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September 29, 2014

Government of the District of Columbia
Advisory Neighborhood Commission 2B
9 Dupont Circle, Northwest
Washington, D.C. 20036

Re: *Submission to the Historic Preservation Review Board*
St. Thomas' Parish Episcopal Church, 1772 Church St. NW, Washington, D.C.

Dear Commissioners:

We write to you concerning the St. Thomas' Parish Episcopal Church submission for development of 1772 Church Street, Northwest to the Historic Preservation Review Board. It is this Firm's opinion that prohibiting such development of the property would violate the Church's rights under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C §§ 2000cc *et seq.*, and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.* Violation of these civil rights could potentially expose the District to years of litigation, millions of dollars in damages and attorneys' fees,[1] and the substantial likelihood of the development occurring in any event.

This Firm has represented many clients in religious liberty matters, and specifically in bringing cases under RLUIPA's land use provisions. We have represented Buddhist, Hindu, Jewish, Moslem, Native American, Sikh, Zoroastrian and Christian clients. Storzer & Greene has recently represented the Third Church Christ, Scientist in its litigation with the Historic Preservation Review Board concerning the now-demolished structure at Sixteenth and Eye Streets, Northwest; the Fisherman of Men Church with respect to Application #12-06 filed by ANC 1A; and St. John's United Church of Christ against the City of Indianapolis over a similar historic landmark designation of its century-old house of worship.

[1] Among the notable settlements and verdicts in RLUIPA litigation have included *Reaching Hearts International v. Prince George's County*, 368 Fed. Appx. 370 (4th Cir. 2010) (affirming a jury award of $3,714,822.36 in damages)**;** *Rocky Mountain Christian Church v. Board of County Commissioners,* 2010 WL 148289 (D. Colo.) (awarding $1,252,327); *Anne Arundel settles religious discrimination lawsuit; County will pay church $3.25 million and admit to violating federal laws*, THE BALTIMORE SUN (Nov. 18, 2010). More recently, the City of Norwalk, Connecticut agreed to pay approximately $2 million to the Al Madany Islamic Center, who we represented, in conjunction with its denial of the Center's permit for development. *Norwalk Settles Mosque Lawsuit for $2 Million*, Connecticut Law Tribune (Sept. 24, 2014).

The actions of the Historic Preservation Review Board are subject to the requirements of RFRA and RLUIPA. RFRA requires that the "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person-- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). "[T]he term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity; . . . the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States; . . . ." *Id.* § 2000bb-2(1) (emphasis added).

RLUIPA mandates that "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 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." 42 U.S.C. § 2000cc(a). The statute includes any governmental "branch, department, agency, instrumentality or official" in its definition of those subject to its terms. *Id.* § 2000cc-5(4).[2] Furthermore, "[t]his chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." *Id.* ¶ 2000cc-3(g). RLUIPA also prevents governments from discriminating between religious denominations, favoring nonreligious assemblies and institutions over religious assemblies and institutions, and unreasonably limiting religious assemblies, institutions or structures. *Id.* § 2000cc(b).

RLUIPA and RFRA apply to landmarking designations. The text of RLUIPA explicitly states that historic designations of church property are subject to RLUIPA: "The term 'land use regulation' means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land)." 42 U.S.C. § 2000cc-5(5). RFRA's broader protections, which apply to any governmental action, also clearly encompass historic designations. 42 U.S.C. § 2000bb-1.

A historic landmark action that prevents needed church development burdens religious exercise and violates federal law. As the HPRB well knows, in *Third Church of Christ, Scientist* the federal District Court made clear that landmark designation imposes a burden on a church's religious exercise:

> The [HPRB's] motion asserts, among other things, that historic preservation designation alone imposes no burden, it's only a process. That argument frankly blinks reality. It is very clear that a burden is imposed by historic designation; it's a financial burden, it's a burden on the alienability of land, on what you can do with land.

Third Church of Christ, Scientist v. District of Columbia Historic Preservation Review Board, Civil Action No. 08-1371, Transcript of Hearing at 49-50 (Apr. 7, 2009).

[2] The HPRB is subject to the terms of RFRA and RLUIPA as it is a branch, department, agency or instrumentality of the District of Columbia government acting under color of law.

To the extent that the HPRB was not previously aware of these legal requirements, it has been placed on notice that its actions are subject to them, as the court in *Third Church of Christ, Scientist*, noted:

> I am troubled to hear that the D.C. government declines even to entertain the religious freedom claims of the plaintiffs here, but the invitation to take that to a court of their choice probably will serve just as well.

Transcript at 50-51. In addition to the experience of Third Church, the HPRB should note the experience of the Indianapolis Historic Preservation Commission, the Metropolitan Development Commission of Marion County, and the City of Indianapolis when it attempted to landmark the St. John United Church of Christ. After that church filed suit, the municipality issued a new resolution, removing the designation.[3] There is no longer any doubt that the HPRB's actions implicate these federal laws.

Here, the Church needs a new, adequate sanctuary space and a modern religious center. Courts have long held that being able to worship together as a congregation is religious exercise central to the beliefs of many faiths.

> Preventing a church from building a worship site fundamentally inhibits its ability to practice its religion. Churches are central to the religious exercise of most religions. If Cottonwood could not build a church, it could not exist.

Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002). To impose upon the Church a requirement that it may not alter the physical structures on its property is to restrain its ability to express its faith as it sees fit. *See First Covenant Church of Seattle v. City of Seattle,* 120 Wash. 2d 203, 217 (1992) ("First Covenant claims, and no one disputes, that its church building itself 'is an expression of Christian belief and message' and that conveying religious beliefs is part of the building's function.").

Several other courts have held that historic preservation regulations that impact churches substantially burden religious exercise. *See First Covenant Church v. City of Seattle,* 120 Wash. 2d 203, 219 (1992) (holding that designation substantially burdens religious exercise both administratively and financially); *Society of Jesus of New England v. Boston Landmarks Com'n,* 409 Mass. 38, 41-43 (1990) (holding that the historical landmark designation of a church unconstitutionally restrained religious worship. "In short, under our hierarchy of constitutional values we must accept the possible loss of historically significant elements of the interior of this church as the price of safeguarding the right of religious freedom."); *Munns v. Martin*, 131 Wash. 2d 192, 207-209 (1997) (ordinance that creates administrative burden on church with historically designated property substantially burdened its religious exercise); *Mount St. Scholastica, Inc. v. City of Atchison, Kansas*, 482 F. Supp. 2d 1281, 1295 (D. Kan. 2007) (plaintiffs' Free Exercise rights violated by historic landmark regulation of property); *Keeler v. Mayor of Cumberland,* 940 F. Supp. 879, 885 (D. Md. 1996) (inability to demolish building that was a financial drain on the church substantially burdened its religious exercise).

[3] The relevant discussion begins at 0:20:10 of the videotaped proceedings, located at http://indianapolis.granicus.com/MediaPlayer.php?view_id=17&clip_id=7278.

We are informed that there is some community opposition to the Church developing its property. However, this hostility, based on apparent aesthetic concerns and some individuals' wish to use the Church's land for their own purposes, must bend to the superior interests of the Church's constitutional rights. In order to justify a substantial burden on religious exercise, a governmental entity is obligated to demonstrate that it is using the least restrictive means of achieving a compelling governmental interest. Courts have long held that aesthetic interests are not "compelling." Thus, opposition that is based on individuals losing their "views" or wishing to preserve ruins cannot outweigh the Church's rights. Furthermore, the desire of certain third party individuals to keep using the Church's property for their own purposes (*see* https://www.facebook.com/neighborsofstthomaschurchdc ("I would be devastated to lose this park and labyrinth"; http://www.change.org/p/save-church-street ("Maintaining all or most of the park to preserve a cherished open space in the area." "That maze on the ground in the park in front of the church. I'd hate to lose that.")) is among the most tenuous of interests that the undersigned has ever heard offered to justify the deprivation of constitutional rights.

Nor is the fact that the development proposal includes non-religious components—which are necessary to finance the Church's construction—relevant. Without a financially feasible project, the Church will likely not be able to build a church at all.

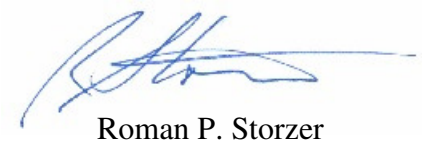
> [A] financial burden on religious activity, if too gross, may unconstitutionally infringe on free exercise. *Hope Evangelical Lutheran Church v. Iowa Dep't of Rev. & Fin., supra; Murdock*, 319 U.S. at 111–12, 63 S. Ct. at 874 ("It is plain that a religious organization needs funds to remain a going concern." Those who can tax religious practice can make the exercise of religion impossible to maintain); *Follett*, 321 U.S. at 576, 64 S. Ct. at 719 ("Freedom of religion is not merely reserved for those with a long purse"); *Sumner v. First Baptist Church*, 97 Wash. 2d 1, 7, 639 P.2d 1358 (1982) (enforcement of code violates First Amendment because "practical [financial] effect of . . . enforcement would be to close down the church-operated school"). *See also Lutheran Church in Am. v. New York*, 35 N.Y.2d 121, 129, 359 N.Y.S.2d 7, 316 N.E.2d 305, 311 (1974) (landmark designation that deprives church of reasonable use of land violates Fifth Amendment).

First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 183-84 (Wash. 1992). *See also Bethel World Outreach Ministries v. Montgomery County Council,* 706 F.3d 548, 557 (4th Cir. 2013) (substantial burden may be imposed on religious exercise even if alternatives exist where such alternatives would create "'delay, uncertainty, and expense'"); *Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona,* 915 F. Supp. 2d 574, 632 (S.D.N.Y. 2013) ("Courts also have found religious institutions have satisfied the substantial burden requirement by alleging or proving that a municipality's zoning scheme imposes significant 'delay, uncertainty, and expense.'")[4]; *Saints Constantine & Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895, 899–901 (7th Cir. 2005) (same); *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach, Fla.*, 727 F.3d 1349, 1359 (11th Cir. 2013) ("The Temple alleges a present injury from the City's discriminatory designation of its property as historic, and to delay the resolution of these claims where no further factual development is possible would serve only to work further hardship upon the Temple.").

[4] In addition to the *Third Church of Christ, Scientist; Cottonwood Christian Center; Anne Arundel; St. John United Church of Christ* and *Norwalk* matters described above, the undersigned was counsel for the plaintiffs in the Montgomery County and Village of Pomona cases.

Local governments may and do regulate new development, including the aesthetic characteristics of such development, so long as such regulation does not burden religious exercise or discriminate between or against places of worship. This includes treating a place of worship on as favorable a basis as other structures with respect to building to the allowable height and density of the applicable zoning regulations. However, local opponents' desire to have church ruins "preserved in their original state, context and place"[5] cannot outweigh the fundamental free exercise rights of a house of worship. Forcing a church to maintain, at its own expense and its own detriment, the remnants of a religious structure based on the desires of a few who wish only to benefit from—but not support the costs of—such structure, irrespective of the church's needs, is neither reasonable nor permitted under the law.

Yours truly,



Roman P. Storzer

[5] H. Misiko, *Neighbors fight D.C. parish's expansion plan*, WASHINGTON POST (June 24, 2014)