



Board of Adjustment  
Town of Gilbert  
90 E. Civic Center Dr.  
Gilbert, AZ 85296

VIA Hand-Delivery and Facsimile (480-497-4923)

RE: Zoning Interpretation on Church Meetings within a Single Family Residence

Dear Board of Adjustment,

This letter is to appeal the Zoning Administrator's interpretation and enforcement of the Town of Gilbert's zoning code to ban all church sponsored activities from taking place in single-family residential structures. The Zoning Administrator and a zoning enforcement officer under his authority have enforced this interpretation against the appellant Oasis of Truth Church ("Church").

### **Introduction**

Gilbert's zoning code bans "religious assembly" from almost all residential structures in the town. There is no provision for obtaining a conditional use permit to circumvent this rule. Only schools are similarly targeted by the zoning ordinance for such an absolute ban.

The Zoning Administrator has interpreted this ban to extend so far as to bar any church sponsored activities, like Bible studies, meeting at any frequency and of any group size from meeting in the privacy of a home in Gilbert. He thus upheld the cease-and-desist order issued by a Gilbert zoning enforcement officer that not only forced a house church consisting of less than ten people to cease meeting in a Gilbert home, but also to cease holding even smaller Bible studies there. These actions have substantially burdened the religious beliefs and practices of the church.

Banning religious meetings of any size or frequency from meeting in a home based solely upon a church's sponsorship of the meeting is both unprecedented and, more importantly, unconstitutional. Further, the Zoning Administrator's interpretation and application of the zoning code is unsupported by the plain language of the code itself. This Board should overturn the Zoning Administrator's interpretation and interpret the code to avoid these problems.

## Facts

The Church was launched in 2009 and consists solely of seven adult members and four children.<sup>1</sup> Before receiving the Town's cease-and-desist letter, the Church held its meetings in the homes of members. They met in different houses on a rotating basis three times per week. Two meetings were held on Sunday, with one in the morning and one in the afternoon. At those meetings, the Church members gathered together for religious and moral instruction, worship, and fellowship. One meeting was held Tuesday night, which focused more primarily on Biblical and moral instruction. The Church meetings did not include and were never intended to include activities like vocational training programs, day cares, or food pantries. Altogether, the meetings lasted for a total of about six to eight hours per week.

The meetings were not noisy or boisterous, and neighbors never complained about them. In fact, some neighbors have commented that they like and respect the ability of private citizens to meet in their own homes for religious meetings.

Attendance of the Church's Sunday meetings before the cease-and-desist order was never more than ten adults or fifteen total people, counting children. Generally, the meetings only consisted of the seven adult members, six of whom were married couples, and three children. At the property in question, \_\_\_\_\_, there was never more than one vehicle parked in the street by people attending the Church meetings. Normally, all the cars of people attending the meetings were parked solely in the home's driveway. Even if a few cars parked along the street, though, that would not have created a problem, since the practice is common throughout the neighborhood. The Tuesday night Bible studies were generally even smaller, as one Church member could not attend due to work conflicts.

The Church leaders have a sincere religious belief that Christian fellowship is a necessary part of Christian life, Heb. 10:25, and that meeting in homes is an important part of Christian fellowship. Such meetings follow the Biblical example of the early Christian church, as seen in Acts 2:46-47, Rom. 16:5, I Cor. 16:19, Col. 4:15, and Philemon 1:2. Further, small-group meetings in homes create an intimate, familial environment that is vital to building relationships with both Christians and non-Christians. This environment cannot be similarly created in typical "church" facilities.<sup>2</sup> Further, the Biblical command of hospitality requires church members to be able to use their own homes to host a variety of church-related activities, including small-group evangelism, Biblical instruction, and Christian fellowship. Finally, the Church instructs its

---

<sup>1</sup> At the time of the Church's request for the Zoning Administrator's interpretation of the code, the Church had only three children. Since then, one of the families has had another child.

<sup>2</sup> See, e.g., Titus 2:1-8; Oasis of Truth Philosophy of Teaching, <http://www.oasisoftruth.org/media/documents/0273e23f-0b54-6174-9dba-4b84a91419e1.pdf>, identifying the need for small group meetings.

members to teach Christian principles within the home to their family members and offers to provide pastoral staff assistance for such teaching.<sup>3</sup>

The Church leaders did not intend to hold Sunday services at their homes permanently, though they certainly planned to continue them longer than was allowed by the cease-and-desist order. Once the meetings got too large for comfortable, community-friendly fellowship, the Church hoped to move to a different location. But even then, meeting in homes would remain an important part of the Church's religious mission. In addition to the many general ministry functions identified above for home-based ministry, future churches planted by the Church would likely be started in homes. Also, the Church remains strongly committed both to continuing its Tuesday-night Bible studies in homes indefinitely and to support Biblical teaching to families within the home.

The Church is not alone in believing that Christian ministry should take place in homes. Many American Christians reject large groups meeting in large buildings altogether and instead hold their small religious meetings in homes.<sup>4</sup> "A recent article by George Gallup reports that 40% of all American adults meet in small religious groups. Not surprisingly, a large number of these groups are in...house churches which revolve around Bible study, prayer, and Sunday school." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 771 (7<sup>th</sup> Cir. 2003) (POSNER, J., dissenting). The Church is aware of at least one other church in Gilbert that solely holds religious services in homes, and of many other churches that regularly schedule Bible studies and other forms of Christian fellowship in homes.

On November 23, 2009, the Church received a letter from Steve Wallace, a Gilbert code compliance officer, ordering it to cease holding church meetings in Pastor Joe Sutherland's home based on the Town's Land Development Code ("LDC"). See Exhibit 1, Cease-and-desist letter. The letter was not sent because of complaints about the Church, but simply because Mr. Wallace had happened to see signs near Pastor Sutherland's home about the meetings. Notably, nothing in the letter said the signs were improper, and no later actions or explanations by the Town have referenced the signs. The focus was and is solely on the church meetings in Pastor Sutherland's home.

The Church immediately began working with Mr. Wallace to comply with the Town's cease-and-desist order, and had stopped holding its Sunday meetings in homes by the end of December. It is now holding its Sunday meetings in a local school, though it can now only hold one service at that location because of the cost of renting the space.

---

<sup>3</sup> See *Oasis of Truth Philosophy of Teach*, *supra*.

<sup>4</sup> See, e.g., <http://www.time.com/time/magazine/article/0,9171,1167737,00.html> (visited March 9, 2010).

Though it obeyed the Town's order as soon as possible, the Church was surprised and confused by the order. Accordingly, the Church asked Mr. Wallace whether other church activities, such as Bible studies and fellowship, were also banned in homes, and further asked whether small-group church meetings of any type were even covered by the code. Mr. Wallace's response was to cite the Town's definition of religious assembly and a definition from the LDC for a "qualifying event":

**Religious Assembly.** Facilities for worship and other religious ceremonies with incidental religious education, religious bookstores, rectories and parsonages, offices, social services, day care, and community programs.

*Large Scale.* Facilities on 10 acres or more

*Small Scale.* Facilities on less than 10 acres.

**Qualifying Event:** A "qualifying event" is any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.

Since it was unclear to the Church how this response answered its questions, the Church posed its questions to the Zoning Administrator. The Zoning Administrator's initial response was simply to affirm Mr. Wallace's actions and quote the same two definitions. *See* Exhibit 2, E-mail correspondence with Michael Milillo. The Church renewed its request for clarification, stating that the Town's decisions were having a "significant impact" on its ministry, limiting its ability to fulfill its religious mission. The Zoning Administrator then gave a more detailed response, stating that even small gatherings, like the Church's normal attendance of only seven adults, was prohibited in homes under the code. He also stated that "[a]ll church-sponsored events," including Bible studies, were similarly banned. The Zoning Administrator offered to provide a formal Zoning Interpretation upon the Church's request and payment of a \$305 fee.

The Church sought the formal Zoning Interpretation on January 19, 2010, and received the Zoning Administrator's formal response on March 1, 2010. The Zoning Interpretation, Exhibit 3, found that:

- 1) The Church's rotating use of Pastor Joe Sutherland's home for a few hours every few weeks put it under the LDC's "religious assembly" definition. Ex. 3 at 3.
- 2) The Church's Sunday meetings were banned from taking place at Pastor Sutherland's home. Ex. 3 at 3.
- 3) As a religious assembly, any activities sponsored by the Church were also banned from meeting in homes. Ex. 3 at 4.
- 4) The ban extended to meetings or activities of any size. Ex. 3 at 3 and 4.

- 5) An activity was “church sponsored” if the Church “has paid for or planned and carried out a project or activity.” Ex. 3 at 3.
- 6) Prohibited “church-sponsored” activities included Bible studies, church leadership meetings, and church fellowship activities. Ex. 3 at 4.

The Zoning Administrator also stated that these LDC provisions would not be enforced against the Church while the Town considers amending the provisions, unless certain conditions arise, like traffic or parking issues.

The Church has decided to appeal to protect its ability to fulfill its religious mission.

### **Legal Analysis**

The Board should overturn the Zoning Administrator’s decision because it is both unsupported by the LDC and is a violation of the Church’s statutory and constitutional rights.

1. *The Church’s meetings in homes do not constitute “religious assembly.”*

The definition of “religious assembly,” found at LDC Art. 6.1 and reproduced verbatim above, does not apply to the Church’s small-group religious meetings in homes. First, the plain language of the definition governs “facilities” which are “for” worship and other religious ceremonies. It does not cover incidental and brief religious meetings in homes, like the few hours per week every couple weeks or so that the Church met at Pastor Sutherland’s home. “[T]hree religious meetings per week at a residence cannot be understood reasonably to convert a home into a site primarily used for religious purposes.” *Konikov v. Orange County, Florida*, 410 F.3d 1317, 1330 (11<sup>th</sup> Cir. 2003).

Otherwise, any incidental religious use of a facility of any sort, whether a single-family residential structure or a coffee-house, would automatically transform that structure into a religious assembly which must abide by the attendant restrictions on such uses.<sup>5</sup> For instance, if the Church begins scheduling a weekly coffee-and-prayer meeting at a local homeowners’ association facility or conducting Church leadership meetings at a golf course’s clubhouse, those buildings will also become a “religious assembly” facilities.<sup>6</sup> Such a result is clearly not what the definition intends.

---

<sup>5</sup> Religious assemblies, in addition to being banned from single-family residential structures, are also only permitted on certain streets and face certain restrictions on outdoor lighting. *See* LDC Table 2.103.

<sup>6</sup> Homeowners association facilities are permitted as of right in single family residential districts; golf courses—which are allowed incidental uses like clubhouses—are allowed under conditional use permits. *See* LDC Table 2.103.

Second, the definition requires that, in addition to worship and religious ceremonies, a “religious assembly” facility must include “incidental religious education, religious bookstores, rectories and parsonages, offices, social services, day care, *and* community programs.” The term “and” indicates that this is an inclusive list, that a facility must host all of the described uses in order to meet the definition. The Church, which does not have a dedicated facility, has never hosted a bookstore, rectory, or offices, and it does not provide social services, day care, or community programs. Accordingly, it does not fit the definition.

The Board may be understandably unwilling to adopt an inclusive interpretation of the definition’s terms. After all, many sizeable churches do not provide all the services or uses listed under religious assembly. But that the Church fails to provide but one of the required incidental uses at its meetings—“religious education,” which more likely refers religious schools than just any type of religious instruction at all—is evidence that the definition was never intended to apply to the Church’s activities.

Further, construing “religious assembly” as applying only to facilities used primarily for religious purposes will not open the floodgates to mega-churches setting up in homes. A church that used a single family residence as its facility, where the use of the facility as a dwelling was only incidental to its religious purpose, would properly be a “religious assembly.”

As discussed in more detail below, the Town’s legitimate interest in regulating the facilities of churches only exists where there are attendant concerns about health, safety, and welfare issues, like parking, traffic, or building and fire safety conditions. Where a church would be converting a home into a place of public assembly—which could raise reasonable traffic, parking, and building safety issues—the “religious assembly” regulations are reasonable. But here, where the Church’s meetings no more impact the Town’s interests than would weekly Monday Night Football parties at people’s houses, such regulations are not reasonable. Thus, the Church should not be regulated under the “religious assembly” definition and limitations.

2. *Nothing in the LDC permits the regulation of “church-sponsored” activities.*

Even if the Town determines that religious assembly regulations apply to small-group religious services as an incidental use of a home, they would not go so far as to ban Bible studies and fellowship activities taking place within homes. Nothing about the regulations allow limitations on “church sponsored” activities that take place away from the religious assembly facility.

Initially, the Town relied upon the “qualifying event” definition to regulate church sponsored activities, like Bible studies, church leadership meetings, and Christian fellowship. Ex. 2. But that “qualifying event” is only related in the LDC to temporary directional signs to

such events.<sup>7</sup> Not once in the LDC is “qualifying event” used for any other purpose. While the Town properly abandoned that basis for regulation in its zoning interpretation, it has compounded the problem by inventing an expansive definition for “church sponsored activities” out of whole cloth and then constructing a new rule that church-sponsored activities can somehow be banned under the religious assembly definition. Ex. 3 at 3

Under the new definition, any activity which is either paid for or planned and carried out by a church is a “church-sponsored” activity. *Id.* In turn, the new rule prohibits the Church from conducting any sort of planned and supported activity in a home. *Id.* at 4. From small-group Bible studies to three-person church leadership meetings to fellowship events like a baby shower, the Church is categorically barred from being a part of its members’ homes. Worse yet, applying this rule would appear to ban the Church from encouraging and assisting parents in the religious education of their children. Such education would generally take place at home and, if the Church was involved in planning it and supporting its execution, would appear to fit the newly constructed definition of “church sponsored” activity.

Further, the new approach irrationally discriminates against churches. While it bans church involvement in a myriad of home-based activities, it does not actually ban any of the activities themselves. Thus, Bible studies and religious fellowship can take place, but only if the Church has no role in them. However, the only legitimate interest that the Town could have would be to regulate the activities, not to ban churches from sponsoring them. Allowing such an unreasonable distinction to stand would open the Town to charges that it is targeting churches for discrimination.<sup>8</sup>

This new ban on church-sponsored activities in homes should be rejected as both irrational and unlawful. The LDC gives no basis—nor could it—for trying to force the Church out of participation in the home-life of its families and into the fringes of the community.

### 3. *The Town’s ban on church meetings in homes violates the Free Exercise Clause.*

Under the Zoning Administrator’s interpretation of “religious assembly,” churches are banned from having small-group meetings of any nature in most homes within Gilbert. This interpretation violates the Church’s First Amendment Right to Free Exercise of religion.

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); *Church of Lukumi*

---

<sup>7</sup> See Glossary of General Terms at 22.

<sup>8</sup> This is not to suggest that the Church believes that the Town or its employees are intentionally engaging in wanton religious discrimination, but rather to identify the necessary result of the “church-sponsored activities” rule.

*Babalua Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). Government may not impose “special disabilities on the basis of religious views or religious status.” *Smith* at 877. And government may only justify policies which burden the free exercise of religion without a compelling government interest when the policy is neutral and generally applicable. *Lukumi* at 546.

The LDC is being applied in a way that is decidedly not neutral or generally applicable. First, it is not neutral because it, on its face, singles out “religious assembly” for discrimination. Only schools receive the same blanket ban against meeting in single-family homes.<sup>9</sup>

Second, the Town’s application of the LDC is not generally applicable because it allows a myriad of exceptions that undermine the interests which purportedly support its regulation of church meetings. Other uses are allowed as of right in single-family residential districts without any limitation locating in a single-family residential structure. In fact, residential day cares are allowed as of right in single-family residential districts and structures “as long as the use is incidental to the principal use of the property.”<sup>10</sup> Residential day cares can provide care of up to ten children or adults and do not have any definitional constraints on how often the day care can be provided.<sup>11</sup> But the LDC does not make similar allowances for religious assemblies. While a day care can take up to ten children or adults to a home for an entire day of supervision on a daily basis, the Church cannot host seven adults (two of whom live in the home in question) for a few hours every couple weeks.

Further, Pastor Sutherland is not barred by the LDC from hosting social organizations, like the Cub Scouts, in his home. In fact, Pastor Sutherland could have weekly, bi-weekly, or tri-weekly Cub Scout meetings in his home with dozens of young scouts in attendance each time. Similarly, nothing in the LDC prevents Pastor Sutherland from having a large number of friends over three times a week to watch sports. But he cannot have a Church meeting of any type, size, or frequency in his home under the Zoning Administrator’s application of the LDC. Thus, the interests that the Town has in preventing traffic, parking, or building-safety problems are threatened even more by allowed uses at homes than by the banned Church meetings, thereby undermining the interests which the Town relies on to limit the Church’s meetings. *Konikov*, 410 F.3d at 1328 (noting that allowing activities like Cub Scouts or sports parties but banning church events was proof of discrimination against religion).

Because the LDC’s ban on the Church’s meetings in homes is underinclusive—that is, it “fail[s] to prohibit nonreligious conduct that endangers [the Town’s] interests in a similar or greater degree than” prohibited religious conduct—it is only constitutional if narrowly tailored to

---

<sup>9</sup> See LDC Table 2.103, condition L3.

<sup>10</sup> See LDC Table 2.103, condition L1.

<sup>11</sup> See LDC Art. 6.1 at pg. 4.

a compelling interest. *Lukumi*, 508 U.S. at 543, 546. But since the Town is willing to allow day cares and sports parties in homes, it cannot assert a compelling reason to ban churches: “It is established...that a law cannot be regarded as protecting an interest of the highest order...when it leaves appreciable damage to the supposedly vital interest unprohibited.” *Id.* at 547. Thus, the LDC’s ban on small-group church meetings in homes is unconstitutional.

4. *The Town’s ban on church meetings in homes violates RLUIPA.*

The Religious Land Use and Institutionalized Persons Act (“RLUIPA”) prevents government from imposing “a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.” 42 U.S.C. § 2000cc(b)(1). Where, as shown above, a law burdens religion in a non-neutral or non-generally applicable way, it also violates the equal treatment provision of RLUIPA. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232-35 (2004). Thus, the LDC’s ban on small-group church meetings in homes is a violation of RLUIPA.

5. *The Town’s ban on church meetings in homes violates FERA.*

The Free Exercise of Religion Act (“FERA”)<sup>12</sup> was passed “to protect Arizona citizens’ right to exercise their religious beliefs free from undue government interference.” *State v. Hardesty*, 214 P.3d 1004, 1006 (Ariz. 2009). FERA applies when an action motivated by sincerely held belief is substantially burdened by government regulation. *Id.* at 1007. In such instances, FERA only allows the regulation to stand if it advances “a compelling government interest” and is the “least restrictive means of furthering” that interest. A.R.S. § 41-1493.01(C).

Here, the Church has a sincerely held religious belief to meet in the homes of its members. That belief is being frustrated by the Town’s absolute ban on religious meetings in homes, particularly since the Church has been ordered by the Town to cease conducting meetings of any size, frequency, or type in its members’ homes.<sup>13</sup> The result of the Town’s ordinance and actions has been both to stop most of the Church’s meetings in homes and to require the Church to begin renting space at a school for its Sunday meetings. Further, the cost of the rental has cut the amount of Sunday services that the Church can have in half. Finally, since these burdens have been imposed irrationally and without support in the LDC’s text, they are *per se* substantial burdens. *Westchester Day Sch. v. Vill. Of Mamaroneck*, 504 F.3d 338, 350-51 (2d Cir. 2007) (finding that a “substantial burden claim [may be successful] where land use restrictions are imposed on the religious institution arbitrarily, capriciously, or unlawfully.”).

---

<sup>12</sup> A.R.S. §§ 41-1493 to 41-1493.02

<sup>13</sup> Notably, while the Town has said it will not enforce the religious assembly ordinance, it has not rescinded the cease-and-desist order it issued to the Church.

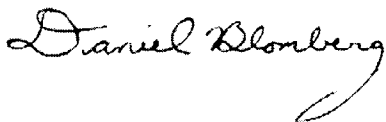
Thus, the Church's sincerely held religious belief is being substantially burdened by the Town's interpretation and enforcement of the LDC.

As noted above, then, the LDC ban must fall because it is not based upon a compelling government interest. Further, FERA's requirements go beyond those of the First Amendment, as it mandates not that a law be merely narrowly tailored, but rather that it be "the least restrictive means" of furthering the government's interests. *Id.* And the LDC's burden on small-group religious meetings in homes is not the least restrictive means of preventing concerns with traffic, parking, or building safety. Proof of this is the residential day care provision, which allows homes to be used for day care operations as long as those uses are "incidental to the principal purpose of the property." A similar provision for religious assembly would allow religious meetings in homes without allowing the homes to be converted into church buildings, and thereby creating the attendant public welfare concerns. But the LDC does not adopt this less intrusive means of accomplishing its goals, and thus it fails FERA's "least intrusive means" test.

### Conclusion

Under First Amendment free speech jurisprudence, the Church would have been able to hold its small meetings on the public sidewalk outside Pastor Sutherland's home without even having to ask the Town's permission. *Grossman v. City of Portland*, 33 F.3d 1200 (9<sup>th</sup> Cir. 1994) (striking down a permit scheme for small groups to use public property); *Cox v. City of Charleston*, 416 F.3d 281 (4<sup>th</sup> Cir. 2005) (noting that small group permit requirements are almost never constitutional); *accord American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600 (6<sup>th</sup> Cir. 2005). And Americans have more rights in their own homes than they do on public property. Private citizens should be able to host small religious meetings in their own homes without being evicted by intrusive and unfair regulations. The Church respectfully requests that the Board reverse the Zoning Administrator's unnecessary and unlawful interpretation of the zoning code.

Respectfully submitted,



Dale Schowengerdt  
Daniel Blomberg  
Litigation Counsel  
ALLIANCE DEFENSE FUND  
15192 Rosewood  
Leawood, KS 66224  
E-Mail: [dblomberg@telladf.org](mailto:dblomberg@telladf.org)  
Phone: 913-685-8000