UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION
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AMOS BEECHY; ALVIN SLABAUGH; DANIEL MAST; JOHN MAST; AMOS WEAVER, individuals and ALL SIMILARLY SITUATED AMISH PERSONS,

Plaintiffs,

v

CENTRAL MICHIGAN DISTRICT HEALTH DEPARTMENT; CENTRAL MICHIGAN DISTRICT BOARD OF APPEALS; MARY KUSHION, Executive Director, Central Michigan District Health Department, sued in her individual and official capacity; MICHELLE PATTON, Supervisor, Central Michigan District Health Department, sued in her individual and official capacity; ROBERT PATTON, inspector, Central Michigan District Health Department, sued in his individual and official capacity; JOHN DOE INDIVIDUALS 1-10; DOE GOVERNMENTAL ENTITIES 1-10; DOE PARTNERSHIPS, CORPORATIONS, FIDUCIARIES, or OTHER ENTITIES 1-10,

Defendants.

HON. DAVID M. LAWSON
EASTERN DISTRICT OF MICHIGAN

FILE NO. 03-CV-10312-BC

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

---/

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---/

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

NOW COME Defendants, CENTRAL MICHIGAN DISTRICT HEALTH DEPARTMENT, CENTRAL MICHIGAN DISTRICT BOARD OF APPEALS, MARY KUSHION, MICHELLE PATTON, and ROBERT PATTON, by and through their counsel, CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C., and hereby move this Court pursuant to FRCP 56(c) for summary disposition on Plaintiffs' claims against them and in support thereof, states as follows:

1. The Plaintiffs, Amos Beechy, Alvin Slabaugh, Daniel Mast, John Mast, Amos Weaver and "all similarly situated Amish persons", filed their lawsuit against Defendants on September 15, 2003.

2. The Plaintiffs bring a four-count Complaint against Defendants, Central Michigan District Health Department, Central Michigan District Board of Appeals, Mary Kushion (individually and in her official capacity), Michelle Patton (individually and in her official capacity), Robert Patton (individually and in his official capacity), and unidentified John Doe individuals, governmental entities, partnerships, etc.

3. In their four-count Complaint Plaintiffs allege Defendants violated their First Amendment Freedom of Religion rights, denied them equal protection of the laws, violated their due process rights and committed a statutory violation of the Religious Land Use and Institutionalized Persons Act (42 USC Sec. 2000).

4. The Plaintiffs are members of a local Gladwin County Amish clan known as the North Gladwin Amish Community. In essence, their Complaint alleges that the requirement by the Central Michigan District Health Department ("CMDHD") that each residential home have or install

a minimum 750 gallon septic tank is a violation of a genuinely held religious belief. The Plaintiffs believe that their water usage is substantially different than the general public and, therefore, they should not be held to the same standard concerning the required capacity of their septic tanks.

5. The CMDHD has attempted to accommodate the differential water usage argument by lowering the required septage capacity to the code minimum of 750 gallons. The Plaintiffs maintain that this requirement is still too high. Thus, this lawsuit challenges not the total absence of accommodation but the degree of accommodation.

6. The Plaintiffs have been afforded considerable notice and an opportunity to be heard on an issue that is not a genuinely held religious belief but a matter of personal preference.

7. The Religious Land Use and Institutionalized Persons Act does not apply to these facts as the CMDHD regulations apply to residential homes not congregational buildings. Even if RLUIPA applies, the size of the septic system is not a sincerely held religious belief, substantially burdened by a governmental interest that is not narrowly tailored to fit the need.

WHEREFORE, summary disposition should enter in favor of all Defendants.

Date: 05/01/06

CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
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Defendants.

HON. DAVID M. LAWSON
EASTERN DISTRICT OF MICHIGAN

FILE NO. 03-CV-10312-BC

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

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CONCISE STATEMENT OF ISSUES PRESENTED

I. Whether the individual Defendants are entitled to qualified immunity.

II. Whether the Plaintiffs can establish a cognizable "genuinely held religious belief" that a required 750 gallon capacity septic tank and field violates their religious freedom while a 300 gallon capacity system does not.

A. What threshold issues set forth a cognizable freedom of religion claim?

B. How have the Plaintiffs classified their freedom of religion claim?

C. Is the Plaintiffs' claim a "genuinely held religious belief" in the Old Order Amish community?

III. Whether the Plaintiffs have been afforded due process.

IV. Whether the Religious Land Use and Institutionalized Persons Act has application to these facts.

STATEMENT OF THE CASE

1. Overview

The Plaintiffs, Amos Beechy, Alvin Slabaugh, Daniel Mast, John Mast, Amos Weaver and "all similarly situated Amish persons", filed their lawsuit against Defendants on September 15, 2003. The Plaintiffs bring a four-count Complaint against Defendants, Central Michigan District Health Department, Central Michigan District Board of Appeals, Mary Kushion (individually and in her official capacity), Michelle Patton (individually and in her official capacity), Robert Patton (individually and in his official capacity), and unidentified John Doe individuals, governmental entities, partnerships, etc. In their four-count Complaint Plaintiffs allege Defendants violated their First Amendment Freedom of Religion rights, denied them a equal protection of the laws, violated their due process rights and committed a statutory violation of the Religious Land Use and Institutionalized Persons Act (42 USC Sec. 2000).

STATEMENT OF FACTS

1. General

The Plaintiffs are members of a local Gladwin County Amish clan known as the North Gladwin Amish Community. In essence, their Complaint alleges that the requirement by the Central Michigan District Health Department ("CMDHD") that each residential home have or install a minimum 750 gallon septic tank is a violation of a genuinely held religious belief. The Plaintiffs believe that their water usage is substantially different than the general public and, therefore, they should not be held to the same standard concerning the required capacity of their septic tanks. The CMDHD has attempted to accommodate the differential water usage argument by lowering the required septage capacity[1] to the code minimum of 750 gallons. The

[1] In the early 1990's, the CMDHD struck an agreement with the South Gladwin Amish to accommodate their differential water use to allow 750 gallon septic systems rather than the minimum 250 gallon capacity/per bedroom. All South Gladwin Amish have since complied.

Plaintiffs maintain that this requirement is still too high. Thus, this lawsuit challenges not the total absence of accommodation but the degree of accommodation.

2. The Individual Plaintiffs

a. Amos Weaver and History of the Federal Action

On May 2, 2000, Amos Weaver applied for an existing septic system evaluation on a proposed five-bedroom home. On May 5, 2000, CMDHD Official Michael Kraut went to the residence. The septic tank was substantially undersized for a 5-bedroom home. The basic rule of thumb is that a 250 gallon capacity septic tank is needed per bedroom. Therefore, under the basic formula, a 1250 gallon septic tank was required. However, due to the early agreement made with the Southern Amish Community, Mr. Weaver was required to have a minimum 750 gallon septic tank. On June 5, 2000, Mr. Weaver received a building permit to place an addition on his home with the agreement that he would install an approved septic system before occupying the home (**Exhibit 1**). Weaver constructed the addition to the home, occupied the home, but did not change, modify or install the approved septic system. (**Exhibit 2** - Deposition of Amos Weaver, pp. 59-69). CMDHD tried on numerous occasions to obtain compliance by Mr. Weaver to no avail. (**Exhibit 3** - Chronology of Weaver residence).

Finally, CMDHD sought Court assistance in enforcing the building code. On January 31, 2002, along with the five other Plaintiffs (who had taken a similar position as Mr. Weaver - see below factual discussion) pled no contest to violations of the health code in the Gladwin County District Court. The District Court Judge delayed sentencing allowing the Defendants to exhaust their administrative remedies including applying for a variance if desired. (**Exhibit 4**).

On May 13, 2002, the CMDHD received six variance requests from the Plaintiffs. (**Exhibit 5**). These requests were found to be unsatisfactory by the Health Department and later affirmed by the Board of Appeals as the variances were based on a two-gallon per person, per day water usage rate. The Health

Department and the Appellate Board believed that this estimate was unsupported, unrealistic, and in conflict with the CMDHD sanitary code and the EPA On-Site Waste Water Treatment Systems Manual[2]. (Variance denial, Scott Jones, May 15, 2002 **Exhibit 6**). Thereafter, the Plaintiffs modified their estimate with no further supporting documents to three gallons per person, per day. This amended proposal was likewise rejected as it was greatly underestimating the water usage flows even for a rural camp.[3] The Plaintiffs appealed the ruling of the Health Department. (**Exhibit 7**).

The Board of Appeals upheld the variance denials by the health supervisor on September 25, 2002. (**Exhibit 8**). The ruling of the Board of Appeals was appealed to the Gladwin County Circuit Court. (**Exhibit 9**).

While awaiting the decision of the Gladwin County Circuit Court on the appeal of the administrative appellate decision, the Plaintiffs filed this lawsuit in Federal Court alleging that their constitutional rights have been violated.

b. Amos Beechy

Amos Beechy was the subject of an enforcement action on a piece of property located at 4049 Hockaday Road in Gladwin, MI. He has since sold the property and has no standing as a Plaintiff in this lawsuit.[4] He testified on October 26, 2004, that he paid $106,000 for open pasture land. Three years later, after having constructed a barn, well house, privy and an illegal residential structure, he sold the property

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[2]The EPA Waste Water Manual is an authoritative treatise and "the most comprehensive summary of on-site waste water management since the U.S. Public Health Service had published a guidance on septic tank practice in 1967." The Manual is "intended to provide information to policy makers and regulators at the state, tribal and local levels who are charged with developing, administering and enforcing waste water treatment and management program codes." ("Introduction" On-site Waste Water Treatment Systems Manual, Office of Water, Office of Research and Development, U.S. Environmental Protection Agency, Feb. 2002).

[3]Pioneer Type Rural Camp (with privy and well) 15 to 30 gallons per person, per day. EPA on-site Waste Water Treatment Manual, Feb. 2002, Table 3-6.

[4]Worth v Seldin, 422 US 490 (1975); Baird v Nortin, 266 F3d 408 (2001), 6th Cir.

to his brothers, Perry and Joe, for $160,000 (**Exhibit 10** - Deposition of Amos Beechy - 10/26/04 at pp. 6-7). His story, however, is illustrative of the difficulty the CMDHD has had in enforcing basic health regulations on the group. (See chronology of Amos Beechy residence, **Exhibit 11**).

At his deposition, Mr. Beechy was asked how the Building Department regulations damaged him, either monetarily or by restricting his religious freedoms. Mr. Beechy testified that the actions of the Health Department had no impact on his decision to sell the property to his brothers and buy a larger parcel. The "red tagging" of the "workshop" did not deter his brothers from purchasing the property because they did not intend on living in the "workshop". In fact, Mr. Beechy made a profit on the sale. (**Exhibit 10**, pp. 33-34).

When asked what "unnecessary hardship" the Health Department actions caused, Beechy stated:

A. "Well, most of it is, like we come out and we don't get our own money until we are 21. Then we start working for ourself and we don't have much money. And if we come in there and put a big old septic system in here, it's going to cost us a lot of money for the guy to come in here and dig it out, buy the tank, put the tank in. And it cost like 4- or 5 thousand dollars and we can't afford it. I mean -- and we feel it's a waste to do that. It's a waste of money to put a big old system in there like that."

Other than the cost to install an approved septic system, Mr. Beechy could point to no other hardship. (**Exhibit 10** at pp. 34, 37).

c. <u>Daniel Mast</u>

Mr. Mast is the former owner of a property at 3126 Shell Road in Gladwin County which was subject by enforcement action by CMDHD. He sold this property to Enos Bontrager and, therefore, has no standing to pursue this federal case. See <u>Worth</u> and <u>Baird</u>, <u>infra</u>, Footnote No. 4). Enforcement efforts as to this property has been similarly frustrating to the CMDHD. (See chronological order of events, Bontrager/Daniel Mast, **Exhibit 12**). In response to repeated efforts to gain compliance, Mr. Mast replied, simply, in a letter dated May 14, 2002, that he had sold the home (to Enos Bontrager) and, as to sewage disposal he stated: "We have been getting along fine with the system that is there. It is not our property, what are you going to do now?" (**Exhibit 13**). Of course, the system that was "getting along fine" was a long trench that ran across

the road, through the neighboring field and dumped household grey water into a nearby stream. Daniel Mast then moved across the road and built a new home at 3125 Shell Road. He hooked his home drains into the same tile as Bontragers. (**Exhibit 14**, Deposition of Daniel Mast - 10/26/04, pp. 19-24). Mr. Mast agreed that there was no personal hardship to him if Enos Bontrager has to install an approved septage disposal system because Mr. Mast no longer owns the property. (**Exhibit 14** at p. 20). As to the explanation as to why a 300-gallon tank (the Plaintiffs' variance requests) would not be an infringement of their First Amendment Rights, but why a 750-gallon tank would be, Mr. Mast stated:

> A. "Yeah. It's something like -- 300-gallon tank would -- just be better because it wouldn't take as much work."
>
> (**Exhibit 14** at p. 34).

d. <u>Alvin Slabaugh</u>

Mr. Slabaugh owns a property at 3478 Renas Road. **Exhibit 15** is a summary of the chronological order of events detailing efforts by CMDHD to bring Mr. Slabaugh into compliance with minimum health code requirements. In 2001, Mr. Slabaugh built an addition to his house without a building permit and all his grey water drains out one floor drain into an adjoining field readily accessible to his pasturing cattle. Mr. Slabaugh lives at this residence with his wife and eight children. (**Exhibit 16** - Deposition of Alvin Slabaugh, pp. 5-7).

When asked specifically what genuinely held religious belief the minimum code septage system requirement violates, Mr. Slabaugh stated:

> A. "Because of this case we are going. I didn't feel it was right for me to do it if some of them didn't do it. We all belong to the same religion so I thought we should all stick together."
>
> (**Exhibit 16,** Dep. of Slabaugh, p. 34).

When asked why a proposal drawn by Plaintiff's expert, Mr. Hayes, which supported the variance request would not violate any genuinely held religious belief, but the 750-gallon capacity minimum health code requirement would, Mr. Slabaugh testified that Hayes' system would be **less costly**:

A. "I know what Mr. Hayes wrote up would be a lot simpler and a lot cheaper than what the Health Department requires.
Q. All right. How much would it cost for Hayes' system?
A. Well, I could do it myself and, you know, therefore labor would not even be considered, but I really don't know. You know, I can't just tell you off hand how much it would cost but --
Q. Are you saying you cannot put in Mr. Kraut's system yourself?
A. Well I could, but it would be an awful lot of work."

(**Exhibit 16**, p. 44).

3. Inspection of the Premises

a. Enos Bontrager, Formerly Daniel Mast

The Plaintiffs' septic systems were inspected by Defendants' expert Richard Farlardeau on May 16, 2005. His notes and respective photographs are attached as **Exhibit 17**. In short summary, his findings were as follows.

Beginning with the **Enos Bontrager** property (formerly the residence of **Daniel Mast**), Mr. Farlardeau found two outdoor privies, poorly constructed and poorly maintained, one in the area of an existing water well. He also found a cistern located in the basement of the structure to collect rainwater. The gutters are plumbed from the roof to this collection cistern. Water that collects in the cistern is then pumped up to the kitchen sink where it is used, presumptively, for washing. This is important as these cisterns were found in all of the Plaintiffs' residences. The Plaintiffs' expert, Robert Hayes, based his septic design analysis on water records provided to him by the Plaintiffs. (**Exhibit 18**). Plaintiffs calculated their water usage by the number of times they activated their well pump. The Plaintiffs did not tell Mr. Hayes that rain water is pumped from cisterns and also used in the homes. This used cistern water then flows down the plumbing into whatever septic tank or discharge system that family uses. **Therefore, the Plaintiffs' water usage records are inaccurate.**

At the Bontrager/Mast residence, Mr. Farlardeau discovered an underground discharge pipe that ran from the basement of the Bontrager residence across the road and more than a quarter mile to a stream

flowing along side a neighboring field. A second home, built across the road by Daniel Mast (now owned by non-plaintiff Vern Glick), was also connected to this drain. The stream that accepts the untreated discharged from the Bontrager/Mast residence flows into other associated streams and rivers open to the public for general recreational use such as fishing and bathing. Recent testing from the stream in the vicinity of the Bontrager/Mast discharge show unacceptable, unsafe and illegal levels of coliform bacteria in the water (**Exhibit 19**).

b. Amos Weaver

During Mr. Farlardeau's inspection of Amos Weaver's property, he found conditions unchanged since the residence had been constructed. A cistern allowed the collection of rainwater from the roof. The outdoor privy was in poor sanitary condition. The septic tank was found to be full of water. The one drain tile that ran out to the back field was likewise full of septage. During Mr. Farlardeau's inspection, Mr. Farlardeau had to avoid being soaked by a bucket of used laundry water that was thrown out of the house at his feet. (**Exhibit 20** a p. 143).

c. Vern Glick, Formerly John Mast

Mr. Farlardeau toured the property located at 2555 Nickless Road, formerly owned by **John Mast** now owned by non-Plaintiff **Vern Glick**. Mr. Farlardeau observed a poorly maintained privy near the home. This privy was built into the home and had a clean out that opened into the backyard. Surface drainage was sloped so that it ran directly under an outdoor clothesline. Grey water runs into a nearby stream. (See Enos Bontrager discussion).

d. Alvin Slabaugh

Mr. Farlardeau toured and took photographs of the **Alvin Slabaugh** property. All sinks within the home were plumbed to one drain which exits the foundation wall and ties into a tile which runs down a hill to a pasture. Mr. Farlardeau observed continuous discharge of grey water from this drain onto the surface

of the ground in the pasture. Cows were grazing nearby. (**Exhibit 17 and 21**). CMDHD has been attempting to gain compliance with the health code since 2002.

e. Aaron Beechy, Formerly John Mast

The property at 2626 Berg Road, formerly owned by **John Mast** and now owned by **Aaron Beechy**, was inspected by Mr. Farlardeau. This property contained the most egregious violations of the sanitary code. There is no septage system connected to this residence. There is a long drain that has been installed underground that leads to a nearby stream where, according to Mr. Beechy's son, will ultimately be connected to the interior septage system.

However, on the date of Mr. Farlardeau's inspection, grey water from the sinks and from the laundry were simply discharged onto the surface water. Domestic and farm animals were walking through this septage. The outdoor privy located within 40 feet of the home was overflowing with excrement. (**Exhibit 17 and 22**).

ARGUMENT

I. THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.

A. Standard of Review

Federal Rules of Civil Procedure Rule 56(c) provides that: "the [summary] judgment sought shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Reasonable inferences drawn from the evidence must be viewed in the light most favorable to a party opposing a motion for summary judgment. Matsushita Electric Industrial Co., Ltd. v Zenith Radio Corp., 475 U.S. 574, 587-8; 106 S. Ct. 1348; 89 L. Ed. 2d 538 (1986). However, "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Id. [citation omitted]. Summary Judgment must be entered against

a party who failed to provide sufficient evidence in support of an essential element of that party's case. Celotex Corp. v Catrett, 477 U.S. 317, 322-3; 106 S. Ct. 2548; 91 L. Ed. 2d 265 (1986).

B. Qualified Immunity as to the Individual Defendants

Government officials performing discretionary functions are entitled to qualified immunity from civil suits for damages arising out of the performance of their official duties "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v Creighton, 483 U.S. 635, 638; 107 S. Ct. 3034; 97 L. Ed. 2d 523 (1987). Resolution of a claim of qualified immunity is a question of law. O'Brien v City of Grand Rapids, 23 F.3d 990 (6th Cir. 1994).

The doctrine of qualified immunity shields government officials from civil liability in the performance of discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). The benefit of qualified immunity "'is effectively lost if a case is erroneously permitted to go to trial.'" Weaver v Shadoan, 340 F.3d 398, 406 (6th Cir. 2003) (quoting Mitchell v Forsyth, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985)). Thus, the threshold question is whether the facts alleged, viewed in the light most favorable to the party asserting injury, show the violation of a constitutional right. Saucier v Katz, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001). If there has been no such violation, the inquiry ends and the defendant is entitled to judgment, Id.; Cartwright v City of Marine City, 336 F.3d 487, 491(6th Cir. 2003).

The applicable standard for qualified immunity is "one of objective reasonableness, analyzing claims of immunity on a fact-specific, case-by-case basis to determine whether a **reasonable official** in the defendant's position **could have believed that his conduct was lawful** in light of clearly established law and the information he possessed." Pray v City of Sandusky, 49 F.3d 1154, 1158 (6th Cir. 1995) (emphasis added), see also, Watkins v City of Southfield, 221 F. 3d. 883 (6th Cir. 2000).

The ultimate burden remains with the plaintiff to show that the defendant is not entitled to the asserted immunity. Wegener v Covington, 933 F.2d 390, 392 (6th Cir. 1991).

The individual Defendants were attempting to enforce minimum standards that had been promulgated by the CMDHD. Incorporating the discussion of this Brief in section II(a)(3), it will be seen that the Old Order Amish do not hold septic tank size to be a "genuinely held religious belief". Given that the South Gladwin Old Order Amish and certain members of the North Gladwin Old Order Amish complied, it cannot be said that "no reasonably competent official would have concluded" that requiring a 750 gallon system was unlawful.

II. THE PLAINTIFFS HAVE NOT ESTABLISHED THAT THE CMDHD REQUIREMENT THAT THEY INSTALL A MINIMUM 750 GALLON SIZE SEPTIC SYSTEM RATHER THAN THEIR PROPOSED 300 GALLON SYSTEM VIOLATES A "GENUINELY HELD RELIGIOUS BELIEF".

To assert a successful § 1983 claim against a municipality, a plaintiff must show that a governmental policy or custom caused the injury. Monell v Dep't of Soc. Servs. of the City of New York, 436 U.S. 658, 690-91, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). Where a plaintiff alleges municipal liability for failing to train its employees adequately, liability will be found "only where a municipality's failure to train its employees in a relevant respect evidences a deliberate indifference' to the rights of its inhabitants. . . ." City of Canton v Harris, 489 U.S. 378, 389, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989). Additionally, plaintiff must show that the purported need for a policy or additional training was "so obvious, and the inadequacy so likely to result in the violation of constitutional rights," that the city was "deliberately indifferent to the need." City of Canton, 489 U.S. at 390.

A. What Threshold Issues Set Forth a Cognizable Freedom of Religion Claim?

To prevail on a first amendment freedom of religion claim against a municipality, the Plaintiffs must establish that the municipality violated a generally held religious belief. In Wisconsin v Yoder, 406 US 205, 92 SCt 1526 (1972), the Supreme Court established guidelines for determining whether a belief is a religious

belief, the free exercise of which is protected by the First Amendment. The Court pointed out that "to have the protection of the religion clause, the claims must be rooted in religious belief" for "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations." 406 US at 215; 92 SCt at 1533. Hence, if the belief asserted is "philosophical and personal rather than religious" or is "merely a matter of personal preference" and not "one of deep religious conviction, shared by an organized group," it will not be entitled to First Amendment protection. 406 US at 216, 92 SCt at 1533.

In Sequoya v TVA, 620 F2d 1159 (6th Cir. 1980), the Sixth Circuit applied Yoder standards to rule that Cherokee Indians could not prohibit the settling of the Little Tennessee River and completion of the Tellico Dam because it would also flood sacred Cherokee lands. The District Court found that the land to be flooded was sacred to the Cherokees but summarily dismissed the claim on the grounds that the Cherokees did not hold a property interest in the area to be flooded. The Court of Appeals upheld the dismissal on other grounds stating that the Cherokees' proofs failed to show the "quality of the claims" allegedly religious. The Affidavits relied on did not show that the valley was central or indispensable to Cherokee religious observances or that worship there was inseparable from their way of life. Instead, the Affidavits demonstrated a "personal preference" rather than convictions "shared by an organized group."

In Brown v Dade Christian Schools, 556 Fd Cir. 310 (1977), the 5th Circuit prohibited discriminatory conduct by commercially operated sectarian schools and held that the segregation by the schools was a result of a social policy or philosophy rather than an exercise of religion. The Court looked to the Church's writings which did not advocate segregation in schools and, although the Court held that a belief need not be "permanently recorded in written form to be religious in nature", the absence of references to school segregation and written literature by the Church is strong evidence that school segregation is not the exercise of religion. (See also Fiedler v Marumsco Christian School, 631 F2d 1144 (1980)).

B. How Have the Plaintiffs Classified their Freedom of Religion Claim?

The Plaintiffs have pled that they have a seriously held religious belief that would prohibit them from putting in a 750 gallon capacity septic tank and drain field. However, based on testimony of their expert, Robert Hayes, and the variance they propose to the CMDHD, they do not have a similar objection, based on religious grounds, to install a 300 gallon tank. Plaintiff Amos Weaver, who tends to be the spokesman and leader of the Plaintiffs' group was deposed on October 26, 2004. Counsel attempted to get to the heart of their religious objection to a greater sized septic tank. Basically, Amos Weaver testified that **the cost of the system** would make it less convenient:

Q. "All right. I'm going back to a comment you made when we were talking about the size of the well. There -- actually it was on a mistreatment question. You said that you believe that the Amish were being mistreated because "they're making us put in a big septic tank and it is a temptation to the world." What does temptation -- what did you mean by that "temptation to the world"?
A. Temptation means that we could put in bathrooms and that's against our ordinance to have something like that.
Q. Do you mean to suggest that if you were -- or did put in a 750-gallon tank then the next thing that might happen is you put in bathrooms?
A. Yes.
Q. But that would be your choice to put in a bathroom?
A. No, it's not - that's not our choice, it's our ordinance.
Q. But you wouldn't do that; right?
A. Well, we've got an ordinance.
Q. Well, you wouldn't violate the ordinance?
A. No.
Q. If it says you can't have bathrooms you wouldn't put a bathroom in; right?
A. No.
Q. And, in fact, there was a bathroom in this house that you took out?
A. Yes.
Q. In your mind, what is the hardship between putting in a 300-gallon septic tank and a 750-gallon tank?

* * *

A. Well, we could make that our own.
Q. You could make a 300-gallon tank yourself?
A. Yeah.
Q. How would you do that?
A. Pour it with concrete or right here is a variance that we could lay it up with cement block.

Q. But you can also do the same for a 750-gallon tank, couldn't you?
A. Yeah, but it'd be a lot bigger.
Q. Okay. Do you know, would there be additional cost for the 750-gallon tank as compared to the 300?
A. Yes.
Q. What would be the additional cost?
A. I don't know but I know it would be a lot more.
Q. Well, how much do you pay for your block?
A. I don't know. I haven't bought any.
Q. Have you ever built a septic tank before?
A. No.

* * *

Q. But as far as the -- if another member of the northern Gladwin group wants to install a 300-gallon tank, you haven't determined what the cost differential would be between a 300 and a 750?
A. No.
Q. Or the difference in, say, for instance, time to build a 300 versus a 750?
A. No. . . ."

(**Exhibit 2**, pp. 82-85).

C. <u>Is the Plaintiffs' Claim a "Genuinely Held Religious Belief in the Old Order Amish Community?</u>

1. <u>Defendants' Expert, Donald Kraybill, Ph.D.</u>

The Defendants have retained the services of Donald Kraybill, Ph.D. Dr. Kraybill has studied the anabaptist faith his entire educational career. His doctoral dissertation was on a Mennonite high school. His primary scholarly pursuit has concerned the Amish culture for the past 25 years. His mentor at Temple University and doctoral advisory was John A. Hustetler, who was the leading national scholar of Amish and Hutterite communities of North America (**Exhibit 23** - Deposition of Dr. Kraybill, pp. 23-24). Dr. Kraybill is a prolific author on the subject. He has more than eight internationally published treatises on the Amish Culture. (**Exhibit 23,** pp. 24-33). Dr. Kraybill also familiarizes himself with the Amish communities on a regular basis. He subscribes to Amish culture newspapers and magazines throughout the world (**Exhibit 23**, pp. 33-38). At his deposition, he also discussed the Central Tenents of Amish Belief, "The Dordrecht Confession of Faith", "1,001 Questions and Answers on the Christian Life", the "Aushund" (The Amish

Hymn Book) and the "Ordnung" (Local Rules and Regulations for Each Community). (**Exhibit 23** at p. 40-45). The Dordrecht Confession of Faith is the foundation of the Amish religious doctrine and contains 18 articles of faith that are the central religious docturnal of all Old Order Amish groups. His review of the Dordrecht text is enlightening as the text at Article 13 "The Office of Civil Government" requires the Amish to submit to the governing entity unless the order is in direct violation of a scriptural belief. Article 14 of the text prohibits the Amish from using force to resist. Thus, according to Dr. Kraybill, the Amish, as a matter of religious practice, do not file lawsuits. (**Exhibit 23**, at pp. 42-44). If a particular Amish group has a problem with government intervention or oversight, they typically contact the National Steering Committee. This is a national committee of Amish leaders who advise on questions concerning the relationship between the government and the Amish. A second group called the National Committee for Amish Religious Freedom is a non-Amish group that will bring litigation on behalf of Amish concerns and did so in the Wisconsin v Yoder case. Dr. Kraybill contacted these two groups and they had never heard of the lawsuit brought by the Northern Gladwin Amish herein. (**Exhibit 23**, pp. 49-50).

Dr. Kraybill also sought information, through the deposition testimony of the Plaintiffs, as to whether or not there was an Ordnung that prohibited installing a 750 gallon septic system. The Ordnung is an unwritten rule handed down by the local Church and ratified by the local congregation twice a year. It deals with the application of their religious beliefs to daily practice. Dr. Kraybill could find not evidence that an Ordnung was ratified by the Northern Gladwin Amish Community as a whole that would prohibit their installation of the 750 gallon septic tank system. (**Exhibit 23**, pp. 45-48).

Not only did Dr. Kraybill find no reference in any of the written treatises or oral rules or regulations prohibiting compliance with the Building Department size requirements for septic systems, he does not find support for a general premise of the Plaintiffs that "waste is a sin". Kraybill stated:

> Q. "Is, in fact, based on your knowledge of the religious precepts and the bases for the Amish religious beliefs, is that doctrine found anywhere, "waste is a sin"?

A. I don't find any reference to that in any of the religious doctrine or religious teaching of the Amish. I think there's a cultural disposition to frugality, a general cultural disposition, but it 's not a religious principal.

Q. Do you think requiring a 750-gallon septic tank, which I believe is less than half of what would normally be required for a non-Amish family, do you believe, sir, that that is an infringement at all on a genuinely-held religious beliefs for the Old Order Amish in North Gladwin?

A. I saw nothing in the documents that I reviewed or my research that would lead me to see the size of the septic tank as a religious issue or related to a religious belief."

(**Exhibit 23**, pp. 55-56).

In Dr. Kraybill's written report, he concludes in his summary section that "the issue at hand, the size of storage tanks for gray water, does not meet any of these seven tests of a sincerely held religious belief in Amish society." (**Exhibit 24**).

III. THE PLAINTIFFS HAVE BEEN AFFORDED DUE PROCESS.

Procedural due process requires notice and an opportunity to be heard. To establish a procedural due process claim pursuant to 42 USC § 1983, the Plaintiffs have the burden of proof to establish three elements (1) that they had a life, liberty or property interest protected by the due process clause of the Fourteenth Amendment to the United States Constitution; (2) that they were deprived of this protected interest without adequate notice and meaningful opportunity to be heard; and, (3) that the Central Michigan District Health Department did not afford them adequate procedural rights prior to depriving them of their protected interest. Hahn v Star Bank, 190 F3d 708, (6th Cir. 1999). **Due process is flexible and calls for procedural protections as the particular situation demands.** Mullane v Central Hanover Bank and Trust, 339 US 306, 70 SCt. 652 (1950); Morrissey v Brewer, 408 US 471, 92 SCt 593 (1972).

Plaintiffs' pleadings are exceedingly unclear as to how their procedural due process rights were violated or what property right was taken from them without due process of law.

Even if the Plaintiffs could be said to have a "property interest" in having a septage system that was under the minimum allowable capacity for a one-bedroom home, they certainly have been afforded

substantial notice and opportunity to be heard. As set forth in the Statement of Facts, the Plaintiffs followed application and site review process. They met personally with Building and Health Department officials. On occasion, CMDHD employees drew out site plans that would be suitable. Accommodations were made to lower the required septic tank capacity size from the 250 gallon capacity per person standard to a flat 750 gallon capacity for each Amish home, which as has been seen could be occupied by as many as 10 to 12 residents. This is not an arbitrary or capricious decision but based on national studies were statistical data had been obtained from broad surveys and used in authoritative treatises on the subject.

When the Plaintiffs refused to comply and the CMDHD sought enforcement action, they were allowed to file appeals to the Zoning Board of Appeals. They were represented by counsel and, at the hearing, allowed to present testimony from Mr. Hayes, the expert hydrologist, wherein their variance request was denied at the Zoning Board of Appeals level and they brought a circuit court action for review. Thus, the Plaintiffs had substantial notice and opportunity to be heard regarding their objections to the 750 gallon minimum capacity regulation.

IV. THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT HAS NO APPLICATION TO THESE FACTS.

The Religious Land Use and Institutionalized Persons Act ("RLUIPA") prohibits a governmental entity from imposing a substantial burden on one's religious exercise absent a showing that government's action is the least restrictive means of furthering a compelling interest. The RLUIPA applies to government action effecting religious exercise by way of land use regulation or a regulation applicable to institutionalized persons. 42 USC § 2000cc imposes the general rule:

> "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--
>
> (A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest."

The statute limits the scope of the general rule to any case in which:

"(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved."

Thus, these Plaintiffs are entitled to protection under the RLUIPA if they satisfy two separate tests. First, the Plaintiffs must establish one of the three jurisdictional requirements listed under §2000cc(a)(2)(A)(3)(C). After meeting the jurisdictional requirements, the Plaintiffs must satisfy the substantial burden test enunciated under §2000cc(a)(1). Herein, the Plaintiffs must establish that the requirement of a minimum 750 gallon septic tank system, rather than the proposed 300 gallon septic tank system, imposes a "substantial burden on the religious exercise of a person, including a religious assembly or institution".

However, under the facts of this case, it cannot possibly be established that the differential between a 750 gallon tank system and the proposed 300 gallon tank system has any impact on the "religious activities" of the Plaintiffs. First, the homes effected are residential homes. They are not Church buildings, religious meeting halls or the like.

Second, as discussed extensively above, the differential between a 300 gallon septic tank system and a 750 septic tank system cannot be considered in the statutory definition of "religious exercise". Under the RLUIPA "religious exercise" includes "any exercise of religion, whether or not compelled by, or central to a system of religious belief." (42 USC § 2000cc(5)-(7)(A)). The RLUIPA require that a claimant's beliefs

are "sincerely held". Westchester Day School v Village of Mamaroneck, 280 F Supp 2d 230 (2003). In Westchester, the Court noted that the government action at issue "must compel action or inaction with respect to a sincerely held religious belief."

This particular group of Northern Gladwin County Amish families have taken a stand against a 750 gallon tank system because of its expense and/or additional time in installing such a system. They do not argue that the use of a septic system is violative of their beliefs. Amos Beechy attempts to assert that a larger septic system would be a "temptation to the world" and would have some type of domino effect in leading this group to a violation of the Ordnung. However, in the very same breath, he concurs that the installation of a larger septic tank system would not cause him to install additional modern conveniences. The fact that the sizing requirements for septic tank systems are not in the "The Dordrecht Confession of Faith", the Ordnung or any pronouncement by the bishop of this Northern Gladwin group is further evidence that the position of the Plaintiffs is not a sincerely held religious belief. Other families from this same Northern Gladwin group of Plaintiffs have complied with the minimum septic tank sizing requirements. (**Exhibit 25**). To the best of the Defendants' knowledge, these families have not be excommunicated or otherwise sanctioned by the Northern Gladwin group. If they were truly violating a generally held religious belief of the group, according to Dr. Kraybill, sanctions would be forthcoming.

Third, the minimum septic tank sizing requirements do not create a substantial burden on the Plaintiffs. "Substantial burden" has been described in various ways. In Thomas v Review Board of the Indiana Employment Securities Division, 450 US 707 (1981), the Court indicated that a substantial burden exists where the state "puts substantial pressure on an adherent to modify his religious behavior and to violate his beliefs." In Murphy v Zoning Commission of Town of New Milford, 148 F Supp 2d 173 (2001), the Court stated that the regulations must have a "chilling effect" in the exercise of religion to substantially burden religion. On the other hand, a government regulation does not substantially burden one's religious

exercise if it only has an incidental effect that makes it **"more expensive or difficult"** to practice the religion. Braunfeld v Brown, 366 US 599 (1961), Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v City of Lakewood, Ohio, 699 F2d 303 (6th Cir. 1983).

The Courts have not found a substantial burden on genuinely held religious beliefs where compliance with the challenged regulation makes the practice of one's religion more difficult or expensive, but the regulation is not inherently inconsistent with the litigant's beliefs. Braunfeld v Brown, 366 US 599 (1961).

The Braunfeld decision involved a challenge to the Pennsylvania Sunday Closing Law by Orthodox Jewish merchants who took the position that the law effectively required them to make a financial sacrifice to practice their religion. The Supreme Court ruled that one's religion is not substantially burdened by a statute that makes one's religious observance more difficult of expensive. Lying v Northwest Indian Cemetery Protective Assoc., 485 US 439 (1988) and Locke v Davey, 540 US 712 (2004). See also Lakewood Ohio Congregation of Jehovah's Witnesses v City of Lakewood, 669 F2d 303 (1983).

In The Episcopal Students Foundation d/b/a Canterbury House v The City of Ann Arbor and the Ann Arbor Historic District Commission, 341 F Supp 2d 691 (2004), the Court analyzed whether or not the Canterbury House, which was located in the Old Fourth Ward Historic District, and, therefore, could not be demolished or altered without approval of the Historic Commission, presented a case of substantial burden when the Commission refused to allow the structure's demolition and replacement with a building more consistent with the congregation's needs. The Court found that the burdens placed on Canterbury house "pale in comparison to the infringement burdens found in Sherbert and Yoder."

The ordinance clearly furthers a compelling governmental interest, i.e. the safety, health and welfare of the community and the Amish themselves, and it is narrowly tailored to that interest. As discussed above, grey water disposal is still the disposal of bacteria and other contaminants. There is a compelling governmental interest in controlling the discharge of bacteria, viruses and other contaminants in the ground

water and water ways of Gladwin County. It has been documented that the current septage disposal modalities of the Plaintiffs are damaging to the local eco system and unhealthy to the surrounding communities and their own. Coliform bacteria has been found in their wells and in the neighboring creeks. Contaminated grey water is available for the cattle to drink. The one undersized septic system found at Amos Beechy's residence, has been failed for some years and is hopelessly overflowing. In response, the residents merely throw their soapy dishwater out on the ground, even at the feet of the Defendants' inspector.

The willingness of the CMDHD to lower the minimum standard to 750 gallon capacity is demonstrative of the narrowness and tailoring of the ordinance to this particular group. Given the number of occupants in each of these homes, the minimum septic tank size requirement under the Building Code would call for a much greater capacity system than that sought by CMDHD. In short, there is no support for the Plaintiffs' position that a 750 gallon septic tank size requirement versus their proposed 300 gallon tank system is a "sincerely held" religious belief substantially burdened by a governmental interest that is neither compelling nor narrowly tailored to fit the need.

CONCLUSION

Plaintiffs have made no supportable allegations, nor have they produced any facts to suggest that any of the individual Defendants can be held responsible for the requirements of the Central Michigan District Health Department's ordinance regarding size of the Plaintiffs' septic systems. The custom, policy and practice of the Central Michigan District Health Department has been to take the Amish lifestyle into consideration in substantially reducing the amount of required capacity of their approved septic systems. All of the Southern Gladwin Amish communities have complied. Some of the North Gladwin families have also complied. (**Exhibit 25**). The Plaintiffs represent a small, aberrant group who, according to their own testimony, simply do not want to do the work or spend the money required for a larger system. They could not express a "genuinely held religious belief" to support their positions.

As indicated by Dr. Kraybill, religious beliefs in the Amish community are not individualized but are set forth from the Dordrecht Confession of Faith and the Ordnung. Nothing in the Dordrecht Confession of Faith would support Plaintiffs' position. In fact, they appear to be acting in contravention to the Dordrecht Confession by bringing this litigation in their own names without using one of the national intermediaries.

Based on the inspections and testing conducted by the Defendants, it is clear that the sanitary practices of the Plaintiffs are harmful to themselves, their neighbors and all those persons downstream of their discharge. There is a clear and viable important governmental interest in assuring the health, safety and welfare of the residence of North Gladwin County. To interpose a presumed doctrine "waste is a sin" that does not find support in the Dordrecht Confession or in the Ordnung to frustrate the health departments' legitimate interests in assuring adequate septage treatment clearly shows that the resistance by the Plaintiffs is "philosophical and personal rather than . . . one of deep religious conviction, shared by an organized group." As Dr. Kraybill so succinctly stated:

> A. "Because it was clear that this -- the local plaintiffs were not working with the Amish resources that were at their disposal and had apparently not informed or consulted with their own people in terms of how to resolve this, which led me to think that it was some aberration and not really a bona fide case."
>
> (**Exhibit 23**, p. 50).

WHEREFORE, the Defendants request this Court to grant summary disposition in their favor and to award to them their costs and attorneys fees necessitated by the defense of this case.

Date: 04/28/06

CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.

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