



September 22, 2010

VIA FED-EX OVERNIGHT AND E-MAIL

Board of Zoning Adjustment

Att: Brad Rodgers

City of Mayfield

211 East Broadway Street

Mayfield, KY 42066

E-mail: *brodgers@cityofmayfield.org*

**Re: Request for Reconsideration/New Review of CU-10-003
Application**

AMERICAN CIVIL
LIBERTIES UNION

Dear Mr. Rodgers:

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OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

We write on behalf of our client, Khadar Ahmed, to seek reconsideration or “new review” of his June 15, 2010, application for a conditional use permit. As explained below, we believe that the August 24, 2010, hearing on this matter was procedurally defective and that the Board’s denial runs afoul of a number of state and federal statutory and constitutional protections.

FACTUAL BACKGROUND

Mr. Ahmed rents the building located at 312 ½ East Broadway Street in Mayfield, where he seeks to establish a small Muslim worship center. On June 15, 2010, Mr. Ahmed submitted an application to the Board of Zoning Adjustment (“the Board” or “BZA”) for a conditional use permit.¹ Though city staff noted that lack of parking “may become an issue at some time if more than the allowed number of individuals come to worship in the building,” they recommended approval of Mr. Ahmed’s application.² According to staff, the city’s attorney concluded that “there is no legal way the request can be refused.”³ Consistent with the staff’s professional opinion and the city attorney’s legal review, the Board unanimously approved Mr. Ahmed’s application at its regularly scheduled meeting on August 10, 2010.⁴ That meeting was open to the public; Mr. Ahmed’s request was placed prominently on the published agenda for the meeting;⁵

¹ See Ahmed Conditional Use Application (Exhibit A, attached hereto)

² BZA Minutes of Aug. 10, 2010 (Exhibit B, attached hereto); see Staff Memorandum to Board of Zoning Adjustments (Exhibit C, attached hereto).

³ Exhibit B.

⁴ *Id.*

⁵ See BZA Agenda for Aug. 10, 2010 (Exhibit D, attached hereto).

and the City provided written notice of the request and meeting to owners of property near the proposed prayer space.⁶

Nevertheless, claiming that “several individuals present at the meeting who wanted to ask questions about this request” did not receive the opportunity to speak,⁷ the Board purportedly vacated its approval of Mr. Ahmed’s application (though no formal vote was taken) and scheduled a special meeting for August 24, 2010, where the request was subject to a “new review.”⁸ At that meeting, the Board heard comments from a handful of opponents of Mr. Ahmed’s application.⁹ Not one supporter of Mr. Ahmed’s application was allowed to speak. Indeed, one or more local residents who attempted to attend the meeting to advocate on Mr. Ahmed’s behalf were not even allowed to enter the building – they were turned away, purportedly due to overcrowding. Despite recognizing that the rejected proponents should be afforded an equal opportunity to speak, and admitting that they did not have sufficient information to make a proper determination,¹⁰ the Board pressed ahead with the vote. Though the Board has granted conditional use permits, with no conditions attached, to at least two other churches in the same zoning district,¹¹ the Board denied Mr. Ahmed’s application “citing change[s] in characteristics and safety.”¹² The Board’s official order concluded, “Based upon the building fire safety capacity and on the parking issue . . . the Board finds that the grant of the Conditional Use Permit would adversely affect the public safety or welfare and would cause a hazard or nuisance to the public under KRS 100.243.”¹³

Had Board members allowed supporters of Mr. Ahmed’s application to speak, they would have learned a number of additional pertinent facts, including but not limited to:

⁶ See Notice to Adjoining Property Owners (Exhibit E, attached hereto).

⁷ See Letter to Mr. Ahmed (Exhibit F, attached hereto).

⁸ See Findings and Order (Exhibit G, attached hereto); see also Exhibit A.

⁹ See BZA Minutes of Aug. 24, 2010 (Exhibit H, attached hereto).

¹⁰ See Exhibit H; Recording of Aug. 24, 2010, meeting (on file with ACLU).

¹¹ See Exhibit H. Board member Don Simpkins explained at the meeting: “In the past, and this is our problem that we’re in today, we’ve always approved them – religious institutions – with conditional uses subject to certain criteria, which is the way this one is. . . . If we did not treat it the same as the past, we would be discriminating. . . . The past precedents we’ve set have to deal with conditional uses for churches and we’ve done it at several locations in town already. . . . We’ve been told that legally . . . if they meet the criteria that staff recommends to us, that legally that’s what we’re supposed to do.” Recording of Aug. 24, 2010, meeting (on file with ACLU). Despite his admission, Simpkins inexplicably moved to deny Mr. Ahmed’s application.

¹² See Exhibit H.

¹³ Exhibit G.

- Most who would pray at 312 ½ Broadway Street live nearby and, therefore, would walk to the site and would not need parking. Indeed, many in the Muslim community in Mayfield are Somali immigrants who do not own cars and do not have U.S. driver's licenses. Those who would drive to the worship center for prayer frequently carpool with one another.
- The five-time daily prayers typically last only five to six minutes. On Friday afternoons, some Muslims gather together for longer prayers lasting up to 40 minutes. Mr. Ahmed does not plan to host these longer prayers at the proposed worship center.
- At any one time, the number of people who have prayed at 312 ½ Broadway Street has not exceeded 40. On the contrary, the number of people gathered in prayer would usually be far fewer than 40.
- If, by some chance, more than 40 people sought to pray at one time at the site, Mr. Ahmed would not permit entrance because the fire code forbids it.
- Mr. Ahmed has no plans to host large religious gatherings or celebrations at 312 ½ Broadway Street. Such events, such as the celebration of Eid ul-Fitr (a Muslim holiday marking the end of Ramadan), are held at a rented hall.
- Mr. Ahmed has no plans to broadcast a "call to prayer" to the neighborhood.

LEGAL GROUNDS FOR RECONSIDERATION/NEW REVIEW

As Mayfield's own attorney recognized and conveyed to staff, the Board's denial of Mr. Ahmed's application is legally unsustainable. It likely violates section two of the Kentucky Constitution (which protects against the exercise of "absolute and arbitrary power" by the state),¹⁴ the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), and various provisions of the U.S. Constitution.

A. The Board's Determination Is Arbitrary.

There is no evidence whatsoever to support a conclusion that *any* problem exists vis-à-vis the prayer room and "the fire safety capacity" or

¹⁴ KY. CONST. § 2.

“parking” – let alone the Board’s finding that these purported issues “would adversely affect the public health safety or welfare and would cause a hazard or nuisance to the public.” That “[m]ore than 40 people would compromise the egress and pose a safety hazard”¹⁵ at 312 ½ East Broadway Street would only be a legitimate concern if there were any evidence that Mr. Ahmed intends to violate the fire safety code by permitting more than 40 people to use the space at once. No such evidence was presented because it is, in fact, Mr. Ahmed’s intention to enforce the limitation, should it become necessary.

Moreover, according to the report delivered by Building Officer Jimmy Bostic at the August 10 meeting, limited parking at the venue “may” become an issue “at some time if more than the allowed number of individuals come to worship in the area.” But again, validation of that concern would require the baseless and false assumption that Mr. Ahmed would not enforce the 40-person limitation imposed by the fire safety codes. Realizing that such speculation would be an improper ground on which to deny Mr. Ahmed’s application, city staff (on the advice of the city’s attorney) recommended granting the permit.

The objections presented by several nearby business owners also provided no evidentiary basis for the Board’s decision. Their claims that parking would be worsened are conclusory at best and completely disregard the fact that most who would engage in prayer at 312 ½ East Broadway Street live within walking distance and others carpool. As illustrated by comments contained in media reports, it is likely that opponents’ parking-related concerns are overblown to mask their real objections to Mr. Ahmed’s application. For example, though the owner of a neighboring flower shop – one of the permit’s most vocal opponents – claimed at the August 24 meeting that his main concern was parking, he told the local NPR affiliate: “It’s just something that I’m not comfortable with, and a lot of people in Mayfield’s not comfortable.”¹⁶ He further explained, “We got some elderly women that come in on a regular basis. They’re telling us that they’re very uncomfortable coming in because a lot of times these men stand out in front of that building over there. Just loafing around.”¹⁷ The same opponent also admitted to a local news station that he wouldn’t have the same parking concerns if a Baptist church had applied for a conditional

¹⁵ See Exhibit H.

¹⁶ NPR, Aug. 20, 2010, *available online at* <http://www.publicbroadcasting.net/wkms/news.newsmain/article/1/0/1690713/Local.Features/Western.Kentucky.May.Get.First.Mosque>.

¹⁷ *Id.*

use permit, noting, “The way I see it, they [Baptists] would park where they are supposed to park. These people [Muslims] do not care.”¹⁸

As noted above, one or more proponents of the conditional use permit were turned away from the meeting and were not allowed to present public comment or evidence supporting the application. Given this procedural defect and the complete lack of evidence supporting the Board’s findings, denial of Mr. Ahmed’s application is, as a matter of law, arbitrary and cannot stand.¹⁹

B. The Board Applied the Wrong Legal Standard.

Kentucky Revised Statutes (KRS) § 100.243, which was cited by the Board as the basis for its decision, applies to variances, not conditional use permits (also known as “exceptions”). Though related, the two categories of zoning permits are different: “[A] ‘variance’ is the authority extended to an owner to use his property in a manner forbidden by a particular zoning enactment, while an ‘exception’ gives him permission to put his property to a use which a zoning enactment expressly allows.”²⁰ Because variances are viewed less favorably than conditional use permits, the standard for granting a variance is harder to meet.²¹

Moreover, the Board completely disregarded RLUIPA, a federal statute that grants heightened protection for religious uses of property. Under RLUIPA, where, as here, an action by a zoning board substantially burdens religious exercise, the board must show that the burden is “in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.”²² In addition, RLUIPA also mandates that “[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly

¹⁸ *Mayfield to vote on mosque Tuesday*, WPSD 6, Aug. 23, 2010, available online at <http://www.wpsdlocal6.com/news/local/Mayfield-to-vote-on-Mosque-Tuesday-101339299.html>.

¹⁹ See *Fallon v. Baker*, 455 S.W.2d 572, 574 (Ky. 1970).

²⁰ *Schmidt v. Craig*, 354 S.W.2d 292, 294 (Ky. 1962) (citing *Kline v. Louisville & Jefferson County Bd. of Zoning Adjustment & Appeals*, 325 S.W.2d 324, 327-29 (Ky. 1959)). Though *Schmidt* and *Kline* pertain to a prior version of the Kentucky statutes, the courts’ reasoning remains apropos to the revised statutes. As explained in *Kline*: The statutes show “a clear demarcation to be maintained between the situations under which a variance may be invoked and those under which an exception may be solicited. This is plainly indicated because each term is specifically dealt with in a separate subsection, and the relevant statutory provisions do not denote that variance and exception should be applied interchangeably to any given set of facts.” 325 S.W.2d at 329.

²¹ See, e.g., *Kline*, 325 S.W.2d at 329 (explaining that “[a]n important difference implicit in these statutory provisos is that an exception may be granted without the showing of any hardship, whereas the existence of a hardship is a condition precedent to the authorization of a variance.”).

²² 42 U.S.C. § 2000cc(a).

or institution on less than equal terms with a nonreligious assembly or institution” and that “[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.”²³ The Board’s treatment of Mr. Ahmed’s application plainly violates all three RLUIPA standards.

REQUEST FOR RELIEF

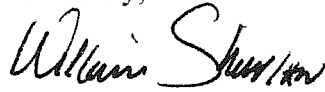
In addition to violating RLUIPA and Kentucky law, the Board’s refusal to permit prayer at 312 ½ East Broadway Street infringes Mr. Ahmed’s Fourteenth Amendment rights to due process and equal protection, as well as his First Amendment rights of free exercise, free association, and free speech. While Mr. Ahmed reserves the right to pursue these and other applicable claims, as well as attorneys’ fees and costs, via the courts, he would prefer to resolve this matter without resort to litigation.

Accordingly, we request that the Board reverse its denial of Mr. Ahmed’s conditional use application.²⁴ At the very least, given the procedural irregularities at the August 24 meeting (resulting in the exclusion of those advocating on Mr. Ahmed’s behalf), consistent with its voiding of the August 10 determination on the same grounds, the Board should vacate its August 24 decision and hold a “new review” of Mr. Ahmed’s application, including a new evidentiary hearing at which Mr. Ahmed and those supporting him are permitted to present evidence. We are confident that once the Board receives evidence from Mr. Ahmed and supporters of his application, it will share in the opinion of the city attorney that “there is no legal way the request can be refused.”

²³ 42 U.S.C. § 2000cc(b).

²⁴ Under RLUIPA, “[a] government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.” 42 U.S.C. § 2000cc-3(e).

Sincerely,



William E. Sharp
ACLU of Kentucky



Daniel Mach
ACLU Program on Freedom of Religion and Belief

Cc: Boyd Neely, Mayfield City Attorney

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LIBERTIES UNION