

THOMPSON•KRONE, P.L.C.

ATTORNEYS AT LAW

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(Please respond to Tucson Address)

November 2, 2022

Via: Email and U.S. Mail

Jonathan Rothschild
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Joseph N. Andrews
Town of Oro Valley
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Re: Oro Valley Church of the Nazarene Stars Center

Dear Mr. Rothschild and Mr. Andrews:

This letter is to inform you that our firm has been retained by numerous homeowners residing in the neighborhoods surrounding the Church of the Nazarene located on Calle Concordia in Oro Valley.

This letter is also meant as a response to a letter that you have received from Michael F. Edgell of Schmitt Schneck Even & Williams P.C. dated June 13, 2022. The letter submitted to you states that the Oro Valley Church of Nazarene's ("OVCN") plan to develop a sports-ministry recreational field and a multi-use ministry building at 440 West Calle Concordia is strictly for religious purposes and thus the Town of Oro Valley lacks discretion to consider whether such development meets the Town of Oro Valley's zoning requirements. The claim is that the OVCN development plan meets the definition of a "religious institution" or an "accessory use" under the Town Zoning Code.

This statement could not be further from the truth. OVCN and its development partner Upward Sports are requesting the Town of Oro Valley provide the OVCN with PAD zoning. In the PAD zoning requested by OVCN they are asking the town to allow modifications to building heights, setbacks and uses from what currently exists. They make the claims that the changes requested will have little or no impact on the neighbors as their mitigation efforts will "minimize" such impacts which again is far from the truth.

What the rezoning is really about is a commercial enterprise not "to make disciples of the nations" as OVCN claims.

OVCN’S USE AS AN ATHLETIC AND RECREATIONAL FACILITY IS NOT WITHIN THE MEANING OF “RELIGIOUS INSTITUTION” OR AN “ACCESSORY USE” UNDER ARIZONA LAW.

OVCN’s application turns primarily on the argument that the sports recreational field and a multi-use building is a “Religious Institution”. The first place OVCN cites to in their amended application for this proposition is Oro Valley’s zoning code. Where the definition of a Religious Institution is “A place of gathering or assembly with the **primary purpose** of religious worship. Typical religious uses include, but are not limited to, churches, synagogues, mosques and temples”. OVCN then points you to the words “but are not limited to” as a way to boot strap you into believing their requested use as a sports recreational field and a multi-use building is a part of what is meant by the words “but are not limited to” portion of the code. OVCN then points you to the catch all of “Accessory Use” claiming that a development of 26.6 acres the bulk of which is not a church is an Accessory Use of the church.

The truth of the matter is, the use OVCN is proposing falls under other uses under the zoning code that are not Permitted Uses within the LDS PAD, the school zoning and the R1-144 designation without following the Town’s review and approval process. These sections are:

Recreation Area

A land area that is designated for recreation or contains specific facilities such as community recreational centers, pedestrian ways, swimming pools, picnic facilities, basketball and sport courts, playground equipment and exercise equipment.

Active

An area delineated for formal activities, which may or may not require equipment and take place on a prescribed field. Active recreational areas include, but are not limited to, tennis, volleyball, bocce ball and other court games, baseball, soccer and other field sports, swimming pools, track and improved playground activity areas.

Recreational Building

A building of which the primary use and function is for recreational activities.

Recreational Facilities

A place designed and equipped for the conduct of sports, exercise, and/or leisure-time activities.

Furthermore, they ignore the fact that R1-144 under the Town’s code is very specific and is defined as follows:

R1-144 Single-Family Residential District

This district is intended to promote and preserve suburban-rural single-family residential development. The large lot size permits agricultural uses and promotes open space.

There is nothing about what OVCN is proposing is harmonious with this definition and the surrounding neighborhood and properties.

OVCN then goes on to attempt to define the words “Religious Institutions” with a number of legal citations from other jurisdictions ignoring Arizona law and ambivalent analogies associated with their flawed argument.

What OVCN failed to do was provide to you any Arizona citations of law that look at the issues being presented to the Town. One such case is *Cochise County v. Broken Arrow Baptist Church*, 161 Ariz. 406, 778 P.2d 1302. This case is directly on point and deals with a church’s failure to seek a special use permit from the county for its use of a building for printing, collating, binding, and dissemination of bibles and printed materials. The court in this case stated clearly:

There is no dispute between the parties as to the sincerity of the Church's religious beliefs. Nor is there any dispute as to the motivation for its Bible ministry. However, we agree with the County that the Church cannot decide the meaning of “public assembly for religious worship” as it applies to zoning regulations, based upon such motives or beliefs. Interpreting the above definitions according to their common, plain, natural and accepted usage, see *VisionQuest National v. Pima County Board of Adjustment*, 146 Ariz. 103, 105, 703 P.2d 1252, 1254 (App.1985), the Church's use of the building was not for religious worship but for manufacturing. Whatever its motives in manufacturing and distributing the Bibles, they do not change the definition of “assembly for public worship” contained in the Cochise County Zoning Regulations to include “manufacturing.”

This case makes it clear in Arizona that OVCN cannot decide the meaning of the zoning code for the Town despite the claims to the contrary in their application. The plain and simple fact is that sports complexes, whether a prayer is said prior to a game or not, are not Religious Institutions within the Town’s code and under Arizona law. If every gathering that said a prayer prior to commencing its activity was allowed to avoid the zoning regulations for doing so there would be no reason to have a zoning code. This argument is simply absurd and contrary to Arizona law.

OVCN in a further attempt to justify its use without Town permission states that the recreational field and a multi-use ministry building are “Ancillary Uses” to the church and thus exempt from the Town’s Code. OVCN fails to provide any authority for this conclusion.

Accessory Use is defined in the Code as “A use customarily subordinate to the main use of the lot or building”. The Town of Oro Valley has already issued a zoning interpretation of Accessory Use under its code. On August 16, 2017, the Town issued a Zoning Interpretation for this exact address under OV1701999. It looked at a request by the LDS Church for a distribution center for clothes from the Church to its parishioners. The Town reviewed its PAD requirements, the definition of Seminary, Accessory Use definition and the Federal RLUIPA standards in making a decision. The Town decided in its interpretation that the Mormon garment is **central to its religious beliefs** and the members need to obtain the garment to practice their faith. Using this interpretation under RLUIPA the Town found that the distribution center was an accessory use under its code. Applying this analysis to OVCN the use as a sports center cannot be considered **central to its religious beliefs**. There is no circumstance where providing sporting activities meets the definition of a use customarily subordinate to the main use of the lot or building. Sports are not activities that are customary to a church.

There is also guidance on this issue by the Courts in Arizona by an unreported case *Harter v. Cochise County*, 2008 WL 4614267. A division two Court of Appeals case interpreting an accessory use of a Bible College as an accessory to its church. The Court looked at whether a religious school was an accessory use to a church. The Court determined that there is no authority in Arizona where a religious school is an accessory use of a church. In reviewing the cases the court relied on it is safe to say that if a religious school teaching church doctrine is not an accessory use to a church, then a sports facility is clearly not an accessory use to a church merely because prayers are said during the sporting events.

THE APPLICATION OF RLUIPA DOES NOT OBTAIN OVCN’S OBLIGATION TO COMPLY WITH THE ZONING CODE.

OVCN’s argument under RLUIPA turns on their first argument that the use of the sports complex is a form of religious exercise or use. As stated above OVCN’s use is not a religious use it is sporting, recreational and commercial use not religious. OVCN appears to argue that the Town is somehow discriminating against OVCN by failing to simply approve its request without the needed processes required by the Town’s Code violating the equal terms provision of RLUIPA.

RLUIPA has four separate provisions limiting government regulation of land use: (1) the substantial burden provision, (2) the equal terms provision, (3) the nondiscrimination provision, and (4) the exclusions provision. 42 U.S.C. § 2000cc(b); *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1169 (9th Cir. 2011).

The statutory text of the equal terms provision provides:

“No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”

The Ninth Circuit has described the elements of a prima facie case under the equal terms provision as follows: “(1) there must be an imposition or implementation of a land-use regulation, (2) by a government, (3) on a religious assembly or institution,” (4) that is “on less than equal terms with a nonreligious assembly or institution.” Centro Familiar, 651 F.3d at 1170–71.

OVCN’s argument fails completely to show that the Town’s imposition of its zoning code is one: on a religious assembly or institution and two: that is on less than equal terms with a nonreligious assembly or institution. The imposition of the requirements contained in the Town’s code is not being imposed on a religious assembly as described in detail above.

Most importantly, the imposition of the requirements contained in the Town’s code is not being imposed on less than equal terms with a nonreligious assembly or institution. The Town is applying its code in the way it would on any zoning request by any applicant religious or not.

OVCN IS SEEKING TO GAIN A COMMERCIAL ENTERPRISE UNDER THE GUISE OF RELIGIOUS INSTITUTION.

In reviewing the history of OVCN’s application there are clear signs of the intent of the request of the Town to ignore its zoning requirements and the effect a large-scale sports facility will have on the neighbors and Pentecostal experiences is not one of them.

OVCN in its neighborhood meeting on March 28, 2022, made two very telling comments. Paul Oland as the developer speaking on behalf of OVCN stated the following:

“This is a business proposal of a large church” Video 3 at 10 minutes.

OVCN’s own words ring loud and clear that what they are seeking to do is a “business” not a religious use. Mr. Oland went on to say in that same meeting:

“Not For Profit recreational facilities are not currently permitted in Public Schools/Church Zone. So, as part of the PAD we are requesting that it be permitted in that portion of the property” Video 4 at 20 minutes.

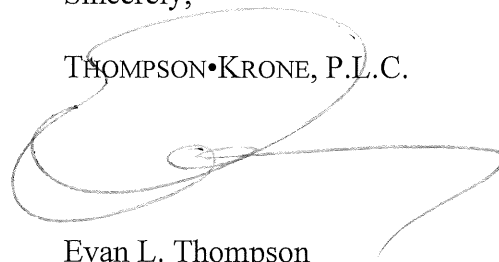
OVCN was admitting that it was seeking recreational facilities which are clearly not religious institutions and that such use was not allowed in the LDS PAD or the school zoning area on the property. Now, only after receiving negative feedback from the Town and neighbors and resubmitting its application, is OVCN taking the position that it is a religious institution and exempt from the application of the Town’s Code. This is a disingenuous position once the whole history of OVCN’s submission is viewed a whole.

CONCLUSION

There really is only one conclusion that can be made when looking at the application as a whole is that this is not a religious institution or accessory use under the Town's zoning code. That there is no basis for the application of RLUIPA to the facts of OVCN's application and intended use. That Arizona law is clear and the Town has the right to interpret its zoning code not OVCN and the Town should act to require OVCN to go through the zoning process like all other land owners wishing to change the zoning of their property. Such a process will allow our clients to voice their concerns about such a change in the proper forum and allow the process to move forward in the way it was designed.

Sincerely,

THOMPSON•KRONE, P.L.C.

A handwritten signature in black ink, appearing to read "Evan L. Thompson", is written over the typed name. The signature is fluid and cursive, with a large loop at the end.

Evan L. Thompson

ELT/hw
cc: clients