

## **Supplemental Comments in Opposition to Proposed Rezoning**

Concerning the Property Located at 9744 Concord Road

From

R-2 (Suburban Residential) to SI-1 Service Institution (Religious)

For the Purpose of

Constructing and Operating a 40,000 Square Foot Facility and Associated Parking

The Brentwood Planning Commission continues to consider a proposed rezoning of the property located at 9744 Concord Road from R-2 (Suburban Residential) to SI-1 Service Institution (Religious). A majority of residents in the surrounding residential developments oppose this rezoning request. I presented Comments in Opposition to this proposal at the Brentwood Planning Commission's March 6, 2006 meeting, and have been asked to represent Willowmet and other interested parties throughout this matter.

### **I. Executive Summary**

The Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C.S. § 2000cc<sup>1</sup>, prohibits a governmental entity from applying a land use regulation in a manner that imposes a substantial burden on religious exercise unless the government demonstrates that imposition of the burden is in furtherance of a compelling government interest; and the burden imposed is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C.S. § 2000cc(a)(1).

**A.** The case law interpreting RLUIPA makes it clear that a religious institution is entitled to be treated on equal terms with non-religious entities. That case law also makes it clear that a religious institution may not build anywhere it wishes, just as secular institutions may not. Where courts have found a substantial burden on the free exercise of religion, those findings were very fact specific: the result of disingenuous activity by the planning authority; expansion of an existing facility; or denial of a variance provided for in the respective zoning regulations. Here:

- 1) This Commission has not acted in a disingenuous manner.
- 2) The fact pattern plainly presents a case where denial would not be a substantial burden on the free exercise of religion.
- 3) The Brentwood Zoning Ordinance provision defining R-2 districts does not provide for the likelihood of a religious institution constructing in a suburban residential district (provided at Attachment I). Approval would require preferential treatment of a religious institution when non-religious institution requests for rezoning have been consistently and rightly rejected. This is clearly not the intent of RLUIPA.

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<sup>1</sup> With respect to "institutionalized persons", RLUIPA was found constitutional in *Cutter v. Wilkinson*, 125 S.Ct. 2113; 161 L.Ed.2d 1020 (2005). However, because the jurisdictional grounds for applying the Act to prisoners is different than those applicable in religious land use, *Cutter* does not necessarily indicate a similar result when a constitutional challenge to the land use provisions is brought before the Court.

- 4) The potential ramifications of a decision supporting any such proposed rezoning (whether for a religious or non-religious use) must be given strong consideration.

**B. When deliberating on a re-zoning request, the Planning Commission should:**

- 1) *Make each determination from a content-neutral perspective.* The courts have clearly stated there should be no consideration of a requesting institution's religious or non-religious nature or affiliation. The law requires that planning authorities pursue a course of neutrality towards religion, favoring neither one religion over others nor religious adherents collectively over nonadherents<sup>2</sup>. The Brentwood Zoning Code was drafted in a manner allowing for content-neutral decision-making, thus enabling religious and non-religious institutions to be considered on equal terms.

- 2) *Decide in accordance with the existing zoning district's characteristics.* For example, in a R-2 (suburban residential) district, there are permitted and prohibited uses. In an area where no commercial use has been permitted, the prevailing use characteristics of the abutting area should be accorded great weight.

- 3) *Consider the request in accordance with the requirements set out in the Brentwood Zoning Code for the petitioner's desired end result.* In the immediate instance, the petition must be considered in light of the requirements set out at Sec. 78-261 (provided at Attachment II) requiring:

suitable areas for the expression of religion which [enhance] the quality of life in the community without creating objectionable or undesirable influences on nearby residential districts ... appropriately located between commercial and residential districts and on other suitable tracts located adjacent to arterial streets where residential development is not appropriate or feasible, and/or where the requirements of this division are deemed adequate to mitigate any adverse impact on the nearby residential development.

- 4) *Where RLUIPA is either directly or indirectly an issue, this Commission must keep in mind that the burden of showing "substantial burden on the free exercise of religion" is one that rests on the institution so claiming.* In the matter at hand, no substantial burden on the free exercise of religion has been argued because no such burden exists. This institution freely elected to divest of an existing 60,000 sq. ft. facility in Nashville, and now seeks authority to construct a new, 40,000 sq. ft. facility in the middle of a developed Brentwood residential district; alternatives to the selected property exist in areas suitable for such construction; residential development on the selected site IS both "appropriate and feasible," hence the current R-2 designation and presence of an existing home on the property; the site is bounded on 3 sides by existing residential development and is not located "between commercial and residential districts"; the traffic profile at this site is less suitable than at other sites previously rejected for institutional construction by this Commission because of traffic concerns.

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<sup>2</sup> *Board of Education v. Grumet*, 512 U.S. 687, 696 (1994)

5) *There is support for the proposition that RLUIPA is not implicated where the matter at issue involves buildings used for secular activities, or used to generate revenue to finance religious activities, such as a gymnasium, administrative offices, soup kitchen, bookstore, etc.* There is an interesting discussion concerning this in *Westchester*, a 2d Circuit decision briefed below.

## II. Legal Considerations

RLUIPA was passed by Congress in 2000 in response to the Supreme Court decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which invalidated the Religious Freedom and Restoration Act of 1993 (“RFRA”), 42 U.S.C. § 2000bb *et seq.* in regard to zoning decisions<sup>3</sup>. Subsequently, there have been numerous decisions interpreting RLUIPA, but only a few directly on point. All of the courts are in agreement that RLUIPA requires that no substantial burden may be placed on the exercise of religion. There is also general agreement that RLUIPA does not require that religious institutions be accorded more than equal consideration in zoning.

In order to establish a *prima facie* case under RLUIPA, the claiming party is required to allege facts sufficient to show that a Planning Commission’s conduct in denying an application: (1) imposes a substantial burden; (2) on the free exercise of religion; (3) of a person, institution or assembly.

### Substantial Burden on the Free Exercise of Religion

Substantial burden on the free exercise of religion is not defined in RLUIPA. However, case law and RLUIPA’s legislative history suggest that Congress used the term “substantial burden” because that was the term used in *Sherbert v. Review Board*, 450 U.S. 707 (1981), and other Free Exercise cases. See also, *Lying v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (No substantial burden where plaintiffs were neither coerced into violating their religious beliefs, nor faced a penalty for their religious activity by denial of any equal share of the rights, benefits, and privileges enjoyed by other citizens.). Further, the Supreme Court has noted “that, when Congress enacts statutes using terms of art that the Court previously has interpreted, Congress intends that those terms have the same meaning.” *McDermott v. Wilander*, 498 U.S. 337, 342, (1991). This is particularly relevant here, because Senators Hatch and Kennedy issued a joint statement in 2000 summarizing the congressional findings on which RLUIPA was based, and noted that RLUIPA does not include a definition of “substantial

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<sup>3</sup> Justice Stevens’ concurring opinion is enlightening:

In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a “law respecting an establishment of religion” that violates the First Amendment to the Constitution. If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment. (citing to *Wallace v. Jaffree*, 472 U.S. 38, 52-55 (1985)). *Boerne* at 537

burden on the free exercise of religion” because that phrase has been defined, over many years, through significant litigation. Rather, the RLUIPA drafters clearly indicated that a definition of “substantial burden on the free exercise of religion”:

should be interpreted by reference to Supreme Court jurisprudence..[and should] not . . . be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden [on] religious exercise." 146 Cong Rec S7774 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy).

Consequently, to determine if a substantial burden on the free exercise of religion would result from denial of the proposal before this Commission, it must be determined that denial would coerce the institution or its members into violating its religious beliefs, or penalize the institution or its members for religious activity by denying rights and privileges enjoyed by others. Below is a look at select, relatively recent case law interpreting RLUIPA. In that regard, I provided each of you a file containing numerous cases decided in the last year involving RLUIPA and churches. At Attachment III is a brief description of certain cases that were decided either on procedural grounds, with no real implication to this discussion, or are unpublished. A briefing of the remaining cases (and a few additional cases found in my last-minute research) is provided below, with additional comments where appropriate.

### III. Case Law<sup>4</sup>

#### 6<sup>th</sup> Circuit

##### 1) **LIVING WATER CHURCH OF GOD v. CHARTER TOWNSHIP OF MERIDIAN**, 384 F. Supp. 2d 1123 (WD MI, 2005)

**Holding:** Denied renewal of special use permit (SUP) for construction of a 35,000 square foot addition to existing building imposed substantial burden.

**Distinguishing Observation:**

This case should be considered very narrowly because:

- a) The church had an existing structure, in use, on the property;
- b) Zoning ordinance provided a SUP for approved activities in the district;
- c) Township had previously granted Church's SUP with a larger footprint;
- d) Immediately before the original SUP expired, Township abandoned practice of granting SUPs;
- e) As a part of its rationale for denial, the Township developed a table entitled Land Area to Building Ratios listing the amount of land compared to building size for each of the public and private schools in the Township, even though public schools are state regulated and not subject to municipal land use regulation.

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<sup>4</sup> Citations are included to guide you to the respective court's logic, and also to answer a question generated at the March 6 meeting concerning relevance (because of date) of certain of the case law presented there. Highlighted cases were previously provided to you in my March 6, 2006 Comments in Opposition (a copy of which is provided as Attachment IV).

f) The ratios were developed solely for the purpose of reviewing the Church's application and had not been applied to any other applicants since their creation.

**2) THE EPISCOPAL STUDENT FOUNDATION v. THE CITY OF ANN ARBOR**, 341 F. Supp. 2d 691 (ED MI, 2004)

**Facts:** A dispute over religious institution's request to demolish its current worship facility and construct a new building in its place.

**Holding:** Financial burden imposed to locate alternative property -- rental or otherwise -- does not rise to the level needed to prevail on RLUIPA claim. The fact that alternative suitable properties may exceed budget, or that additional rental expenses must be incurred to facilitate the religious organization's mission, are not the type of burdens on the free exercise of religion that RLUIPA was drafted to protect.

**Observation:** The fact pattern in this case is very relevant, as the decision concerns an affirmative desire to vacate an existing, adequate facility in order to construct a replacement facility. This court cites frequently to **LAKEWOOD, OHIO CONGREGATION OF JEHOVAH'S WITNESSES, INC. v. CITY OF LAKEWOOD, OHIO**, 699 F.2d 303 (6<sup>th</sup> Cir., 1983) (provided in your last packet) in support of its finding.

**3) THE GREATER BIBLE WAY TEMPLE OF JACKSON v CITY OF JACKSON**, 268 Mich. App. 673; 708 N.W.2d 756 (2005)

**Holding:** City's denial violated RLUIPA

**Facts:** Existing Church purchased adjoining parcels of land for the purpose of constructing an assisted living apartment complex for the elderly, disabled and homeless, and sought rezoning of the parcels from "single-family residential" (R-1) to "multiple-family residential" (R-3).

**Distinguishing Observation:** Available property zoned R-3 near this existing church did not exist.

**4) MOUNT ELLIOTT CEMETERY ASSOCIATION v. TROY**, 171 F.3d 398 (6<sup>th</sup> Cir. 1999).

**Holding:** City's denial of request not a burden on free exercise because ordinances were neutral laws of general applicability.

**Facts:** Church petitioned for rezoning to use property as a Catholic cemetery.

**1<sup>st</sup> Circuit:**

**MINTZ v. ROMAN CATHOLIC BISHOP OF SPRINGFIELD**, 2006 U.S. Dist. LEXIS 17255 (D MA, 2006)

**Facts:** Diocese owns land which contains a church and rectory in an area where zoning permits religious uses. Church wishes to construct a parish center which would include a large social hall, kitchen, office space, and handicap-accessible bathrooms. Proposal requires a variance from size and space restrictions. Residents brought action against church and zoning authority.

**Holding:** Ancillary use central to church mission is religious exercise protected under RLUIPA.

## 2d Circuit:

1) **WESTCHESTER DAY SCHOOL v. VILLAGE OF MAMARONECK**, 379 F. Supp. 2d 550 (SD NY, 2005)

**Holding:** Mere inconvenience to a religious institution is insufficient to rise to the level of substantial burden. See *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995); see also *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996)). The court cautioned that RLUIPA compels states to "pursue a course of neutrality towards religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." quoting *Board of Education v. Grumet*, 512 U.S. 687, 696 (1994)). Finally, though not the basis of the court's ruling, it was also considered relevant that the School's proposed renovations involved some secular purposes.

2) **THE LIGHTHOUSE INSTITUTE v. CITY OF LONG BRANCH**, 406 F Supp. 2d 507 (D NJ, 2005)

**Facts:** Church owned property and had been using it as a soup kitchen; Pastor resided on property. City designated property as part of redevelopment ordinance creating exclusive residential districts and prohibiting construction of church buildings in those districts.

**Holding:** Ordinance did not infringe the congregation's religious freedom, and did not offend the due process clause because it was a legitimate exercise of the city's police power. While ordinance may have frustrated the congregation's desire to locate itself in a more pleasant, more convenient, and less expensive location, such desires are not protected, citing to **LAKWOOD, OHIO CONGREGATION OF JEHOVAH'S WITNESSES, INC., v. CITY OF LAKWOOD, OHIO**, 699 F.2d 303 (6<sup>th</sup> Cir., 1983) The church could have operated as a church in other districts in the city. A mere inconvenience is not enough to meet the "substantial burden" requirement, nor is it a substantial burden when a law merely operates to make the practice of religious beliefs more expensive. *Braunfeld v. Brown*, 366 U.S. 599 (1961). Otherwise, compliance with RLUIPA would 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 exemption from land-use regulations. No such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise. (at 529-530), citing to *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("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 religious exercise incidental to the regulation of land use--however minor the burden it were to impose-- could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means.").

**3) HOUSE OF FIRE CHRISTIAN CHURCH v. CITY OF CLIFTON, 379 N.J. Super. 526; 879 A.2d 1212 (2005)**

**Facts:** Prior to adoption of amended ordinance, churches were the only uses within affected zoning district that did not have a rear yard setback requirement of thirty-five feet (i.e., religious activities held to a different standard than non-religious activities).

**Holding:** Amendment to zoning ordinance, making a rear yard setback requirement for churches consistent with other land uses in the district not inconsistent with RLUIPA.

**Observation:** Religious institutions are entitled only to equal consideration with non-religious institutions.

**4<sup>th</sup> Circuit:**

**CHASE v. CITY OF PORTSMOUTH, 2005 U.S. Dist. LEXIS 29551 (ED VA, 2005)**

**Facts:** Religious institution owns property and improvements built in 1899 and used continuously as a house of worship until 1998. The property's zoning designation required that the City Council approve a Use Permit application to operate a church. The Church argues they are substantially burdened because they are unable to use the property after having spent large amounts of money.

**Holding:** The City has not excluded the Church or its members from practicing their religion in the city, as they are expressly permitted to operate a church in other zoning districts without needing to secure a Use Permit. In addition, economic injury, or the threat of economic injury, "fails to satisfy the substantial burden required of a Free Exercise Clause claim. The City has not excluded them from practicing their religion in the city. In fact, they are expressly permitted to operate a church in other zoning districts without needing to secure a Use Permit, citing to Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 306-07 (6th Cir. 1983) (holding that being unable to worship in a particular location that bears no relation to the practice of the religion is not a substantial burden).

**7<sup>th</sup> Circuit:**

**1) STS. CONSTANTINE & HELEN GREEK ORTHODOX CHURCH, INC. V. CITY OF NEW BERLIN, 396 F.3d 895 (7<sup>th</sup> Cir. 2005).**

**Holding:** The court concluded that the church was substantially burdened and provided the parties with a stay to give the city an opportunity to negotiate with the church to work out an effective solution before providing the church with its requested relief.

**Distinguishing Observation:** *This decision is largely procedural, and has been widely criticized.* The decision chastises the City for being disingenuous with its criteria, and turns on the fact that the city had argued only one legitimate reason for not granting the rezoning--it was worried that if the property were rezoned a subsequent owner might build a school or other non-religious facility--and the church had agreed to a restrictive covenant prohibiting that. Also, see *Petra*, below.

**2) PETRA PRESBYTERIAN CHURCH v. VILLAGE OF NORTHBROOK,**  
409 F. Supp. 2d 1001 (ND IL, 2006)

**Facts:** Petra agreed to buy property, contingent on rezoning to operate a church, withdrew application prior to denial and terminated contract, re-purchased the land, and sought a temporary restraining order preventing zoning enforcement. Village had amended zoning code so that *all* membership organizations were excluded from I-1 zones, and opened additional zones to religious organizations.

**Holding:** Nothing in RLUIPA entitles a party to establish a church anywhere it wants. The fact that a zoning code requires it to locate somewhere other than where it might desire is not a substantial burden. The court found the religious institution's reliance on *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005), unpersuasive because there the Seventh Circuit held the defendant had created a substantial burden by requiring a church to "search[] around for other parcels of land," rather than rezoning property the church already owned. *Id.* at 901. In contrast, Petra offered no evidence that it had satisfied City's legitimate concerns about allowing a church in an industrial park, and agreed on the record that the City's decision to prohibit all assembly uses in its industrial zones was rationally related to several important planning principles, including reduction in actual and potential land use conflicts, and preservation of industrial land.

**Observation:** The 2003 amendments to the City's zoning ordinance put nonreligious assemblies on equal footing with religious assemblies, thus avoiding RLUIPA liability by eliminating a discriminatory zoning provision.

**3) VISION CHURCH V. VILLAGE OF LONG GROVE,** 397 F. Supp. 2d  
917 (ND IL, 2005)

**Facts:** Village passed ordinance regulating the maximum number of square feet for public assembly buildings.

**Holding:** Ordinance with a secular purpose that did not advance or inhibit one religion at the expense of another does not violate RLUIPA. No RLUIPA violation where there was no showing that a non-religious group received more favorable treatment. As the church was treated the same under the ordinance as any other developer, its equal protection claim also failed.

**9<sup>th</sup> Circuit:**

**1) COTTONWOOD CHRISTIAN CENTER V. CYPRESS  
REDEVELOPMENT AGENCY,** 218 F.Supp.2d 1203 (CD CA, 2002)

**Holding:** Violated RLUIPA

**Facts:** city repeatedly put roadblocks in path of church seeking conditional use permit to build on 18-acre parcel of land, even though law allowed churches in that area with permit, and then attempted to take parcel by eminent domain in order to convey it to major warehouse style discount retail outlet.

**2) CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS v. CITY OF WEST LINN**, 338 Ore. 453, 111 P.3d 1123 (2005)

**Facts:** Denial of a conditional use permit to build a new meetinghouse does not violate RLUIPA.

**Holding:** Expense associated with re-application to meet commission's requirements is not a substantial burden. A government regulation imposes a substantial burden on religious exercise only if it "pressures" or "forces" a choice between following religious precepts and forfeiting certain benefits, on the one hand, and abandoning one or more of those precepts in order to obtain the benefits, on the other.

**10<sup>th</sup> Circuit:**

**GRACE UNITED METHODIST CHURCH v. CITY OF CHEYENNE**, 427 F.3d 775 (10<sup>th</sup> Cir. 2005)

**Facts:** Denial of license to operate a daycare in a residential zone

**Holding:** A church has no constitutional right to be free from reasonable zoning regulations nor does a church have a constitutional right to build a day care center or house of worship wherever it pleases. The court cited to *Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 405 (6th Cir. 1999) (city's denial of request to rezone certain property for use as Catholic cemetery not burden on free exercise because ordinances were neutral laws of general applicability) in support of this rationale

**11<sup>th</sup> Circuit:**

**1) WILLIAMS ISLAND SYNAGOGUE, INC. V. CITY OF ADVENTURA**, 358 F. Supp 2d 1207 (SD FL, 2005).

**Facts:** Synagogue attempted to resolve worship space concerns by relocating to a party room located in a zoning district that allowed churches, synagogues, and other houses of worship only by conditional use permit.

**Holding:** No RLUIPA violation because church was treated on equal terms with nonreligious institutions, and its worship space problems could either be solved at the synagogue's current location or amounted to distractions that were not actionable.

**2) KONIKOV v. ORANGE COUNTY**, 410 F.3d 1317 (11<sup>th</sup> Cir. 2005).

**Facts:** Zoning code defined social organizations differently than religious organizations; groups that meet with similar frequency were in violation only if the purpose of assembly was religious.

**Holding:** Unequal treatment of religious and nonreligious assemblies violates RLUIPA.

**3) PRIMERA IGLESIA BAUTISTA HISPANA OF BOCA RATON v. BROWARD COUNTY**, 2004 U.S. Dist. LEXIS 25570 (SD FL, 2004)

**Facts:** Church challenged enforcement of zoning ordinance that imposed a 1,000 foot separation requirement between nonagricultural, nonresidential uses in agricultural zoning districts, from which church had been denied a variance.

**Holding:** RLUIPA claim failed because the church had shown nothing more than an incidental effect on religious exercise which was largely created by the church's purchase

of the property without a zoning condition; also, the county had not discriminated against religious organizations in its enforcement of the separation requirement, nor did the requirement unreasonably restrict religious assemblies.

#### IV. CONCLUSION

Denial of this proposal is appropriate when the Planning Commission's consideration of this petition ensures that religious and non-religious institutions are treated equally. In that regard, the Planning Commission has a long history of protecting residential areas along Concord Road from commercial development, including:

- proposed church at corner of Concord Road and Crockett
- proposed Publix at corner of Edmondson Pike and Concord Road. That property is currently under residential development
- proposed commercial rezoning at the corner of Sunset and Concord. That property is currently under residential development
- proposed US Post Office at corner of Wilson Pike and Concord Road; followed by a petition to rezone that property for a La Petite Academy. Interestingly, noting the character of development from Wilson Pike East to the Williamson County line, this Planning Commission suggested the appropriate development of that property would be residential.

There is no provision in either the Act or in related case law that requires, or even suggests, that a religious institution's request for zoning consideration be judged on more than equal terms. Therefore, this proposal must be scrutinized as if a grocery store, post office, child care facility or other nonreligious institution was seeking the zoning change.

Denial of this proposal will not infringe on the congregation's religious freedom in any manner. While denial may frustrate this congregation's desire to locate itself in a specific location, those desires are not protected by RLUIPA. This assembly's decision to seek building space is not founded on a lack of suitable space or even a lack of space to worship, but rather on an affirmative decision by the assembly to divest of an existing facility and seek property to construct another venue from which to build and grow.

Consequently, the Concord Valley Christian Church's proposal to rezone the property located at 9744 Concord Road from R-2 to SI-1 should be denied. Any other result can only be founded on discriminatory considerations contrary to the intent of the Religious Land Use and Institutionalized Persons Act and to the intent of the Brentwood Zoning Ordinance.

Respectfully submitted this 1st day of May 2006

By: /s/ *David E. Williams*  
David E. Williams, Esq.  
Attorney Reg. No. 015737

**ATTACHMENT I**

Sec. 78-163. Uses prohibited.

Any use or structure that is not specifically permitted in the R-2 zoning district is prohibited. In addition, any use or structure for which approval of the planning commission or planning and codes director is required shall be prohibited unless and until such approval is obtained. Any use or structure for which approval of the board of zoning appeals is required shall be prohibited unless and until such approval is obtained.

(Ord. No. 94-54, § 1(11-503), 12-19-94; Ord. No. 2002-04, § 3, 4-8-2002)

## ATTACHMENT II

Sec. 78-162. Uses permitted.

The following uses are permitted within the R-2 zoning districts:

- (1) General farming activities such as the raising of trees, field and plant crops, breeding and keeping of domestic animals and any similar agricultural uses, provided the minimum lot size is three acres.
- (2) Detached single-family residences, subject to the limitations established in section 78-19 of this Code.
- (3) Designated open space including leisure type facilities within a planned residential subdivision subject to the standards and limitations specified in section 78-171.
- (4) Accessory buildings customarily incidental to the above uses, subject to the standards and limitations specified in section 78-169.
- (5) Home occupations subject to the standards and limitations specified in sections 78-166 through 78-168.
- (6) Accessory uses such as swimming pools, tennis courts, pet enclosures (not to exceed 100 square feet of floor space except on parcels of three or more acres in size), play structures, satellite dish antennas, and free standing open air structures such as gazebos, arbors and pergolas, including related pads, decks, patios, hard surfaces and enclosures. Such accessory uses shall not be subject to the standards and limitations specified in section 78-169, but must be placed within the buildable area of the rear yard.
- (7) Bed and breakfast lodges, subject to the following requirements:
  - a. A bed and breakfast lodge may be operated only by special exception granted by the board of zoning appeals. A special exception granted for a bed and breakfast lodge may be contingent upon special conditions established by the board of zoning appeals in addition to the requirements herein. Failure to comply with any of the requirements herein or the special conditions established by the board of zoning appeals shall be grounds for revocation of the board's approval. A separate home occupation permit from the board of zoning appeals shall not be required for the operation of a bed and breakfast lodge.
  - b. A bed and breakfast lodge may be operated only in a dwelling which has been designated as a historically significant site pursuant to section 2-181 of this Code and which is located on a lot with a minimum lot size of four acres.
  - c. The bed and breakfast lodge must be managed by an owner of the dwelling, or a family member of an owner. The individual managing the bed and breakfast lodge must be a resident of the dwelling and shall provide proof of residency to the planning and codes department upon request.
  - d. Associated food service shall be provided only to overnight visitors. The sale of merchandise shall be prohibited.
  - e. The prior approval of the planning commission, following review and recommendation of the historic commission, shall be required for any structural addition on the property; any modification to the exterior of the dwelling or accessory structures; or any addition or relocation of driveways, parking areas or other similar hard surfaces.
  - f. The bed and breakfast lodge shall adhere to and operate within all applicable laws, regulations and guidelines established by the city, county and state. A copy of all

inspection reports provided by the county or state shall be submitted to planning and codes department. Furthermore, the lodge shall be open to inspection by representatives of the city at all times for the purpose of determining compliance with the requirements hereunder.

g. The bed and breakfast lodge shall maintain current city and county business licenses.

(8) Garage sales conducted by the owners or tenants of the property, provided that no person is compensated for conducting the sale, no more than two garage sales shall occur at the same location in any calendar year, and the duration of a single garage sale shall not exceed two days. Additionally, one auction or other sale to dispose of the household assets of a deceased resident or a resident who is relocating may be held at the resident's home, and the person or agency conducting such a sale may be compensated. No sale of merchandise purchased for resale shall be permitted.

(9) Consignment sales conducted by the owners or tenants of the property, provided that consignment sales may only occur during the months of April and September, and between the hours of 8:00 a.m. and 6:00 p.m. No more than two consignment sales shall occur at the same location in any calendar year, and the duration of a single consignment sale shall not exceed three days. Setup for a consignment sale shall be commenced no sooner than three days prior to the first date of the sale. No tents shall be used in conjunction with a consignment sale. Cleanup of the sale location, including removal of all sale items, signs and displays, shall be accomplished within two days following the last date of the sale. Authorization to conduct a consignment sale shall be contingent upon application by an owner or tenant of the property and issuance of a permit by the city manager or his designee. No sale of merchandise purchased for resale shall be permitted.

(Ord. No. 94-54, § 1(11-502), 12-19-94; Ord. No. 2001-15, § 2, 10-22-2001; Ord. No. 2002-14, § 3, 8-26-2002; Ord. No. 2002-21, § 4, 10-28-2002; Ord. No. 2005-23, § 4, 10-24-2005)

### ATTACHMENT III

#### OTHER CASES

##### A. DECIDED ON PROCEDURAL GROUNDS:

- 1) **FAITH TEMPLE CHURCH, Plaintiff, v. TOWN OF BRIGHTON**, 405 F. Supp. 2d 250 (WD NY, 2005). Eminent domain proceedings do not constitute a "land use regulation" as that term is defined by RLUIPA.
- 2) **WESTCHESTER DAY SCHOOL v. VILLAGE OF MAMARONECK**, 363 F. Supp. 2d 667 (SD NY, 2005) Denial of City's motion for leave to request a jury trial.
- 3) **CITY OF HOPE V. SADSBUARY TOWNSHIP**, 2006 Pa. Commw. LEXIS 15 (2006) Accessory use not covered under RLUIPA (existing (though previously abandoned) campground and hiking trails)
- 4) **JIRTLE v. BOARD OF ADJUSTMENT**, 622 S.E.2d 713 (CT App NC, 2005) Food pantry not a religious exercise under RLUIPA.
- 5) **CATHEDRAL CHURCH OF THE INTERCESSOR v. VILLAGE OF MALVERNE**, 2006 U.S. Dist. LEXIS 12842 (ED NY, 2006) Pattern of selective treatment sufficient to establish claim under RLUIPA.
- 6) **ST. JOHN'S UNITED CHURCH OF CHRIST V. CITY OF CHICAGO**, 401 F. Supp. 2d 887 (ND IL, 2005) RLUIPA does not apply to eminent domain proceedings, which are not zoning regulations.
- 7) **SISTERS OF ST. FRANCIS HEALTH SERVS. V. MORGAN COUNTY**, 397 F. Supp. 2d 1032 (SD IN, 2005) RLUIPA claim not ripe for decision because no application had been made.
- 8) **CONGREGATION KOL AMI V. ABINGTON TWP.**, 2004 U.S. Dist. LEXIS 16397 (ED PA, 2004) Motion for summary judgment denied. No substantial burden, but RLUIPA applies when land use decision turns on issues of individualized exemptions.

**B. UNREPORTED:**

**1) CAMBODIAN BUDDHIST SOCIETY OF CT., INC. V. NEWTOWN PLANNING AND ZONING COMMISSION, 2005 Conn. Super. LEXIS 3158 (2005)**

**Facts:** Society sought special exception to construct a place of religious worship on property it owns in area designated as a farming and residential R-2 zone.

**Holding:** No substantial burden where zoning authority denied an application on grounds it would have applied equally to a secular institution submitting a functionally equivalent application. The court also noted that alternative sites were available, and expressed confidence that the commission would impose the same traffic and safety requirements on any other entity seeking to build on the property.

**2) THE CHURCH OF THE HILLS v. THE TOWNSHIP OF BEDMINSTER, 2006 U.S. Dist. LEXIS 9488 (D NJ, 2006)** Denial of variances necessary for expansion of existing church to ease overcrowding is sufficient to establish a prima facie claim under RLUIPA.

## ATTACHMENT IV

**Comments in Opposition to Proposed Rezoning**  
Concerning the Property Located at 9744 Concord Road  
From  
R-2 (Suburban Residential) to SI-1 Service Institution (Religious)  
For the Purpose of  
Constructing and Operating a 40,000 Square Foot Facility and Associated Parking

The Brentwood Planning Commission is currently considering a proposed rezoning of the property located at 9744 Concord Road from R-2 (Suburban Residential) to SI-1 Service Institution (Religious). A majority of residents in the established residential developments that bound the property on 3 sides oppose this rezoning request. As a resident of Willowmet subdivision, and a practicing attorney, I have reviewed relevant law and offer these comments in opposition to the proposed rezoning.

### I. Introduction

Many courts have interpreted the Religious Land Use and Institutionalized Persons Act (the “Act”), 42 USC §§ 2000cc, et seq., in relation to zoning decisions. The courts agree that no substantial burden may be placed on the exercise of religion, and that zoning decisions must place religious assemblies on the same footing as nonreligious assemblies or institutions.

### II. Legal Considerations

(A) **No substantial burden.** The Commission’s decision may not place a substantial burden on the exercise of a religion where denial is based on an individualized assessment of the proposed use of the property.

▪ **Case Law:**

**LAKEWOOD, OHIO CONGREGATION OF JEHOVAH'S WITNESSES, INC., v. CITY OF LAKEWOOD, OHIO, 699 F.2d 303 (6<sup>th</sup> Cir., 1983).** Congregation applied for a variance to build a church on land it owned in the area that was designated for residential use only. It was denied. The congregation challenged the zoning ordinance arguing it was unconstitutional. The court upheld the ordinance even though it created exclusive residential districts and effectively prohibited construction of church buildings in those districts. The court held that the ordinance did not infringe the congregation's religious freedom, and did not offend the due process clause because it was a legitimate exercise of the city's police power. While the ordinance may have frustrated the congregation's desire to locate itself in a more pleasant, more convenient, and less expensive location, the court found that such desires were not protected by the U.S. Constitution.

Regarding Ordinance 2006-02

- Denial of this proposal will not infringe on the congregation's religious freedom. While denial may frustrated this congregation's desire to locate itself in a more pleasant, more convenient, and less expensive location, those desires are not protected by the U.S. Constitution, the Act or the Brentwood Zoning Ordinance; this assembly's decision to seek building space is not founded on a lack of suitable space or even a lack of space to worship, but rather on an affirmative decision by the assembly to sell an existing facility and seek property to construct another venue from which to build and grow.

**(B) Non-discriminatory action.** In order to ensure a Planning Commission decision can withstand scrutiny, it is required that each decision be made on a nondiscriminatory basis in a manner that treats the religious assembly in the same manner as any nonreligious assembly or institution.

- **Case law:**

**WILLIAMS ISLAND SYNAGOGUE, INC. V. CITY OF ADVENTURA, 358 F. Supp 2d 1207 (2005, SD Fla.)** The synagogue attempted to resolve several alleged worship problems by relocating to a party room that had been previously designated as an accessory use to a residential building. The building was located in a zoning district that allowed churches, synagogues, and other houses of worship only by conditional use permit. The city denied the synagogue's application for a conditional use permit. The court found that no reasonable trier of fact could conclude that the problems identified by the synagogue amounted to "substantial burdens" imposed on religious beliefs within the meaning of 42 U.S.C.S. § 2000cc(a)(1) of RLUIPA, and that the problems could either be solved at the synagogue's current location or amounted to distractions that were not actionable. The synagogue's discriminatory treatment claim under 42 U.S.C.S. § 2000cc(b)(1), (2) failed because it was treated on equal terms with nonreligious institutions.

- Denial of this proposal is appropriate when the Planning Commission's consideration of this petition ensures that religious and non-religious institutions are treated equally. The requirement is that religious and secular institutions be treated on equal terms. There is no provision in either the Act or in related case law that requires, or even suggests, that a religious institution's request for zoning consideration be judged on more than equal terms. Therefore, this proposal must be scrutinized as if a drugstore chain, restaurant, private club or other nonreligious institution was seeking the change.
  - b) approval of this request would, in fact, result in an actionable, discriminatory act by this Planning Commission founded in the elevation of this religious assembly's rights as superior to those of nonreligious assemblies and institutions;
  - c) the Planning Commission has a long history of protecting residential areas along Concord Road from commercial development, including:
    - proposed church at corner of Concord Road and Crockett

Regarding Ordinance 2006-02

- proposed Publix at corner of Edmondson Pike and Concord Road. That property is currently under residential development
- proposed commercial rezoning at the corner of Sunset and Concord. That property is currently under residential development
- proposed US Post Office at corner of Wilson Pike and Concord Road; followed by a petition to rezone that property for a La Petite Academy. Interestingly, noting the character of development from Wilson Pike East to the Williamson County line, this Planning Commission suggested the appropriate development of that property would be residential.

d) Review of the established precedent requires.

**(C) The Zoning Code.** The very intent of the Brentwood Zoning Code is clearly spelled out at Division 9, SI-1 Service Institution (Religious), Sec. 78-261. Intent. That section provides several guidelines for this Commission's consideration:

SI-1 districts should be “[a] appropriately located between commercial and residential districts, [b and c] on other suitable tracts of land located adjacent to arterial streets where residential development is not appropriate or feasible, and/or [d] where the requirements of [the] division are deemed adequate to mitigate any adverse impact on the nearby residential development.” (Emphasis added).

▪ Case law:

**MOUNT ELLIOTT CEMETERY ASSOCIATION v. CITY OF TROY, 171 F.3d 398 (6<sup>th</sup> Cir, 1999).** The court affirmed trial court's grant of summary judgment to city in Catholic cemetery association's challenge to denial of a rezoning request. The court found that the zoning ordinance was content neutral and not a violation of the free exercise clause of the U.S. Constitution.

**MCCALLEN v. CITY OF MEMPHIS, 1988 Tenn. App. LEXIS 433 (Ct. App. WTN, 1988)** Local office of planning and development recommended rejection of application seeking commercial zoning because the commercial uses were not compatible with the surrounding residential properties. The City Council overrode that recommendation and approved the application. The court found that the proof did not support compatibility between the commercial use and the abutting residential property. The proposed commercial development would have unduly injured or damaged the use, value, and enjoyment of the surrounding property, and so the court overturned the City Council's decision.

▪ The Brentwood Zoning Ordinance is content neutral and provides sufficient discretion to decline this petition.

▪ The proposed commercial development would unduly injure or damage the use, value, and enjoyment of the surrounding property.

## Regarding Ordinance 2006-02

- a) The facility is commercially incompatible with the abutting residential property; no commercial development should be approved where that development will, among other reasons, be bounded on 3 sides by existing residential development; the closest commercial district is at least five (5) miles east.
- b) Location of this proposed facility is adjacent to an arterial street, but unlike the failed petitions above, the property is not located “adjacent to arterial streets” as those corner properties certainly are.
- c) Residential development on this property is certainly appropriate and feasible, as the property is currently zoned R-2. In fact, on this 9+ acre plot, the impact on traffic from residential development would be minimal, as the property could only support a small number of residences under the Brentwood Zoning Code.
- d) This Commission is unable to mitigate the entirety of the adverse impact on the surrounding (3 sides) residential development.
  - The structure will rise at least 30 feet higher than the vast majority of affected residences
  - The presence of numerous retention ponds increases the breeding opportunities for mosquitoes, and increases residential exposure opportunities for blood borne viruses such as West Nile.
  - There is no shielding adequate to prevent significant light spillage into the surrounding residential development. Light spillage will interfere with residents’ rights to quiet enjoyment of their property. There is no amount of vegetation that can be placed or grown to block lighting that rises and settles at, above and below existing residences.
  - Development of the property will require intense blasting in the very middle of developed residential areas. Middle Tennessee is located on a karst system and, to my knowledge, a geological study reviewing the presence of caves and other karst features has not been performed. This seems necessary in any evaluation of the probable impact that could ensue from the type of blasting necessary to complete the proposed construction of a 40,000 square foot facility overlooking a developed residential area.
  - This current proposal places a service road directly behind several residences, bringing traffic and unwanted access to the rear of numerous of the surrounding residences.

### **III. Other Considerations**

(A) **Safety.** Of particular interest in the litany of failed proposals described in (II)(B)(b) above, is the fact that each instance involved traffic flow substantially superior to that enjoyed in this current proposal. Each of the requests above involved a corner property, multiple arterial roadways, extended road sight lines to promote safe ingress

and egress, and certain of the properties benefit from existing turn lanes or a four (4) lane road.

- This current property is accessed from immediately beyond a blind curve (the Traffic Assessment confirms that sight distance is inadequate per AASHTO guidelines, February 3, 2006, at page 4).
- In order to accommodate an appropriate sight distance, the Traffic Assessment maintains removal of trees, bushes and fencing along Concord Road to “an appropriate distance” could result in adequate sight distance (*id.*). This is an interesting observation, because access to the proposed driveway requires a left turn, off a 2-lane road, into the property immediately after negotiating a blind curve at 40 mph.
- This 2-lane road offers impaired sight line, no deceleration lane, no turn lane, no protection (e.g., no guard rails), and no discernible shoulder. It is unlikely that enough trees, brush and fencing can be removed to “an appropriate distance” to cure this concern.
- The only ingress and egress to the property, because it is bounded on 3 sides by residential development, is the drive approached from a blind curve.
- In order to avoid the traffic accidents and congestion certain to ensue as a result of this blind approach, both BonBrook and Willowmet can expect increased traffic before and after activities as members of the assembly and neighborhood residents seek alternative routes to avoid traffic at the proposed Concord Road entrance.

**(B) The Traffic Impact Assessment.** The traffic impact assessment is flawed as it takes into account only the impact on Sunday traffic. Services are also scheduled for Wednesday evenings, and volleyball leagues are held on Tuesdays and Thursdays. And what of other activities not yet disclosed? The gymnasium is likely to result in numerous leagues. Will there be a child care facility on site? Choir practices? Chorale performances? What about the picnic area? Will the facility be available for rent for other uses? Each of these activities will have its own impact on an already overtaxed portion of Concord Road, yet none of those activities is addressed in the assessment. For those reasons, the Traffic Assessment should be accorded no weight in support of the proposal.

**(C) Our children.** In Willowmet alone there are at least 11 children under the age of 10 immediately backing up to the proposed property.

- Nap and sleeping times will be disrupted by the sheer intensity of the necessary blasting and the enormous construction noise. Commercial construction is significantly different from residential construction in that regard.

- Shielded lighting will result in dark areas in the parking lot, creating an attractive nuisance for underage drinking, lovers' lane activities and threats to the surrounding homes.

- Such a large, developed parking lot will also create an attractive staging area for pedophiles and other undesirables. We've already had one instance of a cruiser attempting to abduct a child in Chestnut Springs.

**(D) Parking.** Certainly the picnic area will receive use, and the large parking area can provide adequate grounds for numerous activities, with no concern for parking because Owl Creek Park is right across the street lies immediately opposite the entrance drive to the proposed facility. This coincidental placement may, of course, prove useful to the proposed facility for overflow or for larger events that require use of all or portions of the 3 acres of asphalt parking. However such a use of these taxpayer-funded facilities would be directly competitive with the intended recreational use of the park.

#### **IV. Conclusion**

In closing, it is important to emphasize that zoning is a privilege and not a right. Zoning decisions must be reached in a non-discriminatory manner that treats religious institutions and assemblies the same as nonreligious assemblies and institutions.

Consequently, the Concord Valley Christian Church's proposal to rezone the property located at 9744 Concord Road from R-2 to SI-1 must be denied. Any other result can only be founded on a discriminatory consideration in favor of the proposal, is contrary to the intent of the Religious Land Use and Institutionalized Persons Act, and contravenes the Brentwood Zoning Ordinance.

Respectfully submitted this 6<sup>th</sup> day of March 2006

By: /s/ *David E. Williams*  
David E. Williams, Esq.  
Attorney Reg. No. 015737