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**MEMORANDUM**

To: Social Service PILOT and Comparative Impact Study Committee  
(c/o Bob Berman, Chair and Laurie Lee, Vice-Chair)

From: Christopher J. Petrini  
Town Counsel

cc: Board of Selectmen (via electronic transmission only)  
Mark Purple, Interim Town Manager (via electronic transmission only)  
Edward Noonan, Town Moderator (via electronic transmission only)  
Glenna J. Sheveland, Esq., Petrini & Associates, P.C. (w/o enclosures)

Date: February 8, 2006

Re: **Evaluation of Legal Issues Posed by Activities of Social Service PILOT and Comparative Impact Study PILOT Committee, Including Voluntary Questionnaire Issued to Various Non-Profit Social Service Organizations in the Town of Framingham**

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**INTRODUCTION**

This memorandum is in response to a request made by the Social Service PILOT and Comparative Impact Study Committee's ("Committee") asking me to provide a legal analysis as to whether (1) the Salvation Army should be classified as a religious institution; (2) and if so whether it is still within the Committee's charge to include within its study of non-profit organizations certain programs or facilities operated by this organization that appear to be totally social service, and not religious, in nature; and (3) is it within the purview of the Pilot Committee to look at all predominately social service programs run by religious organizations?

## FACTS

As previously set forth in my December 12, 2005 memorandum, the PILOT Committee was created by Town Meeting vote at the 2005 Annual Meeting to identify the social service organizations that are currently operating within the Town and within adjacent and similarly situated municipalities and to determine what impacts social services have on the Town's economy, on the neighborhoods in which they are located, and how they impact municipal services. The Committee was also asked by Town Meeting as part of its formative motion to consider the possible benefits of developing a Payment in Lieu of Taxes ("PILOT") Program as a means by which to voluntarily engage non-profit social service organizations in providing services or monetary contributions to the Town as a means by which to offset the cost of providing municipal services to these tax-exempt organizations.

As part of the deliberation at the Annual Town Meeting under the motion under Article 19 on June 9, 2005 which created the PILOT study, an amendment was proposed by TMM Dawn Harkness that the study should include the Sudbury Valley Trustees, churches, synagogues, temples, and colleges as well as social service agencies. This amendment was not passed by Town Meeting. The defeat of this amendment has caused some confusion among the members of the Committee as to its proper scope and charge, as they are uncertain whether they were effectively instructed by Town Meeting to exclude all services offered by religious institutions or whether they were not to include services that were obviously religious in nature.

This confusion apparently stems from the fact that some religious organizations offer social services that have no religious aspect to them, other than they are overseen by a religious organization, while other religious organizations offer social services as an integral part of their religious mission and observance. Specifically, the Salvation Army has caused confusion as it operates many social services that do not specifically require the inclusion of religious observances. In recognition of the non-religious nature of the services, both the state and municipality use property classifications for its facility that identified it as charitable and non-profit, but not as religious. Based on the analysis below, it will become apparent why such confusion has arisen and why it raises relevant questions that have been addressed by the courts in a variety of different contexts.

### **I. Should the Salvation Army be classified for Purposes of the Study as a Religious Institution?**

The Salvation Army is recognized both in the Commonwealth, as well as nationwide, as a religious organization. "The Salvation Army is a nonprofit, religious organization, a branch of the Christian Church, which provides a wide variety of social service programs." National Labor Relations Board v. The Salvation Army of Massachusetts Dorchester Day Care Center, 763 F.2d 1, 2 (1st Cir. 1985). "The Salvation Army is a church . . ." McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972). "The Salvation Army is a Protestant Christian religious movement which, in addition to preaching the gospel, provides an array of social services to the poor . . ." Salvation Army v. Department of Revenue, 524 N.E. 2d 628, 629-630 (Ill. App. 2 Dist. 1988).

The fact that the Salvation Army offers many different types of social services does not change the fact that it is a religious organization. Accordingly, it is reasonable to anticipate that the Salvation Army would be afforded all of the protections allowed any religion under the state and federal constitutions, including the free exercise of religion secured by the First Amendment to the United States Constitution. The fact that the Salvation Army receives funding from state or federal sources does not affect its standing as a religious institution. Moreover, the fact that the Salvation Army may be characterized for tax purposes as a nonprofit organization, or indeed may be required to pay property taxes on property that is used predominately to raise income for the organization versus to fund a specific charity, has no impact on its identification as a religious institution. See generally Salvation Army v. Department of Revenue, 524 N.E. 2d 628 (Ill. App. 2 Dist. 1988). The considerations involved in determining the payment of taxes by religious organizations does not in any way determine whether an organization itself is identified as a religion, but instead identifies whether the property in question that is owned by the religious institution is used for religious purposes. See Salvation Army v. Department of Revenue, 524 N.E. 2d 628 (Ill. App. 2 Dist. 1988); Young Mens' Christian Ass'n of St. Louis and St. Louis County v. Sestric, 242 S.W.2d 497 (Mo. 1951). Based on the analysis and precedent set forth above, I recommend that for purposes of the study, the Salvation Army be identified and treated as any other religious institution.

**II. In view of the fact that the Salvation Army is a religious institution it is still within the Committee's charge to include within its study of non-profit organizations, certain programs or facilities operated by this organization that appear to be totally social service, and not religious, in nature?**

Whether the Committee has the authority to study those programs or facilities operated by religious organizations that appear to be totally social service and not religious in nature depends on the direction given to the Committee by the Town and the Board of Selectmen. The Committee has the authority to promulgate rules and guidelines which give effect to its mandate. See Thomas v. Commissioner of the Div. of Med. Assistance, 425 Mass. 738, 746 (1997), and cases cited. If the Committee was given the specific direction at Town Meeting that religious institutions were not to be considered as part of the study, then it is not with the Committee mandate to do so and it cannot exceed the authority conferred on it absent a decision by the Committee to return to Town Meeting to allow the study of such religious organizations. See Telles v. Commissioner of Ins., 410 Mass. 560, 564-565 (1991); Saccone v. State Ethics Comm'n, 395 Mass. 326, 335 (1985). Based on the defeated amendment, it is my opinion that it would be outside the scope of the Committee's charge to include in its study social service programs or facilities operated by religious institutions themselves, including the Salvation Army. (This is in contrast to social service programs that may be operated by corporations that are separate from the religious organizations themselves, even though they may have some affiliation with the religious organization in question). Such an alteration of the Committee's mandate would require approval by Town Meeting.

The Committee's consideration as to whether it should treat the Salvation Army differently in the study from other more traditional religious organizations could result in a claim

by the Salvation Army that it has been subjected to unequal treatment of a particular religion by a government entity. Unequal treatment by a government entity that does not address a legitimate concern of government for reasons quite apart from discrimination violates the protections provided to religious organizations pursuant to the Free Exercise Clause of the First Amendment. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993). A government entity may not “single[] out [a] religion for unfavorable treatment.” Locke v. Davey, 540 U.S. 712, 718 (2004), citing id. As indicated by the analysis that follows, the Committee has not identified any specific harm or concern that could require undertaking such unequal treatment of the Salvation Army.

The Committee provides three reasons as to why the Salvation Army should perhaps be considered differently than other religious organizations. The first reason is that community centers are identified as SIC Code 8322. “SIC” stands for Standard Industrial Classification code, which is a number developed by the US Office of Management and Budget (“OMB”) to identify industrial sectors. Industry classifications assemble companies into common designations that reflect shared markets and products. Since the 1930's, industries have been classified according to the four-digit SIC codes used by the U.S. government in census collection. The first two digits identify the broad industrial sector (such as SIC code 8300, Services-Social Services) and the last two digits represent a facility's specialty within this broad sector (such as SIC code 8322, Community Centers). It is not uncommon for one company to be assigned more than one code. Since the old SIC system did not reflect a fundamental change in industrial markets towards service, the OMB adopted in 1997, a new six-digit classification system called the North American Industry Classification System (NAICS). The new NAICS provides more than 350 new industries and 9 new industry sectors.

The SIC code allows agencies, such as the U.S. Department of Labor Occupational Safety & Health Administration (“OSHA”) and the U.S. Securities and Exchange Commission (“SEC”), to identify industry types to ensure compliance with the statutory and regulatory requirements for the industry type claimed. In addition, they allow for the compilation of classifications for census data and statistical analysis, which in turn are used for various types of business and economic studies. How or why the Committee has chosen to use the SIC code for use with this study was not indicated. However, nothing I found in my research indicated that the SIC code was intended to be used for any other purpose than as a classification system to that allows various state and federal agencies to “identify” what type of business or services they provide. Although it may assist the Committee in their study to use such a system, it does not rise to the level of being evidence in support of a conclusion that the Salvation Army's services or facilities should be considered solely non-profit in nature.

The second potential basis given by the Committee to support the proposition that the Salvation Army is different from other religious institutions is the fact that 11% of its funding is government funding. Both the state and federal government have numerous programs that provide funding to religious institutions that qualify for the particular program under consideration. The fact that the Salvation Army receives 11% of its funding from government sources does not distinguish it from other religious organizations. Indeed the YMCA, the Association of Jewish Family and Children's Agencies, and the Lutheran Services in America are

just a few of the organizations that receive substantial amounts of government funding every year. Sixty-five percent of Catholic Charities funding comes from government sources.<sup>1</sup> In briefly reviewing this issue, it appears that current studies indicate that the decrease in funding for social service programs offered directly by the government over the past five years has in turn resulted in an increase in government's financial support to religious organizations that offer social services.<sup>2</sup>

The Committee also points out that the Salvation Army's hiring practices are governed by governmental standards, and suggests that this may form a basis to treat the Salvation Army differently from other religious organizations. However, all religious organizations are subject to state and federal employment standards "where they do not present a significant risk that the First Amendment will be infringed." National Labor Relations Board v. The Salvation Army of Massachusetts Dorchester Day Care Center, 763 F.2d 1, 4-5 (1st Cir. 1985), citing National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972). The relevant state and federal employment laws would apply to those employed by a religious institution whose employment does not involve religious instruction or indoctrination or where a significant condition of employment was imposed with overt religious purposes in mind. See id.

Third and finally, the Committee points out that the state and town property classification are not identified as churches, but are instead identified as charitable and nonprofits. A more comprehensive review of statewide classifications would undoubtedly show that these types of distinctions occur for all religious organizations. However, as discussed above in Question I, this distinction for tax purposes has no bearing the whether the Salvation Army is a religious institution. See Salvation Army v. Department of Revenue, 524 N.E. 2d 628 (Ill. App. Dist. 1988).

In summary, based on my evaluation and research, none of the reasons cited by the Committee appear to provide a legitimate basis that could potentially support treating the Salvation Army differently from any other religious institution for purposes of this study.

### **III. A Decision to include the Salvation Army in the PILOT Review Committee Study Could Lead to Potential Liability Under RIULPA.**

In addition to the obvious First Amendment free exercise of religion issues that may arise if the Salvation Army is included involved in the PILOT Study, the land use provisions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc, et seq., protect individuals, houses of worship, and other religious institutions from discrimination in zoning and regulations.<sup>3</sup> RLUIPA establishes that a government cannot

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<sup>1</sup> *How Catholic Charities Lost Its Soul*, by Brian C. Anderson, City Journal Winter 2000, available at [http://www.city-journal.org/html/10\\_1\\_how\\_catholic\\_charities.html](http://www.city-journal.org/html/10_1_how_catholic_charities.html).

<sup>2</sup> *Faith-based initiatives: Following a new course of social service in America*, by Bruce Murray, FACSNET, January 12, 2006, available at <http://www.facsnet.org/issues/faith/cnaan.php>.

<sup>3</sup> The viability of RLUIPA was drawn into question when the Sixth Circuit found it to be unconstitutional. See Cutter v. Wilkinson, 349 F.3d 257 (2003). The Supreme Court, however, in a unanimous decision held that the Act

establish or enforce a law or regulation which favors one particular religious denomination over another or has the effect of restricting one denomination more than another. For example, governmental actors cannot make zoning decisions for houses of worship based on the popularity (or lack thereof) of a particular religious institution. Regardless of public perception and the pressures of public opinion, governments are required by RLUIPA to treat all religious institutions equally in terms of land use regulations.

RLUIPA prohibits zoning and land use regulations that substantially burden the religious exercise of churches or other religious assemblies or institutions absent the least restrictive means of furthering a compelling governmental interest. This prohibition applies in any situation where: (i) the state or local government entity imposing the substantial burden receives federal funding; (ii) the substantial burden affects, or removal of the substantial burden would affect, interstate commerce; or (iii) the substantial burden arises from the state or local government's formal or informal procedures for making individualized assessments of a property's uses. As all states receive some form of funding from the federal government, RLUIPA arguably applies to all states, including Massachusetts.<sup>4</sup>

In addition, RLUIPA prohibits zoning and land use regulations that: (1) treat churches or other religious assemblies or institutions on less than equal terms with nonreligious institutions; (2) discriminate against any assemblies or institutions on the basis of religion or religious denomination; (3) totally exclude religious assemblies from a jurisdiction; or (4) unreasonably limit religious assemblies, institutions, or structures within a jurisdiction.

As expansive as the protections of RLUIPA appear to be, it is likely that if the Committee were to treat the Salvation Army in a manner that is different than other religions for the purpose of this study, it could form the basis for claimed violations of this Act, particularly if the Committee's recommendations result in some type of proposed zoning changes (which is not recommended generally as noted in my prior opinion), in addition to any First Amendment claims.<sup>5</sup>

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as applied to the rights of incarcerated persons was constitutional. See Cutter v. Wilkinson, 125 S.Ct. 2113 (2005). Although the Supreme Court's decision addressed only the incarceration aspect of the Act, it has already been cited in numerous land use decisions decided since the issuance of the Cutter decision in May, 2005. See e.g. Greater Bible Way Temple of Jackson v. City of Jackson, 2005 WL 3036527 (Mich.App. Nov 10, 2005); Vision Church, United Methodist v. Village of Long Grove, 397 F.Supp.2d 917, 926 (N.D.Ill. Oct 18, 2005); Faith Temple Church v. Town of Brighton, New York, 2005 WL 3454309 (W.D.N.Y. Dec 19, 2005).

<sup>4</sup> Massachusetts fails to have any real defining case law on the applicability of RLUIPA as applied to the land use and zoning context. A violation of RLUIPA only appears to have been raised in one case before the Supreme Judicial Court, and the Court chose not to address its applicability. See Martin v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141, 153 (2001).

<sup>5</sup> There are two ways that action can be taken in regards to a violation of RLUIPA: (1) the U.S. Department of Justice may initiate an investigation of an alleged violation of RLUIPA; (2.) a lawsuit can be brought to state or federal court by an individual, a house of worship, or any other religious institution to enforce RLUIPA.

**IV. Is it within the purview of the Pilot Committee to look at all predominately social service programs run by religious organizations?**

The answer to this question is the same as the answer provided in the first paragraph of Question II. This question is basically best rephrased as “how much interaction will result in interference” in the context of government and religion. This is a difficult question to answer. Despite the honorable intentions of the members of the Committee in seeking to make this study as comprehensive and accurate as possible, the Committee needs to be aware of the case law that finds that even an action that “incidentally burdens” the free exercise of religion, which *could be* as innocuous as including religious organizations in the current study, could have the potential to embroil the Town in complex and costly litigation resulting from claims of violations of the protections afforded to religious institutions once again based in the Free Exercise Clause of the First Amendment. Answering this question requires a balancing act of the competing interests of a comprehensive study against the risks of encroaching on the special place given the free exercise of religion, as well as the right to be free from government-sponsored religions, under our state and federal constitutional scheme:

The Supreme Court has many times recognized that the First Amendment has built a “wall of separation” between church and State. Though that “wall of separation” between permissible and impermissible instruction of the State into matters of religion may blur, or become indistinct, or vary, it does and must remain high and impregnable. In Everson v. Board of Education, 330 U.S. 1 (1947), it was said, “We could not approve *the slightest breach.*”

McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (emphasis added).

Any gathering of information on social services provided by religious organizations must include a consideration of whether such an action “substantially burdens [the free exercise of religion, and, if it does, whether the [Town can show] that it has an interest sufficiently compelling to justify that burden.” Society of Jesus of New England v. Com., 441 Mass. 662, 669 (2004). An “incidental burden” on the free exercise of religion could result in a violation of the First Amendment where there is no “compelling interest” of the Town in burdening a religion. See Employment Div., Dept. of Human Resources of State of Or. v. Smith, 485 U.S. 660, 675 (1988), citing Sherbert v. Verner, 374 U.S. 398, 404 (1963). Here the study undertaken by the Pilot Committee is to provide a greater understanding of the impact that social services have on municipal services provided by the Town. This study is also being undertaken with an underlying interest in the potential to development a voluntary Payment in lieu of Taxes Program. While the Committee’s objectives are undoubtedly very important, it does not appear that inclusion of religious organizations in the study is so compelling an interest, at least as that high standard is set forth by the case law, so as to support even an incidental burden upon these religious institutions. See id.

Taking the above legal standards and criteria into account, if the Committee proposes to include religious organizations themselves in the study, I would counsel great caution and advise against it. If the Committee wishes to include social services offered by separate corporations

that have some indirect affiliation or association with religious institutions, I would be less concerned so long as the study was done with proper impartiality, sensitivity and decorum, and all such providers are treated the same.

At this time it is impossible to predict what actions of the Committee could possibly result in a claimed violation of the First Amendment by including religious organizations themselves (including the Salvation Army) in the study.<sup>6</sup> However, it would seem that based on the highly negative effect that such a claim could have on the Town, and as exclusion of social service programs and facilities offered by religious institutions themselves does not appear to drastically diminish the benefit of the study, my recommendation is that the Committee avoid including programs and facilities offered by religious institutions themselves in the study at this time.

### CONCLUSION

The Salvation Army is recognized as a religious institution by the Commonwealth of Massachusetts, as well as nationwide. As such it should be afforded the same considerations and deference as any other religion. To do otherwise could result in a claim that the Town has engaged in a First Amendment violation by favoring one religion or religious theory over another. The Committee was given the mandate by Town Meeting not to include churches, synagogues and similar religious organizations in its study. Without a modification of the mandate given by Town Meeting, the Committee is without the authority to develop guidelines or rules that would allow inclusion of social service programs or facilities offered by religious institutions themselves in the study. Moreover, the potential legal risk of violating the First Amendment free exercise of religion clause makes exclusion of religious organizations from the study advisable at this time.

I hope this analysis is of assistance to the Committee. Please contact me if you should have any further questions. Thank you.

*2006.01.06 Town Counsel Memo on PILOT Inclusion of Religious Nonprofit Programs (600-122).*

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<sup>6</sup> It is not necessary that the direct actions of the Committee result in a direct infringement upon the religious organizations. Even if the religious organization can show an indirect affect from the study was a cause of their harm, the Town could be held accountable for the violation. "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." Braunfeld v. Brown, 359 U.S. 599, 607 (1961).