

Donut painting sparks free speech debate

By Kathy McCormack and Robert Bukaty Associated Press

CONWAY, N.H. — Bakery owner Sean Young was thrilled when high school art students covered the big blank wall over his doorway last spring with a painting of the sun shining over a mountain range made of sprinkle-covered chocolate and strawberry donuts, a blueberry muffin, a cinnamon roll and other pastries.

The display got rave reviews, and Young looked forward to collaborating with the school on more mural projects at his roadside bakery in Conway, New Hampshire.

Then the town zoning board got involved, deciding that the pastry painting was not so much art as advertising, and so could not remain as is because of its size. Faced with modifying or removing the mural, or possibly dealing with fines and criminal charges, Young sued, saying the town is violating his freedom of speech rights.

The painting could stay right where it is if it showed actual mountains, instead of pastries suggesting mountains, or if the building wasn't a bakery.

“They said it would be art elsewhere,” Young told The Associated Press in an interview. “It’s just not art here.”

“The town should not have the right to police art,” he said.

The controversy has residents of this town of 10,000 grappling with big questions about creativity and liberty as it tries to preserve its rural character. Like other White Mountain communities that draw skiers, nature lovers and shoppers, Conway is under development pressure, making the sign dispute fraught with worries that any concession to commerce could change what they hold dear.

Many — including the zoning board members — applauded the students' colorful work, but said rules must be followed, even if they're old and outdated. At about 90 square feet (8.6 square meters), the mural is four times bigger than the sign code allows.

Following a longstanding democratic tradition of New England town meetings, residents deliberated how to define a sign before ultimately voting down changes last week. The local newspaper said the proposed wording wasn't clear. Ultimately, a judge may have to resolve what remains an open debate in town.

“Those kids put their heart in it,” retiree Steve Downing said. He thinks the painting should stay.

“Everyone has to comply with the ordinance,” said Charlie Birch, a former U.S. Forest Service worker. “And even though it was done by the students, which was well done, and I give them a lot of credit for it ... if you have the ordinance, ‘One for all,’ that’s where we are. You can’t really make any exceptions, otherwise everybody else will want the exception.”

Art teacher Olivia Benish, who worked with three students on the project, apologized to the board in September for not doing “due diligence” to make sure the mural would comply. She didn’t respond to requests for an interview. But she told the board members that there has to be a way to give students the opportunity to create positive public works of art “without upsetting the law and the powers that be,” according to the town minutes.

The lawsuit Young filed in January argues that the town is unconstitutionally discriminating against him. He asked a judge to prevent the town from enforcing its sign code.

And now other businesses have been drawn into the controversy.

Long before the pastry painting was installed, the town had allowed other murals at a local shopping center, but in December the town found that three of those artworks are, indeed, signs that violate size limits. They go before the zoning board on Wednesday.

Young, who is being represented by the Virginia-based Institute for Justice, asked for \$1 in damages. Meanwhile, he’s selling T-shirts as a high school art department fundraiser, saying “This is Art” with the artwork on the front, and “This is a Sign” of a roadside “Leavitt’s Country Bakery” sign on the back.

“As Conway officials have confirmed, the town does not consider a painting to be a “sign” if it does not convey what town officials perceive to be a commercial message,” the lawsuit says. “But the town’s perception is that any mural depicting anything related to a business is a ‘sign.’ This is governmental discrimination based on the content of the speech” and the speaker’s identity, it said.

The lawsuit says the town’s sign definition is “incredibly broad,” with no mention of murals in the code: A sign in Conway is “any device, fixture, placard, structure or attachment thereto that uses color, form, graphic, illumination, symbol, or writing to advertise, announce the purpose of, or identify the purpose of any person or entity, or to communicate information of any kind to the public, whether commercial or noncommercial.”

Board member Luigi Bartolomeo said he thinks the pastry painting is art, not advertising. He read



A customer selects donuts at Leavitt's Country Bakery. **AP Photo/Robert F. Bukaty**

the definition out loud at the board's meeting in August, and said he agrees with a local attorney who called it "unconstitutionally vague."

"I think it's a very badly written piece of code here," said Bartolomeo, who recently retired. But Board Chairperson John Colbath said the board has to work with the ordinance, which was approved by voters, and that there is a process to change that.

"If they had done a seasonal mural on the wall — covered bridges and sunflowers and what have you — and it did not represent what your business is in, then it would be more likely to be a well-respected piece of art and not construed as a sign," Colbath said at the August meeting.

He said to Young, "I understand the art thing — and you look and you see a mountain — but the general public sees donuts on the front of the bakery."

"I think most of the people said it's art," Young responded. In its denial of Young's appeals, the board concluded that the bakery won't be negatively affected without the display.

"This supposed distinction between murals and signs shouldn't matter," attorney Betsy Sanz of the Institute said in a news release. "After all, nothing in the First Amendment distinguishes between art and commercial signs — or commercial speech of any kind."

The town and Young agreed in February to pause court proceedings — and any potential fines or charges — pending a vote on a revised definition that would allow the painting to stay. But it failed in last week's elections, with 805 to 750 voting against it, according to the town clerk's office. The judge now wants to hear from both sides by May 10.

"We're ready to keep going," Young said.

Town Manager John Eastman declined an interview, referring questions to town lawyer Jason Dennis, who said he would soon meet with town officials to discuss next steps.

The Conway Daily Sun offered its analysis in an editorial last week: “Voters smartly concluded that the proposed new definition of signs would only further complicate enforcement. That said, it is not a stretch to conjecture that most voters are fine with the murals at Leavitt’s Country Bakery and Settlers Green. We suggest the town figure out a way to back off enforcement until a clearer definition can be written, one that accommodates ‘art.’”

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A customer holds the door for a family arriving at Leavitt's Country Bakery, April 13 in Conway, N.H. The large painting of pastries created by students and displayed over the bakery is at the center of a legal battle pitting a zoning ordinance against freedom-of-speech rights. **AP Photo/Robert F. Bukaty**



Owner Sean Young poses at Leavitt's Country Bakery, April 13 in Conway, N.H. Young is in a federal lawsuit against the town, alleging Conway is violating his First Amendment right to keep a mural depicting various pastries above the bakery. **AP Photo/Robert F. Bukaty**