IN THE MUNICIPAL COURT OF THE CITY OF PHOENIX

COUNTY OF MARICOPA, STATE OF ARIZONA

STATE OF ARIZONA, Plaintiff, vs. MICHAEL HASHEM SALMAN 7601 NORTH 31ST AVENUE PHOENIX, ARIZONA 85051-7518 DOB: 05/23/1973 Defendant.	Judge: Honorable Sally Gaines Complaint No. 20109013343 MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF PURSUANT TO RULE 32.1(H)

INTRODUCTION

Defendant Salman (hereinafter "Salman") is currently serving a 60-day jail sentence based on his conviction for 67 class one misdemeanors. The misdemeanors consisted of 60 alleged violations of the City's building code and fire code, together with 7 alleged violations of the City's zoning code. The Court found sufficient evidence to establish, beyond a reasonable doubt, that Salman had violated the cited provisions of these codes. However, the State presented no evidence that could demonstrate, as a foundational matter, that these provisions were applicable to Salman's property at all.[1]

Based on a plain reading of pertinent sections of the cited City codes, the provisions pursuant to which Salman was convicted are expressly inapplicable to Salman, because each of the same is applicable only to public or commercial—but not residential or private—uses. The determinative factor on this point is *not* whether Salman has conducted "church" or religious

[1] On appeal, the Maricopa County Superior Court likewise failed to address the foundational question. The court's decision states, on p. 3, that the convictions for violations of the building and fire codes "apply based on the size of the structure and thus the occupancy load of the structure, and not on the use of the property." The court thus expressly overlooked the specific exceptions that will be discussed herein, which decidedly do turn on the use of the property. While the Superior Court went on to cite testimony that that ostensibly demonstrate that the property was "open to the public for religious purposes," the cited testimony supports only the proposition that the property was used for religious worship and that City officials believed it was used as a "church."

worship activities on the property, as the State sought to demonstrate, but rather whether the use falls into the specific Code exceptions for residences, accessory uses, and "private use," respectively. However, none of the State's witnesses appeared to have a coherent understanding of these terms or their pivotal role in the case. For this reason, no reasonable fact-finder could have found, beyond a reasonable doubt, that Salman's property is not residential, nor that it is used for anything other than what is, by statutory definition if not by common parlance, a "private use."

Under Rule 32.1(h), post-conviction relief is appropriate where "The defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt…" The Arizona Supreme Court has explained that in this context, "clear and convincing" evidence requires that the truth of the contention be "highly probable." State v. Roque, 213 Ariz. 193, 215 (2006) (quoting In re Neville, 147 Ariz. 106, 111 (1985)). Thus, in this particular case, this Court should intervene if Salman demonstrates a high probability that no reasonable fact-finder would have found the codes under which he was charged to be applicable to him.

ARGUMENT

I. The provisions of the City's Building Code under which Salman was convicted are expressly inapplicable to his property.

The City's Building Code expressly limits its scope to buildings that are not residences:

> **101.2 Scope.** The provisions of this code shall apply to the construction, alteration, movement, enlargement, replacement, repair, equipment, use and occupancy, location, maintenance, removal and demolition of every building or structure or any appurtenances connected or attached to such buildings or structures.
>
> **Exception:** Detached one- and two-family dwellings and multiple single-family dwellings (townhouses) not more than three stories above grade plane in height

> with a separate means of egress and their accessory structures shall comply with the *International Residential Code*.

According to the Code's definitions, a dwelling is a place "occupied for living purposes." Regardless of what Salman and his family and guests do inside their home, no reasonable factfinder could have found that the home was anything other than a "[d]etached one- . . . family dwelling…" Based on this fact alone, no provisions of the *International Building Code* under which Salman was convicted are applicable to Salman's home. Rather, the property is expressly subject to the City's *International Residential Code*.

Likewise, the garage and detached accessory building or "game room" on Salman's property are subject only to the *International Residential Code* because they are "accessory structures" to the Salmans' dwelling. The *International Residential Code* defines "accessory structure" as "A structure not greater than 3000 square feet ($279m^2$) in floor area, and not over two stories in height, the use of which is customarily accessory to and incidental to that of the dwelling(s) and which is located on the same lot." The Salmans' garage and game room are indisputably less than 3000 square feet in floor area and not over two stories in height.

Thus, the central question in this case is whether or not the gathering of friends, families and guests together for fellowship, study, worship, and discussion in the garage and game room is "customarily accessory to and incidental to" the use of the typical American family home. While the State expended considerable energy in demonstrating that these structures were used for religious worship or "church"-like activities (a fact that Salman never disputed), the State failed to produce any evidence whatsoever to demonstrate that such a use does not constitute an "accessory" use for a residential property. In fact, the transcripts reveal that the State and the City's code enforcement officials appeared to be oblivious to the existence of this concept. Therefore, the State could not possibly have persuaded the reasonable fact-finder beyond a

reasonable doubt that the commercial codes apply to Salman's property, because the *International Residential Code* expressly preempts the operation of the *International Building Code* and *International Fire Code* unless the property is something other than a residential use and accessory structure.

In fact, the Salmans' use must be considered an accessory use under the codes. The average American family regularly hosts meetings and gatherings of guests for a wide variety of social, educational, recreational and religious pursuits. "Use by a family of a home under our customs includes more than simple use of a house and grounds for food and shelter. It also includes its use for private religious, educational, cultural and recreational advantages of the family." 1 Ziegler, Rathkopf's *The Law of Zoning and Planning* (3rd ed.), Ch 23 pp 56 and 57.

Moreover, any interpretation of building, fire and zoning laws that does not recognize group religious worship as an "accessory use" would impose a very substantial burden on the religious exercise of a large number of citizens. Consider some statistics on this point:

> Small storefront or house churches can be found in many places in the city. A recent article by George Gallup reports that 40% of all American adults meet in small religious groups. Not surprisingly, a large number of these groups are in fact storefront or house churches which revolve around Bible study, prayer, and Sunday school.

Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 771 (7th Cir. 2003) (quoting Robert L. Lewis, Jr., "Ministry Research Project: Storefront Churches of Boston; A Photographic Study of Selected Storefront and Home Churches in the City of Boston," http://www.bu.edu/ccrd/research/completed/storefront.html.). A 2009 study by the Barna Group indicated that 22-24% of the approximately 1000 adults surveyed had attended a religious service in a home or similar place other than a typical "church" building. (Barna Group, "How Many People Really Attend a House Church? Barna Study Finds It Depends on the Definition,"

http://www.barna.org/barna-update/article/19-organic-church/291-how-many-people-really-attend-a-house-church-barna-study-finds-it-depends-on-the-definition, last visited July 30, 2012).

But the draconian impact of the City's interpretation will not be limited to religious households. A finding that the gathering of friends, families and guests for purposes including Bible studies, family reunions, Tupperware parties, Cub Scout meetings, football parties or poker games is not an "accessory use" for residential property would empower municipalities to raid game rooms, garages and guest cottages all over the country for failure to comply with commercial building and fire codes. Moreover, the City's interpretation does not limit itself to accessory structures. The City has stated on numerous occasions that Salman is not permitted to host Bible studies in his "home" without undergoing a change of occupancy. See letters from City to Salman, attached hereto as Exhibit A. Clearly, this interpretation constitutes a gross invasion of the most basic property and privacy rights of citizens and thus fundamentally alter the fabric of our society.

It is important to note that there is nothing in the Code that suggests that the sheer number of invited guests is relevant to the determination of whether the property and its accessory structures retain their residential character. Rather, the definition focuses only on the character of activity conducted and whether it is an activity that is customarily accessory or incidental to a residential occupancy. In fact, the State's experts testified that an "assembly" is defined as any gathering of even two people. R.T. of August 17, 2010, at 251, 258. Thus, unless every gathering of two or more people converts a residential use to an "assembly" use, the number of guests cannot be determinative of whether a gathering on residential property triggers the applicability of commercial codes.

Likewise, there is absolutely nothing in the definition of either "dwelling" or "accessory use" that even hints at the relevance of whether each and every person who enters the property is

personally known to the owner or not. And this is surely appropriate. American citizens who own real property surely enjoy the right to exercise hospitality by occasionally allowing new acquaintances or "friends of friends" to enter their homes without subjecting their property to commercial or public use standards. Surely, the City would not enforce the Building Code (as opposed to the Residential Code) against a family who allows previously unknown Cub Scout children or new neighbors to attend the neighborhood Den meeting or Tupperware party in their home.

Neither does the technical ownership of the property by a church or its tax exemption as a parsonage abrogate the property's residential character. Indeed, the residential use of the property is inherent in the definition of "parsonage." R.T. of August 16, 2010, at 55. But under the City's interpretation of its codes, every pastor who resides on a parsonage is precluded from worshiping, praying or studying scripture in his or her home with parishioners unless he or she complies with commercial building, fire, and zoning codes.

The Court should note well that it is essential to the legitimacy of the City's entire system of zoning, building and fire regulations that the regulations be interpreted in the way Defendant argues herein—that the *International Residential Code* take precedence over the other codes for any property that is, in fact, primarily a residence. If, on the other hand, the City maintains that the type of activities conducted from time to time by families inside residential properties can trigger the application of the *International Building Code* and/or *International Fire Code*, then the City must either hire a veritable army of code enforcement officials to raid gatherings of families and friends all over the City, or else invite meritorious claims of selective enforcement and religious persecution.

Consider the following examples of the absurdly intrusive results the City's interpretation of its Codes produces:

- Large homeschooling families (i.e., those including six or more persons) would be classified as an "Educational Group" under the *International Building Code* and required to meet construction standards applicable to public schools. This would have a broad-scale effect on the homeschool community, as it is typical for two or more families to combine children in a single home for the teaching of certain subjects by a parent who has particular expertise in that subject.

- A parent or grandparent who cares for more than five children under the age of 2 ½ years would also be classified as an "Educational Group" and required to meet rigorous construction standards. As there is no apparent exception for frequency of occurrence, a simple toddler play date could trigger these standards.

- Each and every gathering of family and friends for "social functions" such as poker games, movie nights or football parties inside a residence or its accessory structures (garages, game-rooms or in-law quarters) would require that the property meet construction and fire code standards for "Assembly Group" buildings, such as movie theaters and night clubs. If the gathering consists of fewer than 50 people, the property will be subject to the standards for "Business Group B" buildings, such as banks, post offices and print shops.

- Dinner parties for friends or family dinners such as Thanksgiving Day feasts, all of which would qualify as "gathering of persons for food or drink consumption," would trigger the application of "Assembly Group" or "Business Group" standards, depending upon whether the number of guests is greater or less than 50.

- Finally, (and particularly relevant here), every use of a residence for "worship," including small group Bible studies and youth group meetings that are a common feature of many evangelical Christian churches, hymn sings, Jewish "shiva" houses (where Jewish communities gather in the home of grieving families 1-3 times daily for prayer services and study), or even Thanksgiving Day prayer services with extended families, would bring the residence within either "Assembly Group" or "Business Group," depending upon the number of guests.

The City's code enforcement officials have argued repeatedly that the codes treat Salman's gatherings differently from other typical residential gatherings because Salman's gatherings are for the purpose of religious worship. R.T. of August 17, 2010, at 236-7, 287. The City *must* make this argument in light of the fact that the City permitted the construction of the accessory structure as a "game room," and the playing of games necessarily entails the assembly of two or more persons. R.T. of August 19, 2010, 552-53. And yet there is simply no basis in either the zoning, building, or fire code for the idea that a property is categorically disqualified

from being "residential," "accessory," or "private" because those inside are worshiping God. Indeed, if the codes did make this distinction, they would immediately be invalid under the First and Fourteenth Amendments to the United States Constitution, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*, and Arizona's Freedom of Religious Exercise Act, A.R.S. § 41-1493 *et seq.*

Clearly, the idea that a family's residence is sucked into the tractor beam of the *International Building Code* and *International Fire Code* each time the family hosts guests, or each time the family engages in religious worship with others, is not only ludicrous, but unsustainable by the City in terms of enforcement and/or legal challenge for failure to enforce neutrally. But this type of strained, impossible interpretation is not at all necessary, as both codes contain the solution by their own terms: these codes simply do not apply to residential property and its accessory uses.

II. The provisions of the City's Fire Code under which Salman was convicted are expressly inapplicable to his property.

The provisions of the City's Fire Code are also expressly inapplicable to Salman's property, as the Code's "Residential Group" regulations include only buildings that are not regulated by the *International Residential Code* in accordance with § 101.2 of the *International Building Code*. Again, no reasonable fact-finder could conclude that Salman's property is anything other than a single-family detached home and accessory structure, and thus no reasonable fact-finder could conclude that the *International Fire Code* is applicable thereto.

III. The provisions of the City's Zoning Code under which Salman was convicted are expressly inapplicable to his property.

Salman was also convicted of violating the City's Zoning Code by failing to have parking spaces that would conform to the requirements for a "Public Assembly" use. The application of these requirements to Salman's property was clearly in error, as any reasonable fact-finder would

conclude that his property meets the definition of "Private Use" and does not meet the definition of "Public Assembly-Residential."[2]

The Code defines "Private Use" as one which is restricted to the occupants of a lot or building, together with their guests, where compensation for such use is not received and where no business or community activity is associated with such use or building. Zoning Ordinance, § 202. Michael Salman's use of his residential property to host Bible studies and religious worship services from time to time meets this definition in every particular. First, these gatherings were, at all times, limited to persons who could only be considered "guests" of the Salmans. The doors were never opened nor the property ever advertised for indiscriminate access by members of the public unknown to the Salmans.[3]

While the City can point to one instance in which a person previously unknown to the Salmans—private investigator Ray Martinez—obtained entry through deceitful tactics[4], the very fact that he was asked to give an explanation of who he was and why he was on the property is clear evidence that the property was limited to use by the Salmans and their guests. R.T. of September 27, 2010, at 127-28. In fact, Martinez testified that he was hired by neighbors to obtain entry in order to determine whether religious worship was, in fact, taking place. R.T. of August 18, 2010 at 399. This belies the allegations that the gatherings were open to the public, as a private investigator would not be needed to ascertain the activities conducted at public gatherings. The record demonstrates that Martinez learned about the Salmans' gatherings only

[2] All definitions in this section are taken from § 202 of the City's Zoning Ordinance.
[3] While the State's witnesses testified as to the existence of a small sign stating "Harvest Fellowship Community Church" on a gate on Salman's property, this sign was barely, if at all, visible from the public street R.T. of August 19, 2010, at 570-71. Moreover, this sign did not announce dates or times of the worship that occurred on the property.
[4] When Suzanne Salman asked Martinez who he was and why he had come to the meeting, Martinez fabricated a story about his granddaughter being friends with a girl who regularly attended the gatherings. R.T. of September 27, 2010, at 127-28.

from the neighbors who hired them, as opposed to public information such as signage or other advertising. Id. at 413-14.

Prior to April 9, 2009, Dwayne Grierson, Inspector for the City's Neighborhood Preservation Department, phoned Salman in an effort to ascertain whether the religious worship services were public. R.T. of August 18, 2010, at 469-70. According to notes Grierson recorded at the time of the call, when Grierson inquired as to whether his mother could attend services at 7601 North 31st Avenue, Salman replied that no formal services were held there. Id. Moreover, when asked very specifically whether Griersen considered the property to be a "public place of worship," Grierson responded only that he considered it to be a "place of worship," conspicuously omitting the word "public." R.T. of August 18, 2010, at 458. The State simply cannot demonstrate that the property was not a "Private Use," as that term is defined in the codes.

Second, the Salmans do not receive any form of compensation from their family and friends who worship with them on the property. While those who gather there do believe that tithing (giving 10% of one's income) is an essential aspect of religious worship, none of the tithes collected on the property are used for the benefit of the Salmans. Rather, the funds collected are donated to charities or otherwise invested into the community. Moreover, guests are not required to contribute money as a condition for participating in religious worship with the Salmans. Thus, the tithes cannot be said to be "compensation" for any goods or services, and the State has presented no evidence that the Salmans ever received "compensation."

Finally, no business or community activity is associated with the property, as, again, its use is limited to the Salmans' family and guests. It is not opened to the community at large or any business.

While the sole fact that the Salmans' use falls within the Code's definition of "Private Use" should be sufficient to preclude the application of provisions governing "Public Assembly" uses, even without the existence of the "Private Use" caveat the property could not be said to fall within the "Public Assembly" category, as it does not meet that definition. The Code defines both "Public Assembly-Residential" and "Public Assembly-General," the only "Public Assembly" uses arguably related to Salman's property use, as venues where "patrons" gather for activities. As indicated above, the Salmans do not have "patrons," but rather host "guests." Furthermore, the definition for "Public Assembly-Residential," requires that the assemblage follow a pattern that significantly changes the normal flow of vehicular traffic within a residential neighborhood. This certainly cannot be said of the Salmans' average of 40 guests, inasmuch as they are only on the property for approximately four hours per week, and the property is located on a heavily trafficked road (R.T. of August 16, 2010, at 48-49).

Based on these underlying facts, no reasonable factfinder could conclude that Salman's use of the property was not squarely within the "Private Use" category, nor that the use met the definition of "Public Assembly." Therefore, no reasonable factfinder could have concluded that Salman violated the provisions of the Zoning Code applicable to "Public Assembly" uses.

CONCLUSION

While much of the evidence at trial (as well as the Superior Court's reasoning on appeal) focused on the issue of whether or not Salman was conducting "church" on his residential property or whether it was used for "religious worship," these questions are legally and factually irrelevant to the charges against Salman. Indeed, the word "church" is not even defined in any of the Codes that Salman was convicted for allegedly violating.

Many religious individuals, from a wide variety of religious faiths and traditions, engage in activities in their homes—sometimes with friends and families—that are also done in

buildings devoted exclusively to religious worship and open to the public. Many Christians, for instance, do not attend formal "church," but rather conduct religious worship exclusively through "home churches," in which family and friends are invited to gather in private homes to pray, sing, and study the Bible together. Many other Christians supplement their Sunday worship in formal church buildings with weeknight worship and fellowship in small groups that meet in private homes. In each of these instances, the religious worship can only properly be considered an "accessory" use to the primary residential use. In other words, it is incidental to the family's use of the property as a home. To suggest that religious worship and fellowship is not "customarily associated with" the use of a home by religious individuals is to unmoor the City's Code from the nation's earliest traditions.

If Americans are to remain free to worship God according to the dictates of their consciences, they must remain free to worship with others in their private homes. In fact, such worship was the genesis of the "church," as it is how Christ's followers worshiped immediately after his death and resurrection.

Private religious gatherings and worship services inside residential property can no more trigger the application of commercial or public building codes than can a Tupperware party, poker night, lemonade stand, yard sale, Pampered Chef party or book club. There must be some basis for distinguishing when such gatherings are an incidental, accessory, private use associated with a home, and when they rise to the level of requiring compliance with the more rigorous commercial codes. The appropriate distinction would take into account whether a use is commercial in nature, and/or indiscriminately opened to members of the public.

As drafted, the City's Building Code, Fire Code and Zoning Code all recognize this very distinction. As applied, however, the City's codes are legally unsustainable and practically unenforceable. Moreover, their particular application against Salman are in violation of his

rights under the First and Fourteenth Amendments to the United States Constitution, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*, and Arizona's Freedom of Religious Exercise Act, A.R.S. § 41-1493 *et seq.*

For all of these reasons, Defendant respectfully requests pursuant to Rule 32.1(h) that the Court overturn his sentence and conviction and order that he be reimbursed for the fines heretofore paid in satisfaction of the sentence. Defendant certifies, by counsel, that this Memorandum sets forth all the grounds known to him for vacating the judgment and sentence imposed upon him. In light of the fact that Defendant has already served a substantial portion of his 60-day sentence, Defendant requests that an informal conference be held immediately to expedite this proceeding pursuant to Rule 32.7.

DATED this 6th day of August, 2012.

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