

To: Members of the Zoning Board of Appeals

From: Penny St. Louis Littell

Date: August 14, 2008

Re: Wilansky Appeal

Position of City of Portland in Support of Zoning Administrator's Land Use Interpretation of Permissible Land Uses at 101 Craigie Street Portland, Maine.

Facts

The lot identified by the City of Portland ("City") as 101 Craigie Street is located in one of Portland's Residential-3 ("R-3") zones. It measures 0.187 acres in size. On it sits a three bedroom, one bathroom single family house located mid - block and surrounded by other residential houses of modest size. (See Attachment 1: aerial photo) This house is advertised in the community as the "Chabad House" and is lived in by the Wilansky family. The City's tax records indicate Moshe and Chana Wilansky came into ownership of 101 Craigie Street, as joint tenants, on March 7, 1990. The pavement width of Craigie Street is measures twenty nine feet. The dimensional standards for this zone were adopted by the City in 1984, six years before the Wilanskys purchased this property.

Moshe Wilansky is a Rabbi of the Chabad Lubavitch religious movement within the Jewish faith. Chabad Lubavitch of Maine Incorporated, through its Rabbi, has been using 101 Craigie Street as a regular place of worship open to the public. Regular, weekly religious services have been held at 101 Craigie Street for some years by this corporation. These services have attracted around 12 to 15 local worshippers. That number has remained fairly stable over the last couple of years. (See Attachment 2: written and verbal testimony presented to the Portland Planning Board at a public hearing held on July 12, 2005 for the Chabad Pomeroy Street project) Higher numbers of congregants had attended in past years. The Chabad Lubavitch web site, which lists 101

Craigie Street as its address, advertises this location as a place offering regularly scheduled, religious services, on regularly scheduled days of the week, in addition to High Holy Days and other Jewish observances throughout the year. The place of worship is open to the general public for attendance and worship.(See Attachment 3: Internet advertising) Since 1984 the City's Land Use Code has required a two acre minimum lot size for churches and places of worship within R-3 zones.

The City of Portland has received numerous calls over the years relating to the use of 101 Craigie Street for religious services open to the public. The primary complaints have related to parking congestion impacting the neighborhood and occurring before, during, and after religious services and religious activities, an inability of City service trucks (plowing and garbage) to adequately pass, and the intrusion onto neighboring properties by vehicles of those attending the services.

In May 2004 Moshe and Chana Wilansky purchased a 2.018 acre parcel of property located less than one half a mile from 101 Craigie Street.(See Attachment 4) This parcel of land, too, is located in the Residential – 3 zone. This property, on Pomeroy Street, was proposed to be developed (originally by the Wilanskys and later pursued by Chabad Lubavitch of Maine) for use as a residence with an attached synagogue. On June 15, 2004 the Wilanskys conveyed the property to Chabad Lubavitch of Maine, Inc.. This religious organization proceeded with two applications before the City: 1) a Conditional Use approval for a place of worship and 2) a Site Plan approval for a single family house with an attached synagogue.¹

¹ Of note is the fact that at no time during this process did Chabad Lubavitch of Maine, Rabbi Wilansky or his attorney ever deny that it was attempting to relocate its place of worship on Craigie Street to Pomeroy Street or complain that the City's applicable zoning ordinances – the same ordinances now being contested – applied to them or imposed a substantial burden on their religious exercise.

In July 2005 the Portland Planning Board approved the use of the Pomeroy Street property for use as a place of worship by Rabbi Wilansky and Chabad Lubavich of Maine as it admittedly had been operating at Craigie Street. The proposed development met all the conditional use and dimensional requirements contained within the Portland Land Use Code for places of worship in an R-3 zone. (See Attachment 5: Planning Board Approval letter) Wilansky and Chabad Lubavitch never proceeded with construction on Pomeroy Street and the approval for that project expired on July 26, 2007.

The City took no enforcement action to bring the use of 101 Craigie Street as a place of worship into compliance with the Land Use Code between 2004 and 2007 because it was affording the Wilanskys and Chabad Lubavitch of Maine the time needed to obtain approval for development and relocation of its proposed place of worship on property of sufficient size. However, the organization and its Rabbi allowed these approvals to expire. In 2008 the City again began receiving complaints about the parking congestion and safety issues resulting from the continuing use of 101 Craigie Street as a place of worship. On May 22, 2008, the City's Zoning Administrator informed Rabbi Wilansky that the use of the property did not comply with §14-90 of City's Zoning Requirements and the use was required to stop. The Wilanskys now appeal the Zoning Administrator's interpretation and the application of the Ordinance to the religious activities conducted by Chabad Lubavitch of Maine at 101 Craigie Street.

Query 1: Does the Use of 101 Craigie Street Constitute A "Place of Worship?"

Chabad Lubavitch of Maine Incorporated, a religious movement run by Rabbi Moshe Wilansky, operates a place of worship at 101 Craigie Street, Portland, Maine, also known as the Chabad House. This fact is openly admitted by the organization through

various representations and publications. First, the Chabad Lubavitch of Maine web site invites the general public to come and worship at 101 Craigie Street, at regularly scheduled times and on regularly scheduled days of the week, in addition to High Holy days and other occasions.^{2 3} The web site invites member of the general public to enter 101 Craigie Street for purposes of religious worship and related religious activities, although it also conducts some larger sized religious services at the Doubletree Hotel on Congress Street in Portland and located within walking distance of 101 Craigie Street.

Two members of the public have testified before a City Board that they have attended organized worship services at 101 Craigie Street. In July 2005 Mr. Ruben Segal informed the Portland Planning Board that he regularly attended services at 101 Craigie Street:

Ruben Segal, 32 Fall Lane, formerly of Munjoy Hill. Where I grew up my parents had a corner grocery store, what's now called mom and pop store. We had regular customers who came in. We sold them milk, whatever their particular needs were. We never pretended to be a Shaws, or a Hannaford Brothers. We were a mom and pop store. My parents worked hard, long hours every day, they were very much involved in the community, part of the community. My point being, *I go to services almost every Sabbath at Rabbi Wilansky and Chana's*. I can attest that we're talking 10 to 15 people that come on a regular Sabbath. These are people who are running a mom and pop organization. They're not going to pretend to be a big *operation*. They want to do their best. They work really hard, and simply want to continue the work that they're doing.

² 10:00 am – 12:00 pm

Joyful, interactive and educational service that includes Torah reading, topical sermon, followed by a Kiddush luncheon. www.chabadofmaine.com

³ Chabad Lubavitch of Maine invites you to our annual community Passover Seder at the Chabad House 101 Craigie St. Portland, ME 04102. Experience the exodus of Egypt as our ancestors did when they left 3,320 years ago. Saturday Night, April 19, 2008 Sunday Night, April 20 at the Chabad House. Seder begins at 8:30 pm

(emphasis added) Ms. Suzanne Nuroff also testified to her participation in Sabbath services at 101 Craigie Street:

My name is Suzanne Nuroff. ... I'm also a person who goes to the Rabbi and Chana's from time to time, and my kids are friends of their kids, some of their children . . .

I can also attest to the fact that when I picking up a child from a playdate or if we go on a particular Sabbath my husband and I and the kids, it really is a very small number of cars, there's probably more cars on my street on Motley Street than on an average Sabbath at the Rabbi's house.

Furthermore, in advancing the position of Chabad Lubavitch of Maine's site plan for development of a "large house with a small place of worship," proposed in 2005 to have been developed in Portland on a 2.18 acre of property on Pomeroy Street, Marshall Tinkle Esq., attorney for Chabad Lubavitch of Maine and for Rabbi Wilansky, provided testimony as follows:

We're talking about 10 to 15 worshippers on a weekly basis. That's not something that I'm making up. There's a large track record here. Rabbi Wilansky has been in the City for close to 20 years, he has been having services at his current residence on Craigie Street. I've gone to those services, and whenever I've gone, it's been closer to 10 than 15, frankly. But, that is not expected to change for a number of reasons, first what we're talking about is a movement that's a tiny fraction of a tiny fraction of the religious population of Portland.

These representations made clear to the Zoning Administrator that the Chabad House at 101 Craigie Street is being opened to the general public for organized religious services and activities. It is more than simply a prayer group conducted by a private citizen. The Zoning Board of Appeals must consider this evidence and make the determination, on this appeal, whether the use of 101 Craigie Street, by the general public, at regularly schedules dates and time, for the purpose of conducting organized religious services constitutes a place of worship under the City's Land Use Code as determined by Ms. Schmuckal.

Query II: Does the City's Ordinance Allow Places of Worship as a Conditional Use and Can the 101 Craigie Street Property Meet the Dimensional Standards of the R-3 Zone?

a) Places of Worship in R-3 Zones Are Permitted As Conditional Uses

It is important for the Board to understand that the City of Portland does not prohibit churches or places of worship in its R-3 zones. And it is important to remember that this is not a case about trying to prevent the practice of any religion within the City. Nor is this case brought to personally attack Rabbi Wilansky, his family, or the followers of the Chabad Lubavitch movement. In fact, a place of worship (similar to that being conducted at 101 Craigie Street) is a use that is allowed as a Conditional Use in the City's R-3 zones, and at 101 Craigie Street, if reasonable requirements and applicable dimensional standards are met.

b) 101 Craigie Street Does Not Meet the Minimum Lot Size Requirements for Places of Worship in the R-3 Zone.

The specific challenge in this case is whether a required minimum lot size for places of worship of two acres in R-3 zones is permitted under the law. The purpose to be achieved by zoning regulations is generally set forth in Section 14-46 of the Portland Land Use Code.

Sec. 14-46. Purpose.

This article [Zoning] made in accordance with a comprehensive plan, is enacted for the purpose of decreasing congestion in streets; securing safety from fire, panic and other dangers; providing adequate light and air; preventing the over-crowding of land; avoiding undue concentration of population; facilitating the adequate provision of transportation, sewerage, schools, parks and other community facilities and utilities; thus promoting the health, safety, convenience and general welfare of the citizens of the city. This article is made with reasonable consideration, among other things, to the character of each zone and its peculiar suitability for particular uses and with a view to conserving and stabilizing the

value of property and encouraging the most appropriate use of land throughout the community.

The City created the applicable dimensional standards in the R-3 zones in April 1984. This was done after a study which noted institutional uses in residential zones must be balanced with neighborhood interests; small scale institutions, as well as large scale ones can have adverse impacts on neighborhoods; and regulatory distinctions among institutional activities should be based on their physical land use attributes and not on the type, size, tenants or membership of the organization. The dimensional standards applicable to institutional uses in the R-3 zone were designed in recognition of these principles and to fulfill the specific purpose of the R-3. The purpose statement of the R-3 zone (section 14-86) recognizes these zones as "characterized by single-family homes on individual lots and also to provide for planned residential unit developments on substantially sized parcels. Such development [in an R-3 zone] shall respond to the physical qualities of a site and complement the scale, character and style of the surrounding neighborhood."

Not only are churches and places of worship subject to minimum lot size requirements in R-3 zones, but similar dimensional standards are applied to institutional uses choosing to locate in these modest Residential-3 zones. Other institutional uses similarly regulated include fraternal organizations and private clubs, schools, long term care facilities and hospitals. They have the following dimensional requirements:

- (a) *Minimum lot size:*
- ...
- 3. Long-term, extended, or intermediate care facilities: Two (2) acres.
- 4. School: Two (2) acres.
- 5. Church or place of worship: Two (2) acres.
- 6. Private club or fraternal organization: Two (2) acres.

7. Municipal use: Sixty-five hundred (6,500) square feet.
8. Hospital: Ten (10) acres.
9. Planned residential unit development (PRUD): Three (3) acres gross area, as defined in section 14-47 (definitions) of this article, of continuous land.

The reason for minimum lot size requirements is to promote a safe institution that can exist in harmony within the surrounding residential neighborhood. It specifically allows enough space to adequately address the need for on-site parking and to reduce negative impacts to neighboring properties from parking and traffic congestion associated with these institutional uses.⁴

In the instant case, Moshe and Chana Wilansky own 101 Craigie Street, and allow or endorse the use of their property by the Chabad Lubavitch movement for religious services and associated activities. Although that use is allowed in the zone, in order to ensure the safety of the neighborhood, the Rabbi, and the congregants of the Chabad House, the use is governed by a minimum lot size requirement of two acres in the R-3 zone. 101 Craigie Street is only 0.187 acres in size. Chabad Lubavitch could conduct its place of worship at this very site if it could acquire sufficient adjacent properties such the minimum lot size is accrued. However, the current lot size of the property forecloses the ability to provide on-site parking for worshipers and the result is street and traffic congestion which negatively impacts the neighborhood. A place of worship at 101 Craigie Street, as it is currently configured, does not meet the City's zoning requirements.⁵

⁴ Assuming a weekly attendance of fifteen people in fifteen fixed seats, the on site parking requirement, above, would equal an area of 1935 s.f. Dimensions for parking spaces, which allow safe maneuverability are 9 x 19 and would require have a travel width of 24 feet.

⁵ Another alternative, and one the City fully permitted in 2005, is the relocation of the place of worship to the site on Pomeroy Street, a site presently vacant and owned by Chabad Lubvitch of Maine, Inc.

Query 3: Does the City's Minimum Lot Size Requirement for Places of Worship in an R-3 Zone Impose A Substantial Burden on the Exercise of Religion by Chabad Lubavitch and Its Followers That Is Not Offset by A Compelling Governmental Interest in Safety as Permitted by the Federal Religious Land Use and Institutionalized Persons Act (42 USC 2000 cc)?

The federal Religious Land Use and Institutionalized Persons Act ("RLUIPA") does not insulate religious organizations from all zoning regulations. RLUIPA also does not confer any "privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment." Washington v. Klem, 497 F.3d 272(3rd Cir. 2007) Federal Courts across the country, asked to interpret the scope and application of RLUIPA as related to local regulation, have found reasonable regulations to be permitted at the local level. Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846 (7th Cir. 2007) What RLUIPA does not allow is the discriminatory application of land use restrictions on the exercise of religion. And this is a good thing. The City of Portland agrees with the intent behind RLUIPA as it applies to land use regulation and believes that its local Land Use Code complies with both the intent and the language of this law.

The language of 42 USC 2000cc, known as RLUIPA, supports the City's R-3 minimum lot size requirement. That law states:

§ 2000cc. Protection of land use as religious exercise

(a) Substantial burdens.

(1) General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application. This subsection applies in any case in which--

...

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion.

(1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits. No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

The City concedes that under RLUIPA the activities conducted by Chabad Lubavitch at 101 Craigie Street, as advertised by it on its web site and as described at various times by its representatives, constitutes the exercise of religion. What this Board must decide is 1) whether this regulation imposes a substantial burden on the Chabad Lubavitch of Maine religious organization; and if so, 2) whether the City's minimum lot size requirement of two acres is both in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

a) Has the Appellant Met its Burden of Proving the City's Minimum Lot Size Requirement Imposes a Substantial Burden on its Exercise of Religion?

In determining the existence of a "substantial burden" on the exercise of religion by the City's two acre minimum land requirement, this Board must find 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available versus abandoning one of the precepts of his religion in

order to receive a benefit; or 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs. For the following reasons the City does not believe Chabad Lubavitch of Maine Inc. or Rabbi Wilansky can carry this burden.

Neither the residents of 101 Craigie Street nor congregants of Chabad Lubavitch are prohibited from practicing their religion as a result of the City's two acres minimum lot size. The lot size requirement does not require the followers to abandon any tenants of their Jewish faith. There is no specific requirement of the Lubavitch movement that worship services, open to the general public, be held in a residential home. Indeed, this organization has used alternative, appropriately sized venues for some of its worship services. The Double Tree Hotel, located less than a mile away from 101 Craigie Street, has been used for worship services. This location allows the Rabbi, his family, and other congregants who may walk to Craigie Street, to walk to this place.

Further, alternative and suitable locations in the City are available to this congregation. One alternative location is even presently owned by Chabad Lubavitch of Maine, and was permitted by the City in 2005 as an approved location for a place of worship

Finally, this organization could remain at its current location if it could acquire enough property to meet the two acre requirement.

In sum, nothing presented by the Appellant has established a burden, let alone, a substantial burden of their religious exercise.

b) The City Has a Compelling Governmental Interest of Ensuring the Safety of the Residential Components of the R-3 Zones.

If the Board determines the Appellant has established the City's two acre lot size requirement imposes a substantial burden on their exercise of religion, the Board must determine if there is a compelling governmental interest to be achieved by the regulation and if the regulation is the least restrictive means of achieving the goal. The City has the burden on both these issues.

1. Safety is the Compelling Interest

The R-3 zone is primarily residential in nature. Children are out and about playing in yards, sidewalks and even the streets. They wait for the school bus in the morning and get off again in the afternoon. People walk their pets and visit neighbors. The City provides public services, plowing the street and picking up trash. Fire trucks require clear access over the roadways. These are all uses generally expected within a moderate residential zone. Introduce an influx of vehicles associated with a church or place of worship, where the traffic is concentrated during worship hours and significant religious holidays, and associated religious activities are open to the general public who may or may not be familiar with the residential character of the area, and safety becomes of paramount importance. Preserving the safety of those living in an around the neighborhood is a compelling City interest that cannot be minimized. Increased on-street parking from such uses creates diminished site lines, affecting people who need to enter or exit their driveways. It creates diminished road width, especially in winter months, with cars parked along the street, which curtail the ability of large public service trucks and school buses to safely traverse the roadways. These safety issues create a compelling City interest in ensuring traffic congestion is minimized and safe travel is maximized for those living in residential areas where safety is already of concern. Places of worship

should be sensitive to this interest and locate vehicles on site to avoid the public safety issues described above. Chabad Lubavitch of Maine cannot argue that the safety of residents in the Craigie Street neighborhood is not a compelling City interest. The Board should determine that ensuring the public safety and welfare of those in R-3 zones is a compelling City interest.

2. Least Restrictive Means of Ensuring Safety

A two acre minimum lot size for a place of worship is the least restrictive means of regulating the impacts of institutional uses that choose to locate in the City's R-3 zones. Congregations typically grow with time. Regulations are not designed to address any particular church or place of worship.⁶ To the contrary, one must impose the least restrictive regulation necessary to balance the impacts of the use with the residential uses in the existing neighborhood. The minimum lot size considers not only the size of the structure housing the place of worship, but also any accessory uses proposed by the organization, as well as sufficient space for off street parking. It also factors in other impacts as well, like adequate space for landscaped buffers, adequate distance for increased noise to dissipate, etc. In this case, Chabad Lubavitch/Rabbi Wilansky represents that fifteen persons regularly attend the Sabbath services held on Saturday mornings. His proposal to the Planning Board in 2005 articulated that "the synagogue is expected to provide accommodations for religious services with average attendances of approximately thirty persons and occasional functions required to accommodate larger groups." At 101 Craigie Street, based on fifteen worshipers each week, five parking spaces are needed on site. If the congregation expanded to thirty fixed seats, ten spaces

⁶ Clearly that would violate RLUIPA.

would be needed (See Attachment 6 statement of future goal objectives). Moreover, attendance at the Chabad Lubavitch services at DoubleTree hotel are significant in size.

All this to say, that a two acres lot is the minimum required to provide the accommodations necessary to provide for the activities and regular worship services open to one and all.

Finally, it is significant to note that the City did not take a drastic measure of either prohibiting houses of worship altogether in R-3 zones or creating a multitude of onerous zoning regulations conditions to control institutional uses in this zone. Instead, they evaluated impacts generated by churches and places of worship, and adopted a minimum lot size requirement which addressed its compelling need for safety in the zone. This rational approach is the least restrictive means to ensure the safety of all those living in or worshipping in an R-3 zone.

Conclusion

Based upon the evidence and arguments presented, and under the applicable laws, the Zoning Board of Appeals should find as follows:

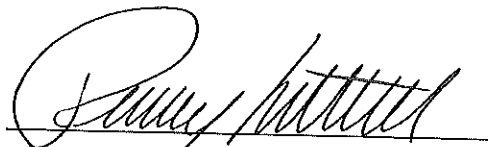
- The regularly scheduled, advertised and organized religious worship activities, open to the general public, occurring at 101 Craigie Street by the Chabad Lubavitch of Maine organization, and run by Rabbi Moshe Wilansky, constitute the operation of a place of worship.
- A place of worship is allowed in the R-3 zone as a conditional use.
- The minimum lot size requirement in the R-3 zone for a place of worship is two acres.

- 101 Craigie Street, being .187 acres in size, does not meet the dimensional requirements of Portland Land Use Code §14-88.
- Rabbi Wilansky was ordered, under the authority vested in the Zoning Administrator to enforce the zoning laws of the City, to discontinue the operation of the place of worship at 101 Craigie Street.
- The Appellant has not established a substantial burden is imposed on their exercise of religion by the imposition of a two acre minimum lot size requirement for a place of worship because:
 - no tenants of the religious practice of the Chabad Lubavitch movement are being restricted
 - other viable alternatives exist for the congregants and leader of this movement, including 1) the ability to use alternative and closely located places of assembly such as the Double Tree Hotel 2) the permitting and construction of a place of worship on the Chabad Lubavitch property on Pomeroy Street, located less than ½ mile from the Wilansky's Craigie Street property is available, and the ability to acquire enough land area adjacent to 101 Craigie Street to maintain a place of worship at 101 Craigie Street.

[As a result of these findings there is no need for the Board to consider the interest served by the regulations challenged here. However, should the Board determine the City's dimensional requirement imposes a substantial burden on the Chabad Lubavitch's exercise of religion, the following findings are appropriate.]

- The City's Land Use Ordinance is legal, appropriate and in conformance with the federal Religious Land Use and Institutionalized Person Act, for the following reasons:
- The City has a compelling governmental interest in ensuring the safety of the R-3 zone by decreasing congestion in streets; securing safety from fire, panic and other dangers; providing adequate light and air; preventing the over-crowding of land; avoiding undue concentration of population; facilitating the adequate provision of transportation.
- The two acre minimum lot size requirement achieves that interest by allowing land area to accommodate off street parking, thereby allowing adequate site distances for those living on the street to enter and leave their property; for public service vehicles, including snow plows, fire trucks, trash trucks and school buses to use the roadway; and to allow children playing to enjoy relative safety.
- The two acre minimum is the least restrictive means of regulating the institutional use of a place of worship to ensure the city's compelling interest is achieved.

Dated this 14th day of August.



Penny St. Louis Littell
Director of Planning and Urban Development
City of Portland