

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

CONGREGATION KOL AMI and	:	
RABBI ELLIOT HOLIN;	:	CIVIL ACTION
	:	No.: 01-1919
Plaintiffs,	:	
v.	:	
	:	
ABINGTON TOWNSHIP; BOARD OF	:	
COMMISSIONERS OF ABINGTON	:	
TOWNSHIP; THE ZONING HEARING :	:	
BOARD OF ABINGTON TOWNSHIP and	:	
LAWRENCE T. MATTEO, JR., in his official	:	
capacity as Director of Code Enforcement of	:	
Abington Township,	:	
	:	
Defendants.	:	

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

This is a facial challenge to Abington Township’s zoning ordinance, which prohibits houses of worship from locating in residential areas in the Township. As courts have repeatedly held since virtually the advent of zoning laws, such a rule is patently unreasonable, and therefore facially unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and under other Pennsylvania and federal constitutional provisions affording similar protection. The facts relevant to this particular issue are not in dispute, and the applicable constitutional law is well-established. In addition, granting summary judgment on these grounds would avoid unnecessary discovery and trial, as well as the decision – as a matter of first impression – whether a new federal statute is constitutional. For all these reasons, this Court should find, as a matter of law, that Abington Township’s ordinance is unconstitutional on its face, because it does not permit houses of worship in the very neighborhoods where worshipers live.

LEGAL STANDARD ON SUMMARY JUDGMENT

Summary judgment is proper if the pleadings and evidence on file “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To prevail on summary judgment, the movant bears “the burden to demonstrate the absence of any genuine issues of material fact.” *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1362 (3d Cir. 1992). Once the movant meets this burden, “the opponent may not rest on the allegations set forth in its pleadings but must counter with evidence that demonstrates a genuine issue of fact.” *Id.* at 1362-63. In making this determination, a court must view the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 256 (1986). However, the “party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.” *Id.*

STATEMENT OF UNDISPUTED MATERIAL FACTS

None of the material facts are in dispute. In 1990, Abington Township revised its zoning ordinance to prohibit religious institutions from locating in any of its four residential districts (R-1, R-2, R-3, and R-4). Opinion and Order of the Board, App. No. 99-36, FF ¶ 38, at 6 (March 20, 2001) (attached hereto as Exhibit A) (hereinafter “2001 Bd. Op.”); *see* Abington Township Revised Zoning Ordinance, Version 6.0, §§ 301-304 (May 9, 1996) (incorporating 1990 revisions) (excerpts attached hereto as Exhibit B) (hereinafter the “Ordinance”).

The R-1 district allows – as of right – agriculture, livestock, single family detached, and conservation / recreation preserve uses, among others. 2001 Bd. Op. FF ¶ 26, at 5; *id.* CL ¶ 1, at 20; Ordinance § 301.2.A.1.-5. It also allows – by special exception – municipal complexes, outdoor recreation, and riding academies, among others. 2001 Bd. Op. FF ¶ 26, at 5; *id.* CL ¶ 1, at 20; Ordinance § 301.2.B.1.-6. The R-1 district does *not* allow houses of worship, even by special exception or as a conditional use. 2001 Bd. Op. FF ¶ 31, at 5; *id.* CL ¶ 6, at 20; Ordinance § 301. Similarly, all other residential districts in Abington forbid houses of worship but allow other institutional and assembly uses. *See* Ordinance § 302-304 (defining R-2, R-3, and R-4 districts). For example, in the R-4 district, day care centers and nursing homes are allowed by special exception, and life care facilities are allowed as conditional uses. *Id.* § 304.B.1.-2., C.1. Similar exceptions do not apply to houses of worship. *See id.* §§ 301-304.

In August 1999, plaintiffs entered into an agreement with the Sisters of the Holy Family of Nazareth (the “Sisters”) to purchase the property located at 1908 Robert Road, Abington Township, Pennsylvania (the “Property”) for use as a synagogue. 2001 Bd. Op. FF ¶¶ 2, 126, 127, at 2, 12. The Property, which is located in the R-1 district, occupies approximately 10.9 acres and includes a Chapel that was built in 1957, seats over 200 people, and, to this day, contains an altar, a sacristy, the stations of the cross, confessionals, and stained glass windows. 2001 Bd. Op. FF ¶ 2, 9, 25, 65, at 2, 5, 8; Opinion and Order of the Board, App. No. 95-33, FF ¶¶ 8, 11, at 2 (May 2, 1996) (attached hereto as Exhibit C) (hereinafter “1996 Bd. Op.”); *see generally* Declaration of Mark Levin (May 16, 2001) (attached hereto as Exhibit D). From 1951 to 1990, Abington Township permitted the Sisters’ use of the Property within the “V-Residential District” – which allowed religious assembly uses by special exception – under the zoning ordinances that predate the current Ordinance. 1996 Bd. Op. FF ¶¶ 14, 16, 17, at 2; 2001 Bd. Op. FF ¶¶ 32, 33, 36, 37, at 6. After the 1990 amendments, the Sisters were able to continue their use of the Property, notwithstanding the rezoning of the Property from V-Residential to R-1 Residential. 1996 Bd. Op. FF ¶¶ 16, 17, at 2; 2001 Bd. Op. FF ¶ 39, at 6; *id.* CL ¶¶ 12, 13, 27, at 20, 21. From January, 2000 through March, 2001, plaintiffs sought approval to continue the Sisters’ use of the property, or a variance to permit plaintiffs’ use, but their request was denied. 2001 Bd. Op. at 23. In reaching its decision, the Zoning Hearing Board applied the Ordinance challenged here.

ARGUMENT

I. PLAINTIFFS MOVE FOR PARTIAL SUMMARY JUDGMENT ON NARROW GROUNDS THAT DO *NOT* INCLUDE PLAINTIFFS' RLUIPA CLAIMS OR CLAIMS THAT MAY INVOLVE DISPUTED FACTS.

Plaintiffs note at the outset the narrow scope of the issue they raise on this motion. Specifically, plaintiffs only seek summary judgment on their claim that the Ordinance is unreasonable on its face because it prohibits houses of worship from locating in residential neighborhoods, and so fails rational basis scrutiny under the federal and Pennsylvania constitutions. This motion would resolve only *parts* of Counts I (federal free exercise), II (Pennsylvania free exercise), III (federal free speech), IV (Pennsylvania free speech), VII (federal equal protection), VIII (Pennsylvania equal protection), and IX (federal due process). Thus, plaintiffs do not presently ask the Court to decide:

- Whether the Ordinance, *as applied* to plaintiffs in this case, *fails rational basis scrutiny*. See Counts I-IV, VII-IX.
- Whether the Ordinance, either *on its face* or *as applied* to plaintiffs in this case, *fails strict scrutiny* under any of a number of asserted constitutional and statutory provisions. See Counts I-XII.
- Whether the Ordinance violates any provision of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.* (“RLUIPA”). See Counts X-XII.
- Whether the Zoning Hearing Board’s determination under the Ordinance is *arbitrary and capricious* and/or not supported by *substantial evidence*. See Count XIII.

Plaintiffs would seek resolution of these remaining claims – which may involve genuine issues of material fact – at trial, after completing additional discovery. Granting the present

motion would render that trial unnecessary. *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir. 1996) (“Summary judgment may present the district court with an opportunity to ... avoid wasteful trials.”)

In addition, Defendants have signaled their intention to challenge the constitutionality of RLUIPA. See Defendants’ Answer to Plaintiffs’ Motion for Preliminary Injunction 23-30 (May 22, 2001). Because this motion is not based on RLUIPA, granting it would eliminate the need to decide the sensitive question – especially as a matter of first impression – whether that new federal statute is unconstitutional. See *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (“Judging the constitutionality of an Act of Congress is properly considered “the gravest and most delicate duty that this Court is called upon to perform,” *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.).”).

II. THE ZONING ORDINANCE IS UNLAWFUL ON ITS FACE BECAUSE IT PROHIBITS PLACES OF WORSHIP IN ALL RESIDENTIAL AREAS IN ABINGTON TOWNSHIP.

The rule that houses of worship cannot be prohibited in residential areas is based on a time-honored, fundamental principle of constitutional law: “Legislatures may not, under the guise of the police power, impose restrictions that are *unnecessary* and *unreasonable* upon the use of private property or the pursuit of useful activities.” *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928)(emphasis added). This general principle is enshrined in various provisions of both the federal and Pennsylvania constitutions. It is based primarily on the Due Process Clause, *Seattle Title Trust Co.*, 278 U.S. at 121 (striking down zoning ordinance under Due Process Clause for failure to “bear a substantial relation to the public health, safety, morals,

or general welfare”), and the Equal Protection Clause of the Fourteenth Amendment. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (striking down zoning ordinance under Equal Protection Clause because not “rationally related to a legitimate state interest”). The Free Exercise and Free Speech Clauses of the First Amendment also require that laws affecting religious exercise and expression be, at a minimum, reasonable.¹ See *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 362-63 (3d Cir. 1999) (discussing rational basis scrutiny under Free Exercise Clause); *Phillips v. Borough of Keyport*, 107 F.3d 164, 172-73 (3d Cir. 1997) (time, place and manner restrictions must be, *inter alia*, “reasonable”).²

¹ It is emphatically the position of plaintiffs that strict scrutiny review *also* applies in this case, not only under the Due Process Clause (because the fundamental right of religious exercise is implicated) and the Equal Protection Clause (because the suspect classification of religion is employed) of the Fourteenth Amendment, but the Free Speech Clause (because the regulations are viewpoint discriminatory and do not allow adequate alternative avenues of expression) and the Free Exercise Clause (because the regulation involves “hybrid rights” and is neither neutral nor generally applicable) of the First Amendment as well. However, as noted above, plaintiffs do not assert that portion of their claims on this motion, because those portions are more fact-intensive than the facial challenge to the Ordinance presented here.

² Article I, Section 26 of the Pennsylvania Constitution is analyzed under the same standards as the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Love v. Borough of Stroudsburg*, 597 A.2d 1137 (Pa. 1991); see *Markel v. McIndoe*, 59 F.3d 463, 472-74 & n.10 (3d Cir. 1995). Similarly, the standards applied under Article I, Section 7 of the Pennsylvania Constitution are the same as those of the Free Speech Clause of the First Amendment to the federal constitution. *Bureau of Prof'l & Occupational Affairs v. State Bd. of Physical Therapy*, 728 A.2d 340 (Pa. 1999). Pennsylvania courts have not yet clarified whether Article I, Section 3 will be interpreted to protect free exercise rights even more vigorously than the federal Free Exercise Clause after *Employment Div. v. Smith*, 494 U.S. 872 (1990). In any event, these state provisions are at least as protective as federal standards, and so also require bare rationality, at a minimum.

In applying this requirement of bare rationality, the vast majority of courts has held that it is unconstitutional, because unreasonable, to prohibit houses of worship in residential areas.³ 2 A. RATHKOPF & D. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 20.01[2][a], at 20-3 (4th ed. 1985) (“The majority view is that facilities for religious or educational uses are, by their very nature, ‘clearly in furtherance of the public morals and general welfare’ and *may not be excluded from a residence district in which location of such use is sought.*”) (emphasis added); R.P. DAVIS, *ZONING REGULATION AS AFFECTING CHURCHES*, 74 A.L.R.2d 377 § 2[a] (1960, Supp. 2000) (“[C]hurches may not, either as a matter of the express language of a zoning regulation or as a matter of administrative application or enforcement of a neutrally worded enactment, *validly be excluded from residential areas as an absolute and invariable rule;*”) (emphasis added); 8 E. MCQUILLIN, *MUNICIPAL CORPORATIONS* § 25.131.30, at 485-86 (3rd ed. 2000) (“Although there is some conflict of opinion as to whether churches or other places of public

³ See, e.g., *State v. Maxwell*, 617 P.2d 816, 820 (Haw. 1980) (“The wide majority of courts hold that religious uses may not be excluded from residential districts.”); *Board of Zoning Appeals v. Schulte*, 172 N.E.2d 39, 44 (Ind. 1961) (“The law is well settled that the building of a church may not be prohibited in a residential district.”) (quoting *Board of Zoning Appeals v. Decatur, Ind. Co. of Jehovah’s Witnesses*, 117 N.E.2d 115, 119 (Ind. 1954)); *Diocese of Rochester v. Planning Bd. of Brighton*, 136 N.E.2d 827, 834 (N.Y. 1956) (“It is well established in this country that a zoning ordinance may not *wholly exclude* a church or synagogue from any residential district.”); *Congregation Committee v. City Council of Haltom City*, 287 S.W.2d 700, 704 (Tex. Civ. App. 1956) (“a city cannot legally exclude a church from a residential district by a zoning ordinance”); *O’Brien v. City of Chicago*, 105 N.E.2d 917, 920-21 (Ill. App. Ct. 1952); *Ellsworth v. Gercke*, 156 P.2d 242 (Ariz. 1949); *State ex rel. Synod of Ohio v. Joseph*, 39 N.E.2d 515, 524 (Ohio 1942) (“We do not believe it is a proper function of government to interfere in the name of the public to exclude churches from residential districts for the purpose of securing to adjacent landowners the benefits of exclusive residential restrictions.”); *State ex rel. Roman Catholic Bishop v. Hill*, 90 P.2d 217 (Nev. 1939).

worship may be excluded from residential zones, most of the judicial decisions have concluded that *such an exclusion is both improper and illegal.*”) (emphasis added).

Although the Third Circuit Court of Appeals has not specifically addressed this question, Pennsylvania courts applying federal constitutional law have followed the majority rule. In *Stark Appeal*, 72 Pa. D. & C. 168 (1950), the court held that, “to be proper and constitutional, such regulations prescribed in the exercise of the police power of the State must not be unreasonable, unnecessary, or arbitrary, and must have a real, tangible and substantial relation to the public health, safety, morals or general welfare” at 176-177. The court went on to state that “[i]f the zoning ordinance *would not permit churches in all residence districts*, including C districts [the most exclusive residential district], it would to that extent be *unconstitutional.*” *Id.* (emphasis added).

Courts have advanced three main reasons in support of this widely-held and long-recognized constitutional limit on the generally broad power of local governments to regulate land use. *First*, it is unreasonable for government to exclude a type of use as *harmful* to the general welfare when that type of use – even taking into account its typical external effects – *serves* the general welfare as a matter of law, as courts have uniformly held regarding houses of worship in residential areas.⁴ RATHKOPF & RATHKOPF, *supra*, at 20-4 (“[C]hurches and other

⁴ See *Boyajian v. Gatzunis*, 212 F.3d 1, 9 (1st Cir. 2000) (noting “[a]n impressive body of case law and scholarly texts and articles supports th[e] conclusion” that “religious institutions, by their nature, are compatible with every other type of land use and thus *will not detract from the quality of life in any neighborhood.*”) (emphasis added); see, e.g., *Diocese of Rochester v. Planning Bd. of Brighton*, 136 N.E.2d 827, 834, 836 (N.Y. 1956) (finding total exclusion from residential districts “bears no substantial relation to the public health, safety, morals, peace or general welfare of the community” because religious uses are
(continued...)

religious institutions are in furtherance of morals and the public welfare as a matter of law”); McQUILLIN, *supra*, at 486 (“[S]uch institutions tend to promote the public health, comfort, and general welfare, and also, so far as zoning laws are concerned, ... the exclusion of such places is unrelated to the public welfare.”); K.H. YOUNG, *ANDERSON’S AMERICAN LAW OF ZONING* § 12.22, at 578 (4th ed. 1996) (“[A]n ordinance which excludes [religious] uses from residential zones does not further the public health, safety, morals, or general welfare” because “religious uses contribute to the general welfare of the community”). Federal and state legislatures have uniformly exempted houses of worship from taxation based on the same blanket determination: that they advance, rather than inhibit, the general welfare.⁵

(...continued)

“clearly in furtherance of the public morals and general welfare”); ***Bright Horizon House, Inc. v. Zoning Bd. of Appeals***, 469 N.Y.S.2d 851, 856 (N.Y. Sup. Div. 1983) (affirming that “religious institutions, by their very nature, are beneficial to the public welfare.”); ***Board of Zoning Appeals v. Schulte***, 172 N.E.2d 39, 43 (Ind. 1961) (“We judicially know that churches and schools promote the common welfare and the general public interest.”); ***City of Englewood v. Apostolic Christian Church***, 362 P.2d 172 (Colo. 1961); ***Congregation Committee v. City Council of Haltom City***, 287 S.W.2d 700, 705 (Tex. Civ. App. 1956) (“The church in our American community has traditionally occupied the role of both teacher and guardian of morals. Restrictions against churches could therefore scarcely be predicated upon a purpose to protect public morals.”); ***Young Israel Organization v. Dworkin***, 133 N.E.2d 174, 183 (Ohio Ct. App. 1956) (“To hold that a church is detrimental to the welfare of the people is in direct contradiction of historical truths and evidences a failure to recognize basic fundamentals of a democratic society.”); ***Yanow v. Seven Oaks Park***, 94 A.2d 482, 491 (N.J. 1953) (“the welfare of the residential community demands the[] inclusion [of houses of worship] in that area”).

⁵ See ***Walz v. Tax Com. of New York***, 397 U.S. 664, 673 (1970) (houses of worship permissibly exempted from taxation because state considers them “beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest.”). See also ***Jacobi v. Zoning Bd. of Adjustment of Lower Moreland Twp.***, 196 A.2d 742, 745 (Pa. 1964) (rejecting claim that presence of church harms “general welfare” by not providing tax revenues, because universal tax exemption of churches would also have to be deemed adverse to general welfare).

Second, it is unreasonable for government categorically to exclude houses or worship from a residential area, because they are an integral part of residential life. Where people live, there houses of worship shall also be. See E.C. YOKLEY, *ZONING LAW AND PRACTICE* § 35-14, at 35 (4th ed. 1980, Supp. 1999) (“Since the advent of zoning, churches have been held proper in residence districts.”); YOUNG, *supra*, at 578 (“Religious uses serve people best when they are accessible to homes. Religious buildings provide convenient meeting places for youth groups and civic associations. This need can be filled best when the religious institution is convenient to the residents who attend.”). Courts interpreting the constitution have recognized that government has no business trying to alter this hard-wired pattern of human behavior.⁶ Because religious assembly uses are inherently appropriate to residential areas, a zoning ordinance must leave at least some room for them there. Thus, it is simply unreasonable for local government to conclude, by a categorical ban, that houses of worship are *always* “like a pig in the parlor” when located among homes. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

⁶ See, e.g., *Stark Appeal*, 72 Pa. D. & C. 168, at n.16 (describing churches as “concomitants of civilized residential life” and noting that “[i]t would be unreasonable to force them into business districts”) (internal quotations omitted); *State ex rel. Lake Drive Baptist Church v. Village of Bayside Bd. of Trustees*, 108 N.W.2d 288, 301 (Wis. 1961) (Hallows, J., concurring) (“The church in our society has long been identified with family and residential life. Churches traditionally have been and should be located in that part of the community where people live. They should be easily and conveniently located to the home.”); *Young Israel Organization v. Dworkin*, 133 N.E.2d 174, 183 (Ohio Ct. App. 1956) (“The place of the church is to be found in that part of the community where the people live. It is associated with the home. Its influence is concerned with family life.”); *Congregation Temple Israel v. Creve Coeur*, 320 S.W.2d 451 (Mo. 1959) (noting the usual and customary location of churches in residential areas). See also *Boyajian*, 212 F.3d at 10 (“[P]roximity to their houses of worship is for some groups a significant component of their religious practice. Orthodox Jews, for example, believe they are prohibited by the Torah, the Jewish Bible, from using automobiles on their Sabbath. They therefore must live within walking distance of a synagogue.”).

Third, it is unreasonable to exclude churches in residential zones when the ordinance allows more intensive uses in those same zones.⁷ RATHKOPF & RATHKOPF, *supra*, at 20-5 (zoning ordinances violate equal protection where “other nonresidential uses, equally or even more abrasive, such as schools, colleges, public libraries, museums, clubhouses, and the like existed therein or were permitted uses therein”). *See also* MCQUILLIN, *supra*, at 489 (“a zoning ordinance requiring a special use permit to operate a church when it does not require such permits to operate community centers, meeting halls, and other establishments similarly situated” violates equal protection).

The Supreme Court’s decision in *City of Cleburne*, *supra*, involving a group home for the mentally retarded rather than a house of worship, directly supports this rationale for the majority rule. There, the City argued in support of the rationality of the ordinance that it was “aimed at avoiding concentration of population and at lessening congestion of the streets,” as well as “fire hazards, [preserving] the serenity of the neighborhood, and the avoidance of danger to other residents.” *City of Cleburne*, 473 U.S. at 450. The Court rejected this argument, not because those purposes were illegitimate, but because the ordinance was not rationally related to those purposes: the ordinance allowed “apartment houses, fraternity and sorority houses, hospitals and the like” to locate freely in the same zone where the group home could not. *Id.*

In sum, zoning houses of worship out of residential districts for whatever reason – to diminish traffic, crowding, or noise – is like zoning all kitchens out of homes to reduce vermin:

⁷ *See, e.g., Black v. Town of Montclair*, 167 A.2d 388 (N.J. 1961); *Franciscan Missionaries of Mary v. Herdman*, 184 N.Y.S.2d 104 (N.Y. App. Div. 1959); *Andrews v. Bd. of Adjustment*, 143 A.2d 262 (N.J. Super. Ct. 1958); *North Shore Unitarian Soc’y v. Village of Plandome*, 109 N.Y.S.2d 803 (N.Y. App. Div. 1951); *Ellsworth v. Gercke*, 156 P.2d 242 (Ariz. 1949).

the law would prohibit a structure that categorically does far more good than bad, and that cannot reasonably be separated from residential life. In this context, to nonetheless allow homes to be built with pantries to store food would only exacerbate the irrationality.

So it is in Abington Township. Its Ordinance does not permit religious assembly or institutional uses – even by special exception or as a conditional use – in any of the four of the residential zones it establishes. But in the R-1 zone alone, where the Property is located, the Ordinance allows various other assembly and institutional uses by special exception, such as “Municipal Complexes” (which include libraries and administration buildings), “Outdoor Recreation” uses (which include country clubs, club houses, pro shops, and snack bars used by patrons of recreational activities “operated on a commercial or membership basis”), and “Riding Academies.” Ordinance §§ 301.2.B.2.-4., 706.E.8., 706.G.6. In addition, R-1 property owners are permitted – *as of right* – to carve up their land into as many single family homes as would fit, with all attendant traffic, crowding, light, and noise. *Id.* § 301.2.A.3.

The remaining “R” districts suffer from the same patent inconsistency. For example, in the R-4 district, though places of worship are forbidden, a property the size of plaintiffs’ could be used – by special exception – as a day care center for children or adults, a nursery school, or a kindergarten for *up to 210 people*, Ordinance §§304.2.B.1., 706.E.3., or as a nursing home with *360 beds*. *Id.* §§ 304.2.B.2., 706.E.9. The Ordinance also permits such a property – as a conditional use – to become a dependent care facility for *360 people*, including auditoriums, chapels, community centers, administration offices, recreational and social facilities, and retail services, such as a beauty shop, coffee shop, and gift shop. *Id.* §§ 304.2.C.1.; 706.E.7.a.3.-4. Thus, the very terms of the Ordinance contain not only a *per se* irrational ban on religious uses

in residential zones, but the same sort of inconsistency regarding intensity of use that the Supreme Court found irrational in *City of Cleburne*.

Finally, the fact that Abington has not actively chased pre-existing churches out of residential neighborhoods does not diminish the constitutional problem with the current Ordinance, but simply avoids a still more egregious problem under the Free Exercise Clause. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) (official action “that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation” is subject to strict scrutiny). Nothing that may be proven at trial can change the fact that, since 1990 and on into the future, by the plain language of the Ordinance, *any* church, synagogue, or temple that would seek to locate in *any* residential neighborhood of Abington would not be permitted to do so, not even by special exception or as a conditional use, even though the Ordinance permits other institutional, assembly, and even residential uses that are similarly or more intense.⁸ It is the very existence of this unreasonable prohibition – and not its application to this case – that plaintiffs challenge on this motion, and that the Due Process and Equal Protection Clauses have

⁸ Indeed, one opinion criticizing total bans on churches from residential areas foresaw precisely the kind of legal regime that Abington has established:

If municipalities, under the guise of general welfare, can exclude churches by the zoning process from a residential district, it follows that by the exercise of that power, a municipality can rezone a residential district making all the churches now located therein nonconforming uses, and eventually relegate churches to commercial and industrial districts. It is no answer to say that municipalities would not do this.

Lake Drive Baptist Church, 108 N.W.2d at 301 (Hallows, J., concurring).

repeatedly been held to forbid, especially where fundamental rights of religious speech and exercise are at stake.⁹

⁹ Cf. *Good News Club v. Milford Central School*, No. 99-2036 (U.S. June 11, 2001) (First Amendment prohibits government exclusion of religious groups from meeting facilities that are open to nonreligious groups).

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment should be granted.

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