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MEMORANDUM

DATE: January 4, 2010

TO: Mayor John Dickert and City of Racine Common Council
c: Brian O'Connell
Thomas Friedel

FROM: Rob Weber, City Attorney

RE: Storefront Churches

At the Common Council meeting of December 15, 2009, the City Attorney's office was directed to prepare a short memo regarding the City's regulatory authority over storefront churches.

From my review of federal legislation and case law, it appears that a municipality's land use regulatory powers are cogently explained in the 7th Circuit Court of Appeals landmark case, *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.2d 752 (2003). Racine is in the 7th Circuit. The Court, interestingly decided the case on a 2 to 1 vote where the majority included Judge Terrance Evans, who has since retired. The United States Supreme Court refused to hear an appeal as described in the newspaper article, which is appended hereto as Attachment 1.

In essence, the storefront churches in the *City of Chicago* case argued: first, that the land use regulations adopted by the City of Chicago violated the Religious Land Use and Institutionalized Persons Act (hereinafter the RLUIPA), 42 U.S.C.S. §2000CC-3(e); and second, that the regulations and the administrative and legislative processes required of the churches in order to obtain permits, violated their rights to free exercise of religion, speech and assembly under the First Amendment and their equal protection rights under the Fourteenth Amendment.

For anyone unfamiliar with RLUIPA, I am appending an excellent summary of the law in Attachment 2, a City of Long Beach memo on the subject.

In short, however, under the RLUIPA, churches and other religious assemblies and organizations (including home bible studies) are protected from "burdensome, restrictive and discriminatory land use regulations." According to the City of Long Beach memo, Congress enacted the RLUIPA because small, unfamiliar and "storefront" churches were being discriminated against in zoning codes and discretionary municipal land use regulations.

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Thus, Congress passed the Act to prohibit zoning and land use laws that "substantially burden" religious assemblies absent the least restrictive means of furthering a "compelling governmental interest." See the highlighted portion of the City of Long Beach memo on page 4 as to the practical effect of the law on municipal land use regulation.

Again, interestingly, the City of Long Beach changed its parking requirements to accommodate storefront churches. See Attachment A of Attachment 2.

As to the churches' claims of RLUIPA violations, the 7th Circuit Court of Appeals concluded as follows:

> "...the meaning of "substantial burden on religious exercise" could be read to include the effect of any regulation that "inhibits or constrains the use, building, or conversion of real property for the purpose of religious exercise." Such a construction might lend support to Appellants' contention that the CZO (Chicago Zoning Ordinance), insofar as it contributes to other existing constraints upon the use of specific parcels as churches, substantially burdens religious exercise. However, this cannot be the correct construction of "substantial burden on religious exercise" under RLUIPA. Application of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise, including the use of property for religious purposes, would render meaningless the word "substantial," because the slightest obstacle to constitute a burden sufficient to trigger RLUIPA's requirement that the regulation **[**19]** advance a compelling governmental interest by the last restrictive means. *HN5* We therefore hold that, in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise--including the use of real property for the purpose thereof within the regulated jurisdiction generally--effectively impracticable.
>
> Appellants contend that the scarcity of affordable land available for development in R zones, along with the costs, procedural requirements, and inherent political aspects of the special Use, Map Amendment, and Planned Development approval processes, impose precisely such a substantial burden. However, we find that these conditions--which are incidental to any high-density urban land use--do not amount to a substantial burden on religious exercise. While they may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, they do not render impracticable the use of real property in Chicago for religious exercise, much less discourage **[**20]** churches from locating or attempting to locate in Chicago. *See, e.g., Love Church v. City of Evanston,* 896 F.2d 1082, 1086 (7th Cir. 1990)

> ("Whatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users]. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them"). Significantly each of the five individual plaintiff churches has successfully located within Chicago's city limits. That they expended considerable time and money so to do does not entitle them to relief under RLUIPA's substantial burden provision. *See, e.g.,* Stuart Circle Parish v. Board of Zoning Appeals of Richmond, 946 F. Supp. 1225, 1237 **[*762]** (E.D. Va. 1996) ("It is well established that HN6 there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely 'operates so as to make the practice of [the individual's] religious beliefs more expensive.'") (quoting Brownfield v. Brown, 366 U.S. 599, 605, 6 L. Ed. 2d 563, 81 S. Ct. 1144, (1961) (plurality opinion)). Otherwise, compliance with RLUIPA would **[**21]** require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemptions from land-use regulations. Unfortunately for Appellants, no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise.

The Court also rejected the churches' First and Fourteenth Amendment claims. I have appended the full decision as Attachment 3. The Court essentially concluded that the zoning regulations enacted by the City of Chicago (which are similar to Racine's) were rational and neutral toward churches of all types, whether established or new. See Footnote 7 on page 9 of 15.

The bottom line is that, despite Judge Possner's strong dissent and the fact that one of the two judges who ruled in favor of the City is now retired, municipalities currently have the right to enforce valid, facially neutral land use regulations against storefront (and other) churches as well as non-religious businesses.

In doing so, however, we must remain mindful of the Religious Land Use and Institutional Persons Act and in close cases, be prepared to exercise flexibility in discretionary decisions.

RKW/kjg