IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONGREGATION KOL AMI and RABBI ELLIOT HOLIN Plaintiffs, v. ABINGTON TOWNSHIP; BOARD OF COMMISSIONERS OF ABINGTON TOWNSHIP; THE ZONING HEARING BOARD OF ABINGTON TOWNSHIP and LAWRENCE T. MATTEO, JR., Defendants.	: : : : : : : : : : : :	CIVIL ACTION NO.01-1919

M E M O R A N D U M

Newcomer, S.J. July 20, 2001

Today, the Court addresses defendants' Motion for Reconsideration, plaintiff's Motion for Entry of Order, and the parties' respective responses thereto.

I. BACKGROUND

On July 11, 2001, this Court granted plaintiffs' Motion for Partial Summary Judgment finding that when defendant Abington Township (the "Township") denied plaintiffs' request for a special exception to a 1996 Township zoning ordinance (the "ordinance"), defendants deprived plaintiff of rights secured by the Constitution. Although the Court found that defendant is liable to plaintiff, the plaintiffs did not request a remedy, and the Court did not order one. Now, defendants move for reconsideration of the Court's July 11, 2001 Order, and the plaintiff moves for entry of an order implementing a remedy.

The facts of this case, as set forth in this Court's July 11, 2001 opinion, are incorporated here. In light of those facts, and the Court's July 11, 2001 opinion, the Court turns to the parties' Motions.

II. DISCUSSION

A. Reconsideration

1. Legal Standard

Local Rule of Civil Procedure 7.1 permits a party to move for reconsideration of any ruling within ten days of the entry of judgment, order or decree. The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. See Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909. {3rd Cir. 1985) (setting forth the standard for a motion for reconsideration), cert. denied, 476 U.S. 1171 (1986). A party filing a motion to reconsider must rely on at least one of the following grounds; (1) the availability of new evidence that was not previously available; (2) an intervening change in the controlling law; or (3) the need to correct a clear error of law or to prevent manifest injustice. See Reich v. Compton, 834 F. Supp. 753, 755 (E.D. Pa. 1993).

Here, although never stated explicitly, defendants rely upon the third ground for reconsideration in their Motion.

2. Defendants' Motion

Defendants first argue that this Court's equal

protection analysis was flawed because Kol Ami and the other uses allowed to request a special exception are not similarly situated. Accordingly, the defendants contend that the Court should not have relied upon the Supreme Court's decision in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) when arriving at its decision.

As the Court explained in its July 11, 2001 opinion, in City of Cleburne, the Supreme Court held that a zoning ordinance that required special use permits to operate a group home for the mentally retarded in a residential district, yet did not require such permits for apartment houses, boarding and lodging houses, dormitories, hospitals, nursing homes and other similar places was unconstitutional as applied. See City of Cleburne, 473 U.S. at 450. Defendants argue that there, the Supreme Court based its holding upon its finding that the zoning ordinance treated the home for the mentally retarded differently because of prejudice. Accordingly, defendants claim that because this Court did not determine whether discrimination played a role in defendants' decision to deny plaintiff's request for a special exception, City of Cleburne is inapplicable.

In City of Cleburne, the Supreme Court stated:

> In the words of the Court of Appeals, "[t]he City never justifies its apparent view that other people can live under such 'crowded' conditions when mentally retarded persons cannot." 726 F.2d, at 202. In the courts below the city also urged that the ordinance is aimed at avoiding concentration of population and at lessening

> congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home such as Featherston for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.

City of Cleburne, 473 U.S. at 450. Thus, in City of Cleburne, the Supreme Court found that the ordinance at issue was applied unconstitutionally because the same neighborhood concerns existed for Featherston, which had to request a special permit, and the other uses not required to request one. Although the Court did say that requiring Featherston to request a permit "appears to us to rest on an irrational prejudice against the mentally retarded," the Court did not base its holding only on that speculative statement. See Bannum, Inc. v. City of Louisville, Ky., 958 F.2d 1354, 1360 (6th Cir. 1992) ("the Court, in City of Cleburne, reviewed each justification advanced by the city for its different treatment of group homes for the mentally retarded, and found them inadequate to establish a rational relationship").

Here, the Township and the Zoning Hearing Board did not even consider Kol Ami's request for a special exception, and thus failed to offer any rational reason to preclude Kol Ami from requesting one. Additionally, the ordinance fails to articulate any reason why a house or worship may not request one, but the other uses, namely a train station, bus shelter, municipal

administration building, police barrack, library, snack bar, pro shop, club house, and country club may request one.

The ordinance was enacted to further the goals of the Township's Comprehensive Plan, first enacted in 1977. The purpose of the Comprehensive Plan is to *serve* as a "guide to orderly Township development in promoting health, safety, welfare and convenience of the people within it. It organizes and coordinates the relationships between land use patterns. It charts a course for growth and change." COMPREHENSIVE PLAN FOR ABINGTON TOWNSHIP, § I.A (1977). Assuming these goals are legitimate, the Township has not offered any reason for precluding Kol Ami from requesting a special exception, but not the other uses. The Township, as they have done here, may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. See City of Cleburne, 473 U.S. at 446; Zobel v. Williams, 457 U.S. 55, 61-63 (1982).

In its response to plaintiffs' Motion for Partial Summary Judgment, defendants argued that the ordinance properly precludes Kol Ami from requesting a special exception because Kol Ami's presence on the Property would cause traffic, light and noise to increase. However, the Township failed to consider whether any of these considerations warranted the Township's decision to preclude Kol Ami from requesting a special exception.

That defendants offer allegedly rational reasons for precluding Kol Ami from requesting a special exception now is of little consequence. It remains true that when the Township did not allow Kol Ami to request a special exception it only relied upon the ordinance, and not on any of the reasons defendants offer now.

Defendants attempt to excuse their failure to consider plaintiffs' request for a special exception by saying that the ordinance does not permit places of worship to apply for one.[1] That contention only adds fuel to the unconstitutional fire. It reinforces the Township's failure to offer any reasons to support its decision. There can be no doubt that the uses currently allowed to request a special exception under the ordinance cause traffic, noise and light pollution. Because the ordinance does not allow Kol Aml to request a special exception, and because the Township failed to consider Kol Ami's request for one, and failed to apply the ordinance in a way that accounts for the ordinance's differing treatment of Kol Ami, the ordinance remains unconstitutional as applied to Kol Ami.

Next, defendants contend that when this Court considered whether the ordinance was unconstitutional as applied

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[1] See Defendants' Pre-Trial Memorandum, at 7 ("It is axiomatic that the Zoning Hearing Board did not have the authority to consider Plaintiff's application as one for a special exception because the zoning Ordinance does not permit places of worship as special exceptions in an R-1 District").

to Kol Ami, it deprived defendants of due process because plaintiff did not raise that issue, and defendants did not have a chance to respond to it. Defendants claim that had they addressed the constitutionality of the ordinance as applied, they would have argued that issues of material fact precluded summary judgment.

Defendants do not dispute this Court's conclusion that denying Kol Ami the ability even to apply for a special exception is unconstitutional. Further, defendants do not suggest what evidence they could offer to show the Township did consider Kol Ami's request for one. As explained above, defendants concede that the Township did not consider Kol Ami's request for a special exception because the ordinance does not allow such consideration. In light of this concession, defendants would be hard pressed to now introduce evidence that they considered Kol Ami's request. Thus, defendants have not persuaded the Court that it has erred.

Additionally, the Court disagrees that defendant did not have an opportunity to address the ordinance as applied, and in fact they did so address the ordinance. The first heading of their legal argument was: "A. The Abington Township Ordinance is Constitutional on Its Face ***and As Applied.***" Defendants' Memorandum of Law in Support of Their Response to Plaintiffs' Motion for Partial Summarv Judgment, at 6 (emphasis added).

Defendants then urged the court to consider the particular facts of this case when ruling on the constitutionality of the ordinance. See id. at 12-14. Finally, the plaintiffs relied heavily on City of Cleburne when they moved for partial summary judgment, a case that held a zoning ordinance unconstitutional as applied as explained earlier.

The defendants also argue that this Court's July 11, 2001 opinion violates the Tenth Amendment, and the Establishment Clause of the First Amendment. The Court finds both arguments without merit. The idea that the Tenth Amendment prohibits a federal court from applying the Equal Protection clause to a city ordinance makes little sense. It has long been the law that zoning regulations must bear a substantial relation to the public health, safety, morals or general welfare, and that legislators may not impose restrictions that unnecessarily and unreasonably interfere upon the use of private property or the pursuit of useful activities. See Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928). This general principle has been enforced through the Equal Protection Clause of the Fourteenth Amendment which commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," a direction that all persons similarly situated should be treated alike. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)). Here, the

Court merely applied the Equal Protection clause to the ordinance.

Defendants argue that the Court violated the Establishment Clause because it endorsed a preference for religion over secular land uses. However, the Court merely concluded that Kol Ami should be treated like the other uses allowed to request a special exception. In the same way that it would be illogical to conclude that the Supreme Court "endorsed" mental handicap in City of Cleburne, this Court did not "endorse" the Reform Jewish tradition, or religion in general, in its opinion. Accordingly, the Court will deny defendants' Motion for reconsideration.

B. Plaintff's Motion for Entry of Order

As the Supreme Court explained in Milliken v. Bradley, 433 U.S. 267, 281, (1977), state and local authorities have primary responsibility for curing constitutional violations. "If, however [those) authorities fail in their affirmative obligations . . . judicial authority may be invoked.'" Id. (citing Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1, 15 {1971). Once invoked, the district court's equitable powers to remedy past wrongs is broad, and flexible. Id.

Nonetheless, the remedial powers of an equity court are not unlimited. Whitcomb v. Chavis, 403 U.S. 124, 161 (1971). "[T]he federal courts in devising a remedy must take into account

the interests of state and local authorities in managing their own affairs, consistent with the Constitution." Milliken v. Bradley, 433 U.S. 267, 280-81 (1977). Thus, a district court should focus on the "nature and scope of the constitutional violation," and ensure that decrees be "remedial in nature." Id., at 280.

Here, plaintiffs would have this Court enjoin the defendants from preventing Kol Ami from using and occupying the Property as a house of worship. However, nothing in this Court's opinions suggest that the Township is required to allow Kol Ami to use the property as a house of worship as of right. In fact, the Court has not addressed that issue. Moreover, this Court is mindful of the Township's interest over the use of land, and that the Township never contemplated such a right in the ordinance. Thus far, the Court has only found that the Township's refusal to consider Kol Ami's request for a special exception violates the Constitution.

On the other hand, the defendants request that the Court remand plaintiffs' application for a special exception to the Zoning Hearing Board for due consideration. In response, plaintiffs argue that such a remedy is reminiscent of the fox guarding the hen house, and that it is a forgone conclusion that the Township will deny plaintiffs' request. The Court is sensitive to plaintiffs' concern, but cannot base its remedy on

such speculative rhetoric. Further, the plaintiffs are not without a remedy should defendants wrongfully deny plaintiffs' request for a special exception.

In light of this Court's prior findings, the Court's accounting of the Township's local interests, and the parties' desire for a quick resolution of this matter, the Court will require the Township to promptly consider plaintiffs' request for a special exception.

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Clarence C. Newcomer, S.J.

IN THE UNITED STATES DISTRICT COURT
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CONGREGATION KOL AMI and RABBI ELLIOT HOLIN Plaintiffs, v. ABINGTON TOWNSHIP; BOARD OF COMMISSIONERS OF ABINGTON TOWNSHIP; THE ZONING HEARING BOARD OF ABING10N TOWNSHIP and LAWRENCE T. MATTEO, JR., Defendants.	:	CIVIL ACTION NO. 01-1919

ORDER

AND NOW, this 20th day of July, 2001, the Court hereby ORDERS as follows:

1) Upon consideration of defendants' Motion for Reconsideration, said Motion is DENIED.

2) Upon consideration of plaintiffs' Motion for Entry of Order, the Court hereby ORDERS as follows:

a) The Zoning Hearing Board of Abington Township shall commence hearings to consider plaintiffs' request for a special exception to the 1996 Ordinance as defined in this Court's July 11, 2001 opinion.

b) Said hearings shall commence no later than August 6, 2001, and shall be completed no later than August 10, 2001 unless a party seeks leave of Court to commence said hearings at a later date, and the Court so orders.

c) When considering plaintiffs' request for a special exception, the Zoning Hearing Board of Abington Township

shall consider plaintiffs' request in the same manner it would consider a request by a use presently allowed to request a special exception under the Ordinance.

d) To help ensure the Zoning Hearing Board of Abington Township gives the plaintiffs' request for a special exception a meaningful review, it shall issue a written opinion setting forth the legal and factual basis of its decision. Said written opinion shall issue no later than August 15, 2001 unless a party seeks leave of Court to issue said opinion at a later date, and the Court so orders.

AND IT IS so ORDERED

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Clarence C. Newcomer, S.J.