



July 20, 2009

Mayor Stephanie Klinzing
City of Elk River
13065 Orono Parkway
Elk River, MN 55330

VIA UPS (Guaranteed for Next Day Delivery) and Facsimile (763-635-1090)

Re: Elk River's religiously discriminatory facility access policy

Dear Mayor Klinzing,

Our client, Brad Bjorkman, has notified the Alliance Defense Fund of twin Elk River policies that discriminate against religious uses of public facilities. These policies are in blatant violation of First Amendment rights. Accordingly, we are writing you to urge you to rescind this policy by August 18, 2009 to avoid litigation.

By way of introduction, the Alliance Defense Fund ("ADF") is a non-profit legal and educational organization that seeks to educate government officials and others on the subject of constitutional rights, particularly under the First Amendment. When necessary, we do proceed to litigation to protect First Amendment rights.

RELEVANT FACTS

Elk River has policies that govern rental access to its Lions Park Center recreation area ("Park") and to its Library community room ("Library"). The Park policy, which allows reduced rate rentals for Park facilities to all Elk River non-profits, provides that the reduced rate is not available for uses that include "prayer or other worship purposes." According to comments made at the City Council meeting on June 15, 2009, groups that wanted to make a religious use of the Park could still do so, but they would have to pay the full rate assessed against commercial and out-of-town groups. Council Member Motin stated that the targeted restrictions on religious uses were created to avoid having churches hold their weekly church meetings at public facilities, thereby dominating the use of those facilities. Under the Park policy, then, any Elk River non-profit group—including churches—can rent the Park facilities at the reduced rate as often as those facilities are available, but as soon as the usage includes religious expression, it is effectively penalized by an increased rental rate.

The Library policy states that “[t]he meeting room is available; free of charge, for use by community members for non-religious, non-commercial meetings, which are open to the public. It is not intended for use by groups, [sic] which meet on a regular basis. . . .” The Library policy further provides that members of the public using its facility must agree that their “usage may not be for prayer or other worship purposes.” Unlike the Park policy, the Library does not charge more for religious uses of its facilities—it simply bans them altogether. Also, while the Park’s policy putatively exists to prevent overuse of inexpensive public facilities by churches, the Library policy already independently proscribes regular use of its facilities. Thus, there is no independent reason to limit religious expression at the Library other than pure discrimination.

RELEVANT LAW

Religious meetings are protected under the free speech clause of the First Amendment. *Widmar v. Vincent*, 454 U.S. 263, 269 (“religious worship and discussion . . . are forms of speech and association protected by the First Amendment”). The Supreme Court has consistently said that targeting religious groups for unfavorable treatment is viewpoint discrimination and highly unconstitutional. *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 112 (2001). *Good News Club* is an example of this rule. There, a school district’s community use policy allowed community groups to use school facilities for any number of secular purposes, but the policy prohibited use “by any individual or organization for religious purposes.” *Id.* at 103. As a result, the school district denied a religious group’s request to have weekly after-school meetings. *Id.* at 104. The Supreme Court, in declaring the policy unconstitutional, said it was “quite clear that [the school district] engaged in viewpoint discrimination when it excluded the Club from the afterschool forum.” *Id.* at 109. Similarly, Elk River’s access policies at the Library and Park discriminate specifically against religious viewpoints while allowing access to facilities for all other types of expression. For instance, the Library allows the use of “light refreshments” in its meeting rooms, allowing groups to enjoy beverages like grape juice as a part of their meeting. But if a Christian group attempted to enjoy the same grape juice with the purpose of celebrating communion, they would be banned from the library. Accordingly, Elk River’s Library and Park access policies enforce viewpoint discrimination in violation of the Free Speech Clause of the First Amendment.

The exclusion of religious groups also violates the right to free exercise of religion under the First Amendment. Laws which discriminate on the basis of religion are presumptively invalid. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). The government may not impose “special disabilities on the basis of religious views or religious status.” *Id.* at 877. Elk River’s facility access policies do exactly this, though, singling out religion for disparate treatment. For example, the Park policy notes that its facilities are “quite popular for concerts.” However, if those concerts consisted of hymns instead of pop songs, the users would be penalized for their religious expression by having to pay a heightened fee to access the park. Prohibited religiously-motivated activities on public property—when the same

activities are permitted in the forum if done for non-religious reasons—blatantly violates the Free Exercise Clause. *Church of the Lukumi Babalu v. City of Hialeah*, 508 U.S. 520, 536-37 (1993) (striking down a law that prohibited killings animals for religious ceremonies but allowed killing animals for food or recreational hunting). Thus, Elk River’s Library and Park access policies violate the First Amendment right to free exercise of religion.

The polices also violate the Establishment Clause of the First Amendment. The Establishment Clause “requires the state to be neutral in its relations with groups of religious believers and non-believers.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). It is well established that “the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.” *Church of the Lukumi*, 508 U.S. at 532. Thus, the neutrality required under the Establishment Clause is violated as much by government disapproval of religion as it is by government approval of religion. See, e.g., *American Family Assn., Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1120-21 (9th Cir. 2002) (The Establishment Clause “applies not only to official condonement of a particular religion or religious belief, but also to official disapproval or hostility toward religion.”) (citations omitted). Because the Elk River has singled out uniquely religious expression for disfavored treatment, it has created an official policy of hostility toward religion and has violated the Establishment Clause.

Elk River’s Park and Library access policies are not only clearly unconstitutional, they also fail to meet the Council’s stated objection for them—prevention of regular use by groups that would dominate facility usage. The Park policy allows almost any group to access the Park as regularly as it likes. Accordingly, it only discourages a particular *type* of use—religious use—and not the frequency of use. Also, the Library policy already has language forbidding regular use, so the religiously discriminatory provisions have no relation to the aim of preventing over-use at all. If Elk River is concerned with its facilities being used too much by a single entity, it can simply follow Council Member Motin’s recommendation from the June 15 meeting and only allow groups to use those facilities up to twice per month. And if there are concerns that some groups will require a lot of use for a short time each year but not the rest of the year, an alternative restriction would allow more than two uses per month but no more than, say, twenty total uses in a year. Such limitations would allow Elk River to meet its concerns without violating the First Amendment of the Constitution.

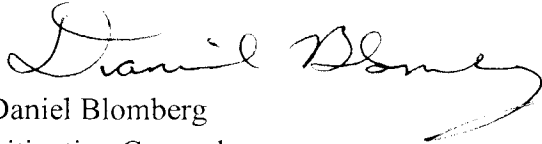
CONCLUSION

We sincerely hope that Elk River will recognize the significant constitutional problems identified above and fix its policies immediately to avoid any further violation of the constitution. However, if Elk River refuses to change these policies, ADF will commence litigation to stop the city’s unfortunate choice to continue violating First Amendment rights. According to the June 15 Council Meeting, City Attorney Beck will be providing his

recommendation on whether to change the policy at the August 17 Council Meeting. ADF will wait until August 18, then, for Elk River to make its decision.

Should you have any questions regarding the foregoing, please do not hesitate to contact me.

Sincerely,



Daniel Blomberg

Litigation Counsel

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