

## Memorandum

**To:** Scott Gustin, Zoning Division Manager, Burlington Permitting and Inspections

**From:** James P. Langan, Esq.

**Date:** October 27, 2022

**Subject:** Zoning Permit for The Cathedral of the Immaculate Conception Parish Charitable Trust (the “Parish”) to Demolish the Immaculate Conception Church (the “Church”)

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### Summary:

- **The Church is not subject to Section 5.4.8 (Historic Buildings and Sites) (“Section 5.4.8”) of Burlington’s Comprehensive Development Ordinance (“CDO”).**
  - Burlington (the “City”) buildings are subject to Section 5.4.8 only if they are listed on a historic registry or if they are eligible for listing on a historic registry. The Church is not listed on a historic registry. Section 5.4.8 states that a building must be at least 50 years old, among other attributes, to be considered eligible for listing on a historic registry. The Church is not yet 50 years old and so does not satisfy a necessary attribute under the CDO to be considered eligible for historic registry listing.
  - The determination of eligibility (“DOE”) placed into the file of the Parish’s previous application (the “2013 DOE”) is a Consensus DOE resulting from the National Historic Preservation Act review process (“Section 106 Review”) required for projects receiving federal funding. Per the federal regulations authorizing the use of a Consensus DOE process, a Consensus DOE only determines historic registry eligibility for Section 106 Review purposes and so the 2013 DOE may not be used to establish historic registry eligibility as part of a local zoning review.
- **Even if the Church satisfied all of the CDO’s required elements to be considered eligible for historic registry listing for Section 5.4.8 purposes, 24 V.S.A. § 4413 (“Section 4413”) prevents the City from considering the Church’s historic value.**
  - The City may only regulate church buildings with respect to specific attributes listed in Section 4413. These specific attributes do not include historic attributes. Thus, the City may not assess the Church’s historic value nor impose any Section 5.4.8 requirements.
  - The only Vermont court precedent interpreting Section 4413 with respect to the demolition of a vacant church building finds that a city lacks the authority to assess the historic value of the building during the city’s review of a demolition permit application.
  - The amount of activity on a property makes no difference to the applicability of Section 4413. The Church does not fall out of Section 4413’s protection until it is sold or its zoning permit is amended.

- Even if the Church were not permitted as a place of worship, the demolition of the Church is church use under both Section 4413 and the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C.A. Section 2000cc(a) (“RLUIPA”).

Background:

The Parish submitted an application in December of 2021 seeking a zoning permit to demolish the Church. The application was deemed incomplete by City Zoning Division staff because they deemed Section 5.4.8 to apply to the application and Section 5.4.8 requires additional submittals and subjects applications to conditional use review. The Parish did not provide the additional submittals required by Section 5.4.8 and decided to withdraw its application. The Parish is now submitting another application (the “Application”), again seeking a zoning permit to demolish the Church. As detailed below, the Application is complete without the submittals required by Section 5.4.8 because the Church does not meet the CDO’s criteria for subjecting a building to Section 5.4.8 and because the City’s authority over the Application is limited by Section 4413.

The Church Is Not a Historic Building for Purposes of Section 5.4.8:

Pursuant to the clear language of the CDO, the Church does not qualify as a historic structure subject to Section 5.4.8. Section 5.4.8(a) of the CDO states that Section 5.4.8 “shall apply to all buildings and sites in the City that are listed, or eligible for listing, on the State or National Register of Historic Places. As such, *a building or site may be found to be* eligible for listing on the state or national register of historic places and *subject to the provisions of this section if all of the following conditions are present: 1. The building is 50 years old or older....* (emphasis added).” The Church is not listed on any historic registry. The Church is also not yet 50 years old. Consequently, the City may not subject the Application to Section 5.4.8. Historic preservation scholars may consider that the Church is eligible for historic registry listing. However, for purposes of deciding whether Section 5.4.8 is applicable to the Church, the opinions of scholars is not definitive. The CDO expressly defines the conditions a building must satisfy to be considered “eligible” in the context of the City’s zoning regulations and hence subject to Section 5.4.8. Without question, the Church does not satisfy all of these conditions because it is not yet 50 years old. Consequently, the City should not subject the Parish’s application to Section 5.4.8.

Even if the City ignores the plain language of Section 5.4.8 and contends that a building that is not yet 50 years old may be deemed eligible for historic registry listing for zoning purposes, the City may not use a Consensus DOE to establish the eligibility. In its response to the Parish’s previous permit application, the City submitted a 2013 DOE stating that the Church was eligible for historic registry listing. The City appeared to be taking the position that the Church was already determined to be eligible for historic registry listing and so it did not matter that Section 5.4.8(a) states that, unless it is already listed on a historic registry, a building needs to be at least 50 years old in order to be subject to Section 5.4.8. The 2013 DOE was the result of the Section 106 Review required for Green Mountain Transit’s (then CCTA) downtown transit center abutting the Church, as a project utilizing federal funding. The 2013 DOE was the result of a Consensus DOE process authorized by the Advisory Council on Historic Preservation’s regulations (36 C.F.R. Sections 800.3 and 800.4). However, the regulations that allow for the use of a Consensus DOE make it clear that a Consensus DOE is a narrow and limited determination. 36 C.F.R.

Section 800.4(c)(2) states that a property receiving a Consensus DOE “shall be considered eligible for the National Register **for section 106 purposes** (emphasis added).” Thus, there is no authority for a Consensus DOE to be used outside of the Section 106 Review context. The proposed demolition of the Church does not utilize federal funding and so Section 106 Review is not implicated. Therefore, the City should not attempt to expand the scope of the 2013 DOE and use it for purposes for which it is not authorized.

The City’s Authority Is Limited by Section 4413:

Even if the express terms of Section 5.4.8 didn’t prevent its application to buildings that are not yet 50 years old, the City’s authority is limited by Vermont law so as to prevent the City from regulating any historical attributes of the Application and hence applying Section 5.4.8. Specifically, under Section 4413, a city may *only* regulate churches and other places of worship with respect to specific attributes, namely: “location, size, height, building bulk, yards, courts, setbacks, density of buildings, off-street parking, loading facilities, traffic, noise, lighting, landscaping, and screening requirements.” A church building’s historic status is not among the attributes that a city is authorized to regulate.

The structure of the statute further demonstrates this limitation on the City. 24 V.S.A. § 4411 (“Section 4411”) specifically authorizes regulation of the “razing” and “removal” of buildings, while a historic preservation regulation is permitted if desired under § 4414(1)(F) (“Section 4414”). Both land regulations are reflected in Section 5.4.8. However, Section 4413 expressly withdraws the general grant of zoning authority derived from its neighboring provisions for razing buildings under Section 4411 and historic preservation under Section 4414 with respect to churches and other places of worship. Instead, under Section 4413, church buildings “may be regulated *only* with respect to” the attributes listed above (location, size, height, etc.). Therefore, the delegation of statutory authority to a municipality to regulate the razing of a church building under Section 4411, or to impose historic preservation restrictions under Section 4414, is effectively subtracted from a municipality’s zoning authority by Section 4413. *Flanders Lumber & Building Supply Co., Inc. v. Town of Milton*, 128 Vt. 38, 45, 258 A.2d 804 (1969).

The only court decision assessing the applicability of Section 4413 to the demolition of a vacant church property clearly concludes that a city lacks the authority to assess the historic value of a building during its review of a demolition permit application. When analyzing the impact of Section 4413 on the planned demolition of a former convent building, the Vermont Environmental Court determined that Section 4413 does not “allow the Court to assess the proposal's own inherent historic, architectural or aesthetic values, whatever they may be.” *In re Valsangiacomo*, No. 130-8-03 Vtec, Decision on Applicable Review Criteria, 2004 WL 5232367 (Vt.Envntl.Ct. Dec. 21, 2004). Consequently, the City does not have the authority to assess the historic status of the Church in its review of the Application and so it may not subject the Application to Section 5.4.8 and conditional use review.

The Use of the Parish’s Property is Determined by Its Zoning Permit:

In response to the Parish’s first demolition permit application, the City uploaded documents to the application portal, including a letter from the President of Preservation Burlington, raising questions about the applicability of Section 4413 given the Parish’s recent limited use and presence at the property. However, the amount of activity on a properly permitted property makes no difference to the applicability of Section 4413. Title 24 is implemented exclusively through a permitting system, in which

municipalities grant permits for uses and structures. 24 V.S.A. § 4449. Those permits are subject to change only on the occurrence of either of two events: (1) a permit amendment; or (2) the approved use becomes non-conforming and is abandoned. 24 V.S.A. § 4412(7). There is nothing in Title 24 to suggest that an allowed and permitted use is somehow transformed or ceases to exist within the closed regulatory universe of Title 24 so long as the permit is not amended. It is clear the Church is an allowed use under the CDO and it has been permitted and used for religious purposes for decades. The Church does not fall out of the protection of Section 4413 until the property is sold or its zoning permit is amended. *See In re Agency of Administration*, 141 Vt. 68, 83-94 (Vt. 1982) (demolition of a building, in itself, does not trigger jurisdiction in Act 250).

Under Title 24's statutory scheme, the zoning permit, once issued, designates the use of a structure, which does not change so long as the use is allowed in the zoning district. So far as zoning is concerned, a structure approved as a church does not stop being a church for zoning purposes merely because it is closed or used only in a limited capacity. Approved zoning uses are not considered to be abandoned simply by non-use unless the use is nonconforming. 24 V.S.A. § 4412(7). The Church has not been transformed into a mere building owned by the Parish to be regulated like any other. Preservation Burlington's letter cites *Vermont Baptist Convention v. Burlington Zoning Bd.*, 159 Vt. 28 (1992) to make the mistaken assertion that the current actual use is somehow a definitive factor in Section 4413 analysis. However, the case does not even consider Section 4413, and if anything, supports the Parish's position.

*Vermont Baptist* involved a zoning decision that a building was a "semi-public" use, mainly because it was owned by a nonprofit religious organization. The organization complained when it could not sell to a commercial buyer due to zoning restrictions on changing the use from nonprofit to commercial. The court overturned the zoning decision because the building had *never* been used for religious purposes, but instead had always been just an office. The court ultimately decided, *based on the ordinance and the historic use of the property*, that an office is an office, even if it is owned by a religious entity. *Id.* at 29-30. The court refused to consider extraneous matters such as the identity of the owner, instead focusing on how the property had been used, the nature of the property, and the bylaw. In the present case, the Church is approved under the CDO as a place of worship. It was built and used as a church, and really has had no other function. That the Church is not currently active does not change its zoning permit nor transform the use to something else. Unlike *Vermont Baptist*, in which the court had to decide what a use was under the ordinance, the Church's use has long been set by the original zoning permit, which establishes it as a place of worship.

#### The Demolition of the Church is Religious Use Under Section 4413 and RLUIPA:

Even if a property's use were not determined by the use approved in its zoning permit, the Parish's act of demolishing the Church would be religious use of its property as an important step in fulfilling the deconsecration of the property. *See Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691 (E.D. Mich. 2004) (decision to demolish a church building is a religious exercise under RLUIPA). As further detailed in the letter from Monsignor Routhier accompanying the Application, the Parish wants to take this property out of liturgical use and change it from a sacred space to a secular space. The deconsecration of the site will serve to help the Parish members cope with the loss of this Parish, cleanse the site, and prevent any future non-sacred use of the building. The demolition of a church is recognized by canon law as a method to formally deconsecrate a property and is the clearest indication of the reduction of a property's sacredness. A denial of the Parish's demolition permit application would

interfere with the Parish's exercise of its religion because the Parish would be unable to use its chosen method, authorized by canon law, to complete the deconsecration process and because the Parish would be unable to focus its resources on the upkeep of the nearby Cathedral of Saint Joseph and the multitude of charitable endeavors based there.

It is also instructive for the City to recognize that Section 4413 is the vehicle by which Vermont ensures compliance with RLUIPA and RLUIPA has a broad definition of what constitutes religious use of a property. *Appeals of Valsangiacomo, et al.*, Nos. 130-8-03 Vtec, 64-4-04 Vtec., Decision and Order on Motion for Summary Judgment, 2004 WL 5232368 (Vt.Envtl.Ct. Oct. 5, 2004) (stating that Section 4413 "ensures that municipal zoning ordinances in Vermont will be applied so as to comply with...RLUIPA...by limiting the attributes of the religious land use that may be regulated by a municipality.") In addition to defining religious use broadly, RLUIPA bestows religious organizations – and not the government – with the ability to declare what constitutes their religious use of a property. It is clear from the text of RLUIPA and the caselaw interpreting it, that a city does not get to decide what constitutes religious use of a property for RLUIPA purposes – the sincerely held beliefs of the religious entity is what controls.<sup>1</sup> Under RLUIPA, a city "cannot avoid the force of RLUIPA by asserting that a particular religious activity is something that a religious group merely wants to do rather than something that it must do." See Statement of the Department of Justice on the Land Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA), available at <https://www.justice.gov/crt/page/file/1071251/download>.

Put simply, the City has no grounds for telling the Parish that the razing of the Church would not be for religious purposes and not constitute a church use or religious exercise under Section 4413 and RLUIPA. As detailed above and in Monsignor Routhier's letter, the Parish is seeking the demolition permit to complete the deconsecration of the property and allow the Parish to further its religious activities at the nearby St. Joseph Cathedral. By denying the Application, the City would not only be violating Section 5.4.8 and Section 4413, but may also violate RLUIPA. RLUIPA's equal terms provision prohibits a municipality from implementing land use regulations in a manner that treats a religious institution on less than equal terms as non-religious institutions. The City may not treat the Parish's demolition permit application differently than an application from a similarly situated non-religious entity and it's not evident that the City has ever denied a demolition permit application to a non-religious institution seeking to demolish a building under 50 years of age on the basis that the building qualified as eligible for historic registry listing under the CDO. In addition, RLUIPA's free exercise provision prohibits a municipality from implementing land use regulations in a manner that imposes a substantial burden on the religious exercise of a religious institution (unless the municipality is furthering a compelling governmental interest by the least restrictive means). As detailed in Monsignor Routhier's letter, the denial of the Application would impose a substantial burden on the religious exercise of the Parish by preventing it from completing the deconsecration of the Church as well as significantly impeding the religious work at St. Joseph's.

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<sup>1</sup> Under RLUIPA, "religious exercise" includes "any exercise of religion, whether or not compelled by, or central to a system of religious belief." [42 U.S.C. § 2000cc-5\(7\)\(A\)](#); see also [Hernandez v. Commissioner, 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 \(1989\)](#) (holding "it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").