

FROM: Yaakov Cohn, Vice Chair, PILOT Committee
TO: PILOT Committee
DATE: February 24, 2006
SUBJECT: Town Counsel's memo of Feb 8, 2006

Based on reading Town Counsel's memo and a subsequent communication from Town Counsel to Laurie Lee, it appears that the Town Counsel presents two primary reasons to leave the Salvation Army out of the PILOT study. Those reasons are based on:

1. The vote of TM defeating the Dawn Harkness amendment to Ted Cosgrove's motion to create the PILOT Committee
2. The protection that a religious institution is provided by the First Amendment and the RIULPA.

In regards to #1, the defeat of the Harkness Amendment:

The overwhelmingly approved Cosgrove motion called for the "research and institution of a Payment in Lieu of Taxes (PILOT) Program for *all social service non-profit agencies* (Social Services) in Framingham. I further move that a comparative impact study of Social Services in Framingham be created..." (*Emphasis added.*)

The soundly-defeated Harkness amendment attempted to expand the Cosgrove motion to include other non-profits including conservation lands trustees, educational institutions, churches, and synagogues.

It is quite a stretch to interpret the defeat of the Harkness amendment as an instruction to ignore faith-based social services. I do not accept Town Counsel's interpretation that the committee was "given the specific direction that religious institutions were not to be considered as part of the study." It is far more accurate to suggest that the committee was given specific direction to not expand its study to include non-profits that were not acting as social service agencies.

Note that just as the Salvation Army can claim some of the protections provided to Houses of Worship, social service agencies can often claim the protections provided to educational institutions. That claim has been central to most claims of Dover Amendment status. Surely, no one would interpret that to mean that Town Meeting was giving explicit direction to exclude Wayside because it also claims educational institution status.

Town Counsel's memo leaves entirely unmentioned the option of directly plumbing the intentions of Town Meeting. Video of that TM session is available. Did anyone on Town Counsel's staff review that video? Did anyone see or hear anything that remotely suggests that the Salvation Army Community Center was not intended to be included? The Salvation Army is a highly visible social service provider in Framingham. Arguably the Salvation Army

is the most highly respected social service provider in American history. Surely, this highly visible agency would have been mentioned if Town Meeting wanted it to be excluded.

The Cosgrove Motion, explicitly reads "all social service non-profit agencies." What more needs to be said? A!!!

I would suggest that the overwhelming majority of Town Meeting Members understood the Harkness Amendment to be an effort to undermine the intentions of the Cosgrove Motion. It is instructive that the three TMMs on the PILOT Committee on record as supporting the Town Counsel's interpretation of the defeat of the Harkness amendment were all in favor of that amendment and at least two voted against the Cosgrove Motion.

In regard to #2, The First Amendment to the US Constitution, and The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA):

The reasoning behind these argument as presented in Town Counsel's memo is tortured, to say the least.

In what fashion is there any "obvious First Amendment free exercise of religion issues" in play here as claimed by Town Counsel? How could collecting publicly available data about the Salvation Army be construed to be an obvious First Amendment violation? In what fashion can asking the Salvation Army voluntarily submit to a questionnaire about its activities be construed as a First Amendment violation?

There has never been any suggestion of treating the Salvation Army differently than any other religious institution.

The Committee long ago established criteria by which to identify non-profit social service agencies. Our criteria are completely blind to the religion of any parties. Whether the providers are G-d-Fearers or worshipers at the alter of Mammon is entirely beyond the purview of this committee.

The Committee does not, cannot, and should not care about anyone's religion or anyone's motivation for providing social services.

As for the **RLUIPA**, the PILOT Committee is chartered to gather information and make recommendations. How does that remotely resemble imposing discriminatory zoning based on the unpopularity of a particular religion as suggested by Town Counsel?

Town Counsel has been presented with the question of how shall we deal with the Salvation Army Community Center, or any other religious institution's activities that *completely* meet our criteria for a social service agency. The committee spent two entire sessions to accept a lengthy and explicit definition of 'social service agency.' The Salvation Army Community

Center completely meets that definition. Further, the Salvation Army Community Center files documents that confirm that understanding. Just about every public discussion of social service agencies in Framingham includes the Salvation Army Community Center in the old Gilchrist Building as part of the discussion. When the BoS invited social service agencies to come to a meeting, The Salvation Army sent two high level officials. The fact that the Salvation Army, as a faith-based provider, is free of certain financial reporting obligations is an oddity, a shades of grey anomaly, which is of no concern to us.

These and my further comments interspersed in Town Counsel's memo below, make clear why I believe that Town Counsel's arguments are not persuasive. If anything, Town Counsel's memo of February 8, 2006 stands in direct opposition to Town Counsel's memo of December 12, 2005, which supported the right of the PILOT committee to gather information. I urge the members not to adopt the Town Counsel's opinion.

Yaakov Cohn

Personal Comment:

I grew up in a home that was dedicated to providing faith-based social services. I personally am inclined to favor faith-based agencies over private non-profits for a number of reasons. For one, I think that faith-based agencies tend to have far better relations with their host communities. I believe that rocky relations that many of the social service agencies have with the town are a central issue that led to the formation of this committee.

Town Counsel assumes that there is no overriding interest to include the Salvation Army Community Center. I suggest that this committee is charged with bringing facts and reason to a public debate that is often characterized by firmly-held, but unsupported assumptions and by often vicious personal attacks. I believe that there is an overriding interest to meet the Cosgrove Motion's instruction that we address "all" social service non-profit agencies.

How can a complete report exclude a major social service agency, and especially, one that I, and others, hold in the highest regard, one that can be held up as a model to others? I cannot accept the recommendation to ignore this social service agency just because its officers and soldiers believe, as I do, that there is a Creator who gives us the opportunity to redeem and save those less fortunate than ourselves.

NOTE: Below you will find the Town Counsel's memo of February 8, 2006, with my comments interspersed in Red, Comic Sans MS font. Some of my comments below are 'struck-through' since they also appear in my memo, above.

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Annotated by Yaakov Cohn in Comic Sans MS, red.

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

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?

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FACTS

As previously set forth in my December 12, 2005 memorandum, **after a motion proposed by TMM Ted Cosgrove**, 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. **The formative motion is not nearly as explicit as the preceding paragraph implies.**

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 (**some of**) 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.

I question the use of the term "confusion" to describe the controversy among the members. The committee asked for a legal opinion because it was split, not because it was confused.

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 just don't see where the promise of this last sentence is met in the rest of this memo.

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).

It would be helpful if the context, or major thrust of these cases was cited. What were the issues in the above-cited cases? In what context did the courts make the statements cited in the preceding paragraph? As presented, it is not at all clear what relevance these cases have to the issue at hand.

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.

How does the issue of the constitutional protection afforded to religion come into play here? In what fashion does the tabulation of publicly available information, or the sending of a questionnaire constitute anything remotely resembling a piercing of the Salvation Army's constitutional protection?

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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.

Isn't this the heart of the question facing the PILOT Committee. We are inquiring into the activities and properties that are not used for religious purposes. Why does this opinion propose that once the parent organization is defined as a religious institution, all thought and analysis must end?

When we list the properties that are owned by non-profits social service agencies, why not include church properties that are used for social service purposes and not for religious purposes? Is this not comparable to the questions addressed in the above cases?

When we list the costs and benefits to the town of social service agencies, why not include the costs and benefits of church-sponsored social service agencies?

Is it not clear from the above-cited cases, that evaluation of the relevance of religious status is based on actual use? Aren't we proposing to take far fewer liberties than the courts allowed in the cited cases?

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).

It would be helpful if the context, or major thrust of these cases was cited. Otherwise, the reader cannot evaluate either the relevance of these cases, or their significance.

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.

~~There has never been any suggestion of treating the Salvation Army differently than any other religious institution.~~

~~The Committee long ago established criteria by which to identify non profit social service agencies. Our criteria are completely blind to the religion of any parties. Whether the providers are G-d Fearers or worshipers at the alter of Mammon is entirely beyond the purview of this committee.~~

~~We do not, cannot, and should not care about anyone's religion or anyone's motivation for~~

~~providing social services~~

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 PILOT Committee was created by the Town Meeting. As a legal matter, of what relevance is any direction that might be given by the Board of Selectmen? Do they have the power to override or modify the vote of Town Meeting?**

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).

To me, this seems to be a somewhat forced interpretation of the refusal of town meeting to extend the formative motion to include conservation land organizations, churches, colleges, and so on. I quote Peter Adams' post to frambors:

"The argument at that town meeting was not over whether to exclude or include churches, but whether to study social services alone or expand the study to include all tax-exempt organizations. The amendment to expand the study was defeated and the will of Town Meeting was that the PILOT committee study the impact of social services on the town. The reason for this was not because churches should not be studied, but because the limited resources of the Town should be focused on the smaller, more reasonably attainable goal.

"So the PILOT committee was NOT instructed to exclude churches, it was instructed to FOCUS on social services. If a church is also a social service, they can be, and should be, studied. It would be a mistake for the PILOT committee to stop looking into the Salvation Army simply because part of their operation is religious."

Based on the defeated amendment,

~~The defeated amendment attempted to include conservation lands, colleges, churches, and synagogues. It is quite a stretch to interpret its defeat as an instruction to ignore church-based social services. It is not at all indisputable that the committee was "given the specific direction that religious institutions were not to be considered as part of the study." It is far more accurate to suggest that the committee was given specific direction to ignore non-profits that were not acting as social service agencies. That would include conservation agencies, educational institutions, houses of worship, etc.~~

~~Note that Social Service Agencies generally claim the protections provided to educational~~

~~institutions. That claim has been central to most claims of Dover Amendment status. Surely, no one would claim we should not include an agency such as Wayside because it also claims educational institution status~~

~~This memo leaves entirely unaddressed the question of what were the intentions of Town Meeting. Video of that TM session is available. Did anyone on Town Counsel's staff review that video? Did anyone see or hear anything that remotely suggests that the Salvation Army Community Center was not intended to be included? The Salvation Army is a highly visible social service provider in Framingham. Its name is mentioned in just about every review of the social service situation in Framingham. Arguably the Salvation Army is the most highly respected social service provider in American history. Surely, this highly visible agency would have been mentioned if Town Meeting wanted it to be excluded.~~

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).

It would be most instructive if we had clarification on this point. What would be different if the Salvation Army Community Center was set up as a corporation that is entirely owned and controlled by the Salvation Army?

If I am interpreting Town Counsel's comment properly, he seems to ascribe much importance to the corporate structure. What did Petrini Associates find was the corporate structure of the Framingham Salvation Army Community Center? Is there no distinction between the Salvation Army Community Center in Framingham and the Salvation Army House of Worship in Ft. Meyers, FL?

I also point out that Town Counsel's memo does not present a definition of religious institution. It is very difficult to evaluate, much less be persuaded by Town Counsel's arguments when the central term is not defined.

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

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by the Salvation Army that it has been subjected to unequal treatment of a particular religion by a government entity.

Another unfortunate posture, imho. The very phrasing chosen here presents a jaundiced view of the question posed to Town Counsel. What supports the view that we might propose to treat the Salvation Army differently than any other religious organization?

I take very strong exception to the statement, "The Committee's consideration as to whether it should treat the Salvation Army differently in the study from other more traditional religious organizations..." That is a distortion of what the committee has asked of Town Counsel. The suggestion that we wish to treat the Salvation Army differently than "other more traditional religious organizations" smacks of defamation.

~~Town Counsel has been presented with the question of how shall we deal with the Salvation Army Community Center, or any other religious institution's activities that completely meet our criteria for a social service agency. The committee spent two entire sessions to accept a lengthy and explicit definition of 'social service agency.' The Salvation Army Community Center completely meets that definition. Further, the Salvation Army Community Center files documents that confirm that understanding. Just about every public discussion of social service agencies in Framingham includes the Salvation Army Community Center in the old Gilchrist Building as part of the discussion. When the BoS invited social service agencies to come to a meeting, The Salvation Army sent two high level officials. The fact that the Salvation Army as a faith based provider is free of certain financial reporting obligations is an oddity, a shades of grey matter, that is of no concern to us.~~

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.

How can the committees' inquiries be regarded as "singling out a religion for unfavorable treatment? How can inquiring about activities, of which the Army is certainly and justifiably proud, be regarded as some sort of "unfavorable" treatment.

I bring to your attention the memo which was issued under Town Counsel's name in regard to the legality of the PILOT Committee. The current memo appears to stand in opposition to the basic thrust of Town Counsel's December 12, 2005 memo in support of the legality of the PILOT Committee. If the attention of the committee constitutes "unfavorable treatment," why doesn't any agency, religious or not, have cause for complaint against us? I believe that Town Counsel's February 8, 2006 memo stands in fundamental conflict with his December 12, 2005 memo that supported the legality of the PILOT Committee.

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. A few sentences back, Town Counsel wrote that SIC codes "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." Therefore, why does Town Counsel's last statement imply that the Committee is somehow using the SIC Code beyond its intended use?

The Committee is using the SIC Code to figure out what an organization does for census purposes, and for statistical analysis to prepare an economic study. Guess what? The Framingham Salvation Army Community Center does social service work. That is how they describe themselves. How does also being a church change that?

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. Is this a typo? Did Town Counsel mean to write, "considered solely non-profit social service agency in nature?" Are Petrini Associates thus claiming that an organization cannot have a dual nature? Doesn't every person and organization fall into any number of categories in a census? Why, in this instance, must the Salvation Army be *either/or*, rather than *both* a church and a social service agency?

I, for example am a Jew and an American. While a few confused people might disagree, identifying myself as a Jew does not mean that I am not counted as an American. Being an American does not imply that I am not to be counted as a Jew. It just depends on why you're counting? Now, we are counting social service agencies, and we should count the Salvation Army Community Center. If a future committee ever counts churches, it may count the Salvation Army on its list, too.

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

Indeed the YMCA, the Association of Jewish Family and Children's Agencies, and the Lutheran Services in America are

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just a few of the organizations that receive substantial amounts of government funding every year.

None of these agencies claims to be a church. What does the fact that the AJFCA gets government funding have to do with the question of the relevance of the Federal funding provided to the Salvation Army's Community Center?

Sixty-five percent of Catholic Charities funding comes from government sources.¹ And 100% of that funding is for activities that the government regards as unrelated to the business of being a church, a House of Worship.

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.² The Federal Government has decided that it can treat certain subsidiary church agencies as if they were not churches. One of the conditions is that that subsidiary agency gives up many of the normal protections that a church may claim. For example, such agencies give up the right to set religious standards for both its employees and its clients.

Is the government not declaring that for all intents and purposes, these agencies are not to be considered as religious institutions for the purpose of delivering social services?

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.

I do not find this argument persuasive. What is the significance of pointing out that the religious institutions' exemption from employment laws is not absolute? A House of Worship can refuse to hire me because I am not a Christian. That is a huge exemption from state and federal employment standards. No social service agency can claim that exemption.

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.

I don't understand this sentence. Laurie, can you help me out here?

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.

Once again, I fail to see why our question is rephrased and misinterpreted to be an effort to treat the Salvation Army differently than any other religious institution?

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

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, In what fashion is there any "obvious First Amendment free exercise of religion issues" in play here. Town Counsel presents no supporting arguments to support this conclusion. Is this not an opinion masquerading as an established fact?

How could collecting publicly available data about the Salvation Army be construed to be an obvious First Amendment violation? In what fashion can asking the Salvation Army voluntarily submit to a questionnaire about its activities be construed as a First Amendment violation?

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. RLUIPA establishes that a government cannot

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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.

The PILOT Committee is chartered to gather information and make recommendations. How does that approach anything resembling imposing discriminatory zoning based on the unpopularity of a particular religion.

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,⁴ RLUIPA arguably applies to all states, including Massachusetts.

Again, I fail to see the relevance of this argument.

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.

Again, I fail to see the relevance of this paragraph.

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.⁵

Once again, the committee cannot be said to be seeking to treat the Salvation Army differently than any other religion. The suggested scenario of a lawsuit charging the committee with violating the RLUIPA seems to be beyond far-fetched.

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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,

Such a dire warning requires explicit citations in order to have any credibility.

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).

What is the context of this 1972 citation, or the context of the original 1947 citation?

¹ *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.

² *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>.

³ 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 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).

⁴ 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).

⁵ 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.

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).

What was the 'burden' imposed in this case? How does gathering public data burden the free exercise of religion?

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. **Again, where is the burden, incidental or not?**

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

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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.⁶

Doesn't one need to provide at least one example to give the skeptic some insight into the logic that underlies this opinion? If I cannot imagine even the most unlikely scenario, and you cannot suggest one... Well just how do we proceed?

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).

⁶ 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).

Conclusion:

Is the PILOT Committee a malevolent force which poses a threat to those it looks at?
What could this committee conceivably do that might cause harm?

The committee has made known the precise nature of the data it is collecting. The committee has also made known each question that it has posed to the social service agencies. It's a short list. Which question has the potential to lead to a lawsuit?

Whispering "vermouth" over a glass of gin does not turn it into a martini. Being motivated by the Creator to feed the poor does not turn such a meal into a prayer service. Conversely, no one of sound mind will suggest that a Eucharistic Mass is a free lunch program.

I see no reason why the PILOT Committee cannot be guided by similar clear-headed logic. A daily program to feed the poor daily should be part of our study. An annual free Thanksgiving turkey giveaway is probably of no interest. What about a one-evening-a-week free medical clinic at a synagogue? If we can't settle that question in ten minutes...