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Via email at msilverstein@aclu-co.org

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In Re: Mennonite Fellowship Church Minor Amendment Application for Outdoor Lockers

Dear Mr. Silverstein and Mr. Connolly:

We have received and reviewed your June 29, 2018 letter regarding the Fort Collins Mennonite Fellowship (the "Mennonite Fellowship" or "Church") minor amendment application, under the City's Land Use Code, seeking to install twenty publicly accessible lockers on the property located at 300 East Oak Street (the "Minor Amendment").

The City is aware of its obligations under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc *et seq.* ("RLUIPA") and the Minor Amendment process complies with RLUIPA. As you recognize in your letter, RLUIPA allows the City to impose conditions on the lockers that are the least restrictive means to achieve a compelling government interest. The Minor Amendment process allows City staff to review the installation of the lockers for conformity with the City's Land Use Code, including provisions that address the safe and efficient use of land within the City. As we are sure you are aware, safety is a recognized compelling government interest. *See, Harbor Missionary Church Corp. v. City of San Buenaventura*, 642 F. App'x 726 (9th Cir. 2016); *Murphy v. Zoning Comm'n of New Milford*, 289 F. Supp. 2d 87, 108 (D. Conn. 2003), vacated, *402 F. 3d 342* (2nd Cir. 2005).

The Minor Amendment process, and imposition of conditions on the Church's use of outdoor lockers, does not substantially burden the Church in violation of RLUIPA because the Church can install and operate the lockers inside the Church without any approval from the Planning and Zoning Board or even administrative review by staff. The Tenth Circuit defines the term "substantial burden" to be one that places substantial pressure on an adherent not to engage in conduct motivated by a sincerely held religious belief. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F. 3d 1114, 1138 (10th Cir. 2013)(analyzing *Abdulhaseeb v. Calbone*, 600 F. 3d 1301 (10th Cir. 2010)). As your letter notes, the Church already conducts a range of services to homeless individuals within the Church and the City did not require a Minor Amendment for these services. Likewise, the City would not require a Minor Amendment for the Church to offer the lockers to homeless individuals within the Church and the Church would merely have to comply with applicable building regulations in its placement and operation of the lockers.

Because the Church chooses to offer the lockers outside, there will be impact to the nearby residential properties that includes increased foot traffic, noise and disturbances. Because of the high amount of public engagement on the issue, the Director has determined it appropriate that the Planning and Zoning Board review the application so that affected neighbors can be heard regarding their position on the impacts the lockers may cause to their property. While engaging in this public process may be an inconvenience to the Church, it does not rise to a substantial burden. *See, Abdulhaseed* 600 F. 3d at 1316 (every infringement of a religious exercise will not constitute a substantial burden).

The Church has not been treated differently than nonreligious applicants in the Minor Amendment process because no other applicant has proposed outdoor, unsupervised lockers for public use on a twenty-four-hour, seven day a week basis. The City did not receive the Church's Minor Amendment application until approximately two weeks before the May Planning and Zoning Board meeting, which did not give staff adequate time to review the impacts for this unprecedented proposed use. After numerous safety concerns were raised by surrounding neighbors, as well as Fort Collins Police Services, City Management directed staff to further review the City's proposed conditions for consistency with other existing outdoor locker programs. City staff has since analyzed at least ten cities in both the United States and Canada to better understand the impacts of the proposed lockers and to ensure that conditions would adequately address safety concerns and mitigate impacts to the surrounding neighbors.

Attached, is a copy of the latest Planning and Zoning board materials for the July 2018 meeting, which includes a staff report that recommends approval of the Church's Minor Amendment application with conditions the City believes are the least restrictive way to ensure the safety of

both the users of the Church's lockers, as well as the surrounding neighborhoods. The conditions also ensure the use of lockers are compatible with the character of the existing residential neighborhoods. These conditions include:

1. Fort Collins Mennonite Fellowship must install a security camera to monitor activities around the lockers. Fort Collins Mennonite Fellowship must retain security footage for 7 days.
2. Staff must be present during hours of operation.
3. The lockers may only be operated between 8 AM and 8 PM.
4. Fort Collins Mennonite Church must restrict access to the lockers outside of normal hours of operation.

My understanding is the Minor Amendment will be heard by the Planning and Zoning Board on July 19, 2018 and there are no current plans to continue the item.

While City staff is recommending approval, with conditions, of the Church's Minor Amendment, the Planning and Zoning Board still retains the discretion to approve, disapprove or approve with conditions the Church's Minor Amendment application, regardless of this recommendation. *See,* City Code Section 2-353(4). Any party-in-interest, as defined in City Code Section 2-46, may appeal the Planning and Zoning Board's decision to City Council, under the criteria outlined in City Code Section 2-48. *See also,* City Code 2-47.

Based on the above, the City cannot simply "approve of the lockers" on July 19, 2018, as your letter suggests, but must follow its internal Minor Amendment procedure, including any invoked appellate procedures. The Church must likewise participate in this process to exhaust its administrative remedies. *See, Grace Community Church v. Lennox Tp.,* 544 F. 3d 609, 613-614 (6th Cir. 2008)(citing *Murphy v. New Milford Zoning* Commission, 402 F. 3d 342 (2d Cir. 2005); *See also, Ciempa v. Jones*, 511 Fed. Appx. 781, 785 (10th Cir. 2013).

Considering the way you describe this situation in your letter, there may be some additional and more accurate information that we can provide that would be of help in resolving your concerns. The City's use of the Minor Amendment procedure in this instance is not unusual, nor was the process modified or created in any way for this particular project. The City's Planning and Zoning Board has routinely heard and decided minor amendment applications pursuant to the relevant Land Use Code provisions, with the Director having referred at least three minor amendment applications to the Planning and Zoning Board in staff's recollection of recent projects. It is also not unusual for the City to postpone planning and zoning items, or items for other decision makers, to allow staff to conduct additional research or analysis. To us, it seems

erroneous to call the City's conduct of its normal processes an "unprecedented" "hardship" by which the City intends to "target" the Church's religious activities.

Your letter also refers to the Council's adoption of Ordinance No. 043, 2017, in March 2017. Since the Church is neither in the downtown business district nor adjacent to a transit stop, and is private, rather than public, property, the Ordinance does not have any relevance to the Church's proposed addition of a bank of lockers on its property or even to the use of the public area adjacent to its property. However, it may be of further assistance to provide you with more information regarding that Ordinance, which you describe as "criminalizing behaviors commonly associated with people experiencing homelessness" and a "belongings ban." Such characterizations appear intended to paint Fort Collins as an intolerant and unwelcoming community. The referenced Ordinance was a measured step that restricted such actions as sitting and lying, or depositing and leaving unattended personal property on public sidewalks in the congested downtown business district between the hours of 9:00 a.m. and 2:00 a.m. Other restricted actions included sitting and lying in entrance or exit areas of public restrooms or in the restrooms themselves, sitting in flower planters or on other structures in the not designed and intended to be sat upon, and occupying the space in transit stop areas other than on benches, unless there is no bench space available. All restrictions under the Ordinance have numerous exceptions. We recall that Mr. Silverstein participated in the public dialogue in connection with the City's consideration of this Ordinance and, at the time, was expressly concerned about theoretical prospect of the imposition of jail sentences for violations of these ordinances. As noted in the context of the Ordinance, the Fort Collins Municipal Court does not jail offenders for violations of these provisions, and, as discussed below, refers such offenders to social service programs and other resources.

Finally, it appears that some explanation of the referenced May 31 email to City staff regarding this matter would be helpful. As noted there, "the approach being taken is not quite the same as our usual process" – in light of the indications from your client in communications with the City, as well as the potential for dispute under RLUIPA, City staff has taken particular care in attempting to work with your client, and in managing the process for Minor Amendment approval. The circumstances of this process have been unusual, in that your client first sought funding assistance from the City for its project, and after a substantial amount of deliberation and discussion, the City determined that it would not be the optimum use of City resources to fund this particular project in support of its goal of making homelessness in Fort Collins rare, short-lived and non-recurring. Understanding the commitments your client has made in connection with this project, City staff has taken special care in providing a fair and consistent process, in addition to the efforts that have been made to reach out to and work with your client to understand and develop ideas for ways to address the impacts the project is expected to have on

the surrounding neighborhood. The assertion that my email admitted "that the City recognized that its special treatment of the Church was likely unlawful" is superficially plausible, but actually wrong when considering the intent of the email and the full context of the City's interactions with this particular project.

We hope this letter gives you a better understanding of both the Minor Amendment process, and the City's consideration of the Church's application. Any allegations that are not addressed by this letter are expressly denied and the City maintains that it has complied with both RLUIPA and the First and Fourteenth Amendments of the Constitution related to the Church's Minor Amendment application.

The City of Fort Collins is attentive to the needs of homeless individuals within its community and has a robust Social Sustainability program that offers extensive resources and outreach to individuals experiencing homelessness within the City. *See,* https://www.fcgov.com/socialsustainability/. The City continues to actively analyze and fund local efforts to provide support and assistance to those experiencing homelessness, directly and indirectly, and to support mental and behavioral health and other social sustainability efforts in the community and the region. My office recently worked with the Fort Collins Municipal Court and the City's Office of Social Sustainability to create a Special Agency Sessions program that works with homeless defendants for alternative sentencing associated with quality of life crimes that includes obtaining social service benefits, drug/alcohol or mental health counseling and other available services. https://www.fcgov.com/municipalcourt/. Thus, while the City recognizes and respects the Church's homeless ministry within the community, the City must also respect the neighboring residents' reliance on the City's Land Use Code to ensure a safe and enjoyable community.

Sincerely,

Carrie Daggett
City Attorney

Christopher Van Hall
Assistant City Attorney