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October 25, 2007

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City of Miami Zoning Board
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Re: Zab Sang Institute's Application for a Conditional Use Permit
(No. 05-00976x)

We have reviewed the public record concerning the application of the Zab Sang Institute, a Tibetan Buddhist assembly, for a conditional use permit to use its property on Main Highway ("the Property") for religious assembly and worship. Although we do not represent the Zab Sang Institute or any of its members, we write to provide you with our opinion as to how a federal civil rights statute, the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc, et seq., ("RLUIPA"), may be implicated should the Zoning Board decide to deny that application.

By way of introduction, the Becket Fund for Religious Liberty is an international, interfaith, public interest law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States and abroad, both as primary counsel and as amicus curiae. Our clients come from all different faith traditions, including Buddhists, Christians, Jews, Hindus, Muslims, Native Americans, Sikhs and Zoroastrians. In particular, we have been intensely involved in litigation under RLUIPA (and corresponding constitutional protections) involving discrimination or the burdening of religious exercise by local land use regulations/officials. We successfully represented the plaintiffs in the first case resolved under RLUIPA, *Haven Shores Community Church v. City of Grand Haven*, No. 1:00-CV-175 (W.D. Mich. 2000). Since then, we have brought suit under RLUIPA in Florida courts and across the country, including in Alabama, California, Colorado, Georgia, Hawaii, Illinois, Maryland, Michigan, New Hampshire, New Jersey, New York, Pennsylvania, and Texas.

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The civil rights principles embodied in RLUIPA enjoy broad, bipartisan support. The legislation sailed through both houses of an otherwise sharply divided Congress, virtually unopposed, and was signed into law by President Clinton on September 22, 2000. RLUIPA's remarkable success in the legislative process can be attributed to strong support from an exceptionally diverse coalition of religious and civil rights groups, ranging from the ACLU and People for the American Way to the National Association of Evangelicals and the Union of Orthodox Jewish Congregations of America.

Any denial of the Zab Sang Institute's application to use the Property for religious assembly raises serious potential liability issues under both RLUIPA and the United States Constitution—exposing the City to the possibility of liability in the millions of dollars and required sensitivity training for City officials.¹ The requirements of RLUIPA are, for the most part, parallel to the protections provided by the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Thus, actions that violate RLUIPA are likely to violate the Constitution as well.

RLUIPA has three main provisions: a “Substantial Burden” provision, an “Equal Terms” provision, and a “Nondiscrimination” provision. The Substantial Burden provision establishes that a local zoning regulation cannot substantially burden religious exercise unless that burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc(a)(1).² The Equal Terms provision requires, among other things, that a zoning authority—at a minimum—treat religious institutions on equal terms with non-religious institutions. 42 U.S.C. § 2000cc(b)(1). And the Nondiscrimination provision forbids discrimination “on the basis of religion or religious denomination.” 42 U.S.C. § 2000cc(b)(2). It is our opinion that each of these provisions would be seriously implicated by any denial of the Zab Sang Institute's application to use its Property for religious assembly in accordance with the Buddhist faith.

Turning to RLUIPA's provisions in more detail, RLUIPA's Substantial Burden provision provides in relevant part as follows:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the

¹ In *Hollywood Community Synagogue v. City of Hollywood*, No. 0:04-cv-61212, Dkt. 381 (S.D. Fla. July 5, 2006), the City of Hollywood, Florida, was required to pay \$2 million in damages and its officials were required to undergo sensitivity training due to a RLUIPA Equal Terms violation. The Becket Fund provided the required sensitivity training to city officials with Department of Justice approval.

² “The term ‘religious exercise’ includes *any* exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7) (emphasis added). Moreover, “[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.” *Id.*

government demonstrates that imposition of the burden on that person, assembly, or institution--
(A) is in furtherance of a compelling governmental interest; and
(B) is the least restrictive means of furthering that compelling governmental interest.

This provision reflects the Supreme Court's conclusion, originally outlined in *Sherbert v. Verner*, 374 U.S. 398 (1963), and later reaffirmed in *Employment Div. v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), that government-imposed burdens on religious exercise must be subjected to the strictest form of judicial scrutiny when they are imposed by systems of "individualized assessments." In other words, pursuant to both the First Amendment and RLUIPA, strict scrutiny applies where burdens are applied on a discretionary, case-by-case basis, as is so often true in zoning permit decisions such as the one before the Board. See, e.g., *Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978, 993 (applying strict scrutiny to a CUP denial and holding the standard is the same under RLUIPA and the First Amendment); *Sts. Constantine and Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895, 897 (7th Cir. 2005) (noting that RLUIPA "codifies *Sherbert*" and imposing strict scrutiny).

The denial of the Zab Sang Institute's application for a place of worship for its Tibetan Buddhist congregation substantially burdens that congregation's ability to engage in a fundamental religious practice. Meditation, as a form of worship, is a principal tenet of Tibetan Buddhism. Denying these Buddhist practitioners the ability to use their property to conduct core religious practices of meditation and worship is a substantial burden on religious exercise. See *Cottonwood Christian Center v. City of Cypress*, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002) (finding substantial burden because "[p]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion"). The same is true of religious education. The ability to communicate spiritual lessons and religious practices is a core concern of many faiths, including Tibetan Buddhism. Substantial burdens often exist when religious organizations cannot engage in religious education. See, e.g., *Westchester Day School v. Village of Mamaroneck*, --- F.3d ---, No. 06-1464 (3d Cir. Oct. 17, 2007) (denial of permit to expand Jewish day school was a substantial burden on religious exercise); *Living Water Church of God v. Charter Twp. of Meridian*, 384 F.Supp.2d 1123 (W.D. Mich. 2005) (denial of CUP to build religious school imposed substantial burden); *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 (W.D. Tex. 2004) (refusal to accept application to use fourth floor of building for religious education was a substantial burden).

We are not aware of any interests that the City might have sufficient to impose such a burden on Zab Sang's Buddhist congregation. RLUIPA and the First Amendment provide that the state may only substantially burden religious exercise when the imposition of such burden is the least restrictive means of furthering a compelling government interest. Courts have repeatedly held that "in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

From our review of the record, we understand that the primary concerns raised in opposition to the application are traffic and parking. However, courts have repeatedly concluded that traffic and parking, though understandably legitimate concerns, do not meet the high threshold of a “compelling” government interest. *See, e.g., Westchester Day School v. Village of Mamaroneck*, 280 F. Supp. 2d 230, 242 (S.D.N.Y. 2003), *affirmed*, *Westchester Day School v. Village of Mamaroneck*, --- F.3d ---, No. 06-1464 (3d Cir. Oct. 17, 2007) (“traffic concerns have *never* been deemed compelling government interests.”³) (emphasis added). The same is true for concerns over neighborhood character, consistency of land uses, and aesthetics.⁴ Moreover, a flat refusal to permit the Zab Sang Institute’s Buddhist congregants to use its property for religious assembly under *any*

3 *See also New Hope Baptist Church v. City of Hackensack*, No. L-2873-03, at 35-36 (Super. Ct., Bergen Co. N.J. Oct. 22, 2003) (asserted interests concerning traffic and parking - as a basis for denying church permit - are not compelling); *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995) (“[A] municipality’s asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling.”); *Curry v. Prince George’s County, Md.*, 33 F. Supp. 2d 447, 452 (D. Md. 1999) (“Again, while recognizing aesthetics and traffic safety to be ‘significant government interests,’ none of these courts found those interests sufficiently compelling to pass the applicable strict scrutiny test.”); *McCormack v. Township of Clinton*, 872 F. Supp. 1320, 1325 n.2 (D.N.J.1994) (“[N]o court has ever held that [aesthetics and traffic safety] form a compelling justification for a content-based restriction on political speech”); *Village of Schaumburg v. Jeep Eagle Sales Corp.*, 676 N.E.2d 200, 204 (Ill. App. 1996) (finding that “[t]raffic safety and visual aesthetics are not the sort of compelling state interest required to justify a content-based restriction on expression”); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988) (“interests in traffic safety and aesthetics, while ‘substantial,’ fell shy of ‘compelling.’”); *Loftus v. Township of Lawrence Park*, 764 F. Supp. 354, 361 (W.D. Pa. 1991) (“we doubt that aesthetics or residential quietude is sufficiently compelling to ever justify a content-based restriction...on freedom of expression”).

4 *See, e.g., Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1569-70 (11th Cir. 1993) (holding that “interest[] in aesthetics...is not a compelling government interest”); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974) (city’s interest in consistency with master plan not compelling); *Living Water*, 384 F. Supp. 2d at 1134-35 (“density” is a “valid interest” but not a compelling interest sufficient to justify denial of a CUP for a religious school); *XXL of Ohio, Inc. Commerce v. City of Broadview Heights*, 341 F.Supp.2d 765, 789-90 (N.D. Ohio 2004) (rejecting “aesthetics” and protection of “neighborhood character” as a compelling government interest); *Guru Nanak Sikh Soc’y v. County of Sutter*, 326 F.Supp.2d at 1154 (E.D. Cal. 2003), *aff’d* 456 F.3d 978 (9th Cir. 2006) (defendant’s reluctance to assert incompatibility of land use as a compelling interest “is understandable, for [RLUIPA’s] strict scrutiny standard...is a difficult one to meet”); *Stuart Circle Parish v. Board of Zoning Appeals*, 946 F. Supp. 1225, 1239 (E.D. Va. 1996) (“compatibility of land uses” would not be a compelling government interest sufficient to support racial classifications, so it cannot support “a substantial burden on the free exercise of religion.”). *See also Cottonwood*, 218 F. Supp. 2d at 1227-28 (purely aesthetic harms, such as the elimination of blight, are not compelling); *King Enterprises, Inc. v. Thomas Township*, 2002 WL 1677687, at *18 (E.D. Mich. 2002) (“Although ‘safety’ and ‘aesthetics’ are substantial government interests, they are not compelling...”).

circumstances will certainly not be considered the “least restrictive means” of achieving a proffered compelling interest. Accordingly, any denial of the Zab Sang Institute’s application to use the Property for religious worship, meditation and other activities raises serious issues under RLUIPA’s Substantial Burdens provision.

Second, RLUIPA provides that, “No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution *on less than equal terms* with a nonreligious assembly or institution.” 42 U.S.C. § 2000cc(b)(1) (emphasis added). Like the Substantial Burdens provision, this Equal Terms provision codifies existing First Amendment precedent. *See Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004); *Freedom Baptist Church v. Twp. Of Middletown*, 204 F. Supp. 2d 857, 869 (E.D. Pa. 2002) (upholding RLUIPA because it codifies existing precedent). “The purpose of this section is to forbid governments from prohibiting religious assembly uses while allowing equivalent, and often more intensive, non-religious assembly uses.” *Ventura County Christian High School v. City of San Buenaventura*, 233 F. Supp. 2d 1241, 1246 (C.D. Cal. 2002) (quotations omitted).⁵ The Eleventh Circuit (the federal Court of Appeals for Florida) has taken a particularly hard line against cities that prohibit religious assemblies in zones where secular assemblies are allowed. *See Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (Florida town violated RLUIPA by prohibiting synagogues where private clubs were permitted); *Konikov v. Orange County*, 410 F.3d 1317 (11th Cir. 2005) (Florida county violated RLUIPA by prohibiting religious assembly in private home while permitting secular assemblies).

The City should be wary of denying Zab Sang’s application when it permits secular assemblies nearby. The Property is directly across the street from Ransom Everglades School, a non-religious school serving more than 800 students. In fact, three secular schools, both public and private, are located within a mile of Zab Sang’s location. Permitting nonreligious assemblies, such as schools, but forbidding the Zab Sang Institute’s comparable religious assembly use would raise serious concerns under RLUIPA’s Equal Terms provision and the Free Exercise Clause. *See, e.g., Midrash Sephardi*, 366 F.3d at 1231.

Finally, RLUIPA also provides that “No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.” 42 U.S.C. § 2000cc(b)(2). Zab Sang’s property is surrounded by other permitted religious uses, including a Catholic school, a Christian Science Reading Room, a Chabad, and several Baptist churches. There are at least nine religious assemblies and two religious schools within a mile of the Property, many of these in residential zones. To deny this Buddhist congregation’s use of its property while permitting various other religious denominations to utilize nearby property would legitimately give rise to serious concerns under RLUIPA’s anti-discrimination provision.

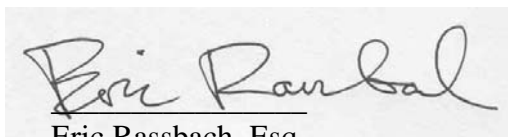
⁵ See also Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON. L. REV. 929, 976-1000 (2001).

We recognize, of course, that RLUIPA is a relatively recent civil rights statute (enacted September 22, 2000), and thus the Board may not have been fully aware of the Act's scope and application. We contact you now so that the Board may consider the Zab Sang Institute's application and otherwise proceed with the benefit of more complete knowledge of how the obligations of RLUIPA and the Constitution may apply in this situation. Should you so desire, we can also provide you with more detailed information about RLUIPA and its requirements upon request. We also invite you to visit our website dedicated to the Act, www.rluipa.com.

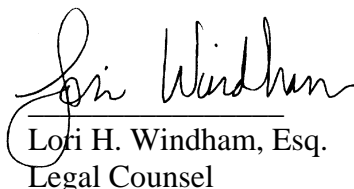
We welcome any inquiries.

Sincerely,

The Becket Fund for Religious Liberty

A handwritten signature in cursive script that reads "Eric Rassbach". The signature is written in black ink on a light gray rectangular background.

Eric Rassbach, Esq.
National Litigation Director

A handwritten signature in cursive script that reads "Lori H. Windham". The signature is written in black ink on a white background.

Lori H. Windham, Esq.
Legal Counsel