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## ABERNATHY ROEDER BOYD HULLETT

EST. 1876

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### *VIA E-MAIL*

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***Re: Conditional Use Permit for The Church of Jesus Christ of Latter-day Saints Temple  
(Case # CUP2024-04).***

Dear Mr. McCoy, Mayor Lessner, and Fairview Town Council Members:

The Church of Jesus Christ of Latter-day Saints has applied for Conditional Use Permit (“CUP”) zoning to construct a house of worship on its 8.16-acre site on Stacy Road. The proposed temple is 45,375 square feet with two above-ground floors. The height of the main building is 65 feet. A 108-foot spire that gets narrower as it gets higher adorns the south end of the building that faces Stacy Road. This letter provides a comprehensive review of the Church’s CUP zoning application to show that nothing in the Town of Fairview’s Code of Ordinances would justify denying the Church’s application. The Town’s Staff Report correctly concludes that the Church meets all legal requirements necessary for approval.



The property is currently zoned One-acre Ranch Estate (RE-1) and is in a location referred to by some as “church row.” To the west is the Chase Oaks Church and the meetinghouse for The Church of Jesus Christ of Latter-day Saints. The Twin Creeks Church of Christ owns the 5-acre parcel to the east and plans to apply for CUP zoning later this year. This block will have four houses of worship.



The Town of Fairview Code of Ordinances (“Town Ordinances”) lists ten factors the Town Council “may take into consideration” when granting or denying CUP zoning. There is only one the Council could try to rely on in denying the Church’s application: the “aesthetic appearance of the use, and other sensory effects that the use may have on the established character of the neighborhood, its property and the property within the town as a whole.” Town Ordinances § 14.02.517. For the reasons explained below, that factor would not justify denying the Church’s application. The temple will be aesthetically beautiful and consistent with the character of the neighborhood.

And such subjective considerations as “aesthetic appearance” and “character of the neighborhood” cannot negate the religious freedom guaranteed by the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) and the Texas Religious Freedom Restoration Act (“TFRFA”). These laws, which protect religious freedom for all, require the Council to approve the Church’s application. Yet the Council appears poised to ignore them. It has refused the Church’s repeated requests for an explanation of the Council’s position regarding these laws.<sup>1</sup>

### **Conditional Use Zoning**

Churches are not permitted uses anywhere in the Town of Fairview. They are allowed in RE-1 districts if the Town Council is willing to rezone the property to a “conditional use permit district,” which is a specific zoning classification in the Town of Fairview. Town Ordinances § 14.02.511(a). A church must seek such a “change of zoning” before being allowed in the Town of Fairview. Id. § 14.02.511(a). Accordingly, the Church applied for CUP zoning pursuant to Town Ordinance § 14.02.003.

Property zoned for a conditional use retains its original RE-1 classification and is given a CU classification in addition. Id. § 14.02.512. In other words, if the Church’s CUP zoning application is approved, the property would be zoned RE-1-CU. Id. § 14.02.519 (a). In this kind of hybrid zoning, the “basic land use district regulations” (meaning the RE-1 regulations) are “applicable for any permitted use *other than the conditional use.*” Id. § 14.02.512. Thus, the 35-foot RE-1 height limitation is applicable to a home (a “permitted use”), but not to a church (a “conditional use”). Instead, “any special condition or regulation established by the grant of the conditional use shall control the specific use and supersedes any conflicting basic condition or regulation.” Id. § 14.02.512.

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<sup>1</sup> The Town Attorney also refuses to allow Church representatives to speak or meet with individual members of the Town Council to explain its position because he misunderstands the Texas Open Meetings Act. It does not prohibit the Church or any person from meeting individually with Town Council members. It prohibits Town Council members from meeting and deliberating with each other, privately or without proper public notice. See Tex. Gov’t Code §§ 551.001, 551.002.

**Temple Size and Height**

The 35-foot height limitation on residences in the RE-1 district does not apply to churches. The Staff Report issued before the first Town Council hearing provides the following examples of churches and other structures in the RE-1 district that exceed 35 feet (or that were approved to exceed that height):

Project	Date	Height	Feature Height
LDS Temple (proposed)		42' mechanical level 56' upper roof 65' bottom steeple	107' top steeple 173'-8" top spire
Faith Anglican Church	2019	39'	48' bell tower
LDS Chapel	2013	30'	68' spire
Chase Oaks Church	2013	42'	
Creekwood UMC	2006	38'	154' bell tower
redesign	2017		51' spire
Fairview Water Towers		140' – 150'	
Radio Tower on HWY 5		163'	
Town Hall		64'	

There is precedent for the Town Council to approve the Church’s CUP-zoning application. In 2006, the Town Council *unanimously* approved a 154-foot bell tower for the Creekwood United Methodist Church, also on Stacy Road about 1.6 miles from the site in question, without expressing any concern. The record does not reveal a single negative comment about the bell tower from residents, the P&Z Commission, or the Town Council. It was completely uncontroversial. No one suggested it would be inconsistent with the character of the neighborhood.

Some have questioned whether the bell tower was finally approved. It is undeniable it was. Minutes of the September 5, 2006, Town Council Meeting state:

“A motion was made by Councilwoman Sommers to approve the Conditional Use Permit for Creekwood United Methodist Church as submitted, **including the 150 foot height for the bell tower** and 38 foot height for the building and includes all other conditions listed on the ordinance in Exhibit “C” which includes the additional height of the building (38’) and goes back to Planning and Zoning for the bells but with note that **Council has no problems with the tower.** Seconded by Mayor Pro Tem Fraser, with all in favor.”

Minutes of the September 14, 2006, Town Council Meeting state:

“At its August 24, 2006 meeting, the planning and zoning commission asked the town staff to provide status of the CUP for the church. At the September 5, 2006 town council meeting, five citizens spoke in support of this CUP request

and the town council made the following motion to approve this request which was unanimously approved: (1) **the 154' height of the bell tower is approved** ....”

“Vice Chairman Ron Kasian made a motion to approve the final plat for the Creekwood United Methodist Church as presented at this meeting modified with the date of September 14, 2006 specifically reflected in the formal date block. Commissioner Brayton Campbell seconded that motion. With no further discussion, the motion was **unanimously approved.**”

Approval of the 154-foot bell tower is further confirmed by the fact that in 2017, Creekwood UMC applied for a *revised* CUP. The Staff Report dated August 1, 2017, explains:

“In 2006, Creekwood UMC **received a CUP that included the installation of a 154' tall digital bell tower.** The bell tower is no longer in the development plans for the church and will not be installed.”

The original Staff Report addressing the CUP-zoning application for the Latter-day Saint temple also confirms that the 154-foot bell tower was approved. It explains, “Historically, the town has approved higher building heights for religious facilities of varying degrees on a case-by-case basis.” One of the approved structures listed in the Staff Report is the 154-foot bell tower. The fact that Creekwood UMC ultimately did not build the bell tower is irrelevant. The Town Council unanimously approved it.

### **CUP Zoning Factors**

The Town of Fairview Code of Ordinances says the Town Council “may take into consideration” the following ten factors in determining whether to grant or deny CUP zoning:

- (1) Safety of motoring public and of pedestrians using the facility and the area immediately surrounding the site.
- (2) Safety from fire hazards and measures of fire control.
- (3) Protecting the property, adjacent property, and other properties within the town from flood or water damage.
- (4) Noise-producing elements, glare of vehicular and stationary lights and the effect of such noise and lights on the established character of neighboring property.
- (5) Street size and adequacy of pavement width for traffic reasonably expected to be generated by the proposed use around the site and in the immediate neighborhood.
- (6) Adequacy of on-site and off-site parking facilities, location of ingress and egress points for parking and off-street loading, and the surfacing of all parking areas to control dust and for the protection of public health.

(7) Such other measures as will secure and protect public health, safety, morals and general welfare.

(8) Off-street parking, unless specifically regulated in the ordinance adopting the conditional use permit zoning classification, shall be governed by other applicable provisions of the comprehensive zoning ordinance or other applicable ordinances of the town.

(9) The economic and/or environmental impact the use may have on property within the town as a whole, as well as on adjacent property, and whether an economic and/or environmental impact study should be submitted as a part of the application for conditional use permit.

(10) The aesthetic appearance of the use, and other sensory effects that the use may have on the established character of the neighborhood, its property and the property within the town as a whole.

Town Ordinances § 14.02.517.

At great cost, the Church has obtained studies and taken other action to ensure that the temple will comply with all ten factors.

#### **Traffic Safety**

A traffic impact analysis (“TIA”) based on criteria set forth by the Texas Department of Transportation and the Town of Fairview shows that construction and operation of the temple will not necessitate any modifications or improvements to the existing infrastructure of Stacy Road or any surrounding roadways and that the temple will not negatively impact current or future traffic flow and operations in the area. A copy of the Traffic Impact Analysis is attached as **Exhibit A**.

The Town’s Staff Report concurs: “The traffic impact analysis has determined that there are no additional deceleration lanes or left turning lanes needed to meet the needs of the peak hour traffic demands. TxDOT has established the criteria necessary for additional deceleration lanes and they are well below the thresholds. There is adequate access from Stacy Rd to accommodate the turning movements and the through traffic.” Staff Report April 11, 2024.

#### **Fire Safety**

The Town follows the 2018 International Fire Code with amendments. The proposed temple will fully comply.

#### **Flood Safety—Drainage**

The Church’s plans include a detention basin to capture runoff and reduce site runoff to pre-development levels for storms up to and including the 100-year storm event. In other words, the project will not have any impact on drainage. A copy of the drainage study is attached as **Exhibit B**. The Town’s Staff Report concurs: “The runoff from the proposed site is captured into



a detention basin prior to release, thus mitigating any adverse effects downstream.” Staff Report April 11, 2024.

### **Off-Street Parking**

A total of 102 parking spaces will be provided on the temple grounds. The Town of Fairview requires 94 stalls. Additionally, driveway connections will allow the 193 parking stalls in the Church’s neighboring meetinghouse to function as overflow parking. The Church’s plan also calls for a landscape island in the parking lot for every eight (8) spaces, which is consistent with commercial design standards. The Town’s Staff Report expressed no concern about parking.

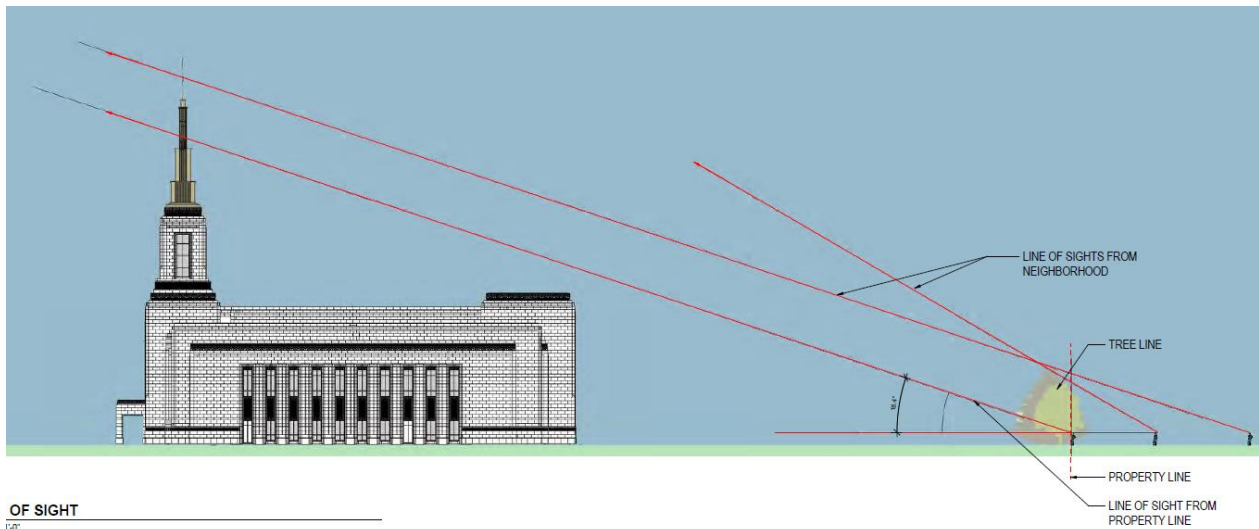
### **Setback Requirements.**

The temple far exceeds the setback requirements in the Town’s zoning ordinance. “The main temple structure is over 220’ feet from the northern property line, far exceeding the 160’ building setback that would typically be required in the CPDD area of town.” Staff Report April 11, 2024.

### **Landscaping and Landscape Buffer.**

The temple will feature both landscape and hardscape elements that complement the exterior façade of the temple and enhance the temple’s reverent, meditative atmosphere. Trees, shrubs, turf, numerous flower beds, and several plazas and seating areas will be maintained year-round to provide a park-like setting for the community’s year-round enjoyment. Tree counts and landscape and hardscape elements will exceed the requirements in the Town’s zoning ordinance.

The existing tree line at the north property line will be rejuvenated and enhanced with additional trees and landscape to maintain a buffer between the existing residences and the temple. This tree line and the significant setback makes the temple invisible to these northern neighbors. Only the narrowest part of the steeple will be visible from certain places in the surrounding neighborhoods.



The Town's Staff Report concludes that the Church's landscaping plan is consistent with the Town's Ordinances. Staff Report April 11, 2024.

### Utilities

The Town issued a letter confirming it will provide the necessary water for domestic uses and fire protection. The Town's Staff Report confirms: "There is adequate water to supply the development and they are coordinating with the City of Allen to provide sanitary sewer, similar to the existing churches to the West." Staff Report April 11, 2024.

### Lot Coverage

Maximum lot coverage in the RE-1 district is typically 35%. As explained, under the Town's Code of Ordinances, such regulations do not apply to conditional uses like churches. Nevertheless, the temple's lot coverage is currently 35%, which conforms with the Town's residential requirement.

### Environmental Impact

The Church's Environmental Impact Memo is attached as **Exhibit C**. Key findings from the memo include the following:

#### Lighting Ordinance

The Church will not only comply with the Town of Fairview's Lighting Ordinance, it will go beyond those requirements by ensuring no light bleed at all onto neighboring properties while the lights are on and turning the lights off completely from 11:00 pm to 5:00 am. The Church has implemented the following measures:

- Architectural building accent lighting will turn on at dusk and be within the maximum 5.0 foot-candle level at the temple's surfaces.
- All architectural building light fixtures are "fully shielded" to accomplish full capture on the surface of the temple and prevent any light bleed to neighboring properties. The architectural lighting will not extend beyond the building's surface.
- All architectural building and landscaping light fixtures utilize 3,000 Kelvin and not the maximum 4,000 Kelvin allowed by the Town's Lighting Ordinance.
- Though not required by the Town's Lighting Ordinance, the architectural and landscape lighting will be turned off completely between 11:00 pm and 5:00 am.
- All area/parking light fixtures are "full cut-off" luminaires, complying with Dark Sky Regulations and the Town's Lighting Ordinances.
- All area/parking light fixtures utilize the Lighting Ordinance's recommended maximum 4000 Kelvin to aid in creating a better feeling of security.



- The area/parking lighting layout conforms to the maximum 2.0 average foot-candle level at the parking surface required by the Town's Lighting Ordinance.
- Parking lot lights will turn on at dusk at the required maximum 2.0 average foot-candle level. As a further gesture, the Church will dim the parking lot lighting 50% from 11:00 pm to 5:00 am and install motion detectors to raise the lighting back to required light levels when motion is detected. After ten minutes, the light will be dimmed again.
- Parking lot lights will be fully shielded to avoid light trespass to neighboring properties.

The Church has accepted every proposed condition and gone above and beyond the Town's Lighting Ordinance to make sure the temple lighting has no impact on neighboring properties. The Lighting Study is attached as **Exhibit D**.

#### *Bird Migration*

The Town of Fairview is in the path of migratory birds. The United States Fish and Wildlife Service (USFWS) published the article *Threats to Birds: Collisions – Nighttime Lighting*, which recommends the following mitigation measures:

- Turning lights off completely at night
- Limiting light to necessary times only
- Turn off lights that face up into the sky or lights that illuminate surrounding landscape
- Avoid upward light scatter by shielding, selecting, or positioning lights where light is not emitted above the horizontal plane
- Keep lighting as low to the ground as possible, only illuminating necessary structures
- Closing blinds, shades, or curtains to avoid light spill
- Use lights that are less than 3,000 Kelvin degrees
- Keep light as dim as possible

The Church's lighting plan implements nearly all of these recommendations. It also conforms to the recommendations of the Texas Parks and Wildlife Department and Light Out Texas.

#### *Bird Habitat*

To comply with the requirements in the Town's ordinances, the Church has incorporated 13 parking lot trees and 16 screening trees into this project. The Church will also add approximately 78 trees (42 large canopy trees and 36 ornamental trees) to the property plus additional shrubs and ground cover. The additional trees and shrubs will provide habitat for migratory birds and other wildlife. The project will not result in a net loss of high-quality migratory bird nesting habitat.

#### *Consistent with the Character of the Neighborhood*

That leaves only one statutory factor for the Council to consider: the “aesthetic appearance of the use, and other sensory effects that the use may have on the established character of the neighborhood, its property and the property within the town as a whole.” Town Ordinances § 14.02.517. It would be arbitrary and capricious and a blatant violation of TRFRA and RLUIPA for the Town Council to deny the Church’s application based on this vague, subjective factor.

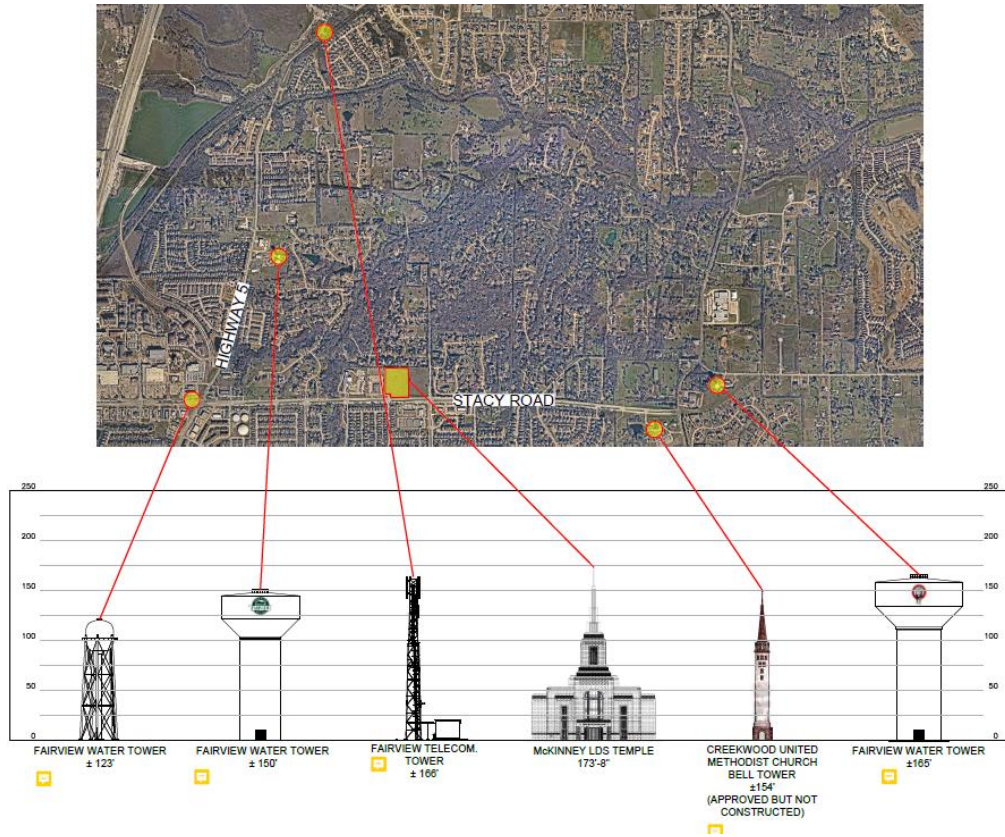
Viewed fairly, the temple is consistent with the “established character of the neighborhood.” Consider the following points:

First, churches are inherently consistent with residential neighborhoods. Churches, like schools, belong in residential neighborhoods because that is where people live. The Texas Supreme Court long ago declared that “exclud[ing] churches from residential districts does not promote the health, the safety, the morals or the general welfare of the community ....” City of Sherman v. Simms, 183 S.W.2d 415, 416-17 (Tex. 1944). Churches are “presumed to have a beneficial effect on the community ....” Pine Knolls v. Zoning Bd./Town of Moreau, 838 N.E.2d 624, 627 (N.Y. 2005). The Town of Fairview’s ordinances declare that the RE-1 zoning district is “to be used only for suburban single-family homes *and the community services and facilities appurtenant thereto*,” which includes churches. The Town of Fairview’s ordinances also contemplate that churches will be built on land that abuts residential property, so long as the required landscape buffer is installed. See Town Ordinances §§ 14.02.351, 14.02.010(f).

Thus, far from being inconsistent with the character of a residential neighborhood, it is widely recognized that churches *belong* in residential neighborhoods. Residential neighborhoods all across the country are dotted with large and small churches, church campuses, and even megachurches. That is especially true here in Texas.

Second, the temple lot is not in the middle of a residential neighborhood; it is on a busy road, with a shopping center right across the street. It is on a block appropriately referred to by some as “church row” as it will have two churches to the west and one to the east. The temple could not be any more consistent with the “established character of the neighborhood.”

Third, the temple’s size is consistent with the “character of the neighborhood.” It is similar in height to several structures in the Town of Fairview. The temple is, in fact, dwarfed by two water towers, both in residential neighborhoods. The water towers are a little shorter than the temple’s steeple would be, but they are massive at the top whereas the top 108 feet of the temple is the narrowing steeple. The main body of the temple does not even reach the bottom of the water tanks on the two giant water towers. The following diagram shows the location and height of several of the tallest structures in the Town of Fairview:



The following photos show the visibility of the tanks on the top of the water towers. In contrast, as the photos further below show, the steeple on the proposed temple is barely visible.







Further, as noted, the Council unanimously approved a 154-foot bell tower for the nearby Creekwood United Methodist Church without expressing any concern about its impact on the “character of the neighborhood.”

Fourth, the temple is consistent with the size of churches in residential neighborhoods in nearby areas. Consider just a few examples:

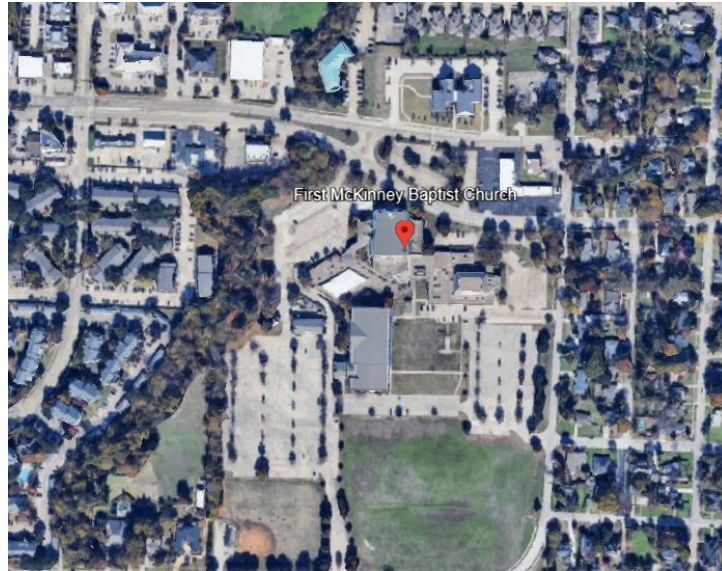
- **First McKinney Baptist Church – McKinney, Texas.** Steeple height approximately 170 feet. Building height approximately 64 feet. Distance to residential homes approximately 250 feet.



The First McKinney Baptist Church, which has the same zip code as the proposed temple, has not just a worship center that is roughly the same size of the proposed temple, but several other buildings as part of a church campus that sits in a residential neighborhood. However, like the proposed temple, the tree cover makes the campus largely invisible from surrounding neighborhoods with only the steeple sticking above the trees.

We doubt anyone drives past the First McKinney Baptist Church and thinks it is out of place or inconsistent with the character of the surrounding residential neighborhoods.



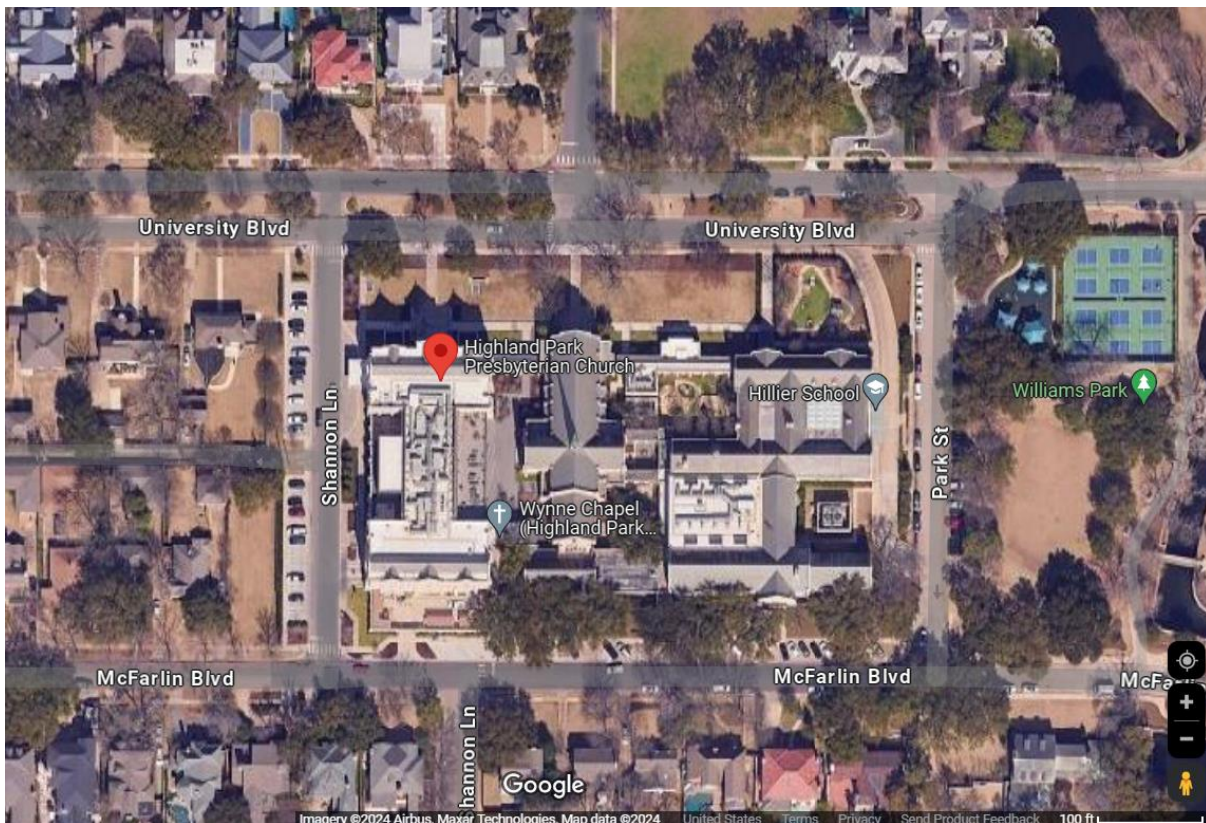


The following scaled image shows that the First McKinney Baptist Church is remarkably similar in size to the proposed temple:



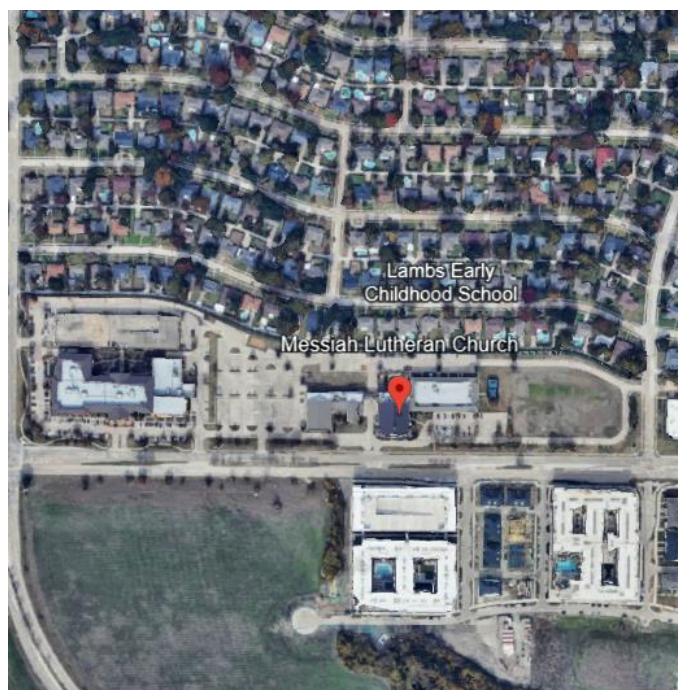


- **Highland Park Presbyterian Church** – City of University Park, Texas. Steeple Height 148.1 feet. Building height 64.2 feet. Distance to residential homes is less than 200 feet.

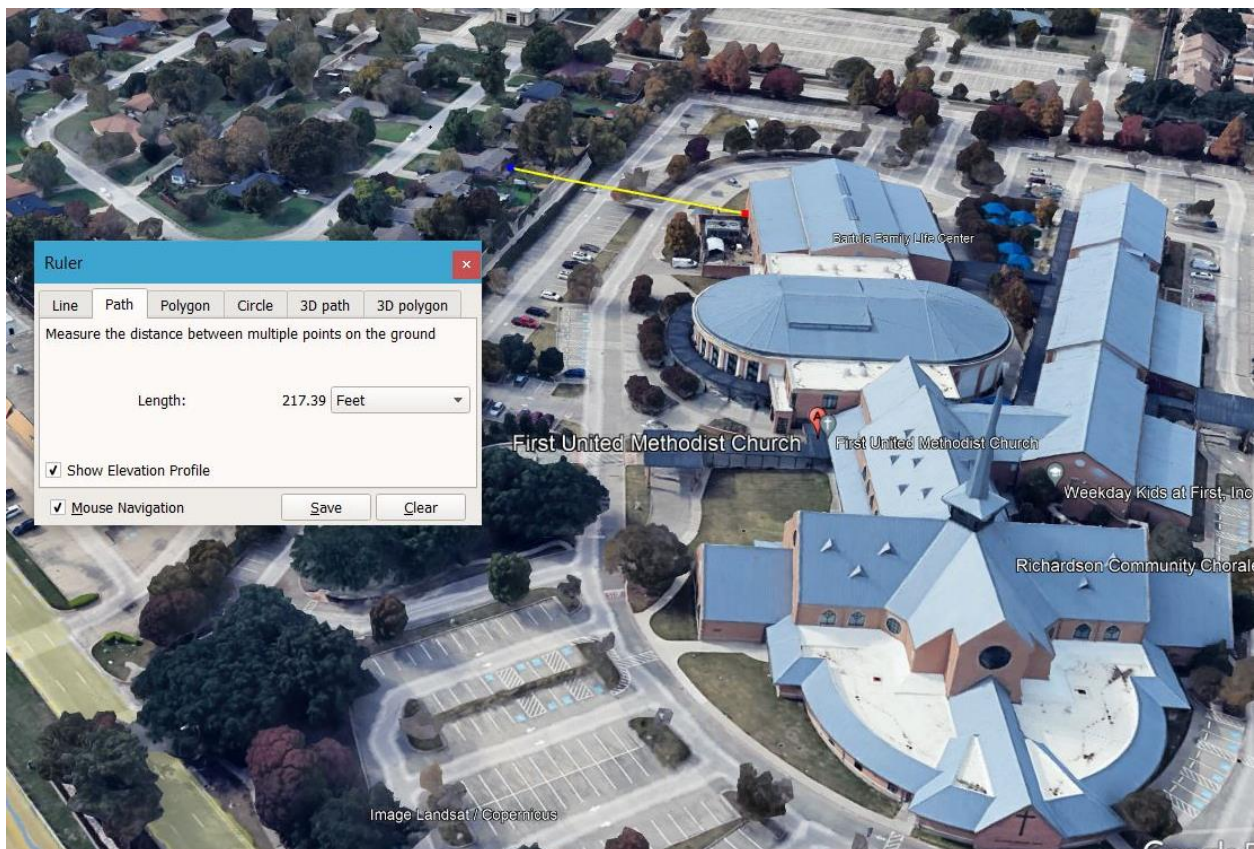




- **Messiah Lutheran Church** – Plano Texas. Steeple height approximately 120 feet. Building height approximately 63 feet. Distance to nearest residential homes is less than 200 feet.

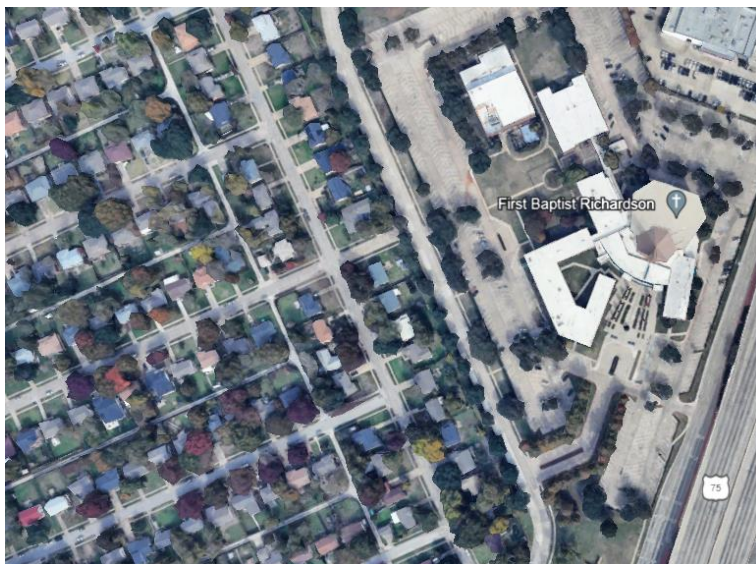


- **First United Methodist Church** – Richardson Texas. Steeple height approximately 160 feet. Distance to residential homes approximately 218 feet.

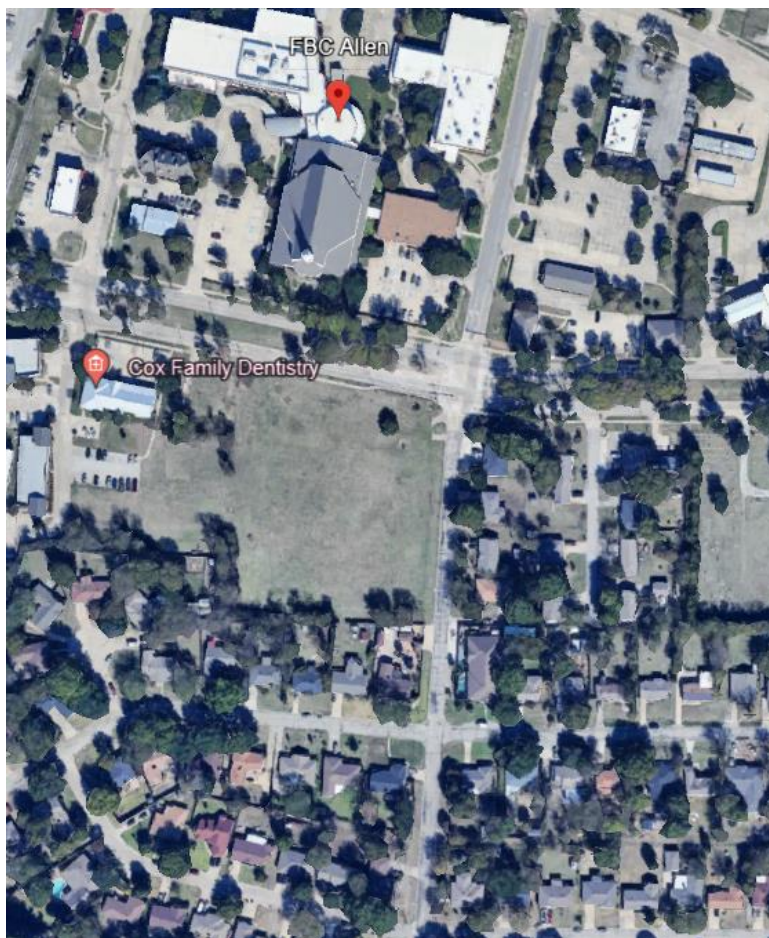




- **First United Baptist Church** – Richardson, Texas. Steeple height over 200 feet. Distance to residential homes approximately 280 feet.

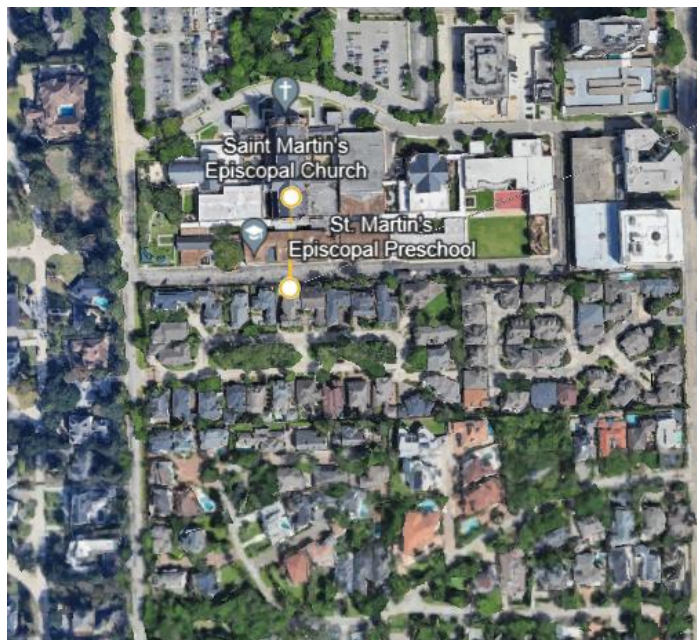


- **First Baptist Church** – Allen, Texas. Steeple height approximately 128 feet. Building height approximately 74 feet. Distance to nearest residential homes approximately 420 feet.





- **St. Martin's Episcopal Church** – Houston, Texas. Steeple height 188 feet. Distance to residential homes approximately 220 feet.



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Churches in residential neighborhoods are a common feature of American life and have never been considered inconsistent with the character of the neighborhood. The Church's own experience confirms this. Most of the temples built by The Church of Jesus Christ of Latter-day Saints in the United States are in residential neighborhoods.

Fifth, although some insist the temple will tower over the Town and look out of place, that is false. The temple is practically invisible from the surrounding neighborhoods. The following shows views from the north, south, east, and west:

**North looking South**



[View from Forest Oaks Dr. looking southwest]



[View from Forest Oaks Dr. looking southeast]





[Forest Oaks Drive looking southeast]



[Forest Oaks Drive looking south]



[Horseshoe Bend looking southwest]



**South looking North**



[View from River Oaks looking north]



[River Oaks Dr. looking northeast]

**East looking West**







[Palomino Drive looking west]



[Palomino Drive looking west]

West looking East







[View from Fairview Town Hall balcony]

These images show that the temple will have little or no visual impact on the “established character of the neighborhood.” It will be almost invisible from the surrounding neighborhoods. Its visibility will be further decreased when the Twin Oaks Church of Christ builds its house of worship on the lot immediately to the east.

The Church recently faced substantial opposition to temples in Heber City, Utah, and Las Vegas, Nevada, based on the same kinds of objections: size and height of the proposed temples and their incompatibility with the surrounding residential neighborhoods. In both cases, notwithstanding vocal opposition from some residents, both jurisdictions unanimously approved the Church’s application, recognizing that it met all the criteria for approval and was not incompatible with the neighborhood. Both temples are substantially *larger* than the proposed temple here. The Lone Mountain Temple in Las Vegas will be 70,194 square feet with a steeple that reaches 196 feet high. The Heber Valley Temple will be 87,626 square feet with a steeple that reaches 200 feet high.

In Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Zoning Board of Appeals of Town/Vill. of Harrison, 745 N.Y.S.2d 76 (App. Div. 2002), the Church appealed from the denial of an application for a height variance for a temple steeple in a residential district. One of the statutory factors was the “character of the neighborhood.” The



ZBA said denial was warranted because “the variance was substantial, representing a 77% increase over the permitted height.” *Id.* at 78. The court reversed because concerns about the “character of the neighborhood” did not justify denial. “[T]he conclusion that the grant of the proposed variance would have a significant negative visual impact on the surrounding residential area was ... contradicted by the ZBA’s own expert ....” *Id.* The evidence here likewise proves that the proposed temple will not have a “negative visual impact on the surrounding residential area ....”

**Texas Religious Freedom Restoration Act and federal Religious Land Use and Institutionalized Persons Act**

The Church previously explained in two separate submissions to the Town why TRFRA and RLUIPA require the Town Council to approve the Church’s application. Those documents are attached as **Exhibit E** and **Exhibit F**. A recent letter from the United States Department of Justice to all municipalities reminding them “of the obligation of public officials to comply with the land use provisions of [RLUIPA]” is attached as **Exhibit G**.

Again, the only factor on which the Council could try to rely to deny the Church’s CUP-zoning application is the “aesthetic appearance of the use, and other sensory effects that the use may have on the established character of the neighborhood, its property and the property within the town as a whole.” Town Ordinances § 14.02.517. TRFRA and RLUIPA do not permit subjective factors like aesthetics and neighborhood character to trump religious freedom. Courts have repeatedly rejected claims by municipalities that such factors can be compelling justifications for denying approval to build churches and other religious structures. *See, e.g., Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 554 (S.D.N.Y. 2006) (“[T]he visual impact of the [p]roject does not implicate a compelling government interest.”), *aff’d*, 504 F.3d 338 (2007); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1227–28 (C.D. Cal. 2002) (noting that aesthetic harm is not compelling).

RLUIPA and TRFRA also disfavor subjective factors like this because they allow decision makers to hide improper motives, such as religious bias. That, too, was one of the motivations behind RLUIPA and TRFRA. RLUIPA and TRFRA protect against this by elevating religious freedom over subjective concerns. *See, e.g., Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) (Observing that RLUIPA is a response to the “vulnerability of religious institutions—especially those that are not affiliated with the mainstream Protestant sects or the Roman Catholic Church—to subtle forms of discrimination when, as in the case of the grant or denial of zoning variances, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards. . . . [T]he ‘substantial burden’ provision backstops the explicit prohibition of religious discrimination in the later section of the Act, much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination.”).

Opponents have preached that the Church needs to “follow the law.” Members of the Town Council have said the same thing – the temple is welcome in Fairview if the Church would “follow

the law.” The “law” they refer to, of course, is the 35-foot height restriction in the RE-1 district. But that height restriction does not apply to churches—as evidenced by the Council’s approval of greater heights for other churches, including a 154-foot bell tower for Creekwood UMC.

Moreover, the “law” applicable here also includes TRFRA and RLUIPA—as well as the United States and Texas Constitutions. The Town Council took an oath to uphold all of them. TRFRA protects all conduct “motivated by religious belief.” Tex. Civ. Prac. & Rem. Code § 110.001(a)(1). Likewise, RLUIPA protects “any exercise of religion” and specifically states that “[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.” RLUIPA, 42 U.S.C. § 2000cc–5 (7)(a & b)

The following religious beliefs motivate the Church’s desire to build this temple:

1. Access to the temple is a key doctrine of the Church. This is because God’s highest blessings are available to those who receive the ordinances of the temple.
2. Temple sites are selected under the direction of the Lord. Choosing a temple site is not a matter of selecting a convenient location, but of determining God’s will.
3. Temple architecture reflects the Church’s belief that the temple is “literally the house of the Lord.”<sup>2</sup> The Church’s president says, “When you look at the temple, you should realize it is a symbol of Jesus Christ.”<sup>3</sup> The architecture, and particularly the steeple, reflect the Church’s belief in looking up to God and ascending to Him.

TRFRA provides that the religious conduct in question need not be “a central part or central requirement of the person’s sincere religious belief.” Tex. Civ. Prac. & Rem. Code § 110.001(a)(1). RLUIPA similarly holds that it protects “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc–5 (7)(a). Temple architecture is motivated by religious belief, and the “centrality” of such belief is wholly irrelevant. As the U.S. Department of Justice has explained, a municipality “cannot avoid the force of RLUIPA by asserting that a particular religious activity is something that a religious group merely wants to do rather than something that it must do.”<sup>4</sup>

RLUIPA and TRFRA prohibit any land-use decision that imposes a “substantial burden” on religious exercise. According to the U.S. Supreme Court, a decision imposes a substantial burden if it interferes with “the ability of the [church] to conduct [itself] in accordance with [its] religious beliefs.” Burwell v. Hobby Lobby Stores, 573 U.S. 682, 724 (2014). See also Barr v. City of Sinton, 295 S.W.3d 287 (Tex. 2009). In short, under TRFRA and RLUIPA, a substantial

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<sup>2</sup> Elder Neil L. Andersen, “Temples, Houses of the Lord Dotting the Earth,” April 2024 General Conference.

<sup>3</sup> Spiritual Doors Will Open: Messages about the Temple from President Nelson, Liahona January 2023.

<sup>4</sup> Dep’t of Justice, Civil Rights Div., Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) (Sept. 22, 2010), [http://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/rluiipa\\_q\\_a\\_9-22-10\\_0.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/rluiipa_q_a_9-22-10_0.pdf).

burden exists when government action prevents the use of real property in a manner motivated by sincerely held religious beliefs.

Moreover, as we stated in our prior submissions to the Town, a municipality must defer to a church's sincere understanding of its religious beliefs and may not "second-guess" a religious group's "description of its religious exercise." City Walk—Urban Mission Inc. v. Wakulla County, 471 F. Supp. 3d 1268, 1286 (N.D. Fl. 2020). See also Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 n.9 (1987) ("In applying the Free Exercise Clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs."); Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 591 U.S. 657, 692 (2020) (Alito, J., joined by Gorsuch, J., concurring) (stating that question in Burwell v. Hobby Lobby was whether complying with the contraceptive mandate would "cause the objecting party to violate its religious beliefs as it sincerely understands them") (emphasis in original); Opulent Life Church v. City of Holly Springs, 697 F.3d 279, 296 (5th Cir. 2012) ("[C]ourts may not second-guess a religious entity's sincere belief that certain activities are central to or required by its religion.").

Thus, a negative decision by the Town Council would impose a substantial burden on the Church's religious exercise. Some have suggested that the Church should build the temple elsewhere, where it would be more welcome. "[O]ne is not to have the exercise of his liberty ... in appropriate places abridged on the plea that it may be exercised in some other place." Barr, 295 S.W.3d at 302. Compelling the Church to change the temple's design would also substantially burden the Church's religious exercise. As opposed to decisions that merely increase cost or create inconvenience, a direct prohibition of religiously motivated architecture would per se be a substantial burden on religious exercise.

Moreover, we reiterate again that for the Church and its members, the selection of a temple site is itself a matter of religious exercise. Temple sites are chosen by prayer and inspiration, not because of cost or convenience. Forcing the Church to abandon the chosen site—even if some alternative site was readily available—would substantially burden the Church's religious practices.

The analysis of the court in The Church of the Hills of the Township of Bedminster v. The Township of Bedminster, 2:05-CV-03332 (D.N.J. Feb. 24, 2006), is instructive. There, the plaintiff sought to build a megachurch complex. The Township denied the application stating that the megachurch "would ... change the entire character of the neighborhood from an essentially rural, quiet neighborhood to one of an entirely different character ...." Id. at \*2. The court rejected this reasoning. Quoting RLUIPA's congressional history, the court explained that "[t]he need for religious institutions to have the ability to develop 'a physical space adequate to their needs and consistent with their theological requirements' is at the heart of RLUIPA's land-use provisions." Id. at \*5. The court also said the Township's concern about the character of the neighborhood was not a compelling interest. Id. at \*6. See also Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1267 (11th Cir. 2005) (applying strict scrutiny in free speech case and holding that city's

sign code was not “narrowly tailored to accomplish the City’s asserted interests in aesthetics and traffic safety, nor has our case law recognized those interests as ‘compelling’”).

Moreover, in addition to imposing a substantial burden on the Church’s religious exercise without a compelling justification pursued through the least restrictive means, denying conditional use approval for the temple would also violate RLUIPA’s unreasonable limitation provision, 42 U.S.C. § 2000cc(b)(3)(B), which prohibits “unreasonably limit[ing] religious assemblies, institutions, or structures within a jurisdiction.” Under this provision, municipalities may not deprive “religious institutions or assemblies of reasonable opportunities to practice their religion, including the use and construction of structures, within” the municipality. Rocky Mountain Christian Church v. Board of Cnty. Com’rs, 613 F.3d 1229, 1238 (10th Cir. 2010), cert. denied, 562 U.S. 1136 (2011); see also Bais Brucha Inc. v. Township of Toms River, 2024 WL 863698, No. 21-3239 (D.N.J. Feb. 29, 2024) (holding that township violated unreasonable limitation provision where houses of worship are only permitted as of right in built-up downtown district, and areas where they are allowed by conditional use permit are unduly restricted); Bensalem Masjid, Inc. v. Bensalem Twp., No. CV 14-6955, 2015 WL 5611546, at \*5 (E.D. Pa. Sept. 22, 2015) (holding that mosque stated a claim under RLUIPA’s unreasonable limitations provision where no parcels were available in zone allowing places of worship as of right and township denied variance). Here, there is nowhere where places of worship can locate as of right in the Town of Fairview. The only way a church can locate in the Town is to be approved in the highly subjective CUP process. Denying approval to the temple under this system and with these facts would be a violation of RLUIPA’s unreasonable limitations provision.

#### ***United States Constitution – First Amendment***

In addition to violating the TRFRA and RLUIPA, denying the Church’s CUP-zoning application for the temple would violate the Free Exercise Clause of the First Amendment to the United States Constitution. The Supreme Court recently clarified that “[a] law is not generally applicable if it invites the government to consider the particular reasons for a person’s conduct by providing a mechanism for individualized exemptions.” Fulton v. City of Philadelphia, 593 U.S. 522, 533 (2021) (citations omitted). If such a law “burden[s]” religious exercise, it must be justified by strict scrutiny or invalidated. Id. at 532-33.

Thus, unlike with TRFRA or RLUIPA, there is no need to show a substantial burden on religious exercise; a “burden” suffices. See id. at 532 (“[I]t is plain that the City’s actions have burdened [the plaintiff’s] religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs.”); see also Kravitz v. Purcell, 87 F.4th 111, 122 (2d Cir. 2023) (holding that no showing of substantial burden is required in Free Exercise cases); Burke v. Walsh, 2024 WL 3548759, \*7, No. 23-11798 (June 5, 2024) (holding that licensing agency’s use of “17 different subjective criteria” to review prospective foster parents triggered strict scrutiny under Fulton when denial burdened religious exercise of Catholic couple). The multiple subjective criteria in the CUP review involves precisely the kind of government discretion

that triggers strict scrutiny when it burdens religious exercise, and denying the CUP would plainly burden the church's religious exercise.

### **CONCLUSION**

The April 11, 2024, Staff Report concludes that the Church's CUP application meets all the legal requirements necessary for approval. It leaves open only the question of the height of the temple, calling this a "policy decision" for the Town Council to make. RLUIPA and TRFRA make that policy decision for the Council by declaring that religious freedom outweighs subjective concerns about aesthetic appearance and neighborhood character. In any case, as demonstrated, the temple is consistent with this residential neighborhood. The Town Council should approve the Church's CUP-zoning application.

Very truly yours,

*/s/ Richard M. Abernathy*

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