



January 19, 2011

Christopher O. Ward
Executive Director, Port Authority
Port Authority of New York and New Jersey
225 Park Avenue South, 15th Floor
New York, New York 10003

SENT VIA FEDERAL EXPRESS

Re: Resuming the Building Process for the Church of Saint Nicholas of the Downtown Part of the City of New York ("St. Nicholas Church")

Dear Mr. Ward:

The American Center for Law and Justice (ACLJ) is happy to support St. Nicholas Church and the Greek Orthodox Archdiocese of America (the "Archdiocese") in their collective attempts to rebuild the only church destroyed in the September 11 attacks at Ground Zero. The Port Authority of New York and New Jersey ("Port Authority") has misrepresented the nature of its preliminary agreement with St. Nicholas Church, engaged in fraud while moving away from negotiations, relied upon defamation to mask its activities, and trespassed on St. Nicholas Church property without warrant or legal justification. The Port Authority's activities are a violation of St. Nicholas Church's rights under federal law 42 U.S.C. §1983 and the First, Fifth, and Fourteenth Amendments of the U.S. Constitution.

The purpose of this letter is to encourage the Port Authority to reverse its present course of bad faith dealings and obstructionist tactics towards the St. Nicholas Church and to advocate for the Port Authority to resume negotiations in good faith. By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion.¹

¹ See, e.g., *Pleasant Grove v. Summum*, 129 S. Ct. 1125 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property);

The following sections explain how the Port Authority has violated the terms of its preliminary agreement and why it is within all parties' best interests for the Port Authority to once again take its place at the negotiating table to see to it that St. Nicholas Church—an iconic structure destroyed by the ruthless actions of extremists nearly ten years ago—is finally rebuilt. The rebuilding process for St. Nicholas Church is long overdue and the Port Authority is capable of reaching a sensible agreement whereby the needs of all parties can be effectively addressed without further obstruction or delay.

STATEMENT OF FACTS

As we understand, the reconstruction of St. Nicholas Church is currently delayed and obstructed due to the Port Authority's refusal to finalize the land exchange necessary to provide the Greek Orthodox congregation with a location near Ground Zero, its original home. St. Nicholas Church preliminarily agreed with the Port Authority to exchange its original parcel, situated at 155 Cedar Street, with a new parcel of land located at 130 Liberty Street. In addition to the exchange of property rights, the Port Authority agreed to provide \$20 million dollars in assistance to rebuild the church structure.

The Port Authority initially agreed to exchange the surface, air, and subterranean rights at 155 Cedar Street for surface and limited air rights at 130 Liberty Street. The parcel at Liberty Street did not include subterranean rights. This bargain was beneficial to both parties as the Port Authority could use the subterranean rights at the Cedar Street location to build the Vehicle Security Center and St. Nicholas could use the larger space at the Liberty location for both the church and a place of quiet public contemplation.

St. Nicholas Church had a valid agreement in place with the Port Authority. On October 2, 2008, the Port Authority even recognized the agreement:

The Port Authority and St. Nicholas Greek Orthodox Church have reached an agreement that will allow the 92-year-old church to be rebuilt near its former Cedar Street location—allowing for the [Vehicle Security Center], a vital artery that will serve nearly every facility on the site, to begin construction immediately. This agreement on one of the linchpin issues for the site brings to a successful conclusion months of negotiations.

The Port Authority has since repeatedly refused to recognize the agreement and has attempted to

McConnell v. FEC, 540 U.S. 93 (2003) (unanimously upholding the First Amendment rights of minors); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

mask its actions by grossly mischaracterizing the negotiations. Instead of honoring the bargain, the Port Authority publicly claimed that St. Nicholas Church was making exorbitant demands, including a spurious claim that St. Nicholas requested over \$60 million dollars to help rebuild. The defamatory characterization of the negotiations was used simply to hide the Port Authority's real intentions of backing away from a valid agreement.

By first denying that an agreement was in place and then using the media to defame St. Nicholas Church's rebuilding efforts, the Port Authority sought to escape contractual liability. Indeed, the Port Authority has requested that the St. Nicholas Church rebuild at the original site. But the most recent plans submitted to the church from the Port Authority showed a sidewalk in the place where the church was and a mound several stories high. These conditions make development on the original parcel impracticable. Regardless, a valid agreement is in place to enable St. Nicholas Church to use the Liberty Street location.

The Port Authority's manner of dealing with St. Nicholas Church indicates hostility toward people of faith. In an interview, you revealed a disturbing animosity toward religious belief:

I'm probably the biggest non-believer in terms of religion. If you are not going to believe in God you have to be smarter than the people who do, because you have to answer tougher questions about why you don't. It taught me an analytic ability to look at problems and be fairly rigorous about what the decisions that you've made are based on.

While it is perfectly fine to disagree with others who hold to a religious point-of-view, your comments combined with the extensive contractual delay and defamation on part of the Port Authority indicate that St. Nicholas Church is being singled out for its religious views.

In addition, the Port Authority has trespassed both on St. Nicholas Church's original site and at the Liberty Street site promised in the agreement. These actions violate both the Takings Clause of the Fifth Amendment and the Free Exercise rights of the First Amendment. The following section illustrates some of the constitutional problems with the Port Authority's current course of action.

STATEMENT OF LAW

The Port Authority must resume negotiations with St. Nicholas Church and cease trespassing on the church property to avoid violating the church's rights under the Fourteenth Amendment Equal Protection Clause, Fifth Amendment Takings Clause, and the First Amendment Free Exercise Clause.

I. THE PORT AUTHORITY'S SELECTIVE TREATMENT OF ST. NICHOLAS CHURCH IS A VIOLATION OF EQUAL PROTECTION UNDER THE NEW YORK CONSTITUTION AND UNDER THE U.S. CONSTITUTION.

“[No] State [shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend XIV. Courts have interpreted this to mean that “all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Policies must be evaluated “with strict scrutiny if they target a suspect class *or* implicate a fundamental right.” *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 99 n.6 (2d Cir. 2009); *see also Heller v. Doe*, 509 U.S. 312, 319–20 (1993).

The Equal Protection Clause of the New York Constitution provides:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or *religion*, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, *or by the state or any agency or subdivision of the state.*

N.Y. Const. art. I, § 11 (emphasis added). New York’s Equal Protection Clause is “no broader in coverage than the Federal provision.” *Hernandez v. Robles*, 7 N.Y.3d 338, 362, 855 N.E.2d 1, 9 (2006) (quoting *Under 21, Catholic Home Bur. for Dependent Children v City of New York*, 65 N.Y.2d 344, 360 n.6, 482 N.E.2d 1, 8 n.6 (1985)).

For equal protection purposes, the Court has the first step of defining the particular classes of persons being analyzed. Because “all persons similarly situated must be treated alike,” equal protection concerns arise when “*first*, a person (compared with others similarly situated) is selectively treated and *second*, such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.” *Bower Assocs. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 630–31, 814 N.E.2d 410, 418 (2004).

The extensive delay caused by the Port Authority’s bad faith negotiations coupled with an arrogant attitude toward people of faith lead to the conclusion that the Port Authority’s actions towards St. Nicholas Church are motivated by hostility toward religion—a violation of equal protection of the laws under both the U.S. and New York constitutions.

II. THE PORT AUTHORITY'S BAD FAITH IN NEGOTIATIONS AND EXTENSIVE EXCAVATION AT BOTH SITES CONSTITUTES A VIOLATION OF THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT.

“[P]rivate property [shall not] be taken for public use, without just compensation.” U.S. CONST. amend. V. The Takings Clause’s purpose is “to prevent the government ‘from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” *E. Enters v. Apfel*, 524 U.S. 498, 522 (1998) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). There are two types of takings: physical takings and regulatory takings. *Buffalo Teachers Fed’n v. Tobe*, 464 F.3d 362, 374 (2d Cir. 2006). Physical takings occur “when the government physically takes possession or an interest in property for some public purpose.” *Id.* Regulatory taking occurs when government acts in a regulatory capacity and deprives a property owner the rightful use of his property, for instance “ban[ning] certain uses of private property.” *Id.* “The gravamen of a regulatory taking claim is that the state regulation goes too far and in essence ‘effects a taking.’” *Id.* (quoting *Meriden Trust & Safe Deposit Co. v. FDIC*, 62 F.3d 449, 454 (2d Cir. 1995)).

The Port Authority has intimated that it will pay fair market value for the subterranean rights under 155 Cedar Street. But the Port Authority’s action in the negotiation process and the extensive excavation at both sites constitutes a taking, requiring just compensation. The Cedar Street location is currently unbuildable. The Port Authority has sent bulldozers on the land without permission or legal justification and provided no notice for its actions. The most recent plans submitted to the church by the Port Authority show a mound several stories high and a sidewalk in the place where the church’s building used to be.

The actions by the Port Authority constitute either a physical taking or regulatory taking. St. Nicholas Church must be justly compensated for the inability to use its property. The original location is in no position to allow for rebuilding, which is why finalizing the negotiation for the Liberty Street location is necessary to avoid any further harm to the church’s interests. In addition, the negotiation delay has rendered both properties unusable and requires just compensation in order to remedy the harm to the church. It has been nearly a decade since the attacks that destroyed St. Nicholas Church and the Port Authority’s actions—both physical occupation and agency negotiations—continue to frustrate the rebuilding process.

III. THE PORT AUTHORITY'S DELAY IN RECOGNIZING THE PRELIMINARY AGREEMENT AND TRESPASS PREVENTS ST. NICHOLAS CHURCH FROM FULLY EXERCISING ITS FIRST AMENDMENT FREE EXERCISE RIGHTS.

Free Exercise protections are triggered if the law or public policy at issue “discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993).

For example, the Supreme Court has held city ordinances allowing disparate treatment between religious denominations to be an infringement on the free exercise of religion. *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

The Port Authority's actions have prevented St. Nicholas Church from being rebuilt at Ground Zero, interfering with members of the church to freely exercise their religious rights. Your outspoken hostility towards people of religious faith and the Port Authority's bad faith negotiation tactics are strong indications of religious discrimination, which has led to the violation of St. Nicholas Church and its members' Free Exercise rights.

CONCLUSION

The law is clear: the Port Authority's current course of dealing harms the constitutional rights of Saint Nicholas Church, not to mention basic principles of contract—the requirements of good faith and the absence of fraud. The Port Authority can and should avoid litigation in federal court by resuming negotiations with Saint Nicholas Church in good faith and by ceasing to trespass upon and obstruct the use of church property.

Please make the appropriate adjustments to Port Authority policy and decision making to protect the rights of an important and iconic institution at Ground Zero. We will continue to offer our support to Saint Nicholas Church to ensure swift and appropriate resolution. Thank you for attending to this matter.

Sincerely,



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