NO. 17-1770

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

KAMAL ANWIYA YOUKHANNA; JOSEPHINE SORO; WAFA CATCHO; MARY 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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE GERSHWIN A. DRAIN
CASE NO. 2:17-cv-10787-GAD-DRG

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

ARGUMENT IN REPLY

I. The District Court Committed Reversible Error by Concluding that the City Council's Approval of the Consent Judgment Did Not Violate the City's Zoning Ordinance or the Michigan Zoning Enabling Act.

The gravamen of this case and the central question before this Court is whether the City Council's approval of the Consent Judgment violates the City's Zoning Ordinance and the Michigan Zoning Enabling Act. The District Court's legal conclusion that the approval of the Consent Judgment does not violate state law constitutes reversible error. *McPherson v. Mich. High Sch. Ath. Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (stating that "[e]ither a legal error, for which [this Court] conduct[s] *de novo* review, or a factual error, for which [this Court] conduct[s] review only for clear error, may be sufficient to determine that the district court abused its discretion") (internal quotations and citation omitted).

To briefly summarize, there is *nothing* in the record to demonstrate that the proposed mosque meets *any* of the standards that served as the basis for the Planning Commission's unanimous denial of the application.[1] And more importantly, there is

[1] When it is the approval authority, the City Council is required to consider *all* of the zoning regulations, not simply those that the Planning Commission relied upon to deny the AICC mosque application. As stated in the Zoning Ordinance, "If the particular special approval land use(s) *is in compliance with the standards* set forth in Section 25.02, the requirements specific to the particular zoning district in which the special approval land use is proposed, the conditions imposed under Section 25.03(D), other applicable ordinances, and state and federal statutes, it shall be approved." (Defs.' Ex. C [City of Sterling Heights Zoning Code, § 25.03 B.1.], R. 14-4, Pg. ID 561) (emphasis added). And to be clear, Plaintiffs are not here to defend the Planning

nothing in the record to demonstrate that the proposed mosque complies with *all* of the standards set forth in the City's Zoning Ordinance or the Michigan Zoning Enabling Act. Indeed, the "poignant" question to ask is this: "What evidence *is in the record* that the City Council *complied* with the relevant zoning regulations when it approved the Consent Judgment?"[2] The answer: there is none, and the City has yet to provide any. Instead, the City simply deflects the central question in this case by claiming that the City Council "considered" the standards. And the District Court, which has a vested interest in ensuring that the Consent Judgment *it approved* withstands further judicial scrutiny, did nothing to pursue *this crucial* line of inquiry. Nothing.

Commission. By not requiring a traffic study under the circumstances of this case, the Planning Commission was derelict in its duty to faithfully enforce the Zoning Ordinance. (*See* City's Br. at 7 n.2 [chastising Plaintiff Norgrove, a member of the Planning Commission, for not requesting a traffic study]). But this dereliction of duty does not excuse the City Council from its independent duty to comply with the Zoning Ordinance before approving a special approval land use permit via a consent decree. (Defs.' Ex. C [City of Sterling Heights Zoning Code, § 25.03 A.2.d.], R. 14-4, Pg. ID 560-61 (stating that when "the City Council is the reviewing authority for a special approval land use under consideration that is proposed" pursuant to a consent judgment, it "*shall investigate* the circumstances of the case prior to approving or denying the request") (emphasis added).

[2] While argument is not evidence, counsel's response to the District Court during the hearing on the motion for a preliminary injunction was grounded in *facts*: there is no basis for approving the construction of a "25,000 plus square foot" structure in a residential neighborhood which is "30 feet higher" than what is acceptable and for which there was admittedly "no consideration" of the well documented "traffic" concerns and "no consideration" whatsoever of its "ancillary uses." (*See* City's Br. at 18 [quoting June 20, 2017 Hr'g Tr., R-53, Pg. ID 1445]). In comparison, counsel for the City simply cited conclusions—conclusions that were *not* grounded in fact. (*See* City's Br. at 19 [quoting June 20, 2017 Hr'g Tr., R-53, Pg. ID 1454]).

Pursuant to the City's Zoning Ordinance, "The following *shall* apply to approval of a special approval land use by the . . . *City Council* in instances where it is the reviewing authority: 1. If the particular special approval land use(s) *is in compliance with the standards* set forth in Section 25.02, the requirements specific to the particular zoning district in which the special approval land use is proposed, the conditions imposed under Section 25.03.D., other applicable ordinances, and state and federal statutes, it shall be approved. *The decision **shall** be incorporated in a statement of findings and conclusions which **specifies the basis for the decision** and any conditions imposed*."[3] (Defs.' Ex. C [City of Sterling Heights Zoning Code, § 25.03 B.1.], R. 14-4, Pg. ID 561) (emphasis added).

This "statement of findings and conclusions" is crucial because it is the only way that private citizens can hold the City Council's feet to the fire when it comes to enforcing the Zoning Ordinance, which is enacted for the benefit of the public, *League of Residential Neighborhood Advocates v. City of L.A.*, 498 F.3d 1052, 1055-56 (9th Cir. 2007) ("Municipalities may not waive or consent to a violation of their zoning

[3] This is also a requirement of the Michigan Zoning Enabling Act ("MZEA"). *See* Mich. Comp. Laws § 125.3502 ("(4) The body or official designated to review and approve special land uses may deny, approve, or approve with conditions a request for special land use approval. The 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."); *see generally Whitman v. Galien Twp.*, 288 Mich. App. 672, 687 (Mich. Ct. App. 2010) ("Because the zoning ordinance does not comply with the MZEA, the zoning board's decision to grant a special-use permit did not comport with the law, and the circuit court erred by affirming the board's decision. . . . We vacate the special-use permit.").

laws, which are enacted for the benefit of the public."), and not for the benefit of the City's politicians who are trying to "extricate" themselves (City's Br. at 22) from two politically-charged, yet meritless lawsuits.[4] Otherwise, consent decrees become a convenient and politically expedient way for the City Council to ignore and thus subvert the law to the detriment of the public. This case is a prime example.

Here, the City continues to refuse to set forth specific facts demonstrating how this mega-mosque construction complies with the requirements of the Zoning Ordinance (because it can't) and instead relies on a tenuous and incorrect argument that it "considered" the Zoning Ordinance—not that it complied with it, but that it merely "considered" it. Not only is this argument insulting, it flies in the face of the express requirements of the Zoning Ordinance itself (and the Michigan Zoning Enabling Act, *see supra* n.3).

Consequently, the City's repeated suggestion that the City Council need only "consider" (*i.e.*, sit back and scratch its collective chin while simply contemplating the zoning requirements) and not actually *apply* the Zoning Ordinance to ensure compliance (and thus protect affected landowners such as Plaintiffs) is wrong as a matter of fact and law. In order to approve the proposed mosque development, the Zoning Ordinance requires the City Council to ensure that the development was "*in*

[4] The City employs this "extrication" argument as if it were the highest objective and all else is subsumed under it. The City is mistaken. "Extrication" is the City's excuse to ignore the law when it becomes politically correct to do so. The City did not want to be portrayed as "anti-Islam," so it has become a lawless "anti-everyone-else."

compliance with the standards." It is simply wrong—and fatal to the City's entire argument and the District Court's decision below—that all the City Council must do is "consider" a standard and then simply ignore it when it comes time to make its final decision to approve the construction. And, as noted, this "decision shall be incorporated in a statement of findings and conclusions which specifies the basis for the decision." That did *not* happen, as the City tacitly admits by repeating its mere "consideration" argument. (*See, e.g.*, City's Br. at 28). Consequently, the City creates a straw man by arguing that "Appellants could not point the District Court to any evidence that the discretionary standards of § 25.02 had not been *considered* by City Council." (City's Br. at 29) (emphasis added). It's not Plaintiffs' burden to prove a negative. Rather, the Zoning Ordinance places the burden squarely on the City Council to produce "a statement of *findings* and *conclusions* which *specifies* the basis for the decision." There is no such statement in the record because it is not possible for this mega-mosque to comply with the Zoning Ordinance, as the Planning Commission correctly concluded and as the City admits here.

Indeed, in its brief, the City makes this telling (and *factually correct*) admission: "In response to the Complaints, the City denied any wrongdoing, maintaining that the decision by the Planning Commission [to deny AICC's application to build the mosque] was based on *legitimate land use concerns* and that the Planning

Commission *acted appropriately in its denial*."[5] (City's Br. at 7) (emphasis added). During the City Council meeting, the Mayor, Defendant Taylor, made the same fatal (and *factually correct*) admission, stating that he fully supported the Planning Commission's unanimous decision to deny AICC's permit application, that the Commission had arrived at the right decision based upon legitimate planning and zoning issues, and that he vehemently denied that the Commission operated in any way to discriminate or violate the rights of AICC,[6] further stating that he "will stand by that until the day I die." (Defs.' Ex. J [Video at approx. 3 hrs. 19 mins. 55 secs. to approx. 3 hrs. 22 mins. 28 secs.], R. 14-11, Pg. ID 894-96). Per the City and its

[5] Contrary to the City's latest contention, AICC does not have "a constitutional right to build a mosque" at its proposed location on Fifteen Mile Road. (*See* City's Br. at 7). While Congress has provided certain statutory protections for religious organizations seeking to build places of worship, *see* Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, that protection does not grant religious organizations the right to special treatment under the applicable zoning regulations. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1241 (11th Cir. 2004) (observing that RLUIP "mandat[es] *equal* as opposed to *special* treatment for religious institutions") (emphasis added).

[6] These admissions call into question the City's motive for its improper reliance on false, unsubstantiated, and entirely irrelevant (and impertinent) *allegations* that the Planning Commission, or more specifically, Plaintiff Norgrove—who is running against Defendant Taylor in this upcoming mayoral election (perhaps hinting at the City's motive)—denied the AICC application based upon a bias against Muslims. (*See* City's Br. at 5-6). Indeed, these allegations are entirely irrelevant because the Consent Judgment expressly disavows any violation of the law. *Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs*, 142 F.3d 468, 477 (D.C. Cir. 1998) (rejecting a *post hoc* justification for the consent decree and stating that "the consent decree in this case specifically provides that no violation of the Voting Rights Act is to be inferred, and the Supreme Court has specifically held that consent decrees should be construed simply as contracts, without reference to the legislation that motivated the plaintiffs to bring suit").

mayor, the Planning Commission unanimously (and appropriately) denied AICC's permit application because the facts and law (*i.e.*, the Zoning Ordinance) required it. The City Council has no authority to circumvent the Zoning Ordinance via a consent decree in order to "extricate" itself from litigation. The Zoning Ordinance does not permit it.

In sum, it simply cannot be denied that the City Council's approval of the AICC mosque construction via the Consent Judgment does not comply with the City's Zoning Ordinance—procedurally or substantively. And it is undisputed that there were no findings that federal law necessitated the entry of the Consent Judgment. (Order at 16, R. 42, Pg. ID 1263). As a result, the Consent Judgment is invalid. The case law overwhelmingly supports this conclusion. *See League of Residential Neighborhood Advocates*, 498 F.3d at 1052; *Perkins v. City of Chi. Heights*, 47 F.3d 212, 216 (7th Cir. 1995) (stating that a district court can "approve a consent decree which overrides state law provisions" only "upon properly supported findings that such a remedy is necessary to rectify a *violation of federal law*"); *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 270 (8th Cir. 2011) (invalidating a consent decree and stating that "[s]tate actors cannot enter into an agreement allowing them to act outside their legal authority, even if that agreement is styled as a 'consent judgment' and approved by a court"); *Kasper v. Bd. of Election Comm'rs*, 814 F.2d 332, 341-42 (7th Cir. 1987) ("A consent decree is not a method by which state agencies may liberate

themselves from the statutes enacted by the legislature."); *Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs*, 142 F.3d 468, 477-79 (D.C. Cir. 1998) (vacating a consent decree implementing an election plan); *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) (stating that the parties to a consent decree "could not agree to terms which would exceed their authority and supplant state law"); *see also Vestevich v. W. Bloomfield Twp.*, 245 Mich. App. 759, 764-65 (Mich. Ct. App. 2001) (affirming decision to set aside a consent judgment in a zoning dispute). Thus, contrary to the City's argument, there is nothing "inapposite" about the cases relied upon by Plaintiffs to demonstrate this relevant and fully applicable point of law. (*See* City's Br. at 25).

In the final analysis, Plaintiffs have demonstrated a substantial likelihood of success on the merits. A preliminary injunction should issue. And to further buttress Plaintiffs' arguments (and to demonstrate the District Court's reversible error), we have provided below a summary of the ways in which the City Council, through the approval of the Consent Judgment, violated the zoning regulations. Since the City Council was required to abide by *all* of the zoning regulations, any one of these violations is sufficient to render the Consent Judgment invalid.

SUMMARY OF VIOLATIONS

- The City Council failed to make the required "statement of findings and conclusions which specifies the basis for the decision and any conditions imposed." Zoning Ordinance § 25.03 B.1.; MZEA § 125.3502.

- The City Council failed to establish the necessary findings to demonstrate that the mosque construction "is in compliance with the standards set forth in Section 25.02," Zoning Ordinance § 25.03 B.1., and instead relies on the fallacious argument (which was erroneously accepted by the District Court) that it need only "consider" the standards and not meet them.

- The City Council failed to incorporate enforceable conditions in the Consent Judgment to ensure compliance with the regulations and to protect, *inter alia*, "adjacent" landowners. *See* Zoning Ordinance §§ 25.03 B.1., 25.03 D.1. & 3. Indeed, without legitimate enforcement mechanisms, all "considered" standards are illusory.

- The Consent Judgment fails to provide the required parking. The parking computation was based upon 1 space per 3 congregants, *see* Zoning Ordinance § 23.02, and only addressed the main "worship"[7] space of 3,204 square feet, as rated for 325 persons, out of a total of 28,374 square feet (which suggests a rated occupancy of over 2,000 persons). The requirement for 130 parking spaces also fails to consider any concurrent or ancillary uses. It does not include parking needs for the lecture area

[7] It should be noted that AICC requested to build a "Religious Community Center" and not a "mosque." (Ex. A [AICC Application], R. 9-4, Pg. ID 264).

of 4,043 square feet or the recreation area (which may accommodate meeting functions) of 4,201 square feet, and these are just on the first floor. The Consent Judgment fails to account for the women's "worship" space and other offices or classrooms in the 7,874 square feet shown for the basement. (*See* Ex. C [September 10 Staff Report], R. 9-4, Pg. ID 276 ["Given the approximately 20,500 square foot size of the proposed *main floor* of the building (not counting dedicated meeting space in the basement) and the allocation of floor space to ancillary uses, there is a likely shortage of off-street parking when the principal and ancillary uses of the building are combined, particularly during times of maximum capacity prayer hall usage."]).

- There is no meaningful nor enforceable parking limitation condition, as required by the Zoning Ordinance. *See* Zoning Ordinance §§ 25.03 B.1., D.3. Instead, the Consent Judgment (unlawfully) puts the burden on nearby residents, providing for "residential permit parking" in not one, but two areas, thereby placing a significant burden on unsuspecting residents for AICC's failure to provide adequate parking.

- The Consent Judgment fails to address, let alone meet, the traffic standards. Zoning Ordinance § 25.02 B.

- The Consent Judgment fails to address whether "public services and facilities" are "capable of accommodating increased service and facility loads" caused by the proposed mosque. *See* Zoning Ordinance § 25.03 D.

- The Consent Judgment fails to account for the fact that AICC's actual use and activity levels of its mosque, per its own admissions, *see infra* n. 11, will stress local support services and contribute significantly to the already dangerous traffic conditions on Fifteen Mile Road.

- The Consent Judgment fails to insure compatibility with adjacent uses of land. As the Planning Commission found based upon established facts: "The square footage of the proposed building in comparison to the size of the parcel is excessive and not compatible with the established development patterns in this R-60 zoning district." (Ex. C [September 10 Staff Report], R. 9-4, Pg. ID 276). The City Council provided no contrary findings.

- As the Planning Commission found based upon established facts: "The scale and height of the proposed building on the site are not harmonious with the character of existing buildings situated in the vicinity of this R-60 zoning district." (Ex. C [September 10 Staff Report], R. 9-4, Pg. ID 276). The City Council provided no contrary findings.

- The Consent Judgment fails to protect the residential character of the zone. Zoning Ordinance § 25.02 G.

- The Consent Judgment violates the zoning requirement that "[t]he proposed use is so designed, located, planned and to be operated that the public health,

safety, and welfare will be protected." Zoning Ordinance § 25.02 F. There are no findings to support this requirement.

- The Consent Judgment did not eliminate "any possible nuisance" that may be noxious to other permitted uses," primarily "noise." Zoning Ordinance § 25.02 C. Indeed, as noted, AICC specifically requested the construction of a "Religious Community Center," and not a mosque *per se*, and the Consent Judgment does not prohibit noisy outdoor sports or other noisy outdoor recreational activities.

- The Consent Judgment expressly provides for a waiver of the zoning regulations. (Muise Decl., Ex. C [Consent J. § 2.6 ("*Except as modified by this Consent Judgment*, AICC shall comply with all City codes . . . ."); § 3.4 ("To the extent that this Consent Judgment *conflicts* with any City Ordinance . . . , *the terms of this Consent Judgment shall control*." (emphasis added)], R. 9-2, Pg. ID. 202, 203-04).

In sum, by approving the Consent Judgment, the City Council violated the zoning regulations. It's not even a close call.

II. Plaintiffs Were Deprived of the Right to Due Process in Violation of the Fourteenth Amendment.

The City incorrectly argues that Plaintiffs "contend that the Zoning Ordinance and the MZEA required that [Plaintiffs] be given notice of the February 21, 2017 meeting and that lack of notice deprived them of their rights to procedural due process." (City's Br. at 34). The City (like the District Court) ignores Plaintiffs'

argument and then creates its own strawman argument. As Plaintiffs argued in their opening brief to this Court (the brief that the City was allegedly responding to here), "the question is not whether the Zoning Ordinance required proper notice and an opportunity to be heard, but whether, under the circumstances, the Fourteenth Amendment demands it." (Pls.' Opening Br. at 36).

Thus, Plaintiffs' due process claim arises under the Fourteenth Amendment and not any particular procedure set forth in a local zoning ordinance or state statute. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 757 (2005) ("Although the underlying substantive interest is created by an independent source such as state law, *federal constitutional law* determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.") (internal quotation marks omitted). However, a procedural rule set forth in a local zoning regulation, such as a rule which deprives an adjacent property owner of proper notice and an opportunity to be heard when a government entity is making a zoning decision that will affect her property, could, as in this case, technically comply with the zoning regulation but nonetheless violate the Fourteenth Amendment. *Macene v. MJW, Inc.*, 951 F.2d 700, 706 (6th Cir. 1991) ("In this Circuit, . . . a § 1983 plaintiff may prevail on a procedural due process claim by . . . demonstrating that he is deprived of property as a result of established state procedure that itself violates due process rights.").

Additionally, what this state law does affirm is Plaintiffs' claim that they, as land owners or occupants, have a "property" interest in zoning decisions that affect *their* property, including the quiet use and enjoyment of their property, even when the zoning decision is directed at adjacent property.[8] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property . . . is an individual entitlement grounded in state law."); *Arill v. Maiz*, 992 F. Supp. 112, 117 (D.P.R. 1998) (holding that the complaint fully alleged a due process claim under § 1983 based on the deprivation of a cognizable property interest in the plaintiffs' quiet use and enjoyment of their property).

Here, the Planning Commission unanimously denied AICC's permit application. However, the City Council *completely reversed* this decision without notifying persons whose property is affected by this decision (Plaintiffs) that it was going to do so, and the City Council, in a Caligula-like fashion, failed to provide notice of the terms and conditions of the Consent Judgment, which was not publicly disclosed until it was approved and then filed by counsel for AICC in its litigation on February 28, 2017. (Rrasi Decl. ¶ 4, R. 9-3, Pg. ID 244; *see also* Muise Decl., Ex. C

[8] *See, e.g.*, Mich. Comp. Laws § 125.3502 ("(2) Upon receipt of an application for a special land use which requires a discretionary decision, the local unit of government shall provide notice of the request as required under section 103. The notice shall indicate that a public hearing on the special land use request may be requested by any *property owner or the occupant of any structure located within 300 feet of the property being considered for a special land use* regardless of whether the property or occupant is located in the zoning jurisdiction.") (emphasis added).

[Consent J.], R. 9-2, Pg. ID 194-213). This violates the due process requirement of the Fourteenth Amendment.

In *Nasierowski Brothers Investment Company v. City of Sterling Heights*, 949 F.2d 890, 893-94 (6th Cir. 1991), this Court found a due process violation under circumstances that are *substantively* the same (including the same defendant), stating, in relevant part, "Nasierowski's injuries accrued and attached immediately when Council convened in executive session and *materially deviated from the recommendations of the planning commission, thus subverting the purpose of the duly conducted notice and comment process*." (emphasis added). Similarly here, the purpose of the notice and comment process that the Planning Commission engaged in—a process required by local and state law—was completely subverted when, without notice to affected property owners, the City Council materially deviated from the decision of the Planning Commission and approved AICC's permit via the Consent Judgment. And, contrary to the City's argument, the fact that Nasierowski owned the property that was subject to the adverse zoning decision does not distinguish it from this case where adjacent property owners (Plaintiffs) are adversely affected by the zoning decision at issue. *See, e.g.*, *Bd. of Regents of State Colls.*, 408 U.S. at 571-72 ("The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.").

In sum, the City Council's approval of the Consent Judgment violated Plaintiffs' due process rights under the Fourteenth Amendment, rendering it invalid.

III. The City Violated the Express Language and Purpose of the Michigan Open Meetings Act.

The City's argument that it complied (technically, at best) with the Michigan Open Meetings Act when it ordered *all* private citizens, including Plaintiffs but excluding the media, to leave the public meeting when it came time for the City Council members to actually vote on the highly contentious Consent Judgment is contrary to the express language and the very purpose of the Act.

"[T]he Open Meetings Act was enacted to provide openness and accountability in government, and is to be interpreted so as to accomplish this goal." *Esperance v. Chesterfield Twp.*, 89 Mich. App. 456, 463 (Mich. Ct. App. 1979). Consequently, "it implicitly requires that *all parts* of the meeting . . . be open to the public." *Id*. at 463 (emphasis added). Indeed, the express language of the Act requires the *entire* meeting to be open to the *public*, not just the media. And a *person* can be excluded from the meeting only if *that person* "*actually committed*" a breach of the peace[9]—the City has

[9] *See, e.g., City of Dearborn Heights v. Bellock*, 17 Mich. App. 163, 168 (Mich. Ct. App. 1969) ("A 'breach of the peace' has been defined in Michigan as any intentional violation of the natural right of all persons in a political society to the tranquillity enjoyed by citizens of a community where good order reigns among its members. *Davis v. Burgess* (1884), 54 Mich. 514. Such a disturbance must be outside the ordinary course of human conduct and a usual noise or one not calculated to create a nuisance or disturbance cannot be penalized under the ordinance. Violations of the ordinance, therefore, must be restricted to intentional, unreasonable disturbances.").

no authority to remove peaceful citizens from the meeting based on the actions of others, which it did here. *See* Mich. Comp. Laws § 15.263 ("(1) *All* meetings of a public body *shall be open to the public* and shall be held in a place available to the general public. . . . (2) *All* decisions of a public body shall be made at a meeting *open to the public*. (3) *All* deliberations of a public body constituting a quorum of its members shall take place at a meeting *open to the public* . . . (6) 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.") (emphasis added). Consequently, the City Council violated the rights of the public, specifically including the rights of Plaintiffs who were unlawfully removed from the public meeting during the actual vote on the Consent Judgment, thereby rendering the City Council's decision invalid. Mich. Comp. Laws § 15.270 ("(2) A decision made by a public body may be invalidated if the public body has not complied with the requirements of section 3(1), (2), and (3) in making the decision . . . and the court finds that the noncompliance or failure has impaired the rights of the public under this act.").

IV. The City's Rule 19 Argument Is without Merit.

In a footnote, the City recycles the Rule 19 argument it made in the District Court (City's Br. at 44 n.20)—an argument which the lower court simply ignored and for good reason: it has no merit. Because the lower court did not address this issue, there is no decision for this Court to review. Nonetheless, the City's argument should

be summarily dismissed.

The City asserts that Rule 19 requires the inclusion of AICC and the Department of Justice in this case as necessary parties. (City's Br. at 44 n.20). The City is mistaken. To begin, AICC has appeared in this case as *amicus curiae* in opposition to Plaintiffs' motion for a preliminary injunction and, quite tellingly, did not present *any* argument or evidence that granting the injunction would cause it harm. (Br. of *Amicus Curiae* Am. Islamic Cmty. Ctr. in Opp'n to Pls.' Mot. for Prelim. Inj., R. 27, Pg. ID 1069-1100). AICC currently has a place of worship, and it will continue to use this location while this case proceeds. Also, the Department of Justice is not a party to the challenged Consent Judgment, and there is no "Consent Judgment" entered in the case between the City and the United States. Rather, the district court entered a "Consent Order," and the order merely requires the City to "abide by the terms of the Consent Judgment" challenged here. (*See* Consent Order, *United States v. City of Sterling Heights*, No. 2:16-cv-14366 (E.D. Mich. Mar. 1, 2017), ECF No. 7)). Consequently, should Plaintiffs succeed in their challenge to the Consent Judgment, this provision of the "Consent Order" is meaningless.

Nonetheless, the City's Rule 19 argument is wrong as a matter of law. *See Hartford Cas. Ins. Co. v. TRE Servs.*, No. 09-14634, 2010 U.S. Dist. LEXIS 118351, at *9-11 (E.D. Mich. Nov. 5, 2010) (stating that a party "is only indispensable, within the meaning of Rule 19, if (1) it is necessary, (2) its joinder cannot be effected, and (3)

the court determines that it will dismiss the pending case rather than proceed in the case without the absentee" and finding that certain defendants were "dispensable parties" because "a resolution of the insurance coverage dispute in this matter will not prejudice the absent" defendants "because existing parties will adequately represent their interests"). A resolution of whether the Consent Judgment is valid will not prejudice the absent parties because the City will adequately represent their interests. *Hooper v. Wolfe*, 396 F.3d 744, 749 (6th Cir. 2005) ("When assessing prejudice, the court must consider whether the interests of an absent party are adequately represented by those already a party to the litigation."). Consequently, the lone case relied upon by the City, *Manybeads v. United States*, 209 F.3d 1164, 1166 (9th Cir. 2000), is inapposite because there the Ninth Circuit found that the government was incapable of representing the interests of the absent party. *See id*. at 1166 ("The United States contends that it can adequately represent the Hopi Tribe, and that there is no need to join the missing sovereign. The contention is weak because it is the reverse of what the government contended in the district court. The contention is contradicted because the government is a trustee not only for the Hopi Tribe and the Navajo Nation but for the very plaintiffs in this case. . . . The government, if it undertook to act for the Hopi Tribe, would stand on both sides of the question. The government cannot represent the tribe.").

Here, the City's "litigation goals [*i.e.*, to validate the Consent Judgment] are completely aligned" with those of AICC and the Department of Justice. *See Hartford Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 118351 at *12. Additionally, it should be highlighted that none of the allegedly necessary and absent parties has moved to join the instant litigation, and AICC's request to participate simply as an *amicus curiae* undermines the City's argument. *See, e.g., Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 49 (2d Cir.1996) ("[Defendant's] attempt to assert on behalf of the Ministry its supposed concern about the dilution of its interest . . . falls outside the language of the rule. It is the absent party that must 'claim an interest.'").

In short, Rule 19 provides no basis for this Court to deny Plaintiffs the relief they request here.

V. The Remaining Factors Weigh in Favor of Granting the Requested Injunction.[10]

To avoid needless repetition, Plaintiffs will not repeat their arguments with regard to the irreparable harm, harm to others, and the public interest factors. Suffice to say, these factors weigh in favor of granting the requested injunction. (*See* Pls.' Opening Br. at 41-44).

[10] The City's claim that Plaintiffs' decision to not seek a stay in the District Court pending appeal is somehow "telling" with regard to "the issue of irreparable harm" is nonsense. (City's Br. at 44 n.19). Staying the proceedings below does not stop nor delay the mosque construction. Rather, it simply delays this litigation. By allowing the case to proceed below, Plaintiffs can more quickly move to a final resolution of the matter, regardless of the outcome of this appeal. Thus, it makes sense to *not* seek a stay of the proceedings under the circumstances.

Here, the City is permitting the construction of a 20,000 plus square foot structure (28,374 square feet when you include the basement) that is over 60 feet high in a residential neighborhood in violation of zoning regulations that were enacted in order to protect property owners and the general public from the harm caused by such zoning decisions. By granting the permit for this construction, the City will force residents to flee from their homes because this structure will disrupt the nature and character of their neighborhood and disrupt the quiet use and enjoyment of their homes. The harm caused by this construction cannot be remedied by the payment of monetary damages. Plaintiff Rrasi, for example, wants to stay *in her home* and care for her elderly family members in peace. She doesn't want to live in the shadow of a giant structure that has an occupancy capacity of over 2,000 people (and that provides parking for a little more than 100).

Indeed, the AICC mosque will sit on this small lot in the middle of a residential neighborhood like a three-story department store with a parking lot. There are no structures in the immediate area of the same height. The structure is disproportionally larger than other structures in the area, and rather than fitting in harmoniously, it would dominate the visual landscape in violation of the zoning regulations. The mosque will also exacerbate an already dangerous traffic situation. And there is no

consideration whatsoever of its ancillary uses,[11] leaving open the very real possibility of further future harm.

In sum, the facts of this case compel the conclusion that Plaintiffs have met all of the factors that a court must consider when reviewing a request for a preliminary injunction. The District Court's contrary conclusions are clearly erroneous.

CONCLUSION

Plaintiffs respectfully request that this Court reverse the District Court and grant their motion for a preliminary injunction in order to maintain the *status quo* as this case proceeds.

Respectfully submitted,

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[11] The City Council only provided for 130 parking spaces for worshipers to attend "group worship" on a Friday afternoon (an absurdity in the first instance given the size of this structure and its occupancy capacity), and completely ignored (contrary to the zoning regulations) the many ancillary uses of this structure. Per AICC, it "offers a variety of services to the local Muslim community, including weekly Thursday programs (Du'aa Kumayl), a Friday afternoon group prayer service, Sunday breakfast and youth program, a program for young children that teaches Arabic and the fundamentals of Islam, community retreats, and other activities. . . . The Friday afternoon service, which is called *Jumma*, is the most important service of the week for Muslims and akin to Christian mass on Sunday. . . ." (Br. of *Amicus Curiae* Am. Islamic Cmty. Ctr. in Opp'n to Pls.' Mot. for Prelim. Inj. at 8, R. 27, Pg. ID 1076; *see also* Order at 3, R. 42, Pg. ID 1250).

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 6,034 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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