UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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Merrimack Congregation
of Jehovah's Witnesses
c/o Ronald Hansen
50 Lawrence Road
Merrimack, NH 03054

Civil Action No. 1:10-cv-00581-JD

Plaintiff

v.

Town of Merrimack and the
Merrimack Zoning Board of Adjustment
6 Baboosic Road
Merrimack, NH 03054

Defendants

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MEMORANDUM OF LAW
OF THE TOWN OF MERRIMACK AND ITS ZBA
IN OPPOSITION TO PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION

The Town of Merrimack and its Zoning Board of Adjustment ("ZBA") submit this memorandum of law in opposition to the plaintiff's motion for a preliminary injunction.

Facts

The plaintiff (the "Congregation") is a religious organization with 90-100 members, which seeks to build a "Kingdom Hall" in Merrimack. Ver. Comp., ¶¶ 1, 11-13. Merrimack's zoning ordinance (the "Ordinance") permits churches in the Town's General Commercial District (§ 2.02.3(B)) and in two Industrial Districts (§§ 2.02.4(B),(D)). It also allows churches by special exception in the Town Center Overlay

District (§ 2.02.13(D)) and the Residential District (§ 2.02.1(B)). Exh. A, pp. 2-8, 2-11, 2-15, 2-22, 2-55.

Section 2.02.1(B)(1) of the Ordinance provides that:

> B. Special Exceptions: The Zoning Board of Adjustment may grant a special exception for the following use of lands within the residential district:
>
> 1. Churches, provided that it finds that all of the following conditions are met:
>
> a) The specific site is an appropriate location for such a use or uses in terms of overall community development.
> b) The use as developed will not adversely affect the neighborhood and shall produce no diminution of real estate values in the neighboring area.
> c) There will be no nuisance or serious hazard to vehicles or pedestrians.
> d) That an adequate parking area is provided for motor vehicles on the premises.
> e) A buffer shall be erected and maintained to screen existing residential uses. Buffers may be fence screens, dense plantings of suitable trees and shrubbery, or naturally occurring shrubs and trees.
> f) The use as developed will be restricted for church purposes only. No commercial use of a church within the residential zone will be allowed.

In September 2010 the plaintiff applied for a special exception to build a house of worship at 63 Wire Road, in the Town's Residential District. Ver. Comp., ¶ 19. The ZBA held a public hearing on September 23, 2010. Following statements from approximately seventeen Town residents, the ZBA voted to deny the petition. Exh. B. The ZBA prepared draft minutes of the September 23 public hearing. The draft minutes stated six findings of fact, one addressing each of the conditions set forth in the Ordinance. Among those findings were determinations that the site was not an appropriate location in terms of overall community development, and that the additional traffic would create a traffic nuisance and increase the hazard to vehicles and pedestrians.

Upon review, the ZBA determined that its secretary had misstated a finding of fact. The secretary prepared amended draft minutes, stating a finding that construction of the church would produce a diminution of real estate values in the neighboring areas. Exh. C, p. 8. On November 18, 2010 the ZBA denied the Congregation's request for rehearing. Ver. Comp., ¶ 30.

This six-count action followed. The plaintiff alleges that the Ordinance's requirement of a special exception to locate a church in Merrimack's Residential District is an unconstitutional prior restraint of its First Amendment rights, both facially and as applied, and that the Town has violated several other constitutional guarantees and state and federal statutes. The Congregation seeks a preliminary injunction, and asks the Court to rule that Ordinance § 2.02.1 is a facially unconstitutional prior restraint of First Amendment rights. That is the only claim at issue in this motion; all remaining questions are reserved for another day.

Argument

The plaintiff's claim is that a town "may not constitutionally require a church to obtain a discretionary special exception prior to being allowed to operate in a residential district." Pl. Mem., p. 3. Presumably, the Congregation does not mean that the Town must allow houses of worship everywhere within its borders regardless of its zoning regulations. The Congregation appears to limit its First Amendment complaint to the requirement of Ordinance § 2.02.1(B)(1)(a) that "[t]he specific site is an appropriate location for such a use or uses in terms of overall community development." While a purely ministerial application of a special exception regulation would be acceptable to the

Congregation, it contends that a regulation that confers any discretionary authority to a local land use board is facially unconstitutional.

Ordinance § 2.02.1 generally permits only residential and accessory uses in the Residential District, along with very limited home occupations and certain telecommunications antennae. Special exceptions are allowed only for churches, one-bedroom accessory dwelling units, and telecommunications towers. Exh. A, pp. 2-8, 2-9, 2-10. The Ordinance thus grants houses of worship *greater* rights than it grants to similar, secular assemblies in the Residential District, which are not allowed at all. However, those rights are conditional. It is true that the Ordinance requires the ZBA to do more than count parking spaces and measure setbacks to determine whether an applicant meets the standards needed for a special exception. Nevertheless, the determinations fall well within the customary and necessary role of a ZBA to exercise a degree of judgment with respect to local land use, and do not work a facial violation of constitutional rights.

I. Preliminary Injunction Standard

Injunctive relief is an extraordinary remedy that "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). To be entitled to a preliminary injunction, the plaintiff must demonstrate "that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 129 S.Ct. 365, 374 (2008).[1] Here, the plaintiff does not seek an

[1] The plaintiff incorrectly identifies the burden of proof in a preliminary injunction proceeding. Pl. Mem., p. 7.

injunction to maintain the *status quo* pending adjudication on the merits, but one that would effectively override operation of the Town's Ordinance.

A. Plaintiff Cannot Show a Likelihood of Irreparable Harm.

As in most cases, the chief inquiry here is whether the plaintiff is likely to succeed on the merits. That question is addressed in Section II below. In addition, the plaintiff has not established that denial of a preliminary injunction would cause it irreparable harm. The ZBA determined that a special exception could not be granted for the property at 63 Wire Road. It did not foreclose the possibility of granting a special exception for a location elsewhere in the Residential District. Moreover, the Congregation alleges that its purchase and sale agreement for the property at 63 Wire Road is now null and void. Ver. Comp., ¶¶ 31, 60. If the ZBA erred in denying the application, the damage has already been done. Nothing in the Verified Complaint justifies a conclusion that only the extraordinary remedy of a preliminary injunction can prevent harm that cannot be redressed once incurred. At most, the Congregation is faced with an incidental burden affecting the location of its religious practices, not with an unconstitutional impairment of its First Amendment right to free exercise of religion.

B. The Equities and Public Interest Do Not Mandate the Imposition of a Preliminary Injunction.

As noted above, in Merrimack churches have greater rights than secular assemblies to locate in the Residential District. There is thus no indication that the Town enacted its Ordinance out of hostility toward religion. The Ordinance follows a generally accepted framework for New Hampshire towns, and is facially consistent with the special exception provisions of RSA 674:33, IV. Where the plaintiff has not specifically alleged

what special harm it will suffer absent injunctive relief, its equitable argument is less than compelling.

In addition, the Congregation has only challenged the facial validity of the "appropriateness" criterion of Ordinance § 2.02.1(B)(1)(a). There are five other criteria, and the ZBA cited two of them (traffic hazards and diminution of property values) in denying the application. Even if the plaintiff were to persuade the Court that an "appropriateness" standard is facially unconstitutional, that ruling would not dispose of the case. The Congregation would still have to prove that the ZBA improperly applied the two other criteria, either of which provides sufficient grounds to deny a special exception even if the proposed use is otherwise "appropriate." The likelihood of success on those "as applied" issues is not now before the Court.

The plaintiff's proposed injunction goes much too far. It does not simply prohibit the ZBA from issuing decisions that depend upon the "appropriateness" of a proposed use. It does not even direct the ZBA to grant a special exception because the Congregation has met all the valid requirements. Instead, it states that the Congregation is not required to obtain a special exception at all. There is no equitable or public interest basis—indeed no legal basis—to nullify special exception procedures for one applicant based on an alleged infirmity of a single provision.[2] If the Court determines that the ZBA may not lawfully judge what is an "appropriate" use for a neighborhood, it should either: (a) strike that provision from the Ordinance; (b) construe the provision to implicitly include sufficiently objective criteria; or (c) direct the Town to amend the Ordinance.

[2] The plaintiff concedes that it "must comply with all otherwise lawful, content neutral, and objective requirements" of the Ordinance. Prop. Prelim. Inj., p. 2. It does not explain why these should not include the requirements concerning traffic safety and maintaining property values, which the ZBA found it did not meet.

However, Ordinance § 2.02.1(B)(1)(a) does not grant the ZBA impermissible discretion to make local land use determinations, and does not impair the plaintiff's First Amendment rights.

II. Ordinance § 2.02.1(B)(1)(a) Does Not Confer Unconstitutional Discretion on the ZBA.

Much of this dispute boils down to the use of the word "appropriate" in Ordinance § 2.02.1(B)(1)(a). Out of context, the word may imply a considerable level of discretion. However, it must be read in the context of New Hampshire zoning law. *See* RSA 672:1, III ("[p]roper regulations enhance the public health, safety and general welfare and encourage the *appropriate* and wise use of land"); RSA 674:2, I ("[t]he purpose of the master plan is to set down as clearly and practically as possible the best and most *appropriate* future development of the area […]"); RSA 674:17, II ("[e]very zoning ordinance shall be made […] with a view to conserving the value of buildings and encouraging the most *appropriate* use of land throughout the municipality"); RSA 674:33, IV ("[a] local zoning ordinance may provide that the zoning board of adjustment, in *appropriate* cases and subject to *appropriate* conditions and safeguards, make special exceptions to the terms of the ordinance")[3] (emphasis added). Like the word "reasonable," "appropriate" encompasses factors too numerous to list in a statute or regulation, but which can nevertheless be evaluated by a ZBA or court. *See, e.g.*, *Hannigan v. City of Concord*, 144 N.H. 68, 73 (1999) (considering whether a golf club's proposed maintenance building was appropriate for its location).

[3] The Ordinance's definition of "special exception" reflects RSA 674:33, IV: "Uses authorized under the Zoning Ordinance subject to appropriate conditions and safeguards as set forth in the ordinance as may be approved by the Zoning Board of Adjustment." Ordinance § 1.03(51); Exh. A, p. 1-8.

In any event, a fair reading of § 2.02.1(B)(1) of Merrimack's Ordinance is that "appropriateness" is less an independent criterion than a general statement of purpose, followed by more specific factors (property values, traffic safety, parking, buffers, no commercial use) meant to establish whether a proposed use is in fact appropriate. It is difficult to imagine the ZBA finding that an applicant's proposed use met all the other requirements of § 2.02.1(B)(1) but was nonetheless "inappropriate." It certainly did not do so in this instance.

The ZBA's amended draft minutes support this interpretation. The "finding of fact" with respect to appropriateness is simply an observation that the church would be a non-residential use in a residential zone. The substance of the ZBA's ruling is contained in the two following paragraphs, in which it finds that the church would lower neighborhood real estate values and create a traffic nuisance. Exh. C, p. 1. The propriety of those findings is not a question of facial First Amendment validity. The plaintiff has not asserted, and cannot reasonably assert, that local land use boards may not consider real estate values and traffic safety in their zoning decisions.

A. Merrimack Has a Substantial Interest in Regulating Land Use.

Municipalities have broad authority to regulate land use, and that regulation is a quintessentially local function. *FERC v. Mississippi*, 456 U.S. 742, 768 fn. 30 (1982). They may enact ordinances to promote traffic safety, or even matters as subjective as community aesthetics. *See Metromedia v. San Diego*, 453 U.S. 490, 507-08 (1981); *Asselin v. Town of Conway*, 137 N.H. 368, 372 (1993). Courts "generally defer to the legislative body passing the law in determining whether the government's ends are advanced by a regulation." *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064,

1073 (9th Cir. 2006). A municipality's finding that a particular ordinance will advance a substantial governmental interest will not generally be overturned unless it is "palpably false." *Ry. Express Agency v. New York*, 336 U.S. 106, 109 (1949).

A town need not conduct new studies or produce new evidence to justify its ordinances, so long as whatever evidence it relies upon "is reasonably believed to be relevant to the problem that the [town] addresses." *City of Renton v. Playtime Theatres*, 475 U.S. 41, 51-52 (1986); *see also National Amusements v. Town of Dedham*, 43 F.3d 731, 742 (1st Cir. 1995). Even content-based speech restrictions may be justified "based solely on history, consensus, and simple common sense." *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 555 (2001) (citation and internal quotation marks omitted). *See also Ginsberg v. State of New York*, 390 U.S. 629 (1968) (social scientific evidence not needed to support common-sense conclusion that quasi-obscene images are harmful to children).

B. The Ordinance Does Not Confer Unconstitutional Discretion on the ZBA.

Local land use boards must often exercise judgment and discretion in implementing regulations. The fact that some judgments include a subjective element does not invalidate local regulations. *See G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1083 (9th Cir. 2006); *Gaughan v. City of Cleveland*, 212 Fed. Appx. 405, 412-413 (6th Cir. 2007) (upholding noise ordinance; "reasonable person" standard was objective, not impermissibly vague); *Caparco v. Town of Danville*, 152 N.H. 722, 727-28 (2005) (if innovative land use ordinance gives board sufficient standards, exercise of authority does not constitute unfettered discretion).

In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969), the Supreme Court ruled that a regulation violates First Amendment guarantees if it grants "unbridled discretion" to local officials by failing to provide "narrow, objective, and definite standards" to guide the application of the regulation. The plaintiff is correct in noting that the Southern District of Florida and the Eleventh Circuit have interpreted *Shuttlesworth* expansively, to the point of finding that "virtually any amount of discretion beyond the merely ministerial is suspect." *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1362 (11th Cir. 1999); *see also CAMP Legal Defense Fund v. City of Atlanta*, 451 F.3d 1257, 1279 (11th Cir. 2006); *Hollywood Community Synagogue v. City of Hollywood*, 436 F.Supp.2d 1325, 1336 (S.D. Fla. 2006).

Both Eleventh Circuit cases involved claims of restraints on free speech or expression, not on the free exercise of religion. The analysis of the two kinds of First Amendment claims overlaps, but the symmetry is not perfect. The *Hollywood Community Synagogue* court treated a special exception requirement for churches as if it were a content-neutral regulation restricting speech. 436 F.Supp.2d at 1335. It is unclear to what extent the viability of the Congregation's facial Free Exercise challenge should depend on whether the Ordinance effectively prevents the ZBA "from encouraging some views and discouraging others through the arbitrary grant of an exemption." *Id.*

More to the point, this interpretation of *Shuttlesworth* and local discretion has not spread far beyond the Eleventh Circuit. It has been criticized by the First Circuit. In *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65 (1st Cir. 2004), the court noted that the *Shuttlesworth* test was developed to address licensing requirements for speech in public fora. The court emphasized that excessive discretion and vagueness inquiries under the

First Amendment are matters of context, and that greater degrees of subjectivity and official discretion are permissible outside the context of licensing speech in a public forum. 390 F.3d at 94-5.

In *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9 (1st Cir. 2002), the plaintiff claimed that regulations allowing Massport to deny a permit to leaflet if the activity would present "a danger to public safety or would impede the convenient passage of pedestrian or vehicular traffic" did not meet the "narrow, objective, and definite criteria" test of *Shuttlesworth*. The *Kinton* court disagreed, noting that *Shuttlesworth* stands for the proposition that even a regulation enacted to serve proper ends may fail to pass constitutional muster "if it also authorizes officials to make judgments on matters beyond their competence" (in *Shuttlesworth*, whether a proposed activity would be consistent with "public morals and decency"). 284 F.3d at 26.

Massport's regulations based on judgments about public safety, on the other hand, were well within the officials' competence. *Id.* The First Circuit found that it could reasonably construe the regulations to limit Massport's discretion, and that the regulations therefore survived a facial challenge. "[W]e must give weight to the agency's narrowing interpretation of its own regulations—especially since the record contains no evidence that the regulations have been administered in an unfair or discriminatory manner." *Id.* The court warned about "insisting on a degree of rigidity that is found in few legal arrangements," and noted that "[i]f and when a pattern of abuse emerges, that

will be the time to deal with infelicitous applications of the regulations." *Id.* (citation omitted).[4]

The mechanistic application of the "narrow, objective, and definite criteria" test urged by the plaintiff is at odds with both the purposes and practical realities of zoning regulation. *Shuttlesworth* sought to prevent only *unbridled* discretion, not "virtually any amount of discretion beyond the merely ministerial." *Lady J. Lingerie*, 176 F.3d at 1362. In fact, the Congregation apparently wants the Court to push *Shuttlesworth* even further, and to find that *any* discretion is unbridled discretion. Pl. Mem., p. 3. The Court should decline. ZBAs are a valuable tool precisely because they offer commonsense judgment and local experience. The First Circuit's more flexible construction protects against abuses without mandating cookie-cutter determinations. It is the better rule of law. Most courts that have addressed Free Exercise zoning cases directly have come down even more strongly in favor of limiting such claims. For example:

Congregation Kol Ami v. Abington Township, 309 F.3d 120, 139 (3rd Cir. 2002) (conclusion that religious uses may not be excluded from residential districts would undermine quintessential state activity of regulating land use); *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 274-75 (3rd Cir. 2007) (plaintiff who asserts free exercise challenge to land use regulation must articulate why inability to occupy a particular location is significant to its belief); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 306-7 (6th Cir. 1983) (where construction of building for worship had no ritualistic significance, zoning

[4] The Congregation alleges that most churches in Merrimack are located in its Residential District, and that in the past fifteen years the Town has never denied a church a special exception. Ver. Comp., ¶¶ 16-17. If that is true, the ZBA plainly has not construed its own discretion to be unfettered.

ordinance prohibiting its erection in residential district did not impose substantial burden on exercise of religion); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003) (zoning ordinance amended to treat churches equally with secular assemblies did not violate constitutional prohibitions regarding free exercise of religion); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2003) (city zoning requirements were general laws of neutral application that did not violate First Amendment's Free Exercise clause); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 654 (10th Cir. 2006) (church's inability to open daycare center in particular district constituted only an incidental burden on religious conduct, not a constitutionally cognizable burden on free exercise).

Conclusion

The plaintiff has failed to demonstrate that it is likely to prevail on the merits of its facial First Amendment claim, that it will suffer irreparable harm absent that extraordinary relief, or that the equities or public policy dictate the need for an injunction. For all the reasons stated above, the Court should deny the plaintiff's motion for a preliminary injunction.

Respectfully submitted,

The Town of Merrimack and its Zoning Board of Adjustment

By Its Attorneys,
RANSMEIER & SPELLMAN
PROFESSIONAL CORPORATION

Dated: January 18, 2011

By: /s/ Garry R. Lane
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CERTIFICATION OF SERVICE

I hereby certify that Michael J. Tierney, Esq., counsel for the plaintiff, has been copied on this ECF filing.

Dated: January 18, 2011

/s/ Garry R. Lane
Garry R. Lane

Exhibits

A. Town of Merrimack Zoning Ordinance (excerpts)

B. Results of Merrimack ZBA Meeting of 9/23/10

C. Merrimack ZBA Amended Draft Minutes for 9/23/10 (excerpts)

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