



November 21, 2018

**VIA EMAIL and FED-EX**

City of Gaffney  
Mayor Henry A. Jolly  
City Council  
201 N. Limestone Street  
Gaffney, SC 29340

***Re: Gaffney zoning ordinance provision excluding religious organizations***

Dear Mayor Jolly and City Council Members:

Innov8tion Church and Mission of Grace have retained the American Center for Law and Justice (“ACLJ”) to represent them in regards to a provision in Gaffney’s zoning ordinance specifically excluding religious organizations from occupying commercial or store front buildings in the CC district.

By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued and participated as counsel of record in numerous cases involving constitutional issues before the Supreme Court of the United States. *See Sumnum v. Pleasant Grove*, 555 U.S. 460 (2009); *NOW v. Scheidler*, 547 U.S. 9 (2006); *McConnell v. FEC*, 540 U.S. 93 (2003); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569 (1987).<sup>1</sup>

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<sup>1</sup> In addition, ACLJ regularly works with municipalities and religious organizations to ensure that constitutional violations, such as RLUIPA, do not occur during the zoning approval process.

The purpose of this letter is to explain that the provision in Gaffney's zoning ordinance which excludes religious organizations from previously occupied commercial or store front buildings, *see* Zoning Ordinance, at p. 15 fn. b, violates federal law, specifically the Religious Land Use and Institutionalized Persons Act ("RLUIPA").

### STATEMENT OF LAW

RLUIPA is a federal law designed to protect religious assemblies and institutions from land use regulations that interfere with their religious exercise. A land use regulation is defined as a zoning or landmarking law "that limits or restricts a claimant's use or development of land." 42 U.S.C. 2000cc-5(5).

Specifically applicable here is RLUIPA's equal terms provision which provides:

Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

42 U.S.C. § 2000cc(b). As Senators Hatch and Kennedy recognized in their support of enacting RLUIPA,

The right to build, buy or rent space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes . . . Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes frequently exclude churches in places where they permit theatres, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways.

*See* 146 Cong. Rec. S7774, S7775 (joint statement of Senators Hatch and Kennedy on the Religious Lane Use and Institutionalized Persons Act of 2000).

Courts have explained that a regulation will violate the Equal Terms provision if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to the regulatory purpose. *Summit Church v. Randolph Cnty. Dev. Auth.*, 2016 U.S. Dist. LEXIS 25665, at \*8 (N.D. W.Va. 2016) (adopting the Third Circuit's analysis in *Lighthouse Institute for Evangelism v. City of Long Branch*, 510 F.3d 253, 264-65 (3d Cir. 2007)).<sup>2</sup> Importantly, courts

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<sup>2</sup> As the court in *Summit Church* noted, there are various tests developed by the Circuits to analyze when a religious organization has been treated on less than equal terms with a nonreligious organization and what constitutes a proper comparator. The Fourth Circuit has yet to weigh in on the issue. The three tests include (1) the regulatory purpose test,

have clarified that in making this determination, there is “no need . . . for the religious institution to show that there exists a secular comparator that performs the same functions.” *Lighthouse Institute for Evangelism*, 510 F.3d at 264-66.

In *Lighthouse*, for example, the court held that the district court erred in awarding summary judgment in favor of the city where the city’s zoning ordinance treated religious assemblies differently or on less than equal terms than non-religious assemblies. *Id.* at 272. In evaluating the reasons for the differential treatment, the court held that it was not apparent why a church would be excluded from the same zoning area as similar uses, such as assembly halls, especially where both uses appeared to cause the equivalent purported harm to stated government objectives. *Id.* at 272-73. The court remanded the case to the district court with instructions to award summary judgment in favor of the church.

Similarly, in *Summit Church*, several non-religious assemblies and organizations were permitted as of right (including convention centers, restaurants, libraries, post offices, museums, professional offices, theatres, *etc*) while religious assemblies were excluded in the same zoning district. 2016 U.S. Dist. LEXIS 25665, at 8. Looking to the regulatory purpose to determine whether the differential treatment was justified, the court noted the stated purpose was to redevelop the railyard “as a commercial mixed-use district that reflects the history and culture of the site.” *Id.* The court found, however, that many of the non-religious uses permitted in the same district contradicted the stated purpose. Specifically, no explanation was provided as to how several of the non-religious uses, such as government offices, libraries, and post offices, were “commercial uses,” much less a reflection of the culture and history of the railyard. Accordingly, the court ordered that Summit Church be permitted to purchase the property in the railyard and use it for a church.

Finally, while Circuits may differ slightly regarding the test employed in evaluating an alleged violation of RLUIPA’s equal terms provision, it remains clear that a zoning ordinance that singles out and treats religious organizations on less than equal terms with a nonreligious assembly or institution is rarely justified. For example, in *Centro Familiar Cristiano Buenas Nuevas*, the city’s zoning ordinance permitted numerous uses by right including membership organizations, while requiring religious organizations to obtain a conditional use permit in the same zoning district. 651 F.3d at 1173-74. The Ninth Circuit held that the city’s ordinance treated religious organizations on a less than equal basis and violated the equal terms provision of RLUIPA. *Id.* at 1174-75. Similarly, in *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846 (7th Cir. 2007), the Seventh Circuit held that a municipality could not allow non-religious membership organizations and community centers

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(2) the accepted zoning criteria test, and (3) the functional intents and purpose test. 2016 U.S. Dist. LEXIS 25665, at 6 (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007); *River of Life Kingdom Ministries v. Village of Hazel Crest, Ill.*, 611 F.3d 367, (7th Cir. 2010); *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667 (2d Cir. 2010); *Rocky Mountain Christian Church v. Bd. of County Comm'rs*, 613 F.3d 1229 (10th Cir. 2010), *cert. denied*, 562 U.S. 1136 (2011); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279 (5th Cir. 2012); *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163 (9th Cir. 2011)).

to locate within an industrial zone while simultaneously excluding churches. *See also Corp. of the Catholic Archbishop of Seattle v. City of Seattle*, 28 F. Supp. 3d 1163, 1169-1170 (W.D. Wash. 2014) (holding a city’s differential treatment of a private religious school compared to that of a public school with regards to certain zoning regulations to be a violation of RLUIPA’s equal terms provision); *Covenant Christian Ministries, Inc. v. City of Marietta, Ga.*, 654 F.3d 1231 (11th Cir. 2011) (holding a municipality could not allow private parks, playgrounds, and neighborhood recreation centers in a residential district, while simultaneously excluding churches).

In the present case, Gaffney’s zoning ordinance specifically excludes religious organizations from occupying commercial and storefront buildings in the Core Commercial District (CC), while permitting “all other organizations” (*i.e.* all non-religious organizations) and similar uses such as museums, historical sites and fitness centers. Just like *Lighthouse* and *Summit Church*, the zoning ordinance fails to provide adequate support for the unequal treatment. In fact, all that can be gleaned from the ordinance is that the purpose of the CC district is to “promote the concentration and vitality of commercial and business uses in historic downtown Gaffney.” *See Zoning Ordinance*, at 3. There is no explanation given as to how non-religious organizations and historical sites would fulfill the stated purpose any differently than religious organizations. In sum, the ordinance fails the test set forth by the court in *Lighthouse* and *Summit Church*. The City’s ordinance would also fail the test employed by other Circuits.

## CONCLUSION

It is Innov8tion Church and Mission of Grace’s hope that this matter can be resolved amicably. We respectfully request that the City Council closely review the challenged provision of the zoning ordinance and take the necessary steps to ensure the ordinance is amended to remove the provision prohibiting religious organizations’ occupancy of commercial and storefront buildings in the CC district.

This matter is an urgent one for Innov8ton Church and Mission of Grace. Both churches – before becoming aware of the exclusionary provision of the zoning ordinance – had already made plans, and taken steps, to relocate to buildings on North Limestone Street at the end of November and/or early December. Accordingly, and in light of the importance attached to these issues, we would appreciate a response from the City **no later than Wednesday, November 28, 2018**, acknowledging receipt of this letter and providing assurances that the matter is being reviewed in an expedient manner.

Should you have any questions regarding the contents of this letter, please do not hesitate to contact me [REDACTED]. Thank you for your attention to this matter.

Sincerely,

**AMERICAN CENTER FOR  
LAW AND JUSTICE**

/s/ Abigail A. Southerland  
Abigail A. Southerland\*  
Senior Litigation Counsel



Cc: City Administrator  
Pastor Sarratt, Innov8tion Church  
Pastor Freyta, Mission of Grace

*\*Admitted to practice in TN, the Supreme Court of the United States, U.S. Court of Appeals for the Sixth Circuit, D.C. Circuit, and Second Circuit, and various U.S. District Courts.*