

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
The Honorable Teasa Kay Weaver

Circuit Case No. 2023-CP-46-01467
Appellate Case No. 2025-002054

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SC Court of Appeals

Midway Baptist Church of York,

Respondent,

v.

County of York,

Appellant.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The present dispute between Midway Baptist Church of York (“Midway” or “Respondent”) and the County of York (the “County” or “Appellant”) stems from differing interpretations of the South Carolina Building Code (the “SCBC” or “Building Code”). The County interpreted the Building Code as requiring Midway to meet certain criteria before it could operate a grade school on its property. As the relevant provisions of the SCBC are ambiguous, and the County’s interpretation and application of those provisions are reasonable, the trial court erred by not deferring to that conclusion.

Moreover, even Respondent acknowledges that the trial court erred by delving into the content of Midway’s curriculum to determine whether it was sufficiently “religious.” Nonetheless, Respondent now contends that the religious character of its instruction *requires* the Court to rule in its favor to avoid violating Respondent’s First Amendment rights. This argument was not presented with any degree of substance to the lower court, which made no findings of fact or rulings of law on the matter. The Court should refrain from doing so now, for the first time, on appeal. However, should the Court take up the issue, the County’s interpretation of the SCBC does not burden Respondent’s religious freedom.

For the reasons discussed herein and in Appellant’s Initial Brief, the decision below should be reversed and the trial court directed to enter judgment in the County’s favor. To the extent the Court determines Respondent’s newly initiated claims on religious liberty warrant consideration, the case should be remanded for findings of fact on those issues. In either event, the trial court’s decision cannot stand.

I. The County Properly Interpreted the SCBC and the Lower Court Erred by Not Deferring to that Interpretation

The present matter involves the interpretation of the SCBC, including the interplay between certain provisions within the SCBC. Although those provisions contain terms that are undefined, their meaning becomes clear when they are viewed in the proper context.

As part of its duty to enforce those provisions, the County determined that Respondent's operation of an elementary school—Midway Christian Academy (the “Academy”)—constituted an educational occupancy that necessitated compliance with certain building requirements. That conclusion was consistent with the plain terms of the SCBC, the underlying purposes of the Building Code, and a harmonious reading of the same, and the lower court erred by not deferring to it.

A. The County's Decision Was Not Arbitrary or Capricious

Contrary to Respondent's suggestion, Appellant does not take issue with the lower court's definition of “place of religious worship.” (*See* Resp't's Initial Br. at 12–13.) Indeed, Appellant itself cited that definition. (Appellant's Final Br. at 10 & n.3.) Appellant simply noted that the lower court placed undue emphasis on that term due to its italicization in the Building Code. (*Id.* at 9.) This distracted the court from the issue of whether Respondent's proposed usage would occupy “religious educational rooms” that are “accessory to” a place of religious worship. (*See id.* at 9–10.)

Although the court purported to defer to the County's definition of those terms, the court rejected the way the County applied them. (*See* R. pp. 18–19 (Order on Mot. Reconsider at 3–4).) Respondent adopts this conclusion on appeal. (*See* Resp't's Initial Br. at 13–14.) In so doing, both Midway and the lower court misconstrue the County's position.

Notably, the County’s decision did not depend on *when* activities take place. Respondent’s brief first suggests that the County’s interpretation limits religious education to “normal” church times, such as Sunday mornings and Wednesday evenings. (Resp’t’s Initial Br. at 7.) Later, Midway states that the County “admits” that Respondent can use its buildings to teach “without time or use limitation.” (*Id.* at 11.) Respondent suggests that this shows the unreasonableness of the County’s position. In truth, it reflects Midway’s confusion as to the County’s position, which depends on neither the time nor the content of Respondent’s instruction. Appellant has consistently maintained that the occupancy classification is based not on *what* is being taught or *when*, but on *how* the buildings are being used. (*E.g.*, R. p. 215, line 22–p. 216, line 1 (Trial Tr. 125:22–126:1); R. p. 220, lines 3–11 (*id.* 130:3–11).) This is consistent with the purpose of the SCBC, which is to classify buildings according to their *use*.¹ SCBC Preface at xii.

Moreover, as this conclusion depends on the interpretation of an ambiguous term, it is entitled to deference. *See Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Env’t Control*, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014). Courts should “generally give[] deference to an

¹ For ease of reference, Appellant copies the most relevant portions of the Building Code here.

305.1 Educational Group E. Educational Group E occupancy includes, among others, the use of a building or structure, or a portion thereof, by six or more persons at any one time for educational purposes through the 12th grade.

305.1.1 Accessory to places of religious worship. Religious educational rooms and religious auditoriums, which are accessory to *places of religious worship* in accordance with Section 303.1.4 and have *occupant loads* of less than 100 per room or space, shall be classified as Group A-3 occupancies.

305.2 Group E, day care facilities. This group includes buildings and structures or portions thereof occupied by more than five children older than 2 1/2 years of age who receive educational, supervision or *personal care services* for fewer than 24 hours per day.

305.2.1 Within places of religious worship. Rooms and spaces within *places of religious worship* providing such day care during religious functions shall be classified as part of the primary occupancy.

SCBC §§ 305.1–305.2.1 (alterations in original).

administrative agency’s interpretation of an applicable statute or its own regulation.” *Doe v. Keel*, 440 S.C. 427, 431, 892 S.E.2d 282, 284 (2023) (citation omitted). A court should refuse to give such deference only if the interpretation “is arbitrary, capricious, or manifestly contrary to the statute [or regulation].” *Id.* (alteration in original) (citation and internal quotation marks omitted). “A decision is arbitrary if it is without a rational basis, is based alone on one’s will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.” *Blackmon v. S.C. Dep’t Health & Env’t Control*, 441 S.C. 342, 353, 893 S.E.2d 578 (Ct. App. 2022) (citation omitted).

The County’s interpretation and application of the Building Code is consistent with cases that have interpreted similar provisions. *See, e.g., Hough v. N. Star Baptist Church*, 312 N.W.2d 158 (Mich. Ct. App. 1981) (per curiam). The outcome in *Hough*, for instance, hinged on a rule that excluded from the definition of a “school” any building where education was “incidental to some other occupancy.” *Id.* at 160 (emphasis removed) (citation omitted).

The church argued that the school it operated—North Star Academy—“was incidental to its occupancy as a church and that, therefore, the fire safety regulations pertaining to a church rather than a school should be applied.” *Id.* The court disagreed, stating that the exemption applied only “where *instruction* is merely incidental to some occupancy other than a *school*,” not “where a *school* is incidental to some other occupancy.” *Id.* (emphasis in original). As North Star Academy was occupying the church “*as a school*, and for instruction therein,” its usage did not qualify as “*incidental instruction*.” *Id.* (emphasis added).

Similarly, the evidence in the instant case supports the County’s conclusion that the Academy constitutes a primary, educational *occupancy* of Respondent’s property—not an

incidental or accessory usage—and therefore should be classified as such. (See Appellant’s Final Br. at 8.)

Midway also argues that the County’s interpretation of the Building Code renders the carveout in section 305.1.1 meaningless. (Resp’t’s Initial Br. at 11.) Midways adopts the position of the trial court, which suggested that if “all K-12th grade instruction of more than 6 students [had to] be classified as Group E, there would be no subsection 305.1.1.” (R. p. 12 (Order at 6).) On the contrary, it is the lower court’s interpretation that reads the terms “religious educational rooms” and “accessory to” places of worship out of section 305.1.1.

For comparison, the very next section, which addresses the classification of daycare facilities, contains an exemption for “[r]ooms and spaces *within* places of religious worship.” SCBC § 305.2.1 (emphasis altered). If the Building Code had meant section 305.1.1 to apply to *all* rooms in a place of religious worship, as Respondent argues and the trial court found, it could have easily said so, just as it did in section 305.2.1. Therefore, the lower court erred by not giving effect to the entirety of the provision as it is written. *See In re Decker*, 322 S.C. 215, 471 S.E.2d 462 (1995) (per curiam) (“A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous” (ellipsis in original) (citation omitted)).

Moreover, the Court need not look far to find a scenario that demonstrates why the County’s interpretation does not render section 305.1.1 a dead letter. *See Moss v. Spartanburg Cty. Sch. Dist. No. 7*, 775 F. Supp. 2d 858 (D.S.C. 2011), *aff’d*, 683 F.3d 599 (4th Cir. 2012). *Moss* addressed a “challenge [to] the constitutionality of a public school’s policy of conferring academic credit to high school students for off-campus religious instruction.” *Id.* at 863. Crucially for purposes of the current dispute, “the released time courses [were] conducted at a church adjacent

to Spartanburg High School.” *Id.* at 866. Although the usage classification of the church was not at issue, it is easy to see how it would qualify for an assembly classification as a “religious educational room” accessory to a place of worship under the Building Code. *See* SCBC § 305.1.1.

A provision like section 305.1.1 would have also been helpful in *City of Sumner v. First Baptist Church of Sumner*, 639 P.2d 1358 (Wash. 1982), where the Washington Supreme Court analyzed several issues related to a city’s building code. Although the court remanded the case on constitutional grounds, it also addressed the church’s challenge to the city’s application of the code to a school it operated out of the church basement. *Id.* at 1364–65. A provision analogous to section 305.1 classified “use[] for educational purposes through the 12th grade by 50 or more persons for more than 12 hours per week or 4 hours in any one day” as an educational occupancy. *Id.* at 1364 (citation omitted). As the court remarked, there was plenty of evidence showing that the school met those criteria. *Id.*

However, because the church predated the building code, a grandfather clause allowed it to continue any usage that was legal when the code was adopted, without regard to new building code requirements. *See id.* On the other hand, a change of use that fell within a different occupancy classification would require the church to comply with the new code. *See id.* at 1364–65. As noted above, the church school likely qualified as an *educational* occupancy. *See id.* at 1364. Therefore, if the church could establish a *preexisting* educational occupancy, the school would be allowed to continue operating on the property. *See id.* at 1364–65.

The church was unable to rely on its history of usage as a *church*, which likely qualified as an assembly occupancy. *See id.* at 1365. However, the church had also operated a vacation Bible school on its property during the summer. *Id.* at 1360, 1365. Therefore, a critical issue was

whether a church grade school and a vacation Bible school qualified for the same usage classification. *See id.* at 1365.

The city, like Appellant here, argued “that a ‘Bible School’ is different for building code purposes from a school that met the compulsory educational requirements of the State of Washington.” *Id.* at 1365 (internal quotation marks omitted). In this context, a provision like section 305.1.1 makes sense and would have provided additional support for the city’s position: it is broad enough to encompass activities such as vacation Bible school—undoubtedly religious educational rooms that are typical of and accessory to a place of religious worship—without swallowing the rule for general educational activities.

As these cases show, there are indeed circumstances where a church (or any other place of religious worship) could provide K-12 religious instruction on its property without necessarily qualifying for an educational occupancy.² The County’s enforcement of the Building Code was therefore not arbitrary and capricious, and the trial court’s ruling to the contrary should be reversed.

B. Midway Flips the Establishment Argument on Its Head

As noted above, Midway acknowledges that the Court erred by considering the religious nature of the school’s instruction. (Resp’t’s Initial Br. at 17.) The trial court’s error should come as no surprise to Respondent, as Midway itself has repeatedly emphasized the religious character of the Academy’s curriculum. (*E.g.*, R. p. 27 (Compl. ¶ 43 (alleging that “[t]eaching *religious* curriculum transforms education that satisfies legal education requirements into religious education” (emphasis added))); R. p. 149, lines 13–15 (Trial Tr. 59:13–15 (asking a witness to identify ways the Academy incorporated religion into its science curriculum))). Confusingly,

² Indeed, Respondent’s brief notes that Midway hosts vacation Bible school on its property. (Resp’t’s Initial Br. at 6.)

Respondent then argues that adopting the County’s content-*neutral* approach would violate the Constitution’s prohibition on the government establishment of religion. (Resp’t’s Initial Br. at 16–19.) Apparently, from Respondent’s perspective, the lower court erred *by considering* whether the Academy’s instruction was religious, and the County erred *by not considering* that the Academy’s instruction is religious.

Contradiction aside, Respondent’s position misconstrues the nature of the Establishment Clause jurisprudence it cites. Midway’s argument relies heavily on two Fourth Circuit decisions. (Resp’t’s Initial Br. at 17–18 (citing *Moss*, 683 F.3d 599; *Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283 (4th Cir. 2000)).)³ Neither is relevant to the present dispute.

Moss involved a challenge to a school district policy that allowed students to receive “academic credits for off-campus religious instruction offered by private educators.” *Moss*, 683 F.3d at 601. *Ehlers-Renzi* considered the constitutionality of a county ordinance that exempted schools on land owned by religious organizations from certain permitting requirements. *See Ehlers-Renzi*, 224 F.3d at 286. In short, both cases involved *challenges to* local policies that were seen as *supporting* religion. The present dispute involves no such challenge; therefore, these cases are inapposite.

The only plausible Establishment Clause argument Respondent makes is that by “exclud[ing] religious education that also qualifie[s] for academic credit” from section 305.1.1 of the Building Code, the County must define “religious education” and therefore becomes excessively entangled with the exercise thereof. (Resp’t’s Initial Br. at 19.) However, Appellant’s

³ Those cases, in turn, rely on the United State Supreme Court’s decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which has since been, if not entirely overruled, frequently disregarded. *See Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 49 (2019) (plurality opinion) (listing cases where the Court “has either expressly declined to apply the [*Lemon*] test or has simply ignored it”).

position does not exclude *all* “religious education” that could qualify for academic credit. (*See supra* pp.5–6 (discussing religious instruction at a church).) Moreover, the Building Code itself alludes to “religious education,” and Midway alleged no facial or as-applied constitutional challenge thereto. Therefore, as this argument was not properly raised to or ruled on by the lower court, and, as discussed in more detail below, it should not be addressed by the Court here. (*See infra* Part II.A.)

In addition, as already noted, the cases on which Midway relies are easily distinguishable. For instance, in *Ehlers-Renzi*, the court found that the ordinance avoided excessive entanglement because (by its express terms) it “exempt[ed] *any* private school located on property owned by a religious organization,” regardless of whether the school was “parochial or nonsectarian.” *Ehlers-Renzi*, 224 F.3d at 290 (emphasis added). In *Moss*, the school district avoided excessive entanglement by accepting academic credits for religious instruction only “from accredited schools,” which relieved the district from having to “review[] the religious content of [the classes].” *Moss*, 775 F. Supp. 2d at 882.

The County does the same here, albeit in a different context and for a different purpose—to determine whether an exception to a generally applicable building code requirement does *not* apply. Regardless of purpose, the criteria are equally neutral—general education curriculum by a state-accredited institution—preventing excessive entanglement with the exercise of religion. Therefore, Respondent’s Establishment Clause argument fails.

II. The Classification Does Not Violate Midway’s Religious Freedom

Midway now argues, for the first time in any detail, that the County substantially burdened Respondent’s exercise of religion, in violation of the Constitution’s Free Exercise Clause⁴ and the

⁴ U.S. Const. amend. I.

South Carolina Religious Freedom Act.⁵ (Resp’t’s Initial Br. at 19.) As this issue was not timely raised to *and* ruled on by the lower court, this Court should not consider it now. Moreover, the lower court made no findings of fact on these issues. Therefore, at a minimum, the case should be remanded for the lower court to make those findings in the first instance. Finally, even considering the evidence in the record, the County’s actions do not unfairly burden Respondent’s exercise of religion.

A. The Court Should Not Rule on This Ground

Issue preservation rules are not as strict for respondents as they are for appellants. Unlike an appellant, “a respondent . . . may raise on appeal any additional reasons the appellate court should affirm the lower court’s ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). Nonetheless, “[t]he *basis* for [the] additional sustaining grounds *must* appear in the record on appeal.” *Id.* at 420, 526 S.E.2d at 723 (emphasis added). Even then, an appellate court retains “discretion whether to address any additional sustaining grounds” and may decline to do so “when the court believes it would be unwise or unjust to do so in a particular case.” *Id.* Indeed, “an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court.” *Id.* at 421, 526 S.E.2d at 724. Therefore, although a respondent *may* present such a ground, “the appellate court is likely to ignore it.” *Id.*

The present dispute began as a declaratory judgment action that challenged the County’s interpretation of the Building Code. (*See* R. pp. 25–28 (Compl. ¶¶ 29–51).) The complaint contained no discussion of religious freedom, and the only constitutional reference was to a prohibition on the use of public funds for religious schools. (R. p. 27 (*Id.* ¶ 42 (citing S.C. Const.

⁵ S.C. Code Ann. §§ 1-32-10 to -60.

art. XI, § 9 (repealed 1973);⁶ *Hartness v. Patterson*, 255 S.C. 503, 508, 179 S.E.2d 907, 909 (1971))). The same is true of the trial transcript. (*See, e.g.*, R. p. 100, line 13–p. 103, line 8 (Trial Tr. 10:13–13:8 (Midway’s opening statement emphasizing the Building Code and noting the state constitutional prohibition on public funds for religious education))). Midway’s religious freedom argument appears for the first time in response to the County’s motion to reconsider. (R. pp. 76–79 (Resp. to Mot. Reconsider at 5–8).) Midway repeated those arguments during the hearing on the County’s motion, (*see, e.g.*, R. p. 337, line 24–p. 342, line 14 (Hearing Tr. 18:24–23:14)), which the County immediately noted was improper, (*see* R. p. 343, lines 7–15 (*id.* 24:7–15)). *See generally Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (“An issue may not be raised for the first time in a motion to reconsider.”). In any event, the lower court did not address this issue.

As required by the South Carolina Rules of Civil Procedure, the trial court’s order included numerous findings of fact. (R. pp. 7–10 (Order at 1–4)); *see* Rule 52(a), SCRPC. These are necessary “so that the parties and the appellate court may determine the basis for the ruling.” *Walterboro Cmty. Hosp., Inc. v. Meacher*, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2010). The lower court’s “findings must be sufficient to allow this Court, sitting in its appellate capacity, to ensure the law is faithfully executed below.” *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 320, 698 S.E.2d 773, 784 (2010). However, the lower court never addressed Respondent’s religious freedom arguments, basing its decision entirely on the County’s interpretation of the Building Code. (*See* R. p. 16 (Order on Mot. Reconsider).) In these circumstances, with a lack of

⁶ Section 9 of article XI no longer exists; however, a similar provision is now found at section 4 of the same article. *See* S.C. Const. art. XI, § 4.

findings by the lower court, it would be improper to affirm the decision below on this additional sustaining ground.

Moreover, the only *evidence* presented of the burden on Midway is testimony from a witness that compliance with an educational usage classification would be too expensive. (R. p. 135, line 18–p. 136, line 6 (Trial. Tr. 45:18–46:6).) Interestingly, another witness for Respondent testified that her position was based on the belief that Midway had a right to continue operating under an assembly occupancy and she had “no concern” about cost. (R. p. 176, line 19–p. 177, line 8 (*Id.* 86:19–87:8).) This scant record does not provide a basis for the Court to rule on this issue in the first instance. If the Court deems this issue worthy of further inquiry, it should remand for findings of fact by the court below.

B. Midway’s Argument Fails on the Merits

The South Carolina Religious Freedom Act (the “SCRFA”) prevents the State from imposing a substantial burden on the exercise of religion unless the State’s actions can survive strict scrutiny (i.e., a compelling interest and least restrictive means). *See* S.C. Code Ann. § 1-32-40. If, despite the problems noted above, the Court nonetheless proceeds to consider Respondent’s argument on the merits, the record does not support Respondent’s position.

1. No Substantial Burden

The first step in establishing a religious freedom claim is for a party to identify some “substantial burden,”⁷ which Midway has failed to do. “A substantial burden exists when the

⁷ In response to the United States Supreme Court holding that the federal Religious Freedom Restoration Act (the “RFRA”) applied only to the federal government, Congress enacted the Religious Land Use and Institutionalized Persons Act (the “RLUIPA”)—to regulate state conduct using its Commerce Clause powers. *See Barr v. City of Sinton*, 295 S.W.3d 287, 295–96 (Tex. 2009). However, the standards under the laws—including the interpretation of “substantial burden”—are largely the same. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d

Government forces a person to act, or refrain from acting, in violation of his or her religious beliefs, by threatening sanctions, punishment, or denial of an important benefit as a consequence for noncompliance.” *Doe v. United States*, 901 F.3d 1015, 1026 (8th Cir. 2018). “[T]he Supreme Court has made clear that the ‘substantial burden’ hurdle is high and that determining its existence is fact intensive.”⁸ *Muslim Cmty. Ass’n of Ann Arbor & Vicinity v. Pittsfield Charter Township*, 947 F. Supp. 2d 752, 768 (E.D. Mich. 2013) [hereinafter *MCA*] (alteration in original) (citation omitted). “An inconsequential or *de minimis* burden on religious practice does not rise to this level, nor does a burden on activity unimportant to the adherent’s religious scheme.” *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008). Crucially, the mere fact that a regulation makes it more expensive to practice one’s religion does not, in and of itself, constitute a substantial burden. *MCA*, 947 F. Supp. 2d at 768; *cf. Andon, LLC v. City of Newport News*, 813 F.3d 510, 516 (4th Cir. 2016) (“The absence of affordable and available properties within a geographic area will not by itself support a substantial burden claim under RLUIPA.”).

As noted above, the substantial burden inquiry is fact intensive. In one illustrative case, a Massachusetts appellate court considered a church’s challenge to a ruling that a church building was “primarily used as a schoolhouse” and therefore had “to comply with more stringent requirements than those applicable to church-related structures.” *Faith Assembly of God of S. Dennis & Hyannis, Inc. v. State Bldg. Code Comm’n*, 416 N.E.2d 228, 229 (Mass. App. Ct. 1981). Notably (and like the facts in the present case) the building was to be open six hours a day, serve lunch, and provide “complete academic instruction in lieu of public education for children in

643, 661 (10th Cir. 2006). Therefore, Appellant cites to the SCRFA, the FRFRA, and the RLUIPA—and cases interpreting the same—interchangeably.

⁸ Of course, this also counsels against the Court ruling on this ground. (*See supra* Part II.A.)

grades kindergarten through twelve by teachers who are certified by the [state] Department of Education.” *Id.* The court found that this was sufficient evidence to support the building commission’s conclusion that the “primary purpose” of the building was as a school and “not for religious instruction.” *Id.* The court then concluded that this did not infringe on the exercise of religion, as it “simply regulate[d] the condition of the physical facility *if it function[ed] as a school.*” *Id.* at 230 (emphasis added). The court further noted that the classification “operate[d] to make the use of the building as a school safer, although, as a consequence, more expensive.” *Id.* Therefore, the court upheld the application of the education classification to the church’s property. *Id.*; *see also Hough*, 312 N.W.2d at 159 (upholding the application of fire safety regulations to a church school as a permissible burden because the church was “prevented only from conducting the school in a building which does not meet minimum fire safety standards applicable to all schools” and therefore any burden on the exercise of religion was “at most financial”).

Courts have reached similar results in non-educational settings. The Fourth Circuit recently considered an appeal from a church that purchased land subject to a special use permit, compliance with which would “cost hundreds of thousands of dollars” that the church did not have, but which was necessary to hold services on the property. *Alive Church of the Nazarene, Inc. v. Prince William County*, 59 F.4th 92, 100 (4th Cir. 2023). Thereafter, the church learned that it could hold services on the property if it obtained “a farm winery or limited brewery license.” *Id.* Ultimately, the church did neither and was “unable to hold religious gatherings on its property.” *Id.* at 101.

The court rejected the church’s substantial burden claims largely on the ground that any burden was self-imposed because the church purchased the property knowing about—and indeed

partly because of—the use restrictions. *Id.* at 106–07. However, the court also noted that there was no substantial burden because the restrictions were not absolute—the church could use the property as it wished, it “simply [had to] comply with the terms of its [special use permit].” *Id.* at 107.

Similarly, the County’s application of the Building Code imposes no substantial burden on Respondent. It does not prevent Midway from operating the Academy, nor does it prevent Midway from operating the Academy where it wishes. It merely requires Midway to comply with reasonable, generally applicable safety requirements. In essence, Midway seeks a blanket exemption from those requirements for religious organizations, a position the Court should reject. *Cf. Andon*, 813 F.3d at 516 (recognizing that adopting the plaintiffs’ position that “denial of a variance imposed a substantial burden on their religious exercise” would “effectively . . . be granting an automatic exemption to religious organizations from generally applicable land use regulations”).

2. Compelling State Interest

Even if a requirement imposes a substantial burden on the exercise of religion, it may not violate the SCRFA if it serves a compelling government interest. *See* S.C. Code Ann. § 1-32-40(1). Appellant has established such an interest here.

Courts have long recognized that the state can regulate religious practices that are “contrary to the state’s interest in the health, safety, and welfare of its citizens.” *Hough*, 312 N.W.2d at 159. “It is also generally conceded that there is a valid state interest in applying reasonable health, fire and safety standards to private, religious schools.” *Sumner*, 639 P.2d at 1363. Moreover, “‘the State has a compelling interest of the highest order in protecting’ the health and safety of children.” *Christian Acad. of Abilene v. City of Abilene*, 62 S.W.3d 217, 219 (Tex.

App. 2001) (quoting *State v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692, 696 (Tex. 1984)). In the zoning context, courts also frequently “[f]ind compelling reasons for land use regulations, as long as they do not discriminate *against* churches.” *Christian Methodist Episcopal Church v. Montgomery*, No. 4:04-CV-22322-RBH, 2007 U.S. Dist. LEXIS 5133, at *32 (D.S.C. Jan. 18, 2007) (emphasis added).

In this case, there is no doubt that the County has a compelling interest in the usage classification of the Academy, as that classification is “very important” for the creation of “a reasonable level of protection or life safety for building occupants.” SCBC Preface at xiii. The fact that the occupants in this case are mostly children makes that interest even greater.

3. Least Restrictive Means

The last element to consider is whether the government regulation is the “least restrictive” means of achieving the compelling interest. S.C. Code Ann. § 1-32-40(2). On this point, the record is almost completely devoid of evidence, as Respondent neither brought nor argued the case on these grounds. Nor does Respondent address this point in its brief, which focuses on the “substantial burden” and “compelling interest” elements.⁹ (See Resp’t’s Initial Br. at 19–22.)

At least one court has criticized “[a]n uncompromising position . . . that strict enforcement of all code provisions was required regardless of the technical nature of the rules or the consequences to the church’s efforts to operate its school.” *Sumner*, 639 P.2d at 1361. However,

⁹ In any event, Respondent relies heavily on cases where a zoning ordinance *prohibited* a particular usage by a religious organization. (Resp’t’s Initial Br. at 20–21 (citing *Alpine Christian Fellowship v. County Commissioners*, 870 F. Supp. 991 (D. Colo. 1994); *Barr v. City of Sinton*, 295 S.W.3d 287 (Tex. 2009)).) In *Alpine*, a county denied a permit that a church needed to operate a school on its property. *Alpine*, 870 F. Supp. at 992–93. In *Barr*, a city passed an ordinance that effectively prevented a religious halfway house from operating within city limits. *Barr*, 295 S.W.3d at 291–92. In contrast, the County seeks merely to prevent Midway “from conducting the school in a building which does not meet minimum fire safety standards applicable to all schools, public or private.” *Hough*, 312 N.W.2d at 159.

as noted above, courts frequently enforce building requirements and land use restrictions against churches, and the evidence does not suggest the requirements are overly restrictive as applied to Respondent. Indeed, if any party has been “uncompromising,” it is Respondent, who seeks to avoid all fire safety requirements that an educational classification would entail because of a belief that the Academy “has a right” to an Assembly classification. (R. p. 176, line 19–p. 177, line 2 (Trial Tr. 86:19–87:2).) Therefore, if the Court does not reject Respondent’s position outright, it should, like the court in *Sumner*, ask the trial court on remand to consider “whether there are less restrictive alternatives than strict enforcement of all the technical provisions of the code while still fulfilling the legitimate governmental interest of adequately protecting the children.” *Sumner*, 639 P.2d at 1363–64.

CONCLUSION

For all the reasons discussed above, the trial court erred and its decision should be reversed. In the alternative, if the Court believes Respondent’s religious freedom claims are worthy of consideration, it should remand for findings by the trial court in the first instance.

Respectfully submitted,

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