

Land Use – We Like Fat Records

By Reed Hardesty

Mr. Johnson applied to the City of Freedom for a variance to construct a 35-foot dome on an out building already on his property. The out building had no known or permitted water or sewer connections. Some people thought Mr. Johnson was using the out building as a residence. City staff considered code enforcement against the Johnson structure. The City's initial review also supported the application did not meet the criteria for allowing a five-foot variance over its height limitations. Mr. Johnson stated on his application the dome was needed to meet the requirements of his religion and that the structure would be used as a private prayer chapel.

Federal law under [42 U.S. Code § 2000cc](#) provides for protection of land use as religious exercise under some circumstances. While the City initially reviewed the matter under sewer connection requirements under the City code it quickly began reviewing the application to understand how federal law impacted their review. For an individual's private religious practice, the government's restriction cannot place a substantial burden on the individual. Mr. Johnson stated his religion could only be practiced in a 35-foot high dome. It had to be exactly 35 feet. The City determined that other members of Mr. Johnson's religion practiced in structures that were not 35 feet high; there was a public religious chapel less than a mile from the Johnson property and that Mr. Johnson submitted in his application that he was currently practicing his religion in his residential home which had a roofline under 30 feet. The variance application also showed the proposed dome height would be 35 feet 6 inches. The planning department incorporated this and other information into the findings of fact for City Council.

The City's municipal code is not a model of clarity but it did state "the City shall hold a public hearing" for land use hearings before the City Council. Mr. Johnson and the public were given an opportunity to comment to City Council before a vote was taken for the variance decision.

This case is an important reminder that in addition to the prescribed process adopted by your municipality there may be federal or state laws that may need to be evaluated under a pending application. In this example, the City did a good job of creating a large record of review for City Council and adopted findings of fact to address issues important in federal law analysis. In one out-of-state lawsuit, the applicant demonstrated the closest prayer chapel was a six-hour drive from their home so the Court required more flexibility on the regulating City so as not to create a substantial burden on the individual.

The City called WCIA early in the process for some pre-defense review assistance. The consulting attorney was able to bring specialized knowledge to help City staff gain a fuller appreciation of the review process it needed for Mr. Johnson's unique development request. If you have a complex land use request remember to use WCIA's pre-defense program.