ACLU
AMERICAN CIVIL LIBERTIES UNION of COLORADO
FOUNDATION
Nathan Woodliff-Stanley, Executive Director
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June 29, 2018

VIA E-MAIL AND U.S. MAIL

Carrie Daggett
City Attorney
Fort Collins City Attorney Office
City Hall West
300 LaPorte Avenue
Fort Collins, Colorado 80521

Re: Fort Collins Mennonite Fellowship Application to Install Lockers

Dear Ms. Daggett:

We write on behalf of the Fort Collins Mennonite Fellowship (the "Mennonite Fellowship" or "Church") located at 300 East Oak Street in the City of Fort Collins (the "City").

Beginning on or before April 18, 2018, the City has been subjecting the Church to an unusual and, based upon our understanding, unprecedented "Minor Amendment" approval process for the installation of twenty publicly accessible lockers on Church property, to be made available to persons experiencing homelessness. The special hardships the City is imposing upon the Church target an essential component of the Mennonite Fellowship's ministry, and thus its religious exercise. The City actions to date, as well as its threatened actions, violate the Church's rights under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA") and the First and Fourteenth Amendments to the United States Constitution. We thus demand that, immediately, the City either declare that the Church's lockers do not require Minor Amendment approval or, without delay, approve the lockers' installation as recommended by City staff.

I. The Church Added Lockers as an Extension of its Ministry to People Experiencing Homelessness

Per its website, the Mennonite Fellowship is a Mennonite church near downtown Fort Collins, "called by Christ to be inclusive, compassionate, justice seeking and peace making." The Mennonite Fellowship practices the "radical inclusivity" of Jesus, which, according to the Church's website, "means working with, having compassion for, and getting to know people who, as Jesus said, are the 'least of us' and are often on the margins of society."

Consistent with its foundational religious beliefs, the Mennonite Fellowship has ministered to those who are on the margins, providing a range of outreach and services to people experiencing homelessness in Fort Collins. These services include twice-weekly dinners, temporary living quarters, and educational programming, all of which occur at the Church. The Church also serves as a warming shelter during the winter. And although the Church enjoys a steady membership, access to the Church's services and ministry is not conditioned upon membership. They are open to all who may need them.

In the spring of 2017, the City adopted a less welcoming approach. On March 21, 2017, the City Council passed an ordinance criminalizing behaviors commonly associated with people experiencing homelessness. Titled "Appropriate Use of Public Facilities" that ordinance made it an offense to sit, kneel, or lie on unapproved objects near transit facilities and public restrooms. The ordinance also made it unlawful to leave personal belongings unattended in public spaces.

Recognizing that the ordinance's "belongings ban" would effectively prohibit people experiencing homelessness from owning anything more than they could carry, the City then sought to pilot a public locker project, which would have allowed members of the community to store personal belongings in publicly accessible lockers located on a service agency's property. For the Mennonite Fellowship, that pilot project represented an opportunity to extend an essential component of its significant ministry to individuals experiencing homelessness. The project culminated in a service agreement between the City and the Church, signed on September 29, 2017, under which the Mennonite Fellowship would supply the lockers on the exterior of the church, as well as related support services. The City was to provide funding for the project. However, the City Council voted against funding the lockers on February 6, 2018.

Following City Council's rejection of the funding, City staff informed the Mennonite Fellowship that lockers would be permitted on the Church's property, and that the Church could proceed with the project if it funded the locker installation on its own. The Mennonite Fellowship then conducted its own fundraising, and purchased twenty used lockers for placement on its property. Thus, by the spring of this year, the Church was equipped with the funds, the lockers, and a calling to expand its comprehensive ministry to people experiencing homelessness. No mention was ever made of necessary zoning approvals for the lockers at the City Council's meeting in February 2018 or in the Church's contract with the City, although the City's Social Sustainability Department Director indicated in a May 2017 email that a Minor Amendment would be necessary to confirm the location of the lockers vis-à-vis a dumpster or trash cans.

II. The City has Subjected the Church's Locker Installation to an Unusual and Difficult Approval Unsupported by the City Code

On April 18, 2018, after the Church had received some of the lockers, it received a letter from a staff member in the City Planning, Development and Transportation Department ("PDT") purporting to require approval via the Minor Amendment permit process pursuant to Section 2.2.10 of the Fort Collins Municipal Code (the "Code"). Although the City had never before requested a Minor Amendment for other accessory uses or structures on Church's property, including the Church's existing ministry to the homeless or its storage sheds, the Mennonite Fellowship completed the required application. When the Church's pastor, Steve Ramer, inquired why the City was requiring an approval only for the locker use, a City official responded that the lockers served members of the public, and were therefore distinct from the Church's other ministries.

We understand that the City processes the vast majority of Minor Amendment applications administratively, as contemplated by section 2.2.10(A) of the Code. We recognize that section 2.2.10(A)(4) allows the PDT Director to refer, on a discretionary basis, such applications to a hearing officer or the Planning and Zoning Board. But we understand that the process typically unfolds over a month or two and is unremarkable. On the facts available, it is not even clear whether the City subjects other publicly accessible storage uses, like the dozens of "little free libraries" around town, to the Minor Amendment process in the first place. And though the City does require some secular uses, such as ATMs, to comply with the Minor Amendment process, the City issues those approvals administratively in a matter of weeks. The installation of lockers on the Church's property does not change anything about the Church's existing use of its property, as the installation of the lockers is consistent with the Church's longstanding ministry to persons experiencing homelessness.

The City has departed from its typical processes. You recognized as much in your May 31, 2018 email to the deputy city manager, assistant police chief, and PDT director, among others. In that email, you stated, "the approach being taken is not quite the same as [the City's] usual process." And presaging this letter, you cautioned that "the special discussions amongst staff could be used as a basis for arguing that we are treating the Church less favorably than other applicants based on the Church's religious practices (ministering to the homeless)." These statements appear to admit that the City recognized that its special treatment of the Church was likely unlawful.

We agree with your assessment. The City's approval process has featured multiple departures from standard practice, including but not limited to the following: (1) the City has subjected the Church to the Minor Amendment approval process without providing any Code support for that approach; (2) the PDT director referred the Church's application to the Planning and Zoning Board instead of processing it administratively; (3) the deputy city manager personally involved himself in the application process; and (4) the City has now on multiple occasions postponed the hearing on the application and in one instance removed the application from the Planning and Zoning Board's agenda just one day before the hearing. Items (2) through (4), we hasten to note, transpired *after* City staff issued a report confirming that the lockers meet the criteria for Minor Amendment approval.

At present, the City has provided notice that the Planning and Zoning Board will consider the application on July 19, 2018, but this history of postponements suggests that we cannot be confident that the application will indeed be considered on that date, nor can we be confident of City approval at that time.

III. The City has Singled Out the Church for Special Treatment and has Imposed Burdens that Violate the Constitution and Federal Law

These events have placed the City in a precarious position. Already, this unusual process evinces hostility to the Church's ministry, and the City's actions have called into question whether the lockers will be allowed at all. Both federal law and the Constitution prohibit governments from subjecting religious exercise to less-than-equal treatment and similarly prevent governments from imposing substantial burdens or unreasonable restrictions on religious institutions. Here, the City's actions have violated and threaten continued violations of RLUIPA as well as various federal constitutional provisions.

With RLUIPA, Congress aimed to prevent governments from miring churches in reviews and restrictions unique to religious exercise. Now, the City has done just that. First, under RLUIPA's "Equal Terms" provision, a

government cannot "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."[1] Unequal treatment includes processing an application by a religious organization on a path less favorable than others' applications.[2]

The City admits that it has placed the Church's application on a special and more difficult track relative to that reserved for secular uses. But equal means equal. The Mennonite Fellowship has now endured a months-long, politicized process that in secular cases takes only several weeks to resolve. We are not aware that the City routinely subjects storage uses that are clearly incidental to a property's primary use to the Minor Amendment process, much less submits those uses for Planning and Zoning Board Review. Indeed, the City did not require a Minor Amendment for the Church's unremarkable storage sheds. The City is violating RLUIPA's equal treatment prong.

Second, RLUIPA prohibits land use regulations that substantially burden an institution's religious exercise unless the government can show that the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest.[3] Courts have routinely held that social services provided by religious assemblies or institutions, such as soup kitchens and services for homeless populations, qualify as religious exercise.[4] In the absence of any code language requiring Minor Amendment approval of the locker use, the City has stated that lockers differ from other components of the Church's ministry in that they serve non-members. The City has apparently decided the lockers are somehow less central to the Church's ministry than are other uses. However, RLUIPA's substantial burden prong rejects this type of governmental inquiry into whether a particular practice is "fundamental" to a religion.[5] The City's rationale suggests that every church risks a more burdensome land-use approval process if the City decides that the proposed use is not sufficiently central to the church's ministry. That arbitrary and capricious approach alone is a substantial burden in violation of RLUIPA.[6] Moreover, the City's decision to subject this aspect of the Church's ministry to a discretionary Minor Amendment approval process, while not applying these same procedural burdens on other types of religious and non-religious uses, constitutes a substantial burden that cannot be justified with a compelling governmental interest or narrow tailoring.

Third, a government cannot "unreasonably limit[] religious assemblies, institutions, or structures within a jurisdiction."[7] Disparate treatment can constitute an unreasonable limitation as well.[8] The City's apparent policy of policing the boundaries of "religious exercise" along with its decision to apply its land use regulations so as to subject the Church to special burdens, makes it more difficult for churches to operate within the City. That difficulty in turn violates RLUIPA's "unreasonable limitation" prong.[9]

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[1] 42 U.S.C. § 2000cc(b)(1).
[2] *Rocky Mountain Christian Church v. Bd. of Cty. Comm'rs*, 613 F.3d 1229, 1236 (10th Cir. 2010)
[3] 42 U.S.C. § 2000cc(a)(1).
[4] *See, e.g., Harbor Missionary Church Corp. v. City of San Buenaventura*, 642 Fed.Appx. 726, 729 (9th Cir. 2016) (unpublished); *Layman Lessons, Inc. v. City of Millersville*, 636 F.Supp. 2d 620, 648-50 (M.D. Tenn. 2008).
[5] *See Grace United Methodist Church v. City Of Cheyenne*, 451 F.3d 643, 663 (10th Cir. 2006).
[6] *See Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 97 (1st Cir. 2013) (collecting cases discussing "substantial burden" jurisprudence).
[7] 42 U.S.C. § 2000cc(b)(3)(B).
[8] *Rocky Mountain Christian Church*, 613 F.3d at 1238.
[9] *See Rocky Mountain Christian Church*, 613 F.3d at 1238–39.

Finally, the City's actions also implicate the Constitution. The First Amendment prevents the government from interfering with the free exercise of religion. Just weeks ago, the Supreme Court confirmed that "[t]he Free Exercise Clause bars even subtle departures from neutrality on matters of religion."[10] Indeed, the First Amendment "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion *or distrust of its practices*, all officials must pause to remember their own high duty to the Constitution and the rights it secures."[11] Differential treatment of religious exercise versus secular acts can indicate impermissible hostility.[12]

The City has singled out the Mennonite Fellowship for special treatment. The City itself has admitted as much. City staff's evenhanded recommendation of approval notwithstanding, the Church's application is not receiving the "neutral and respectful consideration" to which it is constitutionally entitled.[13] Should the City choose to reject the Mennonite Fellowship's application, its actions to date give every reason to believe a court would find that rejection a violation of the Free Exercise Clause.

Additionally, the Fourteenth Amendment's Equal Protection Clause prevents the government from intentionally singling out a person or entity for special hardship without any rational basis for doing so.[14] Here, the City has subjected the Church to a separate and unusual approval procedure and has substantially delayed approval for reasons that appear arbitrary—indeed, the City has never made clear why the lockers require any approval at all.

IV. The Church Demands that the City Immediately Discontinue the Minor Amendment Process or Approve the Locker Installation

The City's special treatment of the Mennonite Fellowship's locker installation has placed a significant limitation on the Church's ability to minister to people experiencing homelessness. This matter is, accordingly, of the utmost importance to the Church. Despite the difficulties to this point, however, the Church remains willing to discuss the possibility of a resolution that avoids litigation concerning the above-described violations. The Church therefore respectfully requests that the City immediately determine that the locker installation does not require Minor Amendment approval, that it discontinue processing the Minor Amendment application for the lockers, and that it immediately return the Church's $350 application fee. In the alternative, the Church requests approval of the lockers, pursuant to the City staff report recommending the same, on or before July 19, 2018. We additionally respectfully request a response to this letter on or before July 9, 2018, confirming the approach that the City intends to take with respect to the requests set forth above.

The City's failure to approve the lockers on or before July 19, 2018 will compound the aforementioned RLUIPA and constitutional violations. Please be advised that, if the City fails to comply with the above requests, the

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[10] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, No. 16-111, 2018 WL 2465172, at *12 (U.S. June 4, 2018) (internal quotations omitted).
[11] *Id.* (emphasis added).
[12] *Id.* at *10.
[13] *Id.* at *9.
[14] *211 Eighth, LLC v. Town of Carbondale*, 922 F. Supp. 2d 1174, 1181 (D. Colo. 2013)

Mennonite Fellowship reserves the right to take appropriate legal action to ensure the City complies with its constitutional and statutory duties to treat the Church with impartiality.

Thank you in advance for your prompt attention to this matter. **Please reply by July 9, 2018.**

Very truly yours,

Mark Silverstein,
Legal Director, ACLU of Colorado

Otten, Johnson, Robinson, Neff
& Ragonetti, P.C.

Brian J. Connolly
In cooperation with the
ACLU Foundation of Colorado