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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18-1874

[Filed August 14, 2019]

RECOMMENDED FOR FULL-TEXT PUBLICATION
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KAMAL ANWIYA YOUKHANNA; WAFA CATCHO; MAREY JABBO; DEBI RRASI; JEFFREY NORGROVE; MEGAN MCHUGH,	)
Plaintiffs-Appellants,	)
v.	)
CITY OF STERLING HEIGHTS; MICHAEL C. TAYLOR, individually and in his official capacity as Mayor, City of Sterling Heights, Michigan,	)
Defendants-Appellees.	)

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

App. 2

No. 2:17-cv-10787—Gershwin A. Drain, District Judge.

Argued: April 30, 2019

Decided and Filed: August 14, 2019

Before: MERRITT, MOORE, and WHITE, Circuit Judges.

COUNSEL

ARGUED: Robert Joseph Muise, AMERICAN FREEDOM LAW CENTER, Ann Arbor, Michigan, for Appellants. Marc D. Kaszubski, O'REILLY RANCILIO P.C., Sterling Heights, Michigan, for Appellees.
ON BRIEF: Robert Joseph Muise, AMERICAN FREEDOM LAW CENTER, Ann Arbor, Michigan, David Yerushalmi, AMERICAN FREEDOM LAW CENTER, Washington, D.C., for Appellants. Marc D. Kaszubski, Nathan D. Petrusak, O'REILLY RANCILIO P.C., Sterling Heights, Michigan, for Appellees.

OPINION

KAREN NELSON MOORE, Circuit Judge. This case arises from the settlement of another case. In 2015, the American Islamic Community Center (AICC) applied for zoning permission to build a mosque in Sterling Heights, Michigan. The City's planning commission denied AICC's request, and AICC sued. The City decided to settle the lawsuit, which alleged violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the First Amendment, and it negotiated a consent judgment that allowed AICC to build the mosque. This lawsuit

challenges the validity of that consent judgment, along with the legality of actions taken by the City and the Mayor during the City Council meeting at which the consent judgment was approved. The district court granted defendants' motion for summary judgment, and we **AFFIRM**.

I. BACKGROUND

AICC's efforts to build a mosque on Fifteen Mile Road in Sterling Heights, Michigan spawned two rounds of litigation. This is the second.

A. The Sterling Heights Planning Commission Denies AICC's Zoning Application

On July 8, 2015, AICC applied for permission to build a mosque on Fifteen Mile Road in a neighborhood that is otherwise zoned for residential use. Appellant Br. at 4–5; *Youkhanna v. City of Sterling Heights*, 332 F. Supp. 3d 1058, 1062 (E.D. Mich. 2018). The Sterling Heights Planning Commission met in August to consider AICC's application. *Youkhanna*, 332 F. Supp. 3d at 1062. Despite a city planner's testimony that the mosque complied with all zoning criteria and was appropriately placed on a major thoroughfare, the proposal faced resistance and its approval was postponed. *Id.* at 1062–63. One month later, the Commission voted down AICC's updated application, giving the following reasons:

- "the location and height of the mosque interferes with and discourages the appropriate development and use of adjacent land and buildings,

- lack of size compatibility with established long term development patterns,
- a likely shortage of off-street parking when the principal and ancillary uses are combined,
- additional parking spaces are required,
- and the scale of the mosque is not harmonious with the neighboring areas."

Id.; R. 67-5 (Sept. 2015 Planning Commission Staff Report at 5) (Page ID #1658).

B. AICC Sues, and Sterling Heights Settles

AICC then sued the City, alleging violations of RLUIPA, 42 U.S.C. § 2000cc et seq., and the First Amendment. *Youkhanna*, 332 F. Supp. 3d at 1063. The Department of Justice also opened an investigation into the City's denial of AICC's application. The DOJ alleged that Jeffrey Norgrove, the commissioner who moved to deny AICC's application, had publicly

demonstrated anti-Muslim bias[1] and had "improperly influenced the other Commissioners." *Id.*

The City denied wrongdoing. *Id.* at 1064. Eventually, the parties (AICC and Sterling Heights) reached a settlement giving AICC "special land use approval" to build the mosque, subject to certain conditions, and the district court entered a consent judgment. R. 67-20 (Consent Judgment at 3) (Page ID #1832).

In order to sign the settlement, however, the City Council had to vote its approval. *Youkhanna*, 332 F. Supp. 3d at 1064. The meeting during which the Council considered the settlement, which was recorded on video, was open to the public and well attended. Video at 1:37:49–41:02 (Mayor Taylor: "We have 181 seats, I believe, in this Council Chamber; every seat is taken (save for maybe one or two) and we also have overflow of at least 25 to 30 or more in the vestibule."). The media were in attendance also, and the meeting

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[1] "The DOJ further alleged that Plaintiff Norgrove attended an anti-mosque protest on August 30, 2015 and improperly influenced the other Commissioners due to his alleged bias against Muslims. In addition, the DOJ asserted that Plaintiff Norgrove opposed the construction of a different mosque in 2011 and posted anti-Islamic statements on his social media stating: 'Oh no the terrorists are gonna attack, according to the media this weekend. Come to the Detroit area. They don't [sic] bomb their revenue source.' The DOJ also claimed that Norgrove shared a picture of a pig with the statement 'share this pig if your [sic] not celebrating Ramadan [sic].' Finally, the DOJ maintained that Norgrove contacted Commissioners between the first and second meetings and informed them that he would be making a motion to deny the application." *Youkhanna*, 332 F. Supp. 3d at 1063–64.

was streamed on the City's website and YouTube channel and was broadcast on live television. *Youkhanna*, 332 F. Supp. 3d at 1068.

After the announcement that the Council would be taking up the agenda item of the consent judgment, the attorney for the City, Ann McClorey McLaughlin, explained the terms of the agreement and the City's reasons for settling the case. Video at 1:42:40. Mayor Taylor then said the floor would open to public comment, although comments would be limited to two minutes and subject to the following ground rules:

> Speakers will be required to stay on point. Your comments during this agenda item must be related to this agenda item. This agenda item is to consider settlements, consent order, and consent judgments in these two cases . . . . If you fail to abide by the Council's Rules, you will be called out of order . . . and you will be asked to go back to your seat. If you do not go back to your seat, we will recess and you will be removed from the auditorium. So please don't make us do that . . . . Outbursts from the audience can be grounds for being called out of order . . . . So again, let's just please be as respectful as we can of each person. We do not need any comments about anybody's religion, that is not the purpose of this meeting tonight and any comments regarding other religions or disagreements with religions will be called out of order. It's simply not relevant to what's going on tonight.

Video at 1:37:00–50:00.

Public comment then began, and many spoke passionately about the issue. Some people voiced concerns about issues such as traffic and noise; others disparaged Islam and AICC, calling them terrorists or terrorist-funded and saying that they wanted to "destroy the American Constitution." *Id.* at 2:00:41, 2:21:15. Whenever someone made an irrelevant comment, Mayor Taylor called that speaker out of order. *E.g.*, *id.* at 2:21:15.

Comments and deliberation were punctuated by audience outbursts, some of which necessitated a recess to restore order. *See Youkhanna*, 332 F. Supp. 3d at 1065 ("Despite Defendant Taylor's ground rules, there were twenty-six outbursts by audience members, both individually and as a body, forcing multiple recesses."). Due to the outbursts, Mayor Taylor cleared the chamber of all spectators, except the press, so that the Council could complete deliberation. (The spectators were able to remain in the vestibule.) R. 69-25 (WDIV Video No. 1).[2] The Council voted to settle the case, and the consent judgment was entered.

C. Plaintiffs Challenge the Settlement

On March 13, 2017, plaintiffs filed suit in the United States District Court for the Eastern District of Michigan, seeking a judgment declaring the consent judgment invalid and unenforceable, along with nominal damages, attorney's fees, and expenses. R. 1 (Compl. at 33) (Page ID #33). Plaintiffs assert seven claims for relief. Five are constitutional and range from

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[2] https://www.clickondetroit.com/news/sterling-heights-accepts-lawsuit-settlement-in-mosque-controversy.

First Amendment and Equal Protection Clause challenges to the Mayor's restrictions on public comments at the Council meeting (claims two and five), a Fourth Amendment challenge to the removal of plaintiff Debi Rrasi from the meeting (claim four), an Establishment Clause challenge to defendants'actions *in toto* (claim three), and a Due Process Clause challenge to defendants' "impermissibl[e] circumventi[on of] procedural protections, including the failure to provide proper notice and an opportunity to be heard" (claim six). R. 1 (Compl. at 26–32) (Page ID #26–32). The seventh claim asserts a violation of the Michigan Open Meetings Act. *Id.* at 32 (Page ID #32).

The first claim, however, is odd. Plaintiffs describe the ground for their first claim for relief as "Declaratory Judgment Act—Unlawful Consent Judgment." *Id.* at 26. Of course, the Declaratory Judgment Act is not a cause of action. 28 U.S.C. § 2201. Rather, it makes available a declaratory judgment "[i]n a case of actual controversy." *Id.* Construed generously, plaintiffs' first claim asserts violations of the Sterling Heights Zoning Ordinance and the Michigan Zoning Enabling Act and seeks a declaratory judgment related to those violations. R. 1 (Compl. at 26) (Page ID #26).

In June 2017, the district court denied plaintiffs a preliminary injunction. After cross-motions for summary judgment, the district court granted defendants' motion and entered a judgment in favor of defendants. R. 42 (Order Den. Mot. for Prelim. Inj. at 26) (Page ID #1273); R. 89 (Op. and Order Granting Defs.' Mot. for Summ. J. at 22) (Page ID #4464). This appeal followed.

II. DISCUSSION

We review the grant of summary judgment de novo. *Bible Believers v. Wayne County*, 805 F.3d 228, 242 (6th Cir. 2015) (en banc). Summary judgment is appropriate if "there is no genuine dispute as to any material fact" to present to a jury. FED. R. CIV. P. 56(a). When deciding a motion for summary judgment, we do not engage in "jury functions" such as making credibility determinations and weighing the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). If there remain any material factual disagreements as to a particular legal claim, that claim must be submitted to a jury. *Id.*

A. Standing

First, we must examine whether plaintiffs have standing. Standing is apparent as to some of plaintiffs' claims: for example, the First Amendment and Fourth Amendment claims. Standing with respect to the claims challenging the validity of the consent judgment, however, was challenged below and warrants brief discussion.[3]

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[3] Although not briefed on appeal or discussed in the district court opinion, defendants and AICC did challenge plaintiffs' standing as to their claims regarding the validity of the consent judgment. This issue was first raised by AICC in an amicus brief, following which the parties briefed the issue. R. 27 (Amicus Br. at 8) (Page ID #1083); R. 28 (Resp. to Amicus Br. at 4) (Page ID #1116); R. 47 (Defs.' Supp. Br. on Standing) (Page ID #1282); R. 50 (Pls.' Supp. Br. on Standing) (Page ID #1405); R. 62 (Defs.' Second Supp. Br. on Standing) (Page ID #1539). The district court flagged this issue for later discussion in its opinion denying plaintiffs' motion for a preliminary injunction, but it did not discuss the issue in its

Federal courts have authority to decide only "cases" and "controversies."[4] U.S. Const. art. III, § 2. For standing to exist, a plaintiff must "allege an actual or imminent injury that is traceable to the defendant and redressable by the court." *Crawford v. United States Dep't of Treasury*, 868 F.3d 438, 452 (6th Cir. 2017). We have no trouble finding that those plaintiffs who reside near the site of the mosque have standing to challenge the validity of the consent decree. The injury they allege is a particularized effect on their properties caused by the consent decree; a declaration that the consent decree is invalid, or an injunction barring its operation, would remedy that injury. *See Goode v. City of Philadelphia*, 539 F.3d 311, 323–24 (3d Cir. 2008) ("[N]eighbors surely would be impacted directly by a large public facility located near them and accordingly would suffer a particularized injury from the operation of the facility very different from that of the general public."). Because at least some of the plaintiffs have standing to bring the claims in this case, we consider the merits.

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opinion granting summary judgment in defendants' favor. R. 42 (Order Den. Mot. for Prelim. Inj. at 2 n.1) (Page ID #1249). Of course, regardless of whether the issue was raised below or on appeal, we must determine whether standing exists.

[4] Plaintiffs seek a declaratory judgment, and so we note that the Declaratory Judgment Act applies only to "case[s] of actual controversy," thus preserving the constitutionality of the Act. 28 U.S.C. § 2201; *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–40 (1937).

B. The Validity of the Consent Judgment—The Due-Process and State-Law Claims

We discuss first whether the consent judgment must be invalidated because the City Council failed to follow state and local law when it voted to sign the agreement. This discussion addresses both the "declaratory judgment claim"[5] and the due-process claim. Both claims fail.

We turn first to the "declaratory judgment claim," better understood as the claim that the City violated its Zoning Ordinance and the Michigan Zoning Enabling Act by the manner in which it approved the settlement. Plaintiffs' argument on appeal is that the City Council failed to consider and make appropriate findings about a variety of factors listed in the Sterling Heights Zoning Ordinance. This, they claim, dooms the consent judgment.

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[5] As discussed above, plaintiffs do not articulate what the underlying controversy is for which they seek a declaratory judgment. It seems that the underlying controversy is whether the Council violated the Sterling Heights Zoning Ordinance and the Michigan Zoning Enabling Act. If so, we have doubts about the soundness of this claim. It is unclear (and plaintiffs never briefed) whether the Enabling Act is enforceable by individuals. The Zoning Ordinance allows "[a] person who is aggrieved by a final decision of the . . . City Council" to appeal the decision within 30 days of the final decision. Zoning Ordinance § 25.03(F). It is far from clear whether plaintiffs qualify as "aggrieved," whether they appealed using the Zoning Ordinance process, and what, if any, the effect of failing to do so would be. Because plaintiffs' claims suffer from another fundamental flaw we need not venture into this territory, but we note that the "declaratory judgment claim" might fail for other reasons.

Both parties ask us to examine the Zoning Ordinance to discern whether there is a distinction between the terms "reviewing authority"and "approving authority." We decline to do so. Plaintiffs accuse the City of procedural errors it did not commit; therefore, even assuming plaintiffs' interpretation of the Ordinance is correct, their claims fail.

The first alleged procedural error is a failure to consider the Zoning Ordinance's criteria for approval of a permit to build a house of worship in a residential area. These criteria are what one would expect from a zoning ordinance. For example, the criteria demand consideration of "harmony with the appropriate and orderly development of the surrounding neighborhood," traffic patterns and parking, the location and height of the building, and the new building's impact on "public health, safety and welfare" Zoning Ordinance § 25.02. It is abundantly clear from the record that the City Council *did* consider these and all other relevant criteria. Context is important. The Planning Commission rejected AICC's application because it failed to comply, in the Commission's opinion, with certain criteria regulating noise, size and height of the building, parking, and traffic. These are exactly the issues the consent judgment addressed by restricting the height of the mosque, stipulating to lot parking only and shuttles for large events, and banning outside sound projection. R. 67-20 (Consent Judgment at 3-7) (Page ID #1832–36).[6] The Council considered the terms

[6] As the district court opinion explains, the Commission's denial of the permit based on traffic was unsupported by the record; the testimony at both Planning Commission meetings was that the

of the settlement before approving it, just as it considered recent large developments in the area that were approved without issue by the Commission, such as a nearby 800-home development. Video at 3:19:20. There is no question that the City Council considered the relevant criteria before voting, and so plaintiffs' assignment of error on this ground is fruitless.

Equally unavailing is plaintiffs' argument that the Council erred by failing to make findings of fact as required by the Sterling Heights Zoning Ordinance and the Michigan Zoning Enabling Act, MICH. COMP. LAWS § 125.3101 *et seq*. The Zoning Ordinance says that, once a special approval land use is granted, "[t]he decision shall be incorporated in a statement of findings and conclusions which specifies the basis for the decision and any conditions imposed." Zoning Ordinance § 25.03(B)(1). In a similar vein, the Enabling Act says that "[t]he decision on a special land use shall be incorporated in a statement of findings and conclusions relative to the special land use which specifies the basis for the decision and any conditions imposed." MICH. COMP. LAWS § 125.3502(4).

Again, plaintiffs argue that defendants failed to clear these procedural hurdles; again, plaintiffs' arguments fail because defendants fulfilled their procedural obligations. During deliberation, Council members and Mayor Taylor considered and made

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mosque was to be on a major thoroughfare (as opposed to the smaller, secondary thoroughfare that the statute requires as a minimum), and so traffic increase was not a valid basis for rejecting the application. *Youkhanna*, 332 F. Supp. 3d at 1063.

findings on the relevant criteria, such as "parking, traffic and overall size of the dome and spires," before voting. Feb. 21, 2017 Meeting Minutes at 37–40.[7] And, if the statement of findings must be in writing, the written minutes containing the findings were adopted and published after the following City Council meeting. *Id.* We can find no authority requiring the findings to take a particular form, nor have plaintiffs pointed us to anything indicating these written findings are insufficient.

The discussion above resolves plaintiffs' due-process arguments also. Even if plaintiffs have a valid property interest and even if the procedures outlined by state law were constitutionally required, the fact that defendants indisputably complied with each procedure means that this claim fails.[8]

C. The First Amendment and Equal Protection Clause Claims

Plaintiffs' next set of claims stems from the Council's restrictions on public comment during the debate over the approval of the consent decree. Two restrictions are relevant here. First, the Mayor

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[7] https://www.sterling-heights.net/AgendaCenter/ViewFile/Item/444?fileID=2766.

[8] Plaintiffs filed a motion asking us to take judicial notice of the fact that in September 2018 plaintiff Debi Rrasi became the owner of the property she had previously been occupying and renting. They argue plaintiff Rrasi's subsequent purchase of her home insulates their due-process claim from the argument that no plaintiff had a cognizable property interest. Plaintiffs' due-process claim fails on other grounds, and so we deny the motion.

required comments to be relevant to the agenda item being considered: the approval of a settlement that would give zoning permission to AICC to build a mosque. Mayor Taylor reiterated this rule before opening the floor to comments:

> Speakers will be *required to stay on point*. Your comments during this agenda item *must be related to this agenda item*. This agenda item is to consider settlements, consent order, and consent judgments in these two cases . . . . We do not need any comments about anybody's religion, *that is not the purpose of this meeting tonight* and any comments regarding other religions or disagreements with religions will be called out of order. *It's simply not relevant to what's going on tonight*.

Video at 1:37:00–50:00 (emphasis added).

This was not, as plaintiffs would have, a ban on talking about religion. This is clear from the fact that comments mentioning religion—including comments mentioning Islam specifically—were allowed when they were relevant to zoning issues. For example, a person stood up to say that he had lived near a mosque previously and that mosque had hosted celebrations for a holiday that involved noise and blocking of the streets. Video at 2:47:45. He asked whether the Council had considered such holidays in the settlement. *Id.* This comment was not interrupted, and the speaker was not called out of order. Another speaker questioned why the mosque was needed, given the number in the area. *Id.* at 2:38:45. Again, this speaker was neither warned nor called out of order. Finally, at least one

speaker was called out of order on relevance grounds for a comment wholly unrelated to religion: explaining the process for running for City Council. *Id.* at 2:55:54. In sum, Mayor Taylor's admonition, viewed in context, limited comments to those relevant to the issue being considered; the mention of religion was "just a preemptive warning" against irrelevant comments about religion. *See* R. 69-14 (Taylor Dep. at 52–53) (Page ID #2585–86). "Religion" was *not* "off-limits for the citizen speakers" if it was relevant to zoning considerations. Appellants Br. at 14.

The second rule enforced at the meeting was a rule against attacking persons or institutions. Although Mayor Taylor did not announce this rule before public comment, he did enforce it. *E.g.* R. 69-14 (Taylor Dep. at 53, 59) (Page ID #2586, 2592).

Plaintiffs argue that the above restrictions were content- and viewpoint-based prior restraints on speech that violated their First Amendment and Equal Protection Clause rights. Appellants Br. at 35. Specifically, Plaintiffs McHugh, Catcho, Rrasi, Youkhanna, and Jabbo claim that, although they spoke at the Council meeting, they did not make comments they otherwise would have made because of Mayor Taylor's preliminary admonition.[9] R. 67-18 (Jabbo Dep. at 37) (Page ID #1819); R. 67-21 (McHugh Decl. at 2) (Page ID #1851); R. 67-22 (Youkhanna Decl. at 2)

[9] Plaintiffs do not specify whether their claim is facial or as-applied, but they argue throughout their briefs that the restriction violated plaintiffs' rights specifically, and they do not address factors relevant to a claim of facial unconstitutionality. We therefore interpret their claims as as-applied challenges.

(Page ID #1855); R. 67-23 (Rrasi Decl. at 2) (Page ID #1859); R. 67-24 (Catcho Decl. at 2) (Page ID #1863).

In order to assess this restriction on speech, we must first determine what type of forum the Council meeting was. A City Council meeting is not a "traditional public for[um] like parks and streets," the sort of setting in which "the government's regulatory powers are at their weakest." *Lowery v. Jefferson Cty. Bd. of Educ.*, 586 F.3d 427, 432 (6th Cir. 2009). Rather, City Council meetings, like the school-board meeting at issue in *Lowery*, "cannot accommodate the sort of uninhibited, unstructured speech that characterizes a public park. That is why courts call this sort of forum a 'designated' and 'limited' public forum: 'designated' because the government has 'intentionally open[ed]' it 'for public discourse,' and 'limited' because 'the State is not required to . . . allow persons to engage in every type of speech' in the forum." *Id.* (internal citations omitted).

In a limited public forum, the government can impose reasonable restrictions based on speech content, but it cannot engage in viewpoint discrimination. The Supreme Court explained this in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995):

> The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not

> exclude speech where its distinction is not "reasonable in light of the purpose served by the forum," nor may it discriminate against speech on the basis of its viewpoint. Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Id. at 829–30 (internal citations omitted).

Here, there were two content-based limitations on speech: the relevance rule and the rule forbidding attacks on people and institutions. The relevance rule was certainly "reasonable in light of the purpose served by the forum." *Id.* at 829 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)). We can think of no content-based restriction more reasonable than asking that content be relevant. Plaintiffs insist that Mayor Taylor's preliminary oral admonition was a ban on mentioning religion, but it is clear from context that Mayor Taylor was reiterating the relevance rule.

Next, the relevance rule is viewpoint-neutral. Plaintiffs argue they were forbidden from discussing the topic at issue from a religious perspective, but that is not so. When the government opens a forum to

discussion of a certain topic, it is viewpoint discrimination to ban discussion *of that topic* from a religious perspective. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–4 (1993). That is not this case, however, despite plaintiffs' protestations to the contrary. Here, the City Council opened the floor for discussion of whether it should approve or deny the consent decree—in other words, to relevant comments. Mayor Taylor allowed comments mentioning religion or Islam when the comment was relevant to zoning considerations—for example, noise and traffic—but not when the comment was irrelevant—for example, expressing he commenters' preference not to live near Muslims. (Presumably, comments expressing approval of the consent decree because of a desire to live near Muslims would have been considered equally irrelevant; no such comments were attempted.) This restriction is not viewpoint discrimination. Irrelevant comments of any sort, from any viewpoint, were out of order. Therefore, the relevance rule is not constitutionally problematic.

The second rule, which forbade attacks on people or institutions, is a more difficult case. Certainly, this rule could be construed as viewpoint discrimination, although Mayor Taylor testified that the rule does not forbid "disparaging comment[s]," but rather "making an attack." R. 69-14 (Taylor Dep. at 59) (Page ID #2592). *Matal v. Tam* does not address speech in limited public forums, but does at least suggest that the "attack rule" could be considered viewpoint discrimination. 137 S. Ct. 1744, 1763 (2017) (stating that "[g]iving offense is a viewpoint"). *But see Am.*

Freedom Def. Initiative v. Washington Metro. Area Transit Auth., WMATA, 901 F.3d 356, 364 (D.C. Cir. 2018), *cert. denied*, 2019 WL 400746 (June 3, 2019) ("The relevance of [*Matal*,] in which the Supreme Court did not engage in a forum analysis at all escapes us; *Matal* did not discuss forum doctrine in any depth because *Matal* dealt not with the Government permitting speech on government property but with government protection of speech from commercial infringement.").

We need not address the constitutionality of Sterling Heights's no-attack rule, however, because there is no dispute in the record that plaintiffs' comments were restricted by the entirely appropriate relevance rule. Plaintiffs Catcho, Rrasi, Youkhanna, Jabbo, and McHugh spoke at the Council meeting but claim that they were "unable to express [their] views regarding the proposed Consent Judgment agenda item." *E.g.*, R. 67-24 (Catcho Decl. at 2) (Page ID #1863). Each plaintiff had the opportunity to testify as to what they would have said, absent the speech restriction, at a deposition. Three—Jabbo, Catcho, and Youkhanna—would have spoken about their desire not to live near Muslims because of persecution due to religious conflict in the Middle East, and in some cases because of their personal experiences of being persecuted for practicing Christianity. R. 67-14 (Youkhanna Dep. at 59–60) (Page ID #1796) (explaining he was prevented from describing the history of persecution of Christians in the Middle East); R. 67-17 (Catcho Dep. at 35–36) (Page ID #1813) ("Q. What is the reason you came? A. I don' want [Muslims] to be near me. Q. Why? A. Because they

scare me."); R. 67-18 (Jabbo Dep. at 37) (Page ID #1819) ("Q. Earlier in the deposition you testified as to some of the objections you had about the construction of this mosque, one of them being persecution that your family members experienced in Iraq by Muslims; is that right? A. Yes. . . . Q. Now did you express any of those views at the council meeting . . . ? A. No, because I was not allowed."). Although we hold great sympathy for plaintiffs for any suffering they endured, these comments were not relevant to the Council's consideration of the settlement. Plaintiffs' comments boil down to the sentiment that the Council should have refused zoning permission because plaintiffs do not want to live near a mosque. The Council cannot refuse zoning permission on these grounds, consistent with RLUIPA. That leaves Ms. Rrasi and Ms. McHugh. During her deposition, Ms. Rrasi said that she wanted to speak "about religion." R. 69-20 (Rrasi Dep. at 43) (Page ID #2959). Ms. McHugh wanted to "address[ ] the preferential treatment . . . [and] the fact that the AICC was so quick to go to lawsuit." R. 67-19 (McHugh Dep. at 39) (Page ID #1826). Ms. Rrasi's statement is entirely vague, and no reasonable jury would be able to conclude based on it that her speech was restricted—the Council allowed some comments about religion, and did not allow others, depending on relevance. Ms. McHugh's deposition is befuddling; plaintiffs argue in their briefs that they wanted to speak from a religious viewpoint but were prevented from doing so. We cannot fathom how Ms. McHugh's desire to comment on the fact that AICC sued or received "preferential treatment" was restricted. In sum, of the plaintiffs who were able to testify with specificity about the views they were prevented from expressing at the

meeting, all stated they wanted to make comments that were irrelevant. Plaintiffs' speech was thus prohibited by the relevance rule alone. The relevance rule was constitutional, and so plaintiffs' First Amendment claims fail.

Plaintiffs' equal-protection arguments fail for the same reasons. The City did not, in fact, "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." Appellants Br. at 41 (quoting *Police Dep' of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)).

D. The Establishment Clause Claim

Plaintiffs' next claim, that defendants violated the Establishment Clause, draws from elements of the discussion above. Plaintiffs argue that the City violated the Establishment Clause because its actions had the effect of endorsing Islam. Appellants Br. at 46. They identify a series of actions that led to an "unmistakable message of approval of adherents to Islam and disapproval of those who were not (in particular, the Chaldean Christians, such as [some of the] Plaintiffs)":

- "(1) [approval of] the Consent Judgment, which was not required by RLUIPA, . . . in violation of the zoning regulations,"
- "(2) [suppression of] speech deemed critical of Islam during the City Council meeting,"
- and "(3) [the display of] hostility to those who opposed the building of the mosque at this meeting."

Appellants Br. at 47. This claim is grounded in mischaracterizations of the record and already-rejected arguments, and therefore fails.

First, as we explain above, the Council did not approve the mosque "in violation of the zoning regulations." Second, neither the City nor the Mayor suppressed speech critical of Islam; they limited discussion to the topic at hand, and plaintiffs'—or anyone else's— views on Islam were largely irrelevant to the Council's decision. Finally, plaintiffs cite no cases standing for the proposition that their individual perceptions that a government body was displaying "hostility to" them are sufficient to find an Establishment Clause violation.

E. The Open Meetings Act Claim and the Fourth Amendment Claim

Plaintiffs' final two claims relate to actions the Mayor and Council took to maintain order during the meeting. First, they argue that the decision to remove the audience from Council chambers during deliberations violated Michigan's Open Meetings Act. Second, they argue that the decision to eject plaintiff Debi Rrasi from the meeting was an unlawful seizure in violation of the Fourth Amendment. Both arguments fail.

1. The Open Meetings Act

The Open Meetings Act provides that, in general, "[a]ll meetings of a public body shall be open to the public and shall be held in a place available to the general public. All persons shall be permitted to attend any meeting except as otherwise provided in this

act. . . . However, a public body may establish reasonable rules and regulations in order to minimize the possibility of disrupting the meeting." MICH. COMP. LAWS § 15.263(1). It requires also that "[a]ll decisions of a public body shall be made at a meeting open to the public" and provides that "[a] person shall not be excluded from a meeting otherwise open to the public except for a breach of the peace actually committed at the meeting." *Id.* § 15.263(2), (6).

During the meeting at issue, the Mayor and Council decided to remove the audience from Council chambers to the vestibule during deliberations. R. 69-25 (WDIV Video No. 1).[10] This happened after public comment closed and after people in the audience began shouting over the Council members who were discussing the agenda item. The press was allowed to stay in the Council chambers, and audience members could see the deliberations from the vestibule in which they were allowed to remain. *Id.* Deliberations were broadcast and recorded.

Even assuming the removal of the audience violated the general provisions of the Act, there was clearly "a breach of the peace actually committed at the meeting." MICH. COMP. LAWS § 15.263(6). The recording of the meeting shows an audience-wide uproar, and so removal of the audience followed. We note that a Michigan court has held already that the City and Mayor's actions at this very meeting did not violate the Open Meetings Act; we agree. R. 69-24 (*Naumovski v.*

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[10] https://www.clickondetroit.com/news/sterling-heights-accepts-lawsuit-settlement-in-mosque-controversy.

City Council of Sterling Heights, No. 2017-0899 at 4–5 (Macomb Cir. Ct. June 2, 2017)) (Page ID #3263–64).

2. The Fourth Amendment Claim

The final issue in this case is the Mayor's decision to remove plaintiff Debi Rrasi from the meeting. Ms. Rrasi brings this claim against both the City and Mayor Taylor. It fails as to both defendants. Although we address this claim on the merits, we do not hold that plaintiffs have cleared the procedural hurdle of showing municipal liability as to the City, nor do we hold that Mayor Taylor is unprotected by legislative immunity.

The undisputed facts regarding Ms. Rrasi's removal from the Council meeting are that she approached the dais and engaged with Mayor Taylor during a recess, and that she was gesticulating and speaking loudly while doing so. R. 69-20 (Rrasi Dep. at 47–49) (Page ID #2963–65); R. 69-14 (Taylor Dep. at 101–02) (Page ID #2634–35). Mayor Taylor asked the police to escort her out, and at least two police officers executed the order. R. 69-14 (Taylor Dep. at 102–03) (Page ID #2635–36). While leaving the Council chamber, Ms. Rrasi stopped, turned around, and started yelling at the Council. R. 69-20 (Rrasi Dep. at 53) (Page ID #2969). At some point during the process of escorting Ms. Rrasi from the building, one of the officers "grabbed [her] arm so [she] could leave," "tapped [her]," "held [her] hand all the way till [sic] [she] got to the doors," and "was pushing [her] out the door basically. That's how [she] felt." *Id.* at 51, 53–54 (Page ID #2967, 2969–70). She was removed from the building but not otherwise detained. *Id.* at 51 (Page ID #2967). Ms. Rasi asserts that she did

not feel "free to leave at [her] own will" during this encounter. *Id.* at 50 (Page ID #2966).

Ms. Rrasi argues that she was seized the moment that Mayor Taylor ordered her out of the Council chambers, but that is not so. In fact, Ms. Rrasi was not seized at all. Although she asserts that she did not feel "free to leave" during this encounter, "the Supreme Court has recognized [that] the 'free to leave' test may not be the best measure of a seizure where a person has no desire to leave the location of a challenged police encounter." *Salmon v. Blesser*, 802 F.3d 249, 253 (2d Cir. 2015). Indeed, the "free to leave" test is hardly applicable in this situation, where Ms. Rrasi wished to remain rather than leave. In *Florida v. Bostick*, the Supreme Court held that "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter" was an appropriate test to determine whether a seizure occurred when someone was asked for consent to search his bag while on a bus that he did not want to exit. 501 U.S. 429, 434–36 (1991). *Bostick*, however, is equally inapplicable. Officers were not asking Ms. Rrasi for consent or engaging in a voluntary interaction with her; rather, they were ordering her to leave a place she wanted to be.

The Second Circuit addressed a similar situation in *Salmon v. Blesser*, in which a man was ordered out of a courthouse and eventually violently ejected. *Salmon*, 802 F.3d at 251. There, it was held that when police officers "order persons to leave public areas . . . such police conduct, without more, [is not] a seizure under the Fourth Amendment as long as the person is

otherwise free to go where he wishes." *Id.* at 253. This is true even if "police . . . take a person by the elbow or employ comparable guiding force short of actual restraint to ensure obedience with a departure order." *Id.* A person is seized, however, if officers use force beyond "guiding force," force that is "painful" and not necessitated by "resistance" on the part of the person being rejected. *Id.* at 254.

We are inclined to agree with the Second Circuit, at least in circumstances where the person being asked to leave is not privileged to remain in the space—either because the space is no longer open to the public (for example, a building is closing or the space must be cleared of all people for safety reasons) or because the person's behavior violated a rule, ordinance, or law (for example, by causing a disturbance). *Cf. Bennett v. City of Eastpointe*, 410 F.3d 810, 834 (6th Cir. 2005) (holding that a police officer who ordered bicycle riders to leave an affluent suburb and escorted them across the municipal boundary had conducted a seizure). Here, Ms. Rrasi lost her privilege to remain in the otherwise-public meeting. First, Mayor Taylor made clear during the meeting that citizens were allowed to address the Council only once, and admonished people attempting to speak for a second time. Ms. Rrasi's attempt to address the Council for a second time thus violated Council rules. Furthermore, this is not an instance of a citizen attempting to engage in dialogue with a public official during an otherwise-quiet moment. The recess during which Ms. Rrasi approached Mayor Taylor was called because the audience was yelling and disrupting deliberations. It was called for the purpose of restoring order, and

Ms. Rrasi's behavior, which undisputedly involved loud speech and gesticulation, contributed to the disruption. It is common sense that a government body should be allowed to remove people who are disrupting a public meeting, and the Michigan Open Meetings Act allows for such a removal. Appellees Br. at 42.

Ms. Rrasi lost her privilege to remain in the public meeting because of her behavior. Her description of the force used by officers to escort her out—holding her hand or arm, tapping her—does not exceed guiding force, especially in light of her mid-exit refusal to leave the Council chambers. There was certainly no painful force, and Ms. Rrasi's freedom was unrestricted once she exited the building. Because there was no seizure, Ms. Rrasi's Fourth Amendment rights were not violated, and summary judgment in favor of defendants was appropriate.

As a final point, and to avoid confusion, we address the fact that Ms. Rrasi insists on characterizing this action as Mayor Taylor retaliating against her based on the content of her speech. Ms. Rrasi did not pursue on appeal the First Amendment retaliation claim stated in her complaint. Furthermore, there is no evidence in the record supporting the retaliation allegations.

III. CONCLUSION

For the reasons discussed above, we **AFFIRM**.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No.: 17-cv-10787
Honorable Gershwin A. Drain

[Filed August 1, 2018]

KAMAL ANWIYA YOUKHANNA, *et al*.,

Plaintiffs,

v.

CITY OF STERLING HEIGHTS, *et al*.,

Defendant.

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT[#69] AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [#67]

I. INTRODUCTION

Presently before the Court are the parties' cross motions for Summary Judgment. These matters are fully briefed and a hearing was held on May 7, 2018. For the reasons that follow, the Court will grant the

Defendants' Motion for Summary Judgment and will deny the Plaintiffs' Motion for Summary Judgment.

II. FACTUAL BACKGROUND

The instant dispute stems from the American Islamic Community Center, Inc.'s ("AICC") attempt to build a mosque in the City of Sterling Heights, which permits places of worship and religious community centers in residential zoned (R-60) areas through special land use.

In 2015, the AICC applied for a special land use with the City to build a mosque on Fifteen Mile Road between Ryan Road and Mound Road. After working with then City Planner Donald Mende for approximately one year, the AICC appeared at a public hearing before the City's Planning Commission on August 13, 2015, seeking approval of its application. At the meeting, Mende reported that the application met all of the objective standards set forth in the zoning code. He indicated that the mosque would cover approximately 11% of the property, well under the 30% limit on R-60 zoned property, the height of the mosque's dome and spires complied with the zoning code, and the proposed 130 parking spaces exceeded the required 109 spaces. Mende further reported that the location of the mosque on a major thoroughfare was also appropriate.

Mende next discussed whether the discretionary standards of the zoning code had been met. This included consideration of the paint to be used, that no audio devices would be used outside of the building, allowance of future liquor sales at nearby businesses,

and limiting use of the multi-purpose room to AICC members only. He further discussed that increased traffic was not a concern because "[t]he average traffic counts [sic] at this location is approximately 11,000 vehicles per day, which is actually average for major roads" and that "accidents have actually been steadily decreased since 2011." Mende recommended that the AICC's application be approved.

The Commission thereafter took public comments. Audience members raised concerns about traffic, size, use of the building, and safety. During deliberations, Commissioner Jeffrey Norgrove, also a Plaintiff herein, indicated that he was thinking of asking for a "full impact study with socioeconomic numbers" and stated that "I'm not exactly comfortable with making this decision tonight after everything I've heard." Commissioner Jerry Rowe suggested a postponement to allow the AICC to "review the scale of the building." Commissioner Stephan Milltello challenged the postponement stating that "I would be against [postponing] . . . [I]f this was a church, a Catholic Church or anything else, we wouldn't be, we wouldn't [need a postponement]." The Commission then voted 6 to 1 to postpone the matter.

On September 10, 2015, the AICC appeared again at another public hearing before the Commission, seeking approval of its Application based on revised plans submitted to the City following the August 13, 2015 meeting. Over 200 people attended this meeting and, before the meeting, many of them engaged in protests outside of City Hall against the building of the mosque. At the meeting, Mende reported that the AICC

had agreed to reduce the height of the mosque's spires by approximately 13% and increase the size of the dome by 12%. At the meeting's conclusion, Plaintiff Norgrove made a motion to deny the AICC's application based on the following discretionary standards set forth in §25.02 of the zoning code: the location and height of the mosque interferes with and discourages the appropriate development and use of adjacent land and buildings, lack of size compatibility with established long term development patterns, a likely shortage of off-street parking when the principal and ancillary uses are combined, additional parking spaces are required, and the scale of the mosque is not harmonious with the neighboring areas. The Commission then voted to deny the application.

The AICC disagreed with the Commission's decision, essentially claiming that the denial was pretext and was truly based upon religious discrimination. Thereafter, the AICC filed a lawsuit against the City alleging, among other things, multiple violations of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000c, *et. seq*., as well as violation of the AICC's First Amendment right to the free exercise of religion.

The United States Department of Justice ("DOJ") also investigated the denial of the application and filed a lawsuit alleging the Commission's decision violated the RLUIPA and discriminated against the AICC. The DOJ further alleged that Plaintiff Norgrove attended an anti-mosque protest on August 30, 2015 and improperly influenced the other Commissioners due to his alleged bias against Muslims. In addition, the DOJ

asserted that Plaintiff Norgrove opposed the construction of a different mosque in 2011 and posted anti-Islamic statements on his social media stating: "Oh no the terrorists are gonna attack, according to the media this weekend. Come to the Detroit area. They don't [sic] bomb their revenue source." The DOJ also claimed that Norgrove shared a picture of a pig with the statement "share this pig if your [sic] not celebrating Ramadan [sic]." Finally, the DOJ maintained that Norgrove contacted Commissioners between the first and second meetings and informed them that he would be making a motion to deny the application.

The City's answer to the complaints denied any wrongdoing, maintaining that the decision by the Commission was based on legitimate land use concerns. The parties participated in facilitation with Magistrate Judge Anthony Patti. With the Magistrate Judge's assistance, the parties fashioned a potential resolution of the lawsuits taking into consideration the issues raised by the Commission, as well as balancing the AICC's right to free exercise of religion.

The potential resolution was proposed to the City Council at its February 21, 2017 meeting. More than 240 people attended the meeting, which exceeded the capacity of Council Chambers so the City added seating in the vestibule located outside of the Chambers. The City employed a "one in, one out" procedure to allow audience members to rotate into the Chambers to provide their comments. Due to the size of the audience, Mayor Michael Taylor, a named Defendant in these proceedings, proposed that speaking time be

limited to two minutes per person so that everyone present would have an opportunity to speak. The vestibule area outside of Chambers had windows through which audience members could watch the meeting and televisions on which the meeting was broadcast live.

The meeting began with the City's Attorney, Ann McClorey McLaughlin, who explained the terms of the Consent Judgment and the concessions received. *See* Defs.' Mot. for Summ. J., Ex. L, 2/21/17 Mtg. Video at 1:42:00-48:06). Specifically, she indicated that the Consent Judgment would approve a special land use to build the mosque in the City and that the AICC agreed to reduce the height of the mosque's dome and spires, to provide off-site parking and shuttling for events exceeding available on-site parking, and not to use any outdoor sound projection or call to prayer. *Id*. McLaughlin further explained that the Consent Judgment required that the dome be painted with non-reflective paint, that all religious activities be conducted indoors, and affirmed the City's ability to institute permit parking on surrounding residential streets and to enforce parking ordinances. *Id*. She noted that the City was not admitting liability and that by resolving the matter now, the City could control the situation rather than leaving it to a judge or jury to decide. *Id*.

After McLaughlin concluded her comments, Defendant Taylor opened the floor for public comment, having previously provided the following explanation of the City's Rules:

> We have 181 seats, I believe, in this Council Chamber; every seat is taken (save for maybe one or two) and we also have overflow of at least 25 to 30 or more in the vestibule. So, it is currently 9:07 p.m. . . we have other agenda items to get to on the agenda tonight aside from this . . . . Our Council Rules allow for us to reduce the speaker time limit and judging by the size of the crowd unless there is objection from Council, I recommend reducing the speaker time on this item only to two minutes . . . . Speakers will be required to stay on point. Your comments during this agenda item must be related to this agenda item. This agenda item is to consider settlements, consent order, and consent judgments in these two cases . . . . If you fail to abide by the Council's Rules, you will be called out of order . . . and you will be asked to go back to your seat. If you do not go back to your seat, we will recess and you will be removed from the auditorium. So please don't make us do that . . . . Outbursts from the audience can be grounds for being called out of order . . . . So again, let's just please be as respectful as we can of each person. We do not need any comments about anybody's religion, that is not the purpose of this meeting tonight and any comments regarding other religions or disagreements with religions will be called out of order. It's simply not relevant to what's going on tonight.

Id. at 1:37:49-41:02. Despite Defendant Taylor's ground rules, there were twenty-six outbursts by audience members, both individually and as a body, forcing

multiple recesses. The outbursts included people speaking out of turn, shouting, applauding, and other disruptive behavior, including attacks on Islam and the AICC for being "terrorists" and wanting to "destroy the American Constitution." *Id.* at 2:20:35-21:14,2:32:54-33:43.

With respect to the Plaintiffs herein, all of the Plaintiffs who were in attendance were permitted to speak uninterrupted and none of the Plaintiffs chose to utilize their full two-minute speaking time. *Id.* at 1:52:37-53:48, 1:53:54-55:27. 1:59:05-37, 2:03:11-41, 2:59:00-25. After every audience member who wished to speak was heard, a motion was made by Councilman Douglas Skrzniarz to approve the Consent Judgment. *Id.* at 3:04:09-54. During Council's deliberation, the audience began screaming at Councilman Skrzniarz, mid-sentence, forcing another recess. *Id.* at 3:04:56-08:13.

When Defendant Taylor was in the process of calling this recess, Plaintiff Rrasi approached the dais and began speaking loudly at Defendant Taylor. Defendant Taylor has specifically testified that Plaintiff Rrasi "came close to the council diaz [sic] and was making gestures with her hands, making threatening comments, and was being disruptive . . . I was trying to do my best to maintain order in there, and in a split second I recall Debi coming up, making a threatening gesture, coming towards the council table, and I believe I asked that the police officer to escort her out." *See* Taylor Dep. at 101:2-5; 102:10-15. After Defendant Taylor asked that she be escorted out of Council Chambers, Plaintiff Rrasi began yelling at

him because she was mad. Because she refused to leave chambers, the officer proceeded to escort her out of the room. *See* Rrasi Dep. at 53:14-18, 54:1-25; 55:1-2.

Upon returning from recess, Defendant Taylor warned the audience that any more interruptions would require him to clear Chambers to allow Council to conclude the agenda item. Ignoring his warning, the audience members continued to interrupt the meeting multiple times. As a result, Defendant Taylor called another recess and ordered that all audience members except for the press be removed to the vestibule where they could view the proceedings. Council returned from recess and voted to approve the Consent Judgment.

Thereafter, Plaintiffs filed the instant action against the City and Taylor claiming that the Consent Judgment was approved in violation of the City's Zoning Code and Michigan law. They also assert violations under the Due Process, Equal Protection and Establishment Clauses and the First Amendment. Plaintiff Rrasi has also alleged a Fourth Amendment unlawful seizure claim.

III. LAW & ANALYSIS

A. Standard of Review

Federal Rule of Civil Procedure 56(a) "directs that summary judgment shall be granted if there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 779 (6th Cir. 1998) (quotations omitted). The court must view the facts, and draw reasonable inferences from those facts, in the light most favorable

to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). No genuine dispute of material fact exists where the record "taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Ultimately, the court evaluates "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52, 106 S.Ct. 2505.

B. Validity of the Consent Judgment

1. The City's Zoning Code and the Michigan Zoning Enabling Act ("MZEA")

The crux of Plaintiffs' Complaint is that the approval of the Consent Judgment should be invalidated because the Council purportedly failed to abide by the City's Zoning Code by neglecting to consider the discretionary standards set forth in § 25.02. Plaintiffs' further assert that the Consent Judgment should be invalidated because the City did not comply with the notice requirements under the MZEA. Both of Plaintiffs' arguments are without merit.

Plaintiffs' first argument rests on the theory that the terms "reviewing authority" and "approving authority" are used interchangeably in the Zoning Code. The relevant provisions state that:

> When the City Council is the reviewing authority with respect to a special land use, it

> shall have the same reviewing authority and shall consider the same standards of the Planning Commission under the special approval land use criteria applicable to such use in a particular zoning district and Article 25.

Zoning Code, § 25.01(C). Thus, the Zoning Code unambiguously requires the City Council to consider the discretionary standards with respect to a special land use application when it is the "reviewing authority." Conversely, when City Council is designated the "approving authority" only, the Zoning Code is silent with respect to the same requirement to consider the discretionary standards under the Code. *Id*. at § 25.01(A)(4) (stating that the City Council shall be the approving authority with respect to special approval land use pursuant to a consent judgment).

Plaintiffs have cited no provision in the Code which designates the Council as the reviewing authority when it approves a special land use by consent judgment to settle pending litigation. In fact, Plaintiff Norgrove, a former Commissioner, has testified that there is a distinction between the terms approving authority and reviewing authority under the Zoning Code. Plaintiffs' reliance on § 25.03(A)(2) in support of their position is unavailing because this provision is only applicable when the Council is the "reviewing authority." *Id*. at §25.03(A)(2).

Plaintiffs' position is further undermined by the fact that §25.01 has been amended. The former version of the section stated that "[t]he City Council shall be the reviewing authority with respect to a special approval land use which is requested pursuant to a Planned

Unit Development project, a conditional rezoning, or consent judgment . . . ." 2005 Zoning Code, § 25.01. The Code current iteration of this section removes Council as the reviewing authority over the settlement of lawsuits by consent judgment, adopting the current language of the Code. 2009 Zoning Code, § 25.01. This change effectively removed the requirement that Council consider subjective standards set forth in § 25.02 before granting a special land use by consent judgment. This court must enforce the current Zoning Code as written and may not read words into the ordinance or read into the ordinance authority above and beyond the express authority conferred. *See Brandon Charter Twp. v. Tippett*, 241 Mich. App. 417, 616 N.W.2d 243 (2000).

In support of their position, Plaintiffs continue to rely upon *League of Residential Neighborhood Advocates v. Cty. of Los Angeles*, 498 F.3d 1052 (9th Cir. 2007), in support of their position. However, in *League of Residential Neighborhood Advocates*, the City of Los Angeles's Zoning Code did not permit the City Council to approve a special land use as part of a Consent Judgment. In contrast, the City Council of Sterling Heights is permitted to approve a special land use by consent judgment. *League of Residential Neighborhood Advocates* has no bearing on the instant dispute.

Additionally, Plaintiffs also rely on *Pentecostal Church of God v. Douglas Cnty.,* No. 3:16-CV-00400-LRH-WGC, 2018 WL 1611184 (D. Nev. Apr. 2, 2018), which is connected to their argument that the Consent Judgment is invalid under *League of Residential*

Neighborhood Advocates. This argument is likewise without merit. *Pentecostal Church of God* is distinguishable from the instant matter because in that case there was no suggestion of religious animus in the decision to deny a special land use for a church. Conversely, the AICC and the DOJ lawsuits alleged that then Planning Commissioner, Plaintiff Norgrove, made anti-Islamic posts on the internet, previously opposed the construction of another mosque, attended an anti-mosque protest, and contacted other Planning Commissioners prior to the vote to approve the mosque to inform them he would be making a motion to deny the AICC's application. As such, Norgrove's conduct placed the City at risk of being found to have violated federal law. As such, there is no merit to Plaintiffs' reliance on this authority.

Plaintiffs further claim that the City violated the MZEA because it failed to give proper notice of the February 21, 2017 meeting's agenda item. However, Plaintiffs read a key word out of the statute, which states that notice is only required when an "application" for special land use is filed. While an application was filed by the AICC, the City did comply with MZEA because it conducted two public hearings on the application and denied it. The Consent Judgment was a settlement of the subsequent lawsuits filed by the AICC and DOJ stemming from the Commission's denial of the application. Moreover, the Zoning Code expressly provides that a public hearing is not required when Council approves a special land use by consent judgment to settle pending litigation. Zoning Code, § 25.03(A)(3)(b).

Accordingly, because the Consent Judgment was not approved in violation of the Zoning Code or the MZEA, summary judgment is appropriate on Plaintiffs' Declaratory Judgment claim.

2. Michigan Open Meetings Act ("OMA")

Plaintiffs also seek to invalidate the approval of the Consent Judgment by claiming the City violated the OMA by removing audience members during the meeting. This claim is also due to be denied.

The OMA provides "[a]ll meetings of a public body shall be open to the public and shall be held in a place available to the general public." MICH. COMP. LAWS § 15.263(1). Also, "a public body may establish reasonable rules and regulations in order to minimize the possibility of disrupting the meeting." *Id*. A person can be excluded from a meeting due to "a breach of the peace actually committed at the meeting." *Id.* at § 15.263(6). Lastly, a council may limit the amount of time that each person can speak at a meeting. *Id.* § 15.263(5).

Consistent with the OMA, the City's rules state that "[n]o comments shall be made from another location, and anyone making 'out of order' comments may be subject to removal from the meeting." Moreover, [t]here will be no demonstrations during or at the conclusion of anyone's remarks or presentation," and "[t]hese rules are intended to promote an orderly system of holding a public hearing, to give every person an opportunity to be heard, and to ensure that no individual is embarrassed by exercising his or her right of free speech." Rules at 7. The rules also provide that "[a]

person may be called to order by the Chair or any Council member for failing to be germane to the business of the City, for use of vulgarity, for a personal attack on persons or institutions . . . ." Rules at 5. Lastly, Robert's Rules of Order govern City Council meetings to the extent they do not conflict with City's rules. As such, pursuant to Robert's Rules, the Council has the right to remove a person from the meeting.

In the instant case, the Mayor removed audience members only after public comment was completed and 26 interruptions, several warnings, and 3 forced recesses so that Council could conclude the agenda item. The removed audience members were permitted to watch the remainder of the agenda item and live vote through the windows and on television in the vestibule of chambers. Moreover, the entire meeting was streamed live on the City's website and YouTube channel and was broadcast live on cable television. To the extent that Plaintiffs suggest that the Council conducted its vote in secret, the evidence before this Court shows otherwise. Plaintiffs have failed to come forward to demonstrate that the OMA was violated. Under the OMA, the City was authorized to remove the unruly and disruptive audience members without turning the vote on the Consent Judgment into a secret vote. Defendants, as opposed to Plaintiffs, are likewise entitled to summary judgment on this issue.

B. Due Process

Plaintiffs further argue that because of the "alleged failure to provide proper notice and an opportunity to be heard, Defendants deprived Plaintiffs of their right to due process." However, Plaintiffs have alleged no

cognizable property interest. In order to have a protected property interest, "one must possess more than a unilateral expectation to the claimed interest; the claimant must have a legitimate claim of entitlement." *York v. Civil Serv. Comm'n*, 263 Mich. App. 694, 689 N.W.2d 533, 539 (2004). Yet, even neighboring landowners do not have a legally protected property interest with respect to claims of increased traffic and generalized aesthetic and economic loss. *See, e.g., Unger v. Forest Home Twp.*, 65 Mich. App. 614, 237 N.W.2d 582, 584 (1975).

Here, Plaintiffs Norgrove, Jabbo, Catcho, and Rrasi do not own property near the location of the proposed mosque. While Youkhanna and McHugh own real property ¾ of a mile and 3 miles away from the site of the proposed mosque, there is no evidence that they have been deprived of any interest in that property, or, if they were, that the alleged deprivation is anything other than generalized, unsupported grievances concerning traffic and loss of aesthetic and economic value.

Plaintiffs are not entitled to summary judgment on Plaintiffs' Due Process claim. Rather, Defendants are entitled to summary judgment on Plaintiffs' Due Process claim.

C. First Amendment and Equal Protection

Plaintiffs next argue that their speech was improperly restricted and that they were treated differently under the City's rules. Because their claim involves an intersection of the First Amendment and the Equal Protection Clause, the United Supreme

Court has instructed courts to decide both claims under a First Amendment analysis. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 384 n.4 (1992).

Specifically, Plaintiffs claim their speech was impermissibly chilled when they and other audience members were limited to a two-minute speaking time, prevented from speaking critically of the Islamic faith, and removed from the meeting for being disruptive. However, "[t]he First Amendment does not guarantee persons the right to communicate their views at all times or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981). When the government designates a limited public forum for speech, as is the case of a city council meeting, it may apply restrictions to the time, place, and manner of speech so long as those restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Jobe v. City of Catlettsburg*, 409 F.3d 261, 266 (6th Cir. 2005).

In *Lowery v. Jefferson Cnty. Bd. of Educ.*, 586 F.3d 427 (6th Cir. 2009), the United States Court of Appeals for the Sixth Circuit considered whether a school board policy was content-neutral and narrowly tailored to serve a significant government interest. Under the policy, persons were allowed to apply to speak and they would be permitted to speak for a maximum of five minutes provided the content of their speech was "not frivolous, repetitive, nor harassing." *Id.* at 433. The Sixth Circuit held that the policy was both content-neutral and narrowly tailored:

> The policy's stated justifications include: allow[ing] everyone a fair and adequate opportunity to be heard;" "assur[ing] that the regular agenda of the Board is completed," and "recogniz[ing] the voluntary nature of the Board['s]time and us[ing] that time efficiently." Each of these justifications has nothing to do with the subject of an individual's proposed speech and everything to do with conducting orderly, productive meetings. The school board's policy is narrowly tailored because it prohibits speech only when it is "repetitive," "harassing" or "frivolous."

Id. Courts have recognized that a person may be entirely excluded from a limited public forum without violating the Constitution when the person is disruptive or wishes to speak on a topic not encompassed within the purpose of the forum. *See, e.g., Freedom from Religion Found., Inc. v. City of Warren*, 873 F. Supp.2d 850, 863 (E.D. Mich. 2012); *Beaton v. City of Allen Park*, No. 14-CV-13590, 2015 WL 3604951 (E.D. Mich. 2015); *Jones v. Heyman*, 888 F.2d 1328, 1333 (11th Cir. 1989). Lastly, alternative channels of communication need not be the best means of communication if the intended audience can still be reached. *Phelps-Roper v. Strickland,* 539 F.3d 356, 372-73 (6th Cir. 2008).

In this case, the purpose of the February 21, 2017 meeting was to discuss the approval of the Consent Judgment, thus comments about Islam were irrelevant to the discussion before the Council. Moreover, Defendant Taylor indicated at the outset that

commentary regarding anyone's religion was not relevant to whether the Consent Judgment should be approved and the reason for the speaking limitation and removal provision was to maintain order and to ensure that all audience members wishing to speak had the opportunity to do so. As such, Plaintiffs have failed to come forward with any evidence that the City's rules were not content-neutral or narrowly tailored.

Additionally, Plaintiffs had ample alternative channels of communication. The City established a location just outside City Hall, where individuals, including the Plaintiffs, could gather and express their opinions and concerns about individuals who practice Islam, terrorism and other views not germane to whether the Consent Judgment should be approved. Lastly, the contact information for each Councilmember is available on the City's website and Plaintiffs were able to contact the members to express their views.

For these reasons, Defendants are likewise entitled to the summary judgment on Plaintiffs' First Amendment and Equal Protection Clause claims.

D. Fourth Amendment

Plaintiff Rrasi claims that her Fourth Amendment rights were violated when she was removed from the City Council meeting. As an initial matter, the February 21, 2017 meeting was a limited public forum and Defendant Taylor was allowed to restrict non-germane speech and remove individuals who were being disruptive without violating the Constitution. Moreover, interference with a city official during the

performance of official duties is a misdemeanor offense. *See* City Ordinance, §35-16(M).

Here, the record reveals that Plaintiff Rrasi approached the dais and used gestures in a threatening manner. She was escorted out of Chambers when she refused to leave after being called out of order by Defendant Taylor. As such, there was no unlawful seizure under the facts of this case. In any event, even if an unlawful seizure occurred, Defendant Taylor would be entitled to immunity because he was engaged in a legislative activity. *See Hogan v. Twp. of Haddon*, 278 F. App'x 98, 104 (3d Cir. 2008). Summary judgment is therefore denied to the Plaintiffs on this claim and granted in favor of the Defendants.

E. Establishment Clause

Lastly, Plaintiffs' Establishment Clause claim is without merit and Defendants are entitled to summary judgment in their favor. The law is well settled that "[s]ince the advent of zoning, churches have been held proper in residential districts" and that "[t]he concerns underlying the Establishment Clause arise not when religion is allowed by government to exist or even flourish, but when government sets a religious agenda or becomes actively involved in religious activity." *Boyajian v. Gatzunis*, 212 F.3d 1, 9-10 (1st Cir. 2000) (internal quotation marks and citations omitted).

Government action does not violate the Establishment Clause where it has a secular legislative purpose, its principal or primary effect neither advances nor inhibits religion by conveying a message that the government was endorsing a religion, and it

does not foster an excessive government entanglement with religion. *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 590 (6th Cir. 2015) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) and *Lynch v Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor J. concurring). When determining the purpose of government action or the effect of its implementation, the court must view the evidence from the perspective of a reasonable observer. *Smith*, 788 F.3d at 590. The reasonable observer is deemed aware of the history and context of the community as well as the context in which the challenged government activity took place. *Id*.

Based on the evidence, the Court is compelled to conclude that a reasonable observer would know that the purpose of the speech restrictions at the Council meeting were designed to facilitate an orderly and productive meeting that permitted all audience members an opportunity to speak on whether the Consent Judgment should be approved. The purpose of the Consent Judgment was to permit the AICC the free exercise of religion through a special land use and to resolve pending litigation against the City. Moreover, the City has no connection to the AICC or the proposed mosque, thus there is no entanglement with Islam. Here, the City did not violate the Establishment Clause by enabling the AICC's members the free exercise of religion by approving the Consent Judgment and thereby permitting a special land use for the construction of the mosque.

IV. CONCLUSION

Accordingly, for the reasons articulated above, Defendants' Motion for Summary Judgment [#69] is GRANTED.

Plaintiffs' Motion for Summary Judgment [#67] is DENIED.

SO ORDERED.

Dated: August 1, 2018

/s/Gershwin A. Drain
GERSHWIN A. DRAIN
United States District Judge

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on August 1, 2018, by electronic and/or ordinary mail.
/s/ Tanya Bankston
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No.: 17-cv-10787
Honorable Gershwin A. Drain

[Filed August 01, 2018]

KAMAL ANWIYA YOUKHANNA, *et al.*,

Plaintiffs,

v.

CITY OF STERLING HEIGHTS, *et al.*,

Defendants.

JUDGMENT

Pursuant to the Opinion and Order entered on this date; judgment is hereby entered in favor of the Defendants and against the Plaintiffs.

SO ORDERED.

Dated: August 1, 2018

/s/Gershwin A. Drain
GERSHWIN A. DRAIN
United States District Judge

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on August 1, 2018, by electronic and/or ordinary mail.
/s/ Tanya Bankston
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18-1874

[Filed September 10, 2019]

KAMAL ANWIYA YOUKHANNA; WAFA CATCHO; MAREY JABBO; DEBI RRASI; JEFFREY NORGROVE; MEGAN MCHUGH,	)
Plaintiffs-Appellants,	)
v.	)
CITY OF STERLING HEIGHTS; MICHAEL C. TAYLOR INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS MAYOR, CITY OF STERLING HEIGHTS, MICHIGAN,	)
Defendants-Appellees.	)

BEFORE: MERRITT, MOORE, and WHITE, Circuit Judge.

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/_____
Deborah S. Hunt, Clerk