MEMORANDUM

TO: City of Portland Zoning Board of Appeals

FROM: Marshall J. Tinkle,
Zachary Heiden,
Paul Aranson,
Counsel for Rabbi Moshe Wilansky

DATE: July 16, 2008

RE: Interpretation Appeal Application filed by Rabbi Moshe Wilansky
101 Craigie Street, Zone R-3 (CBL: 120-B-001)

Rabbi Moshe Wilansky has filed an Interpretation Appeal from the order set forth in the letter from the Zoning Administrator dated May 22, 2008, a copy of which is annexed hereto as Attachment A, in which he was ordered to cease using his residence as a "place of worship." We are seeking to have the order vacated as arbitrary, lacking a sufficient basis in fact and law, contrary to federal law, and unconstitutional.

BACKGROUND

Who is Rabbi Wilansky?

Rabbi Wilansky and his wife Chana have owned their home at 101 Craigie Street since March 1990. It is their only home. They pay property taxes on their home like everybody else. They have not made any structural alterations to the property, which does not stand out in any way from the other houses on the street.

The Wilanskys have resided in Portland for 21 years. They have 13 children, ranging in age from three months to 21 years old.

Rabbi Wilansky is a rabbi in the Chabad Lubavitch movement. Founded in the late eighteenth century, Chabad Lubavitch is one of the largest movements in Hasidic Judaism. Hasidism is a mystical movement within Judaism emphasizing the love of others and love of God. Chabad Lubavitch Jews have maintained their own customized

liturgies and their own modes of dress. Rabbi Wilansky and his household are the only Chabad Lubavitch or Hasidic Jews currently living in Maine.

As a Chabad Lubavitch rabbi, Rabbi Wilansky has a religious duty to engage in outreach activities with other Jews. To that end, he has set up a nonprofit entity, Chabad Lubavitch of Maine.

The Zoning Administrator's Order.

On May 22, 2008, the Zoning Administrator hand-delivered her letter to Rabbi Wilansky. The letter begins by referring to "a long standing issue of your residence at 101 Craigie Street being used as a "place of worship," although Rabbi Wilansky has no recollection of ever discussing this "issue" with Ms. Schmuckal or other City officials. Without making any findings on this "issue," the letter then recites that the property is in the R-3 zone; that under section 14-88 of the Code a "place of worship" is a conditional use in the R-3 zone; that the minimum lot size for a place of worship in that zone is two acres; that his property is 0.187 acres; and that therefore a conditional use appeal would be fruitless. The letter than states:

> You are hereby requested and **ORDERED** to cease using 101 Craigie Street immediately as a place of worship and return the use to exclusively residential.

Basis for the Order.

On May 23, 2008, Rabbi Wilansky, through counsel, requested all documents and other evidence on which she relied in issuing her letter. In response, we received eleven pages of documents (attached hereto as Exhibit B). The first page consists of a phone message to "Joe" from Mrs. Frank Lewis of Craigie Street, stating, "She is tired of Rabbi Wilensky [sic] running religious services and in the summer a day care from his house." This is apparently the only complaint the City has received against Rabbi Wilansky. Rabbi Wilansky generally gets along very well with his neighbors. Alone among the

neighbors, Mrs. Lewis has consistently manifested an irrational animosity toward the Wilanskys. She has demanded that they move out. Because her husband worked for the city for many years, she seems to be able to obtain special treatment.[1] For example, several years ago she got the City to designate the entire frontage of her property as a no-parking zone, though parking is permitted on the rest of the street.

The remaining pages consist of printoffs from the Chabad Lubavitch of Maine website. These printouts consist of announcements of (a) an annual Passover *seder* (meal), (b) children's activities that do not mention or involve "worship,"[2] and (c) a two-hour *shabbat* (Saturday) service. Nothing in these documents signifies that 101 Craigie Street is a "place of worship."[3]

The Order infringes on the Rabbi's exercise of religion.

To understand how the Zoning Administrator's order impedes Rabbi Wilansky's exercise of his religion, it is necessary to grasp some basic points about Jewish religious practice. Religious Jews (like many other people of faith) routinely pray in their homes. The most important prayer service of the week occurs on Saturday morning. That service requires a *minyan*, a quorum of ten (in Orthodox practice, male) adults. The service may be conducted in either a home or synagogue, but there is no synagogue in Maine that uses the Chabad Lubovitch liturgy. Moreover, because Orthodox Jews like Rabbi Wilansky cannot drive on Saturday (the Jewish Sabbath), his prayer options are basically restricted

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[1] Someone had written "Frank Lewis" on her message, in a different hand than the rest of the message.

[2] Notwithstanding Mrs. Lewis' message, Rabbi Wilansky has not been cited for running a "day care," and the Wilanskys do not in fact have a day care facility. This is non-issue.

[3] The web site is, of course, a public relations tool. Some of it is clearly boilerplate and, as such, should not be taken as Rabbi Wilansky's description of the specific operations of Chabad Lutovitch of Maine. For example, the description of the shabbat service is virtually identical to that of the web pages of Chabad Lubavitch of New Hampshire and Chabad Lubavitch of Tennessee, copies of which are annexed hereto as Attachment C.

to his house.[4] Additionally, as noted, Rabbi Wilansky has a religious duty, as a Chabad Lubavitch rabbi, to invite other Jews in to pray with him.

These prayer services do not disturb the peace in any way. They are not noisy or indecorous. They do not create any traffic or parking difficulties, because most attendees walk rather than drive. They do not attract a mob; the goal is to get ten males over the age of twelve, including the Rabbi and his family members. They do not alter the fundamentally residential character of his house or of the neighborhood. Hence, it is hard to see what the City would gain, or what conceivable objective of the zoning ordinance would be advanced, by squelching Rabbi Wilansky's religious practices.

ANALYSIS

1. The property is not a "place of worship" in violation of the zoning ordinance.

The uses permitted in the R-3 zone include, among others, (a) single-family dwellings; (b) planned residential unit developments (PRUDs); (c) "home occupation," *i.e.,* secondary use of a residence for a host of occupations, including rabbis and other clergy, not to mention doctors, lawyers, accountants, architects, artists, authors, musicians, photographers, instructors, hairdressers, therapists, etc.; (d) parks and other recreational spaces; (e) municipal uses, doubtless including assembly halls, meeting places, libraries, and recreation centers; and (f) accessory uses. *See* Code §§14-47, 14-87, 14-410. Conditional uses include, *inter alia,* sheltered care group homes, schools, long-term and extended care facilities, intermittent care facilities, hospitals, daycare facilities, sewer treatment plants, water pumping stations, electric power substations, fraternal organizations and private clubs (defined as "open exclusively to members and to

[4] It is not uncommon for Jews to hold prayer services with a *minyan* in their homes. A substantial percentage of Jewish homes in Portland have probably hosted a *minyan* service. For example, it is customary in all branches of Judaism to hold a home service with a *minyan* at least once a day during *shiva,* the seven-day mourning period after the death of a close relative.

their bona fide guests accompanying them" and formed for various social, recreational, or civic purposes), and "Church or other place of worship." *See* Code §§14-47, 14-88. A "church or place of worship" is subject to a minimum lot requirement of two acres, as are schools, long-term care facilities, and private clubs; however, dwellings, home occupation uses, sheltered care group homes, day care facilities for 12 or fewer children, municipal uses, and sewer treatment plants and the like are subject to a lot size requirement of just 6500 square feet. *See* Code §§14-88(4)(d), 14-90.

"Other place of worship" is not defined in the Code. Because zoning ordinances curtail the uses of property and are in derogation of the common law, the Maine Law Court has repeatedly held that they must be strictly construed and may not be extended by implication. *Pitcher v. Wayne,* 599 A.2d 1155, 1157 (Me. 1991); *Moyer v. Board of Zoning Appeals,* 233 A.2d 311, 316 (Me. 1967). In the absence of specific definitions, words in an ordinance must be given their plain meaning. *City of Portland v. Grace Baptist Church,* 552 A.2d 533, 535 (Me. 1988). "[A]ny ambiguity should be resolved in favor of the property owner." 6 Rohan, *Zoning and Land Use Controls* §36.03[2] (2007). General terms must be given a broad meaning. *Id.*, §36.03[9][a].

Under these standards and viewing the term in context, a fair understanding of "other place of worship" is a building devoted exclusively to congregational religious practice. It is a structure of roughly the same size and layout as an average church. It is tax-exempt. *See* 36 M.R.S.A. §652(1)(G). Like a private club (as defined by the ordinance), it is open to dues-paying members.

The house at 101 Craigie Street satisfies none of these criteria. Rabbi Wilansky has no congregation with a defined membership. He and his wife are the sole members of his organization (Chabad Lubavitch of Maine). No one pays him dues. Moreover, the

City has been collecting taxes on the property for as long as he and his family have been living there.

The house at 101 Craigie Street was built as a residence and continues to have all of the rooms and features of a single-family home. It lacks the elements of a typical church or a similar institution. It has no sanctuary, no vestry, no pulpit, no sacristy, no social hall, no pews. Most significantly, 101 Craigie is in fact the Wilanskys' home. It is where they live, eat, and sleep. Like most people of faith, they also pray there. It is universally recognized that religious ritual is part of the normal and customary use of a residence. As one court proclaimed:

> Use by a family of a home under our customs includes more than simple use of a house and grounds for food and shelter. It also includes its use for private *religious*, educational, cultural and recreational advantages of the family.

Chatham v. Donaldson, 69 N.J. Super. 277, 282, 174 A.2d 213, 216 (1961) (emphasis supplied). This formula has been echoed by courts and commentators across the country. *See, e.g., State v. Owens*, 114 Ariz. 565, 568, 562 P.2d 738 (1977); *Boise City v. Gabica*, 106 Idaho 94, 96, 675 P.2d 354 (1984); *Thomas v. Zoning Board of Adjustment*, 241 S.W. 2d 955, 959 (Tex. App. 1951); *Alta v. Ben Hame Corp.*, 836 P.2d 797 (Utah App. 1992); 2 *Anderson's American Law of Zoning* §9.28 at 197 (4th ed. 1996).

What an occupant of a home can do alone he has a right to do with guests. Just as regularly entertaining guests for recreational or social purposes does not convert home use into a "private club," inviting guests for a weekly prayer service does not turn a home into a "place of worship." Such a practice is at most an accessory use. *See, e.g., In re Scheiber*, 168 Vt. 534, 724 A.2d 475 (1999) (using shooting range for benefit of gun club on residential property was accessory use); *New Orleans v. Estrade*, 8 So. 2d 536 (La. 1942) (gathering friends several times a week for horseshoe games was valid residential

use). Hence, there is no basis for labeling the Wilanskys' residence an unlawful "place of worship."

2. The Order violates federal law and the Wilanskys' constitutional rights.

An ordinance should not be given an interpretation that renders it unconstitutional. *See Town of Baldwin v. Carter*, 2002 ME 52, ¶9, 794 A.2d 62, 66. The Zoning Administrator has interpreted the ordinance in such a manner as to prevent Rabbi Wilansky (or anyone similarly situated) from practicing his religion. As discussed above, the order would preclude the Rabbi from praying with a *minyan*, and hence from carrying out a proper service on the holiest day of the Jewish week. The free exercise of religion is enshrined in both the United States and Maine Constitutions. *See* U.S. Const. amend. I; Me. Const. art. I, §3 (ordaining, among other things, that "no person shall be... restrained in that person's liberty or estate for worshiping God in the manner and season most agreeable to the dictates of that person's own conscience").

To protect that right, Congress has enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA). "In passing RLUIPA, Congress recognized that places of assembly are needed to facilitate religious practice, as well as the possibility that local governments may use zoning regulations to prevent religious groups from using land for such purposes." *Midrash Sephardi Inc. v. Town of Surfside*, 366 F.3d 1214, 1226 (11th Cir. 2004).

RLUIPA sets up a strict scrutiny standard for the implementation of land use regulations affecting religion. *Grace United Methodist Church v. City of Cheyene*, 451 F.3d 643, 661 (10th Cir. 2006). First of all, a land use regulation cannot "substantially burden" "religious exercise" unless the municipality can show that the regulation furthers a compelling governmental interest and is the least restrictive means of furthering that

interest. 42 U.S.C. §2000cc-1(a). Secondly, the statute contains a nondiscrimination provision, prohibiting land use regulations that either disfavor religious uses relative to nonreligious uses or unreasonably exclude religious uses from a particular jurisdiction. *Id.*, §2000cc(b).

As interpreted by the Zoning Administrator, the ordinance would violate both prongs of RLUIPA. First, it substantially burdens the "exercise of religion," which includes "assembling with others for a worship service." *Cutter v. Wilkinson,* 544 U.S. 709, 720, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005); *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). Any pressure that tends to coerce a religious adherent to forego religious precepts amounts to a substantial burden. *See Midrash Sephardi,* 366 F.3d at 1227.

Second, to proscribe a small weekly prayer service in the R-3 zone is patently discriminatory. Among other things, the ordinance allows photographers to regularly take pictures of customers and therapists to regularly conduct group therapy sessions in their homes, so why wouldn't a rabbi be able to have a prayer service? By the same token, any of Rabbi Wilansky's neighbors unquestionably could invite guests to their homes to play games, to enjoy a swimming pool, to have a party, or to watch sports on TV, without changing their homes into a prohibited "private club." *See Scheiber*, 724 A.2d at 478; *Estrade*, 8 So. 2d at 537. The equal-terms section of RLUIPA "is violated whenever religious land uses are treated worse then comparable nonreligious ones, whether or not the discrimination imposes a substantial burden on the religious uses." *Digrugilliers v. Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007). Thus, even if an ordinance ostensibly treats a "place of worship" the same as a secular "club," RLUIPA is violated if a municipality deems religious assemblages to be unlawful but fails to

recognize the same number of nonreligious meetings as a zoning violation. *See Konikov v. Orange County*, 410 F.3d 1317, 1327-29 (11th Cir. 2005) (thrice-weekly services protected under RLUIPA),

Thus, for example, in *Chabad of Nova, Inc. v. Cooper City*, 533 F. Supp. 2d 1220 (S.D. Fla. 2008) (attached), a Chabad Lubavitch organization was granted judgment on the pleadings on its RLUIPA claim, where the land use code prohibited religious assembly in certain zones but allowed day care centers, aerobic studios, art schools and the like. The court held as a matter of law that the latter uses "undoubtedly meet the definition of assemblies." *Id.*, at 1223. Because such assemblies were permitted but religious assemblies were not, the city had violated section (b)(1) of RLUIPA. *Id.*, at 1222-23.

RLUIPA authorizes civil actions against a governmental unit to "obtain appropriate relief," **including monetary damages and reasonable attorney's fees.** *See* 42 U.S.C. §§1988(b), 2000cc-2(a). Punitive damages are also available. *See Agrawal v. Briley*, 2006 U.S. Dist. LEXIS 88697, *55-57 (N.D. Ill. 2006). Similar relief is available under both state and federal civil rights statutes. If the Board chooses to rubber-stamp the Zoning Administrator's unlawful order, Rabbi Wilansky will have no choice but to seek to vindicate his rights under RLUIPA and other civil rights laws.

3. The order exceeds the Zoning Administrator's authority and is unconstitutionally vague.

Nothing in either the City's Land Use Ordinance or Maine statues authorizes the Zoning Administrator to "order" a resident to stop using his residence as a place of worship. Moreover, the order is impermissibly vague. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d

222 (1972); *Veiga v. McGee*, 26 F.3d 1206, 1212 (1st Cir. 1994). "If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Id.* An edict is unconstitutionally vague when it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden... ." *Cobb v. Board of Counseling Professionals Licensure*, 2006 ME 48, ¶26, 896 A.2d 271, 278, quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972).

The order forbids Rabbi Wilansky from using his property as a "place of worship," but it gives no hint as to what such a use would entail. The order does refer to the ordinance, but the ordinance does not define the term. The phrase is obviously being used quite broadly (since it would not apply to Rabbi Wilansky's home at all under a reasonably narrow interpretation), but *how* broadly is anybody's guess. Is he forbidden to pray in his own home? Is he prohibited from giving religious instruction, even to his own children? Is he banned from inviting anyone to his house for any religious purpose? If not, then what religious activities, other than (presumably) Saturday morning services, can he observe with guests, and how many, and when?

Because the order forces people of ordinary intelligence to guess at its meaning, it is unconstitutional. *See Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoe Workers Protected Ass'n*, 320 A.2d 247, 253 (Me. 1974).

CONCLUSION

For all of the foregoing reasons, the order dated May 22, 2008 should be vacated.