

**CITY OF PORTLAND
BOARD OF APPEALS**

Findings of Fact, Legal Conclusions and Decision

Appellant: Rabbi Moshe Wilansky
101 Craigie Street

Type of Appeal: Appeal of order of Zoning Administrator Marge Schmuckal
Pursuant to Code of Ordinances Sec. 14-471(a)

Date of Hearing: August 21, 2008

Board members: Peter Coyne
Jill Hunter, Secretary
Deborah Rutter
Philip Saucier - absent
Gordon Smith, Acting Chair
William Getz

PROCEDURAL BACKGROUND

Rabbi Moshe and Chana Wilansky ("Wilansky") are the owners of 101 Craigie Street, Portland, Maine. On May 22, 2008, City of Portland Zoning Administrator Marge Schmuckal sent a letter to the Wilanskys ordering that they cease using 101 Craigie Street as a place of worship. Wilansky filed an appeal of the Zoning Administrator's order on June 19, 2008.

JURISDICTION

The Board of Appeals has jurisdiction over this appeal under 30-A M.R.S.A. §4353 and Portland Zoning Ordinance Sec. 14-471(a).

ISSUES

Three issues are before the Board:

Issue # 1: "Does the use of 101 Craigie Street make the property a 'place of worship' under the City's zoning ordinance?"

Issue #2: "If use of 101 Craigie Street is a 'place of worship' in violation of the zoning ordinance, is enforcement affected or precluded by the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) or the Maine or U.S. Constitution?"

Issue # 3: "If use of 101 Craigie Street does violate the zoning ordinance and enforcement is not precluded, is the letter from Marge Schmuckal, Zoning Administrator, dated May 22, 2008, legally sufficient, i.e. does it inform Rabbi Wilansky with sufficient specificity what activities are prohibited at the property?"

WRITTEN SUBMISSIONS TO THE BOARD BEFORE THE HEARING

Wilansky submitted the following document to the Board before the hearing:

1. Memorandum dated July 16, 2008 from Marshall J. Tinkle, Zachary Heiden, and Paul Aranson as counsel. The memorandum is ten (10) pages in length and includes the following attachments:
 - A. Letter from Marge Schmuckal dated May 22, 2008 (1 page)
 - B. Phone message slip and handwritten notes regarding phone call May 6 (1 page)
 - C. Printout from Chabad of Maine website dated 5/7/08 regarding Passover, April 20-27, 2008 (2 pages)
 - D. Printout from Chabad of Maine website dated 4/25/08 regarding dates of Jewish Kids Club (1 page)
 - E. Printout from Chabad of Maine website dated 4/25/08 titled "Welcome to our Shul" (2 pages)
 - F. Printout from Chabad of Maine website dated 5/7/08 regarding Camp Gan Israel (1 page)
 - G. Printout from Chabad of Maine website dated 4/25/08 captioned "Shabbat Services" (1 page)
 - H. Printout from Chabad of Maine website dated 4/25/08 captioned "Centers" (1 page)
 - I. Printout from Chabad of Maine website dated 4/25/08 regarding the Jewish Kids Club (2 pages)
 - J. Printout from Chabad of New Hampshire website (3 pages)
 - K. Printout from Chabad Lubavitch of Tennessee website (3 pages)
 - L. List of license plates of cars outside 101 Craigie Street dated June 28, 2008 and July 5, 2008 (2 pages)
 - M. Maine Registrations records of two cars (2 pages)
 - N. Handwritten notes of license plate numbers (1 page)
 - O. Printout from Chabad of Maine website date unclear captioned "Parsha Class" with handwritten notes (1 page)

The City submitted the following document to the Board before the hearing:

1. Memorandum dated August 14, 2008 from Portland Director of Planning and Urban Development Penny St. Louis Littell. The memorandum is sixteen (16) pages in length and includes the following attachments:
 - A. Air photo of Craigie Street (1 page)

- B. Partial transcription of Planning Board Meeting, July 12, 2005 (4 pages)
- C. Memorandum dated January 12, 2005 from the Portland Department of Planning and Development, Planning Division, from Ethan Boxer-Macomber to the Planning Board re: Wilansky Residence/Synagogue Site Plan and Conditional Use Permit Application, with attachments (9 pages)
- D. Letter dated September 30, 2004 from Ethan Boxer-Macomber, Portland Planner, to Moshe and Chana Wilansky regarding conditional use application (3 pages)
- E. Email dated 9/27/04 from Marge Schmuckal to Ethan Boxer-Macomber subject line "Pomeroy Street Place of Worship" (1 page)
- F. Document dated November 16, 2004 from Marshall J. Tinkle, Counsel for Chabad Lubavitch of Maine captioned "Conditional Use Narrative" (2 pages)
- G. Document dated December 2004 titled "Stormwater Management Report for Chabad Lubobitch [sic] of Maine Inc" prepared by BH2M Engineers (6 pages)
- H. Printout from Chabad of Maine website date unclear captioned "Welcome to Our Shul" (2 pages)
- I. Printout from Chabad of Maine website undated captioned "Celebrate Freedom, Passover April 20-27, 2008" (2 pages)
- J. Aerial photo showing distance from Craigie Street to Pomeroy Street dated August 2008 (1 page)
- K. Letter dated August 8, 2005 on City of Portland Planning Board letterhead to Moshe and Chana Wilansky regarding Wilansky residence/synagogue, incomplete document, pages 1 and 3 of 4-page letter submitted
- L. Document captioned "Written Statement of Building Description" from Mark J. Burnes, AIA of Foreside Architects, LLC regarding Chabad House showing fax date of July 13, 2004 to Tompkins, Clough, Hirshon & Langer (1 page)

PREHEARING PROCEDURAL MATTERS

The following disclosures were made regarding any conflicts or ex parte communications of Board members:

None

Mary Kahl, Counsel for the Board, provided a verbal overview to the Board regarding the issues before the Board and the Board's procedure for the hearing. Counsel provided the Board members with a 1-page outline of the issues and process. Issues were clarified among counsel for the Board and the parties by email before the hearing. A 4-page document regarding procedure and issues was emailed to the parties by counsel for the Board on Tuesday, August 19.

Penny Littell asked the Board to consider taking Issue #3 first.

Marshall Tinkle said his client wanted a decision on the first issue.

William Getz stated he did not object to taking Issue #3 first.

Acting Chair Gordon Smith said deciding Issue #3 first was okay with him if it was okay with the parties. He said the Board would proceed in the order of the issues.

HEARING WITNESSES AND SUBMISSIONS BY PARTIES

1. Wilansky presented the following witnesses and submitted the following documents/exhibits:

A. Witnesses/Statement of Counsel

Marshall Tinkle, Zachary Heiden and Paul Aranson were counsel for Rabbi Wilansky.

Marshall Tinkle provided the following information:

Rabbi Wilansky is a rabbi in the Chabah Lubovitch movement, which is a form of Hasidic Judaism. Rabbi Wilansky sees it as his religious mission to spread the word of Chabad Lubovitch.

Rabbi Wilansky resides at 101 Craigie Street, which is the only building he owns. He and his wife and thirteen children live there. They also pray there.

One day a week, Rabbi Wilansky prays with a minyan, which is a group of at least ten male adults (thirteen years of age or older). A minyan is required for a proper Saturday prayer.

The prayer is a family religious observance. His wife is preparing the kiddush; the children are present.

There are 4 - 6 cars during the prayer service, because most of the attendees walk; Orthodox Jews do not drive on the Sabbath.

The only advertisement for the prayer services is on the organization's web page.

The house is physically like any other house on the street.

Services are peaceful and quiet. People who come to pray do not pay dues or otherwise pay. Rabbi Wilansky pays property taxes to the City.

Only one neighbor has a problem.

Marge Schmuckal's letter was the first knowledge Rabbi Wilansky had that there was an issue with religious services in his home.

Rabbi Harry Sky testified as follows:

Rabbi Sky was the rabbi at Temple Beth El for 32 years; he is now its Rabbi Emeritus.

Rabbi Wilansky and Chabad Lubovitch speak to the hearts of people. Part of the belief is that the house is open on all four sides for people to come. A community needs such a beacon. A gathering in the home is especially spiritual.

Rabbi Carolyn Braun testified as follows:

Rabbi Braun is the rabbi at Temple Beth El.

She has prayed in City Council Chambers, but she doesn't believe it is a "place of worship."

Rabbi Wilansky's home is not a synagogue. A lot of Jewish rituals occur in the home; it is a home-based religion. Examples of religious rituals which occur in the home include sitting shivah and observing holidays.

There are no dues at Rabbi Wilansky's.

David Lourie testified as follows:

He is the former Corporation Counsel for the City.

He drafted the ordinance provision on institutional uses as conditional uses in the R-3 Zone. The intent was to regulate those coming forward with applications, not individual residents.

A structure can only have one principle use. The principle use as a residence does not change because one day a week there's a prayer meeting. This is an accessory use.

Gordon Smith asked in what capacity Mr. Lourie was testifying.

David Lourie answered that he is a member of the Maine Civil Liberties Union.

Marshall Tinkle added that the Saturday prayer meeting is 10:00 a.m. – 12:00 noon.

William Getz asked if any dues or tithing was involved, or if there were donations.

Marshall Tinkle answered that some donations are made through the website, but no dues or payments are required.

Jill Hunter asked about how the summer camp worked.

Marshall Tinkle answered that the summer camp is a national program but involves only local activities, it is not a real camp in the sense of having land or a physical facility.

B: Documents/Exhibits

1. 36 pages of documents were provided to Board counsel in advance of the meeting and the Board at the meeting. The documents in this packet are:
 - a. Undated letter to the Portland City Counsel [sic] from Rev. Frederick Lipp (1 page)
 - b. Email dated August 19, 2008 from Wells Staley-Mays to Marshall J. Tinkle (2 pages)
 - c. Email dated August 19, 2008 from Natan Kahn to Rabbi Moshe and Chana Wilansky (1 page)
 - d. Letter dated August 16, 2008 from Selma Turnipseed to Marge Schmuckal (1 page)
 - e. Statement of William Weiner dated August 17, 2008 (1 page)
 - f. Letter dated August 14, 2008 from Richard Buckberg to the Board of Appeals (2 pages)
 - g. Undated letter from Phyllis Leeke to the City Council, Zoning Board of Appeals and the Forecaster (2 pages)
 - h. Copy of a printed letter from an unspecified newspaper written by Joyce Woodbury (1 page)
 - i. Letter dated August 4, 2008 to Members of the Zoning Board of Appeals from Jody Sataloff (1 page)
 - j. Letter dated August 19, 2008 to Rabbi Wilansky from Diane Blanchard (2 pages)
 - k. Letter dated August 16, 2008 to "Rabbi" from Betsy Parsons (1 page)
 - l. Letter dated August 19, 2008 from Michael Mills to Rabbi Wilansky (1 page)
 - m. Letter dated August 19, 2008 from Thomas Hall (feedback on chabadofmaine.com) (1 page)
 - n. Letter dated August 19, 2008 from Ron Brown (feedback chabadofmaine.com) (1 page)

- o. Undated letter from Governor Angus S. King, Jr. to Rabbi Moshe and Chana Wilansky regarding the 10th Anniversary of Chabad-House Lubavitch of Maine (1 page)
- p. Undated letter from President Bill Clinton congratulating Chabad House – Lubovitch of Maine on its 10th Anniversary, with attached photo of President Clinton and Rabbi Wilansky (2 pages)
- q. Undated letter from Senator Susan M. Collins regarding the 10th Anniversary Celebration of Chabad-House Lubavitch of Maine (1 page)
- r. Letter dated Sept. 23, 1997 from Senator Olympia J. Snowe to "Friends" regarding the 10th Anniversary Celebration of Chabad-House Lubavitch of Maine (1 page)
- s. Letters from Rep. John E. Baldacci to "Friends" and Rep. Tom Allen to Rabbi Wilansky regarding the 10th Anniversary Celebration of Chabad-House Lubavitch of Maine (1 page)
- t. Copy of P. 118 of an unspecified telephone directory listing churches (1 page)
- u. Copy of P. 681 of an unspecified telephone directory listing synagogues (1 page)
- v. Copy of unspecified newspaper listing of churches (1 page)
- w. Copy of 2009 City of Portland property tax bill for 101 Craigie Street (1 page)
- x. Copy of 2008 City of Portland property tax bill for 101 Craigie Street (1 page)
- y. Copy of a document captioned Chapter Three, Davening (2 pages)
- z. Copy of a cover letter dated August 20, 2008 from Marshall J. Tinkle to David Dorr, Board Chair, referencing 11 copies of a letter from Joseph L. Bornstein (1 page)
- aa. Copy of a letter dated August 20, 2008 from Joseph L. Bornstein to the Zoning Board of Appeals (2 pages)
- bb. "Community Voices" Article published in the Portland Press Herald August 14, 2008, by Akiva Herzfeld (2 pages)

2. The City presented the following witnesses and submitted the following documents/exhibits:

A. Witnesses/Statement of Counsel

Penny St. Louis Littell was counsel for the City.

Penny Littell provided the following information:

Zoning is a tool that attempts to balance uses in a city. Zoning sets forth rules that individuals and organizations must follow. It must be enforced for the benefit of all.

The issue for the Building Authority in enforcement was whether the use at 101 Craigie Street met the zoning regulations as written. There were two questions for the City: 1) is the use at 101 Craigie Street a "place of worship"? and 2) if so, does 101 Craigie Street meet the 2-acre requirement for places of worship?

Marge Schmuckal testified as follows:

In 1982-83 planning staff and the planning board did research on institutional uses in residential zones. In 1984 the provision regarding conditional uses in the R-3 Residential Zone was enacted.

There is a history of complaints about 101 Craigie Street. They have been tracked by computer since 2000. Not all complaints have come from the same person. Some people do not want to leave their names. Not all of the Wilanskys' neighbors complained.

In July 2004 Rabbi Wilansky and Chabad Lubovitch submitted a site plan application to build a new single family dwelling and place of worship on a lot on Pomeroy Street – two principle uses on the lot. The application was accepted by the Planning Board. There was no argument by Rabbi Wilansky or counsel that the R-3 Zone regulations did not apply or that they did not need to go through the conditional use process.

Ms. Schmuckal put in writing that the proposal for Pomeroy Street was in conformity with the R-3 Zone requirements. It met the 2-acre requirement.

During the approval process, there were several meetings with the City and the Rabbi.

Ms. Schmuckal is not treating the use at 101 Craigie Street any differently than the proposed use at Pomeroy Street.

In 2005 the Planning Board approved both the conditional use and site plan applications for Pomeroy Street. At the Planning Board meeting, there was testimony as to the use at 101 Craigie Street.

Factors that persuaded her that 101 Craigie Street was a "place of worship" included:

- the Chabad Lubovitch of Maine, Inc. website provides 101 Craigie Street as its corporate address
- the extent and nature of the activities listed for Chabad Lubovitch on its web site
- the website states that the general public is invited to religious services at 101 Craigie Street
- there are regularly scheduled meetings

- there is a mission of outreach
- for children's activities, 101 Craigie Street is the address where children are dropped off
- Chabad Lubovitch is a recognized segment of the Jewish faith
- Rabbi Wilansky is executive director of Chabad Lubovitch of Maine, Inc.

Ms. Schmuckal's opinion is that the organization is conducting services at 101 Craigie Street.

The Planning Board approval for Pomeroy Street lapsed on July 26, 2007 because construction had not commenced.

The lot at 101 Craigie Street is 0.187 acre; 2 acres is required for a place of worship in the R-3 Zone.

The Planning Board has already made the determination that this is a "place of worship," whether at 101 Craigie Street or Pomeroy Street. Ms. Schmuckal's determination agrees with the Planning Board determination.

Chabad Lubovitch of Maine, Inc. owns the Pomeroy Street property. The Chabad Lubovitch place of worship would be permitted as a conditional use at the Pomeroy Street property.

Testimony in response to cross examination by Paul Aranson:

Ms. Schmuckal has worked for the City for 35 years.

She was not directly involved in ordinance drafting. She interprets the ordinance, has been doing interpretation for 13 years.

She has had an issue regarding a "place of worship" in another context, but not in a home before.

"Place of worship" is not defined in the ordinance.

Ms. Schmuckal does not know how many homes have prayer in the home, and is not trying to restrict prayer in the home. She defines worship as people getting together for religious activities.

She did not interview Rabbi Wilansky as to activities at his summer camp and what the religious component was. Religious organizations do not always just worship, they also do other activities. She looks at the whole to make a determination.

The testimony for the Pomeroy Street application stated what activities are occurring at 101 Craigie Street.

She has not sent any other enforcement order regarding a place of worship in a residence.

Both religious services and religious outreach are part of being a place of worship.

Rabbi Wilansky never applied for a conditional use approval for 101 Craigie Street.

She had nothing to do with putting "No parking" signs in front of Mrs. Lewis' house and did not know Mr. Lewis.

Get-togethers and parties are permitted in the home.

Testimony in response to cross examination by Zachary Heiden:

A poker game or knitting group would not be a "place of worship" because it is not religious. An Elks Club would also be an institution and a conditional use in the R-3 Zone. A long-term care facility would also be a conditional use and requires a larger lot in the R-3 Zone.

The determination of "place of worship" is based on use, not the number of people.

She did not analyze this case any differently from any other use issue.

The Chabad Lubovitch website ad regarding summer camp was a fact she considered in her determination. The address given is 101 Craigie Street. She felt the ad was sufficient to inform her and did not talk to parents.

Testimony in response to cross examination by Paul Aranson:

Ms. Schmuckal does not agree with David Lourie that a property can have only one principle use.

In response to questions from Jill Hunter, Ms. Schmuckal testified that she had run the enforcement letter by Corporation Counsel before serving it. It was served by hand delivery.

She went by 101 Craigie Street on some occasions to see how many cars were there. On Saturday morning there were approximately 8 cars. She also visited a couple of evenings. She did not visit during summer camp.

In response to questions from Gordon Smith, Marshall Tinkle stated that services on High Holy days are at the Double Tree Hotel. Services are generally 10 – 15 people, with 4 – 6 cars. Rabbi Wilansky is the organization, Chabad Lubovitch.

William Getz asked about the regularly advertised events on the website that are open to the general public rather than individual invitees. He asked if use of the building is open to the public.

Marshall Tinkle answered that the fact that activities are on the website doesn't mean they are actually happening. Actual attendance is slight, someone must express interest and be invited in.

Jill Hunter asked if there was a reason the Pomeroy Street property was not developed.

Marshall Tinkle answered that the Rabbi dreamed of a bigger house and while he was at it having a real synagogue. Rabbi Wilansky did not go forward primarily for financial reasons.

Jill Hunter asked about principle uses and accessory uses.

Penny Littell answered that ordinance section 14-04 contains provisions regarding accessory uses.

Marge Schmuckal answered that in addition to section 14-04, accessory uses are defined in section 14-47, which also includes the definition of "home occupation." Ordinance section 14-410 also has criteria for home occupations, including the office of a minister, rabbi or priest.

Gordon Smith stated that just because you have a website and organization, it doesn't mean anything is going on other than one person in front of a computer.

Penny Littell said you need to look at the whole. This is an organization that invites the general public to come to 101 Craigie Street. It also offers regularly scheduled events. The totality of circumstances led to the determination that this is a "place of worship."

Marshall Tinkle stated that Rabbi Wilansky handles some of the organization's correspondence from a different site.

B: Documents/Exhibits

1. Complete copy of letter dated August 8, 2005 on City of Portland Planning Board letterhead to Moshe and Chana Wilansky regarding Wilansky residence/synagogue (4 pages)
2. Packet of printouts from Chabad of Maine website dated August 20, 2008; 10 pages, including The Jewish Kids Club, the Jewish Women's Circle, Shavuot Ice Cream Party and Hotels near the Chabad House.

3. Cover letter to Marshall Tinkle from Penny Littell dated August 18, 2008, with 5 pages of attachments showing computer printouts of complaints.
4. Packet of 4 documents including two memos from Marge Schmuckal to Ethan Boxer-Macomber dated 7/8/05 and 9/1/04, a letter from Chabad Lubovitch of Maine to the Portland Planning Board dated July 19, 2005, and a letter dated June 6, 2006 to the Portland Dept. of Planning and Development from Marshall Tinkle.

Opportunity for rebuttal was provided to both parties during the presentation of the cases.

PUBLIC HEARING

The following members of the public spoke:

1. Robert Hains: Penny Littell used to be a City attorney. Rabbis have many different duties and activities. There is no standard test to become a rabbi. Jewish life revolves around home, family, and guests. On El Al flights, ten or more men will gather to pray. Is this a "place of worship"? In the Jewish religion, anyone can conduct a prayer. There is no comparison between Rabbi Wilansky's prayer sessions and use of 101 Craigie Street and the Elks Club.
2. Imam Dawud Ummad: The Muslim community practices religion in the same way. We pray five times a day and invite others to join us. Other religions also have similar religious practices. Portland is a dangerous city for muslims and other minority religions if the City takes actions like this enforcement action against Rabbi Wilansky.
3. Robert Aranson: Rabbi Wilansky's house is not a "place of worship" in the sense of a church. There are no weddings, confirmations, or Sunday school. I attend minyans at 101 Craigie Street. There are usually no more than 15 people or the number of cars Marshall Tinkle mentioned. Growing up Jewish in Portland was not easy; when I returned 20 years later it has changed and is greater understanding. Home is *the* place to celebrate Passover.
4. Father Richard Senghas: Presented a message from Bishop of Portland Richard J. Malone. Catholic and other church groups often meet in private homes. These gatherings may create parking issues, but so do birthday parties and Superbowl games. If parking is the problem, seek a parking solution. The answer is not to revoke the Rabbi's right to gather in prayer.

On his own behalf, Father Senghas added that for the first 300 years of Christianity, prayer was in homes. Are we going to deny this to Jews?
5. Ralph Johnson: I am a neighbor of Rabbi Wilansky's. For 11 years, I've seen the parking situation at 101 Craigie Street for different programs. I have not

seen a problem. There is a very small increase in people at the house during services. They have never blocked my driveway or interfered with access. There are a lot of people when there's a birthday party for one of the kids. Most religious activities are in the house – the kid's birthday party is often in the yard.

6. Anne Underwood: For people of faith, their home is always a place of worship. But for Gentiles, this is different from the Jewish practice. Educating children, committee meetings, doing good works are also things Gentiles think of when they think "place of worship."
7. Nancy Akers: Religious freedom in a person's home is a right. American home life includes religion; religious practice in a private residence does not make it a "place of worship."
8. Kathie Turnipseed: I live diagonally across from 101 Craigie Street. Maybe 5 or 6 cars are there when there's an activity at 101 Craigie Street. The real parking problem is at the other end of Craigie near Congress Street; there's always a double line of cars. I work ten hours a week, so I know what's going on in the neighborhood. The only way to know that there are other people at 101 Craigie is there are a few cars. I was unaware of the summer camp. Any restrictions to the Rabbi's activities would be unfair.
9. Mike Almeda: I come from a military family. This country is built on the constitution and the Judeo-Christian ethic. This country was built on religious freedom.
10. Ben Marcus: I am the Chair of the Community Relations Committee of the Jewish Community Alliance. The ordinance provision is anti-religious. It's a question of degree. The activity at the Rabbi's house is de minimis. This is not a case of enforcing a rule even when unpopular.
11. Allan Labos: I am one of the 10 – 15 people who attend prayers at 101 Craigie Street. It's a bunch of friends getting together. It's not a membership. It's how religion used to be practiced in this country. I've lived in Portland 20 years, and it took me 18 to find Rabbi Wilansky. If I see cars parked on Craigie Street I will park at Brighton Medical Center and walk. It's a regular house.
12. Jolene Michaud: I don't want the zoning law to stay as it is. I have had my pastor and friends to my home every Wednesday for 25 years, between 2 and 20 people. I hope I never have to seek permission. Marge Schmuckal did not ask Rabbi Wilansky for information as to what activities were occurring. Will Rabbi Wilansky get his tax money back if it's a place of worship?
13. Lindsey Thompson-Rowell: It disturbs me that Rabbi Wilansky's use of the internet to reach out was interpreted as evidence of a "place of worship." If you're a small religious group, the internet is how you reach out. I wouldn't be able to find others to worship with without using the internet. Internet information can be misleading as to what's actually going on.

14. Perla Ega: The internet statement about being open to the public doesn't mean the general public can come. It only means Jewish people are invited. The rabbi does acts of kindness for the general public, not just Jewish people. When someone dies, there are no invitations, but the Jewish community will come. Rabbi Wilansky and Chabad Lubovitch of Maine are the same. Wherever he is is a place of worship.
15. Shana Tinkle: I attended Camp Gan Israel as a child. It was not at 101 Craigie Street – we went to the park and other places. I've attended birthday parties and other events as a friend of the Wilansky children. It was definitely a home and not a synagogue.
16. Sarah Galvez: I live on Craigie Street. My husband is a Spanish minister from New York City. My family has 4 kids and 6 cars. I've never heard the Wilansky family, although I've seen them walking down the street. We have our whole family over on Saturday nights, which is probably as many people as visit the Wilanskys.
17. Lawrence Gardner: I am a member of the four synagogues in Portland. None of them pay property taxes. Rabbi Wilansky does not have a synagogue – there's no sign, no structure dedicated to religious purposes, no dues. Saturday morning prayers cannot happen without ten adult men. Rabbi Wilansky cannot pray anywhere else because none of the synagogues have the Chabad Lubovitch liturgy.
18. Stanley Leiderman: I have known Rabbi Wilansky for many years. Rabbi Wilansky assists people in distress. 101 Craigie Street is his home. When he assisted a troubled child, he put him up in a hotel because his children live in his house at 101 Craigie Street.
19. Jonathan Howard: I have known Rabbi Wilansky for many years. I belong to Congregation Bet Ha'am in South Portland, which is a reform congregation. Lubovitch is different. 101 Craigie Street is a home, not a synagogue. Rabbi Wilansky holds a seder every year and hosts other religious observances at his home. There may be 20 - 23 people.
20. Abraham Peck: Portland has come a long way with diversity. What we've seen tonight is a new Portland.
21. Chana Wilansky: Everyone on Craigie Street is very friendly except one neighbor. Many friends come over – for dinner, ice cream parties and so forth.

The public hearing closed at 9:50 p.m. and the Board commenced deliberating on the finding of facts, including its finding as to the specific religious activities it determines have occurred at the property.

FINDINGS OF FACT

1. Moshe and Chana Wilansky are the owners of 101 Craigie Street, Portland, Maine.
2. On May 22, 2008, City of Portland Zoning Administrator Marge Schmuckal sent a letter to the Wilanskys ordering that they cease using 101 Craigie Street as a place of worship.
3. Wilansky filed an appeal of the Zoning Administrator's order on June 19, 2008.
4. On July 16, 2008, Wilansky filed a memo to the Board regarding his appeal.
5. On August 14, 2008, Portland Director of Planning and Urban Development Penny St. Louis Littell filed a memo to the Board regarding this appeal.
6. The property at 101 Craigie Street is located in the R-3 Residential Zone.
7. Zoning Ordinance §§ 14-86 through 14-91 govern properties in the R-3 Residential Zone.
8. Under ordinance §14-88, Institutional uses, including churches and other places of worship, are conditional uses in the R-3 Residential Zone.
9. Institutional uses, including churches and other places of worship, require Planning Board approval as conditional uses in the R-3 Residential Zone.
10. Absent a variance, to be approved as a conditional use in the R-3 Residential Zone, a church or other place of worship must meet a minimum lot size requirement of two (2) acres.
11. The property at 101 Craigie Street is 0.187 acres.
12. The property at 101 Craigie Street is the residence of the Wilansky family.
13. Wilansky has not sought approval and the City has not approved 101 Craigie Street as a "place of worship."
14. No structural changes have been made to the property at 101 Craigie Street, which remains a single family home.
15. Rabbi Wilansky is a rabbi in the Chabad Lubovitch movement.
16. As a Chabad Lubovitch rabbi, Rabbi Wilansky has a religious duty to engage in outreach activities with other Jews. To that end, he has established a nonprofit entity, Chabad Lubovitch of Maine.
17. Religious Jews routinely pray in their homes.

18. The most important prayer service for religious Jews is Saturday morning. This service requires a minyan, which is ten male adults (thirteen years of age or older).
19. Orthodox Jews are not supposed to drive on Saturday.
20. There is no synagogue in Maine that uses the Chabad Lubovitch liturgy.
21. Rabbi Wilansky has been offering a weekly prayer service at 101 Craigie Street.
22. Regular weekly services attract approximately ten to fifteen worshippers.
23. The Chabad Lubovitch website lists 101 Craigie Street as its address, and advertises regular religious services on regularly scheduled days of the week, as well as special services on the High Holy Days and other Jewish holidays. However, what is stated on the website may not actually be occurring.
24. Some larger religious services of Chabad Lubovitch take place at the Doubletree Hotel on Congress Street.
25. Over the past several years, the City of Portland has received calls regarding the number of parked vehicles during prayer meetings.
26. In May 2004 Moshe and Chana Wilansky purchased a 2.018 acre parcel of property on Pomeroy Street located less than one half a mile from 101 Craigie Street.
27. The property on Pomeroy Street is also in the R-3 Residential Zone.
28. The property on Pomeroy Street was proposed to be a residence with an attached synagogue.
29. Chabad Lubovitch of Maine applied to the City for a Conditional Use approval and a Site Plan approval for a single family home with attached synagogue for the Pomeroy Street property.
30. The Planning Board granted approval of the applications described in #29 in July of 2005.
31. Chabad Lubovitch of Maine never proceeded with construction on Pomeroy Street and the approval lapsed on July 26, 2007.
32. There are no signs at 101 Craigie Street indicating that it is a place of worship, there are no dues for attending prayer services, and no weddings or funerals are conducted there.
33. The intensity of use at 101 Craigie Street is not significantly different from other residential properties on the street.

34. There is no significant increase of vehicular or pedestrian traffic at the time of prayer meetings.
35. Gatherings at Rabbi Wilansky's house are part of the cultural traditions of his faith.
36. There is no area in the house set aside specifically for religious purposes.
37. The rabbi has no defined congregation or dues-paying members.
38. The property is taxed as a single family home and not tax-exempt as religious property. The Wilanskys have been paying property taxes since 1991.

The above findings of fact were approved by the Board by a vote of 5-0 on August 21, 2008.

Legal Issue #1: What is the meaning of "place of worship" in ordinance Sec. 14-88(C)(3)?

Argument presented by Wilansky:

Marshall Tinkle stated that in the absence of a definition in the ordinance, the Board must apply the plain meaning of the term "place of worship." The plain meaning is a real church or synagogue. There are five criteria:

- is it used exclusively or at least primarily for worship
- does it have typical indicia of a church, such as a sanctuary, sign, religious symbol on the exterior
- is it open to dues-paying members
- is it a relatively large structure as opposed to a regular size house
- is it tax-exempt

There are no members and no dues at Chabad Lubovitch/101 Craigie Street. Rabbi Wilansky pays property taxes. "Regular" services does not mean "constant" services. The website is designed to reach a very limited audience.

Argument presented by the City:

Penny Littell stated that the ordinance is clear on its face. Zoning is designed to protect everyone.

This is a matter of degree. The City Council decided that a place of worship must have a 2-acre lot.

The question is whether the activities at 101 Craigie Street are a "place of worship." The ordinance does not provide a definition, so the plain meaning applies.

Marge Schmuckal's reasoning as to why she determined that 101 Craigie Street is a place of worship is sound, based on the totality of circumstances.

Churches and places of worship are not prohibited in the R-3 Zone. But they require a 2-acre site.

Board counsel provided Board members with dictionary definitions as reference.

Findings and Decision of the Board:

1. Ordinance Sec. 14-88, governing conditional uses in the R-3 residential district, includes "institutional" uses as a category of conditional uses, under which is the subcategory of "church or other place of worship."
2. Neither the word "church" nor the term "place of worship" is defined in the ordinance.
3. The Board finds that the term "place of worship" in the ordinance involves an intensity of use greater than an average single family home. It is likely to have signage, dues, a designated place for worship, and an identifiable congregation.

The above determination on Legal Issue #1 was approved by the Board by a vote of 5-0 on August 21, 2008.

Issue # 1: "Does the use of 101 Craigie Street make the property a 'place of worship' under the City's zoning ordinance?"

Findings and Decision of the Board:

Applying the meaning of "place of worship" as interpreted by the Board above to the findings of fact regarding the use of 101 Craigie Street as recited above, the Board finds that the use of 101 Craigie Street does not make it a "place of worship" under the City's Zoning Ordinance.

The Board's reasoning is that the building is a typical residential property. There are no signs, dues or an identifiable membership, and the type and intensity of use does not rise to the level of a "place of worship."

The above decision on Issue #1 was approved by the Board by a vote of 5-0 on August 21, 2008.

Based on the Board's determination on Issue #1, Issue #2 and Issue #3 are moot.

DECISION

Based on the above facts and conclusions the Board sustains the appeal.

You may appeal to Superior Court within 45 days of this decision.

Dated: _____, 2008

Peter Coyne

Jill Hunter

Deborah Rutter

ABSENT

Philip Saucier

Gordon Smith

William Getz