UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT MURPHY ET AL PLAINTIFFS	
VS.	CIVIL ACTION NO. 300CV2297HBF
ZONING COMMISSION OF THE TOWN OF NEW MILFORD ET AL DEFENDANTS	
	MARCH 12, 2001

DEFENDANTS' LEGAL MEMORANDUM IN SUPPORT OF ITS OBJECTION TO PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION

On or about January 18, 2001, a hearing was held on the Plaintiffs' motion for a preliminary injunction as well as their request to consolidate that hearing with a trial on the merits. The Defendants objected to both motions. After a lengthy hearing, during which several witnesses testified and documents were offered as evidence, it became apparent that there were several legal issues which needed to be addressed before a judgment could be issued.

An order was issued by this Court dated February 14, 2001, requesting that the parties respond to certain questions stated in said order. This legal memorandum is filed in accordance with the Court's Order. While it does not address the Court's questions in precisely the order asked, all have been answered. The Defendants would like to reserve the right to file additional responses as needed.

FACTS

The Plaintiffs, Mr. and Mrs. Robert Murphy Jr., are the owners of a single family residence located at 25 Jefferson Drive, a cul-de-sac with approximately 8 other single family homes. This residence is located in the R-40 zone, a single family residential zone. Only single family dwellings, farms and the keeping of livestock are permitted uses in this zone.(Defendants' exhibit 515, Section 025-020) Other uses are only allowed by special permit.

The Plaintiffs' hold weekly meetings at their home on Sunday. The precise number of people in attendance, as well as the length of the meetings, are in dispute. In the Plaintiffs' affidavit, it is stated that the number rarely exceeds 25 and that the meetings are from 2:00 p.m. to 6:00 p.m. At the public meetings, testimony showed that it is likely that this number is 40 and may be as high as 75, while the hours of operation may be from 12:00 noon to 9:00 p.m. (Defendants' exhibit 516 p.3)

In order to accommodate the cars of those attending these meetings, the Plaintiffs have converted their back yard into a parking lot. (see Amended Complaint, par. 24) At this time, the parking lot is gravel. The Plaintiffs have expressed a desire to pave the parking area with asphalt.

At several of its meetings, the New Milford Zoning Commission sought to address the Plaintiffs' use of their property. During these meetings, testimony from the neighbors as well as from Patrick Murphy were taken. In addition, letters and photographs concerning the use of the Murphy's property were

accepted. Evidence showed that there were traffic, drainage and safety concerns. (Defendants' exhibit 503) Members of the Commission, as well as the zoning enforcement officer, made site visits to see in person what impact the use of the Murphy's home as a weekly meting place was having on the single family neighborhood. (Defendants' exhibit 503, testimony of George Doring, also testimony of Kathy Castagneta at 1/18/01 hearing).

At the November 28, 2000 meeting, the Defendant Commission issued an opinion, finding in part, that the parking lot as well as the use of the property as a weekly meeting place for 25 to 40 people who are not family members were not permitted by the zoning regulations nor were they an incidental use customary to a single family residence and that if this illegal use continued, the zoning enforcement officer was to issue a cease and desist order.

On or about November 29, 2000, the zoning enforcement officer of the Town of New Milford sent a letter to the Plaintiffs informing them that their present use of the property as a weekly meeting place and parking lot violated Chapter 25 of the Zoning Regulations of the Town of New Milford. (Plaintiffs' exhibit 2).

On or about December 14, 2000, the Plaintiffs filed an amended complaint in Federal Court alleging that the Defendants' actions violated certain of their Constitutional rights, such as freedom of speech, assembly and exercise of religion as well as certain state and federal statutory rights. Only after this complaint was filed was any enforcement action taken by the New

Milford Zoning Enforcement Officer which was in the form of a cease and desist order dated December 19, 2000. (Plaintiffs' exhibit 4) No appeal was taken of this order.

On or about December 21, 2000, at the request of the Plaintiffs, a temporary restraining order was granted, the terms of which substantially mirrored the terms of the cease and desist order.

On or about January 18, 2001, a hearing was held on the Plaintiffs' application for a preliminary injunction. The Court also entertained the Plaintiffs' request to convert this hearing into a hearing on the merits which was subsequently denied. On February 14, 2001, the Court issued an order directing the parties to brief certain questions, whereupon, the motion for preliminary injunction would be decided.

ISSUES

1. Does the U.S. District Court have subject matter jurisdiction to hear the Plaintiffs' claim.

2. Did the named Defendants' actions violate any of the Plaintiffs' rights as secured by the United States Constitution or laws or the Constitution or laws of the State of Connecticut.

LAW and ARGUMENT

I. Subject Matter Jurisdiction

Before this Court can consider any of the Plaintiffs' claims, the issue of whether or not this matter is properly before this Court must be addressed. A review of the proceedings before the Defendant Commission as well as the actions taken by it reveal that the Plaintiffs failed to exhaust the

administrative remedies available to them and that their claims are not ripe for judicial review.

A. Exhaustion of Administrative Remedies

"It is a well settled principle of administrative law that, if an adequate administrative remedy exists, it must be exhausted before a court will obtain jurisdiction to act in the matter. The doctrine of exhaustion is grounded in a policy of fostering an orderly process of administrative adjudication and judicial review in which a reviewing court will have the benefit of the agency's findings and conclusions. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene." Pet v. Department of Health Services, 207 Conn. 346, 351, 352, 542 A.2d 672, *internal quotes and citations omitted.*

This case is essentially an appeal of an opinion made by a zoning commission. Once the commission or its agent act, the proper way to challenge such an action is to appeal it to the New Milford Zoning Board of Appeals. Connecticut General Statute 8-6 specifically states that any appeal of an order of a zoning enforcement official or zoning commission acting in an enforcement capacity must be to the zoning board of appeals. Where the law provides a statutory remedy or procedure, such remedy or procedure is exclusive. Davis v. Yudkin, 3 Conn. App. 576, 495 A.2d 714 (1985). Only after the zoning board of appeals issues a decision on the validity of the enforcement action can an appeal to court be taken.

The Plaintiffs have failed to exhaust the administrative remedies available to them as provided by law. Until this is done, any hearing on the merits is premature and this Court is without jurisdiction.

In its memorandum in support of its application for a preliminary injunction, the Plaintiffs assert that their claims are exempt from the application of the doctrine of exhaustion of administrative remedies because their claims assert Constitutional grounds for reversing and nullifying the actions of the Defendants and because they have raised a claim under 42 USC sec. 1983. A review of the law as well as the facts of this case clearly show that the Plaintiffs are required to comply with the exhaustion doctrine.

1. Constitutional Claims

While it is true that exceptions to the exhaustion doctrine exist, they have been limited in their application, otherwise, they could swallow the rule. As the courts have found "Even claims of Constitutional violations, however, are not always an exception to the general requirement of exhaustion. Simply bringing a Constitutional challenge to an agency's actions will not necessarily excuse a failure to follow an available statutory appeal process." Pet at 354.

One limit which has been placed on this exception to the exhaustion rule is where the Constitutional issue(s) raised goes not to the validity of the zoning ordinance as a whole but instead, to its application to a particular case. In addition, there should be an adequate administrative remedy. Poe v.

Baltimore, 241 Md. 303, 216 A.2d 707. A review of the Plaintiffs' Amended Complaint reveal that it is not the zoning regulations that are challenged, but the application of these regulations, specifically Chapter 25, to the use of their property as a meeting hall. Because of this, and the fact that there exists an administrative remedy, the Plaintiffs are required to exhaust the administrative avenues available before seeking redress in court.

Another limit placed on the exception to the exhaustion rule is that if relief can be granted on grounds other than the Constitutional claims, the need to address these Constitutional issues can be avoided and thus, exhaustion of administrative remedies can be required. Public Utilities Commission v. United States, 355 U.S. 534, 78 S.CT 446 (1958).

The Plaintiffs' Amended Complaint contains claims for relief other than those based on the United States or State Constitutions. In particular, count 10 is based on the legal theory of Ultra Vires Acts, while counts 11 and 12 rely on federal and state statutes. If successful on any one of these counts, the Plaintiffs would be entitled to the injunctive relief they ask for and this Court would need to go no further. The Constitutional claims could be avoided. Therefore, the Plaintiffs are required to exhaust the administrative avenues available to them because they have stated claims for relief upon non-Constitutional grounds.

2. 42 USC sec. 1983

Citing Patsy v. Florida Bd. of Regents, 457 U.S. 496, 102 S.CT. 2557 (1982) in their supplemental brief in support of their request for a preliminary injunction, the Plaintiffs assert that since their federal claims are premised on sec. 1983, they need not exhaust their administrative remedies. This assertion is in error. While the United States Supreme Court did so hold in Patsy that sec. 1983 claimants do not necessarily need to follow the exhaustion doctrine, this holding has been limited in its application to those situations where the sec. 1983 claimant is seeking damages and not injunctive relief.

The Connecticut Supreme Court has consistently held that "[N]ot withstanding *Patsy v. Board of Regents of the State of Florida,* the fundamental requirement of inadequacy of an available legal remedy in order to obtain injunctive relief remains in full force." Pet, at 369, see also Laurel Park Inc. v. Pac, 194 Conn. 677, 485 A.2d 1272 (1984). As the court points out, "it was a sec. 1983 action for damages in federal court that the plaintiff argued should not be dismissed for failure to exhaust his state remedies." Pet at 369. In Patsy as well as in Costello v. Fairfield, 811 F.2d 782 (D.Conn. 1987) and Solomon v. Emanuelson, 586 F.Supp. 280 (D.Conn. 1984), the claimants were all seeking damages.

This action does not concern damages. The Plaintiffs are clearly seeking injunctive relief from this Court so that the zoning regulations of the Defendants can not be enforced as to the use of their property. Because of this distinction from the

claimant in Patsy, as well as those in the other cited cases, it is clear that this matter does not come within the exception to the exhaustion doctrine. Such a finding would be in accord with the reasoned opinion of the Connecticut Supreme Court and would further the principle stated by the Plaintiffs in their supplemental brief at p. 4 that "As a general rule, federal courts are loath to order injunctive relief when the plaintiff has not exhausted all administrative remedies available to him." citing Sampson v. Murray, 415 U.S. 61 (1974).

Because the Plaintiffs are not entitled to an exception from the doctrine of exhaustion of administrative remedies and they have not exhausted those remedies available to them, this court should decline to exercise jurisdiction over this matter.

3. State Constitutional Claims

The ninth count of the Plaintiffs' Amended Complaint asserts a claim pursuant to several rights secured by the State Constitution. "The fact that the [plaintiffs] have raised state Constitutional issues does not give them the right to bypass the zoning procedures of the city ..." Husti v. Zuckerman Properties LTD., 199 Conn. 575, 508 A.2d 735, 743 (1986). In Husti, the court found that the defendants in that case had not exhausted their administrative remedies because they had not attempted to gain permission from the zoning agency for the use of their property, either as an accessory use or by applying for a variance.

Similarly, the Plaintiffs' here have not taken advantage of any of the administrative remedies available to them. "Until the

[plaintiffs] have exhausted these procedures, they cannot claim that the city has denied their right[s] ... under the state Constitution." Id at 743. Therefore, the court should refuse to entertain any claims brought pursuant to the State Constitution.

B. Ripeness

This matter is not ripe for judicial review. A reading of the Plaintiffs' Amended Complaint reveals that they seek review of an opinion made by the Defendant Commission as well as a letter issued by a person not a party to this action. As of the date of the Amended Complaint, no agency action had been instituted by the Defendants against the Plaintiffs. "Judicial relief or review is often denied for lack of finality where action of the administrative agency is only anticipated [or] threatened ..." 2 Am.Jur.2d *Administrative Law* section 497 (1994) citing Industrial Acci Board v. Glenn, 144 Tex 378, 190 SW2d 805 (1945).

A review of the Plaintiffs' Amended Complaint as well as the Defendants' opinion (Defendants' exhibit 516) reveal that the Defendants were only contemplating taking action against the Plaintiffs when this action was commenced. No enforcement action had taken place. Far from being a final action, the Defendant Commission had only issued an opinion regarding whether a zoning violation existed.

A similar situation occurred in Metro Baptist Church v. Consumer Affairs, 718 A.2d 119, (D.C.1998) where a church appealed the inclusion of certain properties it owned in a newly formed historic district. Such an inclusion would subject the

church to additional requirements and permit procedures if it chose to change or replace the buildings on its property. In its appeal, the Church claimed that subjecting it to these additional requirements and permit procedures infringed on its Constitutionally protected right to the free exercise of its religion. In reviewing this claim, the court determined that it was not yet ripe for judicial review.

In reaching this finding, the court looked to the purpose of the ripeness doctrine which is "to prevent courts ... from entangling themselves is abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties" Id. at 130 citing Abbott Lab. v. Gardner, 387 U.S. 136, 148 (1967).

Next, the court applied a two part test, first finding that the agency action was not final or concrete and then finding that no hardship would come to the parties if judicial review was withheld at this time. Metro Baptist at 131, 132. The finding that the agency action was not final was based on the fact that the plaintiff had yet to apply for a permit from the defendant commission to renovate and/or replace its buildings. Without doing so, the court was deprived of any idea just what effect the inclusion of the church's property into the historic district would have on its plans. In addition, it was possible that such an application would be granted and a dispute may never develop between the parties. Id. at 131. As for hardship to the parties,

the court found none essentially because any alleged hardship was mere speculation. In addition, the plaintiff church failed to show that the historic designation of its property had a direct and immediate effect upon its rebuilding plans. Id. at 132.

The similarities to the matter at hand are significant. First, the agency's action which instigated the Plaintiffs' appeal was not final. Other steps were necessary before the action could be viewed as final and ripe for judicial review. These include the issuance of a cease and desist order, an appeal to and a decision from the zoning board of appeals and an appeal to superior court. Second, they will be no hardship to the parties at this time if judicial review is withheld. As already presented to this court in previous briefs by the Defendants, the opinion of the Defendant Commission only attempts to place a reasonable limit on the number of people attending meetings at the Plaintiffs' home, it does not intend to eliminate or prohibit those meetings. Robert Murphy testified before this court that the exercise of his religion only requires him to pray at his home with others as opposed to a specific number of people. Therefore, any number equal or greater than 2 people would satisfy his religious needs. There simply is no hardship.

Therefore, because the agency action appealed from is not final and withholding judicial review will not cause hardship to the parties, the Defendants respectfully request that this Court find that this matter is not ripe for judicial review.

II. Alleged Violations of Plaintiffs' Rights

Both in their complaint and their supplemental brief in support of a preliminary injunction, the Plaintiffs assert a multitude of Constitutional and legal protections that they claim were violated by the Defendant Commission's opinion. Essentially, they claim that because the use of their property involves religion, they are immune from the application of the zoning regulations. As the following argument will show, this is a false premise.

Zoning is a function of the police power of the state. All property is held subject to this police power and its use may be regulated in the interest of the public health, safety and welfare. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926). Religious beliefs cannot serve to bar this principle, for to hold otherwise, "would make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." Employment Division v. Smith, 494 U.S. 872, 879 (1990). The fact that the use of their home involves prayer does not place the Murphys beyond the restrictions imposed by the New Milford Zoning Regulations.

A. Standard of Review

It is well settled in this state that when a trial court is reviewing the decision of a local zoning authority acting in its administrative capacity, the court's review is limited to a determination of whether the zoning agency acted illegally, arbitrarily or in abuse of its discretion. Beit Havurah v. Zoning

Board of Appeals, 418 A.2d 82, 117 Conn. 440, 444 (1979) *citing several other cases.* When a zoning agency states the reasons for its decision, the court's review should only examine the record and evidence before it to see if those reasons are reasonably supported, relevant to the decision and permitted by the regulations. Id at 445 *citing several other cases.* "Courts are not to substitute their judgment for that of the board ... and decisions of local boards will not be disturbed so long as honest judgment has been reasonably and fairly exercised after a full hearing." Whittaker v. Zoning Board of Appeals, 179 Conn. 650, 654, 429 A.2d 910 (1980). "If there is conflicting evidence in support of the zoning commission's stated rational, the reviewing court cannot substitute its judgment for that of the Agency." Quality Sand and Gravel Inc. v. Planning & Zoning Commission of the City of Torrington, 55 Conn. App. 533, 539, 738 A.2d 1157 (1999). If only one reason is found by the Court to be supported by the record, the Court must uphold the Commission's decision. Id., at 539.

Since the United States Supreme Court ruling in Smith, this standard applied even if the land use involved was religious in nature as long as the government regulation involved was neutral and generally applicable. However, a higher standard of review may apply to this matter. The Supreme Court in Smith stated that if a Free Exercise Claim is joined with other Constitutional protections, then a compelling interest standard would apply. Smith at 881. A review of the Plaintiffs' Amended Complaint reveal that in addition to a Free Exercise Claim, 6 other U.S.

Constitutional protections are raised. If these protections are found not to apply here, then the reasonable basis standard would apply. Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 473 (8th Cir. 1991).

Under the reasonable basis standard, the court reviews the evidence before it to see "whether the [opinion of the commission] is reasonably supported by the record and whether it is pertinent to the considerations which the commission is required to apply under the zoning regulations." Zieky v. Town Plan & Zoning Commission, 151 Conn. 265, 267-68, 196 A.2d 758 (1963).

The Plaintiffs also seek relief under 42 USC sec 2000cc and C.G.S. sec 52-571b, both of which could be called religious relief acts. Enacted in response to Smith, they both seek to impose the compelling interest standard on courts when they review the actions of an agency which pertains to a religious activity. If either are found to apply, then a brief discussion of the compelling interest standard is necessary.

Under the compelling interest test, "if a government regulation **substantially burdens** the free exercise of religion, then it is unconstitutional unless it is justified by a **compelling** government interest that cannot be served by a **less restrictive** means." K. YOUNG, ANDERSON'S LAW OF ZONING Sec. 21.21A (4th ed. 1996). As the law and facts reveal, the Defendant Commission's opinion passes even this test.

B. Free Exercise Claim

In order to prevail in their appeal of the Defendant Commission's opinion under the compelling interest test, the Plaintiffs must first establish that the opinion complained of substantially burdens the exercise of their religious belief. Without meeting this threshold test, the other two parts of the compelling interest test become irrelevant.

1. Substantial Burden

In their Amended Complaint, affidavits and legal memoranda filed in support of their request for a preliminary injunction, the Plaintiffs state that their religion requires them, among other things, to regularly pray individually and with family and friends in their home. (Amended Complaint, par. 53, 54). It is this belief that they claim is prohibited by the Defendants' opinion. It is this alleged prohibition which forms the basis of their claim for relief.

A reasonable reading of the Defendant Commission's opinion shows that it was an attempt to regulate the use of the Plaintiffs' property, not prohibit it. The opinion essentially states in that the use of the Plaintiffs' property as a weekly meeting place for 25 to 40 people who are not family members is not a permitted use under the zoning regulations. (Defendants' exhibit 516) Therefore, under this opinion, meetings with family members can still take place on a regularly scheduled basis. Likewise, a smaller number of friends could attend as long as the concerns over traffic and parking, which led to the issuance of the opinion in the first place, do not occur again. While this

does place a limit on the Plaintiffs' activities, it does not substantially burden their ability to exercise the religious belief in question. It certainly does not prohibit it. "The crucial word in the Constitutional text is 'prohibit': For the Free Exercise Clause is written in terms of what the government cannot do to the individual ..." Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439,451 (1988).

Placing limits on religious uses is permissible. Just because a use is religious in nature does not entitle the property owner to unfettered use of his property. For example, when a height variance was denied for a temple hall, a court found that this did not place a substantial burden on the temple's free exercise of religion under either the state or federal Constitutions. Korean Buddhist Dae Won Se Temple v. Sullivan, 87 Haw. 217, 953 P.2d 1315 (1998). Similarly, a building which was being used as a residence as well as a place of religious worship was still subject to a zoning regulation limiting the number of residents to 5 unrelated people. Marsland v. International Society for Krishna Consciousnexx, 66 Haw. 119, 657 P.2d 1035, appeal denied 464 U.S. 805 (1983).

It is clear that limits can be placed on a religious use by zoning without offending the protection afforded such uses. Just as placing a height limit on the height of a temple or limiting the number of occupants in house shared by a religious sect did not substantially burden the religious beliefs of the people involved, placing a limit on the number of people who can attend weekly meetings at the Plaintiffs' home does not place a

substantial burden on their religious belief that they pray with others. Government restrictions on religious uses which result in expense and inconvenience do not rise to the level of a Constitutional violation. Da Won Sa Temple. Therefore, there is no violation of the Plaintiffs' First Amendment right to the free exercise of religion.

2. Compelling Interest

When the Defendant Commission addressed the matter of the Plaintiffs' accessory use of their property as a weekly meeting hall, the concerns focused mostly on the traffic and parking problems generated by this use. (8/22/00 transcript, testimony of L. Montemurro, 11/14/00 transcript, testimony of T. Showalter) These concerns conform with some of the stated purposes of zoning which are the stabilization of property uses, Kimball v. Court of Common Council, 148 Conn. 97, 167 A.2d 706 (1961) to promote health, safety, welfare and prosperity of the community, Langbein v. Board of Zoning Appeals, 135 Conn. 575, 67 A.2d 5 (1949) and to lessen congestion in the streets. Bradley v. Zoning Board of Appeals, 151 Conn. 46, 193 A.2d 502 (1963). The Plaintiffs' use of their property jeopardized these goals because they introduced a use which was foreign and detrimental to the already established permitted uses of the other properties in the area: single family homes. They did this by subjecting this quiet cul-de-sac to a weekly intrusion of traffic, noise, light and parking congestion. Not only did this affect the quality of life of the neighborhood, it also presented some real safety

issues regarding child safety and access for vehicles. (Defendants' exhibits 512, 513, 514)

What can be considered a compelling interest has been addressed by the courts on numerous occasions. It includes: maintaining the zoning scheme and protecting the character of a residential neighborhood where a religious group sought a required special permit to build a church in a residential neighborhood, Christian Gospel Church v. San Francisco, 896 F.2d 1221 (9th Cir. 1990), not adversely affecting the public interest, Pylant v. Orange County, 328 So.2d 199, protecting the public health, safety and welfare, South Side Move of God Church v. Zoning Board of Appeals, 47 Ill. App.3d 723, 365 NE.2d 118 (1977), and protecting property values from substantial harm, Id. In South Side, the court recognized that stricter standard of judicial oversight becomes operative when zoning regulations are applied to uses involving religion. Nevertheless, because the applicants failed to meet the general standards needed for the issuance of a special permit, the zoning board was justified in denying their request.

All of these compelling interests are served by the Defendant Commissions' opinion. In finding that the Plaintiffs' use of their home as a weekly meeting place was in violation of the zoning regulations, the Defendant Commission was interested in eliminating the harmful effects this illegal use was having on the quiet cul-de-sac. The record before it, as well as personal observations, revealed that the plaintiffs' weekly meetings were attracting at least 25 to 40 individuals along with their cars.

The parking of these cars tended to hinder traffic and block access to neighboring properties. The amount of traffic generated by this use posed a risk to children who were accustomed to and justly expected that a cul-de-sac would have only limited traffic. In addition, when the Plaintiffs turned their back yard into a parking lot, drainage concerns as well as offensive exterior lighting became additional concerns. Because these concerns directly affected the safety and welfare of the neighborhood residents, adversely affected property values, the zoning scheme and the residential character of the neighborhood, the Defendant Commission's opinion was based on compelling interests.

3. Least Restrictive Means

Even if it is found that the government's interests are compelling, the ordinance drawn to protect those interests must be the least restrictive means of doing so, otherwise, these interests must yield to the protections afforded to the exercise of religious beliefs by the First Amendment. If it is determined that a government ordinance is either overbroad or underinclusive, then it is not the least restrictive means of achieving the compelling government end.

An example of this is where a municipality enacted several ordinances prohibiting the killing of animals for sacrifice which was defined as the unnecessary killing of an animal in a ritual which was not for the primary purpose of consumption. In finding the ordinance too restrictive, the Supreme Court stated that the ordinance was underinclusive because it did not prohibit other

kinds of animal killing, such as fishing, exterminating and small scale butchering. It was over inclusive in that a lesser restriction on the animal sacrificing practices of the plaintiffs could have been used to achieve the stated government interests of preventing public health risks and cruelty to animals. "[T]he texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1993). The same cannot be said of the Defendant Commission's opinion or the zoning regulation it invokes.

The opinion in question is a simple finding that the use of the Plaintiffs' home as a weekly meeting place for 25 to 40 people plus family members is not an accessory use for the R-40 residential zone. (Defendants' exhibit 516) It is silent as to the purpose the meeting serves. It is clear from a reading of the transcripts of the public meetings that it was the intensity of the use and not the type of meeting, which was the sole concern of the neighbors and the Defendant Commission. "Our objections are not that its a religious..." (Defendants' exhibit 503, testimony of T.Showalter at p.7). "The fact that it is a religious use or whether that is ... if he were having a weekly meeting of the descendents of the Grand Army of the Republic at his home and the same situation were resulting I think the same question would be raised." (Defendants' exhibit 503 at p.8).

This opinion is not underinclusive because it would apply to any regularly scheduled meeting at the Plaintiffs' home attended by 25-40 persons who are not family members. By claiming that it targets prayer meetings only is a fabrication of the Plaintiffs and is not supported by the record. The opinion was not gerrymandered to target religious uses only.

Nor is the opinion overbroad. It specifically describes the activity being conducted and concludes that such an intensive use is not one that has "... been commonly, habitually and by long practice been established as reasonably associated with a single family home..." (Defendants' exhibit 516 at 4) A less intensive use by the Plaintiffs of their home, such as fewer people, fewer meetings and fewer cars, could be found to be in compliance with the zoning regulations as an accessory use.

It must be remembered that the religious belief in question is the ability to pray with family and friends at home. The exercise of this belief, within reasonable and expected limits, would not run afoul of the zoning regulations of the Town of New Milford. In short, the Plaintiffs can still exercise this religious belief under the opinion issued. Therefore, the opinion issued was the least restrictive means of protecting the compelling interests jeopardized by the Plaintiffs' activity.

C. Other First Amendment Rights

In its Amended Complaint, the Plaintiffs' assert that four other of their rights secured by the First Amendment to the U.S. Constitution were violated when the Defendant Commission stated

D. Due Process

In the fifth count of their amended complaint, the Plaintiffs allege that their right to due process, as secured by the fourteenth amendment to the U.S. Constitution, has been infringed by the Defendant Commission. The basis for this claim is that the standards upon which the Defendant Commissions' opinion was founded on are to general in nature and thus gave it "unfettered discretion".

The Defendant Commission determined that the Plaintiffs' use of their property as a weekly meeting place for 25-40 non-family persons was not an accessory use. In reaching this opinion that it did, the Defendant Commission relied on several well established principles of land use law.

1. Accessory Uses

Zoning regulations may be permissive or prohibitory in character. Regulations which are prohibitory in character allow all uses except those expressly prohibited. Park Regional Corporation v. Town Plan & Zoning Commission, 144 Conn. 677, 682. Regulations which are permissive in character affirmatively list the uses permissible in various zones. Any use which is not specifically permitted is automatically excluded. Bradley v. Zoning Board of Appeals, 165 Conn. 389, 394, 334 A.2d 914 (1972).

The zoning regulations of the Town of New Milford are **permissive** in character. (Defendants' exhibit 515, sec. 010-060). Hence, any use of land which is not specifically listed as a permitted use is automatically prohibited.

Section 025-020 of the zoning regulations lists all of the permitted uses of land for the R-40 zone where the subject property is located. Weekly, regularly scheduled meetings for 25-40 people as well as parking lots are not listed and are therefore prohibited. If not for the legal creation of accessory uses, our discussion would stop here for the Plaintiffs would need a special permit or a variance to continue their use.

An accessory use, defined in section 015-010 of the zoning regulations, is "A use or building subordinate to the main building on a lot and used for purposes **customarily incidental** to those of the main use or building." Accessory uses are permitted in all zones.

The question before us is what is an accessory use and can the Plaintiffs' use of their property be considered one. In answering this question, the discretion of the Defendant Commission is limited by the standards "customary" and "incidental" usage, standards which have been interpreted by the courts on numerous occasions. The leading case on defining these terms is Lawrence v. North Branford Zoning Board of Appeals, 158 Conn. 509, 264 A.2d 552 (1969).

a. Incidental

The court defined incidental to mean a use which is subordinate to the principle use of the property and also bears a reasonable relationship to it. "It is not enough that the use be subordinate, it must also be attendant or concomitant. To ignore this latter aspect of incidental would be to permit any use which

is not primary, no matter how unrelated it is to the primary use." Id., at 512.

b. Customary

In defining this standard, the court stated:

> "The word 'customarily' is even more difficult to apply. Although it is used in this and many other ordinances as a modifier of incidental, it should be applied as a separate and distinct test. **Courts have often held that use of the word customarily places a duty on the commission** or court **to determine whether it is usual to maintain the use in question** in connection with the primary use of the land ... In examining the use in question, it is not enough to determine that it is incidental in the two meanings of that word as discussed above. The use must be further scrutinized to determine whether it has **commonly, habitually and by long practice** been established as reasonably associated with the primary use. As stated in 1 Rathkopf, Zoning & Planning (3d Ed), p. 23-4: 'In situations where there is no ... specific provision in the ordinance, the question is the extent to which the principle use as a matter of custom, carries with it an incidental use so that as a matter of law ... it will be deemed that the legislative intent was to include it.' In applying the test of custom, we feel that some of the factors which should be taken into consideration are the size of the lot in question, the nature of the primary use, the use made of adjacent lots by neighbors and the economic structure of the area. As for the actual incidence of similar uses on other properties, geographical differences should be taken into account, and the use should be more than unique or rare, even though it is not necessarily found on a majority of similarly situated properties." Id. at p. 512-513, *emphasis added.*

c. Judicial Review

When determining whether or not a use is a permitted accessory use, a zoning agency is vested with broad discretion in applying these standards to a particular use of land. "The application of the concept to a particular situation may often present and depend upon questions of fact, or involve or be open

to a legal exercise of discretion ..." Id. at p. 513. On appeal, the court should give deference to the board's decision and not substitute its judgment for that of the board's." Whittaker v. Zoning Board of Appeals, 179 Conn. 650, 654, 429 A.2d 910 (1980).

2. Religious Uses as Accessory Uses

The concept of accessory uses has often been applied to situations involving religious uses. The fact that this concept involves the use of general standards has not resulted in its having been found unconstitutional or illegal. To hold otherwise would remove this useful tool which allows a zoning agency to permit a use which would otherwise only be allowed except by variance or special permit, if at all.

Some examples of general standards that have been found by courts to pass due process muster have included such terms as "not adversely affect the public interest" Pylant v. Orange County, 328 So.2d 199 (1976), "protect public health, safety and welfare", and "no substantial injury to property values" South Side Move of God. Like accessory uses, the granting of a variance involves the application of general standards, such as "unusual hardship" to a particular situation. The denial of a variance, based on general standards, for a religious organization to increase the height of its temple was upheld by the court, such decision not violating either the state or federal Constitutions. Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Haw. 217, 953 P.2d 1315 (1998). In another variance case, the court found that "[R]eligious institutions ... are not wholly exempt from the requirement of establishing practical

difficulty, and other standards applicable to the granting of zoning variances ..." Islamic Soc. of Westchester & Rockland Inc. v. Foley, 96 App Div 2d 536, 464 NYS 2d 844 (1983). Therefore, just because a use happens to be religious in nature does not make it immune from zoning regulations based on general standards. To hold otherwise would result in the paradox that a religious use would be freer from control when it is a prohibited use than when it is a permitted use.

When the Defendant Commission considered the issue whether or not the use of the Plaintiffs' property as a meeting hall for 25-40 people on a regularly scheduled basis as well as a parking lot, it considered the evidence presented to it as well as the personal knowledge of the commission members. It then had to decide whether the use in question was the principle use of the property and if not, was it an accessory use.

The Defendant Commission determined that the principle use was, at the time of its opinion, a single family residence. It therefore turned to the issue of whether the use was accessory to this single family residential use. According to well established legal precedent as well as the definition in the zoning regulations, the commission applied the standards which governed its discretion in determining whether a use was an accessory use.

In its opinion, the Defendant Commission found that the Plaintiffs' use, while subordinate, was not incidental to the primary use and that "... such a use has not been commonly, habitually and by long practice been established as reasonably

associated with a single family home in an R-40 zone." (Defendants' exhibit 516 p. 4). As already discussed in this brief in the section entitled II.B.2 "Compelling Interests", testimony showed that the use in question had grown far larger than typical meetings held in homes (cub scout and brownie troops typically do not exceed 8 to 10 persons), usually exceeding 40 persons and going as high as 75. The intensity of the use, both in its size and duration (noon to 9:00 p.m.) placed it beyond what could be considered as a use which was commonly, habitually and by long practice been established as reasonably associated with the primary use.

Appropriately, the Defendant Commission limited its gaze to residential zones in New Milford, particularly the R-40 zone. As the Court said in Lawrence, when deciding whether a use is an accessory use, the use made of adjacent lots and the actual incidence of similar uses on other properties should considered but geographical differences should also be taken into account. Id at p. 513.

While it has been held that what constitutes an accessory use of a primary religious use should be considered broadly in order to avoid Constitutional problems (Beit Haruvah v. Zoning Board of Appeals, 117 Conn. 440, 418 A.2d 82 (1979), Daughters of St.Paul Inc. v. Zoning Board of Appeals, 17 Conn. App. 53 (1988), this must be balanced by the fact that "... the objectives of the Comprehensive Plan will be jeopardized if accessory use is so broadly construed as to allow incompatible uses to invade the district." Lawrence at p. 511.

When the Defendant Commission considered the use of the property in question, it exercised the discretion vested in it by law and limited by standards it was required to follow. These standards, while general in nature, have been found to pass Constitutional muster and thus not violate any due process guarantees contained in the Constitution, either state or federal. Supported by evidence in the record and guided by standards, the Defendant Commission's opinion did not violate the Plaintiffs' due process rights.

III. Preliminary Injunction

A preliminary injunction is an extraordinary remedy which is not available unless plaintiffs carry their burden of persuasion. Before a preliminary injunction will issue, the plaintiff must demonstrate likely irreparable harm, probable success on the merits coupled with a balance of hardship tipping decidedly in plaintiff's favor. Russ Berrie & Co. v. Jerry Elsner Co., 482 F. Supp. 980 (SD NY 1980). As the following discussion will show, the Plaintiffs have failed to meet the above requirements.

A. Irreparable Harm

The Plaintiffs, both in their Amended Complaint and subsequent motions, allege that the opinion of the Defendants deprives them of their First Amendment freedoms, to wit, the free exercise of religion and speech as well as other rights. This allegation has no basis in fact.

A careful reading of the opinion of the Defendant zoning commission, a copy of which is attached, reveals the following on the final page: "(1) they are to cease and desist in their use of

said premises as a meeting place by a diverse group of people (25 to 40), who are not 'family' as that term is defined in these regulations, on a regular basis, in this instance each Sunday".

The Plaintiffs claim that this order will prevent them from having communal prayer in their home. This alleged deprivation of the right to communally pray in their home is the major allegation of their Amended Complaint. I refer the Court to the Plaintiffs' affidavits, which state this claim and no other, except for the issuance of a driveway permit.

The Defendants' opinion, as well as any cease and desist order issued in accordance with it, will not deprive the Plaintiffs of their right to communally pray. First, the opinion permits the Plaintiffs to pray with family members as defined by the zoning regulations. The definition of family is as follows: "One or more persons occupying a single housekeeping unit and using common cooking facilities, provided that, unless all members are related by blood or marriage, no such family shall contain more than five members." Therefore, the Plaintiffs can pray with their immediate as well as extended family.

Second, the opinion of the Defendants permits the Plaintiffs to invite some guests, in addition to family members. The religious belief that is at issue here is the Plaintiffs' right to pray in their home with others. Apparently, as long as they do not have to pray alone, they can exercise this belief. The opinion of the Defendants does not attempt to make them pray alone, only to limit the number of attendees. There simply is no irreparable harm.

B. Success on the Merits

While the Plaintiffs attempt to disguise this matter as religious persecution, it is truly nothing more than a zoning appeal. The opinion issued by the Defendant zoning commission is silent as to the subject matter of the meetings taking place in the Plaintiffs' home. It instead focuses on traditional points of concern for zoning, whether the use of the single family home as a meeting place with a parking lot is a permitted accessory use in the R-40 zone.

It is well settled in this state the decision of a zoning commission will only be disturbed if it is shown that it was arbitrary, illegal or in abuse of its discretion. Torsiello v. Zoning Board of Appeals, 3 Conn. App. 47, 49, 50. The burden of proof is on the Plaintiff to prove that the board or commission acted illegally or so arbitrarily and unreasonably as to invalidate its action. McCrann v. Town Plan and Zoning Commission, 161 Conn. 65, 74.

As the Court is fully aware, this case presents a multitude of difficult legal issues which could be decided for either party. It has been found that a preliminary injunction application should be denied where there are complex issues of law because the applicant cannot possibly show that it is entitled to a substantial likelihood of success. First National Bank & Trust Co. v. Federal Reserve Bank, 495 F.Supp. 154 (WD Mich. 1980). Finally, this entire matter may be prematurely before this Court. No cease and desist order has been issued and

if one has, the proper way to challenge such an order is to appeal it to the New Milford Zoning Board of Appeals.

C. Balance of Hardship

The Court should refrain from granting the Plaintiffs' motions for temporary restraining order and preliminary injunction because the balance of hardship does not tip in its favor. As already discussed above under Irreparable Injury, the Plaintiff will suffer no hardship if its motion is not granted. The opinion of the Defendant Commission in no way interferes with the Plaintiffs' ability to meet with family members and a few guests, which would be in accordance with their religious beliefs.

It is the size of their meetings, and not the nature thereof, which run afoul of the zoning regulations. It is the number of people, together with their cars, which cause such a hardship to the neighborhood where the Plaintiff's reside. This is a true hardship.

From the attached letters from several of the neighborhood residents, the Court can see that this is a small, quiet neighborhood, which is subject to a use totally foreign to the concept of a single family home. Besides the noise and inconvenience, there are real safety issues involved, such as access for emergency vehicles as well as increased water runoff from the parking lot.

The evidence admitted in court does not show that the balance of hardship is in favor of the Plaintiffs. They will still be able to meet, only in smaller groups. However, if their

claim for relief is granted by this Court, this neighborhood will be forced to endure an intrusive, incompatible use which poses a threat to their safety as well as their peaceful enjoyment of their property. Since the burden is on the Plaintiffs to show that the balance of hardship is in its favor, and the evidence presented clearly does not support this, the Court should decline to issue the preliminary injunction.

IV. Religious Animus and Opposition to Prayer Meetings

At various times, including their prayer for relief, the Plaintiffs have stated that the motives behind the issuance of an opinion by the Defendant Commission were based on animosity to religion in general and prayer meetings in particular. A fair reading of the evidence before this Court show that this is a reckless statement with absolutely no basis in fact. In its order to the parties dated February 14, 2001, the Court specifically asked the parties to show where in the evidence does it show that the Defendants sought to regulate the Plaintiffs' use of their property because they were holding prayer meetings or that there was religious animosity towards the Plaintiffs. None can be found. What the evidence does show is quite the opposite, that religion played absolutely no role in the Defendant Commission's issuance of its opinion.

If the Plaintiffs had taken the time to attend the public meetings where the use of their property was addressed, they would have heard numerous times that religion was not a factor. One of the neighbors, Lisa Montemurro, stated the following at the August 22, 2000 meeting: " But my concern is not the

worshiping or the prayer because I am a Roman Catholic and I believe in God and I don't have a problem with that." (Defendants exhibit 501, p. 3)

Another neighbor, Terry Showalter testified at the November 14, 2000 public meeting that "For record, we go to St. Francis Church. ... our objections are not that its religious." (Defendants' exhibit 503 at p.7) The fact that these neighbors are Catholic and attend mass at St. Francis Church is important because the Plaintiffs attend the same church and are catholic themselves.

Finally, the chairman of the Defendant Commission, stated that the religious nature of the meetings would play no factor in the taking of measures to regulate the Plaintiffs' use of their residential property. At the November 14, 2000 meeting he said "The fact that it is a religious use or whether that it is ... a weekly meeting of the Grand Army of the Republic at his home and the same situation were resulting, I think the same question would be raised. We certainly are not getting into that aspect."

In bringing this action, the Plaintiffs reacted to a situation which they clearly did not understand. Instead of approaching the Defendant Commission or responding to communications, they chose to initiate a federal lawsuit without a complete understanding of the circumstances. Their persistent claims that the Defendant Commission and their neighbors (and parishioners) acted out of religious animus is clear proof of their distorted perception of the reality surrounding the use of their property. What is clear that instead of seeing the

substantial harm their weekly meetings were having on their neighborhood, they adopted the view that they were victims of religious persecution. The facts show how mistaken they are.

CONCLUSION

In Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536 (1974), Justice Marshall said "[zoning] may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." Id. at 13. The Plaintiffs would have us ignore this most essential government function simply because their large weekly meetings, which intrude on a peaceful residential neighborhood, involve prayer. As already stated, even religious uses are subject to the zoning power of the state and its agents.

It is clear that the Plaintiffs have not exhausted the administrative avenues available to them, have brought this action prematurely, and that the Defendant Commission's action does violate any U.S. or State Constitutional guarantees or laws. Therefore, the Defendants respectfully ask this Court to deny the Plaintiffs' request for a preliminary injunction and dismiss their action.

THE DEFENDANTS

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CERTIFICATION

This is to certify that a copy of the above was mailed postage prepaid to the following counsel and pro se parties this 12TH day of March, 2001.

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