Ottawa’s prohibitions.

140. Unless Ottawa’s prohibitions, as applied to Plaintiff and others who are similarly situated, are declared unconstitutional and permanently enjoined, Plaintiff and others who are similarly situated will continue to suffer great and irreparable harm. Plaintiff therefore seeks such declaratory and injunctive relief.

Request for Relief

Plaintiff respectfully request the Court grant the following relief:

141. Plaintiff realleges and incorporates by reference all the preceding paragraphs.

142. Declaratory judgment that the City of Ottawa’s home-based business prohibitions, as described throughout and above, are unconstitutional under Kansas Constitution Bill of Rights Sections 1, 2, and 18, when applied to Plaintiff and others who are similarly situated.

143. Declaratory judgment that the City of Ottawa’s home-based business prohibitions, as described throughout and above, are unconstitutional under Kansas Constitution Bill of Rights Section 1, in that the City of Ottawa’s home-based business prohibitions:

- a. Unconstitutionally deprives Plaintiff of her fundamental and inalienable natural right to earn an honest living free from unreasonable government restrictions.
- b. Unconstitutionally deprives Plaintiff of her fundamental and inalienable natural right to earn an honest living in an occupation of her choice, one in which she is otherwise capable, experienced, and qualified.
- c. Unconstitutionally deprives Plaintiff of her fundamental and inalienable natural right to use her own backyard for a peaceful, productive, and benign purpose.

- d. Are unreasonable, arbitrary, oppressive, and irrational.
- e. Are not appropriately tailored to any sufficiently important government interest.
- f. Do not directly or materially advance any sufficiently important government interest.

144. Declaratory judgment that the City of Ottawa's home-based business prohibitions, as described throughout and above, are unconstitutional under Kansas Constitution Bill of Rights Section 18, in that the City of Ottawa's home-based business prohibitions:

- a. Unconstitutionally deprives Plaintiff of her fundamental and inalienable natural right to earn an honest living free from unreasonable government restrictions.
- b. Unconstitutionally deprives Plaintiff of her fundamental and inalienable natural right to earn an honest living in an occupation of her choice, one in which she is otherwise capable, experienced, and qualified.
- c. Unconstitutionally deprives Plaintiff of her fundamental and inalienable natural right to use her own backyard for a peaceful, productive, and benign purpose.
- d. Are unreasonable, arbitrary, oppressive, and irrational.
- e. Are not appropriately tailored to any sufficiently important government interest.
- f. Do not directly or materially advance any sufficiently important government interest.

145. Declaratory judgment that the City of Ottawa's home-based business prohibitions, as described throughout and above, are unconstitutional under Kansas Constitution Bill of Rights Section 1 and 2 in that the City of Ottawa's home-based business prohibitions apply unequally.

146. To the extent the government takes the position that either backyard gardening or backyard beekeeping as hobbies are prohibited by the Code, declaratory judgment that the Code, as described throughout and above, is unconstitutional under Kansas Constitution Bill

of Rights Sections 1, 18, and/or separation of powers and void for vagueness doctrine under the Kansas Constitution.

147. For entry of temporary, preliminary, and/or permanent prospective injunctive relief, enjoining Defendant, Defendant's officers, agents, employees, attorneys, servants, assigns, and all those in active concert or participation who receive, through personal service or otherwise, actual notice of this Court's order, from enforcing or directing the enforcement of the portions of the City of Ottawa's home-based business prohibitions, or any provision related to the home-based business prohibitions, as described throughout and above, and to the extent the government takes the position that backyard gardening or backyard beekeeping as hobbies are prohibited by the Code, or any provision related thereto, as described throughout and above, that constitute violations of Kansas Constitution Bill of Rights Sections 1, 2, 18, and/or separation of powers and void for vagueness doctrine under the Kansas Constitution, against Plaintiff and others similarly situated.

148. Such other legal or equitable relief as this Court deems appropriate and just.

Jury Demand

149. Plaintiff demands a jury trial on all issues so triable.

Kansas Justice Institute

Dated: May 22, 2023.

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