IN THE COURT OF APPEALS FOR THE
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE



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| Kevin Fisher, et al.<br><br>Plaintiffs/Appellees,<br><br>v.<br><br>Rutherford County Regional Planning Commission, et al.<br><br>Defendants/Appellants. | ) APPELLATE CASE NO. M-2012-01397-COA-R3-CV<br>) RUTHERFORD COUNTY CHANCERY CASE NO. 10CV-1443<br>) CHANCELLOR ROBERT E. CORLEW, III |

# BRIEF OF APPELLANTS

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ORAL ARGUMENT REQUESTED

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## ISSUES PRESENTED

1. Whether the Court erred in its June 1, 2012 Order when it held the Planning Commission violated the Open Meetings Act by publishing notice in its customary manner for the May 24, 2010 meeting where the site plan for the ICM Mosque was reviewed.

2. Whether the Court erred when it applied a different notice standard for the ICM Mosque because of the Court's conclusion the Mosque was of "great public importance" and "tremendous public interest."

3. Whether the Court erred by not specifying how it is to be determined when a matter is of "great public importance" or "tremendous public interest" or, in such event, what types and methods of notice would then be necessary or appropriate.

4. Whether the June 1, 2012 Order violates the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §2000cc, *et seq.* or the Tennessee Religious Freedom Act, Tenn. Code Ann. §4-1-407.

## STATEMENT OF THE CASE

### A. *Nature of the Case*

This case involves a claim that the Rutherford County Regional Planning Commission (the "Planning Commission") violated the Tennessee Open Meetings Act, Tenn. Code Ann. §8-44-101, *et. seq.*, by failing to provide adequate notice for its regularly scheduled meeting on May 24, 2010. At the May 24, 2010 meeting, the Planning Commission approved a site plan submitted by the Islamic Center of Murfreesboro (ICM) for the construction of a Mosque on property located at 2700 Veals

Road in Rutherford County, Tennessee. The Planning Commission handled the ICM site plan application in a manner consistent with other site plan applications, religious and non-religious. The trial court found that the Mosque was "a matter of great public importance" and a "matter of tremendous public interest." *See* Memorandum Opinion dated May 29, 2012 (R. Vol. 14 at p. 1806, 1808). The Court concluded that "given the significance of the matters decided and the overall general interest of the community as a whole" the notice given for the meeting was inadequate under law. *Id.* at 1809. The Court likewise found that because the notice was inadequate, the ICM site plan was void *ab initio*. *Id.*

The Defendants/Appellants ask this Court to reverse the decision of the trial court on several grounds. First, case law supports that the notice given for the regularly scheduled Planning Commission meeting where the ICM Mosque site plan was reviewed was adequate under law. Second, it would have been unlawful for the Planning Commission to apply any heightened notice standard to the ICM Mosque different from its customary practice, despite the trial court's errant conclusions to the contrary. The only differentiating fact from this site plan as compared to the many other religious meeting places in Rutherford County is that it was a Mosque. Third, the Court erred when it provided no basis or criteria by which one would determine when a matter is of "great public importance" in the future or what notice standard would then apply.

### B. *Course of Proceedings and Disposition Below*

The Plaintiffs' filed their original Complaint and an Amended Complaint in September, 2010 requesting an injunction to prevent and stop the construction of the ICM Mosque. R. Vol. I at 1, 66. The Rutherford County Chancery Court held a multi-day evidentiary hearing spanning approximately eight (8) days from September through November, 2010. TR. Vols. 15-25. At the conclusion of the injunction hearing, the Court denied the request for an injunction. TR Vol. 25, pp. 236-291; R. Vol. 4, p. 525.

Because the Court did not stop the construction of the Mosque and grant an injunction in 2010, the Mosque construction proceeded in due course. At the same time, discovery in the case proceeded. The Plaintiffs requested voluminous documents from the Defendants, including emails exceeding 10,000 in number. R. Vol. 5, p. 683. As a result of the Defendants' Motion to Dismiss, the Chancery Court issued a Memorandum Opinion dated May 17, 2011 and dismissed all causes of action raised by the Plaintiffs save only those surrounding the Open Meetings Act. R. Vol. 6, p. 783.

The matter proceeded to trial in April, 2012. TR. Vol. 26-28. After two days of trial, the Court took the matter under advisement. TR. Vol. 28 , p. 277. On May 29, 2012, the Chancery Court entered a Memorandum Opinion that was incorporated into an Order dated June 1, 2012. R. Vol. 14, p. 1803, 1806. In its Order, the Court found that "given the significance of the matters decided and the overall general interest of the community as a whole," the notice given for the May 24, 2010 Planning Commission meeting was inadequate under the Tennessee Open Meetings Act. *Id.* As a result, the Court found that all actions taken relative to the ICM site plan at the May 24, 2010 meeting were void *ab initio*. *Id.* Thereafter, Defendant Rutherford County filed a Motion

for Stay requesting the Court stay its June 1, 2012 Order pending appeal. R. Vol. 14, at 1844. The Stay Motion was heard on July 2, 2012 and denied. *Id.*

On July 18, 2012, the United States of America filed suit against Rutherford County in the United States District Court in Case No. 3:12-0737 alleging that the June 1 Order entered by Chancellor Corlew violated RLUIPA. The Federal District Court granted a restraining order that required Rutherford County to process the ICM construction in a typical fashion, including completing final inspections and issuing a certificate of occupancy. As a result, the Mosque is now a completed structure.

## SUMMARY OF FACTS

The ICM purchased property on Veals Road in Rutherford County, Tennessee in order to build a Mosque. Under the Rutherford County Zoning Resolution ("Zoning Resolution"), there are certain "uses of right" within Rutherford County. R. Vol. 17, p. 213, Exhibit 10; Zoning Resolution. Among the "uses of right" are "religious meeting places." *Id.*; *See* Zoning Resolution at Section 1.04. Where there is a "use of right," the owner is not required to have the property rezoned before it can use the property for the specified use. *See* Testimony of Doug Demosi TR. Vol. 17, p. 221. To that end, when the ICM purchased the property on Veals Road, it was entitled by right to utilize the property as a religious meeting place.[1] *Id.* at 213-214.

[1] The Court concluded the Mosque is a religious meeting place. In a Memorandum Opinion dated August 29, 2011, the trial court also found that Islam is a religion. The Court found that it is a "well established principle" that "under the laws which have been established, those who are adhering to Islam are entitled to pursue their worship in the United States just as are those who are adhering to more universally established faiths. We are all very familiar with the legal principle that in the United States, all citizens enjoy the right to freedom of religion and freedom of speech." R. Vol. 8 at 994.

Despite that the ICM could use its property as a religious meeting place without any rezoning, the Zoning Resolution still required the submission of a site plan. *See* Zoning Resolution at Section V. To that end, the ICM submitted a site plan to the Rutherford County Planning Department, which was to be reviewed by the Planning Commission. TR. Vol. 17, p. 213-214.

Under the Zoning Resolution, site plans are only reviewed by the Planning Commission. *Id.* at 216. They are not reviewed by the County Commission. *Id.* at 217. In reviewing a site plan, the Planning Commission is acting as an administrative body to determine whether the site plan meets the requirements of the Zoning Resolution. *Id.* at 19. If it meets the requirements, it must be approved. *Id.*; Zoning Resolution Sec. 5.05. With the exception of the administrative review of the site plan, the Planning Commission had no authority to prevent the ICM from using its property consistent with its "use of right." *Id.* at 216.

The Planning Commission generally holds two meetings per month. *See* Testimony of Commissioner Will Jordan, TR. Vol. 20, at 265. At one meeting, the Planning Commission considers those matters that do not require a public hearing under applicable Tennessee land use statutes. *Id.* At the other meeting, the Planning Commission considers those land use decisions that require a public hearing. *Id.* Under the Zoning Resolution, a public hearing is not required for a site plan review. TR. Vol. 17 at 221; *See* Zoning Resolution at Section V.

The ICM site plan was scheduled to be reviewed at the regularly scheduled Planning Commission meeting on May 24, 2010. TR. Vol. 17, at p. 217. Because the Planning Commission meeting at which the ICM site plan was to be reviewed did not

require a public hearing, the only notice required for the meeting was that necessitated by the Open Meetings Act. *Id.* at 222. Therefore, the Rutherford County Planning Department gave notice in its customary way. *Id.* at 222-223. Among the methods was to have an agenda of the meeting available at the Planning Department office, a meeting notice ran in *The Murfreesboro Post*, and a meeting notice was available on *The Murfreesboro Post* website. *See* Memorandum Opinion and Order May 29, 2012 (R. Vol. XIV at p. 1806-1813). In 2007, the Tennessee Attorney General issued an opinion that *The Murfreesboro Post* is a "newspaper" or "newspaper of general circulation" for purposes of publishing most official notices. Tenn. Atty. Gen. Op. No. 07-62. As a result, running a notice in *The Murfreesboro Post* had been a method for giving notice of regularly scheduled meetings for a period of years. *Id.* at 223.

The meeting notice that ran in *The Murfreesboro Post* read as follows:

> LEGAL NOTICE
> OF PUBLIC MEETING
>
> The Rutherford County Regional Planning Commission announces the following meetings:
>
> - May 10, 2010 at 6:00 PM in the Historic County Courthouse located in the Public Square, Murfreesboro, TN.
>
> - May 24, 2010 at 9:00 AM in the Planning Department Mezzanine Meeting Room located at 1 South Public Square, Murfreesboro, TN
>
> All interested parties are invited to attend.
>
> TO BE RUN IN THE MURFREESBORO POST: May 2, 2010

TR. Vol. 17 at 224-225, Exhibit 8.

This notice did not differ in any material respect with any other meeting notice supplied on behalf of the Planning Commission. *Id.* at 224. The notice ran 22 days before the meeting and gave notice of the public body that would be meeting; the time and location; and invited the public. *Id.* There was no requirement under the Zoning Resolution that an agenda be published with the notice. *Id.* at 225. Because there was no rezoning and it was merely a site plan, the Zoning Resolution did not require notices to be mailed to residents. *Id.*

The meeting on May 24, 2010 proceeded like any other. *See* DVDs of the May 24, 2010 meeting. It was an open meeting that members of the public could attend. *Id.* The meeting was recorded and transmitted by the Rutherford County Channel 19 television station. *Id.* At the meeting, the Planning Commission reviewed and approved the ICM Mosque site plan. *Id.* In every material respect, the ICM site plan was handled consistent with the Zoning Resolution. TR. Vol. 17 at 265. It was likewise handled consistent with prior practices of the Planning Department. *Id.*

Shortly after the site plan approval, the Plaintiffs and others began to display their unhappiness about the Mosque. *See e.g.* Memorandum Opinion August 29, 2011, R. Vol. 8, p. 994. This culminated in the Plaintiffs' September, 2010 Complaint in the Rutherford County Chancery Court which, among other things, requested an injunction to prevent and stop the construction of the ICM Mosque. R. Vol. 1, at 1. The Rutherford County Chancery Court held an evidentiary hearing on the injunction request spanning approximately eight (8) days from September through November, 2010. TR. Vols. 15-25. A huge amount of the hearing dealt with issues relating to whether Islam was religion, terrorism, alleged "ties to terrorism" by the ICM, alleged malicious

motivations by the County and other matters well outside the scope of a claim under the Open Meetings Act.

Part of the testimony offered by the Plaintiffs at the injunction hearing was Frank J. Gaffney, Jr., President of the Center for Security Policy in Washington, D.C. TR. Vol. 15, p. 43. Mr. Gaffney was asked to offer testimony on things such as Shariah Law, the Muslim Brotherhood, the North American Islamic Trust and whether Islam is a religion. *Id.*

During the preliminary injunction hearing, George Dean testified on behalf of the Defendants and was recognized by the Court as an expert witness on site plans in Tennessee. *See* testimony of George Dean, TR. Vol. 24 at 16. Mr. Dean testified that a site plan approval is a process where a planning commission reviews the layout of the facilities on a particular site. *Id.* at 17. In such a circumstance, the property is already properly zoned and so the site plan reviewed does not include a rezoning of the property. *Id.* at 17-18. As in this case, where the use is already a use of right, no rezoning would even be required. *Id.* According to expert Dean, it is customary that a planning commission would be the reviewing body of a site plan. *Id.* at 19. There is no public hearing required with a site plan review. *Id.* at 23. In fact, administrative review without a public hearing is consistent with the process all across middle Tennessee. *Id.* at 23-24.

Mr. Dean, as an expert on site plans, testified that he is not aware of any requirement that an agenda be published with the notice for a site plan meeting. *Id.* at 24-25. Mr. Dean's testimony was that the notice given in this case, which he had reviewed, was adequate. *Id.* at 25. He likewise testified that, as relates to site plan

review, it would be improper for a planning commission to consider the denomination or faith of the religious applicant or to prefer one religion or denomination over another. *Id.* at 27. In summarizing his testimony, he was asked:

> Q. In your expert opinion, based on all you reviewed, did Rutherford County fail to follow the law in any respect that you could discover?
>
> A. No, I - - I think they complied entirely.

*Id.* at 29.

At the conclusion of the injunction hearing, the Court denied the injunction and the request to stop construction of the Mosque. TR. Vol. 25, pp. 236-291; R. Vol. 4 at 525.

In May of 2011, the Court granted much of the Defendants' Motion to Dismiss. The Plaintiffs' then filed a Rule 59 Motion[2] resulting in a Memorandum Opinion dated August 29, 2011 to clarify portions of its previous rulings. In it, the Court found that the purpose of the Plaintiffs' action was to stop construction of the Mosque. R. Vol. 8 at 994 (where the Court found that "The Plaintiff's have sought . . . to have the Court halt the construction of a planned place of worship for a local Muslim congregation; a group which is already having services some few miles away . . .). The Court also recognized the issue was one of land use and such laws must be administered in a non-discriminatory manner. *Id.* at 975. The Court went on to rightly state:

> . . . [I]f the congregation at issue qualifies as a religion and the structure proposed qualifies as a structure for worship. . . the County must treat this application just as it treats other similar applications from religious groups . . . .

[2] On May 17, 2011, the Court entered an Order granting Defendants' Motion to Dismiss as to all aspects of the case, save the Open Meetings Act. The Plaintiffs' Rule 59 Motion followed.

*Id.* at 995. Moreover, despite the Plaintiffs' previous repeated assertions to the contrary, the Court recognized that "it has been established in our law that Islam is a religion." *Id.*

The matter proceeded to trial in April, 2012. TR. Vols. 26-28. During the trial, Elisha Hodge, the State of Tennessee Open Records Counsel, testified as an expert on behalf of the Defendants. TR. Vol. 28. Shortly after the May 24, 2010 meeting, Ms. Hodge was contacted by one of the Plaintiffs, Kevin Fisher, who made a complaint about the May 24 meeting. *Id.* at 211-214. As a result of this complaint, Ms. Hodge investigated the allegations in her customary manner. *Id.* at 212, 216. She ultimately concluded there was no violation of the Open Meetings Act and so testified at trial. *Id.* at 214-215; Exhibit 42.

The trial court took the matter under advisement and ultimately issued a Memorandum Opinion dated May 29, 2012 that was incorporated into a June 1, 2012 Order. R. Vol. 14, at p. 1803, 1806. As stated above, the Court concluded, among other things, that some heightened level of notice should have been given in this case because it represented a matter of "great public importance" and "tremendous public interest." *Id.* at 1808. Without giving any indication or insight into what type of notice the Court thought appropriate, it also invited the County to "re-notice" the meeting using the heightened standard and re-pass the site plan.[3] *Id.* at 1806. Also problematic, the Court Order gave no insight into how the Defendants would determine what future land use applications may be of "public importance" or, if one is, what notice is required. *See id.* at 1806-1813.

[3] Although perhaps facially enticing, there was no standard offered by which to know whether the County's notice of a new meeting would pass this new heightened, but unspecified, notice standard.

A Notice of Appeal was filed on June 21, 2012. Thereafter, the Defendants filed a Motion for Stay requesting the Court stay its June 1, 2012 Order pending appeal. R. Vol. 14, p. 1844. This Motion was heard on July 2, 2012 and denied. *Id.*

On July 18, 2012, the United States of America filed suit in the Federal District Court for the Middle District of Tennessee in Case Number 3:12-0737.[4] In its Complaint, the United States alleged that the Court's June 1, 2012 Order violated RLUIPA. The Federal Court then entered an injunction requiring Rutherford County to continue to process the ICM in the ordinary course of business including issuance of the certificate of occupancy. *See* Exhibit A to Appellants' Motion to Consider Post Judgment Facts. Moreover, the Federal Court, through Judge Todd Campbell, made several findings that are relevant here, including (i) that the Plaintiff carried its burden of showing that "Defendant's compliance with the Orders of the Rutherford County Chancery Court in this dispute violates RLUIPA"; and that (ii) compliance with the State Court's Orders imposes a heightened notice requirement regarding the Mosque which substantially burdens the Islamic Center's free exercise of religion without a compelling governmental interest." *Id.* As a result of these findings, the Federal Court required Rutherford County to undertake certain actions "notwithstanding the Orders of the Chancery Court of Tennessee Sixteenth Judicial District at Murfreesboro of June 1, 2012 . . ." including the following:

> 1. The County shall process the Islamic Center of Murfreesboro's request for a certificate of occupancy for the Mosque on Veals Road by performing forthwith a final building inspection; and

[4] This Court entered an Order dated November 9, 2012 granting the Appellants' Motion to Consider Post Judgment Facts and allowing Appellants to address the fact of the federal lawsuit.

2. If the building complies with applicable codes and regulations, the County shall issue, on or before July 19, 2012, the certificate of occupancy for the Mosque on Veals Road; if the County determines that the building does not comply with applicable codes and regulations, then the County shall immediately notify the Islamic Center of the specific deficiencies and shall promptly reinspect the building after the Islamic Center informs the County that it has corrected the deficiencies.

*Id.* at p. 4.

As a result, Rutherford County inspected the Mosque and issued the certificate of occupancy to the ICM. The Mosque is now complete and being used by the ICM.[5]

## STANDARD OF REVIEW

The standards appellate courts use to review the results of bench trials are well settled. *See C-Wood Lumber Co., Inc. v. Wayne County Bank*, 233 S.W.3d 263, 271 (Tenn. 2007). With regard to a trial court's findings of fact, the appellate courts review the record *de novo* and will presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. *Id.*; Tenn. Rule App. Pro. 13(d). If a trial court has not made a specific finding of fact on a particular matter, the appellate court will review the record to determine where the preponderance of the evidence lies without employing a presumption of correctness. *Id.*; *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997). While there exists a presumption of correctness, an appellate court is not bound to leave the trial court's findings of fact undisturbed if it determines that the aggregate weight of the evidence demonstrates that a finding of fact

[5] On July 19, 2012, the Chancery Court stayed its Orders that were at "variance" with the federal court under the "doctrine of federal preemption." R. Vol. 14, at p. 1845.

other than the one found by the trial court is more probably true. *Wayne County Bank*, 233 S.W.3d at 261; *Parks Props v. Maury County*, 70 S.W.3d 735, 742 (Tenn. Ct. App. 2001).

There is no presumption of correctness with respect to conclusions of law. *Wayne County Bank* 233 S.W.3d at 271. Therefore, appellate courts review of a trial courts' resolution of any legal issues without a presumption of correctness and reach their own independent conclusions with regards to these issues. *Id.*; *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn. 2001).

## LAW AND ARGUMENT

### I. *The trial court erred when it concluded the notice provided for the May 24, 2010 Planning Commission meeting was inadequate under law.*

The trial court concluded that the Defendants violated the Tennessee Open Meetings Act because the notice for the May 24, 2010 Planning Commission meeting was inadequate. The Open Meetings Act requires little in terms of notice for regularly scheduled meetings. Tennessee Code Annotated §8-44-103(a) states, in part, that for a regular meeting "[a]ny such governmental body which holds a meeting previously scheduled by statute, ordinance, or resolution shall give adequate public notice of such meeting." Tenn. Code Ann. §8-44-103(a).[6] The Tennessee Supreme Court has

[6] The Plaintiffs have repeatedly argued, incorrectly, that the standard announced in *Englewood Citizens for Alternative B v. The Town of Englewood*, 1999 WL 419710 (Tenn. Ct. App. 1999) applies to this case. However, the Tennessee Court of Appeals made clear that the *Englewood* standard applies only to "special called meetings." To that end, the *Englewood* Court said "[o]ur determination of adequate public notice is given only in respect to T.C.A. §8-44-103(b) for special meetings under the Sunshine Act and not for regularly scheduled meetings under T.C.A. §8-44-103(a)." 1999 WL 419710 at *2 n.1. The meeting in question in the case at bar was a regularly scheduled meeting – not a special meeting.

adopted a "totality of the circumstances" approach to determine whether a given notice "fairly inform[ed] the public." *Memphis Publ'g Co. v. City of Memphis*, 513 S.W.2d 511, 513 (Tenn. 1974). In considering the requirements of notice, the Tennessee Supreme Court has observed:

> We think that it is impossible to formulate a general rule in regard to what the phrase "adequate public notice" means. However, . . . adequate public notice means adequate public notice under the circumstances, or such notice based on the totality of the circumstances as would fairly inform the public.

*Memphis Publ'g Co.*, 513 S.W.2d at 513.

Tennessee law contemplates two separate standards for notice under the Open Meetings Act: that required for a regular meeting; and that required for a special meeting. *See* Tenn. Code Ann. §8-44-103(a)-(b). The notice at issue in this case was for a regular meeting – not a special meeting. For that reason, cases that have repeatedly been relied upon by the Plaintiffs to discredit the notice and argue the Court should be concerned about things of "pervasive importance" do not have direct application here. *See Englewood Citizens for Alternate B v. Town of Englewood*, 1999 WL 419710 (Tenn. Ct. App. 1999) (where the court set out a three pronged analysis to analyze notices for a special meeting but expressly limited the opinion to only special meeting.); *Neese v. Paris Special School District*, 813 S.W.2d 432 (Tenn. Ct. App. 1990) (where the court found that a special meeting of the PSSD to consider clustering was of "pervasive importance" and found the associated notice to be inadequate).[7]

[7] The Court in *Town of Englewood* made reference to the *Neese* case but noted that it dealt with a "special meeting." *Town of Englewood*, 1999 WL 419710 at *3. *Neese* has no application here because the meeting at issue in this case was a regularly scheduled meeting.

A review of case law dealing with notices for regular meetings makes clear the notice in this case was adequate. In *Souder v. Health Partners, Inc.*, the Court reviewed a notice for a regularly scheduled meeting that included only the name of the entity meeting, the date, the time, and the location of the meeting. 997S.W.2d 140, 150 (Tenn. Ct. App. 1998). The notice in *Souder* read as follows:

> [t]he Board of Trustees of West Tennessee Healthcare will meet in the City-County Conference of Jackson-Madison County General Hospital at 5 p.m. on Tuesday, _____.

*Souder,* 997 S.W.2d at 150. In determining that this notice was adequate, the court stated:

> In view of the totality of the circumstances, the notice of the meeting comports with the provisions of the Act. Notice was given to the media in order to notify the public of the meeting. The notice provided the public with a reasonable opportunity to be present at the meeting . . . . Furthermore, while Souder protests the contents of the notice in not referring to the proposed action of limiting the physician network, the meeting was not limited to this sole subject. The agenda of the meeting presented several different areas regarding the business of the district. Thus, failing specifically to state in the notice the issue concerning HP did not make the notice inadequate in light of the several purposes of the meeting. We are of the opinion that notice was given which "would fairly inform the public" under the circumstances.

*Id.*

Similar to *Souder*, the notice in the case at bar was provided to the media and ran in *The Murfreesboro Post.*[8] The notice was for a regularly scheduled meeting where other customary items would also be considered at the meeting. The public was

[8] The *Souder* opinion found adequate that the notice was "sent" to the media, without any finding it was actually published. Here, it is undisputed that the notice actually ran in *The Murfreesboro Post.* Thus, the notice criteria here easily exceed those in *Souder.*

informed of the meeting despite that no "public hearing" was required for the site plan review. Based on *Souder*, the notice in the case at bar was legally adequate.

Even with the heightened analysis in dealing with special meetings, there is still no requirement that a notice run in a newspaper. As relates to notices for special meetings, the courts have set out a three-pronged analysis: the posting location; the contents of the notice; and the time of posting. In *Englewood*, the Court found that posting notice for a special meeting at city hall, the post office, and a bank was adequate in terms of a posting location. *Englewood*, 1999 WL 419710 at *2. There was no posting in a newspaper at all. Similarly, in *Kinser v. Town of Oliver Springs*, the Court found that notice of a special meeting posted inside city hall, over the entrance to the police department and council room, and at the post office was adequate. *Kinser*, 880 S.W.2d 681 (Tenn. Ct. App. 1994). Given that the notice requirements for regularly scheduled meetings are less than special meetings, notice in a newspaper and, more specifically, a newspaper of general circulation such as *The Murfreesboro Post,* is clearly adequate.

While reasonable notice must be made, there is also an obligation on interested members of the public to investigate. In *Lewis v. Cleveland Mun. Airport Authority*, the court stated that the notice requirement could be couched in terms of whether there was sufficient information "for the individuals receiving the notice to make further inquiry if they wished to do so." *Lewis*, 289 S.W.3d 808, 820 (Tenn. Ct. App. 2008). The Court in *Lewis* also cited *Irene Neighborhood Ass'n v. Quality Life*, 2002 WL 1050264 at *7 (Tenn. Ct. App. 2002) for the proposition that "[W]here circumstances are such that a reasonably prudent person should make inquiry, that person is charged with knowledge

of the facts reasonable inquiry would have revealed." *Id.* In the case at bar, an interested person could have easily discovered when and where the Planning Commission regularly met and, more specifically, the relevant information concerning the meeting on May 24, 2010. The Planning Commission regularly met two times per month in the same locations and the notice of these meetings was regularly place in *The Murfreesboro Post.*

The only expert on open meetings at trial, Elisha Hodge, Open Records Counsel for the State of Tennessee, testified on behalf of the Defendants. *See* TR. Vol. 28 at 200, 201, 209. In her role as Open Records Counsel, Ms. Hodge deals with questions, training, and investigations related to the Open Records Act and Open Meetings Act all across Tennessee. *Id.* at 204-205. Among other things, she offers informal advisory opinions and performs presentations and training. *Id.* at 205-206. To that end, her office is under a legislative charge to respond to inquiries from governmental entities and citizens, as well as to educate. *Id.* at 207.

Ms. Hodge received a complaint from one of the Plaintiffs, Kevin Fisher, in June, 2010 related to the May 24, 2010 Planning Commission meeting. *Id.* at 211-213. After investigation, Ms. Hodge authored an opinion letter dated June 22, 2010 in which she opined that the Planning Commission had not violated the Open Meetings Act. *Id.* at 214-215; Exhibit 42.[9] In testifying within her expertise of the Open Meetings Act, Ms. Hodge clarified that there is a distinction between special meetings and regularly called meetings. *Id.* at 216-217. While case law has drawn a distinction as to what types of

[9] Ms. Hodge testified that she conducted a thorough investigation including communication exchanges and information gathering with Mr. Fisher, communication with the Planning Department, review of relevant case law, review of statutory authority, and review of the Zoning Resolution. *Id.* at 212, 216.

notices are required for specially called meetings, the requirements for regular meetings are very limited. *Id.* at 217.[10]

With respect to regularly scheduled meetings, Ms. Hodge's expert testimony was that there is no requirement that an agenda be published with a notice. *Id.* at 217. There is no requirement that notice be provided on a website. *Id.* at 218. There is no requirement that notice be placed in a "newspaper of general circulation." *Id.* There is no requirement that the notice even appear in a newspaper. *Id.* at 218-219. In fact, Ms. Hodge was aware of cases where notice did not appear in any newspaper at all. *Id.* There is no obligation to run notice on television or on the radio. *Id.* There is no obligation in Tennessee that a notice reach any particular percentage of people. *Id.* at 220. There is nothing that requires an analysis of who received actual notice. *Id.*

In drawing the conclusions that she did, Ms. Hodge reviewed and relied in part on several cases, including *Englewood*, *Memphis Publ'g Co.* and *Souder*. *Id.* at 223. In responding to questions from the Court, Ms. Hodge rightly testified that the notice that was published in *The Murfreesboro Post* was adequate. *Id.* at 245. Important, Ms. Hodge was qualified as an expert on open meetings. There was no testimony offered by the Plaintiffs', expert or lay, to rebut or refute the testimony Ms. Hodge offered.

While notice in a newspaper of general circulation is not a legal requirement, the notice in this case was published in a newspaper of general circulation - *The Murfreesboro Post*. In 2007, the Tennessee Attorney General authored an opinion that *The Murfreesboro Post* "is a 'newspaper' or 'newspaper of general circulation' for the

[10] The Planning Commission has historically had one day meeting per month for matters that do not require a public hearing (such as a site plan) and one evening meeting per month for public hearings. *See* testimony of Commissioner Will Jordan, TR. Vol. 20 at 265.

purpose of publishing most official notices," with the exception of election notices. Tenn. Op. Atty. Gen. No. 07-62. In 2009, while reviewing a request from the *Rutherford County Reader*, the Attorney General again referred to *The Murfreesboro Post* as a newspaper of general circulation. Tenn. Op. Atty. Gen. No. 09-137 and fn. 1.

There has not been any case, Attorney General Opinion or other information that has called into question the propriety of using *The Murfreesboro Post* as a 'newspaper of general circulation.' Based, in part, on a legitimate reliance on the Attorney General Opinion, *The Murfreesboro Post* was the customary location for publishing Rutherford County meeting notices for several years prior to 2010.

At trial, Ronald Fryar, the publisher of *The Murfreesboro Post* and President of The Murfreesboro Post, LLC, testified. *See* testimony of Ronald Fryar, TR. Vol. 27, 106, 107. In comparing *The Murfreesboro Post* in 2007 when the Attorney General Opinion was issued with May, 2010, when the notice at issue ran, the similarities were striking. In both 2007 and 2010, *The Post* was a free publication with "rack and stack" distribution. *Id.* at 115. It was available in all zip codes within the County in both 2007 and 2010. *Id.* at 116. *The Post* was published on Sundays and was free of charge. *Id.* at 116-17. During both periods of time, its content was general community information in columns. *Id.* at 117. According to Mr. Fryar, Rutherford County had been regularly running its meeting notices in *The Post* since 2007. *Id.* at 125. *The Post* also ran monthly notices for the City of Murfreesboro. *Id.* at 123. The portion of the paper dedicated to notices was substantial. In fact, *The Post* typically had as many as five (5) pages of legal notices. *Id.* at 124. In late 2010, *The Murfreesboro Post* had a circulation audit performed by Certified Audit Circulations (CAC), which is one of three

companies traditionally used by the newspaper industry for verification and validation of circulation. *Id.* at 129-30. Supporting Mr. Fryar's testimony, the audit covered the time period of May 2010, when the notice at issue appeared in *The Post*. *Id.* at 131.[11] Given that *The Post* was a newspaper of general circulation to the Tennessee Attorney General in 2007 – it certainly still was in 2010.

Virtually all the facts relied upon by the Court to decide the notice was inadequate were error. Moreover, the notice obligations and the distinctions upon which the June 1, 2012 Order were based have no foundation in law. The trial court concluded that "better" prior notice was needed "given the attention this matter has achieved *subsequently*." *See* Memorandum Opinion, R. Vol. 14 at 1810 (emphasis added). Despite the Court's finding, there is no law that supports a heightened notice requirement for a regularly scheduled public meeting because it later generates public interest. The Trial Court found that "perhaps greater publicity" would have been attained by offering information regarding this "particular agenda item at issue here." *Id.* There is no legal basis to require publication of an agenda. Moreover, there was no history of publishing an agenda and, thus, no basis to require it just for the Mosque. The Court alluded to notice by radio and television. *Id.* at 1810-1811. However, there is likewise no requirement to place notice on television or radio.

The Court noted certain commissioners did not receive actual notice. *Id.* at 1809. There is no basis to suggest whether a notice was adequate is based on who actually receives notice. In fact, all the notice in the world would not insure that anyone would see it or look at it. Similarly, there is no legal requirement to send actual notice to

[11] *The Murfreesboro Post* is also a member of the prestigious National Newspaper Association. *Id.* at 136-137.

neighbors. The Trial Court spent significant time analyzing where *The Murfreesboro Post* is circulated by noting it is "in racks in some 300 locations . . ." and listing the zip codes in which it was available. *Id.* at 1807-1808. Ironically, the Court then declined to address *The Posts* request for Declaratory Judgment, which would have required an analysis of these very facts. Instead, the Court wrongly analyzed these facts to consider the legitimacy of this method of notice. Thus, when notice in a newspaper is not a legal requirement to begin with. The fact the meeting was noticed in a newspaper of general circulation is itself adequate notice and going beyond the legal requirements. In reality, the only discernible objective legal requirement under case law is that the notice include the name of the entity meeting, the date, the time, and the location of the meeting. *See Souder*, 997 S.W.2d at 150; testimony of Open Records Counsel at 223. The notice here certainly met those conditions and was published in a newspaper of general circulation. The trial court must be reversed.

Rutherford County has reviewed many religious oriented site plans since 2000 and handled them consistent with the Mosque. *See* Interrogatory Answers of Assistant Planning Director Elizabeth Emslie at No. 20, R. at 1431. The testimony was that this application was not treated more favorably or harshly than any other site plan. *See* testimony of Commissioner Jeff Phillips, TR. Vol. 20 at 343. The Court apparently agreed that this was how notice was customarily accomplished when it found that the notice was placed in *The Post* "simply because this was the way business was generally accomplished." *Id.* at 1811. The Court recognized it was a "regularly scheduled meeting," but some "better" notice was nonetheless necessary "where an issue of major public importance is discussed." *Id.* Simply put, there is no legal basis

to identify the Mosque as an issue of "major public importance" based simply on the fact it was a Mosque, nor to require "better" notice because of public interest. The Court erred its Order should be reversed.

Any citizen wanting to know about public meetings could have easily apprised themselves of sought after information and chosen to attend the meeting. As discussed above, site plan reviews are not "public hearings." However, the right to notice does not carry with it the right to participate. On the contrary, the court in *Whittemore v. Brentwood Planning Commission*, stated there is no right to participation in a meeting - there is only a right to notice, and stated:

> The Sunshine Law gives citizens the statutory right to attend the meetings of state and local governmental bodies and agencies. However, it does not give citizens the right to participate actively in all public meetings nor does it require public officials to depart from their agenda or to interrupt their business to accommodate the public's demands to be heard.

*Whittemore v. Brentwood Planning Com'n, et al.*, 835 S.W.2d 11, 18 (Tenn. Ct. App. 1992).[12] Thus, the reality is that the public would not have had a right to speak at the meeting, which the Trial Court recognized when it noted that "we do not intend through our ruling here to suggest . . . any entitlement of the public to a public hearing." *Id.* at 1813.

In the case at bar, the notice clearly met the applicable requirements for a regularly scheduled meeting. The notice was published in *The Murfreesboro Post*, a

[12] It is worth noting that Section V of the Zoning Resolution does not allow a public hearing on a site plan review. Thus, even if many people showed up for the open meeting, they would not have had the right to participate in the meeting. Site plans are an administrative review and, thus, the public could not have lawfully influenced that review. If the site plan met the requirements (which it did), then there was no option but to approve.

newspaper recognized as a newspaper of general circulation by the Attorney General. The notice included information about the governmental entity that was meeting, the time, the date, and the location. The notice was published on *The Murfreesboro Post* website and the agenda was available at the Planning Commission office. The Court's conclusions that the notice was inadequate were clearly based on criteria that have no basis in law. The Court's Order must be reversed.

## II. *The Court Order must be reversed because it violates RLUIPA and the Tennessee Religious Freedom Act.*

The June 1, 2012 Order must be reversed because it violates the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §2000cc. For similar reasons, the Order also violates the Tennessee Religious Freedom Act (TNRFA), Tennessee Code Annotated §4-1-407.

### A. *The June 1, 2012 Court Order violates the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §2000cc, et. seq.*

The Religious Land Use and Institutionalized Persons Act (RLUIPA) prevents discrimination against religious groups in land use decisions. To that end, RLUIPA provides, in part, as follows:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution –
>
> (A) It is in furtherance of a compelling governmental interest; and

> (B) Is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §2000cc(a)(1).

> The statue applies in any situation in which:
>
> the substantial burden is imposed by the implementation of a land use regulation or system of land use regulations, under which a governmental makers, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

42 U.S.C. §2000cc(a)(2)(C).

RLUIPA applies to any imposition or implementation of a "land use regulation." The term is defined the same for all of the various sections of RLUIPA as "a zoning or land marking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land). . . ." 42 U.S.C. §2000cc-5(5). This definition can encompass a wide range of regulatory action by a local government. For example, the Sixth Circuit Court of Appeals applied RLUIPA in a case involving the denial of a special use permit in *Living Water Church of God v. Charter Twp. of Meridian*, 258 Fed. Appx. 729 (6th Cir. 2007). Similarly, the 6th Circuit analyzed RLUIPA when bed and breakfast regulations were applied to a religious retreat. *DiLaura v. Ann Arbor Charter Twp*, 112 Fed. Appx. 445 (6th Cir. 2004). The court in *Layman Lessons, Inc. v. City of Millersville*, held, in part, that a city official informing a church that its certificate of occupancy application would be denied because of a proposed ordinance was a "land use regulation" under RLUIPA. 636 F.Supp.2d 620, 646 (M.D. Tenn. 2008).

In the Chancery Court's June 1, 2012 Order, it found that the customary notice as was given in this case was inadequate because the Mosque was, in the Court's opinion, a matter of "great public importance." Without doubt, the only meaningful difference between the ICM application and any other religious (or non-religious) site plan was that this was a Mosque. Elizabeth Emslie identified in her interrogatory responses a number of religious oriented site plans similar to the Mosque approved in a similar manner since the year 2000. *See* R. 1491, Interrogatory No. 20. There is simply no legal basis upon which to require a different notice because the site plan application was for a Mosque. On the contrary, RLUIPA forbids it.

To the extent there was uncertainty about the application of RLUIPA in this case, on July 18, 2012, the United States District Court for the Middle District of Tennessee entered a Restraining Order requiring Rutherford County to process the ICM application and, if it passed inspection, issue a certificate of occupancy to the ICM Mosque. Judge Campbell made a specific finding that the Chancery Court's June 1 2012 Order and the County's compliance created a RLUIPA violation. To that end, Judge Campbell found that "Defendants' compliance with the Orders of the Rutherford County Chancery Court violates RLUIPA." *See* Exhibit A to Appellants' Motion to Consider Post-Judgment Facts. The federal court also found that the Chancery Order did, in fact, require heightened notice. *Id.* While the Federal Court's findings and Order are not binding on this Court, federal decisions are recognized as persuasive authority in the state courts of Tennessee. *See State v. Carruthers*, 35 S.W.3d 516, 561, n. 45 (Tenn. 2000); *In re All Assessments*, 67 S.W.3d 805, 818-19 (Tenn. Ct. App. 2001).

The Order entered by the Trial Court requiring a heightened notice for the Mosque not only has no basis in law, it actually violates RLUIPA. The Order must be reversed.

### B. *The June 1, 2012 Court Order violates the Tennessee Religious Freedom Act (TNRFA)*

Effective July, 2009, the Tennessee enacted a religious freedom act similar to RLUIPA, but more stringent. Tennessee Code Annotated §4-1-407 is titled "Free Exercise of Religion; Burden by Government Entity." Among its provisions, T.C.A. §4-1-407(c) states as follows:

> (c) No government entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is:
>
> (1) Essential to further a compelling governmental interest; and
>
> (2) The least restrictive means for furthering that compelling governmental interest.

Tenn. Code Ann. §4-1-407(c). Moreover, the statute indicates that, except as provided, "no government entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability." *See* Tenn. Code Ann. §4-1-407(b).

The "exercise of religion" as contained in the Act means "the exercise of religion under Article I, §3 of the Constitution of Tennessee and the First Amendment to the United States Constitution." *Id.*(a)(2). To that end, the statute provides that "nothing in this section shall be construed to authorize any government entity to burden any religious belief." *Id.*(b)(1)(A). The prohibition against governmental entities in the statute includes "any branch, department, agency, commission or instrumentality of

government, any official or other person acting under cover of state law or any political subdivision of the state." *Id.*(a)(5).

In *Johnson v. Levy*, the Tennessee Court of Appeals had the opportunity to review the TNRFA and its application. In doing this, the *Johnson* court identified two important differences between the federal version (RLUIPA) and the Tennessee version. 2010 WL 119288 at *6 (Tenn. Ct. App. 2010). First, under the federal version, "demonstrating" is defined and "means the burden of going forward with the evidence and of persuasion." *Id.* (citing 42 U.S.C. §2000bb-2(3)). In other words, in a federal court, this is the burden of persuasion in a civil suit which is by a preponderance of the evidence. *Id.* On the other hand, the Tennessee version defines "demonstrates" to mean "meets the burden of going forward with the evidence and of persuasion under the standard of *clear and convincing evidence*." *Id.* (emphasis added). Thus, the standard under the TNRFA is higher than that under RLUIPA.

The second difference between federal law and the TNRFA noted by the court in *Johnson* is that in order for the government to justify a burden on religion under the federal version, it must demonstrate the proposed action is in "furtherance of a compelling governmental interest." *Id.* at *7 (citing 42 U.S.C. §2000bb-1(b)(1)). By contrast, under the Tennessee Act, the governmental agency must prove its proposed course of action is "*essential* to further a compelling governmental interest." *Id.* (citing Tenn. Code Ann. §4-1-407(c)(1) (emphasis added)). Thus, reasoned the court, the distinction between "in furtherance" and "essential" revealed the Tennessee General Assembly's intention to provide greater protection of religious freedom than that afforded under federal law. *Id.*

In a similar way that the Court Order violates RLUIPA, it likewise violates TNRFA. There certainly is no clear and convincing evidence in the record that would support a finding that the notice requirement created by the trial court is "essential" to a compelling governmental interest as required by the statute. In the end, the Court's June 1, 2012 Order required a notice standard for the Mosque different from that traditionally used. Moreover, the Court found the notice, clearly adequate under law, inadequate under the theory that the Mosque was of significant public importance and interest and, thus, warranted something more. The Court's finding is error, however, because the record reveals no clear and convincing evidence of an "essential" governmental interest that supports the Court's Order. As a result, the Court's Order must be reversed.

## III. *The Court Order should be reversed because it does not articulate workable guidelines.*

While the trial court found the May 24, 2010 regular meeting notice inadequate, it offered little or no guidance for the future. The Order offered no explanation on what makes an application of "great public importance" or how to recognize such an application in the future. Most applications that garner interest do not do so until during or after the meeting. In fact, in this case, the Court noted that the matter only gained a high level of attention "subsequently." Memorandum Opinion R. Vol. 14 at 1810. There is no reasonable basis upon which to conclude a planning department can predict public interest at the time an application is filed so as to know the type of notice required based on the standard of "subsequent" public interest.

Where a site plan application may be of "public importance" or "interest," the Order offered no guidelines of what type of notice would then be required. The Court simply said that "the County had the obligation under the totality of the circumstances to provide 'better' notice of the occurrence of the meeting and the fact that this matter was to have been considered." *Id.* As stated elsewhere in this brief, there is no basis or criteria for the vague standard of "better" notice. Moreover, the idea of notice of "this matter" is actually contrary to existing law both because no agenda is required and the Mosque could not lawfully be singled out. So, what type of notice would be "better?" The options are at least theoretically limitless up to budgeting constraints. To simply require "better" notice without any indication as to how to apply the new standard moving forward is error.[13] If any new standard for public notice is to be forged, it should be done by the legislature – not the trial court. The trial court's proffer of an entirely new legal standard without any guidance to application is unworkable, baseless and must be reversed.

## CONCLUSION

The Order entered by the trial court on June 1, 2012 is erroneous in that it requires a notice standard for a regularly scheduled meeting that is not supported by law. The Order violates RLUIPA and TNRFA. Finally, the Order offers no guidance for the future. For all these reasons and those set out in this brief, Appellants pray this Court reverse the Chancery Court and for such further and general relief the Court may deem proper.

[13] It is at least in part for this reason, among others, that any effort to re-notice the meeting as suggested by the trial court is perilous, at best.

Respectfully submitted,

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Certificate of Service

A true and exact copy of the foregoing pleading has been sent to all parties at the address set forth below by United States Mail on the 21st day of November, 2012:

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