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February 20, 2006

Hon. Dan Coody,
Mayor of Fayetteville
Hon. Members,
Fayetteville City Council
113 W. Mountain
Fayetteville, AR 72701

Re: **Application of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to Temple Shalom, Fayetteville, AR**

Dear Mayor Coody and Council Members:

We are writing to provide you with our legal opinion regarding the application of the City of Fayetteville land use ordinances to the Temple Shalom Congregation, and the consequences of that application under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the United States Constitution.

We have been contacted by Darla Newman, who has provided us with background on the Congregation's situation. In addition, we have reviewed the record—including relevant zoning ordinances and city attorney opinions—concerning the Congregation's application for a Conditional Use Permit which asks for permission to use its "Butterfly House" property for religious assembly and worship. It is our opinion that if the City Council fails to approve the Congregation's application for a Conditional Use Permit for religious uses on their property, the City may be subject to liability under federal law.

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, both as primary counsel and as *amicus curiae*. 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 and 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 successful suits under RLUIPA in courts across the country, including in Alabama, California, Colorado, Florida, Georgia, Hawaii, Illinois, Michigan, New Hampshire, New Jersey, New York, and Texas.

The principles embodied in RLUIPA enjoy broad, bipartisan support. The legislation sailed virtually unopposed through both houses of an otherwise sharply divided Congress, and was signed into law 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 American Civil Liberties Union and People for the American Way to the National Association of Evangelicals and the Union of Orthodox Jewish Congregations of America.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 four main provisions: a "Substantial Burden" provision, a "Nondiscrimination" provision, an "Equal Terms" provision and an "Exclusion and Limits" 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 Nondiscrimination provision forbids discrimination "on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2). The Equal Terms clause bans "treat[ing] a religious assembly or institution on less than equal terms with a nonreligious assembly or institution. 42 U.S.C. § 2000cc(b)(1). And the Exclusion and Limits provision prohibits municipalities from "totally exclud[ing] religious assemblies from a jurisdiction." 42 U.S.C. § 2000cc(b)(3).

It is our opinion that each of these provisions would be seriously implicated by a decision to deny the Congregation's application for a Conditional Use Permit so that it may use its property for religious assembly and worship.

Denying the Congregation's Application Would Violate RLUIPA's Substantial Burden Provision

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,

¹ Numerous courts of appeal have recognized that RLUIPA is a constitutional exercise of Congress's authority. See *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004). See also *Sts. Constantine and Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005) (noting that RLUIPA is an "uncontroversial use" of Congress's power to enforce the First and Fourteenth Amendments' guarantee of free religious exercise).

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.*

unless the 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 practically unavoidable in the zoning context.³ The City Attorney has admitted that wide discretion is present in this case, where a Conditional Use application is before this Council.⁴

The denial of the Congregation's application for a place of religious assembly and worship would substantially burden its ability to engage in fundamental religious activities. Courts have repeatedly found that denying the members of a religious body the ability to use *their property* to conduct core religious practices of worship constitutes a substantial burden on religious exercise.⁵

Indeed, the facts of a recent United States Court of Appeals decision bear a striking similarity to the present application before the Council and therefore warrant particularly close examination. In that case, a Greek orthodox church applied to the city to rezone its property "from residential to institutional so that it could build its church." *Sts. Constantine & Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895, (7th Cir. 2005). Although the church, (like the Congregation in this case) was willing to adopt measures that would prevent the property from being used for any use other than a house of worship, the city refused to approve

³ See, e.g., *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857, 868 (E.D. Pa. 2002); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1221 (C.D. Cal. 2002).

⁴ "Basically such permits [conditional use] may issue when the appropriate municipal agency finds that certain conditions or requirements have been satisfied. That determination involves the exercise of discretion . . ." 1/27/06 Memo from Kit Williams to Council at 3 (quoting *Rolling Pines v. Little Rock*, 73 Ark. App. 97, 101 (2001)).

⁵ See, e.g., *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140 (E.D. Cal. 2003) (county's denial of permit to build temple substantially burdened Sikh believers' religious exercise); *Cottonwood*, 218 F. Supp. 2d at 1226 (finding substantial burden because "[p]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion"); *Murphy v. Zoning Comm'n of Town of New Milford*, 148 F. Supp. 2d 173 (D. Conn. 2001) (restrictions on ability to hold prayer meetings in home constituted substantial burden). *DiLaura v. Ann Arbor Charter Tp.*, 30 Fed. Appx. 501, 510 (6th Cir. 2002) (denial of zoning variance that prevented individuals from assembling on land for religious purposes constituted substantial burden).

the rezoning. *Id.* The Court held that this refusal violated RLUIPA's substantial burden provision:

The Church in our case doesn't argue that having to apply for what amounts to a zoning variance to be allowed to build in a residential area is a substantial burden. It complains instead about having either to sell the land that it bought in New Berlin and find a suitable alternative parcel or be subjected to unreasonable delay by having to restart the permit process to satisfy the Planning Commission about a contingency for which the Church has already provided complete satisfaction. . . .

The burden here was substantial. The Church could have searched around for other parcels of land (though a lot more effort would have been involved in such a search than, as the City would have it, calling up some real estate agents), or it could have continued filing applications with the City, but in either case there would have been delay, uncertainty, and expense. That the burden would not be insuperable would not make it insubstantial. The plaintiff in the *Sherbert* case, whose religion forbade her to work on Saturdays, could have found a job that didn't require her to work then had she kept looking rather than giving up after her third application for Saturday-less work was turned down. But the Supreme Court held that the fact that a longer search would probably have turned up something didn't make the denial of unemployment benefits to her an insubstantial burden on the exercise of her religion.

Id. at 900-901 (emphasis added). Denying the Congregation's application for a Conditional Use Permit would similarly require a finding that the Council had substantially burdened the Congregation's religious exercise.

It is no answer to suggest that the Congregation is free to leave the city limits or find some place to worship on land with a different zoning designation or that their current arrangements for worship space are adequate. Not only does RLUIPA prohibit a city from closing its borders to a house of worship, but requiring the Congregation's members to abandon their *current* property would impose an additional burden on their religious exercise as they would have to begin the search process anew, just as in the *Sts. Constantine & Helen* case.⁶ The Congregation currently worships in truncated form at a Unitarian Universalist church as a matter of necessity, not because it is consistent with religious preferences. In fact, a lack of a synagogue poses obstacles to the full religious expression of the congregation.⁷ There has been occasion

⁶ RLUIPA's protections extend to a wide variety of real estate arrangements, protecting all claimants who have an "ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest." 42 U.S.C. § 2000cc-5(5).

⁷ Through a lot of hard work the Congregation has slowly grown to its present size of 50 families over 25 years and would like to continue the slow-growth pattern or at least preserve its current membership. However, the fact remains that Temple Shalom lacks a temple and some

(and will be in the future) where visiting rabbis or Lubavitchers cannot perform certain Jewish religious ceremonies at the borrowed Unitarian church because it has not been *specifically* and properly dedicated according to Jewish law. In contrast, Butterfly House will be fully under the control of Temple Shalom and will satisfy these religious requirements, thereby allowing the Congregation to practice the full range of its religious beliefs in a way that is not presently possible for the Congregation. Indeed, another federal court recently ruled in favor of a Jewish Congregation in factual circumstances nearly identical to this case. *See Congregation Kol Ami v. Abington*, No. 01-1919, 2004 WL 1837037 (E.D. Pa. Aug. 17, 2004). In *Kol Ami*, like here, a township denied a Jewish congregation the ability to develop and operate its property so that it could establish a permanent home for a synagogue. Because of that denial, that congregation, like the Congregation in this case was forced to limp along at inadequate rented sites. The court held that this was a substantial burden under RLUIPA. *Id.* at * 9 (“Under the statute [RLUIPA], developing and operating a place of worship . . . is free exercise. There can be no reasonable dispute that the Ordinance and the denial of the variance, which have effectively prevented the Plaintiffs from engaging in this ‘free exercise,’ create a substantial burden within the meaning of the Act.”).

We are not aware of any interests that the City might have sufficient to impose such substantial burdens on the Congregation’s religious exercise. 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 interests identified by opponents of the Congregation are traffic concerns and compatibility with the neighborhood. *See* 1/27/06 Memo from Kit Williams to Council at 4. However, courts have repeatedly concluded that traffic, though understandably legitimate concerns for a municipality, do not meet the high threshold of a “compelling” government interest.⁸ Nor does the bare assertion by some

potential new members have explicitly refused to join because of that fact. As in any religious organization, members come and go, but the ability to at least *replace* members that leave is substantially burdened by the lack of a permanent house of worship for the Congregation.

⁸ *See, e.g., 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

Congregation opponents that the Congregation would be incompatible with the surrounding residential neighborhood provide a sufficient reason to substantially burden the Congregation's religious exercise. Not a single court has ever held that such aesthetic concerns constitute a compelling government interest.⁹

Moreover, any assertion that houses of worship are inconsistent with residential districts

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"); *Love Church v. Evanston*, 671 F. Supp. 515, 519 (N.D. Ill. 1987), *vacated based on standing*, 896 F.2d 1082 (7th Cir. 1990) ("While traffic concerns are legitimate, we could hardly call them compelling."); *American Friends of Soc'y of St. Pius v. Schwab*, 417 N.Y.S.2d 991, 993 (N.Y.A.D. 1979) ("[C]onsiderations of the surrounding area and potential traffic hazards . . . are outweighed by the constitutional prohibition against the abridgement of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community."); *State ex rel. Tampa Company of Jehovah's Witnesses, etc. v. Tampa*, 48 So. 2d 78, 79 (Fla. 1950) ("The contention that people congregating for religious purposes cause such congestion as to create a traffic hazard has very little in substance to support it. Religious services are normally for brief periods two or three days in the week and this at hours when traffic is at its lightest."); *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 under RLUIPA).

⁹ 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"); *XXL of Ohio, Inc. Commerce v. City of Broadview Heights*, 341 F.Supp.2d 765, 789-90 (N.D. Ohio 2004) (internal citations omitted) (rejecting "aesthetics" and protection of "neighborhood character" as a compelling government interest); *Castle Hills*, 2004 WL 546792, at *16 (W.D. Tex. 2004) (preserving neighborhood privacy concerns not a compelling government interest); *Ohio Citizen Action v. City of Mentor-On-The-Lake*, 272 F.Supp.2d 671, 685 (N.D. Ohio 2003) (interest in protecting residents' privacy did not rise to the level of compelling interest); *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 . . ."); *Open Door Baptist Church v. Clark County*, 995 P.2d 33, 41 (Wash. 2000) (furthering "aesthetic and cultural interests" is not a compelling interest); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996) (holding that such important interests as safeguarding the heritage of a city and fostering civic beauty are not compelling); *Alpine Christian Fellowship*, 870 F. Supp. at 994 (holding that avoiding additional "noise impacts" of religious school not a compelling interest); *Society of Jesus v. Boston Landmarks Comm.*, 564 N.E. 2d 571, 574 (Mass. 1990) ("The government interest in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion, a right of primary importance."). See also *Congregation Comm. v. City Council of Haltom City*, 287 S.W.2d 700, 704-05 (Tex. Civ. App. 1956) ("Neither is mere inconvenience to neighbors . . . a valid reason to deny a church the right to exist in a residential district. It is hard to visualize a church being constructed in a residential district without inconveniencing someone. To restrict churches to areas where no one will be inconvenienced would be, in effect, excluding churches from residential districts.").

contradicts a well-established line of precedent holding that houses of worship may not be excluded from residential neighborhoods.¹⁰

In addition, there are a myriad of ways to address legitimate concerns absent a flat refusal to permit the Congregation to use its property for religious assembly under *any* circumstances. Such a refusal will certainly not be considered the “least restrictive means” of achieving a proffered compelling interest.¹¹ Accordingly, a denial of the Congregation’s application to use the property for religious worship would raise serious issues under RLUIPA’s Substantial Burdens provision.

Denying the Congregation’s Application Would Seriously Implicate RLUIPA’s Non-Discrimination Provision

RLUIPA’s non-discrimination provision 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). The overwhelming

¹⁰ See, e.g., 2 A. RATHKOPF & D. RATHKOPF, THE LAW OF ZONING AND PLANNING § 20.01[2][a], at 20-3 (4th ed. 1985) (“The majority view is that facilities for religious or educational uses ... may not be excluded from a residence district in which location of such use is sought.”); R.P. DAVIS, ZONING REGULATION AS AFFECTING CHURCHES, 74 A.L.R.2d 377 § 2[a] (1960, Supp. 2000) (“[C]hurches may not ... validly be excluded from residential areas as an absolute and invariable rule;”). Cases are legion in support of this general proposition. See, e.g., *Islamic Center of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 300 (5th Cir. 1989) (noting that, on federal constitutional grounds, “state court decisions have held that municipalities may not completely exclude facilities for religious use from such [residential] districts”); *State v. Maxwell*, 617 P.2d 816, 820 (Haw. 1980) (“The wide majority of courts hold that religious uses may not be excluded from residential districts.”); *Board of Zoning Appeals v. Schulte*, 172 N.E.2d 39, 44 (Ind. 1961) (“The law is well settled that the building of a church may not be prohibited in a residential district.”) (quoting *Board of Zoning Appeals v. Decatur Co. of Jehovah’s Witnesses*, 117 N.E.2d 115, 119 (Ind. 1954)); *Diocese of Rochester v. Planning Bd. of Brighton*, 136 N.E.2d 827, 834 (N.Y. 1956) (“It is well established in this country that a zoning ordinance may not *wholly exclude* a church or synagogue from any residential district.”); *Congregation Committee v. City Council of Haltom City*, 287 S.W.2d 700, 704 (Tex. 1956) (“a city cannot legally exclude a church from a residential district by a zoning ordinance”); *O’Brien v. City of Chicago*, 105 N.E.2d 917, 921 (Ill. 1952) (“We do not believe it is a proper function of government to interfere in the name of the public to exclude churches from residential districts for the purpose of securing to adjacent landowners the benefits of exclusive residential restrictions.”) (quoting *State ex rel. Synod of Ohio v. Joseph*, 39 N.E.2d 515, 524 (Ohio 1942)); *State ex rel. Roman Catholic Bishop v. Hill*, 90 P.2d 217 (Nev. 1939). Cf. *Boyajian v. Gatzunis*, 212 F.3d 1, 9 (1st Cir. 2000) (noting that “[a]n impressive body of case law and scholarly texts and articles supports th[e] conclusion” that “religious institutions, by their nature, are compatible with every other type of land use and thus will not detract from the quality of life in any neighborhood.”).

¹¹ This is particularly the case with respect to any alleged concern over inadequate parking in light of the fact that the Congregation has addressed the issue of a shortage of available parking on its property by making arrangements with nearby property owners to provide for off-site parking.

majority of the houses of worship presently located Fayetteville are Christian. To deny this Congregation's application to be the first Jewish synagogue in Fayetteville (particularly if based on alleged concerns of incompatibility with the neighborhood) when Christian churches are located in other residential zones within the city would legitimately give rise to serious concerns under RLUIPA's non-discrimination provision.

Denying the Congregation's Application Would Seriously Implicate RLUIPA's Equal Terms Provision

RLUIPA's Equal Terms provision bans "treat[ing] a religious assembly or institution on less than equal terms with a nonreligious assembly or institution. 42 U.S.C. § 2000cc(b)(1). Under conditional uses allowed in residential zones, houses of worship fall under the designation of "cultural and recreational facilities." U.D.C. § 162.01(D)(2). This designation implicitly acknowledges that some or all of the listed uses are comparable to each other, as indeed they are. Among the listed uses, at the very least, auditoriums, churches, museums, community centers, private clubs or lodges, and theaters all share the common feature of providing assembly spaces. All of these uses are conditionally allowed in Fayetteville residential zones, yet RLUIPA mandates that religious institutions can be treated *no worse than any nonreligious assembly* under zoning law. Thus, if Fayetteville allows or has allowed, for example a single elks lodge (or any of the above assemblies), to locate in a residential zone, it cannot suddenly claim that a synagogue is "incompatible" with the character of the neighborhood or that traffic is now a pressing concern, as it would be treating a religious use on less than equal terms with a nonreligious one. *Midrash Sephardi v. Surfside*, 366 F.3d 1214, 1219 (11th Cir. 2004) (holding that "excluding churches and synagogues from locations where private clubs and lodges are permitted violates the equal terms provision of RLUIPA."); *Konikov v. Orange County*, 410 F.3d 1317, (11th Cir. 2005) (holding that if gatherings for Cub Scout meetings, sports-watching, and birthday celebrations are allowed in residences, gatherings for Jewish religious services must be as well; "groups that meet with similar frequency are in violation of the Code only if the purpose of their assembly is religious. This treatment of religious assemblies on less than equal terms than nonreligious assemblies constitutes an equal terms violation.").

Denying the Congregation's Application Would Violate RLUIPA's Exclusion and Limits Provision

Finally, RLUIPA also provides that:

EXCLUSIONS AND LIMITS.--No government shall impose or implement a land use regulation that--
(A) totally excludes religious assemblies from a jurisdiction; or
(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C. § 2000cc(b)(3). This provision codifies the First Amendment rule that prohibits municipalities from "effectively denying [land users] a reasonable opportunity" to do what the First Amendment protects within their borders." *Freedom Baptist*, 204 F. Supp. 2d at 871

(quotation omitted). Moreover, the Exclusion and Limits provision, like the First Amendment itself, prevents a municipality from defending an exclusionary land use ordinance on the basis that citizens may exercise their First Amendment rights in some other jurisdiction. *Id.* (“[One] is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”) (quoting *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981)).

Here, there is a question as to whether a denial of the Congregation’s application would violate RLUIPA’s Exclusion and Limits provision. It appears that Fayetteville does not specifically allow houses of worship to operate as of right under any residential zoning code designation but are potentially allowed as a conditional “cultural and recreational” use. There is a question as to whether excluding a house of worship from a residential zone for being “incompatible” with the character of the neighborhood violates RLUIPA’s prohibition on “unreasonably limit[ing] religious assemblies, institutions or structures within a jurisdiction.” Since a denial here may be interpreted as an effective denial for all residential zones, the question is particularly salient considering that the overwhelming majority of Fayetteville’s land is zoned residential in some form.¹²

The Council May Still Take Advantage of RLUIPA’s Safe Harbor Provision

RLUIPA grants municipalities discretion, via a safe harbor provision, to take measures to avoid applying their land use ordinances in such a way as to violate the Act. Specifically, Section 5(e) of RLUIPA provides:

Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of [RLUIPA] by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

42 U.S.C. 2000cc-5(e). Here, the Council may take advantage of this safe harbor provision—and avoid the violations of RLUIPA discussed above—by using its discretion to approve the Congregation’s application for a Conditional Use Permit.

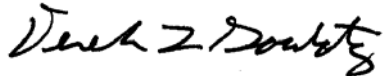
Conclusion

¹² As revealed by even a summary glance at Fayetteville’s zoning map. *See* http://www.faygis.org/website/Zoning_FAY/viewer.htm.

We recognize, of course, that RLUIPA is a relatively young law (enacted September 22, 2000), and thus the Council may not have been fully aware of the Act's scope and application. We contact you now so that the City Council may proceed with the benefit of more complete knowledge on how the obligations of RLUIPA and the Constitution apply in this situation. We also invite you to visit our website dedicated to the Act, www.rluipa.com.

Thank you for your time. We welcome any inquiries. Sincerely,

The Becket Fund for Religious Liberty



Derek L. Gaubatz, Esq.
Director of Litigation

cc: Kit Williams, Fayetteville City Attorney
Darla Newman