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April 28, 2025

Derek E. Bruce
Gunster
200 South Orange Ave.
Suite 1400
Orlando, FL 32801

Re: *Land use matter involving Orlando Torah Center in Orange County, FL*

Dear Mr. Bruce:

We have been requested to provide you with an analysis of the rights of Orlando Torah Center, Inc. ("OTC") under the federal Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc, *et seq.*, the federal Constitution, and the Florida Religious Freedom Restoration Act ("FRFRA") with respect to the proposed expansion of OTC's place of worship located at 8613 Banyan Boulevard, Orlando, Florida 32819 (the "Property"). As discussed in further detail below, it is this Firm's opinion that the above-referenced laws provide OTC with the right to engage in its proposed religious exercise on the Property. Furthermore, if the Orange County ("OC") Board of Zoning Adjustment ("BZA") denies OTC's application to construct its much-needed place of worship on the Property, it would be violating these same civil rights protections. Such action could expose OC and the BZA to years of litigation, as well as being liable for an award of damages and attorneys' fees. This Firm is highly experienced in religious liberty litigation in general, and specifically in bringing cases under RLUIPA's land use provisions and related constitutional protections.

We understand that OTC had previously obtained a special exception to operate a synagogue, but that its current structure is not adequate for its religious needs. After obtaining its special exception in 2020, OTC converted an existing single-family home to a house of worship. The Property is 0.75 acres in area and is located in an existing single-family neighborhood in the County's R-1A zoning district. Chapter 38 of the Orange County Land Development Code ("LDC") provides that houses of worship require a special exception to operate in, *inter alia*, the R-1A zoning district. Further, Section 38-1476 of the LDC is ambiguous in its calculation of parking spaces required for assembly uses without "fixed seats." It provides that one parking space must be provided for every three (3) "patrons" within the synagogue, plus one additional parking space for each employee. Staff for the BZA has taken an approach contrary to section 38-1476, and has calculated a parking requirement based on the maximum occupancy for the "event space" in the proposed expansion, resulting in their opinion that 52 parking spaces are required and therefore necessitating an application for a variance. This is an arbitrary calculation based on the ambiguous nature of the LDC.

We have been informed that the congregation's current facilities do not meet the diverse needs of its members. OTC's congregation includes members from diverse ethnic backgrounds and seeks to offer multiple prayer groups to meet their specific religious needs. The lack of space has impeded the ability of these groups to engage in group prayer. The current lack of space also prevents the congregation from offering youth programming that will support its religious mission of education and meaningful worship opportunities for youth who may not be ready for the main service. Additionally, due to lack of space, the traditional "Kiddush Social" meals held after services on Saturday mornings must be held outside regardless of the weather, which impedes the community-building purpose of these meals. Additional burdens suffered by OTC include not enough restrooms for the congregation; no space to celebrate lifecycle events such as *brit milah* without interrupting other programming; and lack of sufficient office space for clergy to work and have meetings with congregants.

Should the BZA deny OTC's special exception and variance request, it is this Firm's opinion that it would violate its rights under RLUIPA, FRFRA, and the United States Constitution, and that OTC would be able to seek redress for such violations in an action filed in the United States District Court for the Middle District of Florida for the following claims.

RLUIPA—Substantial Burden

RLUIPA's "Substantial Burdens" provision, 42 U.S.C. § 2000cc(a), prohibits a government from imposing or implementing a zoning law that "imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution," unless the government can prove that such burden is both 1) "in furtherance of a compelling governmental interest"; and 2) "is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000cc(a)(1). Whether a zoning regulation imposes a substantial burden under RLUIPA is a question of degree. While mere inconveniences are insufficient to seek relief under that statute, land use regulations (or the implementation of regulations) that interfere with religious exercise–as is the case here–are actionable. *See Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 831 (11th Cir. 2020) ("*Thai Meditation Ass'n I*").

In *Thai Meditation Ass'n I*, the federal Court of Appeals for the Eleventh Circuit held that a substantial burden on religious exercise under RLUIPA exists where government action coerces or pressures a person or religious entity to change its religious behavior. *Id.* ("a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior . . . it isn't necessary for a plaintiff to prove . . . that the government required her to completely surrender her religious beliefs; modified behavior, if the result of government coercion or pressure, can be enough." (emphasis added)); *see also Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 352 (2d Cir. 2007) (cited by *Thai Meditation Ass'n I*, holding that Jewish day school had established that Village imposed a substantial burden under RLUIPA where denial of approval for expansion left the school without "quick, reliable, and financially feasible alternatives" to expand its facilities); *Pass-A-Grille Beach Cmty. Church, Inc. v. City of St. Pete Beach, Fla.*, 515 F. Supp. 3d 1226, 1232-33 (M.D. Fla. 2021) (holding, based on *Thai Meditation*

Ass'n I, that city barring church from offering free parking to beachgoers as church outreach effort was a substantial burden on the church's religious exercise).

The Eleventh Circuit in *Thai Meditation Ass'n I* laid out non-exclusive factors to guide a court in evaluating whether a burden is "substantial," including whether a religious entity can demonstrate a religious need for the building it seeks; whether there is a nexus between the government denial and the inability to pursue that religious activity; whether it has viable alternatives for constructing its facility on other properties that would not cause considerable "delay, uncertainty, and expense"; whether the government has shown any bias or arbitrariness in its actions; whether the government action is final or if it has pointed to deficiencies which could be remedied in a subsequent application; and whether the religious entity's expectations in receiving the relief it sought but was denied were reasonable in light of the zoning code and zoning practices with regard to similar applicants. 980 F.3d at 831-32.

The first three factors plainly support OTC, since the expansion is critical to its religious mission, and a denial of the special exception and variance applications would prevent that expansion. The existing facility does not have sufficient space for the congregation to engage in religious programming and worship that is at the core of its purpose and central to meeting its religious needs. If OTC does not obtain the zoning relief that it seeks, it will continue to be unable to provide adequate opportunities to worship. As to the third factor, OTC has no readily available alternatives. Even if OTC were able to find another property in Sand Lake Hills sufficiently near its congregation, it would be required to engage in the same special exception process again, leading to significant delay, expense and uncertainty.

As to the fourth factor, the BZA's staff report refers to two "negative" community meetings that, coupled with evidence of hostile and targeted comments by community members, is just such an indication of bias or arbitrariness. So too is the County's decision to assess the parking requirement based on improper criteria. The "finality" factor would also be met by an outright denial. Finally, OTC's expectation to obtain the zoning relief is reasonable, given its current existence at the location and prior approval, and its reasonable belief that it can meet the subjective special exception criteria.

It is also important to remember that no factor is dispositive, and they are intended to be "non-exhaustive." *Thai Meditation Ass'n of Alabama, Inc. v. City of Mobile*, 83 F.4th 922, 927 n.1 (11th Cir. 2023) (*Thai Meditation Ass'n II*). Rather, a court is required to look at, considering all of the context, whether there is in fact a substantial burden on OTC's religious exercise, or whether a denial would constitute a mere "inconvenience." *Thai Meditation Ass'n I,* 980 F.3d at 831. We believe that the standard is easily met here.

Because such a denial would impose a substantial burden on OTC's ability to exercise its Jewish faith, the burden will be on the BZA to prove that the denial was necessary to achieve a "compelling governmental interest," and further that an outright denial was the "least restrictive means" to achieve this interest. 42 U.S.C. § 2000cc(a)(1)(A)-(a)(1)(B). The BZA cannot meet that burden here.

A compelling governmental interest means not just a "legitimate" or even "important" interest, but an interest "of the highest order." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). As the Supreme Court explained in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993): "The compelling interest standard that we apply . . . is not watered . . . down but really means what it says." *Id.* at 547 (quotations omitted). With respect to RLUIPA, "Congress borrowed its language from First Amendment cases applying perhaps the strictest form of judicial scrutiny," and "[t]hat test isn't traditionally the sort of thing that can be satisfied by the government's bare say-so." *Yellowbear v. Lambert*, 741 F.3d 48, 59 (10th Cir. 2014) (Gorsuch, J.).

The Eleventh Circuit in *Thai Meditation Association II* rejected the city's argument that preserving a neighborhood's character and controlling traffic were sufficiently compelling to meet strict scrutiny and block construction of a Buddhist meditation center. The court explained: "[W]e have never held that neighborhood character or zoning are compelling government interests sufficient to justify abridging core constitutional rights." *Thai Meditation Ass'n II*, 83 F.4th at 931. The court continued: "Indeed, in *Solantic, LLC v. City of Neptune Beach*, we held that 'aesthetics and traffic safety' were not compelling government interests justifying content-based restrictions on signs. *Id.* (citing *Solantic*, 410 F.3d 1250, 1267-69 (11th Cir. 2005). The court in *Thai Mediation II* thus held that the aesthetic and character interests were insufficient, and while safety might be compelling in some circumstances, the generalizations and speculative concerns about traffic safety asserted by the city are "concerns that we have cautioned are inappropriate."[1] *Id.* at 932.

In addition to proving that its denial is supported by a *compelling* governmental interest, the BZA would also need to demonstrate that it used the "least restrictive means" to achieve that compelling interest. Again, it cannot do so here. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (striking down New York's COVID caps on places of worship, holding that "there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services."). It is the government's obligation to refute all "alternative schemes suggested by the plaintiff to achieve that same interest and show why they are inadequate." *Yellowbear*, 741 F.3d at 62 (quotation marks and citation omitted). And as the *Diocese of Brooklyn* case shows, even as important an interest as fighting COVID must be pursued with careful attention to precisely tailoring the means used to that end. Thus, there is little chance that a court would find a compelling interest, pursued through the least restrictive means, in the BZA's denial.

We have reviewed the BZA staff report, and, in our opinion, a BZA denial based on the same would not meet this standard. None of the bases cited for recommending denial implicates a threat to public health or safety. Rather, they are aesthetic interests or are completely tied to the parking issue, which is itself predicated upon an arbitrary calculation of the required parking. Further, OTC has demonstrated that it is willing to accept reasonable conditions, as we understand it did in the context of its prior special exception. Conditions are available to the BZA to mitigate

[1] The undersigned was counsel for the Plaintiffs in both *Thai Meditation I* and *Thai Meditation II*.

any purported impacts by the synagogue expansion. Reasonable conditions rather than outright denial would be a less restrictive means than outright denial.

RLUIPA and Free Exercise Clause—Discrimination

In addition to barring unjustified burdens on religious exercise, RLUIPA prohibits laws that "discriminate[] against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2). Thus, discrimination based on religion through a denial of the zoning relief would violate the rights of OTC. We understand that there has been considerable negative sentiment by neighbors, including examples of comments online that a rise in global antisemitism will cause non-Jewish neighbors to be "caught in the crossfire" and turn the neighborhood to become "a war zone," calling the synagogue an "office tower" and a "skyscraper," likening OTC to "rabid dogs," and saying that since OTC has moved in, "the neighborhood is going down the drain." Being responsive to such community opposition is an illegitimate ground for denying the synagogue's application.

The Eleventh Circuit held in *Thai Meditation Ass'n I* that to evaluate discrimination under RLUIPA, a court should apply the standard established for zoning cases in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). A court will analyze "a list of considerations that bear on the question whether discriminatory intent was a 'motivating factor' in an allegedly discriminatory decision," including "(1) any disproportionate 'impact' caused by the decision, (2) the decision's 'historical background,' (3) the 'specific sequence of events leading up' to the decision, (4) 'departures from the normal' decisionmaking process, and (5) any 'legislative or administrative history' in the form of contemporary statements by the decisionmakers." 930 F.3d at 834 (*quoting Arlington Heights*, 429 U.S. at 265–68). Here, among other evidence, neighborhood residents have been rallying to oppose the special exception and variance application, resulting in there being significant feedback in opposition to the requested zoning relief. Such neighborhood opposition was specifically cited in the staff report recommending denial.

In addition to violating RLUIPA, official action to disadvantage a particular religious group violates the First Amendment. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993) (zoning law that had the effect of singling out a religious group violated Free Exercise Clause).

First Amendment–Prior Restraint

It is this Firm's opinion that the broad, highly discretionary special exception criteria at issue here would not survive a First Amendment Prior Restraint challenge. There is substantial case law holding that approval criteria such as that in the LDC can constitute an unconstitutional prior restraint on expressive activity (including religious expression) in violation of the First Amendment to the United States Constitution. A zoning law is susceptible to a prior restraint

challenge where it "specifically targets, rather than simply happens to affect, expression protected by the First Amendment." *Spirit of Aloha Temple v. County of Maui*, 49 F.4th 1180, 1191 (9th Cir. 2022).[2] In *Spirit of Aloha Temple v. County of Maui*, the federal Court of Appeals for the Ninth Circuit held that a statutory list of criteria for a special use permit provided an unconstitutional amount of discretion to zoning officials where the criteria directed them to determine whether "[t]he proposed use would not adversely affect surrounding property" as part of the determination to issue a permit to a house of worship. *Id.* at 1191-1192. The phrase "adversely affect" permitted unbridled discretion and allowed for arbitrary determinations that could "be abused in a manner" that would limit land use for First Amendment freedoms by disfavored groups. *Id.* at 1191.

Similarly, in *Hollywood Community Synagogue, Inc. v. City of Hollywood*, 436 F. Supp. 2d. 1325 (S.D. Fla. 2006), a federal court in Florida held that special exception criteria applied to a synagogue were an unconstitutional prior restraint where they did not provide sufficiently "narrow, objective, and definite standards" and instead "provide[d] City officials unbridled discretion in their consideration of the application." 436 F. Supp. 2d at 1336.

Here, it is this Firm's opinion that the special exception criteria similarly do not provide sufficiently defined standards. The criteria at issue in *Hollywood Community Synagogue* are strikingly similar to the criteria set forth in the LDC. Specifically, "[t]hat the use is compatible with the existing natural environment and other properties within the vicinity;" 436 F. Supp. 2d at 1334, as compared to "[t]he use shall be similar and compatible with the surrounding area and shall be consistent with the pattern of surrounding development." LDC Section 38-78(2). The consideration that "[t]he use shall not act as a detrimental intrusion into a surrounding area" in LDC Section 38-78(3) invites at least as much discretion as the "adversely affect" language in *Spirit of Aloha* that the Ninth Circuit found to be unconstitutional. Thus, the special exception standards themselves would certainly implicate the First Amendment on this basis.

Florida Religious Freedom Restoration Act

The Florida Religious Freedom Restoration Act, Fla. Stat. Ann. §§ 761.01–.061 (West), provides, like RLUIPA, that the "government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person: (a) Is in furtherance of a compelling governmental interest; and (b) Is the least restrictive means of furthering that compelling governmental interest." Fla. Stat. Ann. § 761.03 (West). For the same reasons as described above, the FRFRA similarly protects OTC's religious freedom rights.

For the reasons set forth above, it is our opinion that denial of the special exception and variance requested by OTC would violate OTC's rights, and the best course of action to redress

[2] The undersigned was counsel for the Plaintiffs in *Spirit of Aloha Temple*.

such violation would be to file an action in federal court seeking appropriate relief, which includes injunctive relief, compensatory damages, and attorneys' fees.

We would welcome the opportunity to discuss this matter further with you.

Very truly yours,

Roman P. Storzer