



Sent via email

March 13, 2023

To the New Philadelphia City Council,

I am writing to you on behalf of the National Homelessness Law Center in support of Friends of the Homeless (“FOTH”) and their efforts to find a new location for their adult and family shelter. FOTH have operated the shelter on High Street for many years without incident and as a good neighbor. Now it is time for New Philadelphia (“the City”) to be a good neighbor to FOTH and help them find a place to move that will meet the needs of the people they serve and that will avoid the displacement of the people currently in their care.

I want to start with a foundational point - just because “homeless shelters” are not specifically addressed in the City’s current zoning code, it doesn’t mean that they can’t exist. New Philadelphia appears to use permissive zoning¹, which generally means a use is prohibited unless expressly permitted. However, permitted uses cannot be so specific as to completely prohibit “similarly situated” land uses. Similarly situated land uses are not identical uses but uses that are alike for “all relevant purposes.”² Relevant purposes include things like traffic safety concerns, whether the project will overburden public utilities, or create an environmental hazard that can’t be mitigated. Any zoning decisions must be based on a distinction between the proposed use and other permitted similarly situated uses.³ Similarly situated uses for a homeless shelter include hotels, motels, multi-family housing, assisted living facilities, etc.

If the zoning rules or decisions of a city prevent projects that are similarly situated to others in that zone from going forward, it will not survive an Equal Protection claim under the Fourteenth Amendment of the U.S. Constitution unless there is a “rational basis” for the difference in treatment.⁴ However, the Supreme Court has made it clear that “negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding” is not a rational basis to treat one group differently than another similarly situated one.⁵ In other words, “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”⁶ Looking at the news coverage surrounding the issues with finding a site for

¹ See Section 1137.01(a) of Codified Ordinances of the City of New Philadelphia Ohio (“No building, structure or land shall hereafter be used or occupied, and no building or structure or part thereof shall hereafter be erected, constructed, reconstructed, moved or structurally altered except in conformity with all of the regulations herein specified for the district in which it is located.”)

² *Williams v. Vermont*, 472 U.S. 14, 23–24 (1985)

³ See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) at 449

⁴ See *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989)

⁵ *Cleburne Living Ctr.*, 473 U.S. at 448

⁶ *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) at 433



the FOTH shelter, it is clear that there are negative attitudes, bias, and fear of unhoused people and that this is affecting the City's zoning decisions. This opens the city up to legal liability and federal constitutional claims.

Furthermore, as a nonprofit with a mission based in religious belief and practice⁷, FOTH may also have legal claims under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).⁸ RLUIPA prohibits land use regulations that imposes a "substantial burden" on religious exercise except when justified by a "compelling governmental interest" pursued in the least restrictive way possible.⁹ It also prevents governments from unreasonably limiting "religious assemblies, institutions, or structures within a jurisdiction."¹⁰ Religious assemblies or institutions includes faith-based social services.¹¹ Religious exercise includes any religious activity "whether or not compelled by, or central to, a system of religious belief."¹² When there is a conflict between RLUIPA and the local zoning code or how it is applied, RLUIPA takes precedence.¹³

In deciding whether there is a substantial burden under RLUIPA, the question is how likely is the individualized zoning decision to impair the ability of the group to engage in the religious exercise in question?¹⁴ Does it impose a significant restriction on religious use of a property?¹⁵ In the case of FOTH, denial of variances and being told by the City that they will not even consider a centrally located site, make it very likely that FOTH will be substantially restricted in their ability to engage in acts of charity that are central to their faith. As to whether there is a compelling government interest to proceed with a burdensome zoning decision, courts have ruled that a municipality's asserted interests in revenue generation and economic development¹⁶ or aesthetics¹⁷ were not compelling. As such, any arguments that shelter can't be centrally located because of economic development would not likely withstand legal challenge.

⁷ See <https://fohtusc.org/>: "The mission of the Friends of the Homeless of Tuscarawas County is to assist families and individuals in a faith-based environment to achieve stability, sobriety and permanent housing."

⁸ 42 U.S.C. §§ 2000cc to 2000cc-5

⁹ RLUIPA, 42 U.S.C. § 2000cc(a)

¹⁰ RLUIPA, 42 U.S.C. § 2000cc(b)(3)(B)

¹¹ See, e.g., *Harbor Missionary Church Corp. v. City of San Buenaventura*, 642 F. App'x. 726, 729 (9th Cir. 2016); *Layman Lessons, Inc. v. City of Millersville*, 636 F. Supp. 2d 620, 648-50 (M.D. Tenn. 2008).

¹² RLUIPA, 42 U.S.C. § 2000cc-5(7)(A)

¹³ *Holy Ghost Revival Ministries v. City of Marysville*, 98 F. Supp. 3d 1153, 1165 (W.D. Wash. 2015) (zoning laws that conflict with RLUIPA must yield under the Supremacy Clause)

¹⁴ See *World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009); *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 1000 (7th Cir. 2006)

¹⁵ *Guru Nanak Sikh Soc'y v. Cty. of Sutter*, 456 F.3d 978, at 988 (9th Cir. 2006)

¹⁶ *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 at 1228-29 (C.D. Cal. 2002).

¹⁷ See *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 at 353.



Finally, in Ohio, private property rights are considered “fundamental rights” to be “strongly protected” under the state constitution.¹⁸ In *State ex rel. Pizza v. Rezcallah*, 84 Ohio St. 3d 116, 128 (1998), the Ohio Supreme Court explained that “the free use of property guaranteed by the Ohio Constitution can be invaded by an exercise of the police power only when the restriction thereof bears a substantial relationship to the public health, morals and safety.”¹⁹ A general fear or unease regarding unhoused people would not be considered a substantial relationship to public health, morals and safety. Even under lower level of scrutiny, Ohio courts have found that zoning classifications may not be arbitrary and “must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed.”²⁰ There has not been any indication that there is a *land use* difference between the FOTH shelter and other businesses or housing in the same zones as the proposed building sites. As such, FOTH may also have state-based legal claims if they are continually denied the needed approvals to move forward with an appropriate site.

Supporters of the shelter have clearly stated the urgent need of finding a new site due to the fact that the current shelter is falling apart and the needed repairs cannot be made without displacing the many people who desperately need the shelter and related services FOTH provides. We urge the City to approve a centrally located site for the new shelter and not allow bureaucracy and red tape to leave unhoused neighbors out in the cold.

Sincerely,

A handwritten signature in black ink that reads "Katie Scott". The signature is written in a cursive, slightly slanted style.

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¹⁸ See *Norwood v. Horney*, 110 Ohio St.3d 353, 361-62 (2006) (“Ohio has always considered the right of property to be a fundamental right. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces.”)

¹⁹ 84 Ohio St. 3d at 131

²⁰ *State v. Mole*, 149 Ohio St. 3d 215, 222 (Ohio 2016)