

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 01-3077

CONGREGATION KOL AMI, and RABBI ELLIOT HOLIN
Appellees

v.

**ABINGTON TOWNSHIP, BOARD OF COMMISSIONERS
OF ABINGTON TOWNSHIP, THE ZONING HEARING BOARD
OF ABINGTON TOWNSHIP and LAWRENCE T. MATTEO, JR.
ABINGTON TOWNSHIP, BOARD OF COMMISSIONERS OF
ABINGTON TOWNSHI, THE ZONING HEARING BOARD OF
ABINGTON TOWNSHIP and LAWRENCE T. MATTEO, JR.**
Appellants

**BRIEF FOR THE COMMONWEALTH OF
PENNSYLVANIA, AMICUS CURIAE IN SUPPORT
OF THE JUDGMENT BELOW**

**On Appeal from the Orders filed July 11 and July 20, 2001
in the United States District Court for the
Eastern District of Pennsylvania at Docket No. 01-1919**

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STATEMENT OF INTEREST OF THE AMICUS
COMMONWEALTH OF PENNSYLVANIA

The *amicus* is the Commonwealth of Pennsylvania, which files this brief by its Attorney General, D. Michael Fisher. The Attorney General, as the chief law enforcement officer for the Commonwealth of Pennsylvania, *see* Pa. Const. Art. IV., §4.1; Commonwealth Attorney's Act, Act of October 15, 1980, P.L. 950, *as amended*, 71 P.S. §§732-101 - 732-206, has a specific responsibility to defend the constitutional rights of its citizens and to uphold the Commonwealth of Pennsylvania's public policy against discrimination based on religious affiliation.

The Commonwealth of Pennsylvania has a long tradition of religious freedom and toleration which spans back more than three hundred years to the founding of Pennsylvania by William Penn in 1682.¹ Both the First Amendment to the federal Constitution and Article I, Section 3 of the Pennsylvania Constitution guarantee religious liberty to all its citizens. In addition, the Pennsylvania Constitution specifically prohibits the discrimination by the

¹ Religious liberty was guaranteed for the original settlers of Pennsylvania in The Great Law (1682). It was reaffirmed in colonial times by The Charter of Liberties (1701). In 1776, Pennsylvania's first Constitution was adopted. It included a Declaration of Rights which continued to guarantee the religious rights of Pennsylvania's citizens. Although Pennsylvania has had four constitutional conventions since that time (1790, 1838, 1874, and 1968), the language guaranteeing religious liberty contained in the 1776 Constitution remains substantially the same in Pennsylvania's present Constitution.

Commonwealth or a *political subdivision* “against any person in the exercise of any civil right.” Pa. Const. Art. I, §26.

The appellants in this case are Abington Township, the Abington Township Board of Commissioners, the Abington Township Zoning Board, and the Director of Code Enforcement for the Township (collectively, “Abington Township”). All municipalities in Pennsylvania, other than Philadelphia and Pittsburgh, have been granted the authority to establish local zoning regulations through the Pennsylvania Municipalities Planning Code, 53 P.S. §§10101 - 11202. Abington Township - through its zoning laws - has attempted to prohibit Congregation Kol Ami (“Kol Ami”) from establishing a synagogue in an area zoned residential despite the fact that the property was previously used as a convent by the Catholic Church and other institutional uses are permitted within the same zoning district.

This case raises the question of whether a municipality may establish an absolute prohibition against locating places of worship in residential zoning districts without violating the Equal Protection Clause under the Fourteenth Amendment, where special exceptions are permitted for other non-residential uses. The Commonwealth has an interest in preventing the disparate treatment of religious organizations by municipalities in Pennsylvania. Therefore, the decision in this case could have important implications for the religious rights of citizens

not only in Abington Township, but throughout Pennsylvania.

SUMMARY OF ARGUMENT

Churches, synagogues, and other houses of worship are not permitted within any of Abington Township's four residential districts under its 1996 Zoning Ordinance. However, various other non-residential uses are permitted by special exception. In the R-1 District, where Kol Ami wishes to establish a synagogue, the uses allowed by special exception include municipal administration building, police barracks, library, road maintenance facility, miniature golf courses, swimming pools, ball courts, tennis courts, ball fields, train stations and bus shelters, and various other accessory uses.

Abington Township, like other municipalities in Pennsylvania, has the authority to put reasonable restrictions on the use of property where it furthers the general health, safety and welfare of the community. However, the Township's total exclusion of houses of worship from residential areas while at the same time permitting other similarly burdensome uses is arbitrary and irrational.

Accordingly, under the standards established by the Supreme Court in *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985), the Abington Township Zoning Ordinance violates the equal protection rights of Kol Ami under the Fourteenth Amendment.

ARGUMENT

THE TOTAL EXCLUSION OF CHURCHES, SYNAGOGUES AND OTHER HOUSES OF WORSHIP FROM RESIDENTIAL DISTRICTS WHERE OTHER NON-RESIDENTIAL USES ARE ALLOWED BY SPECIAL EXCEPTION IS ARBITRARY AND VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985), the Supreme Court held that the Equal Protection Clause was violated where a municipality required a group home for the mentally retarded to obtain a special permit to locate in a residential district under its zoning ordinance. The Supreme Court found that even under rational basis scrutiny, the treatment of the home was arbitrary since a variety of other uses including dormitories, apartment hotels, hospitals, sanitariums, nursing homes, and private clubs were permitted in the same district without a special permit. *Id.* at 447-48. In the present case, the district court correctly concluded that Abington Township's exclusion of Kol Ami from all residential districts within its borders lacked a rational basis and violated Kol Ami's right to equal protection of the laws as set forth in *City of Cleburne*.

Under Abington's 1996 Zoning Ordinance ("Zoning Ordinance") (J.A.² 976a-1242a), houses of worship are not permitted within any of the Township's

² References are to the Joint Appendix.

four residential districts. In the R-1 District where Kol Ami's property is located, various non-residential uses are permitted by special exception including municipal administration building, police barracks, library, road maintenance facility, miniature golf courses, swimming pools, ball courts, tennis courts, ball fields, train stations and bus shelters, and various other accessory uses. (Zoning Ordinance at 18-19; J.A. 1000a-1001a) The other three residential districts completely ban houses of worship, but allow other non-residential uses by special exception. (*Id.* at 21-24; J.A. 1003a-1006a) In this respect, the zoning ordinance in *City of Cleburne* was less onerous since the property owner in that case could at least theoretically obtain a special permit for a group home for the mentally retarded. However, under Abington's Zoning Ordinance, there are no provisions for Kol Ami or any other religious group to obtain a special exception since houses of worship are totally excluded from residential districts under the Zoning Ordinance.

Abington Township argues that the Zoning Ordinance does not prevent Kol Ami or other religious institutions from situating themselves in or near residential areas. (Appellant's Brief at 38-39) It notes that there are 25 houses of worship which are permitted as prior non-conforming uses in residential districts within the Township and that Kol Ami is free to purchase any one of these non-conforming

properties to use as a synagogue.³ *Id.* at 16 & 38.

This argument is unavailing for at least two reasons. First, Kol Ami cannot purchase one of these properties unless one of the existing religious institutions decides to discontinue operations or re-locate. Of course, religious institutions are normally not interested in the former and pursue the latter only out of extreme necessity. In fact, Kol Ami had unsuccessfully attempted to find a suitable property for a synagogue before purchasing the Robert Road property.

(Declaration of Sloviter, ¶¶5-10; J.A. 154a-55a) (Declaration of Milbert, ¶¶4-7; J.A. 170a-71a)

Second, the property which Kol Ami ultimately purchased had previously been used as a convent and a monastery. In addition, it has a 250 seat chapel. *Congregation Kol Ami v. Abington Township*, 161 F. Supp. 2d 432, 435-36 (E.D. Pa. 2001). Nonetheless, Abington Township has denied Kol Ami's request to continue to use the property for religious purposes. Yet, Abington Township continues to maintain in its brief that Kol Ami is free to purchase one of twenty-five other properties currently being used for religious purposes to use as a

³ The logical implication of the Township's position is absurd. If its position were correct, a zoning ordinance could never be found to be exclusionary so long as similar pre-existing, non-conforming uses existed somewhere within the community or the particular zoning district in question.

synagogue, but not the Robert Road property. (Appellants' Brief at 17 & 38-39)

Regardless of whether Kol Ami was the victim of intentional discrimination by Abington Township in this case, the Abington Township Zoning Ordinance's total exclusion of new houses of worship in residential areas within the Township violates fundamental principles of equal protection under the Fourteenth Amendment.⁴ In reaching this conclusion, the Commonwealth fully recognizes the authority of municipalities in Pennsylvania to place rationally based restrictions on property used for religious purposes which further the general health, safety and welfare of the community. *Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Bilbar Const. Co. v. Bd. of Adjustment of Easttown Twp.*, 141 A.2d 851, 856 (Pa. 1958). However, as this Court recognized in *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 362-63 (3d Cir.), *cert. denied*, 528 U.S. 817 (1999), laws which place restrictions on the exercise of religious liberty must at a minimum be reasonable.

The use of property for religious purposes is presumptively beneficial to the community. For example, the Supreme Court has held that exempting religious organizations from paying property taxes does not violate the Establishment

⁴ The Commonwealth is not arguing that Abington Township intentionally discriminated against Kol Ami when it enacted the new Zoning Ordinance in 1996.

Clause and furthers a legitimate government interest.⁵ *Walz v. Tax Com. of New York*, 397 U.S. 664 (1970). Moreover, the majority rule in the United States is that an absolute ban on houses of worship in residential neighborhoods is invalid. See R.P. Davis, Annotation, *Zoning Regulations as Affecting Churches*, 74 A.L.R. 2d 377, 380 (1960 & Supp. 2002). Although Pennsylvania’s appellate courts have not addressed this precise issue, the majority rule is consistent with the Commonwealth’s long-standing commitment to protect and accommodate the rights of its citizens under the Free Exercise Clause.⁶ See, e.g., *Springfield School Dist. v. Department of Education*, 397 A.2d 1154 (Pa. 1979) (Upholding state law requiring school districts to provide transportation to students attending parochial schools located within 10 miles of district boundaries); *Appeal of O’Hara*, 131 A.2d 587, 599 (Pa. 1957) (holding that denial of “application [to build parochial school] would be an unnecessary, unwarranted and unreasonable intermeddling with applicant’s ownership . . . under the label of the preservation of the health

⁵ Pennsylvania exempts all houses of worship from local property taxes pursuant to Pa. Const. Art. VIII, §2 and 72 P.S. §502-204(a)(1).

⁶ The only Pennsylvania case which squarely addresses this question is an Allegheny County Court of Common Pleas decision in which the court concluded that the exclusion of churches from all residential districts in a community violates the due process and equal protection clauses of the Pennsylvania and Federal Constitutions. See *Appeal of Stark*, 72 Pa. D & C 168, 187-88 (Allegheny County C.C.P. 1950).

and safety of the community”).

According to Abington Township, the district court’s decision gives special preference to religious institutions while effectively barring local governments from any meaningful land use regulation of churches and synagogues.

(Appellants’ Brief at 28) However, Kol Ami is not seeking preferential treatment, but rather equal treatment. The Commonwealth recognizes the need of municipalities to impose reasonable restrictions on the use of land where it furthers the public health, safety and welfare. *See Euclid; Bilbar Const. Co.* In this respect, religious organizations are held to the same standard as other members of the community. *See Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *City of Newark*. Likewise, houses of worship undoubtedly place a greater burden on the community’s infrastructure in terms of parking and traffic than a single family home. The flaw in Abington Township’s argument is that the same can be said of police barracks, libraries, bus stations, train stations, miniature golf courses, swimming pools, and the other non-residential uses which are allowed in the R-1 District by special

exception.⁷

Kol Ami does not have the right to locate wherever and in whatever manner it chooses. However, it is entitled to have its application considered on the same terms as other non-residential uses which are permitted by special exception. Zoning decisions are in most cases based on specific facts unique to a particular parcel of land and the surrounding area. In determining the impact which one particular use will have on the community, it is necessary to consider the size of the property, the number of patrons or members who will be using the property, the frequency of such use, the hours of operation, and a variety of other factors. Abington Township, through its Zoning Ordinance, has made an *a priori* determination that churches, synagogues, and mosques, as a class, are incompatible with a residential neighborhood while bus stations, train stations, libraries, miniature golf courses, and other non-residential uses may be found to be

⁷ Abington Township relies largely on the Sixth Circuit's decision in *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983), to support its argument that the Abington Zoning Ordinance is constitutional. Although it is true that churches were excluded from residential districts in the *City of Lakewood* case, there is nothing to suggest that other similarly burdensome non-residential uses were permitted by special exception as in the present case. Furthermore, the church did not make an equal protection argument and it was not considered by the court in reaching its decision. Thus, *City of Lakewood* is distinguishable from the present case on its facts and does not support the Township's position.

compatible. The Commonwealth believes that this distinction is arbitrary and violates established equal protection standards under both the federal and state Constitutions.

CONCLUSION

_____The order of the district court requiring Abington Township to consider Kol Ami's request for a special exception to be permitted to use its property as a synagogue should be affirmed.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I, Howard G. Hopkirk, Deputy Attorney General, hereby certify that I am a member in good standing of the Bar of this Court.

HOWARD G. HOPKIRK
Deputy Attorney General

CERTIFICATE OF SERVICE

I, Howard G. Hopkirk, Deputy Attorney General, hereby certify that on this date I caused to be served the foregoing Brief for the Commonwealth of Pennsylvania Amicus Curiae In Support of the Judgment Below, by depositing two copies of the same in the United States mail, postage prepaid, in Harrisburg, PA., addressed to the following:

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