

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

ALL MUSLIM ASSOCIATION OF AMERICA,
INC.

Plaintiff,

v.

STAFFORD COUNTY, VIRGINIA and
STAFFORD COUNTY BOARD OF
SUPERVISORS,

Defendants.

Civil Action No. 1:20-CV-00638
(LMB) (JFA)

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT OR,
IN THE ALTERNATIVE, FOR LEAVE TO FILE A SURREPLY**

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Plaintiff AMAA,¹ through its undersigned counsel, respectfully submits this memorandum in support of its motion for leave to file a second amended complaint or, in the alternative, for leave to file a surreply (the “Motion for Leave”).

PRELIMINARY STATEMENT

Less than two weeks ago, on October 29, 2020, Defendants repealed the 2020 Ordinance addressed in the Amended Complaint. Defendants then submitted their reply brief on their pending motion to dismiss the Amended Complaint, presented the new “facts on the ground,” and argued that the repeal moots AMAA’s lawsuit. *See* Defs.’ Reply in Support of Defs.’ Motion to Dismiss under Rule 12(b)(1) and (b)(6) [Dkt. No. 73] (“Reply”). Defendants are wrong and AMAA should be afforded the opportunity to respond.²

While the repeal removes the unnecessary setbacks and discretionary approval processes that encumbered AMAA’s ability to build a Muslim cemetery on the Property, AMAA’s case remains live and ripe for adjudication for two reasons: first, because AMAA has incurred and must be compensated for damages caused by Defendants’ legal violations and second, because Defendants *continue* to violate RLUIPA and AMAA’s constitutional rights through their new and novel misuse of the Virginia Code’s consent requirements (“Consent Requirements”).

Defendants willfully misapply the Consent Requirements to continue to block AMAA’s development of an Islamic cemetery. Specifically, Defendants are using the Consent Requirements to force AMAA to seek consent from at least one neighbor who has already indicated he will not provide it and who should have no consent rights under the law (as applied

¹ Capitalized terms not defined herein shall have the meaning ascribed to them in the Amended Complaint [Dkt. No. 46].

² On November 10, 2020, counsel for Defendants advised that Defendants do not consent to the relief requested in this Motion for Leave.

by the County to other community members for decades). Defendants’ twist on how the Consent Requirements should be applied is directly at odds with the plain language of the statute and the County’s past practices. The bottom line is that while Defendants proclaim to this Court that the repeal is a cure-all and this case should go away, they have simply refocused on another mechanism to prevent the AMAA from building its cemetery—an impermissible reading of the Consent Requirements that imposes a substantial burden on AMAA’s religious exercise and is discriminatory.

AMAA seeks to amend its complaint to address the repeal and to focus its pleading more specifically on facts and circumstances relevant to Defendants’ improper application of the Consent Requirements.³ AMAA’s request for leave to amend its complaint is necessitated by Defendants’ decision, for the second time, to change the law during the course of this litigation. Should the Court be disinclined to grant AMAA’s request for leave to amend, AMAA respectfully seeks, in the alternative, to file a surreply to address arguments surrounding the repeal made for the first time by Defendants in their Reply.⁴

³ AMAA has already sufficiently alleged that Defendants’ misapplication of the Consent Requirements violates RLIUPA and AMAA’s constitutional rights in its prior pleading. *See* Am. Compl. ¶ 175 [Dkt. No. 46] (“Defendants have indicated an intent to misconstrue Virginia’s neighbor consent standard to continue to preclude AMAA’s proposed cemetery, rendering any application futile.”). But a further amendment is important so that AMAA can present its case in a manner that focuses on violations pertaining to Defendants’ interpretation of Consent Requirements and takes into account the import of the repeal.

⁴ In the interest of judicial economy, AMAA respectfully requests that argument on Defendants’ pending Motion to Dismiss the Amended Complaint [Dkt. No. 60] (the “Motion to Dismiss”), currently scheduled for November 17, 2020, be rescheduled until the Court has ruled on this Motion or deemed moot if the Court grants AMAA leave to amend its complaint prior to that date. *See Davis v. 7-Eleven Inc.*, No. 17-cv-81, 2018 U.S. Dist. LEXIS 235894, at *7 (E.D. Va. July 31, 2018) (mooting defendant’s motion to dismiss amended complaint upon granting plaintiff leave to file a second amended complaint); *O’Boyle v. Superior Moving & Storage, Inc.*, Case No. 5:09-cv-00166, 2009 U.S. Dist. LEXIS 71437, at *5 (S.D. W. Va. Aug. 13, 2009) (“Because the original [c]omplaint is no longer operative, the usual course of action would be for the [c]ourt to dismiss as moot the motion challenging its sufficiency.”).

RELEVANT FACTUAL BACKGROUND

In 2015, AMAA purchased approximately 29 acres of land at 1508 Garrisonville Road (the “Property”) to develop a cemetery to provide burials consistent with the Islamic faith. At the time of the purchase, AMAA obtained the requisite neighbor consents. AMAA chose the Property in part because it was zoned A-1, which permitted cemetery development by-right. In 2016, Defendants adopted an unlawful ordinance (the “2016 Ordinance”) that precluded AMAA from building a cemetery on the Property. Plaintiff commenced this action on June 8, 2020, asserting that the 2016 Ordinance was discriminatory and imposed a substantial burden on Plaintiff’s exercise of religious freedom. The Complaint [Dkt. No. 1] alleged violations of RLUIPA, the U.S. and Virginia Constitutions and Virginia’s Dillon Rule.

On August 18, 2020, Defendants amended the 2016 Ordinance by adopting the 2020 Ordinance. The amendments included in the 2020 Ordinance did not eliminate the burden imposed on AMAA nor the damages resulting therefrom. Instead, Defendants adopted lesser—though still unjustified—setbacks between private wells and certain cemeteries and Defendants doubled down on their definition of “churchyard,” which knowingly excluded Muslim cemeteries. With this Court’s permission, AMAA filed its first Amended Complaint on September 18, 2020 to address the 2020 Ordinance.

On October 29, 2020, Defendants changed the cemetery law again, this time repealing the 2020 Ordinance. The repeal eliminates Stafford County Code section 28-39(o), the provision addressing cemetery establishment. As such, the repeal removed the unnecessary setbacks and the discretionary approval processes of the 2016 and 2020 Ordinances. The repeal also removed the County-specific neighbor consent requirements set forth in the 2016 and 2020 Ordinances. The result is that cemetery development in the County may now be subject to the Consent

Requirements under Virginia Code section 57-26 and Defendants have made clear that they will misapply section 57-26 to continue to block AMAA's cemetery development.

In their Reply, Defendants contend for the first time that the repeal of the 2020 Ordinance moots AMAA's claims or nullifies them under RLUIPA's safe harbor provision. Defendants did not, and could not, make these arguments in their opening memorandum of law because the repeal happened only days before the Reply was due. Accordingly, Plaintiff could not address this development in its Opposition to Motion Under Rule 12(b)(1) and (b)(6) to Dismiss the Amended Complaint. *See* Dkt. No. 67. AMAA should be permitted to respond and counter Defendants' assertions through a second amended complaint or, in the alternative, a surreply.

PROPOSED AMENDMENTS TO THE COMPLAINT

Plaintiff seeks to amend its complaint to add allegations concerning the repeal of the 2020 Ordinance; the actions taken to repeal the Ordinances; the County's historical application of the Consent Requirements; the parameters of Virginia Code section 57-26; Defendants' refusal to provide guidance to AMAA regarding Defendants' application of Virginia Code section 57-26; and Defendants' assertions as to how Virginia Code section 57-26 will be applied.

The Court's Scheduling Order [Dkt. No. 30] contemplates prompt amendments to the pleadings. AMAA's proposed second amended complaint is attached as Exhibit A. A comparison between the Amended Complaint and the proposed second amended complaint is attached as Exhibit B.

ARGUMENT

I. AMAA Should be Granted Leave to File a Second Amended Complaint

Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that a court "should freely give leave [to amend a pleading] when justice so requires." Fed. R. Civ. P. 15(a)(2). Rule 15(d)

of the Federal Rules of Civil Procedure allows a party to serve a supplemental pleading setting forth occurrences or events that have happened since the date of the original pleading. *See Rowe v. U.S. Fid. & Guar. Co.*, 421 F.2d 937, 942 (4th Cir. 1970) (“a supplemental complaint should be allowed in aid of economy and the speedy disposition of the controversy”). The U.S. Supreme Court has explained that where there is no undue delay, bad faith, undue prejudice or futility of amendment, leave should “as the rules require, be ‘freely given.’” *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999) (leave to amend should only be denied when there is bad faith, futility, or prejudice to the opposing party); *Wolfe v. Clarke*, 819 F. Supp. 2d 538, 568 (E.D. Va. 2011) (applying same standard to a motion to supplement a complaint pursuant to Rule 15(d)).

Here, AMAA seeks leave to amend to ensure that its allegations reflect the complete set of facts and circumstances relevant to adjudication of this lawsuit, including the impact of the repeal of the 2020 Ordinance, which occurred *after* the first Amended Complaint was filed, and the evolution of Defendants’ position with respect to application of the Consent Requirements. There has been no undue delay or dilatory motive on the part of AMAA, and the amendment is compelled solely Defendants’ actions.

Granting AMAA leave to file a second amended complaint would also not be prejudicial to Defendants. “Whether an amendment is prejudicial will often be determined by the nature of the amendment and its timing.” *Kore Holdings, Inc. v. Rosen (In re Rood)*, 426 B.R. 538, 558 (D. Md. 2010) (quoting *Laber v. Harvey*, 438 F.3d 404, 426-27 (4th Cir. 2006)). Courts have permitted amending pleadings when they are the “logical outgrowth of the evidence[.]” *See Suntrust Mortg., Inc. v. AIG United Guar. Corp.*, 800 F. Supp. 2d 722, 737 (E.D. Va. 2011). Here, AMAA needs to amend its complaint in response to Defendants’ repeal of the 2020

Ordinance, and AMAA seeks to do so less than two weeks after the repeal. Defendants cannot be prejudiced by circumstances that they knowingly created and that they now assert should be a basis for dismissal of the case. *See* Reply at 2.

There is also nothing futile about the proposed amendment. As noted above, although Defendants' claim that the case should be dismissed because they have repealed the offending Ordinances, Defendants continue to violate RLIUPA and the U.S. and Virginia Constitutions through their misapplication of the Consent Requirements. This is a live controversy that requires redress by this Court, and is best addressed within the framework of an amended pleading that sets forth all of the relevant facts and circumstances that have come to light in recent weeks.

II. In the Alternative, AMAA Should be Granted Leave to File a Surreply

As noted above, Defendants address the repeal for the first time in their Reply and claim it should end the case. AMAA should be able to submit a response. Courts in this Circuit routinely grant leave to file a surreply to provide an opportunity to respond to new evidence or new arguments raised in a reply brief. *Butts v. Berkeley Medical Center*, No. 16-cv-71, 2016 WL 11607262, at *1 (N.D.W. Va. Sept. 28, 2016) (granting plaintiff leave to file a surreply to address specific issues); *Medish v. Johns Hopkins Health Sys. Corp.*, 272 F. Supp. 3d 719, 722 (D. Md. 2017) (granting defendants leave to file a surreply because they "had not had an opportunity to address [a new] argument" raised in plaintiff's reply for the first time.). Furthermore, a surreply is necessary when a court might rely on new information in making its decision. *Butts*, 2016 WL 11607262, at *1 (citation omitted). Here, Defendants are affirmatively asking the Court to rely on information and arguments made in Reply that have not

been addressed by AMAA. It follows that a surreply would ensure that the Court had the benefit of arguments advanced by both parties before rendering a decision.

AMAA's proposed surreply is attached hereto as Exhibit C.

CONCLUSION

For the foregoing reasons, AMAA respectfully requests that the Court grant Plaintiff's Motion for Leave to file a second amended complaint or, in the alternative, for leave to file a surreply.

Dated: November 11, 2020

Respectfully submitted,

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