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March 3, 2009

Mayor Craig Covey
Mr. Robert J. Bruner, City Manager
Board of Zoning Appeals

City of Ferndale
300 East Nine Mile Road
Ferndale, MI 48220

Re: ***First Baptist Church of Ferndale, Michigan; Zoning Dispute Concerning Religious Use of Land***

Dear Mayor Covey, Mr. Bruner, and Members of the Board of Zoning Appeals:

I am writing on behalf of the American Civil Liberties Union of Michigan to express our concern about certain existing or proposed zoning restrictions impacting the activities of the First Baptist Church of Ferndale, Michigan. It is our understanding that the City of Ferndale, through its Board of Zoning Appeals, is considering whether to prohibit the First Baptist Church from using its facilities to provide charitable services to the poor. We believe that such a restriction would violate the religious freedom rights of the First Baptist Church guaranteed by federal law.

The First Baptist Church has a sincerely held religious belief that providing assistance to the poor is a tenet and duty of the Christian faith. The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, commonly referred to as "RLUIPA," prohibits any land use regulation that imposes a substantial burden on religious exercise unless the imposition of that burden (1) furthers a "compelling governmental interest" and (2) is the "least restrictive means" of furthering that compelling governmental interest. As explained below, a zoning-related restriction on the First Baptist Church's use of its facilities would not survive RLUIPA's "strict scrutiny" test.

A Zoning Decision Restricting the First Baptist Church's Use of Its Facilities Would Be Subject to RLUIPA

By its terms, RLUIPA applies to "the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2)(C). Any individualized zoning decision by the City of Ferndale regarding the First Baptist Church's use of its facilities would therefore be a "land use regulation" covered by RLUIPA. *See, e.g., Shepherd Montessori Center*

Milan v. Ann Arbor Charter Township, 259 Mich. App. 315, 327-28 (2003) (individualized zoning decision covered by RLUIPA).

The First Baptist Church's Proposed Use of Its Facilities Is Religious Exercise Protected by RLUIPA

Under RLUIPA, "religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," as well as "[t]he use, building, or conversion of real property for the purpose of religious exercise," 42 U.S.C. § 2000cc-5(7). Congress instructed courts that RLUIPA "should be construed in favor of a broad protection of religious exercise, to the maximum extent permitted" *Id.* § 2000cc-3(g).

Consistent with congressional intent, courts have held that RLUIPA protects a wide range of church-based uses and activities. As the U.S. Court of Appeals for the Sixth Circuit recently stated, "RLUIPA's definition of religious exercise covers most any activity that is tied to a religious group's mission." *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 736 (6th Cir. 2007). Significantly, "religious exercise" extends far beyond "religious worship." As Judge Borman explained in *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691 (E.D. Mich. 2004):

The fact that many . . . activities are not confined to religious worship does not mean . . . that the acts themselves are not religious in nature. In fact, many religions offer services beyond traditional worship services as part of their religious offerings. ***For example, churches often participate in charitable activities***

Id. at 701 (emphasis added).

It is our understanding that the First Baptist Church intends to use its facilities for charitable activities serving the poor by inviting the South Oakland Shelter ("SOS") to use a wing of the church. The SOS space will be used to provide daytime social services to the homeless population, including job counseling, access to telephones and the Internet, and personal hygiene facilities. The First Baptist Church has a sincerely held religious belief in a duty to serve the poor, and using its facilities for charitable services to the homeless population is inexorably tied to that religious mission. See *Living Water Church of God*, 258 F. App'x at 736.

The First Baptist Church and SOS also intend to offer opportunities for religious education such as Bible study, and SOS clients will be invited to First Baptist Church for worship and community events. Land used for religious education is clearly covered under RLUIPA, see *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007); *Mintz v. Roman Catholic Bishop of Springfield*, 424 F.Supp.2d 309, 319 (D. Mass.

2006), as are church events that "provide [] members with an opportunity to meet and educate non-members" in order for the church "to seek growth in its local community," *Episcopal Student Foundation*, 341 F. Supp. 2d at 701. The First Baptist Church's intended use of its facilities is therefore religious exercise protected by RLUIPA.

Restricting the First Baptist Church's Use of Its Facilities Would Substantially Burden Religious Exercise

Any land use regulation that imposes a "substantial burden" on religious exercise is subject to RLUIPA's strict scrutiny test. Although RLUIPA does not expressly define "substantial burden," courts have consistently held that zoning decisions impose a substantial burden when they effectively bar a religious institution from using its facilities for RLUIPA-protected religious exercise.

For example, in *DiLaura v. Township of Ann Arbor*, 112 F. App'x 445 (6th Cir. 2004) (per curiam), the Sixth Circuit held that the defendant township's permitting scheme substantially burdened the religious exercise of the plaintiffs because it prohibited them from operating a religious retreat unless they charged money for their overnight guests. Similarly, in *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d at 321, the court held that denying a church permission to build a community center would substantially burden its religious exercise. And in *Westchester Day School*, 504 F.3d at 352-53, the court held that denying a Jewish day school permission to expand its facilities imposed a substantial burden on religious exercise.

As previously stated, the First Baptist Church's intention to use its facilities for charitable and religious services for the homeless population flows directly from its religious mission and sincerely held religious belief in a duty to serve the poor and underprivileged. It is our understanding that the First Baptist Church has taken reasonable measures to limit the number of clients SOS will serve (no more than thirty) and the hours of service (no overnight stays). If the First Baptist Church is prohibited from using its facilities to assist the poor in accordance with its religious beliefs and mission, its religious exercise would be substantially burdened.

A Negative Zoning Decision Would Not Survive Strict Scrutiny Under RLUIPA

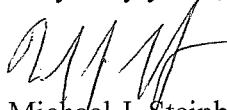
A land use regulation that substantially burdens religious exercise under RLUIPA is subject to strict scrutiny: it is prohibited unless it is (a) imposed in furtherance of a compelling governmental interest *and* (b) the least restrictive means of furthering that compelling governmental interest. "Requiring [the government] to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Consequently, few land use regulations survive RLUIPA's strict scrutiny test.

In this case, we do not believe that the proposed or contemplated restrictions on the First Baptist Church's activities are the least restrictive means of furthering any compelling governmental interest. "Compelling interests" are "interests of the highest order." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). We note that the First Baptist Church's zoning determination request was initially approved, only to be placed under reconsideration, apparently, based on complaints from some residents in the area. Under RLUIPA's strict scrutiny test, zoning-related applications that substantially burden religious exercise may not be "denied because of undue deference to the opposition of a small group of neighbors." *Westchester Day School*, 504 F.3d at 353.

Courts in RLUIPA zoning cases have held that municipalities do not have a compelling interest in protecting property values and aesthetic concerns. *See, e.g., Westchester Day School v. Village of Mamaroneck*, 417 F.Supp.2d 477, 553-54 (S.D.N.Y. 2006). Moreover, even when a municipality can prove that it substantially burdened religious exercise in furtherance of a compelling governmental interest, its zoning decision is unlawful unless it can also prove that no less restrictive alternative was available. *See, e.g., Elsinore Christian Center v. City of Lake Elsinore*, 291 F. Supp. 2d 1083 (C.D. Cal. 2003) ("In essence, the City must show that its interests could not be achieved by narrower state action that burdens the Church to a lesser degree."). Under the circumstances, the City of Ferndale would not be able to satisfy this very strict standard.

In sum, the ACLU of Michigan urges the City of Ferndale and its zoning board not to take any action that will prohibit the First Baptist Church from using its facilities to provide charitable services to the poor and homeless. Such a decision would violate the religious freedom rights of the First Baptist Church under RLUIPA. Thank you for your attention to these concerns, and please do not hesitate to contact me should you wish to discuss this matter.

Very truly yours,



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Cc: Daniel Christ, City Attorney
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